

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR place Switzerland on the Watch List in 2012 and urges that USTR increase its bilateral engagement with Switzerland in the coming year.

Executive Summary:¹ Since the September 8, 2010 issuance of a troublesome opinion of the Swiss Federal Supreme Court in the Logistep case, which authorities have interpreted to preclude private parties from collecting the IP addresses of Internet users sharing pirate material over publicly available networks, the Federal Council has closed the lid on civil Internet enforcement in Switzerland. In November 2011, the Federal Council published a report that forecloses any effort in the near future to resurrect the discovery of a crucial piece of information needed to bring a copyright infringement action. The Logistep decision, issued by Switzerland's highest court, required Logistep AG to stop collecting the IP addresses of suspected infringers that it turned over to right holders for purposes of pursuing civil actions. In doing so, the Federal Supreme Court held in favor of a 2008 recommendation issued by the Swiss Data Protection Authority (FDPIIC), which argued that Switzerland's Data Protection Act (DPA) only allows such data harvesting to be used in criminal actions. FDPIIC has interpreted the decision to be fact-specific to the type of data collection done by Logistep, stating, "Clearly it should be possible to punish copyright infringements on the internet. The DPA provides no protection against illegal acts."² However, in the aftermath of the Logistep decision, anti-piracy activities in 2011 were completely undermined by an overly broad reading of the Logistep decision: public prosecutors abandoned actions declaring as inadmissible evidence any IP addresses used to identify defendants. Appellate judges agreed, dismissing the subsequent appeals against these determinations. Rights holders are thus proscribed from analyzing the IP addresses of suspected infringers, notwithstanding the fact that such information is made publicly available by users who participate in P2P file sharing on public networks. Rights holders are unable to bring civil actions for online copyright infringement in Switzerland, a violation of Switzerland's obligation to "ensure that enforcement procedures ... are available under [its] law so as to permit effective action against any act of infringement of intellectual property rights" covered by the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights. In addition, though somewhat marginalized by these recent developments, IIPA also has other long-standing concerns with certain aspects of the copyright and related laws in Switzerland, which are detailed further below.

PRIORITY RECOMMENDED ACTIONS FOR SWITZERLAND IN 2012

- Resume enforcement of the current Copyright Act in the Internet environment by Swiss public prosecutors and courts.
- If necessary, amend the Data Protection Act and/or the Copyright Act in Switzerland to permit the collection of data available over digital networks for the purposes of enforcement of copyright against infringing activity.
- Ensure that further copyright reform and the importance of effective copyright enforcement in both the offline and online environment continue to be addressed both through U.S.-Swiss trade dialogues and within the Government of Switzerland itself.

¹For more details on Switzerland's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.

²See <http://www.edoeb.admin.ch/aktuell/01688/index.html?lang=en>.



ONLINE COPYRIGHT ENFORCEMENT IN SWITZERLAND

IIPA raised the Logistep decision and its implications for copyright actions in our 2011 Special 301 filing on Switzerland, noting concern that legislative amendments would be necessary to undo the damage to civil actions that the Logistep decision would do. On November 30, 2011, the Federal Council published a report on illegal uses of works on the Internet in response to the March 2010 motion of Senator Géraldine Savary to determine whether better legislation is needed to protect music online.³ The report concludes that there is no need for new legislation. It questions whether Internet piracy is an immediate concern for Switzerland because the illegal distribution of copyright protected works online is generally a cross-border phenomenon that should be coordinated internationally and points out, in any case, that there are no figures available regarding the impact of Internet piracy problems in the country. Nevertheless, the report extrapolates from a 2009 Dutch study⁴ that in 2010, one out of three users in Switzerland have been downloading films, music or software illegally. Despite that determination, the Federal Council sees no need for action to change the existing legislation as the current legislative framework is “sufficient.” The Swiss Federal Institute of Intellectual Property (IPI), Switzerland’s Federal agency in charge of patents, trademarks, industrial designs and copyright, commented on the report, concluding that internet piracy is not actually a problem for Switzerland because it mainly affects foreign rights holders. (It should be noted that foreign films, for example, account for about 95% of the market share in Switzerland). Together with the opinion of the Data Protection Commissioner in support of the Logistep decision, three Federal agencies of crucial influence over copyright enforcement policy have interpreted Swiss law to foreclose the analysis of publicly available IP addresses in civil copyright cases.

There appears to be one avenue of recourse that could allow civil and criminal anti-piracy activities to resume in Switzerland. Despite his support for the Logistep holding, the Data Protection Commissioner has opined that the anti-piracy activities of the type carried out by IIPA members, including the music and film industry are compliant with the Data Protection Act. Following from this opinion, the State Secretariat for Economic Affairs (SECO) is forming a Roundtable to develop a code of best practices in anti-piracy activities. It is likely to take place in March 2012 and will be chaired by SECO. Invitees will be the Federal Data Protection Commissioner, representatives of the Federal Supreme Court, Public Prosecutors, representatives of the IPI, and the Federal Office of Justice, as well as representatives from some copyright sectors. If successful, the best practices could permit anti-piracy activities such as those undertaken by the local music and film industry bodies to resume. If the Roundtable does not find a resolution, the only remaining recourse would be legislative amendments, a process that guarantees to be lengthy and to leave Internet piracy virtually unhindered for some time to come.

