

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendations: IIPA recommends that Switzerland be placed on the Watch List in 2023.¹

Executive Summary: For more than a 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 enactment of an amended Copyright Act that largely maintains the troubling 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 amended 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 additional amendments to the Copyright Act to bring it in line with its international treaty obligations, current best practices in Europe, and international norms.

PRIORITY ACTIONS REQUESTED IN 2023

- 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 Internet Protocol (IP) address evidence in connection with civil claims, and effective remedies regarding intermediaries or Internet service providers (ISPs), including no-fault injunctions against ISPs whose services are used by third parties for copyright infringement.
- 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, or do away with the remuneration caps for catch-up TV.
- Stop the extended collective licensing (ECL) regime from moving forward. However, should the ECL regime move forward, ensure that it is clearly delineated, applies only to acts of exploitation that are onerous to license on an individual basis, and provides for clear and practically effective opt-out mechanisms that can be exercised by rights holders at any time.
- Strongly encourage data centers and ISPs to implement and enforce better "know-your-business-customer" (KYBC) protocols.
- Permit effective enforcement against ISPs based in Switzerland and hosting infringing services and introduce a legal framework for combating copyright infringements, both via civil and criminal means.
- Clarify those areas of the Swiss Film Act that currently negatively affect the distribution of audiovisual works in Switzerland to apply only to distributors or platforms located 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).

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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.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 the ordinances of the Telecommunications Act (TCA) to facilitate rights holders' access to 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 is becoming 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. As discussed below, the uncertainties of the recent Copyright Act amendments are further worsening the situation.

Piracy continues to undermine and disrupt the growth of the legitimate digital content market and leads to less 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.

The use of cyberlocker services for storage and sharing of illegal files continues to be a concern. The notorious cyberlockers *rapidgator.net* and *uptobox.com* attract a significant number of visits from Switzerland, with *rapidgator.net* receiving 730,770 visits and *uptobox.com* receiving over 806,751 visits during the last quarter of 2022, according to SimilarWeb. A newer site, *Ddownload.com*, also received over 378,000 visits during that same period, according to SimilarWeb. In a positive development, however, the popular cyberlocker *Uploaded.net* was found liable for copyright infringement by Germany's Federal Court of Justice (BGH) in 2021 and was subsequently shut down in December 2022.²

The music and motion picture industries report several 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. 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.³ Following the removal action by RIPE, the company dissolved. Some ISPs that purport to be based elsewhere, for example 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 virtual private networks (VPNs) to mask their identities. Despite being apparently based in Panama with no known operation in Switzerland, Private Layer offers dedicated servers in Switzerland and 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 to shield their facilitation of illegal activity. Swiss authorities should act to ensure that these ISPs and data centers operate meaningful KYBC policies and take action to have these policies 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. According to SimilarWeb's data, there were 3.32 million visits to stream-ripping sites from Switzerland during Q3 of 2022 that were explicitly for the purposes of downloading copyright protected music. *Mp3y.download* was the most popular stream-ripping service in Switzerland with 2.6 million visits from Switzerland during the twelve months prior to the end of Q3 2022, based on

² See <https://torrentfreak.com/cyando-kills-uploaded-net-before-copyright-quagmire-drowns-it-221129/>.

³ Some hosting providers are referred to as "bulletproof" because their terms of service allow their customers to upload and distribute infringing content without consequence.

SimilarWeb data. Four other sites received more than 1m visits from Switzerland over this same period: *ytmp3.cc*, *y2mate.com*, *yt1s.com*, and *savefrom.net*.

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. According to SimilarWeb data gathered in the last quarter of 2022, *bs.to* is the most popular pirate site in Switzerland receiving over 10.5 million visits. Several BitTorrent indexing sites, including *thepiratebay.org* and *1337x.to*, are also very popular in Switzerland. *Thepiratebay.org* received over 802,884 visits from Switzerland and *1337x.to* received over 1.309 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 had 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 amendments confirmed that IP address data is 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 legislature 10 years to remedy this enforcement gap and yet it only provided 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 engender 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 ISP, could not be required to block access to copyright infringing websites because of the absence of any provision of law specifically dealing with access providers' responsibilities. According to the court, the pirate site operators were the only parties that could be held liable under the law because users who downloaded infringing content using these services could rely on the broad private use exception.

Unfortunately, rights holders in Switzerland often have very little recourse against piracy sites, particularly those operated or hosted outside Switzerland. Therefore, better cooperation from intermediaries is crucial to effectively tackle the problem of illegal content in Switzerland. Such cooperation should include providing for no-fault injunctions against ISPs whose services are used by third parties for copyright infringement, as required under the European Union (EU) Copyright Directive, and the law should be changed to reflect that. Further, while the amended Copyright Act permits collection of IP address data for criminal copyright cases, as noted above the amendments did not change the status of IP address collection for civil cases. Barring any further 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.

