

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendations: IIPA recommends that Switzerland remain on the Watch List in 2021.¹

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, that went into force in April 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.

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.

PRIORITY ACTIONS REQUESTED IN 2021

- Amend 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 freedom and licensing practices for film and television series.
- Remove the extended collective licensing (ECL) regime.
- Require data centers and ISPs to implement better "know-your-business-customer" protocols and enforce that requirement.
- Permit effective enforcement against ISPs based in Switzerland and hosting infringing services and introduce a legal framework for combating copyright infringements.
- Clarify those areas of the Swiss Film Act that currently negatively affect the distribution of audiovisual 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.

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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- End the unfair treatment of neighboring rights under collective rights management by modifying the 3% cap in Article 60(2) of the Copyright Act, which remains below other European countries and substantially below the cap of 10% for authors.
- Improve draft amendments to the ordinances of the Telecommunications Act (TCA), proposed in spring 2020, to ensure that rights holders are able to obtain information about domain name registrants and operators of infringing websites.

THE NATURE OF PIRACY IN SWITZERLAND

Switzerland suffers from high domestic piracy rates for music, film, and video games. Moreover, the country has been turning into an 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 the identities or businesses of their customers. The uncertainties of the new Copyright Act provisions will likely hinder the objective of reducing such 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 enforce against piracy that could disrupt the growth of the legitimate market. The main methods of music piracy remain cyberlockers, stream-ripping, and BitTorrent indexing sites.

Cyberlocker services for storage and sharing of illegal files continue to be a concern. The cyberlockers *Rapidgator.net* and *uptobox.com* attract a significant number of visits from Switzerland, with each site receiving over one million visits during the third quarter of 2020, according to SimilarWeb. *Uploaded.net*, a very popular “cyberlocker” also responsible for pre-release leaks, is still run by a Swiss company (Cyando AG). There is a pending case (C-683/18) with the CJEU against the site and a decision is expected in early 2021. It was reported in January 2021 (in what would be a highly concerning decision), that the operators of the cyberlocker, *Rapidshare*, together with the site’s lawyer, have all been acquitted of facilitating mass copyright infringement.²

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. The popular cyberlocker site *oboom.com*, which notes that it is “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. Panama Connection, a Switzerland-based “bulletproof” ISP, offered “no questions asked” hosting services and was also involved in other criminality, before it was removed by RIPE, an entity that controls the allocation of IP addresses in Europe. Following the removal action by RIPE, the company dissolved. Some ISPs that purport to be based in the Seychelles, in fact, have data centers in Switzerland. Private Layer, which provides hosting services for numerous copyright infringing sites, is routinely used by both pirate sites and users that operate VPNs to mask their identities. 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. Swiss authorities should take action and should ensure that these ISPs/data centers operate a meaningful “know-your-customer” policy and take action to have it enforced.

Stream-ripping sites and applications, which permit users to create an unauthorized local copy of streamed content, are still widely used, and there is currently no effective solution in Switzerland. For example, *YTMP3.cc* is the most popular stream-ripping service in Switzerland with over 1.4 million visits from Switzerland during the third quarter of 2020, based on SimilarWeb data. Following the closure of the stream-ripping site *Convert2mp3.net*, due to legal

²The court’s written decision has not yet been released, but a press report on this can be found here: <https://torrentfreak.com/former-rapidshare-operators-lawyer-acquitted-of-copyright-infringement-210111/>.

action coordinated by rights holder representatives, other stream-ripping services, including *ytmp3.cc*, *flvto.biz*, *savefrom.net*, *2conv.com*, *y2mate.com* and *mp3juices.cc*, saw an increase in traffic from Switzerland.

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. This is facilitated by the notion that private use of copyrighted works from illegal sources is legally permitted. Peer-to-Peer (P2P) BitTorrent activity for sharing infringing material remains popular. Downloading and streaming of unauthorized content for private use are likewise viewed by many as legal in Switzerland as long as no uploading occurs. A number of BitTorrent indexing sites, including *yggtorrent.si*, *thepiratebay.org* and *1337x.to*, are very popular. According to SimilarWeb data gathered in the third quarter of 2020, *Yggtorrent.si* is the most popular pirate site in Switzerland receiving over 1.5 million visits during this period. *Thepiratebay.org* received over 740,000 visits, and *1337x.to* over one million visits, during this same period.

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 *yggtorrent.ch*, *kickass2.ch*, *wootly.ch*, *movierulz.ch*, *project-free-tv.ch*, and *torrentdownload.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

Switzerland lacks meaningful remedies and effective enforcement against online copyright infringement, and 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 as a *de facto* ban barring the collection and use of any IP address data identifying defendants in criminal copyright cases. The Copyright Act confirmed that IP address data is now available in connection with criminal claims, but not civil claims, creating a *de jure* ban on the use of such evidence in civil actions. 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. It took the legislator ten years to patch up this enforcement gap and yet it only provides a partial solution. 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 to 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 above 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. Litigation proceedings are currently pending before the Federal Court on a procedural issue. A new tariff arrangement was negotiated in 2020, but, as of early 2021, it has not yet been settled. 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 for certain hosting providers that create a “particular danger” of copyright infringement (Article 39d). 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.

Switzerland also has never introduced reliable rules for considering ISP liability, and has not adopted practices that have become standard elsewhere in Europe. “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. Swiss law also still allows circumvention of technological protection measures for purposes of uses permitted by law, including the wide scope of the private use exception. In combination, these protection deficits leave the Swiss marketplace largely unprotected against cross-border piracy services.

