SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)
2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendations: IIPA recommends that Switzerland remain on the Watch List in 2020.[1]

Executive Summary: For the past decade, rights holders in Switzerland have been deprived of the ability to enforce their copyrights in civil and criminal cases involving the online environment. In 2013, the Government of Switzerland embarked upon a legislative process to revise the Copyright Act, ostensibly to provide more effective enforcement mechanisms and bring Swiss copyright law closer in line with international norms. That process resulted in the adoption of a Copyright Act in September 2019, expected to come into force in March 2020.

Despite some modest positive changes, the new Copyright Act as adopted largely maintains the status quo and does not address the most glaring enforcement problems in Switzerland. Perhaps most importantly, the Copyright Act maintains the "private use" exception that severely limits rights holders' access to remedies against acts of online infringement.[2] Specifically, unlike the U.S., European Union, and most other countries, in Switzerland, individuals who download from illegal sources are not themselves liable for copyright infringement. Besides the private use exception, other troubling provisions of the Copyright Act include: the inability to use IP address evidence to bring civil claims, absence of a provision allowing site blocking where the site provides unauthorized access to copyrighted content, "stay down" provisions that create legal uncertainty by applying only to hosting providers that create a "particular danger" of copyright infringement, and no change to the availability of "catch-up" TV viewing or the remuneration caps and collective licensing regime for payments to rights holders for such performances. The positive aspects of the Copyright Act include an increased term of protection that conforms to the emerging international standard, revisions that allow the use of IP address evidence in criminal claims, a carve out for U.S. rights holders to collective management remuneration right for Video-on-Demand (VOD), and the elimination of the "hotel exception" whereby hotels and related establishments would have become exempt from the collective licensing regime for retransmission of copyrighted works.

IIPA urges the U.S. Government to convey to the Government of Switzerland that the Copyright Act does not sufficiently comply with Switzerland's obligations to provide for effective and deterrent remedies against any act of copyright infringement, especially with respect to civil claims. The enforcement deficit remains deeply problematic, particularly within the context of our otherwise strong bilateral trade relationship with Switzerland. IIPA further urges the Government of Switzerland to consider amendments to the Copyright Act to bring it in line with its international treaty obligations, current best practices in Europe and international norms. The Government of Switzerland has expressed interest in a possible Free Trade Agreement (FTA) with the United States. Any negotiations of such an agreement should address the deficiencies in copyright protection and enforcement outlined in this report.

[1]For 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/2020/02/2020SPEC301HISTORICALCHART.pdf.

[2]The Copyright Act fulfills the reassurance announced in the parliament press release presenting the results of the December 2018 vote: "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." (Avec 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)).

PRIORITY ACTIONS REQUESTED IN 2020

- Amend to the Copyright Act to provide sufficient tools to combat all types of piracy, regardless of technical details and including cross-border piracy. This should include the ability of rights holders to use IP address evidence in connection with civil claims, and effective remedies with regard to intermediaries or Internet Service Providers (ISPs).
- Amend the Copyright Act to affirm that Switzerland's private use exception permits single copies for private use only if they derive from a legal (authorized) source. Further, limit catch-up TV services that are not authorized by content owners, a problem resulting from an overly-broad interpretation of the private use exception. In the alternative, do away with the remuneration caps for catch-up TV, which interfere with the contractual licensing and remuneration practices for film and television series.
- Amend the new exception introduced in Article 19 of the Copyright Act, which exempts 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 WIPO Performances and Phonograms Treaty (WPPT) Article 15.
- Remove the extended collective licensing (ECL) regime for audiovisual works. Or, at a minimum, establish a simplified process of notification of a planned ECL and opt-out.
- Require datacenters and ISPs to implement better "know-your-customer" policies and enforce that requirement.
- Clarify those areas of the Swiss Film Act that currently negatively affect the distribution of audio-visual works in Switzerland, including limiting the requirement (under Article 19 par. 2) that rights holders must exclusively control all language versions exploited in Switzerland (and 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 Copyright Act, which remains below other European countries.

THE NATURE OF PIRACY IN SWITZERLAND

Switzerland suffers from high domestic piracy rates for music, film, and video games. Moreover, the country is turning 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. The shortcomings of the new Copyright Act will likely hinder the objective of reducing piracy.

Piracy continues to undermine and disrupt 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 enforces 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 cycles. This is facilitated by a general understanding (supported by the government and Supreme Court decisions) that private use of copyrighted works from illegal sources is legally permitted. Peer-to-Peer (P2P) BitTorrent activity for sharing infringing material remains popular. Stream-ripping sites and applications, which permit users to create an unauthorized local copy of streamed content, are still widely used. Downloading and streaming of unauthorized content for private use are likewise viewed by many, including the government and supreme court, 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. Though reports indicated that the site would be deactivated for business reasons, it remains active. 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. Despite being apparently based in Panama with no known operation in Switzerland, Private Layer appears to use P.O. box services and 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 places high value on privacy protection. Amendments to the Copyright Act or other legislation 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 rely on the *.ch* domain, such as *eztv.ch*, *1channel.ch*, *arenabg.ch*, *couchtuner.ch*, *levidia.ch*, and *project-free-tv.ch*. IIPA recommends that the Government of Switzerland expand its enforcement actions, as its jurisdiction is not necessarily limited to sites with a *.ch* domain in Switzerland.

