

10-1-2016

The Influence of Special Interest Groups on Copyright Law and Policy—A Comparison of the Legislative Processes in the United States and Switzerland

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Michael P. Kunz, *The Influence of Special Interest Groups on Copyright Law and Policy—A Comparison of the Legislative Processes in the United States and Switzerland*, 12 WASH. J. L. TECH. & ARTS 1 (2016).
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WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS
VOLUME 12, ISSUE 1 FALL 2016

THE INFLUENCE OF SPECIAL INTEREST GROUPS ON
COPYRIGHT LAW AND POLICY—A COMPARISON OF THE
LEGISLATIVE PROCESSES IN THE UNITED STATES AND
SWITZERLAND

Michael P. Kunz^{*}
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CITE AS: 12 WASH. J.L. TECH. & ARTS 1 (2016)
<http://digital.law.washington.edu/dspace-law/handle/1773.1/1648>

ABSTRACT

In April 2016, the Office of the United States Trade Representative placed Switzerland on the Watch List of its 2016 Special 301 Report, which contains an annual review of the state of intellectual property rights protection and enforcement in U.S. trading partners around the world. According to the Report, the decision to put Switzerland on the Watch List was premised on U.S. concerns regarding specific difficulties in Switzerland's system of online copyright protection and enforcement, particularly the "Logistep" ruling issued by the Federal Supreme Court of Switzerland in 2010. Although the Swiss authorities have acknowledged the difficulties mentioned in the Special 301 Report, the fierce criticism raised by the U.S. seems inappropriate, as the Swiss federal legislature decided long ago to remedy the shortcomings in the Swiss Copyright Act and initiated the appropriate legislative procedures in

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2012. Due to the nature of Switzerland's direct democracy, however, the legislative process is still in progress, with the parliament awaiting the results of the public consultation procedure during the course of the year. Despite this clear roadmap, the United States is increasing its pressure on the Swiss government and encourages it to move forward with concrete and effective measures that address copyright piracy in an appropriate and effective manner.

Over the same period of time, the most recent legislative proposals in the field of copyright law in the United States have come to an abrupt halt. Unprecedented public outcry against the legislative proposals in 2012 led to the so-called SOPA and PIPA online protests, which resulted in a political deadlock in the field of copyright law and policymaking. In the eyes of several legal scholars, these protests have revealed a lack of democratic legitimacy in the federal legislative process in the United States, as it denies the general public any meaningful form of participation.

Focusing on the respective histories of copyright law and policy in the United States and Switzerland, this Article examines how copyright lobbyists and other special interest groups assert their influence in the legislative process, and how their influence can be diminished. Illustrated by the example of copyright legislation, the Article shows that the instruments of direct democracy in Switzerland—which ultimately caused the delays addressed in the Special 301 Report—not only effectively counterbalance the effect of legislative lobbying, but also help to enhance public acceptance of legislative proposals in general. Ultimately, this Article claims that the United States could strengthen the democratic legitimacy of its federal legislative process by implementing a mandatory public consultation procedure based on the model of Switzerland, which might create a first step towards breaking the current standoff in U.S. copyright lawmaking.

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INTRODUCTION

*“On the premise that rational political opinion- and will-formation is at all possible, the principle of democracy only tells us how this can be institutionalized, namely, through a system of rights that secures for each person an equal participation in a process of legislation. . .”*¹

In the spring of every year, the Office of the United States Trade Representative (“USTR”) releases its Special 301 Report in which it reviews the state of intellectual property rights protection and enforcement in U.S. trading partners around the world.² By referring to itself as a “positive catalyst for change,” the report claims to serve the critical function of identifying opportunities and challenges facing U.S.-based innovative and creative industries operating in foreign markets.³ After several unsuccessful attempts, the USTR eventually followed the International Intellectual Property Alliance’s (“IIPA”)⁴ repeated recommendations and placed Switzerland on the 2016 Watch List. According to the Report, the USTR based its decision on national concerns regarding specific difficulties in Switzerland’s system of online copyright protection and enforcement.⁵

¹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 110 (William Rehg trans., Polity Press 1998).

² Office of the United States Trade Representative, *2016 Special 301 Report Executive Summary*, (Apr., 2016), available at <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf>.

³ *Id.*

⁴ The IIPA is a private sector coalition formed in 1984, composed of trade associations representing U.S. copyright-based industries; the coalition works to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. See *Letter to Mr. Probir Mehta, Acting Assistant USTR for IP and Innovation*, IIPA (Feb. 5, 2016), available at <http://www.iipawebsite.com/pdf/2016SPEC301COVERLETTER.PDF>.

⁵ *International Intellectual Property Alliance (IIPA) 2016 Special 301*

As the world's greatest producer of intellectual property, the United States has a transparent interest in granting writers, artists, and other creators of copyrighted material strong protection from online piracy in the digital age.⁶ In fact, apart from some philosophical discrepancies, there is a worldwide consensus that granting creators certain exclusive rights in their works of authorship plays a significant role in advancing cultural diversity.⁷ The crucial question is, therefore, not whether such rights should be protected, but rather how to secure that protection in an increasingly connected world.

From a substantive point of view, it is still unclear what impact online piracy has truly caused.⁸ While the copyright industry appears to remain strong and thriving, it is certainly possible that online piracy has prevented the industry from

Report on Copyright Protection and Enforcement, Country Report Switzerland, IIPA (Feb. 5, 2016), <http://www.iipawebsite.com/rbc/2016/2016SPEC301SWITZERLAND.PDF>, at 55.

⁶ National Crime Prevention Council, *Intellectual Property Theft: Get Real: Facts and Figures* (Nov. 8, 2011), available at <http://www.ncpc.org/topics/intellectual-property-theft/facts-and-figures-1>.

⁷ Paul Goldstein & P. Bernt Hugenholtz, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 7* (Oxford University Press, Third Edition, 2012).

⁸ Although the economic profession has taken a significant number of attempts to tackle this empirical issue, a recently published meta-analysis from the University of Warsaw suggests that there is no clear conclusion on whether and how unauthorized online-distribution of cultural goods affects their authorized sales. The study identified three reasons why the literature, after two decades of research, is so unequivocal: (1) the terms "sales" and "digital piracy" belong to a group of poorly measurable phenomena; (2) there is no proper instrument to identify a causal link; and (3) the complexity of the phenomenon of "digital piracy", including the cases of upload piracy, leak piracy, potential piracy and the lag between the piracy and the observed sales. See Wojciech Hardy, Michael Krawczyk, and Joanna Tyrowics, *Friends of Foes? A Meta-Analysis of the Link between "Online Piracy" and Sales of Cultural Goods*, University of Warsaw, Faculty of Economic Sciences, Working Papers No. 23/2015 (171), available at http://www.wne.uw.edu.pl/files/9214/3741/1680/WNE_WP171.pdf.

growing even further.⁹ Thus, this Article deliberately refrains from making substantive suggestions with respect to how copyright protection should be secured. Instead, it confines itself to the procedural questions, offering a comparative legal analysis of the law and policymaking processes in the United States and Switzerland.

The key impetus to this Article was the 2012 Stop Online Piracy Act (“SOPA”) protest (also known as the SOPA and PIPA Internet blackout, or simply the “SOPA strike”) which successfully derailed copyright legislation in the United States for years. Approximately six months after this unparalleled legislative defeat for the copyright-based industries in the United States, the Federal Council of Switzerland decided to close the gaps in its copyright infringement enforcement by initiating the legislative process, which is required in order to amend the Swiss Copyright Act.¹⁰ By the end of 2015, nearly four years after the SOPA protest, the Federal Council submitted the preliminary draft for the revised Copyright Act, which then became subject to the public consultation procedure until March 31, 2016.¹¹ During the same period, the United States Copyright Office announced that it intended to conduct a study evaluating the impact and effectiveness of the DMCA safe harbor provisions, seeking public input on a number of key questions and accepting written submissions until April 1, 2016.¹²

As a matter of coincidence, the legislative authorities of the United States and Switzerland simultaneously invited the general

⁹ Mike Belleville, *IP Wars: SOPA, PIPA, and the Fight over Online Piracy*, 26 *Temp. Int'l & Comp. L.J.* 303, 330.

