

# Internet file-sharing: Switzerland goes its own way

Da Vinci Partners **Sharon Gobat** and **John Moetteli**, discuss Switzerland's reluctance to strengthen its control on internet file-sharing

In August 2011, the Swiss Federal Council published a report: *The Federal Council report on illegal uses of works on the internet in response to postulate 10.3263 Savary*<sup>1</sup>. The report looked at the illegal use of copyrighted works on the internet and included a discussion of possible legislative solutions to the problem.

At the end of November, on the basis of the report's findings, the Federal Council issued a statement that the existing legal framework allows an adequate response to the problem, and so there is no need at this time for legislative action.

Currently, Swiss law as amended in 2008, allows personal use of copyrighted works (with the exception of computer software), even if they are downloaded free on the internet. Permissible personal use covers not only making the first copy, but also the sharing of additional copies with closely related people – such as family members and close friends. To compensate creators of works that are downloaded or copied for personal use, Swiss law provides that a levy be paid by producers and importers of blank recording media (CDs and DVDs). These levies go to the collecting societies authorised by the Swiss Federal Institute of Intellectual Property to manage and distribute copyright revenues for the benefit of creators.

Although the amendments in 2008 were designed to adapt the law to the digital era, they do not clearly address the problem of file-sharing on peer-to-peer (P2P) networks. Offering copyrighted works for downloading, without a licence, is illegal in Switzerland. Thus, the users who upload music and movies to publicly accessible P2P networks are violating the law. Operating a business for the purpose of unlicensed distribution of copyrighted works is also illegal, and in both cases civil and criminal penalties apply. However, enforcement in Switzerland has been hampered by a Federal Supreme Court decision in the *Swiss Federal Data Protection and Information Commissioner v Logistep AG* September 2010 case, ruling that the Swiss Data Protection Act prohibits collecting and tracking the IP addresses of P2P users<sup>2</sup>.

The Federal Council's report came only five months after the government accepted a request by a member of the Council of States, Géraldine Savary, asking for a study on the illegal file-sharing problem. Her request noted that the "new market" created by file-sharing services might benefit from more regulation. Although acknowledging that markets for intangible goods are very often dysfunctional, the report concludes that allowing the market to auto-regulate toward

a new equilibrium is preferable, at least for the time being, to any legislative intervention.

The 13-page report provides historical and legal background and paints a portrait of the current situation with statistics on file-sharing activity and the economics of the music and film sectors. It also discusses various proposed or enacted legislative approaches. In essence, the Swiss conclusion is that so far, the attempts to stop illegal file-sharing are "repressive" measures that are impractical, expensive to enforce, and unlikely to have any real effect. The report discusses the idea of a global "flatrate" licence for non-commercial uploading, but expresses concern that creating such a system by legislation may conflict with Switzerland's obligations under the World Intellectual Property Organization (WIPO) Internet Treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogrammes Treaty (WPPT).

In order to describe the file-sharing problem in quantitative and economic terms, the report relies heavily on an extensive study in the Netherlands, which produced a 128-page report in 2009<sup>3</sup>. About the prevalence of file-sharing, the Swiss Federal Council statement says, "Existing studies allow the conclusion that up to one-third of people over 15 years of age download free music, films and games."

In the report of the Netherlands study, there is a slightly more specific statement, "File-sharing or 'free' or unlicensed downloading is widespread in the Netherlands: some 4.7 million people over the age of 15 out of a total of 13.5 million have, over the past 12 months, engaged in downloading without paying on one or more occasions. Downloading music is most common, with 40% of all internet users doing it, followed at some distance by films (30%) and games (9%)."

The report documents a veritable collapse of revenues in certain sectors of the entertainment industry (notably music CDs), but also shows that Swiss consumers continue to spend essentially the same percentage of their disposable income on entertainment as they did before the growth of file-sharing. Instead of buying CDs and DVDs, consumers are buying concert and cinema tickets, and merchandise related to copyrighted works. Therefore, the report concludes that fears of a negative impact on Swiss cultural creation due to increased file-sharing are unfounded. It further suggests that economic losses suffered in some parts of the industry are a temporary effect of the introduction of a disruptive technology – the internet.

### Implications for users and rightsholders

As a result of the Federal Council's statement, file-sharing users in Switzerland may now be more aware of the personal use exemption, and more inclined to participate in the public debate on how to combat illegal file-sharing.