COPYRIGHT ENFORCEMENT IN SWITZERLAND

Overall, enforcement showed no improvement in 2019 and unfavorable outcomes generated in enforcement cases, as well as implementation of the Copyright Act as adopted, may well cement a low level of protection. 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—who voiced their own frustration with the situation—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. The Copyright Act reverses that decision and confirms that IP address data is now available in connection with criminal claims. However, prosecutors have historically tended to consider copyright enforcement cases as low priority, and the extent to which they take advantage of this development remains to be seen. The use of IP addresses in civil procedure (e.g., to obtain injunctions) remains unlawful in many cases.

Two major copyright cases that concluded in 2019 do not encourage confidence in the government's ability or will to engage in effective copyright enforcement. A criminal trial against the notorious cyberlocker *Cyando/Uploaded*, which facilitates rampant infringement, ended in March 2019 with the government's announcement that it found "no real ties" to Switzerland, despite the parent company Cyando AG's apparently blatant ties with Switzerland. And, in February 2019, the Swiss Federal Supreme Court found, in a case that had been pending since 2015, that Swisscom, a major hosting provider, could not be liable because it did not participate in copyright infringement, in the absence of any provision of law specifically dealing with access providers' responsibilities. The court explained that Swiss citizens who download infringing content are not liable under the private use exception, and that Swisscom is not responsible for infringement that occurs on its system. Rather, according to the court, the direct infringers are the pirate site operators, and those pirate sites, it should be noted, cannot be blocked under Swiss law. Further, while the Copyright Act allows IP address data for criminal copyright cases, as explained later in this submission, it does not change the status of IP address collection for civil cases. Barring any amendments, rights holders therefore remain proscribed from collecting and analyzing the IP addresses of suspected infringers (individuals or website operators) for purposes of establishing the existence of an underlying direct infringement, or as part of a secondary liability claim.

Proceedings were also filed by a number of broadcasters challenging the collective licensing/remuneration practice for catch-up TV recording and making available services. These services currently have seven-day full recordings of TV programs from several hundred channels, amounting to several tens of thousands of hours of content that is available to the public at any given moment. The proceedings are currently pending before the Federal Court

on a procedural issue and are expected to be concluded during 2020. Unfortunately, the Copyright Act contains no provisions limiting time-shifting and catch-up TV, and Parliament expressed strong support for this practice during its debates.

A distributor of a device commonly pre-loaded with piracy software, called the Kodi Box, operating in the French part of Switzerland, continues to be in business despite a criminal investigation that has been ongoing since 2015. IIPA is informed that prosecuting authorities seemed to be taking the case seriously. The future of that prosecution remains uncertain given the unclear legal status of linking as infringement, and the law that private use of works from illegal sources is not actionable. Notwithstanding investigations, criminal proceedings continue to lag and distribution of this and other piracy devices continues.

As explained in more detail below, the Copyright Act includes a "stay down" provision, which will hopefully improve upon ISPs' previous self-regulation. For the past several years, hosting providers have purported to take down infringing content subject to notification, while "sharehosters," such as sites like *Uploaded.net*, practiced takedown but have not prevented (and have even supported) quick re-upload. It remains to be seen how these new provisions in the Copyright Act will be implemented and enforced.

"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 amend the Copyright Act or pass other implementing legislation 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

One glaring flaw in the Copyright Act threatens to undermine the entire effort of effective copyright enforcement in Switzerland: downloading by individuals from illegal sources is still considered legal if it is a "private copy." There are therefore still no effective options for tackling this problem under current Swiss law.

Copyright Act Adopted September 2019

In September 2019, Parliament adopted the Copyright Act amendment bill. The bill was prepared by the Working Group on Copyright (AGUR12) in 2013,[3] but fell short of implementing the full AGUR12 compromise recommendations agreed to by rights holders. As expected, the version of the Copyright Act adopted in September 2019 falls short of addressing several major concerns regarding copyright protection and enforcement. As explained herein, amendments or other legislation are needed to adequately address rights holders' concerns and to raise the level of copyright enforcement in Switzerland to that available elsewhere. Most importantly, the law's affirmation that private use of illegal sources is permitted is a blow to rights holders, inconsistent with Switzerland's international obligations and impairing cooperation with intermediaries.

Revisions to Article 77i were 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 Copyright Act allows rights holders to use personal information (including IP addresses) for filing criminal complaints, it does not allow for collection or processing of this information solely to bring civil claims. This needlessly limits right holders' ability to pursue their rights. To properly address the privacy concerns raised in the *Logistep* case, the provision should be amended or modified in implementing legislation or regulation to simply limit data collection to that which is reasonably necessary

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

for the pursuit of violations of law (this would mirror the standing opinion of the Federal Data Protection and Information Commissioner (FDPIC),[4] as well as the recommendation of the AGUR12).