¹⁰ Urheberrechtsgesetz [URG], Loi sur le droit d’auteur [LDA], Legge sul diritto d’autore [LDA] [Copyright Act] Oct. 9, 1992, SR 231.1 (Switz.) (hereafter COPA).

¹¹ *Media Release*, Federal Council of Switzerland (Dec. 11, 2015), available at https://www.ige.ch/fileadmin/user_upload/Urheberrecht/e/modernisierung_urheberrecht_2015_e/Medienmitteilung_2015_12_11_EN.pdf.

¹² Federal Register, *Section 512 Study: Notice and Request for Public Comment*, Library of Congress, U.S. Copyright Office, 80 FR 81862, available at <https://federalregister.gov/a/2015-32973>.

public to participate in the further development of copyright law and policy in their respective countries. The ideas behind the procedures, however, strongly differed from one another. The Section 512 study in the United States took place outside of a specific legislative proposal. By contrast, the mandatory consultation procedure in Switzerland is an integral part of the country's federal legislation process, intended to provide information on material accuracy, feasibility of implementation, and public acceptance of a specific federal project.¹³ Using copyright law as a practical example, this Article seeks to prove that the implementation of direct democratic procedures such as the mandatory consultation procedure in the legislative process successfully prevents special interest groups from asserting undue influence upon legislative decision-making.

The remainder of this Article unfolds in four parts. Part I provides a brief overview of the international framework regarding copyright protection and its deficiencies in the field of copyright enforcement. It explains why the problems of online piracy can only be solved through domestic legislation. Part II discusses the influence of special interest groups on U.S. copyright legislation and how the 2012 SOPA protests changed the political landscape for corporate lobbyists in the field of copyright law. Shifting perspective, Part III provides insight into the history of Swiss copyright law and policy, focusing on the origins, rationale, and aftermath of the Swiss Federal Supreme Court's *Logistep* decision. Part III further discusses the preliminary draft for the Swiss Copyright Act and explains how the direct-democratic elements of the federal legislative process successfully counterbalance the influence asserted by special interest groups in the legislative process. Coming full circle, Part IV discusses the shortcomings of the federal legislative process in the United States and explains how the implementation of a mandatory consultation procedure on the federal level based on the model of Switzerland would not only enhance the general public's acceptance of copyright legislation,

¹³ Vernehmlassungsgesetz [VIG], Loi sur a consultation [LCo], Legge sulla consultazione [LCo][Consultation Procedure Act] Mar. 18, 2005, SR 172.061, art. 2 (Switz.).

but also help to break the current standoff in copyright policymaking.

I. ONLINE PIRACY AND INTERNATIONAL COPYRIGHT LAW

A. *The International Framework*

Throughout history, lawmakers all over the world have been required to modify their copyright laws in response to new technologies that facilitated the reproduction of pre-existing works.¹⁴ In the Digital Age, this requirement still holds true. The growing availability of digital content and broadband Internet access, along with the rise of affordable cloud storage services, enables the unauthorized distribution of copyrighted music, movies, television programs, software, video games, books, and images to flourish around the world.¹⁵ Because of its simplicity, the online distribution process poses a significant challenge for copyright owners who wish to maintain control over their works. Taking into account how the widespread use of smartphones allows the Internet to pervade even the remotest corners of the planet, it should be obvious that online infringement of copyrighted material is a challenge that calls for a global solution.¹⁶ Due to various political and procedural difficulties, however, a unified answer to the problem of online piracy is still a long way off.¹⁷

International copyright issues are primarily handled through two treaties: The Berne Convention and Trade-Related Aspects of Intellectual Property Agreement (“TRIPS”).¹⁸ When the Berne Convention was enacted in 1886, its primary purpose was to

¹⁴ Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 Harv. J.L. & Tech. 203, 227.

¹⁵ Daniel Castro, Richard Bennett & Scott Andes, *Steal These Policies: Strategies for Reducing Digital Piracy*, *The Information and Technology & Innovation Foundation*, Executive Summary (Dec. 2009).

¹⁶ Belleville, *supra* note 9 at 331.

¹⁷ *Id.*

¹⁸ *Id.* at 332.

protect the rights of authors on an international level.¹⁹ To make sure that authors' rights would be respected internationally, the Berne Convention created a "floor of protections" by establishing minimum standards to which all member countries must adhere.²⁰

The question of how to enforce those minimum standards was in focus when the World Trade Organization ("WTO") enacted TRIPS in 1994.²¹ TRIPS' enforcement provisions are based on two different ideas of enforcement.²² First, in order to enable copyright owners to assert their rights in all WTO member countries, TRIPS requires that the civil and criminal enforcement procedures in member countries meet certain performance standards.²³ Second, if a member country fails to comply with the standards expected of its national laws, other member countries can enforce the standards by bringing a complaint under the WTO dispute settlement mechanism.²⁴

In theory, TRIPS created an enforcement mechanism for all WTO members. In practice, however, its broad and general language does not provide a clear enough standard.²⁵ Article 41(1) of TRIPS merely states that "members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement" ²⁶

Naturally, such an ambiguous legal standard makes it hard for member countries to settle any disputes.²⁷ While some scholars

¹⁹ Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & Tech. 1, 15 (1988).

²⁰ *Id.*

²¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Part III, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 869 U.N.T.S. 299 (hereinafter "TRIPS").

²² Antony Taubman, *A Practical Guide to Working with TRIPS* 111 (2011).

²³ Belleville, *supra* note 9 at 316.

²⁴ Taubman, *supra* note 22.

²⁵ Belleville, *supra* note 9 at 316.

²⁶ TRIPS at art. 41(1).

²⁷ Peter K. Yu, *TRIPS AND ITS ACHILLES' HEEL*, 18 J. Intell Prop. L. 479,

describe these enforcement provisions as the agreement's Achilles heel,²⁸ the provisions' lack of clarity may also show that the principles underlying copyright law and policy in different countries are—despite Berne and TRIPS—far from universal.²⁹ The American fair use doctrine serves as an excellent illustration of this point. While the fair use doctrine mirrors the special place of free speech in the United States Constitution, it permits free use of copyrighted works under circumstances that other countries would find hard to excuse.³⁰

B. *Rojadirecta*—A Current Example

A more practical example of the lack of international unity is the ongoing case of the Spanish TV linking site *Rojadirecta*, which describes itself as “the world’s biggest sport events index”³¹. In 2009, the District Court of Madrid dismissed a complaint against Puerto 80, the owner of *Rojadirecta*, holding that a website providing links to infringing content does not violate copyright law.³² In 2010, the Appellate Court of Madrid sided with the District Court’s earlier decision and concluded that *Rojadirecta* was a legal operation.³³

In contrast, in 2011, the United States District Court for the Southern District of New York authorized the seizure of two

482 (2011) (*quoting* J.H. Reichman & David Lange, BARGAINING AROUND THE TRIPS AGREEMENT: THE CASE FOR ONGOING PUBLIC-PRIVATE INITIATIVES TO FACILITATE WORLDWIDE INTELLECTUAL PROPERTY TRANSACTIONS, 9 *Duke J. Comp. & Int'l L.* 11, 35, 38-39. (1998))

²⁸ *Id.*

²⁹ Goldstein, *supra* note 7 at 4.

³⁰ *Id.* at 5.

³¹ *See Rojadirecta*, *Rojadirecta TV* (last visited on Sept. 22, 2016), available at <http://www.rojadirecta.tv>.

