

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendations: IIPA recommends that USTR place Switzerland on the Watch List in 2016 and urges that USTR increase its bilateral engagement with Switzerland in the coming year.¹

Executive Summary: Six years after the *Logistep* decision effectively brought online copyright enforcement in the country to a halt, a clear mandate to resume civil and criminal cases does not appear imminent. Although the Intellectual Property Institute has opened a public comment period for a project of law revising the Swiss Copyright Act to address some of the current gaps in enforcement, the contemplated revisions are on track to enter into force no sooner than the end of 2018, if at all. At the end of this process, in the best case scenario, right holders will have gone eight years without remedy to enforce their rights in the online marketplace. Such delays might be expected from governments of developing or emerging markets, but Switzerland makes no claim that it lacks the resources or technological expertise to make swift change. Nor is there a need for prolonged debate over the changes needed to combat online piracy; the multi-stakeholder *Arbeitsgruppe Urheberrecht 2012*, or Working Group on Copyright (AGUR12), met regularly for more than a year before publishing its unanimous recommendations on the topic in December 2013. The fact that online piracy continues to escape any liability in Switzerland, and that downloading from patently illegal sites is considered legal, can only be attributed to a reluctance on the part of Swiss leadership to live up to its obligations under international agreements to provide remedies that prevent and deter infringements.² IIPA urges the U.S. Government to send a clear message that this is unacceptable, particularly within the context of our otherwise strong bilateral trade relationship, and urges the U.S. Government to work closely with the Swiss Government to address the situation.

Switzerland remains a haven for online 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. The Swiss Government should take the following immediate actions to show its willingness to combat these serious infringing activities within its borders:

PRIORITY ACTIONS REQUESTED IN 2016

- Endorse the standing opinion of the Federal Data Protection and Information Commissioner clarifying what evidence collection practices are permissible for effective civil and criminal online copyright enforcement under the Data Protection law, to permit copyright enforcement actions to resume as soon as possible;
- Upon completion of the public comment period for the December 2015 draft Copyright Act amendments, accelerate the passage of a bill to incorporate the compromise recommendations of the AGUR12 dated December 6, 2013, and to make other improvements to modernize the Swiss Copyright Act so that it is fit for purpose;
- Improve the draft Copyright Act amendments to provide efficient anti-piracy tools against all types of piracy regardless of technical details;

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/2016SPEC301HISTORICALCHART.pdf>.

²Switzerland is subject to Article 41(1) of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which requires that its members "ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." See also WIPO Copyright Treaty (WCT) Art. 14(2), and WIPO Performances and Phonograms Treaty (WPPT), Art. 23(2).



- 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;
- End the discrimination against neighboring rights under collective rights management by deleting the 3% cap in Article 60(2) of the Swiss Copyright Act; and
- Extend the term of protection consistent with emerging global developments and EU law, including protection for producers and performers of 70 years from publication or performance.

THE NATURE OF PIRACY IN SWITZERLAND

At the time of the 2010 Federal Supreme Court decision enjoining Logistep's data collecting practices in the context of preliminary civil anti-piracy cases, Logistep predicted that Switzerland would soon become a safe haven for large-scale copyright infringement.³ Over the past six years, that prediction has largely come true. Switzerland suffers not only from increasing domestic piracy rates for music, film, video games, and entertainment software, but also from a growing base for the operations of certain Internet service providers (ISPs) dedicated to piracy on a global scale.

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 service *Uploaded.net*, currently ranked number 483 of the world's most popular websites according to Alexa, an ad-based file storage service that fuels piracy through the sale of "premium accounts" permitting immediate downloads of multiple files at once. The hosting provider Private Layer (with data center and hosting operations in Switzerland and corporate operations in Panama) hosts a large number of illegal websites including the BitTorrent indexing site *Bitsnoop.com*, the linking site *Putlocker.is*, the linking and streaming site *Watchseries.it*, and the streaming cyberlocker site *Nowvideo.sx* (which offers uploaders rewards of about US\$20 per 100 downloads, and refuses to comply with takedown notices). USTR identified both *Uploaded.net* and *Putlocker.is* in December 2015 as Notorious Markets that engage in or facilitate substantial copyright piracy.⁴ 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.

