

# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendations:** IIPA recommends that Switzerland remain on the Watch List in 2017 and urges that USTR increase its bilateral engagement with Switzerland in the coming year.<sup>1</sup>

**Executive Summary:** In 2016 and 2017, there were new rounds of meetings of the multi-stakeholder *Arbeitsgruppe Urheberrecht 2012*, or Working Group on Copyright (AGUR12), regarding long-awaited revisions to the Swiss Copyright Act. These contemplated revisions, even if agreed-upon, would enter into force no sooner than the end of 2018 at the very earliest, and if at all. Meanwhile, unprecedented restrictions remain in place with respect to the *de-facto* ban on the use of IP address evidence in civil and criminal copyright actions arising out of the 2010 *Logistep* case. The debate over the legislative changes needed to combat online piracy has been unnecessarily prolonged; the original multi-stakeholder AGUR12 met regularly and published its *unanimous* recommendations on the topic in December 2013. While the government published a draft bill for consultation in December 2015, the AGUR12 has now resumed. The fact that online piracy continues to escape any liability in Switzerland over three years after the first AGUR12 recommendation, 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 the country's obligations under international agreements to provide remedies that prevent and deter infringements. IIPA urges the U.S. Government to send a clear message that the status quo remains deeply problematic, particularly within the context of our otherwise strong bilateral trade relationship. IIPA further urges the U.S. Government to work closely with the Government of Switzerland to address the piracy enforcement situation, which raises serious questions with respect to Switzerland's commitments under the WTO TRIPS Agreement to provide a remedy for any form of infringement. The Government of Switzerland should address online piracy now, including through legislation implementing the compromise recommendations of the AGUR12, and update its legislation to match copyright protection (including term of protection) offered elsewhere in Europe, in the United States, and in other developed markets.

### PRIORITY ACTIONS REQUESTED IN 2017

- Improve, and accelerate the passage of, the draft Copyright Act amendments to provide efficient tools against all types of piracy, regardless of technical details and to otherwise incorporate the compromise recommendations of the AGUR12 dated December 6, 2013.
- Endorse the standing opinion of the Federal Data Protection and Information Commissioner (FDPIC) clarifying permissible evidence collection practices under the Data Protection law in criminal online copyright enforcement actions, and highlight that this extends to civil enforcement actions.
- 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.
- 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.

<sup>1</sup>For more details on Switzerland's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Switzerland's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



## THE NATURE OF PIRACY IN SWITZERLAND

Levels of Internet based piracy in Switzerland remain high due to weak enforcement and weak laws (including current law, which does not sanction the private consumption of works from clearly illegal sources). Switzerland suffers not only from high domestic piracy rates for music, film, video games, and entertainment software, but also from serving as a base of operations for some Internet Service Providers (ISPs) dedicated to piracy on a global scale. At the same time, Switzerland's legitimate online market is growing, with Netflix's entry into the market and the building of Subscription Video on Demand (SVoD) libraries by local telecom operators. Thus, it is increasingly important that the Government of Switzerland strongly enforce against piracy that could disrupt the growth of this legitimate market.

Streaming platforms operated from remote or unknown jurisdictions continue to be highly popular in Switzerland and carry copyrighted material relevant for this market, especially films early in their exploitation cycle. Peer-to-Peer (P2P) BitTorrent activity for the purposes of sharing infringing material remains popular. Stream ripping sites and applications, which permit users to create a local copy of unauthorized streamed content, are still high in usage. Downloading and streaming of unauthorized content for private use are widely viewed as legal in Switzerland, as long as no uploading occurs. Cyberlocker services for storage and sharing of illegal files also continue to be a concern in Switzerland, such as Cyando AG, operator of *uploaded.net*, and, in the case of *oboom.com*, hosting is via SwissBrothers AG. Additionally, Switzerland is used as the fake domicile by ISPs such as the very widely used Private Layer, which provides hosting services for numerous BitTorrent sites including *bitorent.am*, *bitsnoop.com*, and *1337x.to*, who benefit from access to P.O. box services and possibly server capacity. These distributors of pirated content rely on and refer to Switzerland's legislation that sets high value on privacy protection. While the Government of Switzerland has demonstrated a willingness to pursue pirate sites on the .ch domain (the Swiss country code TLD (ccTLD)), formerly problematic sites on this domain, such as *Torrented.ch*, now migrate to websites using other domains. Other problematic sites, such as *Torrentflow.com* and *torrentproject.org*, also no longer utilize .ch domains, but are hosted by Switzerland-based ISPs—Rook Media GmbH and Private Layer, respectively. IIPA recommends that the Government of Switzerland expand its enforcement actions, as their jurisdiction is not necessarily limited to sites with a .ch domain.

