

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR place Switzerland on the Watch List in 2014 and urges that USTR increase its bilateral engagement with Switzerland in the coming year.¹

Executive Summary: More than three years have passed since the Swiss Federal Supreme Court issued its decision in the Logistep case, which prompted Swiss prosecutors to halt all investigations on online copyright crimes. Enforcement authorities have too broadly interpreted the decision as precluding private parties from collecting the IP addresses of Internet users sharing pirate material over publicly available networks, the first and necessary step in identifying illegal online activities for purposes of enforcement, whether for civil or criminal cases. In the immediate aftermath of the decision, experts came together in an IPR Round Table to resolve this legal gap, but the activities of the Round Table disappointingly came to a stop in December 2013 without any concrete results. Meanwhile, the Swiss music industry is attempting to break this deadlock with a test case: The alleged infringer is a heavy uploader of pirated material via the "Gnutella" peer-to-peer (P2P) file-sharing protocol. Once again, the prosecutor has refused to accept this case on grounds of the Logistep decision and the appeal is currently pending with the Zurich Supreme Court. It is unclear whether the case will result in a conviction or if it can eventually set the needed precedent to permit prosecutors to move forward as needed.

In the meantime, piracy in Switzerland continues to damage many rights holders, and much of what IIPA reported in 2013 remains unchanged. The country remains a haven for existing and new services heavily engaged in infringing activity that have opened or moved headquarters or servers to Switzerland. From there, they provide a global service to export pirated content. This long-lasting and ongoing activity can be directly attributed to the reality that Swiss law enforcement still provides no effective consequences for online copyright infringement on any scale. The Swiss Government should respond to the unanimous report of the *Arbeitsgruppe Urheberrecht 2012*, or Working Group on Copyright 2012 (AGUR12) as published in December 2013, by incorporating the full package of compromise recommendations, including measures to fairly and effectively address websites providing access to both hosted and non-hosted infringing content and repeat infringers, as well as a civil liability limited to certain service providers hosting structurally infringing sites.

PRIORITY ACTIONS REQUESTED IN 2014

- To permit law enforcement authorities to resume online copyright enforcement, prioritize the full implementation of the recommendations of the AGUR12, as published in Section 9.3 of the final AGUR12 report dated December 6, 2013, and introduce a corresponding bill to the legislative branch in 2014.
- Continue to address copyright reform and the importance of effective copyright enforcement in the online environment both through U.S.-Swiss trade dialogues and within the Government of Switzerland itself.
- Clarify Switzerland's exceptions to copyright to ensure that single copies for private use are permissible only as long as they derive from a legal source.

¹For more details on Switzerland's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Switzerland's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



THE NATURE OF PIRACY IN SWITZERLAND

Switzerland suffers not only from increasing domestic piracy rates for music, film, videogames, and entertainment software, but also from a growing reputation as a safe haven for certain Internet service providers (ISPs) to base operations dedicated to piracy on a global scale. While BSA | The Software Alliance (BSA) reports a positive experience, generally speaking, in that Switzerland has among the lowest PC software piracy rates in the world, other industries face great difficulty in the current Swiss market. The percentage of all active Internet users in Switzerland using unlicensed services is still higher than the piracy rate in countries that actively engage in anti-piracy measures, such as France and Germany.² Swiss Internet users utilize a broad range of mechanisms to access pirated content online. P2P activity for the purposes of sharing infringing material remains popular, both through P2P client networks and BitTorrent networks. Cyberlocker services for storage and sharing of illegal files are also still available, though with some decline in favor of BitTorrent networks since the closure of Megaupload in 2012. Illegal streaming and the use of stream ripping sites and applications, which permit a user to create a local copy of unauthorized streamed content, are still high in usage. Downloading and streaming for private use are widely viewed as legal, as long as there is no uploading.

Some of the world's most popular Internet services for the unauthorized sharing of copyrighted works have opened or moved headquarters or services to Switzerland, including the file storage services Uploaded and Rapidshare, along with *couldzer.net*, another file storage service which fuels piracy by incentive programs, which are just the latest name on this dubious list. The hosting provider Private Layer, which hosts a large number of illegal websites including *darkwarez.pl*, is also running dedicated servers in Switzerland, while the company is domiciled in Panama. These services have a worldwide clientele affecting Russia, Poland, the United States, the EU, and beyond, and are accountable for significant traffic of pirated content.

ONLINE COPYRIGHT ENFORCEMENT IN SWITZERLAND

Criminal and civil actions against online infringement under Swiss law have almost entirely ceased in the aftermath of the 2010 decision of the Swiss Federal Supreme Court in the Logistep case, which prosecutors have interpreted broadly as barring the collection and use of any IP address data identifying defendants in criminal copyright cases. This is despite a clarification from the Swiss Data Protection Authority (FDPIC) stating that under Swiss privacy laws, the decision only barred the specific data harvesting that was used in that case, and only from use in civil actions. In fact, 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, and is supportive of rights holders' Best Practices.³

Based on the broader misreading of Logistep, public prosecutors have 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 currently proscribed from analyzing the IP addresses of suspected infringers for purposes of establishing the existence of an underlying direct infringement as part of a secondary liability claim, notwithstanding the fact that such information is made publicly available by users who participate in P2P file sharing on public networks. Consequently, because rights holders are unable to bring actions for online copyright infringement, Switzerland appears to be in violation of its 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" under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 41.