Swiss Internet users avail themselves of a broad range of mechanisms to access pirated content online. peer-to-peer (P2P) BitTorrent activity for the purposes of sharing infringing material remains popular. Cyberlocker services for storage and sharing of illegal files are also still available. 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.

Book and journal publishers also face a difficult environment in Switzerland, where textbook photocopying and the publication of illegal pdf-scans on websites proliferate. Private copying is allowed from illegal sources, and is permitted not only by private individuals, but also by government and commercial entities. E-books of all kinds circulate widely online. Meanwhile, higher education textbooks are frequently pirated, and while the Copyright Act allows for the copying of a part of a book or a single article of a journal, even where these extracts and articles are electronically available for purchase or rent, there is no mechanism on Swiss campuses to monitor whether professors take the liberty to copy books in substantial part or even in their entirety. Proposed text- and data-mining exceptions in the draft copyright amendments currently under review risk creating new excuses for users to engage in wholesale copying of entire collections, without safeguards for the stability of publisher platforms.

³See Logistep press release (Sep. 8, 2010), available at <http://www.openbroadcast.de/artikel/59607/Schweizer-Bundesgericht-verhindert-Durchsetzung-der-Urheberrechte-in-der-Schweiz-.html>.

⁴See 2015 Out-of-Cycle Review of Notorious Markets, December 2015, available at <https://ustr.gov/sites/default/files/USTR-2015-Out-of-Cycle-Review-Notorious-Markets-Final.pdf>.

COPYRIGHT LAW AND ENFORCEMENT IN SWITZERLAND

Copyright industries in Switzerland have kept up efforts to resume criminal and civil actions against P2P online infringement under Swiss law, which almost entirely ceased in the aftermath of the 2010 decision of the Swiss Federal Supreme Court in the *Logistep* case. Some prosecutors still pursue investigations against cyberlockers and structurally infringing sites, but seem unsure how to enforce existing laws and lack resources to freeze assets, or to secure evidence residing on servers (which may contain significant quantities of infringing materials). Prosecutors — although now beginning to voice their own frustration with the situation — have interpreted the precedent broadly as barring the collection and use of any IP address data identifying defendants in criminal copyright cases. Right holders are 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.

It was nearly two years after the *Logistep* decision that the Federal Department of Justice and Police recognized at last the magnitude of this enforcement deadlock and other concerns, and agreed to set up AGUR12, a stakeholder working group made up of artists, producers/distributors, collecting societies, copyright user organizations, and consumer organizations, along with government participants and ISP representatives brought in as experts. After more than a year of deliberations, on December 6, 2013, AGUR12 published its unanimous compromise recommendations for reform — a significant accomplishment given the variety of viewpoints that were represented in the working group.⁵

In June 2014, the Federal Council instructed the Department of Justice to respond to the December 2013 recommendations of the AGUR12 by developing a project of law on a very protracted schedule.⁶ The project of law is open to public consultation until the end of March 2016, at which point the government will evaluate stakeholder input and prepare the draft Copyright Act amendments together with a report for the parliamentary law making process. Any resulting proposed amendments would not become law before the end of 2018 (if at all). In the meantime, the Department of Justice has done nothing to set the record straight for its own prosecutors that the *Logistep* decision was a narrow case that, under the Swiss data protection law, should not have foreclosed further private sector gathering of evidence in online copyright cases. Also, one recommendation of the AGUR12 that could have been actionable in the very near term, namely a public awareness campaign, has been wholly ignored.