Curiously, however, there has been little evidence in Switzerland of creative artists being dissatisfied with the existing legal framework. Given the law's fundamental purpose of encouraging Swiss cultural creation, their voices will be a necessary ingredient in any campaign to change the law.

Rightsholders in Switzerland include the collecting societies and their members, and have a monopoly on the collection and distribution of copyright revenues (albeit under federal rules and supervision). For them, the Federal Council's report is a strong signal that they should be looking for ways to stop piracy that do not involve changing the law.

### Is it a surprise that one in three users download unauthorised music?

This level of illegal downloading is not a surprise. CDs are very expensive in Switzerland, as is the space to keep them. At the same time, Switzerland has high internet use per capita. Because the country has a small population and three official languages, a marketer of physical goods such as CDs or DVDs will often choose to ignore the Swiss market because of the headaches involved in adapting to the market requirements. Also, the catalogues of digital music and film available for legal downloading (eg, iTunes) are relatively limited. Until recently, movies were not available at all in the Swiss iTunes store. DVDs produced in the US use a region code that is incompatible with DVD players sold in Switzerland, making it either impractical or illegal for users to enjoy imported DVDs, even if they are willing to pay the high customs duties. Interestingly, none of this is mentioned in the Swiss Federal Council's report.

### Implications for groups like the Pirate Bay

The debate over how to enforce the law against illegal file-sharing in Switzerland is far from over, and new approaches are sure to be found and tried. A group like The Pirate Bay, which has an admitted purpose to distribute copyrighted works without paying royalties, would not gain any legitimacy by transferring to Switzerland, and would run foul of numerous provisions of company law.

### What will rightsholders do now?

The Swiss copyright collecting societies do not directly criticise the personal use exemption, but they are urging the Swiss Parliament to reject the Federal Council's report, arguing that the council wrongly concluded there is no need to act. They continue to assert that illegal file-sharing is a direct cause of the economic crisis in the music and film industries, and that losses amount to several hundred million Swiss francs annually for publishers, creators and taxpayers. In response to the Federal Council's inaction, an "alliance against piracy on the internet" has formed, comprising at least 18 associations, including the five authorised collecting societies. The alliance will undoubtedly continue to press for legislative action to address the problem of illegal file-sharing. They have called for, among other actions, a study that is specific to Switzerland, to enable quantitative assessment of market dynamics and damages.

### How will the policy overall impact IP?

Switzerland has a well-deserved reputation for doing things differently in commercial, legal and social affairs. This often means that it can be ignored by other countries when they seek to solve policy problems. In

the case of illegal file-sharing, however, Switzerland could prove to be an excellent laboratory for problem-solving. Switzerland has a potentially large impact in the global effort to adapt laws for fair governance of a market radically altered by technology by recognising that the main purpose of Swiss copyright law is to encourage Swiss cultural creation. Furthermore, this could be achieved by legislating in favour of transparency on how this is accomplished and by engaging proactively in international discussions and treaty negotiations.

### Analysis

Entertainment industry lawyers should be looking to economists (and perhaps to social scientists as well), for help in developing practical business models that capture the full value of creative works, and take advantage of digital distribution networks to give users legal access to the content they want.

Lawyers for internet service providers (ISPs) should be seeking to clarify the role of ISPs in the digital ecosystem, and to enable ISPs to participate in building and experimenting with new business models.

Measuring the harm caused by internet piracy is part of the foundation for developing effective new business models. However, if Switzerland is asked to compensate the harm caused by illegal file-sharing via legislative control, a solid argument appealing to public interest must first be found.

### Footnotes

1. [https://www.ige.ch/fileadmin/user\\_upload/Urheberrecht/f/Bericht\\_Savary\\_f.pdf](https://www.ige.ch/fileadmin/user_upload/Urheberrecht/f/Bericht_Savary_f.pdf) [in French].
2. The court ruled that Logistep AG may not search peer-to-peer networks for copyright infringing files as IP addresses are personal data and that the collection of these addresses violate data protection law because it occurs without the consent of the concerned persons.
3. *Economic and cultural effects of file-sharing on music, film and games* report: [http://www.ivir.nl/publicaties/vaneijk/Ups\\_And\\_Downs\\_authorised\\_translation.pdf](http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorised_translation.pdf).

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