COPYRIGHT PIRACY IN SWITZERLAND

Switzerland is known to host a powerful Internet piracy infrastructure that influences worldwide networks, including piracy heavy-hitters such as Rapidshare and Private Layer. It has also hosted such piracy hubs as Sharereactor and Razorback2, the latter of which was shut down only by virtue of the actions of Belgian authorities and continues to escape prosecution in Switzerland. A safe haven for top-level source piracy directed to the German and worldwide markets, Switzerland is now even closer to gaining status as a market largely lost to illegitimate copyrighted content. And with 6.15 million Internet users,⁵ one-third of which already are reported by the Federal Council to be engaged in piracy, the market to be lost to piracy is considerable indeed. German release groups continue to use Switzerland as a base for recording soundtracks and for maintaining their file-servers. Cyberlockers (such as Rapidshare, based in Switzerland) that are used to store and distribute infringing content also present a problem with an ever growing number of portal sites and forums offering links to such content—these trends have,

³The report is available in German, French, and Italian at: <http://www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2011/2011-11-30.html>.

⁴Huygen, Annelies et al (2009): Economic and cultural effects of file sharing on music, film and games. TNOP Rapport on behalf of the Dutch ministries of Economic Affairs, Justice and Education, Culture and Science.

⁵According to <http://www.internetworldstats.com> (as of June 2011).

predictably, gone unchanged in the past year. Since Switzerland's copyright law contains a private copy exception with no expressly stated legal source requirement, downloading and streaming from servers operated by pirates outside Switzerland are being portrayed as legal in Switzerland by the press and anti-copyright activists, as long as there is no uploading. Switzerland also has a problem with parallel imports of DVDs coming from Canada while the films are still running in Swiss cinemas.

THE SWISS COPYRIGHT ACT AND RELATED LAWS

On July 1, 2008, the Swiss law implementing the 1996 WIPO Internet Treaties entered into force. Right holders' proposals in a number of areas were not approved. Since 2008, IIPA continues to have concerns with several other areas related to Switzerland's law which lead to severe problems.

First, the private copy exception in Article 19 of the copyright law is too broad, and has been interpreted to allow the making of copies of works or phonograms that come from unlawful sources. This is completely inappropriate for a "private copy" exception and is inconsistent with the three-step test in the Berne Convention, the WIPO Internet treaties, and the WTO TRIPS Agreement.

Second, Swiss law allows acts of circumvention of technological measures "for the purposes of a use permitted by law" (Article 39(a)(4)), an exception that is also far too broad, particularly given the inappropriately wide scope of the private copying exception. Taken together, these exceptions would allow individuals to circumvent access or copy control measures in order to copy from illegal sources and share with friends.

Third, IIPA has a number of concerns with a review mechanism ("observatory") created to monitor "misuse" and "the effects of technological measures," as set out in a draft decree implementing Article 39b of the Copyright Act that entered into force on July 1, 2008. It still remains unclear how the mechanism will fulfill its role, but the decree focuses its attention very narrowly on abuse of technical measures and could undermine the observatory's authority to act as a fair mediator.

Fourth, the new Articles 22a to 22c regarding mandatory collective administration provide overbroad benefits to state-licensed broadcasting organizations, at the expense of record producers and artists.

Fifth, Article 60(2) of the Swiss Copyright Act caps the remuneration payable to right owners (usually collected via collecting societies) at 10% of the licensees' income for authors and 3% for neighboring right owners. The Swiss artists and record producers requested collecting society "Swissperform" to start arbitration proceedings against this cap as the codified cap (1) has the effect of an expropriation and devaluation of the intellectual property rights of Swiss right owners, (2) is not in line with the notion of "equitable remuneration" contained in international copyright conventions such as Article 15 of the WIPO Performances and Phonograms Treaty, and (3) curtails the freedom of right owners to negotiate their "equitable remuneration." Furthermore, it does not reflect the higher income shares negotiated by other European collecting societies. On November 4th 2010, the Swiss Arbitration Commission dismissed Swissperform's complaint on the ground that the above cap was in line with Swiss law. Swissperform has appealed this decision to the Swiss Federal Administrative Court which is expected to render its judgment by the end of 2012. The next and final instance will be the Swiss Federal Court.

Sixth, there is a need for camcording legislation to combat the illicit recording of movies at movie theaters, a major source of pirated motion pictures on the Internet, as well as on street corners and flea markets around the world. These issues were not adequately addressed in 2011.

Finally, the Swiss Federal Institute for Intellectual Property is focused on issues in the areas of patents and trademarks, where Switzerland has a strong export industry, and provides little support to strengthening copyright law and its enforcement.