

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendations: IIPA recommends that Switzerland remain on the Watch List in 2019.¹

Executive Summary: For almost a decade now, right holders have been deprived of the possibility of enforcing their copyrights in civil and criminal cases involving the online environment. In 2013, the multi-stakeholder *Arbeitsgruppe Urheberrecht 2012*, or Working Group on Copyright (AGUR12) issued a “compromise” recommendation to reform the legal and enforcement regime, partly steered by the government. In November 2017 the Federal Council adopted a “dispatch” (i.e., an explanatory report) and a legislative draft. In December 2018, the National Council held a first vote on the legislative proposal, including its own amendments. Despite some welcome proposals, the copyright bill as adopted by the first chamber of parliament does not address the majority of copyright enforcement priorities and represents a vote for the status quo. In fact, the parliament press release presented the results of the December vote as follows: “With this reform, consumers who download films illegally do not need to worry. Downloading for private use through peer-to-peer networks shall remain legal. Access to illegal sites will not be blocked.” The Federal Council has opted for self-regulation by site hosts in the fight against piracy.² While certain aspects of the draft amendments provide positive and welcome changes, such as an increased term of protection to match that offered elsewhere, they contain a number of troubling provisions, which would result in limitation of existing copyright protection. Moreover, the draft amendments omit important and much-needed protections. In particular, the government and first chamber of parliament persists in the position that individual downloads from illegal sources are not themselves actionable.³ And while the draft offers one isolated enforcement instrument (a stay-down duty for certain hosting providers), it leaves large parts of Switzerland’s enforcement deficit unresolved (including by not providing for an access blocking mechanism or a legal basis for obtaining injunctions against intermediaries). It also introduces a troubling collective management remuneration right for Video on Demand (VOD) that will interfere with industry practice in the audio-visual and broadcast sectors, as well as in the Swiss music industry, and a retransmission exception for hotels and similar entities that ignores Berne rules on national treatment, including remuneration of rights. Moreover, the parliament has introduced an amendment exempting several sectors of the economy from the existing obligation to pay for the public performance of music. The government’s dispatch and public comments on the draft demonstrate an unwillingness to address either of these two key issues, siding with Internet Service Provider (ISP) preferences against enforcement needs. Moreover, until the Copyright Act amendments are enacted, which may occur this year, unprecedented restrictions remain in place, arising out of the *de-facto* ban on the use of IP address evidence in civil and criminal copyright actions as a result of the 2010 *Logistep* case, which effectively eliminates the ability of right holders to enforce their rights online.

The copyright amendment bill, inclusive of the amendments by the National Council, will be next debated by the Council of States in early 2019 and the legislative amendments are expected to be adopted in 2019. Legislative reform remains delayed, with the absence of a meaningful reform bill appearing to indicate 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. This is deeply worrying and out of place for a country reliant on intellectual property rights. IIPA urges the U.S. Government to send a clear message that the proposed amendments are unsatisfactory

¹For more details on Switzerland’s Special 301 history, see previous years’ reports at <https://iipa.org/reports/reports-by-country/>. For the history of Switzerland’s Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.

²Avec la réforme, les consommateurs qui téléchargent illégalement un film ne seront pas inquiétés. Le téléchargement pour un usage privé sur un réseau pair à pair restera autorisé. L’accès à des sites illégaux ne sera pas bloqué. Le Conseil fédéral a privilégié l’autorégulation pour lutter contre la piraterie au niveau des hébergeurs de site” (Parliamentary press release of 14 December 2018).