²Source: IFPI trend analysis based on data by comScore, Inc. (October 2013).

³More details about the Logistep decision and its political aftermath in Switzerland are provided in IIPA's 2013 Special 301 filing, available at <http://www.iipa.com/rbc/2013/2013SPEC301SWITZERLAND.PDF>.

In early 2012, the Swiss State Secretariat for Economic Affairs (SECO) initiated a Round Table of experts and stakeholders to seek a way forward. However, the activities of this Round Table did not include any concrete outcomes, and in any case were paused in December 2013 without any promising resolutions. Of particular disappointment, the Round Table took no initiative to improve the legal framework was taken. The only measurable result of the Round Table was that the Swiss music industry took the initiative to launch a test case against a heavy P2P uploader to clarify the practical meaning of the Logistep case. Unfortunately, the Zurich state prosecutor refused to accept the case. That decision has been appealed to the Zurich Supreme Court where it is still pending. It remains unclear whether the case will result in a conviction and if it can eventually set the needed precedent to permit prosecutors to move forward as needed. It is believed that the Round Table will resume after a decision in the test case has been issued by the Zurich Supreme Court. If the lower court's dismissal is affirmed and the members of the Round Table do not find a resolution, the only remaining recourse would be legislative amendments, a process that is sure to be lengthy and to leave Internet piracy virtually unhindered for some time to come.

On a separate track, in August 2012, the Federal Council for Justice agreed to set up a stakeholder working group (known as "AGUR12"), and invited fifteen participants from the private sector, including artists, producers/distributors, collecting societies, copyright user organizations, and consumer organizations. Representatives from various ministries also participated as well as ISP representatives who were invited to a number of meetings as experts. On December 6, 2013, the AGUR12 published its unanimous recommendations for a reform – the significance of which cannot be overstated given the variety of viewpoints that were represented in the working group. The full list of recommendations was presented as a package that, altogether, reflects a compromise among the four represented stakeholder groups, and includes:

- Introduction of a fair and effective mechanism to address websites providing access to both hosted and non-hosted infringing content via a governmental body;
- Introduction of a simplified mechanism to deter repeat infringers, which ultimately leads to civil liability for the holder of an infringing IP address;
- Introduction of liability for certain hosting providers, similar to the form of liability known in German courts as "Störerhaftung," leading to a take-down/stay-down obligation for certain providers;
- Limitation of liability for ISPs meeting certain criteria, along the lines of Article 14 EU E-Commerce Directive; and
- A right of information for the collection and use of data (including IP addresses) for copyright enforcement purposes.

The practical feasibility of this package of recommendations, and the fact that all stakeholder groups agreed on them, clearly introduce a unique opportunity for the Swiss government to demonstrate its commitment to copyright protection and to combating online piracy vigorously. Unfortunately, the government has given no response so far and has declined to announce a date by which it intends to comment on the AGUR12 report. For this reason, the Swiss rights holders have serious concerns about their government's will to accept and prioritize the implementation of this AGUR12 package of recommendations, and are afraid that their call for legal protection remains once more unheard. Instead, the Swiss government should now prioritize the full legal implementation of this package of unanimous recommendations by the end of this year.

THE SWISS COPYRIGHT ACT AND RELATED LAWS

In addition to the urgent developments regarding Internet piracy enforcement in Switzerland, IIPA continues to have other long-standing concerns with certain aspects of the copyright and related laws in Switzerland. These were explained in detail in IIPA's 2013 Special 301 submission on Switzerland.⁴ In summary:

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.

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. As a consequence, devices and circumvention software are widely available in Switzerland.

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

Fourth, 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 collecting society "Swissperform" initiated arbitration proceedings against this cap, and after the case was dismissed in 2010 by the Swiss Arbitration Commission, subsequently appealed before the Swiss Federal Administrative Court. That Court dismissed the case, and now, more than three years later, the case is pending with the Swiss Federal Supreme Court.

Fifth, 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.

Sixth, although Article 12 Section 1*bis* of the Swiss Copyright Act states that copies of audiovisual works may not be distributed or rented if this prejudices the right holder's public performance right – e.g., if the audiovisual work is still in the theaters – an explicit criminal sanction for the violation of this principle is needed, in order to deal effectively with an influx of French language DVDs imported from Canada and freely distributed while the motion pictures are still playing in Swiss cinemas.

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.

⁴See <http://www.iipa.com/rbc/2013/2013SPEC301SWITZERLAND.PDF>.