Moreover, piracy activities targeting the neighboring markets of Germany, France, and Italy also affect the markets in the respective language communities in Switzerland. For example, Italian language platforms, even those blocked in Italy, are accessible and popular in the Italian-speaking regions of Switzerland. There is no clear legislation and no tested court practice for disabling access to such platforms in Switzerland.

## COPYRIGHT 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. With some exceptions, prosecution services tend to consider copyright enforcement cases as non-priority. Obstacles to enforcement include the *de-facto* ban on IP address based evidence following the *Logistep* decision, and the legal complexity of copyright cases.<sup>2</sup> Right holders are currently proscribed from collecting and 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. While some prosecutors do pursue investigations against cyberlockers and structurally infringing sites, they seem unsure how to enforce existing laws and lack resources to freeze assets or secure evidence residing on servers (which may contain significant quantities of infringing materials). Prosecutors—although now beginning to voice their own frustration with

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<sup>2</sup>While enforcement of copyright law against private users may still be technically possible, as highlighted by the Government of Switzerland in its public comment regarding the 2016 Special 301 report, industry sectors report that prosecutors remain unsure how to reconcile the *Logistep* case with the need for IP address based evidence.

the situation—have interpreted the precedent broadly as barring the collection and use of any IP address data identifying defendants in criminal copyright cases.

## **COPYRIGHT ACT AND RELATED LAWS IN SWITZERLAND**

### **Copyright Reform**

**Logistep:** The 2010 *Logistep* decision by the Swiss Federal Supreme Court held that the IP addresses of Internet users sharing pirate material over publicly available networks—a crucial piece of information needed to bring an online infringement action—are protected by Switzerland’s strict data protection laws. The decision, issued by Switzerland’s highest court and supported by the Swiss Data Protection Authority (FDPIC), required Logistep AG to stop collecting the IP addresses of suspected infringers that it had turned over to right holders to pursue civil actions. In the aftermath of *Logistep*, online copyright enforcement in the country came to an effective halt.

**History of AGUR12:** Two years after the *Logistep* decision, the Federal Department of Justice and Police, recognizing the magnitude of the enforcement deadlock arising out of the case and other concerns surrounding copyright, initiated AGUR12, a stakeholder working group made up of artists, producers/distributors, collecting societies, copyright user organizations, and consumer organizations, 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 copyright reform—a significant accomplishment given the variety of viewpoints that were represented in the working group.<sup>3</sup>

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.<sup>4</sup> The project of law was to be open to public consultation until the end of March 2016, at which point the government was to evaluate stakeholder input and prepare the draft Copyright Act amendments together with a report for the parliamentary lawmaking process. Instead, given the contentious nature of the draft amendments, discussed below, another round of committee discussions are taking place.

**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.<sup>5</sup> This draft suggested a statutory notice and take-down, counter-notice and put-back procedure and a self-regulation organization for hosting providers (e.g. structurally infringing services); stay-down duties for not self-regulated hosting providers, an administrative procedure for website access blocking and a double-notice warning and disclosure procedure for infringing individuals. However, the proposals were rendered toothless by unreasonable thresholds for enforcement, such as tests for heavily infringing platforms, or legal online availability of the infringed content as a prerequisite for enforcement; by limitation to P2P technology; and by critical cost burden. The proposal also was burdened with ancillary proposals including new copyright limitations such as “extended collective licensing,” and research uses. Moreover, it did not address term extension, removal of caps and restrictions on performance rights, or the recognition of an independent status of producers’ performance rights. The contentious draft amendments generated a very high volume of responses during the consultation period. Substantial revisions to the draft amendments are needed to adequately address right holder concerns.