It remains critical that the Swiss government come into compliance with the Berne Convention/WTO TRIPs, WIPO Internet Treaties, and internationally acceptable enforcement standards. Necessary minimum changes include: (1) ensuring broader liability under Swiss law for parties who facilitate, encourage, and profit from widespread infringement; (2) engaging ISPs, including access providers, in the fight against online piracy; (3) affirming that current law does not permit copying from unauthorized sources; and (4) implementing adequate civil and criminal enforcement tools.

COPYRIGHT ACT AND RELATED LAWS IN SWITZERLAND

Copyright Act that went into force in April 2020

In September 2019, Parliament adopted the Copyright Act amendment bill, which went into force in April 2020. 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 that went into force 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, the law did not solve the problem *Logistep* created and puts rights holders in a worse position than they were in following the *Logistep* decision. While the

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

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, and criminal cases are rare given prosecutorial discretion and reluctance. This needlessly limits rights 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 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 Video-on-Demand (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 While the provision excludes certain rights holders from claiming remuneration, it is not clear whether audiovisual works from countries that do not offer a comparable remuneration scheme could nevertheless be subject to remuneration demands from Swiss collective management organizations (CMOs). It should therefore be clarified in the law that works from countries whose rights holders cannot claim remuneration will not be subject to CMO payment demands.

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 the enforcement of exclusivity and individual licensing. 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 devalues the market value of the work, setting a tariff “norm” that could undermine exclusivity and 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 a “diligent search” set out in the EU Orphan Works Directive. A recordation requirement for rights holders to protect their works could constitute a formality prohibited by international law, including the Berne Convention and TRIPS.

⁴A 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.”

⁵The 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.

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, 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 3bis).** 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.

On June 4, 2019, the Council of States requested the Federal Council, following the implementation of the revision of the copyright law, to present in a report, developments in the areas affected by copyright. The purpose of the study is to examine the effectiveness of the revision in light of the development of the relevant law at the European level. The report will focus on the situation of publishers and media professionals. The Federal Council is now expected to present this report in 2022 or 2023.

Additional Concerns Under the Copyright Act and Related Laws

IIPA continues to have other long-standing concerns with certain aspects of Swiss laws related to copyright, which are further detailed below.

Private Copy Exception: Another long-standing priority of the creative industries is the narrowing of the private copying exception, which is too broad and has been interpreted to allow the making of copies of works or phonograms that come from unlawful sources. 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, as well as other infringing 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 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 system abolishes exclusivity of audiovisual works and precludes direct licensing by rights holders, which limits their right to maximize and exclusively control these significant primary rights, 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: 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 is currently evaluating country restrictions that affect the cross-border portability of copyright protected content.⁶ This appears to be in service of assessing the possibility of legislating the portability of audiovisual content, similar to and inspired by the EU's Portability Regulation.⁷ This consultation is particularly troubling in light of the broader "Digital Switzerland" Strategy, currently underway.⁸

Provide Neighboring Rights More Fair Treatment: Despite lobbying efforts, the Swiss Copyright Act continues to cap the remuneration payable to rights owners at 10% of the licensees' income for authors and 3% for owners of related rights. In 2010, Swissperform, the Swiss CMO for performers and producers, initiated arbitration proceedings against this cap, but in 2014, lost the case in the Federal Supreme Court. The Court acknowledged that the remunerations for performing rights are, in fact, higher in other European countries, but saw itself unable to intervene on the merits. Instead, it held that it is up to the Swiss legislature to set these caps based on a political assessment. However, the legislature declined to address this issue in the recent Copyright Act amendments. 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.⁹ 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 Telecommunications Act: Following public consultations in Spring 2020, amendments to the ordinances of the TCA have come into force as of January 2021. The ordinances may create a further obstacle for anti-piracy activities because they will make it harder for rights holders to gather information about the domain name registrants and operators of infringing websites. While registrars will have to identify holders, (i) publication of such domain registrant's identification and contact details in WHOIS is banned for individuals and is not an obligation even where the registrant is a legal entity; and (ii) there is no obligation for registrants to provide and update all information, which is needed for enforcement purposes. While free-of-cost access for rights holders to non-public domain registrant data is provided in principle, its quickness and effectiveness will depend on the access proceedings and the required level of substantiation, unilaterally defined by the registrar.

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. For example, 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

⁶See <https://www.ige.ch/en/protecting-your-ip/copyright/monitoring-office-otm.html>.

⁷Regulation (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.

⁸See <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-80379.html>.

⁹Moreover, 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.

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.

MARKET ACCESS BARRIERS IN SWITZERLAND

Film Act Amendment: Effective since 2016, a Film Act provision known as the “unique distributor clause” has been extended to all forms of exploitation, including DVD/physical home entertainment and all forms of VOD/online distribution, with the exception only of linear television (broadcasters’ ancillary on-demand rights are excepted only for seven-day catch-up). Exploitation of a film in any media in Switzerland now requires exclusive control over all language versions in Switzerland, to the extent actually exploited, in the hands of a single distributor. This is accompanied by laborious registration and reporting duties, which address foreign entities owning and exploiting rights in Switzerland. Despite a revised guideline published by the Federal Office in 2020, the provision still lacks clarity regarding the extent of “grandfathering” protection for existing contractual fragmentation of film rights; output deals made prior to 2016 lost “grandfathering” treatment as of 2019. In sum, this amendment interferes with internationally established licensing practices.

Copyright Act: A new provision, effective since April 2020, interferes with VOD licensing by imposing a mandatory, inalienable collective author and performance rights remuneration on VOD services available in Switzerland for films produced in Switzerland or in countries practicing similar remuneration schemes. Films from other countries are not affected; however, the provision lacks clarity on qualifying countries or remuneration schemes and co-productions.