

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR place Switzerland on the Watch List in 2013 and urges that USTR increase its bilateral engagement with Switzerland in the coming year.¹

Executive Summary: Piracy in Switzerland is on the rise. Since early 2011, the percentage of Swiss Internet users who access unlicensed services in a given month rose from about 30 to about 35 percent,² well above the European average. The country has become an attractive haven for services heavily engaged in infringing activity, including Uploaded and Private Layer, all of whom have opened or moved headquarters or servers to Switzerland. From there, they provide a global service, effectively turning Switzerland into a major exporter of pirated content. This marked increase in infringing online activity can be directly attributed to the reality that Swiss law enforcement currently provides no effective consequences for digital copyright infringement on any scale.

Criminal and civil actions for online infringement under current legislation and case law have almost entirely come to a stop 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 Switzerland's privacy laws, the Logistep decision only barred the specific data harvesting that was used in that case, and only from use in civil actions.

Some internet operators still refuse to comply with notices to remove infringing content from their servers, and due to the absence of a legal basis for liability of hosting providers, they have no incentive to comply with any such take down requests or to engage in serious negotiations about a voluntary agreement.

IIPA strongly encourages the U.S. Government to work with the Government of Switzerland, including through the Round Table meetings hosted by State Secretariat for Economic Affairs (SECO) that are set to continue in early 2013, to find near-term solutions that will: (1) clarify an evidentiary way forward for digital copyright infringement cases; (2) permit injunctions against unauthorized streaming or other infringing websites; (3) permit injunctions against intermediaries whose services are used by a third party to infringe copyright; and (4) establish a civil right of information parallel to that found in Article 8 of the EU Enforcement Directive.

PRIORITY RECOMMENDED ACTIONS FOR SWITZERLAND IN 2013

- Resume enforcement of the current Copyright Act in the Internet environment in Switzerland's courts.
- If necessary, amend Swiss law to permit the collection of data available over digital networks for the purposes of enforcement of copyright against infringing activity.
- Clarify within Swiss law the responsibility of intermediaries that enable online piracy through hosting, streaming, linking, etc. and make remedies available to (1) issue injunctions against intermediaries whose services are used by a third party to infringe a copyright; (2) ensure availability of effective and rapid notice and takedown procedures; and (3) implement an effective and deterrent notice procedure against infringing customers.

¹For more details on Switzerland's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.

² Source: IFPI based on data by comScore, Inc.



- Ensure that further copyright reform and the importance of effective copyright enforcement especially in the online environment continue to be addressed 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 as long as they derive from a legal source.

THE NATURE OF PIRACY IN SWITZERLAND

By the end of 2012, about 35 percent of all active Internet users in Switzerland use unlicensed services.³ This is much higher than the European average of 26 percent, and significantly higher than the piracy rate in countries that actively engage in anti-piracy measures, such as France and Germany. Swiss Internet users are sophisticated in their use of a broad range of vehicles to access pirated content online. Peer-to-peer (P2P) activity for the purposes of sharing infringing material remains popular, both through P2P client networks (three of which, Ares Galaxy, eMule, and LimeWire, are among the top 20 most popular infringing services worldwide) and, increasingly, through BitTorrent networks. The use of cyberlocker services for storage and sharing of illegal files remains popular, although they have seen a decline since the closure of Megaupload in 2012, in favor of BitTorrent networks. Finally, illegal streaming continues to take place, and the use of stream ripping sites and applications, which permit a user to create a local copy of unauthorized streamed content, is strongly increasing and expected to reach the level of popularity of cyberlockers and BitTorrent sites soon. 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, as long as there is no uploading.

The consequences for the Swiss economy from these levels of piracy are stark. Between 2002 and 2012, 57 percent of full-time employee positions among Swiss music labels have been lost.⁴ Between 2001 and 2011, the annual revenue of Swiss music labels has gone down by 59%. Some of the world's most popular Internet services for the unauthorized sharing of copyrighted works, such as the filehosters Uploaded, and the hosting provider Private Layer, which hosts a large number of illegal websites, have opened or moved their headquarters or hosting services to Switzerland. These services have a worldwide clientele and are accountable for a substantial part of the Internet traffic of pirated content. But for all this infringing activity, Switzerland cannot benefit from the revenues and taxes associated with legitimate sales. Legitimate streaming music platforms, such as Deezer, Simfy, Spotify, and Juke, have exploded in popularity globally, more than doubling their annual revenue each year, but account for only one percent of the revenue of Swiss music labels from Internet sales. Meanwhile, unauthorized TV and film content hosted in Switzerland is available on international sites such as TVDuck.com, nowvideo.eu, darkwarez.pl, piratenz.eu, and cyberlocker.ch., affecting worldwide markets ranging from Russia, to Poland, to the United States, the EU and beyond.

Switzerland also has a problem with an influx of French DVDs imported from Canada (presumably released after the motion picture's theatrical release in Canada has ended) and freely distributed while the motion pictures are still running in Swiss cinemas. Despite a provision in Swiss law that makes it unlawful to distribute DVDs when the movie is still in theatrical release, the law is not supported with criminal penalties and, as a result, there is no effective enforcement in Switzerland. This is especially harmful to theatrical releases in Switzerland. 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 missing.