³Press release, “Federal Council adapts copyright law to the digital age,” November 22, 2017, available at <https://www.ejpd.admin.ch/ejpd/en/home/aktuell/news/2017/2017-11-221.html> (“the principle that consumers who take advantage of such illegal offers will not be criminalised.”).



and do not sufficiently comply with Switzerland's obligations to provide for effective and deterrent remedies against any act of copyright infringement, and for criminal remedies, at least in the case of infringements on a commercial scale. The enforcement deficit 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 improve Swiss ISP cooperation as part of the work needed to address the international piracy with links to Switzerland, which benefits from the dire enforcement situation and raises serious questions about Switzerland's compliance under the WTO TRIPS Agreement to provide a remedy for any form of infringement, including on a cross-border basis. The Government of Switzerland should address online piracy now and revise the draft amendments to the Copyright Act to bring it in line with the current best practices in Europe, including by providing a site-blocking mechanism.

PRIORITY ACTIONS REQUESTED IN 2019

- Improve the draft Copyright Act amendments to provide efficient tools against all types of piracy, regardless of technical details and including cross-border piracy. This should include a mechanism to block access to copyright infringing websites, the ability of right holders to use information such as IP addresses in connection with civil claims, a limitation on the private use of copyrighted works obtained from illegal sources, and effective remedies with regard to intermediaries or ISPs.
- Confirm the positive developments in the draft Copyright Act amendments, for example, the extension of term of protection for producers and performers to 70 years.
- Eliminate from the draft Copyright Act amendments proposed new provisions that impede VOD exploitation and the development of on-demand/non-linear services in Switzerland, notably the proposed collective VOD remuneration. If elimination is not possible, insert a clear carve out of U.S. works from the scope of mandatory remuneration for VOD exploitation in draft Copyright Act amendments. Any kind of statutory license for VOD cannot be imposed without a corresponding remuneration obligation.
- Eliminate from the draft Copyright Act the new exception introduced in Article 19, which would exempt several sectors of the economy from the scope of protection under the existing music public performance right and would be incompatible with Switzerland's international obligations under the WPPT Article 15. Also, eliminate a new measure that would create a retransmission exception for hotels and similar entities, in violation of Switzerland's Berne and TRIPs obligations.
- Require datacenters and ISPs to implement better "know-your-customer" policies and enforce that requirement.
- Publicly affirm that Switzerland's exceptions to copyright permit single copies for private use only if they derive from a legal (authorized) source. Also, end the Federal Arbitration Committee's levy on "Catch-Up TV," which is based on the presumption that the recording and making available of entire TV channels is covered by the private use exception.
- 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 extend this to civil enforcement actions.
- Clarify those areas of the Swiss Film Act that currently negatively affect the distribution of audio-visual works in Switzerland, including, most notably, VOD, and limit the accompanying reporting obligations to apply only to distributors or platforms located in Switzerland.
- End the discrimination against neighboring rights under collective rights management by deleting the 3% cap in Article 60(2) of the Swiss Copyright Act.

THE NATURE OF PIRACY IN SWITZERLAND

Overall, enforcement showed no improvement in 2018 and unfavorable outcomes generated in enforcement cases may well cement a low level of protection, subject to Federal Court decisions to come. As discussed throughout this submission, the government has refused to take action against the commonplace consumption of works from clearly illegal sources, whereas the options open to right holders for tackling illegal sources are very

limited, as there is no website blocking remedy. Thus, Switzerland suffers from high domestic piracy rates for music, film, video games, and entertainment software, which makes the country into a potentially attractive base of operations for some ISPs dedicated to piracy on a global scale. In particular, there is a serious problem with host and data centers based in Switzerland that provide hosting services to other ISPs, including pirate services, often without checking into the identities or businesses of their customers.

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. There are 28 legitimate digital services available for recorded music in Switzerland.⁴ Recorded music revenue in 2017 was \$137.8 million, up from \$125.3 million the previous year.⁵ But legitimate music services face stiff and unfair competition from illegal offerings. Piracy undermines and disrupts the growth of the legitimate digital content market and leads to lower willingness to pay for legitimate offerings. Although the Swiss music market has been growing for the last three years, it still accounts for less than one-third of the revenue it generated 20 years ago. Thus, it is as important as ever that the Government of Switzerland strongly enforce against piracy that could disrupt the growth of the legitimate market.

