

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SPECIAL MENTION

SWITZERLAND

Special 301 Recommendation: IIPA urges that USTR give special attention to Switzerland in 2008 and heighten its bilateral engagement with a view to Switzerland's reviewing the copyright amendments it adopted last October.

EXECUTIVE SUMMARY

In our 2007 submission, IIPA expressed concern over the direction of the Swiss effort to amend its copyright law to bring it into compliance with the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)). Switzerland adopted two sets of amendments on October 5, 2007, one to implement obligations under the WCT and WPPT (the law also authorized Switzerland to ratify the treaties) and the other to make other amendments to the copyright law. The amendments are due to enter into force on July 1, 2008.

While the amendments were improved in many respects from the version that was pending in February 2007, there still remain serious problems. The Swiss law, as amended, will: diverge from the protection granted in EU member states; violate Switzerland's international obligations; and will have a deleterious effect on the legitimate industries in the online marketplace. IIPA urges the Swiss government to review these amendments again and further amend them to bring Switzerland's copyright law in tune with the laws in the EU and other OECD countries and with Switzerland's international obligations in the WCT and WPPT and the TRIPS agreement. We urge that the issues of copyright reform and the importance of effective copyright enforcement in both the offline and online environment continue to be addressed in the work program of the new Swiss-U.S. Trade and Investment Cooperation Forum.

COPYRIGHT LAW REFORM AND RELATED ISSUES

Copyright Law Reform: The copyright industries continue to be concerned with the Swiss effort to implement the WIPO Internet Treaties. The current amendment would create a difficult legal environment for the protection of copyrighted materials. The vast majority of European countries have amended their laws to meet their international obligations and all EU member states have implemented the EC Copyright Directive adopted in 2001. Switzerland also committed to implement these Treaties on June 21, 2001, when it signed an agreement, which extends the coverage of the EFTA Convention to the protection of intellectual property (Chapter VII, Article 19 and Annex J to the Convention).¹

The key problems in these two sets of amendments can be summarized as follows:

¹ The EC Copyright Directive, which has been implemented by all EU Member States as well as a number of other European countries provides a standard level of copyright protection across Europe. While Switzerland is by no means obliged to implement every aspect of the Copyright Directive, the Swiss WIPO Treaties' implementation does not create a level playing field and is inconsistent with the rules across Europe. Such consistency is vital in a networked environment. Article 19(4) of the EFTA Convention states that Member States should avoid or remedy trade distortions caused by actual levels of protection of intellectual property rights. The EFTA Convention (Article 2) also promotes the enactment and respect of equivalent rules as well as the need to provide appropriate protection of intellectual property rights, in accordance with the highest international standards.

Technological protection measures (TPMs): Legal protection for technological measures is insufficient to satisfy treaty standards and represents a dramatic departure from the standard in the EU Copyright Directive (Articles 6.1 and 6.2) and the U.S. Digital Millennium Copyright Act (17 U.S.C. §1201). The Swiss law would allow circumvention of technological measures “for the purposes of a use permitted by law” (Article 39(a)(4)). While certain narrow exceptions to the act of circumvention would be justifiable, such as those in the Digital Millennium Copyright Act, this provision sweeps so broadly to as to permit circumvention of any type of technological measure for any permitted purpose. This is far too broad, particularly given the inappropriately wide scope of the private copying exception, which taken together with this provision would allow individuals to circumvent access or copy control measures in order to copy from illegal sources and share with friends. It would thus seriously undermine the legal protection of technological measures and would diminish right holders’ ability to enforce “effective legal remedies” (as required by WCT Article 11) in the event of such circumvention. While this provision is overbroad, IIPA acknowledges that the Swiss Parliament limited the “permitted purpose” exception to acts of circumvention only and appropriately does not apply it to permit trafficking in circumvention tools. Adequate standards for protection against acts of circumvention of technological measures are set out in both the EU Copyright Directive and the DMCA, neither of which goes so far as to permit or sanction such acts in such a sweeping manner. It should be noted that beyond the public rhetoric against Digital Rights Management (DRM), both the Copyright Directive and the DMCA have gone a long way to promote new modes of delivery of copyright works for consumers.

On a more positive note, the penal provisions for infringement of copyright and related rights have been improved. Infringement of copyright/related rights on a commercial scale now is sanctioned with up to 5 years’ imprisonment or a fine (Articles 67(2) and 69(2)); imprisonment has to be combined with a fine. The previous provisions set out a penalty of imprisonment of up to 3 years and a fine of up to 100,000 francs (US\$90,500). A new Article 69a provides for fines for the circumvention of TPMs, the manufacture, import, distribution etc. of circumvention devices, the removal or alteration of electronic rights management information and the reproduction, distribution, importation etc. of works from which electronic rights management information has been removed or altered without authority. The violation of the anti-circumvention provisions on a commercial scale is sanctioned with up to one year imprisonment or a fine.