The Draft Amendments

The Federal Council presented its proposed revisions to the Copyright Act on December 12, 2015, incorporating many of the AGUR12 recommendations regarding online piracy.⁷ The project of law includes some important elements that IIPA has urged the Swiss Government to adopt in the context of *Logistep* and its aftermath, namely, measures that address websites providing access to both hosted and non-hosted infringing content and repeat infringers. The draft amendments need substantial improvement, but offer a basis for continuing the work of modernizing Swiss copyright law. We offer some preliminary, but not exhaustive, comments below. We hope that the Swiss Government will approach this important subject carefully and creatively, incorporating best practices that have been employed in some other jurisdictions.

Data processing of infringing online activity. As a general matter, proposed Article 66j is a welcome reaffirmation of the private sector's ability to conduct online piracy investigations. The provision lays out new conditions under which a right holder may collect data about online violations of his or her copyright, and is an apparent effort to restore this ability after the *Logistep* decision caused authorities to question the admissibility of such data in court. However, the proposed amendment is overly restrictive, imposing requirements that any data

⁵For the full report of AGUR12 recommendations, see <https://www.ige.ch/en/copyright/agur12.html>.

⁶See the press release of the Swiss Government at <http://www.admin.ch/aktuell/00089/index.html?lang=fr&msg-id=53259>.

⁷"Federal Council wants to modernize copyright: consultation process under way," Dec. 11, 2015, available at <https://www.ige.ch/en/copyright/modernisierung-des-urheberrechts-2015.html>.

collection be limited to only cases of serious breaches of copyright or related rights (meaning only regarding either a pre-release file, or large-scale making available of published works), and only to activity occurring over P2P networks. The term “large-scale” is not defined. The provision states that data collection should capture no more data than is necessary to pursue copyright infringement actions, then goes further by limiting the permitted collections to three specific types of data.

While the proposed article on data processing is a positive step forward to affirmatively permit certain types of forensic investigations, as written it still perpetuates the incorrect notion that the ability of right holders to investigate online piracy of their works is a privilege, rather than a necessary element in exercising the right to enforce copyright and related rights. That presumption contradicts the statements that the Federal Data Protection and Information Commissioner (FDPIC) made in the wake of the *Logistep* decision — even as it stood by the Federal Court’s opinion — in which the FDPIC underscored, in the context of online piracy cases, that “we still believe that there is an overriding interest involved which would justify a violation of privacy rights as a result of the data processing”.⁸ To elucidate its agreement with the Federal Court’s decision against *Logistep*, the FDPIC criticized not the particulars of the data that *Logistep* collected but instead the manner in which the data was presented to the court. To properly address the privacy concerns raised surrounding the *Logistep* decision, it would be sufficient for the proposed amendment language to simply limit data collection to that which is reasonably necessary for the pursuit of violations of law (which, incidentally, would mirror the recommendation of the FDPIC, as well as the recommendation of the AGUR12)⁹. Instead, by specifying precise types of data that may be collected, the proposed Article 66j risks jeopardizing the kind of agile analysis in anti-piracy efforts that is vital in a world of evolving technology.

Notice, Take Down and Stay Down. Proposed Articles 66b through 66e of the draft law introduce notice-and-action mechanisms to be undertaken by service providers. Under these provisions, a right holder or a competent authority sends a communication about an infringement to an online service provider, upon which the service provider takes the infringing material down or prevents access to it. The draft law provides that Swiss uploaders or service providers (depending on the mechanism in play) may oppose the measures and, in the case of materials hosted in Switzerland, right holders may then take the matter to court. Articles 66b and 66c are directed toward online service providers such as web hosting providers, chat platforms, and document exchange platforms. These “derivative” online service providers are under an obligation to take preventative measures against repeat infringements of the same works (Art. 66b(4)), unless they join a Swiss self-regulatory organization (Art. 66c(2)). In order to make sure that these mechanisms work effectively and are time- and cost-efficient, these articles need to more deeply regulate the formalities and measures to be followed by online service providers, with specifics as to timelines and cooperative exchange with right holders.