Illegal streaming platforms operated from remote or unknown jurisdictions continue to be highly popular in Switzerland, and carry copyrighted material that undermines the legitimate market, such as films early in their exploitation cycle. This is facilitated by a general understanding (supported by the government) that private use of such platforms is legally permitted. 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 widely used. Downloading and streaming of unauthorized content for private use are likewise viewed by many 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. For example, the popular cyberlocker site *oboom.com*, which notes being "Swiss made" on its home page, is hosted via SwissBrothers AG. Industry reports a number of host and data centers based in Switzerland that provide hosting services to other ISPs, often without any review to ensure their customers do not include pirate services. For example, before it was removed by RIPE, which controls the allocation of IP addresses in Europe, Panama Connection, a Switzerland-based "bulletproof" ISP, offered "no questions asked" hosting services and was also involved in other criminality. Following the removal action by RIPE, the company dissolved. Likewise, some ISPs that purport to be based in the Seychelles in fact have data centers in Switzerland. Another example is Private Layer, which provides hosting services for numerous copyright infringing sites, which benefit from access to P.O. box services and possibly server capacity. Private Layer, apparently a Panama based organization with no known operation in Switzerland, seems to use server capacity at an ISP in the Zurich area. It also appears to use Swiss telephone numbers. These distributors of pirated content rely on and refer to Switzerland's legislation that sets high value on privacy protection. Further revisions to the draft Copyright Act amendments should require host and data centers to implement a "know-your-customer" policy to avoid providing hosting to pirate services.

While the Government of Switzerland has demonstrated a willingness to pursue pirate sites on the *.ch* domain (the Swiss country code top-level domain (ccTLD)), numerous copyright infringing sites that have been adjudicated as illegal in other countries remain to rely on the *.ch* domain, such as *eztv.ch*, *1channel.ch*, *arenabg.ch*, *couchtuner.ch*, *levidia.ch*, and *project-free-tv.ch*. The IIPA recommends that the Government of Switzerland expand its enforcement actions, as its jurisdiction is not necessarily limited to sites with a *.ch* domain.

⁴See <http://www.pro-music.org/legal-music-services-europe.php>.

⁵IFPI, *Global Music Report* (April 2018), at p. 123, available at <http://www.ifpi.org/recording-industry-in-numbers.php> ("GMR 2018").

COPYRIGHT ENFORCEMENT IN SWITZERLAND

Copyright industries in Switzerland have made efforts to resume criminal and civil actions against online infringement under Swiss law, which almost entirely ceased in the aftermath of the 2010 *Logistep* decision of the Swiss Federal Supreme Court. Prosecutors—although now beginning to voice their own frustration with the situation—have interpreted the *Logistep* precedent broadly as a *de-facto* ban barring the collection and use of any IP address data identifying defendants in criminal copyright cases.⁶ With some exceptions, prosecutors tend to consider copyright enforcement cases as low priority. 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). A criminal trial against the notorious cyberlocker *Cyando/Uploaded* should have ended with a judgment in the fall of 2018, but no outcome has been made public so far. And in September 2018, the founders of a major hosting service that facilitate piracy went on trial in Switzerland, with a verdict expected this year. The proposed Copyright Act amendments would clarify that IP address data may be used for criminal copyright cases—however, as explained later in this submission, it does not change the status of IP address collection for civil cases. Until the draft amendments are enacted, right holders remain proscribed from collecting and analyzing the IP addresses of suspected infringers for purposes of establishing the existence of an underlying direct infringement, or as part of a secondary liability claim.