The practice of mandatory collective licensing of rights implicated in catch-up TV recording and making available services, in place for nearly a decade, has been reconfirmed again by approval of a new tariff for remuneration regarding these services. These catch-up services offer 24-hours per day, 365 days per year full recordings of TV programs from several hundred channels, making several tens of thousands of hours of televised content available to the public. The new tariff provided for improved conditions in favor of broadcasters, and litigation proceedings previously brought by them have been settled. The mandatory tariff effectively eliminates exclusive rights implicated by these services, offering only *de minimus* remuneration for these audiovisual exploitation rights and precluding direct licensing by rights holders. This undermines the opportunity for rights holders to secure fair market value for works, including in licenses to broadcasters and platforms. In addition, the extension of the private copy exceptions to these catch-up TV and other making available services (such as a network Personal Video Recorder (nPVR)) compromises the exclusive making available right, and thus, is inconsistent with Switzerland's international obligations, including under the WIPO Copyright Treaty (WCT). Unfortunately, the Copyright Act contains no provisions limiting time-shifting and catch-up TV services (see discussion below on the private copy exception), and the parliament expressed strong support for this practice during its debates.

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,” (also known as cyberlockers) have practiced takedown, but have not prevented (and have even supported) the re-upload of the infringing content. 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. KYBC policies for ISP hosting services are needed 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 (TPMs) for purposes of uses permitted by law, including the over-broad 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 Agreement, the WCT and WIPO Performances and Phonograms Treaty (WPPT) (collectively, the 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 Amendments

The 2020 Copyright Act amendments unfortunately fell short of implementing the full Working Group on Copyright (AGUR12) compromise recommendations agreed to by rights holders.⁴ As discussed below, further amendments or other legislation are needed to adequately address rights holders' concerns and to ensure adequate

⁴ The copyright amendment legislation was prepared by the Working Group on Copyright (AGUR12) in 2013. For a full description of the AGUR12 process, see prior years' IIPA Special 301 reports, at <https://iipa.org/reports/reports-by-country/>.

and effective copyright protection and enforcement. 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 impairs 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 amended law did not solve the problem *Logistep* created and in many ways puts rights holders in a worse position than they were in following the *Logistep* decision. While the Copyright Act may allow rights holders to use personal information (including IP addresses) to file criminal complaints, it does not allow for collection or processing of this information solely to bring civil claims. This needlessly limits rights holders' ability to enforce their rights and essentially forces rights holders to rely exclusively on criminal enforcement. However, criminal enforcement alone is grossly inadequate because prosecutors rarely bring criminal cases against piracy due to resource constraints and a general reluctance. To properly address the privacy concerns raised in the *Logistep* case, the provision should be amended or modified in implementing legislation or regulation to only 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), as well as the recommendation of the AGUR12).⁵

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). Unfortunately, the legal requirements remain unclear, particularly the required evidence for showing that a hosting provider created a “particular danger” for copyright infringement through its technical features or its business model. This provision will require potentially intricate and lengthy pilot proceedings to become enforceable.

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 applies only if a film is of Swiss origin or produced in a country that provides a similar collectively enforced right of remuneration.⁶ 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 and exercise of exclusive and individual licensing. The opt-out provision does not render an ECL voluntary, and the language of the provision suggests that opting out must be declared for each individual license. There is, therefore, substantial risk that ECLs 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 opt out and exercise their exclusive rights. An initial tariff was agreed upon and became effective in 2022. In addition, requiring a rights holder to opt out to exercise exclusive rights

⁵ 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.”

⁶ 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.

could constitute a formality prohibited by international law, including the Berne Convention and the WTO TRIPS Agreement. In short, ECLs, 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,” as 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 the WTO TRIPS Agreement.

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 requires only that the copy is created, copied, or made available in Switzerland, including, potentially, copies made available from foreign sources. As a result, the provision could be applied 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, it is possible this provision could be combined with other exceptions such as the existing, unusually broad private use exception, which can apply 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 protected for just 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.

On December 17, 2021, the Federal Council issued a report (requested in 2019 by the Council of States) on the effectiveness of the 2020 amendments to the copyright law. The report holds, *inter alia*, that the new stay-down provision (Art. 39d) had not been tested in courts so far. Rights holders understand that this will likely require a long and expensive test case litigation. Also, the report confirms that few criminal proceedings have been reported and, thus, the effects of the new data processing permission (Art. 77i) cannot yet be fully assessed.

