



February 22, 2018

Public Comment regarding the 2018 Special 301 Report

Switzerland's Comments on Copyright Protection and Enforcement

Switzerland welcomes the opportunity to provide an update on its copyright system and to respond to the main concerns expressed by the United States and its industry stakeholders in recent years with regard to the ability of copyright owners to protect their rights in the online environment in Switzerland. More concretely, the United States criticizes the Swiss copyright system as not being effective enough in prosecuting hosting providers of pirate websites operating in Switzerland, offering them a “safe haven.” Furthermore, the United States expressed concerns about the uncertainty arising from the *Logistep* decision¹ with regard to data collection on the Internet for the purpose of copyright enforcement.

I. Draft Amendment to the Swiss Copyright Act

The draft bill², adopted by the Federal Council at its meeting on November 22, 2017, addresses both of those concerns. It aims at further modernizing Swiss copyright law for the purposes of the digital environment and steps up the fight against Internet piracy. The draft is based on both a compromise agreed upon by a multi-stakeholder working group (*Arbeitsgruppe Urheberrecht/AGUR12*) and the comments received during the public consultation process.

Firstly, the draft bill introduces a “stay down” obligation for hosting providers who constitute a “specific threat”³ to copyright infringement. Such hosting providers will have to ensure that infringing content, once removed, remains off their servers. The provision is designed to target the kinds of websites mentioned in the USTR’s *2017 Out-of-Cycle Review of Notorious Markets*. The applicable test will thus be similar to the “active inducement test.” The “stay down” will prevent rogue websites from being hosted in Switzerland and will make the fight against Internet piracy more effective and sustainable. That should put an end to criticism directed against Switzerland as a host country for infringing sites.

Secondly, the draft bill clarifies that the processing of data for the purposes of prosecuting copyright infringement is permissible. With that, it puts an end to the debate that followed the *Logistep* decision about the extent to which the recording of IP addresses for prosecution purposes is admissible. The provision enshrines in law the Federal Data Protection and Information Commissioner’s standing opinion on permissible evidence collection practices under data protection law in criminal online copyright enforcement actions. The provision also extends to civil claims insofar as the way to civil proceedings is open following a criminal complaint. The draft bill thus confirms the ability of copyright owners to meaningfully protect their rights in the online environment in Switzerland.

¹ Decision of the Swiss Federal Supreme Court of September 8, 2010 (BGE 136 II 508).

² <https://www.admin.ch/opc/fr/federal-gazette/2018/655.pdf>

³ For instance, because of the technology design or the business model used by the hosting provider.

In the draft bill, no provision is made for Internet blocking. The public consultation process clearly showed that such a blocking provision in the area of copyright does not presently enjoy sufficient support to be passed by the Swiss Parliament. Including an Internet blocking provision may well jeopardize acceptance of the entire draft bill. For that reason, Switzerland's efforts focus on preventing infringing materials from coming from its jurisdiction.

In conclusion, the draft bill includes effective remedies for the concerns referred to above. This demonstrates Switzerland's commitment toward copyright protection and enforcement in the online world. Switzerland is confident that the revision of the Swiss Copyright Act will more effectively address the challenges posed by the Internet. The parliamentary discussion of the draft bill is expected to start in the coming months. Updated information regarding the ongoing legislative process is available on the website of the Swiss Federal Institute of Intellectual Property⁴.

Switzerland looks forward to continuing to work with the U.S. to further clarify any issue relating to online piracy.

II. Other Issues Raised by U.S. Industry concerning the Draft Amendment to the Swiss Copyright Act

Stakeholders voiced concerns related to possible disadvantages for record producers and producers of music videos arising from the implementation of the new remuneration for video-on-demand. This provision does not target the online exploitation of *music*. It aims at reducing the so-called "value gap" – the inability of artists to receive adequate remuneration from the online exploitation of *audiovisual works*.

The purpose of the "extended collective license" (ECL) is to create new possibilities for exploiting large numbers of works in situations where such works would otherwise not be used due to the high transactional costs related to obtaining individual licenses. The ECL makes such uses possible and thus offers an additional possibility for remuneration for the rights holders concerned. The provision, however, does not hinder the individual exploitation of works since it allows rights holders to opt out. They are free to opt out whenever they expect a better return arising from an individual exploitation of their works.

Finally, with respect to the concerns raised by U.S. industry with regard to Swiss copyright law in a more general sense, Switzerland refers to its 2012, 2013, and 2016 submissions in Special 301 Report procedures, which contain relevant information and responses. The Swiss Federal Institute of Intellectual Property is available to provide interested parties with additional information and clarifications.

III. Issues Raised by U.S. Industry concerning the Swiss Film Act

With respect to the allegations concerning the extended unique distributor clause, Switzerland wishes to refer to the information available on the website of the Federal Office of Culture⁵. The clause mainly addresses the wholesale level and aims at protecting the cultural diversity in a multilingual country which is enshrined in the Swiss constitution. The wording of the revised clause is straightforward and covers all forms of distribution, including the different rights and usages in the online environment. Contrary to the presumption made by IIPA, the administration of multi-territorial licenses at the wholesale level concerning the online environment remains possible if all necessary rights for Swiss territory are included. The Federal Office of Culture is currently working on guidelines refining the interpretation and application of the

⁴ <https://www.ige.ch/en/law-and-policy/national-ip-law/copyright-law/modernisation-of-copyright.html>

⁵ <http://www-temp.bak.admin.ch/film/03614/05759/index.html?lang=en>

clause in specific situations. The guidelines will enhance legal certainty in a highly dynamic market and should be published by the end of 2018.

The Federal Office of Culture and the Federal Statistical Office closely cooperate with the relevant Swiss and foreign entities with respect to reporting obligations laid down in the Swiss Film Act. Switzerland has made all conceivable efforts concerning the implementation of those obligations in order to confine the obligations of firms to a minimum. There are no registration obligations for firms operating exclusively in the online sector.⁶ Moreover, Switzerland has decided not to apply the reporting obligation with respect to the use of physical storage media (for example, DVDs) to reduce costs for firms. The reporting obligation was applied preliminarily and successfully with regard to the online exploitation of audiovisual works during the year 2017. Thus, concerns that U.S. firms would incur substantial additional costs are clearly unjustified. Similarly, possible fears that the U.S. cultural industry faces impediments to entering the Swiss market lack any basis.

⁶ This conclusion can be derived from Art. 23 para. 1 of the Swiss Film Act.