³² Enigmax, *Streaming and Bittorrent Sports Links Site Declared Legal*, *Torrentfreak* (Jul. 24, 2009), available at <https://torrentfreak.com/streaming-and-bittorrent-sports-links-site-declared-legal-090724>.

³³ Ernesto, *Sports Streaming / Torrent Link Site Victorious in Court*, *Torrentfreak* (May 10, 2010), available at <https://torrentfreak.com/sports-streaming-torrent-links-site-victorious-in-court-100510>.

domains belonging to Puerto 80: rojadirecta.com and rojadirecta.org. The district court held that the domain names were subject to forfeiture because they had been used to commit criminal violations of copyright law by providing links to streams of sporting events taking place in the United States.³⁴ Following the seizure, Puerto 80 successfully petitioned the U.S. government to return the domains in 2012.³⁵ The legal dispute continued into June 2015, when the District Court of Madrid approved a complaint from the Spanish Professional Football League (“LFP”) and ruled that Puerto 80 was prohibited from linking to unauthorized streams of football events to which the corporations “Mediapro” and “Gol Television” owned the rights.³⁶

Given the discrepancy in verdicts between the United States and Spain with regard to Rojadirecta’s services, it is not surprising that there is no international consensus as to what exactly constitutes copyright infringement.

C. International Copyright Enforcement: Quo Vadis?

If two member countries disagree on whether an online service based in one country violates copyright law, the minimum protection standards of the Berne Convention and the enforcement provisions in TRIPS become highly ineffective.³⁷ Even if matters rise to a government-to-government level, findings of non-compliance in a TRIPS dispute settlement can only be enforced through international trade relations by denying other trade

³⁴ Puerto 80 Projects, S.L.U. v. United States of America and, Department of Homeland Security, *Immigration and Customs Enforcement*, 11 Civ. 3983 (S.D. N.Y. 2011).

³⁵ Julie Samuels, *Rojadirecta: The Government Reverses Course and Returns Domain without Explanation. Again*, Electronic Frontier Foundation (Aug. 29, 2012), available at <https://www.eff.org/deeplinks/2012/08/rojadirecta-government-reverses-course-and-returns-domains-without-explanation>.

³⁶ Ernesto, *Court Forbids Rojadirecta to Stream Football, or else...*, Torrentfreak (Jun. 23, 2015), available at <https://torrentfreak.com/court-forbids-rojadirecta-to-stream-football-or-else-150623>.

³⁷ See Belleville, *supra* note 9 at 331.

benefits in retaliation.³⁸ In a statement before the Subcommittee on Intellectual Property regarding international piracy, former United States Register of Copyrights Marybeth Peters concluded that:

*“The TRIPS agreement has been a tremendously valuable tool in advancing the development of legal structures to support enforcement of copyright around the world. [...] Despite all these accomplishments, the fact remains that copyright enforcement in too many countries around the world is extremely lax, allowing staggeringly high piracy rates. . . .”*³⁹

In recognition of the fact that the current framework under Berne and TRIPS had not been sufficiently developed to provide an appropriate solution to online copyright enforcement, the United States and Japan began discussions on a new multilateral treaty to combat counterfeiting and piracy in 2006.⁴⁰ The resulting Anti-Counterfeiting Trade Agreement (“ACTA”), however, was dealt a serious blow when the European Parliament made use of its Lisbon Treaty power to reject international trade agreements and voted against ACTA in July 2012 by 478 to 39 votes.⁴¹ To this day, Japan is the only country that has formally approved the treaty.⁴²

The United States has subsequently focused its efforts on

³⁸ See generally Taubman, *supra* note 22.

³⁹ U.S. Copyright Office, *Statement of Marybeth Peters Before the Subcommittee on Intellectual Property, Committee on the Judiciary, United States Senate, 109th Congress, 1st Session (2005)*, available at <http://www.copyright.gov/docs/regstat052505.html>.

⁴⁰ Office of the United States Trade Representative, *ACTA - Summary of Key Elements under Discussion* (2009), available at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2009/november/acta-summary-key-elements-under-discussion>.

⁴¹ European Parliament Press Release, *European Parliament rejects ACTA* (Jul. 4, 2012), available at <http://www.europarl.europa.eu/news/en/news-room/20120703IPR48247/European-Parliament-rejects-ACTA>.

⁴² Ministry of Foreign Affairs of Japan, *Conclusion of the Anti-Counterfeiting Trade Agreement (ACTA) by Japan* (Oct. 5, 2012), available at http://www.mofa.go.jp/policy/economy/i_property/acta_conclusion_1210.html.

two other multinational agreements, both with significant potential to influence the international IP protection standard: the Trans-Pacific Partnership⁴³ (“TPP”)—signed on February 2016 in Auckland—and the Transatlantic Trade and Investment Partnership⁴⁴ (“T-TIP”) with the European Union, which is still in negotiations.

Although these two agreements may rectify certain deficiencies in intellectual property enforcement, they are unlikely to bring online copyright infringement to a halt. The main issue with regard to online copyright enforcement is that index services, such as Rojadirecta, can easily escape jurisdiction by moving their domains to other countries, essentially playing a “whack-a-mole game” with both domestic and international law enforcement agencies, in which the index services always stay one step ahead.⁴⁵

In light of the Berne Convention’s weaknesses, the key to a successful international online copyright enforcement system in the future is to ensure that all countries follow the same principles. While such harmonization cannot be achieved by pushing countries into signing multinational treaties, the copyright-based industries in the United States have illustrated that lobbying efforts on a domestic level can be highly effective.

II. PUBLIC CHOICE THEORY AND THE SOPA / PIPA PROTESTS

A. Copyright Lawmaking in the United States

Over the past two centuries, copyright protection in the United States has grown significantly. When the first Federal Copyright Act of 1790 was enacted, it granted the rights to

⁴³ Office of the United States Trade Representative, *Trans-Pacific Partnership Minister’s Statement* (Feb. 4, 2016), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement>.

⁴⁴ Office of the United States Trade Representative, *Transatlantic Trade and Investment Partnership (T-TIP)*, available at <https://ustr.gov/ttip>.

⁴⁵ See Peter W. Singer, Allan Friedman, *CYBERSECURITY AND CYBERWAR: WHAT EVERYONE NEEDS TO KNOW* 194 (2008).

reproduce and distribute any map, chart, or book to its respective author for fourteen years.⁴⁶ A renewal term of fourteen additional years could be obtained, provided that the author survived throughout the first term.⁴⁷ Each new version of the Copyright Act since the 1790 Act has provided longer, broader, and more powerful protections.⁴⁸ Today, the Copyright Act provides that copyright protection subsists in all original works of authorship fixed in tangible mediums of expression, including sound recordings, audiovisual works, and architectural works.⁴⁹ In addition, the copyright term has been extended to the life of the author plus seventy years,⁵⁰ and the initial exclusive rights have been expanded by the rights of derivative works, public performance, and public display.⁵¹

In recent decades, many intellectual property scholars have applied public choice theory to explain this continuous copyright expansion, pointing out the enormous influence of corporate right holders over the legislative process.⁵² Generally speaking, public choice theory suggests that well-organized groups with substantial resources and clearly defined interests tend to have proportionally greater political influence than the public at large.⁵³ According to modern public choice theory, also referred to as interest group theory, legislation is considered “a good demanded and supplied much [like] other goods.”⁵⁴ Legislators are primarily motivated by their interest to be reelected, whereas interest groups hold useful political resources, such as financial support, public exposure, and

⁴⁶ See William F. Patry, *COPYRIGHT LAW AND PRACTICE*, Ch. 1 (2014).

⁴⁷ See *id.*

⁴⁸ See Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. Cin. L. Rev. 741 (Spring, 2001).

⁴⁹ Copyright Act of 1976 § 101, 17 U.S.C. § 102 (1990).

⁵⁰ *Id.* §§ 302 (1998).