**Revived AGUR12 Copyright Reform Committee (AGUR12 II):** As a result of the strong reactions to the draft amendments, in 2016 the Federal Institute of Intellectual Property began leading consultations with a revived AGUR12 copyright reform committee (AGUR12 II), which includes efforts to bring together right owners and ISPs. Members of the reform committee include consumers, users, producers, distributors, Suisseculture, collecting

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<sup>3</sup>See [https://www.ige.ch/fileadmin/user\\_upload/Urheberrecht/d/Schlussbericht\\_der\\_AGUR12\\_vom\\_28\\_11\\_2013.pdf](https://www.ige.ch/fileadmin/user_upload/Urheberrecht/d/Schlussbericht_der_AGUR12_vom_28_11_2013.pdf) for the complete AGUR12 report recommendations. See [https://www.ige.ch/fileadmin/user\\_upload/Urheberrecht/e/Medienmitteilung\\_zum\\_Schlussbericht\\_AGUR12\\_EN.pdf](https://www.ige.ch/fileadmin/user_upload/Urheberrecht/e/Medienmitteilung_zum_Schlussbericht_AGUR12_EN.pdf) for an English summary of the recommendations.

<sup>4</sup>The Government of Switzerland press release is available at: <https://www.admin.ch/aktuelle/00089/index.html?lang=fr&msg-id=53259>.

<sup>5</sup>The draft amendments are addressed in greater detail in IIPA’s 2016 Special 301 submission, available at <http://www.iipawebsite.com/rbc/2016/2016SPEC301SWITZERLAND.PDF>.

societies, and ISPs. The group has met three times since September 2016, and will have met five times by March 2017. It is tasked with creating a specific legislative proposal, together with the Federal Institute of Intellectual Property, to be issued shortly thereafter. The content of the draft is meant to follow the compromise reached by the AGUR12 in 2013. However, it has become apparent that there is fierce resistance to robust anti-piracy provisions in the revised Act, mainly from ISPs, *EconomieSuisse*, the data protection commissioner and consumer advocacy groups.

IIPA urges the participants of AGUR12 II and the participating government bodies to reach a compromise formula that will address many of the most pressing issues as to ISP liability, in accord with the compromise recommendations of the AGUR12 dated December 6, 2013. IIPA further urges an accelerated implementation of AGUR12's core enforcement proposals, in order to adequately address the current enforcement issues.

**Interim Measures Needed:** Given the protracted time frame for copyright reform under AGUR12, IIPA urges the Government of Switzerland to take interim steps to protect against online piracy. A standing opinion of the FDPIC made in the wake of the *Logistep* decision—even as it stood by the Federal Court's opinion—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.” 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 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). In the meantime, until such amendments are implemented, the Department of Justice should endorse the FDPIC opinion and clarify for its prosecutors that the *Logistep* decision was a narrow case that, under the Swiss data protection law, does not foreclose criminal or civil online copyright enforcement actions.

The current lack of ISP liability legislation, and strong privacy laws, operate in favor of ISPs and tend to protect even repeat infringers from prosecution. The website hosting industry's trade association established a code of conduct a few years ago, which it administers autonomously and defends against interference by government or rights owners. Trade association affiliated hosting providers purport to be taking down notified content, while “Sharehosters,” such as *Uploaded.net*, practice takedown regularly but do not prevent from (and even support) quick re-upload, avoiding effective stay-down. Informally, cooperation is being offered in action against infringing hosting providers via enforcement of business-to-business contracts with telecommunications/access providers. These provisional measures in principle could work well, but fail to be effective in halting online infringement due to the lack of clear and tested liability rules. The Government of Switzerland should encourage ISPs to work together with right holders to improve the voluntary notice and take-down process, but should also move as swiftly as possible to implement legislation establishing such a process and imposing liability for ISPs that host infringing content.

Finally, AGUR12 recommended a public awareness campaign about copyright. To be effective, such a campaign would require technical, operational and financial support from the Swiss government. So far, such campaign has not been initiated. IIPA suggests that this would be beneficial in the interim.