A test case on website blocking is pending in the Swiss courts. This litigation seeks an access-blocking order against the market leader ISP in Switzerland and has been pending since 2015. Prior to this litigation, courts declined to order the blocking of access to illegal sites due to a lack of clear legal grounds for doing so. The claim was brought in absence of any provision of law specifically dealing with access providers' responsibilities. The case was dismissed in mid-2018 in the first instance, with the court ruling that there were no legal grounds for such claim under Swiss law. It is currently pending before the Federal Court as final instance, with a judgment expected during the first half of 2019. Access providers have refused to agree on any access-blocking mechanism during the pendency of this civil case.

Proceedings were also filed by a number of broadcasters challenging the collective licensing/remuneration practice for Replay/Catch-Up-TV recording and making available services (under private copying rules). These services currently have a scope of seven-days full recording of entire TV programs of several hundred channels, amounting to several tens of thousands of hours of content, including film and series available to the public at any given moment. The proceedings were dismissed in the first instance on the grounds that there was no procedural capacity to appeal. This is currently pending before the Federal Court as final instance on this procedural issue, with a judgment expected during the first half of 2019.

A distributor of a device commonly preloaded with piracy software, called the Kodi Box, operating in the French part of Switzerland, continues to be in business despite an ongoing criminal investigation. IIPA is informed that prosecuting authorities now seem to be taking the case seriously, after a two year delay. However, the future of that prosecution remains uncertain given the unclear legal status of linking as infringement, and the stated position of the government that private use of works from illegal sources is not actionable. Notwithstanding investigations, criminal proceedings continue to lag and distribution of Piracy Devices continue.

The current uncertainty around ISP liability, and Switzerland's application of its privacy laws, have favored ISPs and have inadvertently led to protecting even repeat infringers from prosecution. The website hosting industry's trade association has established a code of conduct agreeing to a stay-down provision, though it administers the code of conduct autonomously and defends against interference by government or right holders. Hosting providers affiliated with the trade association purport to take down infringing content subject to notification, while

⁶While 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.

"sharehosters," such as *Uploaded.net*, practice takedown but do not prevent (and even support) quick re-upload, thus avoiding effective stay-down. These provisional measures, in principle, could work well; however they fail to mitigate online infringement due to the lack of clear and tested liability rules. The Government of Switzerland should require ISPs to work together with right holders to improve current processes and to agree on measures that have proven to effectively prevent or restrain infringement. It is also crucial that it move as swiftly as possible to implement legislation establishing such a process and imposing liability for ISPs that host infringing content in relevant circumstances. Moreover, "know your customer" policies for ISP hosting services are needed in order to prevent ISPs from providing hosting services to online platforms that facilitate infringing activity. The government should revise the draft Copyright Act amendments to require or encourage host and data centers to adopt and enforce such policies, which reflect the basic duty of care applicable to businesses operating in this area.

COPYRIGHT ACT AND RELATED LAWS IN SWITZERLAND

While the Swiss Government made some progress this year toward reforming the country's Copyright Act, one glaring position threatens to undermine the entire effort: downloading by individuals from illegal sources is still considered legal if it is a "private copy," and there are no effective options for tackling this problem.

Copyright Reform

On November 22, 2017, the Federal Council adopted a bill with draft Copyright Act amendments and an explanatory memo providing an article by article commentary (a "dispatch"). The dispatch and the draft amendments were debated and voted on by the National Council on December 14, 2018 and a new, consolidated version of the draft Copyright Bill has now moved to the Council of States for a March debate and vote. The project grows out of the AGUR12 working group,⁷ but falls short of implementing the full AGUR12 compromise recommendations which were already a big compromise on the part of copyright right holders. Substantial revisions to the draft amendments are needed to adequately address right holder concerns and raise the level of copyright enforcement in Switzerland to that available elsewhere. Worryingly, in the press release regarding the draft amendments, the government steadfastly announced that it did not intend to criminalize or otherwise sanction so-called "private use" of materials obtained from illegal sources. This is a blow to right holders as it cements the notion that private use of illegal sources is permitted, which is inconsistent with Switzerland's international obligations.