The Copyright Act provides a limited "stay down" obligation that applies to 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 Copyright Act includes a compulsory collective right to remuneration for authors and performers for exploitation of their audiovisual works on VOD online platforms. This mandatory collective remuneration scheme only applies if a film is of Swiss origin, or produced in a country that provides a similar collectively enforced right of remuneration.[5] The provision expressly exempts the use of music (e.g., in concert films and music videos) and U.S. works. This provision presents two problems. First, Swiss artists and those from the covered countries may earn substantially less money from the online exploitation of their work under this provision. Second, the provision arguably conflicts with the three-step test in Berne and the WTO TRIPS Agreement.

Other potentially problematic provisions in the Copyright Act as adopted include:

(i) **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 provision was purportedly motivated by the desire to make difficult-to-license content, such as large archive stock, more accessible, the provision's scope is overbroad. 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. The opt-out provision 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. There is therefore 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 rights 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, even with opt-out rights, are wholly inappropriate with respect to services that are already licensed directly around the world.

(ii) **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 produced during the legislative process troublingly noted 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.[6] A recordation requirement for rights holders to protect their works 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 is created, copied or made available in Switzerland,

[4]A 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—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."

[5]The Memorandum accompanying the adopted Copyright Act states that the Government of Switzerland anticipates to "grant" reciprocal rights to foreign authors of audiovisual works from: Argentina, Belgium, Bulgaria, France, French-speaking Canada, Italy, Luxembourg, Monaco, Poland, and Spain.

[6]Directive 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.").

including, potentially, copies made available from foreign sources, thus opening the provision to content hosted outside of Switzerland.

(iii) **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 private use exception, which can apply even to commercial organizations.

(iv) **Protection of photographs regardless of their "individual character" or level of creativity (Article 2, paragraph 3*bis*).** In keeping with international norms, all types of photographs should be protected under the same standard generally applicable to other copyrightable works (e.g., music, film, literature). Under Swiss law, photographs that "do not necessarily have an individual character" are only protected for 50 years after their publication (or production). This dual-standard for photographs should be eliminated and the term of protection for all copyrighted photographs should be 70 years.

One positive change in the Act is the extension of the term of protection for performances and recordings, including audiovisual content, from 50 years to 70 years. This will provide greater incentives for the production of (*inter alia*) audiovisual and recorded content, and will provide a stronger incentive to invest in the local recording industry, spurring economic growth, as well as tax revenues. This would also bring Switzerland in line with the EU term of protection.

Additional Concerns Under the Copyright Act and Related Laws

IIPA continues to have other long-standing concerns with certain aspects of Swiss copyright law. None of these concerns have been remedied by the Copyright Act, and 2019 otherwise 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 Swiss Federal Supreme Court confirmed as much in the recent Swisscom decision. The Copyright Act does 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 imposes 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 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 rights 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 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.[7] This appears to be in service of assessing the possibility of legislating the portability of

[7]See https://www.ige.ch/en/protecting-your-ip/copyright/monitoring-office-otm.html.

audiovisual content similar to and inspired by the European Union's Portability Regulation.[8] This consultation is particularly troubling in light of the broader "Digital Switzerland" Strategy, also currently underway.[9]

Discrimination Against Neighboring Rights: Article 60(2) of the Copyright Act caps the remuneration payable to rights holders (collected via collecting societies) at 10% of the licensees' income for authors and 3% for neighboring rights owners. The unjustified 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 these caps. 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 is 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. The Swiss legislature has declined this reform and, with the Copyright Act, again codified the remuneration caps. 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.[10] 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 the distribution or rental prejudices the rights 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 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: Amendments to Switzerland's Federal Act on Film Production and Film Culture (Film Act) have been in effect since 2016.[11] 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 up to seven days) may be undertaken only by an organization that controls the rights for all available language versions and regions exploited in Switzerland. Despite some pronouncements, this provision remains opaque. Specifically, it is still not fully clear whether the provision means that if a company acquires any rights for Switzerland it needs to acquire all forms of VOD rights (i.e., Subscription Video-on-Demand (SVOD), Transactional Video-on-Demand (TVOD) and other), as an exclusive right, and for all languages spoken in Switzerland, or whether it just means that the entity that acquires certain rights (e.g. video) 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, 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 in 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

[8]Regulation (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.

[9]See https://www.bakom.admin.ch/bakom/en/homepage/digital-switzerland-and-internet/strategie-digitale-schweiz.html.

[10]Moreover, as discussed above, it is inappropriate and detrimental that the government has created additional collectively managed rights in the Copyright Act without addressing first the fundamental unfairness in Switzerland's collective management system—namely, the discrimination against neighboring rights holders. This discrimination is fundamentally contrary to the standard U.S. policy of not establishing a hierarchy of rights, and should be amended.

[11]See https://www.admin.ch/opc/en/classified-compilation/20001389/index.html#a19.

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, the Film Act's provisions interfere with internationally established licensing practices and should be amended.

SWITZERLAND'S COMPLIANCE WITH EXISTING INTERNATIONAL OBLIGATIONS

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." Switzerland is not currently doing so and, as explained in this report, the newly-adopted Copyright Act does not bring Switzerland in line with its existing obligations.