

# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends Special Mention for Switzerland in 2010, and again urges that USTR heighten its bilateral engagement on the issues listed below with a view to Switzerland revising its 2008 copyright law amendments.

**Executive Summary:** Switzerland adopted two sets of amendments on October 5, 2007, one to amend its copyright law to implement obligations under the WCT and WPPT (the law also authorized Switzerland to ratify the treaties) and the other to amend its copyright law on other issues effective July 1, 2008. There still remain serious problems, as the Swiss law: diverges from the protection granted in EU member states; violates Switzerland's international obligations; and has a damaging effect on the legitimate copyright-based industries in the online marketplace in Switzerland and beyond. For this reason, for the past three years, IIPA and its members have expressed concern over the direction. Swiss effort has taken 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)).

**Priority Actions to be Taken in 2010:** The copyright industries recommend that the following actions be taken by Switzerland in order to ensure the adequate and effective protection of copyrighted materials:

- Revisit its 2008 amendments 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 under the WCT, WPPT and the TRIPS Agreement.
- Ensure that further 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.
- Revisit its provisions on mandatory collective management, which may violate Switzerland's obligations under TRIPS and the WIPO Internet Treaties.
- Adopt anti-camcording legislation.

### PIRACY AND RELATED CONCERNS

With 5.74 million Internet users,<sup>1</sup> Switzerland remains a haven for top-level source piracy oriented towards the German market. German release groups use Switzerland as a base for recording soundtracks and for maintaining their file-servers. Cyberlockers (such as Rapidshare which is hosted in Switzerland) also present a problem as there are a growing number of portal sites and forums "offering" cyberlocker links. Since there is no legal source requirement, downloading and streaming from servers operated by pirates outside Switzerland, such as [www.kino.to](http://www.kino.to), are arguably legal in Switzerland, as long as there is no uploading.

Swiss Internet Service Providers (ISPs) continue to drag their feet in cooperating with right holders in addressing P2P piracy. Meetings convened in 2009 between right holders, the state prosecutor and three major ISPs did not lead to any results, with the ISPs citing data protection and disclosure issues as barring them from participation in a graduated response system and remaining unwilling to take any action before a decision is rendered in the Logistep case, which is currently pending before the Federal Supreme Court. The state prosecutor has indicated its support for greater ISP cooperation, but is also of the view that further discussions with ISPs should be held off until the Logistep decision is rendered. The Swiss copyright industries continue trying to obtain governmental support for such consultations between right holders and the ISP community. Right holders' proposals to amend Article 65 regarding precautionary measures to include a right of information have not been taken up, despite right holders' continued requests.

<sup>1</sup> [www.internetworldstats.com/europa2.htm](http://www.internetworldstats.com/europa2.htm) (as of September 2009)

In the Logistep case, the Swiss Data Protection Authority rendered a recommendation in January 2008 that it was not permitted to collect IP addresses or to use them in a civil case (stating that the use of IP addresses in civil cases violates the Swiss telecom law, as IP addresses constitute personal information protected under privacy rules). The company Logistep was collecting IP addresses of suspected infringers and turning them over to right holders. It was also obtaining IP addresses from prosecutors in a criminal case, which is permitted, and using them in a civil case, before the criminal case had concluded, which the Data Protection Authority said was not permitted.<sup>2</sup> The Federal Administrative Court in June 2009 disagreed and held that privacy concerns and the interests of people whose data were processed were outweighed by the interests of right holders and the public interest not to condone copyright infringement. This case is now pending before the Federal Supreme Court and the judgment is expected in the first quarter of this year. The decision of the Federal Administrative Court clearly shows that ISP cooperation is essential for right holders to be able to effectively address online piracy, and in particular peer-to-peer (“P2P”) piracy. The consultations and ISP meetings sought by the Swiss copyright industries will only lead to meaningful results, if the government backs and drives these discussions. At the latest, when the Federal Supreme Court has rendered its decision in the Logistep case, government should actively seek a solution, forcing a reasonable and effective result.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

On July 1, 2008, the Swiss law implementing the 1996 WIPO Internet Treaties entered into force. Right holders’ proposals (a) to make clear that the private copy exception should not cover copying from illegal sources; (b) that such copies should not be subject to a general remuneration obligation; (c) to extend the term of protection for performers and producers in sound recordings; and (d) to remove a provision that provided a broad exception to the anti-circumvention/technological protection measures (TPMs) obligations for all non-infringing uses were not approved. In addition, the Swiss Copyright Act now establishes an “observatory” mechanism to monitor “misuse” of TPMs; it still remains unclear how the mechanism will fulfil its role. Provisions on mandatory collective management must be amended and anti-camcording legislation should be urgently adopted.