The draft Copyright Act amendments include a few positive changes to the Act. In particular, the draft amendments extend the term of protection for sound and audiovisual recordings and recorded performances from 50 years to 70 years, in line with the term for other works (Article 39, paragraph 1). This will provide greater incentives for the production of sound recordings, and 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. This would also bring Switzerland in line with the EU term of protection. Broadcasts, on the other hand, receive only a 50 year term of protection; this should be increased to 70 years, as well, in line with international trends.

However, certain changes and late additions to the amendments raise serious concerns or fail to meet the promises of the AGUR12 compromise.

Revisions to Article 77i are meant to address the *de-facto* ban on the use of IP address evidence in civil and criminal copyright actions arising out of the 2010 *Logistep* case. However, while the proposed amendment allows right holders to use personal information (including IP addresses) for the purposes of filing criminal complaints, it does not allow for collection or processing of this information solely to bring civil claims. The proposed amendment and explanatory comments do state that the information may be used to assert civil claims in the context of a criminal proceeding or after criminal proceedings have concluded. However, this needlessly limits right holders' ability to pursue their rights. To properly address the privacy concerns raised in the *Logistep* case, the proposed amendment

⁷For a full description of the AGUR12 process, see prior years' IIPA Special 301 reports, at <https://iipa.org/reports/reports-by-country/>.

should be modified to simply limit data collection to that which is reasonably necessary for the pursuit of violations of law (this would mirror the standing opinion of the FDPIC,⁸ as well as the recommendation of the AGUR12).

The amendment offers an enforcement instrument, a “stay-down” obligation for certain hosting providers that create a “particular danger” for copyright infringement, such as those that incentivize illicit uploads and undermine take-down efforts (Article 39d). While this may help deter the operation of cyberlocker businesses that thrive due to copyright infringement, it is left to the courts to determine whether the hosting provider in fact has such a business model, which will create legal uncertainty. The website hosting industry’s trade association has agreed to a stay-down provision, enhancing the chances of its being passed by Parliament. However, the amendment should create an obligation on the part of all hosting services to take measures demonstrated effective in preventing and restraining infringement, including, among other things, disabling access to the specific location of identified infringing content.

One unexpected and negative change appeared for the first time in this draft amendment. Under the original AGUR12 recommendations, a compulsory collective right to remuneration for authors and performers of audiovisual productions for exploitation of these works on online platforms (VOD) had expressly exempted concert films and music videos because of the specificity of these sectors. This clear carve-out, unfortunately, was removed from the draft amendment without notice. This collective right of remuneration only applies to audiovisual works produced in Switzerland or other nations with a similar collectively enforced right of remuneration. This approach disregards the AGUR12 consensus and could pose major problems and market uncertainties for Swiss record producers and producers of music videos and other audiovisual works. If enacted, artists may earn substantially less money from the online exploitation of music videos under this provision than they do presently as a result of agreements negotiated by their record company with online platforms. Moreover, prior to introducing any new or novel rights, the Swiss Government should concentrate on addressing the existing problem of discrimination in the collectively managed rights area. The compulsory collective right of remuneration provisions are in Articles 13a and 35a and should be deleted. If elimination is not possible, U.S. works should be carved out from the scope of mandatory remuneration for VOD exploitation in draft Copyright Act amendments. Consistent with Switzerland’s international copyright obligations under Berne and TRIPs, any VOD exploitation under a compulsory license for mandatory collective management of licensing should trigger remuneration for right holders on a national treatment basis.

