

Kluwer Copyright Blog

Switzerland proposes new measures against piracy

Yaniv Benhamou (Lenz & Staehelin, Geneva) · Tuesday, January 7th, 2014



The Swiss working group on Copyright (AGUR12) released his report on December 2013 related to management of rights at the digital age. This should lead to a legal basis for a notice and takedown procedure and thus reduce the supply of illegal content, while downloading from illegal sources should remain legal.

The original mandate goes back to a [postulate](#) referred by the Federal Council Simonetta Sommaruga on August 2012 to optimize the collective management of rights, in particular to adapt copyright law to technical developments. After more than a year of discussion, representatives of artists, economists and consumers made nine recommendations, addressed either to rightholders and collective societies, asking them to be more proactive, or to the legislator, asking to provide new legal foundations. These recommendations (90 pages, spec. chapter 9) are based on 5 so called pillars:

1. Awareness-raising

An information campaign will take place in order to raise consumer awareness, in particular about unwilling copyright infringement.

2. Efficiency and transparency of the collective rights management organisations

The efficiency and transparency of collective societies require to simplify the management of rights, in particular to provide electronic data processing and to simplify the tariff system (the approval process and the understanding to the users).

3. Adaptation of regulations governing exceptions and limitations

There is a need to adapt copyright exceptions to the digital age, in particular the exception for private copying, since internet users share protected work outside a private circle (e.g. on facebook), and to authorize the reproduction of work for cataloging and indexing collections.

4. Improve legal downloading platforms; and 5. Fight against piracy

Based on the premise that downloading from illegal sources should remain legal and uploading of illegal contents prohibited, these recommendations involve all parties:

Hosting providers should remove content that has been illegally uploaded when notified to do so by the rights holder or a competent authority (take down procedure). Those whose business model is clearly designed for the infringement of copyright by users, should take all reasonable measures to prevent any further illegal uploading of such content (*stay down procedure*). This includes monitoring link resources, an obligation to use general search engines with suitably formulated queries and, if necessary, to also use so-called web crawlers to determine whether there is evidence of further infringing links to their service and with respect to the content notified.

Based on the [E-Commerce Directive](#), Internet service providers (ISPs) must benefit from liability exclusion when they do not initiate the published illegal content or do not select or modify the published illegal content. ISPs should block access (by means of IP and DNS blocking) to web portals that feature obvious illegal sources. Such measures should be limited to serious cases, taken by the order of authorities, such as The Coordination Unit to Fight Internet Crime (KOBIK).

Rightholders should have access to IP addresses that infringe their copyright but in respect of the protection of personal data : internet users shall be notified prior to any measures; ISPs shall send them a unique notification and, only where they continue infringing, shall communicate the contact details of them to the rightholders willing to take legal action.

Comments

If some recommendations, such as the adaptation of copyright and the simplification of tariffs, are certainly interesting, the 4th and 5th pillars deserve specific attention.

Firstly the recommendations reflect a Swiss consensual approach: on the one hand, internet users must not be criminalized (based on the premise that downloading from illegal sources should remain legal and upload of illegal contents prohibited) but on the other hand, there must be an effective system involving all parties. To that end, the active role of providers with “*take down procedure*” and “*stay down procedure*” and of ISPs with a “notification procedure” and blocking access will reduce the number web portals that feature obvious illegal sources; well-known Swiss websites would be targeted by the measures. However, if the idea of a consensual approach satisfies all parties involved (even the [Consumer Federation is in favour of the recommendations](#)), the individual measures don't, and it will be difficult and time consuming to achieve the next legislative step.

Secondly, if the proposed “take down procedure” can be enforced in Switzerland, the “stay down procedure” by hosting providers and the “blocking access“ by an ISP represent new measures and could lead to an extended or even an *a priori* control. Such a control could be considered as a risk of internet censorship.

Thirdly, the “notification procedure“ will go against Swiss case-law (in the [Logistep decision](#), the Supreme Court considered IP addresses as private data and banned Logistep from controlling and recovering IP addresses) and is similar to the french [HADOPI and graduated response](#).

Fourthly, improvements with regard to the possibilities of legal downloading – which certainly represents the best solution in the fight against piracy – is being quoted without an in-depth analysis and concrete proposals.

Finally, the recommendations reflect a proactive alignment to European jurisdictions, such as the [notice and takedown procedure](#), and might satisfy countries, such as the United States: AGUR12 started on 2012 after the U.S. Congress has added Switzerland to the [piracy watchlist](#) as one of the worst countries with regard to copyright protection and stated: “[Swiss law] must be updated to provide for meaningful enforcement efforts against digital piracy. [...] Until these changes are made, Switzerland will continue to be a magnet for rogue sites. Switzerland must ensure basic accountability for enterprises that profit from widespread infringement and clarify that copying from illegal sources is illegal. In doing so, Switzerland will fulfill its obligations under the WIPO Internet Treaties and other international copyright norms.” From now on, the United States would closely monitor developments of AGUR 12 and Switzerland could stop being described as a paradise for piracy.

YB

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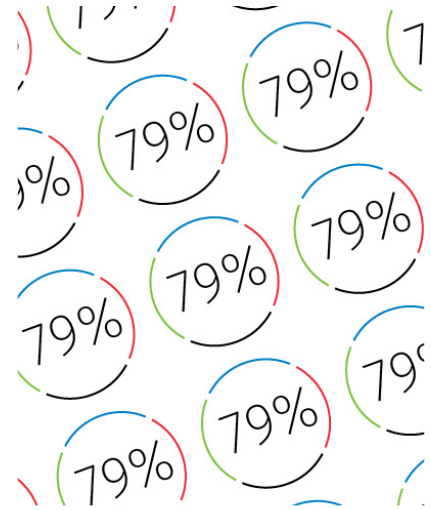
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