All EU Member States have amended their laws to implement the WIPO Internet Treaties since adoption of the EC Copyright Directive 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).<sup>3</sup>

**Private Copy Exception:** While efforts were made by rights 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 obviously illegal sources, such a clarification was not made in the final law. Unfortunately, the Swiss government’s Explanatory Memorandum in the “Botschaft” to the draft dated March 10, 2006 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).

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<sup>2</sup> See news report at [http://www.infoworld.com/article/08/01/25/Antipiracy-group-tactics-violate-Swiss-law\\_1.html](http://www.infoworld.com/article/08/01/25/Antipiracy-group-tactics-violate-Swiss-law_1.html).

<sup>3</sup> 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 not 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.

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. Such copying is allowed even where payment is made. This is completely inappropriate for a “private copy” exception and is inconsistent with the three-step test in the WCT, WPPT and TRIPS.

**Technological protection measures (TPMs):** Legal protection for technological measures does not satisfy treaty standards and represents a dramatic and trade-distorting 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 allows the 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 in the U.S., this provision sweeps so broadly as to permit circumvention of any type of technological measure to take advantage of any copyright or related rights exception. 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 and its members acknowledge that the Swiss Parliament limited the “permitted purpose” exception to acts of circumvention only, and appropriately did 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 delivering copyright works to consumers.

On a more positive note, as stated in IIPA’s 2008 and 2009 submissions, 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 circumvention acts penalized under Article 69a, however, should carry the same sentences as other acts of copyright infringement penalized under the copyright law. With the categorization of circumvention acts as mere “misdemeanours” (“Übertretungen”) instead of offences (which can be penalized with up to three years’ imprisonment or a fine), several procedural measures for criminal prosecution are not available. These include for example imprisonment or the sentencing for attempt which is only possible if there is an explicit reference to this in the law. This distinction in sanctions is not justified, given that these acts are intentional acts with the same degree of injustice as the other infringing acts set out in the chapter on penal provisions. We urge the Swiss government to rethink these provisions.

In addition, some of the penal provisions have been improved. Infringement of copyright and related rights on a commercial scale now is sanctioned with up to 5 years’ imprisonment and 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 Swiss Francs (US\$92,963).

**The “observatory” mechanism in Article 39b:** The new law sets up a review mechanism – an “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 were set out in a draft decree implementing Article 39b of the Copyright Act. The decree, which entered into force on July 1, 2008, focuses its attention too narrowly on abuse of technological measures, thus potentially undermining the body’s authority to act as a fair mediator. Joint proposals by MPA and Swiss trade body *Audiovision Schweiz* to secure a more neutral mandate of the observatory (to include consideration of the positive effects of use of TPMs for consumers) have not been included in the decree. The decree also sweeps more broadly than the system set up in the Copyright Directive, which defaults first to the rights 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.

**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 runs 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 rights holders’ exclusive rights (guaranteed under TRIPS and the WIPO Treaties) by falling short of the requirements of the three-step test. They 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). This cap is not appropriate and should be abolished. Furthermore, Article 35(2) should be amended to set out a separate remuneration right for record producers and not a mere (equitable) share of the remuneration granted to performers.

**The Need for 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 and it remains not expressly illegal in Swiss law and probably would be excused under the private copy exception if it were raised as a defense. In order to facilitate enforcement and prosecution of such piracy, anti-camcording legislation should be adopted in Switzerland to require jail sentences. In order to have sufficient deterrent effect, the sentences should preferably be up to a year or longer for the first offense, and a higher penalty for any subsequent offense. Only 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.” In the absence of clarifying legislative action, MPA is considering bringing a test case that camcording is already illegal under Swiss law.