Software piracy: BSA | The Software Alliance (BSA) reports that the software piracy rate in Switzerland remains low – at 25% – but nonetheless concerns remain about unlicensed software use by business end-users,

³ Source: IFPI trend analysis based on data by comScore, Inc. (October 2012).

⁴ Source: IFPI survey among 33 Swiss music labels (December 2012).

particularly small- to medium-sized enterprises (SMEs). Internet piracy also continues to present significant challenges to the software market. In 2011, the software piracy rate in Switzerland remained at 25%, representing a commercial value of unlicensed software of US\$ 514 million.⁵

ONLINE COPYRIGHT ENFORCEMENT IN SWITZERLAND

Online copyright enforcement in Switzerland has come to a grinding halt 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. Compounding matters, in November 2011, the Federal Council published a report on illegal uses of works on the Internet,⁶ concluding that there is no need for new legislation. In later comments the Swiss Federal Institute of Intellectual Property (IPI), Switzerland's Federal agency in charge of patents, trademarks, industrial designs and copyright, also concluded that Internet piracy was not a priority for Switzerland. Traditionally, the IPI provides more support in relation to patents and trademarks, than to copyright matters. In early 2012, Switzerland's State Secretariat for Economic Affairs (SECO) initiated a Round Table of experts and stakeholders to seek a way forward for online enforcement. The Round Table meetings have yet to produce concrete results to meet the immediate need to stem Switzerland's growing online infringement problem. It is critical that the Swiss Government push forward with these efforts in 2013 for a near-term solution. Our concerns are of course exacerbated by the fact that the federal Council and IPI do not appear to believe that there is a problem that requires a solution.

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, as part of a for-profit exercise on Logistep's part, 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 (FDPIC), which argued that Switzerland's Data Protection Act (DPA) only allows such data harvesting to be used in criminal actions. FDPIC 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."⁷ 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. However, in the aftermath of the Logistep decision, anti-piracy efforts have been completely undermined by an overly broad reading of the Logistep decision: public prosecutors have abandoned actions declaring as inadmissible evidence any IP addresses used to identify defendants and have even redirected their resources from copyright matters to other areas of law. 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. Consequently, because rights holders are unable to bring actions for online copyright infringement, Switzerland is 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.

⁵BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Switzerland was 25%, representing a commercial value of unlicensed software of US\$ 514 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

⁶The report, issued in response to the March 2010 motion of Senator Géraldine Savary to determine whether better legislation is needed to protect music online, is available in German, French, and Italian at: <http://www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2011/2011-11-30.html>.

⁷See <http://www.edoeb.admin.ch/aktuell/01688/index.html?lang=en>.

In March 2012, SECO invited stakeholders (the Ministry of Justice, the U.S. Embassy, the Data Protection Commissioner, the Zurich state prosecutor and rights holders) to an industry “Round Table” aimed at evaluating solutions regarding data protection issues following the Logistep decision. The Round Table members agreed to evaluate whether the data protection problem could be resolved without a legislative amendment, and to set up an expert group to discuss legal and technical details. The Round Table met again in October 2012, agreeing to look into mechanisms to permit (1) injunctions against unauthorized streaming websites; (2) injunctions against intermediaries whose services are used by a third party to infringe a copyright; and (3) the civil right of information parallel to Article 8 Enforcement Directive. 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.

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 (six from the creative sector, three producers, three user representatives and three consumer group representatives). The AGUR12 will discuss Internet copyright enforcement as well as more general issues like collective licensing and private copying exceptions. It is mandated to present a report by the end of 2013, but so far the results of the meetings, at least in respect to enforcement measures, have been disappointing. IIPA urges the Swiss Government to maintain this momentum toward concrete recommendations that can address the fundamental gaps in Swiss online enforcement.

THE SWISS COPYRIGHT ACT AND RELATED LAWS

In addition to the urgent developments regarding Internet piracy enforcement in Switzerland, IIPA also has other long-standing concerns with certain aspects of the copyright and related laws in Switzerland. On July 1, 2008, the Swiss law designed to implement the 1996 WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (together, the WIPO Internet Treaties) entered into force. 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. Swiss authorities have argued that the private copy exception in Switzerland is similar to that in Germany, which has not been subject to rights holders’ complaints. However, the relevant article 53 of the German copyright law contains an important clause (and one that is absent from the Swiss law), that single copies for private use are permissible *as long as the copy is not made from an obviously illegally produced or publicly made available copy*. Such a provision is necessary to prevent the private copy exception from becoming an exception that swallows the rule.

Most recently, the overly broad view of the private copy exception has resulted in a December 2012 decision of the Federal Copyright Commission to supplement the tariff for set-top boxes with a license for so-called catch-up TV. This license allows for a time-shifted access to one or several pre-selected TV channels (30 hours with free access, 7 days with paid access). Contrary to the view of the Federal Copyright Commission that such services are covered by the private copying exception, this device clearly infringes the making available right by offering time-shifted programming at the discretion of the service provider, not at the command of the viewer or the authorization of the affected rights holders. It must be noted that the new Swiss rule of catch-up TV is isolated and cannot be found in any other European jurisdiction.

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 22a to 22c 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 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." This share of the neighboring right owners is by far the lowest in Europe, where the income shares provide for at least an equal split between authors and neighboring right owners or even a two-thirds share for the neighboring right owners. 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 in early 2013. The next and final instance will be the Swiss Federal 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.

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.