The “Review” Mechanism in Article 39b: The new law sets up a review mechanism -- “observatory” -- to review “the effects of technological measures” that might be caused by employing devices and services to protect unauthorized access to, or infringement of, copyright or related rights. The objective of the observatory as set out in the law is to promote solutions based on partnership between the opposing parties. The Federal Government may, but has not yet conferred administrative powers to the observatory. Details on the observatory mechanism are set out in a draft decree implementing Article 39b of the Copyright Act. The draft decree focuses its attention too narrowly on abuse of technological measures, thus potentially undermining the body’s authority to act as a fair mediator. It also sweeps more broadly than the system set up in the Copyright Directive, which defaults first to the right holder to provide the solution with the national governments acting only if voluntary action does not accomplish the result. Finally, this “observatory” system has no authority to review whether the blanket ability to engage in acts of circumvention to facilitate taking advantage of copyright exceptions can have a debilitating effect on the development of new business models in the online environment, such as on-demand and interactive services. This system should be reconsidered and brought more closely into conformity with the systems in place in the EU or in the U.S.

Private Copy Exception: While efforts were made by right holders during the debates on the bills as they were being developed to ensure that the private copy exception in Article 19 of the copyright law did not apply to copies made from illegal sources, such a clarification was not made in the final law. Unfortunately, the Explanatory Memorandum in the “Botschaft” to the draft dated March 10, 2006, issued by the Swiss government states that there should be no distinction whether the work or phonogram comes from a lawful or unlawful source. Consequently, it could be argued on the basis of this Memorandum that the making of copies from unlawful sources would be allowed. That position encourages copyright infringement on a massive scale, is clearly inconsistent with the three-step test and other international norms, and threatens the vitality of Switzerland’s digital environment.

Moreover, the concept of what is a “private” copy is overly broad, in that the law refers to the “private circle” (“any use in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends”) rather than to copies made “by the individual for his or her own private use and for no direct or indirect economic or commercial gain” (see Article 5.2b of the EU Copyright Directive).

Finally, Article 19(2) allows for “private copies to be made by third parties” including libraries and “other public institutions and businesses” which provide their users with photocopiers and even if the copying is subject to payment. This is completely inappropriate for a “private copy” exception and is consistent with the three-step test in the WCT, WPPT and TRIPS.

Mandatory collective administration: The new Articles 22a to 22c provide overbroad benefits to state-licensed broadcasting organizations in the following activities, at the expense of record producers and artists:

- Use of archive works (Article 22a): while the definition of archival productions (“archive works”) is acceptable, Article 22a(1) is too broad in that it also applies to other works or parts of works which are integrated into the archive work, as far as they do not determine to “a significant degree” the character of the archive work. The Article also requires mandatory collective administration of the exploitation of archival productions only by approved collecting societies.
- Use of orphan works (Article 22b) and use of background music in connection with broadcasts (Article 22c): also these uses require mandatory collective administration, which is unnecessary and should be disfavored.
- Reproduction for broadcasting purposes: Article 24b sets out mandatory collective administration for the reproduction rights in sound recordings for broadcasting purposes (“ephemeral right”). Furthermore, efforts to include a specific time period after which the reproductions made under this article have to be destroyed were not successful, the broadcasters’ preferred wide interpretation that these reproductions are to be destroyed after “they have served their purpose” unfortunately prevailed. Because no effective time limit is set for retaining such copies, the Article would run afoul Article 11bis(3) of the Berne Convention which provides that the copies must be “ephemeral.”

The mandatory collective administration provisions of the mentioned uses in effect constitute an expropriation of the right holders’ exclusive rights (guaranteed under the WIPO Treaties) and also act as an onerous and unnecessary price control, lowering the record producers’ share of remuneration inappropriately, since the Copyright Act (in Article 60(2)) limits the level of remuneration which can be collected (the cap on remuneration for related rights remained unchanged at 3% of the proceeds from or cost of utilization).

Camcording Legislation: The illicit recording of movies at movie theaters (“camcorder piracy”) is a major source of pirated motion pictures available over the Internet, as well as on street corners and flea markets around the world. Switzerland has been traced as a source for unauthorized camcording. In order to facilitate enforcement and prosecution of such piracy, anti-camcording legislation should be adopted in the Switzerland to require jail sentences, preferably up to a year or longer for the first offense, and a higher penalty for any subsequent offense. One illicit recording of a first-run motion picture spread through the Internet and on street corners can destroy a film’s ability to recoup the investment made in its production. Therefore, the result is exponentially greater economic harm than what is traditionally experienced as a result of a single act of “theft.”