⁵¹ *Id.* §§ 106 (2012).

⁵² See Lev-Aretz, *supra* note 14 at 213.

⁵³ Neil W. Netanel, *NEW DIRECTIONS IN COPYRIGHT LAW* VOL. 6 3 (2007).

⁵⁴ Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 265 (1982).

reputation.⁵⁵ As a consequence, legislators are tempted not only to use their voting privileges to garner support from influential interest groups, but also to avoid choices that may provoke opposition from those groups.⁵⁶

Since copyright law creates enforceable rights for private parties, its legislation naturally attracts significant lobbying.⁵⁷ While corporations may commonly seek advantages that solidify and advance their market position, it is important to note that this method of aiming for political influence is not necessarily malicious or illegal.⁵⁸ The problem is that the interests of lobbying entities are often opposed to the interests of the general public.⁵⁹ Thus, in order to protect public interest in copyright policymaking, it is essential that the commercially-driven proposals of the copyright-based industries are counterbalanced.⁶⁰ This democratic objective can only be achieved if all interested parties are properly represented in the legislative process.⁶¹ Like most legislation in the United States, however, copyright legislation presents a severe collective action problem that consists of two parts.⁶² As economist and social scientist Mancur Olson illustrated, groups that try to obtain collective benefits for a large and diffuse body of people are unlikely to form in the first place.⁶³ Olson argues that even in the improbable event that a large number of individuals manages to successfully form a group representing the interests of a diffuse

⁵⁵ See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 *Stan. L. Rev.* 191, 228-30 (2012).

⁵⁶ The Honorable Robert H. Katzmann, *Statutes*, James Madison Lecture at the New York University School of Law (Oct. 18, 2011), in 87 *N.Y.U.L. REV.* 637, 674 (2012).

⁵⁷ See Deborah Tussey, *COMPLEX COPYRIGHT: MAPPING THE INFORMATION ECOSYSTEM* 38 (2012).

⁵⁸ Netanel, *supra* note 53.

⁵⁹ *Id.* at 4.

⁶⁰ Tarleton Gillespie, *WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE* 189 (2009).

⁶¹ Tussey, *supra* note 57.

⁶² *Id.* at 39.

⁶³ Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 9-16 (1971)

body of people, issues with collective action—particularly information costs and organization costs—are likely to inhibit the group’s political activity.⁶⁴

As applied to the federal legislative process, Olson’s theories certainly help in understanding the development of copyright law and policy in the United States. In *Digital Copyright*, Jessica Litman offers a comprehensive historical review of the copyright legislative process in the United States that goes back to the enactment of the 1909 Copyright Act.⁶⁵ The 1909 Copyright Act was born out of conferences conveyed by the Librarian of Congress, which only representatives of interest groups attended.⁶⁶ When uninvited parties expressed their disapproval of the drafted bill, the representative of the affected parties conducted negotiations and agreed on a revised draft that was promptly enacted by Congress.⁶⁷ Like their predecessors, the drafters of the 1976 Copyright Act depended on negotiations among representatives of a variety of interests affected by copyright, in order to draft a copyright bill.⁶⁸ As a result, expansive rights were balanced by narrow exceptions.⁶⁹ When the bill finally emerged from the conferences, it “enlarged the copyright pie and divided its pieces among conference participants so that no leftovers remained.”⁷⁰

The enactment of the Digital Millennium Copyright Act was based on the same multilateral, interindustry negotiation, but was “extended to the point of self-parody”, with copyright owners securing new rights designed to prevent the discovery of loopholes, and diverse powerful players being granted detailed exceptions.⁷¹ The only interest groups that had not yet made a deal was the drafters were the libraries, universities and schools, and civil

⁶⁴ *Id.* at 35.

⁶⁵ See Jessica Litman, *DIGITAL COPYRIGHT* 35-63 (2000).

⁶⁶ Jessica Litman, *Copyright Legislation and Technological Change*, 68 ORE. L. REV., 284-285 (1989).

⁶⁷ *Id.* at 286-288.

⁶⁸ Litman, *supra* note 65 at 37.

⁶⁹ *Id.*

⁷⁰ Litman, *supra* note 65 at 31.

⁷¹ Litman, *supra* note 65 at 37.

liberties and consumer organizations.⁷² Consequently, the “internally inconsistent” Digital Millennium Copyright Act did not only make non-commercial and non-infringing behavior illegal, but also imposed liability on ordinary citizens for violating provisions they had no reason to suspect are part of the law.⁷³ Ultimately, Litman argues, the copyright laws of the United States “have not been written by Congress or Congressional staffers, not by the Copyright Office or any public servant in the executive branch, but rather by copyright lobbyists.”⁷⁴

Irrespective of whether the public choice argument applies, the fact remains that the copyright-based industries in the United States have had a strong and lasting influence in drafting copyright legislation.⁷⁵ The general public, on the other hand, has historically been insufficiently organized to effectively assert its interest, even if some lobbying groups such as library associations may claim to represent some aspects of the public interest.⁷⁶ After decades of successful copyright amendments, however, the so far well-functioning strategy of extending legal protection was put to an unexpected end when Congress set out to enact the copyright lobbyists’ most recent proposal: the Stop Online Piracy Act.

B. The Stop Online Piracy Act

In October 2011, Representative Lamar Smith from Texas introduced SOPA in the House of Representatives, attempting to combat the unsolved problem of rampant online copyright infringement by restricting access to domestic and foreign websites that host or facilitate the trading of pirated content.⁷⁷ With respect to its key provisions, SOPA strongly related to its Senate

⁷² *Id.* at 37.

⁷³ *Id.* at 145.

⁷⁴ Jessica Litman, *War Stories*, 20 *CARDOZO ARTS & ENT. L.J.* 337, 350 (2002).

⁷⁵ Lev-Aretz, *supra* note 14 at 206.

⁷⁶ Tussey, *supra* note 57 at 39.

⁷⁷ Julianne Pepitone, *SOPA Explained: What It Is and Why It Matters*, CNN Money (Jan. 20, 2012), available at http://money.cnn.com/2012/01/17/technology/sopa_explained.

counterpart, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (“PIPA”), which Senator Patrick Leahy introduced in March 2011.⁷⁸

PIPA and SOPA were never signed into law, despite broad initial support in both chambers, as their highly controversial provisions created an enormous public outcry over questions of free speech and fair use.⁷⁹ On January 18, 2012, more than one hundred thousand websites and blogs participated in an orchestrated online protest against the bills, which gave them widespread and unforeseen coverage in the media.⁸⁰ Internet users protested against the bills by posting and tweeting on social media, signing online petitions, sending emails, and making millions of phone calls to their representatives.⁸¹ In view of this overwhelming opposition, more and more lawmakers started to dissociate from the bills. While on the morning of the SOPA strike only 31 members of Congress opposed the legislation, the number rose to 142 after the publicized backlash.⁸² Two days after the strike, Senate Majority Leader Harry Reid announced on Twitter that he had decided to postpone the planned vote on PIPA “in light of recent events”.⁸³ A few hours later, Representative Lamar Smith indefinitely postponed the House discussion of SOPA until there was a “wider agreement on a solution.”⁸⁴

⁷⁸ Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011) (hereinafter “PIPA”).

⁷⁹ Phil Portantino, *Finding The Treasure Without Walking The Plank: The Critical Need for Properly Tailored Anti-Piracy Laws*, 11 Rutgers J. L. & Pub. Pol’y 664, 666 (Spring, 2014).

⁸⁰ *The January 18th Blackout / Strike in Numbers and Screenshots*, Fight For the Future (2011), available at <http://www.sopastrike.com/numbers>.

⁸¹ *Id.*

⁸² Dan Nguyen, *SOPA Opera Update: Opposition Surges*, PROPUBLICA (Jan. 19, 2012), available at <https://www.propublica.org/nerds/item/sopa-opera-update>.