### **Additional Concerns Under the Copyright Act and Related Laws**

In addition to the developments regarding proposed amendments to the Copyright Act to address online piracy, 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:

**Private Copy Exception:** 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 wide open for individuals to download from illegal sources without consequence or penalty of any kind. Such a broad private copying exception together with serious concerns regarding the protection of TPMs (see below) constitute significant hurdles for the protection against stream ripping services that dominate the list of top pirate services. Moreover, the Swiss Federal Arbitration Commission has imposed a levy on catch-up TV, placing these services within the scope of the private copy exception. This precludes direct licensing by right holders, including the initial broadcaster, on a platform-by-platform basis. This extension of the private copy exception to catch-up TV services impinges on the exclusive making available right, and thus may violate Switzerland's international obligations, including under the WIPO Copyright Treaty (WCT).

**Circumvention of Technological Protection Measures (TPMs):** 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 far too broad, particularly given the inappropriately wide scope of the private copy 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.

**Discrimination Against Neighboring Rights:** 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 unjustified in the present reality of the music markets. The discrimination against the neighboring rights leads to 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 Swiss legislature to set these caps based on a political assessment. 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 Government of Switzerland 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. 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 any online services. Extended collective licenses undermine individual licensing, which is the norm for online services. An opt-out provision, as proposed, does not render an extended collective license as 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 could 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.

**Insufficient Term for Sound Recordings:** IIPA is disappointed 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, all of the other European Free Trade Association (EFTA) states (even neighboring Liechtenstein), 28 out of the 32 Organisation for Economic Co-operation and Development (OECD) member countries, and 9 out of the top 10 music markets (by total revenue in 2014).

**Criminal Sanctions Needed for Distribution that Prejudices the Public Performance Right:** 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 a motion picture 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:** On January 1, 2016, amendments to Switzerland's Federal Act on Film Production and Film Culture (Film Act) took effect,<sup>6</sup> extending the existing "unique distributor clause" and related regulatory provisions for the Swiss film market from theatrical to other forms of exploitation. The "unique distributor clause" requires theatrical distributors to acquire distribution rights for the whole of Switzerland (i.e. for all language versions and regions exploited in Switzerland), and the amendment extended this to apply to DVD/physical home entertainment distribution and all forms of online licensing of theatrical (and direct-to-DVD/online) movies, with the exception of linear television broadcast. While many aspects of the amended law have remained unclear and its interpretation has been a matter of controversy between various stakeholder groups and the government, some of its features are likely to have adverse effects, mostly in online distribution.

The law has interfered with existing licensing practice allocating online exploitations to platforms by language regions or other multi-territory platforms where each may have a different set of language versions. In practice, it may require exclusive licensing, interfering with non-exclusive licensing practices, and is understood by some to require package licensing of various forms of online distribution (such as transactional video on demand (TVoD), SVoD and advertising video on demand (AVoD)) to one entity, thus interfering with the current practice of different licensing channels and windows for each of these platforms. Instead of facilitating a consistent film offering across the entire country, this regulation may make it more difficult and unattractive to market films in Switzerland at all, leaving market potential untapped. The amended law also extends registration and detailed reporting obligations (from January 1, 2017) for films exploited in Switzerland in physical home entertainment distribution and online licensing, to which both platforms and their licensors will be subordinate, including those domiciled abroad. This is likely to cause substantial additional cost and effort to enter the market.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

Switzerland is a member of the Berne Convention, TRIPS, WCT, and the WIPO Performances and Phonograms Treaty (WPPT). It is thereby obligated under these international agreements to provide "effective" remedies to prevent and deter infringement. Under Article 41(1) of TRIPS (and similarly the WCT Art. 14(2) and WPPT Art. 23(2)) it is required to "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." It is not currently doing so, as explained in this report, especially in light of the *Logistep* case, which severely curtailed enforcement procedures against online infringers.

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<sup>6</sup>See <https://www.admin.ch/opc/en/classified-compilation/20001389/index.html#a19>.  
International Intellectual Property Alliance (IIPA)