Website Blocking. Articles 66d and 66e establish a notice-and-action mechanism to be followed by Swiss telecommunication service providers in cases where infringing material is hosted by an online service provider whose headquarters is outside of Switzerland, or is concealed. Under this mechanism, Swiss telecommunication service providers would respond to orders listed by the Swiss Intellectual Property Institute in the Federal Gazette by blocking access to the infringing material from Swiss users. Also, the wording of the articles actually prevents actions against sites offering unreleased material, which is of course the most harmful type of piracy.

Notifications and Identification of Users. Proposed Articles 66g through 66h set up a limited mechanism for right holders or competent authorities to send notifications to users engaged in infringing activity, which may result in the identification of repeat infringing users for purposes of civil liability. The mechanism is limited to cases of serious infringement (specifically, either a pre-release of a single work, or the large-scale making available of

⁸Statement of the Federal Data Protection and Information Commissioner (FDPIC), “*Internet file-sharing networks – the legal situation after the Logistep ruling*”, June 15, 2012, available at <http://www.edoeb.admin.ch/dokumentation/00153/00154/00170/index.html?lang=en>.

⁹Proposal of the AGUR12”, Paragraph 9.3.5, dated Dec. 6, 2013, available at https://www.ige.ch/fileadmin/user_upload/Urheberrecht/e/Schlussbericht_der_AGUR12_Empfehlungen_EN.pdf.

otherwise legally available works) that occur over P2P networks (apparently excluding such platforms as cyberlockers). Right holders must allow for at least a two-month delay between notifications, and may not request the identification of the alleged infringer (according to proposed Article 62a) until they have sent two notifications. In other words, it is at least a four-month process to seek from a telecommunication service provider the identity of a user whose Internet connection was used to violate a right holder's copyright. This procedure is too costly and time consuming, and therefore utterly ineffective. It gives any heavy infringer a theoretical safe haven period of at least four months before even a threat of consequences. Furthermore, the draft should clarify that the right holders shall be able to transfer all costs for the procedure to the infringer.

Limitation of Liability. The proposed amendments limit the liability of service providers that comply with these mechanisms against claims of copyright violation that occur over their services or networks, or other contract claims or tort liabilities. (Art. 66k.) However, the proposed amendments fail to explicitly establish any pre-existing possibility of secondary liability, making the supposed incentive of Article 66k likely to be ineffective.

ADDITIONAL CONCERNS UNDER 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. None of these concerns have been remedied with the current proposed amendments to the Copyright Act. In summary:¹⁰

First, the private copy exception in Article 19 of the Copyright Act is too broad, and has been interpreted to allow the making of copies of works or phonograms that come from unlawful sources. As the Swiss Federal Council cautioned when it announced that copyright amendments were to be drafted, the Swiss Government has confirmed in statements that downloading from an illegal source is to be permitted, and the current draft amendments do nothing to foreclose this possibility under Article 19. In fact, the measures proposed in the draft amendments apply only to serious cases of infringement, leaving the door open for individuals to download from illegal sources without consequence or penalty of any kind.

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, circumvention devices and software are widely available in Switzerland.

Third, Articles 22(a) to 22(c) of the Copyright Act, 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 Copyright Act caps the remuneration payable to rights owners (collected via collecting societies) at 10% of the licensees' income for authors and 3% for neighboring rights owners. This cap on right holders is wholly inadequate in the present reality of online content licensing. The discrimination against the neighboring rights leads to poor revenues that are substandard in comparison to most European countries. In 2010, the Swiss performing artists and record producers collecting society “Swissperform” initiated arbitration proceedings against this cap. In 2014, the Swiss Federal Supreme Court dismissed the case in the final instance. In its judgment, the Federal Supreme Court stated that the 3% and 10% caps serve as a rule of thumb for what is an equitable remuneration under collective rights management. It acknowledged that the remunerations for performing rights are in fact higher in other European countries, but was unable to intervene on the merits. Rather, it held that it is up to the

¹⁰These were explained in greater detail in IIPA's 2013 Special 301 submission on Switzerland. See <http://www.iipa.com/rbc/2013/2013SPEC301SWITZERLAND.PDF>.