⁸³ Harry Reid, *Twitter Feed*, Twitter (Jan. 20, 2012, 6:27 AM), available at https://twitter.com/SenatorReid/status/160367959464878080?ref_src=twsrc%5Etfw.

⁸⁴ Hayley Tsukayama, *SOPA bill shelved after global protests from Google, Wikipedia and others*, The Washington Post (Jan. 20, 2012), available at

C. The Reasons Behind SOPA's Failure

In order to understand the failure of SOPA and PIPA, it is important to contextualize the way in which Congress attempted to solve the problem of online copyright infringement. Faced with the problems caused by online services such as Rojdirecta, the Senate created PIPA to target foreign websites that infringed upon U.S. copyrights but were difficult to bring to justice under U.S. jurisdiction.⁸⁵ To achieve this goal, the bill proposed to grant the ability to bring an action against any foreign website to the holder of an infringed intellectual property right, provided that the holder can show that the targeted website has a connection to the United States. The holder could subsequently obtain an injunction that would cut the website off from consumers in the United States by redirecting its domain name and filtering its domain name from search engines.⁸⁶ The simplicity of this approach might appear convincing on first sight; however, later opinions and commentaries from the legal and technical community raised the question of whether Congress really understood its implications.⁸⁷

Following PIPA's introduction, a group of 108 law professors submitted a joint letter to Congress, arguing that PIPA would be unconstitutional on First Amendment grounds, create several technical consequences affecting the security of the Internet address system, and undermine U.S. foreign policy.⁸⁸

https://www.washingtonpost.com/business/economy/sopa-bill-shelved-after-global-protests-from-google-wikipedia-and-others/2012/01/20/gIQAN5JdEQ_story.html.

⁸⁵ Michelle Sherman, *PROTECT IP Act: One Approach To Dealing With Internet Piracy*, 15 No. 4 J. Internet L. 3 (Oct. 2011).

⁸⁶ PIPA, S. 986, 112th Cong. (2011), §§ 2(7)(A)(i)-(iii).

⁸⁷ See Mike Masnik, *Are There Any Politicians Who Know What Protect IP is About?*, TECHDIRT (Jul. 19, 2011), available at <https://www.techdirt.com/articles/20110718/15393615155/are-there-any-politicians-who-know-what-protect-ip-is-about-senator-hutchison-thinks-its-about-net-neutrality.shtml>.

⁸⁸ *Professors' Letter in Opposition to "Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011"*, United

Several members of the technical community also opposed the bill, raising concerns about a number of technical issues that the bill would create.⁸⁹ These members argued that the proposed domain name filtering system would not only produce significant collateral damage by preventing users from accessing web sites that were not intended to be filtered, but that changes in the operation of the domain name system (“DNS”) would create security risks for individual users, banks, credit card web sites, and health care providers.⁹⁰ In accordance with these concerns, a group of 83 computer and network engineers who described themselves as a “who’s-who of the proud geeks who built the modern Internet” wrote an open letter to Congress, warning that compliance with SOPA’s and PIPA’s provisions would have “capricious technical consequences” for the global DNS and its security and stability.⁹¹

In reaction to these critical voices, Rep. Lamar Smith announced three days prior to the blackout that he would remove the provisions in SOPA that required Internet service providers (“ISPs”) to block access to foreign websites accused of piracy.⁹² This late attempt to calm the waves was insufficient to prevent the announced protests. In hindsight, however, this last-minute compromise proposal to save the bill clearly demonstrates the significance of including professional expertise in the lawmaking process as early as possible. In her article regarding the influence of SOPA’s failure on policymaking, Annemarie Bridy rightly

States Senate Legislation & Records (July 5, 2011), *available at* <https://www.wyden.senate.gov/imo/media/doc/Law%20Professor%20Letter%20July%202011.pdf>.

⁸⁹ Belleville, *supra* note 9, at 322.

⁹⁰ See Steve Crocker, David Dagon, Dan Kaminsky, Danny McPherson & Paul Vixie, *Security and Other Technical Concerns Raised by the DNS Filtering Requirements of the Protect IP Bill* (May 2011), *available at* <http://domainincite.com/docs/PROTECT-IP-Technical-Whitepaper-Final.pdf>.

⁹¹ *An Open Letter from Internet Engineers to the U.S. Congress*, Electronic Frontier Foundation (Dec. 15, 2011), *available at* <https://www.eff.org/files/Internet-engineers-letter.pdf>.

⁹² Greg Sandoval, *DNS Provisions Pulled From SOPA, Victory For Opponents*, CNET (Jan. 13, 2012), *available at* <http://www.cnet.com/news/dns-provision-pulled-from-sopa-victory-for-opponents>.

argued that the only people in a position to deliver the “best available information and arguments” about the technical implications and consequences of DNS blocking were “the nerds.”⁹³ In spite of this obvious conclusion, however, not a single technical expert was invited to the debate or to testify at the House Judiciary Committee hearing on SOPA.⁹⁴ While representatives of Pfizer and the MPAA testified on behalf of intellectual property right-holders, and representatives of Google and MasterCard testified on behalf of the online intermediaries whose business practices the bill sought to regulate, there was nobody to testify on behalf of the average consumer or the technical community.⁹⁵ One of the few people aware of the dimension of this problem was Representative Jason Chaffetz, who illustrated to his colleagues that they were preparing to make Internet policy without any actual understanding of the technical consequences:

“I was trying to think of a way to describe my concerns with this bill, but basically we are going to do surgery on the Internet, and we haven’t had a doctor in the room tell us how we[‘re] going to change these organs. We are basically going to reconfigure the Internet and how it is going to work without bringing in the nerds, without bringing in the doctors.”⁹⁶

Admittedly, the official exclusion of the Internet engineers did not stop them from talking back to the legislature by using the channels open to them.⁹⁷ It is also difficult to say whether the

⁹³ Annemarie Bridy, *Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA*, 30 *Cardozo Arts & Ent. L.J.* 153, 162-163 (2012)

⁹⁴ *Id.* at 161 (quoting Stop Online Privacy Act: Hearing on H.R. 3261 Before the H. Comm. On the Judiciary, 112th Cong. (2011), page III, available at https://judiciary.house.gov/_files/hearings/printers/112th/112-154_71240.PDF).

⁹⁵ *Id.*

⁹⁶ *Id.* at 156 (quoting Stop Online Piracy Act: Markup Hearing on H.R:3261 Before the H. Comm. On the Judiciary, 112th Cong. 88 (2012) (statement of Rep. Chaffetz)).

⁹⁷ *Id.* at 162.

uninvited testimony of the technical community was a decisive factor in SOPA's defeat.⁹⁸ Regardless of the actual impact, however, it seems fair to argue that including the Internet engineers in the bill's deliberations—and so excluding the DNS provisions from the bill—would not only have allowed Congress to better understand SOPA's implications, but would have decreased the risk of creating such fierce opposition in the first place.

D. Seeking a Democratically Legitimate Solution

Following the overwhelming success of the SOPA protest, many commentators were full of hope for a better and more balanced copyright regime, going so far as to designate the SOPA strike the beginning of a “new era of political engagement based on social media.”⁹⁹ But while social networks may have empowered individuals to become more active in the political process, multiple factors suggest that protests along the lines of SOPA are unlikely to reduce the excessive influence of lobbyists and other special interest groups in the legislative process.¹⁰⁰

A primary reason is that public participation—as seen in the SOPA and PIPA Internet blackouts—depends on the availability of a stimulator that provides the required information about the legislative activity and further coordinates the opposition against it. This tedious and time-consuming function is only voluntarily assumed by individuals or groups who fear a specific proposal; the general public cannot rely on being informed and agitated every time a bill threatens to compromise one of their interests.

Secondly, even if the success of the SOPA protests could be repeated on a regular basis, this would give the general public

⁹⁸ *Id.* at 163.