Other potentially problematic provisions in the draft amendments include:

- (i) **Exemption for certain public performances of musical works and sound recordings (Article 19).** A surprise new exception providing that certain establishments open to the public—hotels, rental accommodation, hospitals, and prisons—would become exempt from the obligation to pay for the public performance of musical works and sound recordings. Such exception would not be compatible with Switzerland’s current obligations under the WPPT and would also represent a significant rollback of copyright protection in Switzerland, especially compared to the protection offered by EU countries.
- (ii) **Extended collective licensing (ECL), i.e. collective licensing schemes including non-affiliated rights owners, with a case-by-case opting-out option (Article 43a).** Although the proposal is purportedly motivated by the desire to make content accessible that otherwise is barred due to licensing difficulties, such as large archive stock, its scope is not so limited. This creates a risk that extended collective licenses could be applied in areas where they undermine individual licensing, such as online services, where individual licensing is the norm. An opt-out provision, as proposed, does not render an extended collective license voluntary, and the language of the provision suggests that opting out must be declared for each individual license, and right holders would have to monitor ECL announcements. There is substantial risk that extended collective licenses applied in the online space would depress the

⁸A standing opinion of 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—underscores, 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.”

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.

- (iii) **An orphan works provision (Article 22b), including compulsory licensing of extended orphan works.** This provision allows works to be considered “orphan” after “research performed with appropriate thoroughness.” The dispatch on this article troublingly notes that “this responsibility is considered fulfilled if [the users] have consulted the relevant databanks for the corresponding work category.” A better standard would be the requirement for “diligent search” set out in the Orphan Works Directive.⁹ The draft provision should be amended to make clear there is no recordation requirement for right holders to protect their works, or this could constitute a formality prohibited by international law, including the Berne Convention and TRIPS. Also, the provision does not specify that the institution (such as a public or publicly accessible library, school, museum, collection, archive or broadcaster) possessing the orphan work copy must be domiciled in Switzerland; it merely requires that the copy have been created, copied or made available in Switzerland, including, potentially, copies made available from foreign sources, thus opening the provision to content hosted outside of Switzerland.
- (iv) **A free reproduction license for scientific research (Article 24d), meant to cover “text-and-data mining.”** There is a potential for this license to exceed its intended purpose. For example, if combined with other exceptions such as the existing, unusually broad permission of use inside companies and organizations, (Article 19 (1) c).
- (v) **Protection of photographs regardless of their “individual character” or level of creativity (Article 2, paragraph 3bis).**

As expected, the draft amendments do not include a legal basis for website access-blocking. According to the Swiss Government, this element “would not find a majority” in the parliament. However, IIPA notes that in spring 2017, parliament adopted a website blocking provision regarding illegal foreign gambling sites. This provision was confirmed in a public referendum held in June 2018. There is additionally a revision of the Telecommunications Act soon to be discussed in Parliament that would introduce website blocking in the context of child pornography. Illegal copyright piracy sites should receive similar treatment.

Additional Concerns Under the Copyright Act and Related Laws

IIPA continues to have other long-standing concerns with certain aspects of the Copyright Act and related laws in Switzerland. None of these concerns have been remedied by the proposed Copyright Act amendments, and 2018 saw no positive developments on this front.

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. The Swiss Government has confirmed in numerous statements that downloading from an illegal source is to be permitted, and the current draft amendments do not make any changes to Article 19. This broad private copying exception, together with serious concerns regarding the protection of technological protection measures (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. Cable and over-the-top (OTT) providers, including major

⁹Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, Article 3 and Recital 14 (“A diligent search should involve the consultation of sources that supply information on the works and other protected subject-matter as determined, in accordance with this Directive, by the Member State where the diligent search has to be carried out. In so doing, Member States could refer to the diligent search guidelines agreed in the context of the High Level Working Group on Digital Libraries established as part of the i2010 digital library initiative.”).

telecom corporations, offer seven-day catch-up services on integral recordings of hundreds of TV programs, relying on this government-approved collective remuneration tariff. 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 likely violates Switzerland's international obligations, including under the WIPO Copyright Treaty (WCT).