Swiss legislature to set these caps based on a political assessment.¹¹ With this judgment, the Swiss Federal Supreme Court clearly shows the path for reform: This unusual and unjustified discrimination against the neighboring rights should be ended, and replaced with a fair and equitable remuneration for both performing artists and producers. The Swiss Government refused to address this concern in the draft legislation on the grounds that AGUR12 did not find an agreement on this particular point. However, the same was true, for example, with respect to the lending right remuneration which the government nevertheless included in the draft.

The present rule will have an even greater negative effect if Switzerland adopts a so-called “extended collective license” for streaming and Internet television, as is currently proposed in the background media kit that accompanies the draft Copyright Act amendments.¹² The proposed licensing scheme described therein is voluntary in name only. While forms of extended collective licenses exist in some other territories, it is essential that it not be used in connection with central economic rights implicated in services such as streaming. Extended collective licenses undermine individual licensing, the norm for online services. And an opt-out provision does not render an extended collective license a form of voluntary collective licensing. There is substantial risk that extended collective licenses applied in the online space would depress the value for creative works, setting a tariff “norm” that can undermine licensing terms for right holders who choose to exercise their exclusive rights and opt out. In addition, requiring opt-out in order to exercise exclusive rights could constitute a formality prohibited by international law, including the Berne Convention and TRIPS. In short, extended collective licenses are wholly inappropriate with respect to services that are already licensed directly around the world, even with opt-out rights. Together with the existing remuneration caps, the two schemes fall short of the country’s international obligations, including with respect to exceptions and limitations to copyright under the three-step-test of TRIPS Article 13.

Fifth, IIPA is disappointed to find that the current proposed amendments to the copyright law do not include any provision for term extension. The term of protection for sound recordings under the current Copyright Act is only 50 years, and should be extended to at least 70 years. Such extension would not only provide greater incentives for the production of sound recordings, but also provide producers with a stronger incentive to invest in the local recording industry, spurring economic growth as well as tax revenues and enabling producers to continue offering recordings to local consumers in updated and restored formats as those formats are developed. A longer term would support the development of the industry and the creation of new jobs. Currently, 63 countries protect sound recordings for 70 years or longer, including the EU Member States, 28 out of the 32 OECD member countries, and 9 out of the top 10 music markets (by total revenue in 2014). Further, in the recently concluded Trans-Pacific Partnership Agreement (TPP), the minimum term of protection for sound recordings is set at 70 years.

Sixth, there is a need for specific camcording legislation to combat the illicit recording of movies in theaters, a major source of pirated motion pictures on the Internet, as well as on street corners and flea markets around the world.

Seventh, although Article 12 Section 1*bis* of the 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 those motion pictures are still playing in Swiss cinemas.

Amendments to the Swiss Film Act. In June 2015, the Swiss Parliament passed amendments to the country’s Federal Act on Film Production and Film Culture (Film Act) that took effect on January 1, 2016. These amendments extend restrictions on theatrical distribution to all other forms of exploitation with the exception of linear broadcasts. The amended law generally provides that an entity may only distribute audiovisual content in Switzerland

¹¹FSC no. 2C/783, p. 16, cons. 6.6.

¹²See media kit prepared by the Swiss Intellectual Property Institute, available at https://www.ige.ch/fileadmin/user_upload/Urheberrecht/e/modernisierung_urheberrecht_2015_e/Medienrohstoff_URG_EN.pdf.

if it holds rights to all language versions actually exploited in the country in the particular method of distribution. Several relevant issues are not addressed in the amendments and the potential implications of the amended law remain unclear, resulting in much confusion in the marketplace as to compliance. The Federal Ministry of Culture should provide clarification on these amendments so as not to unsettle or disturb licensing activity.