⁹⁹ Lev-Aretz, *supra* note 14, at 208, (quoting David Binetti, *SOPA Scorecard: Internet 1, Lobbyists 0*, TechCrunch (Jan. 19, 2012), available at <http://techcrunch.com/2012/01/19/sopa-scorecard-Internet-lobbyists/>).

¹⁰⁰ *Id.*

the ability to stop, but not to proactively shape new legislation.¹⁰¹ Such destructive power creates an evident problem: if the public starts to prevent one unpopular bill after another, Congress might decide to rely on alternative methods: including unpopular legislative proposals in so-called omnibus bills, for example, which cover a variety of unrelated topics and make the individual proposal immune from any form of democratic control.

The Cyber Intelligence Sharing and Protection Act (“CISPA”) provides a good example for the concerns mentioned above. Initially introduced in the House in November 2011, CISPA was intended to facilitate government investigations of cyber threats and to safeguard the security of networks against cyber-attacks.¹⁰² Although advocates of Internet piracy and civil liberties strongly opposed CISPA,¹⁰³ their attempts to invoke the success of the SOPA protests did not bear fruit.¹⁰⁴ The opposition had fewer participants, enjoyed less media coverage, and ultimately did not succeed in preventing the House from voting on the bill.¹⁰⁵ Despite President Obama’s threat to veto, the House passed CISPA by a vote of 248-168.¹⁰⁶ Only later did the bill fail in the Senate.¹⁰⁷ When the House reintroduced the bill in 2013, the Senate did not

¹⁰¹ *Id.* at 243.

¹⁰² Rules Committee Print 112-20 Text of H.R. 3523, The Cyber Intelligence Sharing and Protection Act (CISPA), *available at* <http://docs.house.gov/billsthisweek/20120423/CPRT-112-HPRT-RU00-HR3523.pdf>.

¹⁰³ Trevor Timm, *Cybersecurity Bill FAQ: The Disturbing Privacy Dangers in CISPA and How To Stop It*, Electronic Frontier Foundation (Apr. 15, 2012), *available at* <https://www.eff.org/deeplinks/2012/04/old-cybersecurity-bill-faq-disturbing-privacy-dangers-cispa-and-how-you-stop-it>.

¹⁰⁴ Lev-Aretz, *supra* note 14 at 242.

¹⁰⁵ *Id.*

¹⁰⁶ H.R. 3523 Recorded Vote, 26-Apr-2012, 6:31 PM, *available at* <http://clerk.house.gov/evs/2012/roll192.xml>.

¹⁰⁷ Kate Cox, *Third Time’s The Charm? House to Take another Stab at Terrible CISPA Bill*, THE CONSUMERIST (Jan. 8, 2015), *available at* <https://consumerist.com/2015/01/08/third-times-the-charm-house-to-take-another-stab-at-terrible-Internet-bill-cispa/>.

even look at it, and CISPA died once more.¹⁰⁸ On March 17, 2015, however, a similar bill—known as the Cybersecurity Information Sharing Act (“CISA”)—was introduced in the Senate, and passed on October 27, 2015.¹⁰⁹ Due to the White House’s expressed support for the bill, CISA was on its way towards becoming law.¹¹⁰ But facing a potential government shutdown, legislators started to confer on a new version of the cybersecurity bill and included it in a \$1.1 trillion federal government spending bill which consisted of more than 2,000 pages.¹¹¹ By including CISA in the “Consolidated Appropriations Act, 2016”¹¹² which secured governmental funding through the next fiscal year, the introduction of the bill became a mere matter of form—even though digital rights groups had urged the Obama administration to veto the legislation.¹¹³ This approach, however, stripped the final bill of various meaningful privacy protections that were included in the Senate’s original version of CISA.¹¹⁴ More importantly, omnibus legislation requires a strong

¹⁰⁸ *Id.*

¹⁰⁹ Trevor Timm, *The Senate, Ignorant on Cybersecurity, Just Passed a Bill about It Anyway*, THE GUARDIAN (Oct. 27, 2015), available at <http://www.theguardian.com/commentisfree/2015/oct/27/senate-ignorant-of-cyber-security-just-passed-cisa-bill-anyway>.

¹¹⁰ Andy Greenberg, *Congress Slips CISA into a Budget Bill That’s sure to Pass*, WIRED (Dec. 16, 2015), available at <https://www.wired.com/2015/12/congress-slips-cisa-into-omnibus-bill-thats-sure-to-pass/>.

¹¹¹ Aaron Boyd, *Final CISA bill Wrapped into Omnibus Package*, FEDERAL TIMES (Dec. 16, 2015), available at <http://www.federaletimes.com/story/government/cybersecurity/2015/12/16/cisa-omnibus/77416226/>.

¹¹² H.R. 2029—Consolidated Appropriations Act, 2016 (signed into law on Dec. 18, 2015), available at <https://www.congress.gov/bill/114th-congress/house-bill/2029/text>.

¹¹³ Andrew Blake, *CISA Cyber Bill Squeezed into Omnibus Spending Plan*, THE WASHINGTON TIMES (Dec. 16, 2015), available at <http://www.washingtontimes.com/news/2015/dec/16/cisa-cyber-bill-squeezed-omnibus-spending-plan/>.

¹¹⁴ Sen. Ron Wyden (R-Ore.), Press Release (Dec. 16, 2015), available at <https://www.wyden.senate.gov/news/press-releases/wyden-slams-latest-worse-version-of-cybersecurity-bill>.

presumption that few members of Congress would actually take the time to read and scrutinize the provisions it contains. When Sen. Rand Paul was asked why he voted against the spending bill, he stated what many were thinking:

“It was over a trillion dollars, it was all lumped together, 2,242 pages. Nobody read it, so, frankly, my biggest complaint is that I have no idea what kind of things they stuck in the bill. [...] We were given it yesterday or the day before the bill came forward, and so this is not a way to run government. It’s a part of the reason why government is broke.”¹¹⁵

On their face, the events surrounding the SOPA protests in 2012 primarily demonstrated that the general public in the United States demands a right to participate in the future development of copyright legislation. From a legal point of view, however, SOPA’s failure predominantly shows an unequivocal need for procedural control over the federal law-making process in general. As shown above, Congress has restricted the right to participate in the legislative process to specific special interest groups. In so doing, Congress thus may arbitrarily exclude other participants affected just as much by the legislative proposal.

While public protests might serve as a means of last resort to stop a legislative project, the lack of public control over the federal law-making process begs an important question: what could the United States do to allow the general public to participate in a more constructive way? In the following section, this Article will analyze the current legal situation in Switzerland and introduce a legislative process that might present a potentially feasible solution for the problems raised above.

¹¹⁵ Bradford Richardson, *Paul: Nobody read the \$1.1 trillion omnibus bill*, THE HILL (Dec. 20, 2015), available at <http://thehill.com/blogs/blog-briefing-room/news/263836-paul-nobody-read-the-11-trillion-omnibus-bill>.

III. COPYRIGHT LAW AND SWISS DEMOCRACY

A. *The History of Copyright Law in Switzerland*

Despite its relatively small size, Switzerland has played a significant role in the development of international intellectual property law. Not only was Switzerland host to the Berne Convention—adopted in 1886—it is also currently home to the World Intellectual Property Organization (“WIPO”), which maintains its headquarters in Geneva.¹¹⁶ Despite the country’s prominent role with international organizations, however, there is probably no area of civil law in Switzerland in which the notion of justice is as underdeveloped as in that of copyright.¹¹⁷

While European countries like England, France, and the historic state of Prussia adopted copyright laws in the early 19th century, Switzerland only enacted its first Federal Copyright Act in 1883, a mere three years before the Berne Convention passed.¹¹⁸ Prior to its enactment, several Swiss cantons—the member states of the Swiss Confederation, equivalent to the states in the U.S.—wholly resisted the recognition of intellectual property, primarily because the supply of neighboring countries with unlicensed works was seen as a profitable business.¹¹⁹ In spite of this, Switzerland played an important role in the Berne Conference, and the Swiss Federal Council was given the mandate of writing the draft convention.¹²⁰ After the foundation of the ‘Berne Union’, however, Switzerland gradually passed over the role of copyright guide to

¹¹⁶ WIPO, *A Brief History*, available at <http://www.wipo.int/about-wipo/en/history.html>.