Circumvention of Technological Protection Measures (TPMs): Swiss law allows acts of circumvention of TPMs “for the purposes of a use permitted by law” (Article 39(a)(4)). This exception is far too broad, particularly given the inappropriately wide scope of the private copy exception. Taken together, these exceptions 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. Furthermore, the country's Monitoring Office for Technological Measures (OTM) is currently evaluating country restrictions that affect the cross-border portability of copyright protected content.¹⁰ This appears to be in service of assessing the possibility of legislating the portability of audiovisual content similar to and inspired by the European Union's Portability Regulation.¹¹ This consultation is particularly troubling in light of the broader “Digital Switzerland” Strategy, also currently underway.¹²

Discrimination Against Neighboring Rights: Article 60(2) of the Copyright Act caps the remuneration payable to right holders (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 owners 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 remuneration 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 showed the path for reform—yet it did not make its way into the draft Copyright Act amendments. Rather, those amendments create an “extended collective licenses” provision that, when combined with the existing remuneration caps, falls short of the country's international obligations. This unusual and unjustified discrimination against the neighboring rights owners should be ended and replaced with a fair and equitable remuneration for both performing artists and producers.¹³ The IIPA notes that there are no independent broadcasting and public performance rights for sound recording producers under current Swiss law, as producers merely have an entitlement to receive a share of artists' remuneration.

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.

¹⁰See <https://www.ige.ch/en/protecting-your-ip/copyright/monitoring-office-otm.html>.

¹¹Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

¹²See <https://www.bakom.admin.ch/bakom/en/homepage/digital-switzerland-and-internet/strategie-digitale-schweiz.html>.

¹³Moreover, the government should not be attempting to create additional collectively managed rights (in the proposed Copyright Act amendments) without addressing first the fundamental unfairness in Switzerland's collective management system—namely, the discrimination against neighboring right holders. This discrimination is fundamentally contrary to the standard U.S. policy of not establishing a hierarchy of rights, and should be resolved prior to entertaining proposals regarding collective management.

Amendments to the Swiss Film Act: Amendments to Switzerland's Federal Act on Film Production and Film Culture (Film Act) have been in effect since 2016.¹⁴ They require that any form of exploitation in the Swiss market, including theatrical, DVD/physical home entertainment, and all forms of VOD/online distribution (with the exception only of linear broadcast television and reportedly some catch-up TV) may be undertaken only by an organization that controls the rights for all available language versions and regions exploited in Switzerland. It is still not yet fully clear whether or not the revised provision shall mean that if a company acquires any rights for Switzerland it needs to acquire all rights (i.e., theatrical, video, VOD) and for all languages spoken in Switzerland, or whether it just means that the entity that acquires certain rights (e.g. video) just needs to acquire for this category of rights the rights for all language versions that are available for exploitation in Switzerland.

This law has interfered with the internationally established practice of cross-border licensing, particularly to multi-territory online platforms for specific language versions or language regions. If construed so as to require exclusive licensing and/or package licensing of various forms of online distribution, the law interferes with practices of non-exclusive licensing and of separate licensing for SVOD, transactional video on demand (TVOD), and advertising video on demand (AVOD). While the markets are adapting to licensing practices, adverse effects of this regulation on the market remain probable. No sanctions have been imposed yet. The amended law also imposes registration and detailed reporting of exploitation data upon entities (including foreign) for films exploited in Switzerland in all sectors, which became effective 2018 (for figures collected in 2017). The provision lacks clarity and has caused several areas of uncertainty: 1) whether or not all types of VOD (including SVOD) must be included in exclusive "package" licenses for the territory; 2) to what extent broadcasters' ancillary on-demand rights (such as catch-up) are excepted; and 3) the extent of "grandfathering" protection for existing contractual fragmentation of film rights. In sum, this amendment's provisions interfere with internationally established licensing practices.

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 Article 14(2) and WPPT Article 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, and the draft Copyright Act amendments do not do enough to bring Switzerland in line with its existing obligations.

¹⁴See <https://www.admin.ch/opc/en/classified-compilation/20001389/index.html#a19>.