



February 13, 2015

## Public Comment with Regard to the 2015 USTR Special 301 Report

### Switzerland's Comments on Copyright Protection and Enforcement

Switzerland welcomes the opportunity to provide information on its ongoing process of shaping the future of copyright management in the online world.

In June 2014, the Federal Council decided to fully implement the recommendations of the Stakeholders' Working Group on Copyright (AGUR12)<sup>1</sup> on how to effectively combat Internet piracy. The proposals were warmly welcomed by the authors and the producers. The preparatory work for the respective legislative amendments is currently well under way.

The amendments envisaged by the Federal Council are aimed at fighting piracy. Hosting providers will commit to removing infringing content from their platforms (take down). There will be further consequences for hosting providers whose business model is clearly designed for infringement of copyright or who intentionally promote running the risk of performing illegal acts through measures or omissions for which they are responsible. Those providers will be required by law to remove illegally uploaded content when notified to do so by the rights holder and to prevent its reintroduction (stay down).

Moreover, a key element in combating Internet piracy will be the blocking of access to rogue sites whose location is abroad or unknown. This measure is designed to significantly reduce the national level of piracy. In that context, we note the concerns expressed by the Business Software Alliance (BSA) regarding potential impediments to cross-border data transfers. In fact, such blocking measures should be designed in order to avoid or at least minimize detrimental side effects.

The use of peer-to-peer networks will be discouraged through the introduction of a "three-strikes" system. Internet users whose access is misused for large-scale copyright infringement through peer-to-peer networks will receive two educational notifications informing the access owner of the potential consequences of that misuse. Those access owners who are unwilling to modify their behavior or to protect their access from misuse will be subject to a simplified procedure. The specific amendments will explicitly provide for the user's identification. Although the *Logistep* decision does not preclude data collection on the Internet for the purposes of copyright enforcement<sup>2</sup>, it created some uncertainty regarding the scope of data collection possible in Switzerland and the balance of interests vis-à-vis personal data protection. The proposed legislation will be designed to overcome the "*Logistep* gap" while ensuring the above-mentioned balance.

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<sup>1</sup> The report of the AGUR12 is available at [www.swiss-copyright.ch](http://www.swiss-copyright.ch).

<sup>2</sup> The Federal Data Protection and Information Commissioner confirmed this opinion in his 19<sup>th</sup> Annual Report 2011/2012, point 1.3.7.

The International Intellectual Property Alliance (IIPA) seems to hold the view that Switzerland is unwilling to conduct broad-based information campaigns. IIPA appears to be unaware of the various actions already undertaken by the Swiss Federal Institute of Intellectual Property (IPI) in that regard. In addition to specifically designed information material and dedicated webpages<sup>3</sup>, the Institute has established a service to personally respond to all questions from members of the public by phone, e-mail or letter. Furthermore, broader, more visible awareness-raising campaigns in association with relevant stakeholders aimed at educating the public are regularly organized by STOP PIRACY<sup>4</sup>, a public-private partnership, for which IPI acts as the secretariat.

As recommended by the AGUR12, the envisaged copyright law amendments will not affect the scope of the current private-use exception. There was agreement in the AGUR12 that copyright enforcement on the Internet must target rogue sites which massively infringe copyright.<sup>5</sup> There was also a consensus in AGUR12 that a download from the Internet by an individual user exclusively for private use should not be made a crime and that prosecuting everyday Internet users would be disproportionate. Disproportionate enforcement action against individual users of the Internet would be likely to cause, among other negative consequences, a backlash in the form of growing public criticism of the copyright regime. That would result in defeating the very goal of the amendments, namely, strengthening respect for copyright. A comparison with the EU shows that a restriction of private copying to licensed sources will not significantly reduce the level of piracy.<sup>6</sup>

Article 60(2) of the Swiss copyright law provides guidance to the Federal Arbitration Commission on setting fair and equitable remuneration under collective rights management for the holders of copyright and of neighboring rights. IIPA's request for deletion is noted. However, discussions in the AGUR12 revealed that rights holders are divided on this issue. If the rights holders were in agreement, the deletion could certainly be envisaged.

Finally, IIPA's submission also raises concerns with regard to Swiss copyright law in a more general sense. Switzerland already responded to those concerns in its past submissions in the context of the 2012 and 2013 Special 301 Report procedures. Rather than addressing those issues again, Switzerland refers to its 2012 and 2013 submissions.

As regards the criticism by the American Apparel & Footwear Association (AAFA) in relation to the unavailability of information about registrants of domains under the Swiss country code top level domain name (ccTLD) .ch, Switzerland does not understand the concern; in Switzerland, the complete contact information of registrants is publicly available in the WHOIS register for each domain name under the ccTLD .ch.<sup>7</sup> Registrants cannot hinder the publication of that information. Disputes in relation to ch.-domain names may be brought to court or

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<sup>3</sup> [https://www.ige.ch/fileadmin/user\\_upload/Services\\_Links/Download/Urheberrecht/Droit-dauteur-et-droits-voisins.pdf](https://www.ige.ch/fileadmin/user_upload/Services_Links/Download/Urheberrecht/Droit-dauteur-et-droits-voisins.pdf).

<sup>4</sup> <http://www.stop-piracy.ch/?lang=en-US>.

<sup>5</sup> See information provided by Switzerland in its submission in the context of the 2014 Special 301 Report procedure.

<sup>6</sup> Actual data seems to be published only for software: BSA: The Compliance Gap, BSA Global Software Survey, June 2014, p. 9, [http://globalstudy.bsa.org/2013/downloads/studies/2013GlobalSurvey\\_Study\\_en.pdf](http://globalstudy.bsa.org/2013/downloads/studies/2013GlobalSurvey_Study_en.pdf).

<sup>7</sup> <https://www.nic.ch/reg/ds03/whois/view.html?lid=en>.

can be submitted to a dispute resolution system. In practice, those mechanisms have proved efficient in combating cybersquatting; they are thus maintained in the new Ordinance on Internet Domains<sup>8</sup>. We encourage AAFA to contact the Swiss Federal Institute of Intellectual Property for clarification regarding its submission.

In conclusion, the ongoing legislative work referred to above demonstrates the Swiss Government's commitment to copyright protection and enforcement as well as to proactively addressing the challenges posed by the Internet in that context. Considering the complexity and sensitivity of the many issues involved, as raised by BSA's comment regarding cross-border data transfers, and the forthcoming stakeholders' consultation and parliamentary debate, significant attention and care must be given to all the points under discussion.

Switzerland looks forward to continuing to work with the U.S. to further clarify any of the above-mentioned issues. However, given the challenges, the efforts and progress made in the ongoing legislative process on modernizing copyright law, including Switzerland in the Watch List would be completely unjustified.

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<sup>8</sup> The Ordinance on Internet Domains (RS 784.104.2) entered into force on January 1, 2015.