¹¹⁷ Aloïs Troller, *The Hundredth Anniversary of the Berne Convention: the Development of Law in the Copyright Field Through the Interaction of the Convention and Swiss Legislation*, Copyright, Monthly Review of the World Intellectual Property Organization (WIPO), 208, 208 (Jun. 1986).

¹¹⁸ Schweizerisches Institut für Immaterialgüterrecht [Swiss Federal Institute of Intellectual Property], *Die Geschichte des Urheberrechts*, available at <https://www.ige.ch/rev-urg/D/heute/duh10.php?m=5&s=1>.

¹¹⁹ *Id.*

¹²⁰ Troller, *supra* note 117, at 210.

other states. Scholars have attributed the decision to the somewhat arid nature of the subject for a country with a direct democracy, but also to the development of law which took place more rapidly in centralized countries.¹²¹

When the 1883 Swiss Copyright Act was first amended in 1922, it employed the same language as the revised Berne Convention, affording authors fair and efficient protection for a fixed term of thirty years.¹²² In the decades that followed, Swiss copyright legislation continued to align itself with neighboring countries on the scope of its copyrights and refrained from including new ideas or original formulae that might have served as models for broadening the Berne Convention.¹²³ This strategy of mere international compliance ended in June 1989, when the Swiss Federal Council signed off on a complete revision of the Copyright Act with the intention to adapt copyright law to the economic and technological developments that had taken place since 1922.¹²⁴

The current Copyright Act of Switzerland was enacted on January 1, 1993; it has been amended seven times, most recently on January 1, 2011. One of the most controversial changes of the 1993 Copyright Act was the introduction of a broad statutory private use exception.¹²⁵ Article 19 of the Swiss Copyright Act¹²⁶ (“CopA”) currently states that published works, with the exception of computer programs, may be used for any personal use, copied, and shared within a circle of persons closely connected to each other, such as relatives or friends.¹²⁷ In line with prevailing legal

¹²¹ Ernst Roethlisberger, *Die Revision des schweizerischen Urheberrechtsgesetzgebung*, reprinted from the review *Schweizerische Juristen Zeitung*, 6th year, 1910, Nos. 20, 21, 221.

¹²² Troller, *supra* note 117, at 212.

¹²³ *Id.*

¹²⁴ Botschaft zu einem Bundesgesetz über das Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz, URG), BBl 1989 III 477 (1989).

¹²⁵ *Id.*, at 537.

¹²⁶ Urheberrechtsgesetz [URG], Loi sur le droit d’auteur [LDA], Legge sul diritto d’auteur [LDA] [Copyright Act] Oct. 9, 1992, SR 231.1 (Switz.) (hereafter COPA).

¹²⁷ *Id.* at 19.

opinion, the legislator who introduced this exception clarified in 2006 that ‘private use’ included the right to download audiovisual works from the Internet,¹²⁸ regardless of whether the file has been downloaded from a legal or illegal source.¹²⁹

Because of its broad application, the private use exception has been met with harsh criticism from copyright-based industry representatives such as the IIPA.¹³⁰ It is important to note, however, that the private use exception does not include a right to use a work outside of the private sphere. This caveat has a large impact on the private use doctrine. While downloading a copyrighted work from an illegal source—with the exception of computer programs—may not constitute copyright infringement, Internet users in Switzerland are not allowed to upload or share downloaded, purchased, or otherwise acquired copies with the public.

The Swiss Copyright Act grants authors not only the exclusive rights to copy and to distribute, but the additional right to make the work perceptible.¹³¹ Through this right, the Swiss Copyright Act affords more protection than its U.S. counterpart. Although some U.S. copyright owners have attempted to judicially create a so-called “making available” right based on the right to distribute, the prevailing doctrine holds that the mere offer to distribute a copyrighted work does not violate section 106(3) of the Copyright Act.¹³²

This broad set of exclusive rights gives Swiss law enforcement agencies the opportunity to take strong action against online copyright infringement. Despite the widespread use of file-sharing services in the country, however, it was not until early 2010 that the first case of online copyright infringement in

¹²⁸ Botschaft zum Bundesbeschluss über die Genehmigung von zwei Abkommen der Weltorganisation für geistiges Eigentum und zur Änderung des Urheberrechtsgesetzes, BBl 3430 (2006).

¹²⁹ *Id.*

¹³⁰ IIPA, *supra* note 5.

¹³¹ COPA, *supra* note 126, art. 10(2)(f).

¹³² 4 William F. Patry, PATRY ON COPYRIGHT § 13:11.50.

Switzerland became public.¹³³ In a historical precedent, an 18-year-old student from Bellinzona was found guilty of up- and downloading approximately 4200 copyrighted musical works and 270 movies, convicted of criminal copyright infringement, and sentenced to 30 days in jail on parole and a penalty of 400 Swiss Francs. Notwithstanding the comparatively mild monetary sentence, the case was heavily criticized for its lack of proportionality.¹³⁴ Approximately one year later, the Federal Supreme Court of Switzerland ruled that providing hash-links to an illegal file-sharing arrangement on a website may constitute copyright infringement, regardless of whether the provider of the link participates in the actual file-sharing process.¹³⁵ After a detailed scrutiny of the technical procedure, the court reasoned that providing hash links to copyrighted material violates the author's right to make the work perceptible, since visitors can start the download process simply by clicking on the link in question.¹³⁶

Since most file-sharing services were, and still are, based on concurrent downloading and uploading of a single file, these two decisions seemed to render the private use exception inapplicable with regard to downloading copyrighted works from the Internet. Further, taking legal action against copyright infringers became even easier when companies like Logistep AG from Switzerland started to offer their services to copyright owners by de-anonymizing users of file-sharing services. However, the anticipated flood of lawsuits and cease-and-desist orders ultimately came to a halt before it started.

¹³³ Paolo Attivissimo, *Svizzera, condanna per file sharing*, *Il Disinformatico* (Jan. 2, 2010), available at <http://attivissimo.blogspot.com/2010/01/svizzera-condanna-per-file-sharing.html>.

¹³⁴ Julia Klein, *Filesharing in der Schweiz übertrieben bestraft*, *Gulli* (Jan. 8, 2010), available at <http://www.gulli.com/news/12144-filesharing-in-der-schweiz-uebertrieben-bestraft-2010-01-08>.

¹³⁵ Bundesgericht [BGer] Feb. 7, 2011, 6B_757/2010.

¹³⁶ *Id.* (The court further reasoned that even if the file-sharing client is not pre-installed on the computer, then the hash-link leads to another website which allows the Internet user to download the file-sharing client needed to perform the file-sharing process.)

B. The Logistep Decision

1. The Federal Administrative Court's Ruling in 2009

In May 2008, the Federal Data Protection and Information Commissioner of Switzerland ("Federal Commissioner") brought suit against the Swiss company Logistep AG before the Federal Administrative Court.¹³⁷ Logistep AG was in the business of collecting information about users of peer-to-peer (P2P) file-sharing services who shared copyrighted content for download via the service's networks.¹³⁸ The information was obtained by Logistep's software *File Sharing Monitor*.¹³⁹ File Sharing Monitor acted like any other P2P-Client, with the exception that the Monitor had been programmed to prevent the subsequent upload of downloaded information.¹⁴⁰

Whenever the Monitor found a copyrighted work, it automatically initiated a download and recorded information such as: the Internet Protocol address ("IP address") of the user offering the copyrighted file; the user's P2P username; the name of the P2P network; the name and hash code of the network; and the date and time of the download.¹⁴¹ Logistep supplied this information to its clients in order to assist them in identifying copyright infringers.¹⁴² Copyright owners would then use the infringer's IP address to file criminal charges against persons unknown, identify the infringing individuals after obtaining access to the criminal files, and use the information to seek damages through a civil lawsuit.¹⁴³

¹³⁷ Bundesverwaltungsgericht [BVGer] May 27, 2009, A-3144.