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 to narrow the private copying exception, which is overbroad and exceeds the limits of the three-step test. The exception 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 the inadequate protection accorded to TPMs (see below), constitute significant hurdles for 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 relies on the private copy exception to permit cable and over-the-top (OTT) providers, including major telecom corporations, to offer seven-day “catch-up” services on integral recordings of hundreds of TV programs, imposing a government-approved collective remuneration tariff in these

services. 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 use by the initial broadcaster, on a platform-by-platform basis. This extension of the private copy exception to these catch-up TV services undermines the exclusive making available right, and thus, is inconsistent with Switzerland's international obligations, including under the 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 and inconsistent with Switzerland's obligations under the WIPO Internet Treaties, which require “adequate legal protection and effective legal remedies” against circumvention of TPMs.⁷ Moreover, given the inappropriately wide scope of the private copy exception (discussed above), this exception to the circumvention of TPMs could be interpreted to permit individuals to circumvent access or copy controls that protect copyrighted content and disseminate that content widely. As a result, 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.⁸ 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.⁹ This consultation is particularly troubling in light of the broader “Digital Switzerland” Strategy, currently underway.¹⁰

Provide Neighboring Rights More Fair Treatment: Article 60(2) of 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 the Federal Supreme Court upheld the cap. The Court acknowledged that the remunerations for performing rights are, in fact, higher in other European countries, but decided not to intervene on the merits. Instead, the Court ruled that it is up to the Swiss legislature to set these caps based on a political assessment. Unfortunately, the legislature declined to address this issue in the recent Copyright Act amendments. This unusual and unjustified discrimination against neighboring rights owners should be ended and replaced with a fair and equitable remuneration for both performing artists and producers.¹¹ 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 1bis 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 (TCA): The Federal Council enacted amendments to the ordinances of the TCA that entered into force in January 2021. The ordinances may create a further obstacle for anti-piracy activities because the ordinances 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.e., registrants), (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-

⁷ See Article 11 of the WCT and Article 18 of the WPPT.

⁸ See <https://www.ige.ch/en/protecting-your-ip/copyright/monitoring-office-otm.html>.

⁹ 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.

¹⁰ See <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-80379.html>.

¹¹ Moreover, as discussed above, it is inappropriate and detrimental that the government has created additional collectively managed rights in the Copyright Act without first addressing the fundamental unfairness in Switzerland's collective management system—namely, the discrimination against neighboring rights holders. This discrimination is fundamentally contrary to the important U.S. policy of not establishing a hierarchy of rights and should be ended by modifying the cap.

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, WTO TRIPS Agreement, WCT, and WPPT. Switzerland is thereby obligated under these international agreements to provide “effective” remedies to prevent and deter infringement. For example, under Article 41(1) of the WTO TRIPS Agreement (and similarly 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 amended Copyright Act does not bring Switzerland in line with its existing obligations. In addition, as noted above, Switzerland is not presently providing “adequate legal protection and effective legal remedies” against the circumvention of TPMs, as it is required to do under Article 11 of the WCT and Article 18 of the WPPT.

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 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.

Investment Obligations and Streaming Services Quotas: Another amendment to the Swiss Film Act, adopted in May 2022, introduced an investment obligation for streaming services in Swiss film productions and quotas for streaming services. All audiovisual services providing film content (commercial broadcasters, foreign broadcasters with publicity windows to Switzerland, transactional video-on-demand (TVOD) and subscription video-on-demand (SVOD) platforms as well as telecom services) must invest in Swiss film production or its promotion. The investment obligation amounts to four percent of their annual gross income generated in Switzerland. If they fail to do so, they must pay a subsidiary levy after a period of four years. The revised Film Act also sets a new 30% quota of European films on streaming services and regulates public access to films that have received federal funds. The provisions implementing the amendments are scheduled to enter into force on January 1, 2024. These amendments interfere with contractual freedom and were adopted without a proper impact assessment to determine if the market is capable of absorbing any such investment. The Swiss Federal Council has opened a consultation on these regulations that will close in mid-February. If implemented, the obligations should be assessed against the benchmarks of flexibility, proportionality, predictability, and non-discrimination. The obligations should be re-evaluated every two years from entry into force and provide a maximum of flexibility. Switzerland is not required to implement these amendments by international agreements.

Broadcasting Quotas: The Federal Act on Radio and Television obligates broadcasters to reserve half of their transmission time for European works, where practicable. This obligation should be removed to ensure a level playing field for U.S. audiovisual works.