¹³⁸ *Id.* at A.

¹³⁹ *Id.* at 2.3.3

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at A.

¹⁴³ *Id.*

a. The Federal Data Protection Act Applies to IP Addresses

Since the case was brought by the Federal Commissioner, the Federal Administrative Court first needed to consider whether the Federal Act on Data Protection¹⁴⁴ (“FADP”) applied under the circumstances.¹⁴⁵ In particular, since the identification of the users was enabled by collecting their IP addresses, the court had to assess whether IP addresses constituted personal data within the meaning of Article 3(a) of the FADP.¹⁴⁶

Albeit Switzerland is not part of the European Union (“EU”), the lack of precedent prompted the court to refer to comparative legal analysis and look at the legal situation in the EU, where the Article 29 Working Group¹⁴⁷ had recently concluded that static IP addresses constitute personal data because they refer to an identifiable individual.¹⁴⁸ The court adopted this view and noted that dynamic IP addresses become equally identifying as soon as criminal charges are filed.¹⁴⁹ As a consequence, the court concluded that all IP addresses are personal data within the FADP’s meaning.¹⁵⁰

The court further held that Logistep processed the personal data within the meaning of Article 3(e) of the FADP,¹⁵¹ reasoning

¹⁴⁴ Bundesgesetz über den Datenschutz [DSG], Loi fédérale sur la protection des données [LPD], Legge federale sulla protezione dei dati [LPD] [Federal Act on Data Protection], Jun. 19, 1992, SR 235.1 (Switz.).

¹⁴⁵ BVGer *supra* note 137, at 1.2.

¹⁴⁶ Article 3(a) of the FADP holds that personal data is all information relating to an identified or identifiable person.

¹⁴⁷ Article 29 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

¹⁴⁸ BVGer *supra* note 137, at 2.2.3.

¹⁴⁹ *Id.* at 2.2.4. Once criminal charges are filed, the law enforcement agencies can request Internet Service Providers to determine which user has been assigned the IP address at the time of the infringement.

¹⁵⁰ *Id.*

¹⁵¹ According to Article 3(e) of the FADP, processing means “any operation with personal data, irrespective of the means applied and the procedure, and in particular the collection, storage, use, revision, disclosure,

that Logistep's *File Sharing Monitor* collected, saved, and transferred information that qualifies as personal data.¹⁵² The court did not follow Logistep's argument against FADP's applicability based on the allegation that all identified IP addresses and copyright owners were domiciled abroad.¹⁵³ Rather, the court held that the Act does not contain any provisions regarding its territorial applicability, and that the subsidiary principle of territoriality makes the Act applicable whenever processing of personal data takes place in Switzerland.¹⁵⁴

b. Logistep's Data Collection Constitutes a Breach of Privacy

In the main part of the decision, the court assessed whether the processing of personal data by Logistep amounted to a breach of privacy. FADP's breach of privacy provision states in general that anyone who processes personal data must not unlawfully breach the privacy of the data subjects in doing so.¹⁵⁵ Further, Article 12(2) of the Act holds that data processors must not process personal data, except if in accordance with the general principles of Articles 4, 5(1), and 7(1), and must not process data pertaining to a person against that person's express wish without justification. However, Article 12(3) clarifies that there is no breach of privacy if the data subject has made the data generally accessible and has not expressly prohibited its processing.

The court disregarded Logistep's argument that IP addresses in P2P networks are generally accessible, holding that "even if the Internet could be qualified as an open space [...] its usage does not mean that personal data should be made accessible to all Internet users without further ado. [...] IP addresses are normally not knowingly communicated, especially not for the purpose of having them processed by third parties."

The court continued by looking at the general data

archiving or destruction of data."

¹⁵² BVGer *supra* note 137, at 2.3.3.

¹⁵³ *Id.* at 4.1.

¹⁵⁴ *Id.* at 4.2.

¹⁵⁵ *See* FADP, art. 12(1).

protection principles contained in Article 4, focusing on the act's principles of lawfulness, good faith, transparency, and expediency.¹⁵⁶ Based on the principle of lawfulness, the court held that Switzerland does not have a statutory basis which regulates the gathering and transfer of personal data in P2P networks, and concluded that this type of data collection is not expressly forbidden.¹⁵⁷ Following this conclusion, the court held that the principles of good faith and transparency are of particular importance in the context of data collection, and highlighted that personal data should not be processed if the affected person cannot expect such proceedings.¹⁵⁸ Since Logistep collects personal data without the knowledge of the affected individuals, the court followed the Federal Commissioner's reasoning and held that Logistep violated the principle of transparency.¹⁵⁹ With regard to the principle of good faith, on the other hand, the court indicated that Logistep only collects personal data of P2P users who are assumed to be guilty of criminal copyright infringement.¹⁶⁰ Since the current legal framework does not offer copyright owners alternative solutions to enforce their rights, and copyright owners cannot be expected to silently tolerate violations of their statutory rights, the court held that Logistep's collection of personal data does not constitute a violation of the principle of good faith.¹⁶¹ Lastly, the court found a violation of the principle of expediency, reasoning that Logistep's method does not communicate the purpose of proceedings to the affected individual, mainly because

¹⁵⁶ These principles are contained in Articles 4(1)-(4) of the FADP, holding that (1) personal data may only be processed lawfully; that (2) the processing of personal data must be carried out in good faith; that (3) personal data may only be processed for the purpose indicated at the time of collection, that is evident from the circumstances, or that is provided for by law; and (4) that the collection of personal data and in particular the purpose of its processing must be evident to the data subject.

¹⁵⁷ BVGer *supra* note 137, at 8.3.2.

¹⁵⁸ *Id.* at 9.3.1.

¹⁵⁹ *Id.* at 9.3.4.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

such information would render any investigation impossible.¹⁶²

c. Logistep's Breach of Privacy is Justified

After holding that Logistep collected personal data in violation of the principles of transparency and expediency,¹⁶³ the court yet had to determine whether the resulting breach of privacy was illegitimate.

According to Article 13(1) of the FADP, a breach of privacy is unlawful unless consented to by the injured party, or justified by an overriding private or public interest or by law. Holding that there is no consent of the injured party and no statutory rule that would justify the injury by law, the court assessed whether Logistep's collection of private data could be justified by an overriding private or public interest.¹⁶⁴ In an introductory note to its justification analysis, the court recalled that copyright is an absolute right pertaining to the system of property ownership and, as such, is afforded protection under the Federal Constitution of Switzerland.¹⁶⁵ Thus, once copyright owners' property rights have been violated, the owners need to be able to defend their rights, which requires knowledge of the infringer's identity. Logistep's collection of personal data would likely help in enforcing copyrights against infringers; without collecting their IP addresses, it would be impossible to identify the violators and to seek damages and injunctive relief against them.¹⁶⁶ Balancing the copyright owners' interests with the FADP's privacy principles, the court noted that "the interference with the affected person's personal rights does not seem very serious. If the accusations are not substantiated to a sufficient degree, criminal proceedings—albeit they may cause some hardship—would be abandoned, and correlating civil claims would be considered unjustified."¹⁶⁷

¹⁶² *Id.* at 10.3.2.

¹⁶³ *Id.* at 11.4.

¹⁶⁴ *Id.* at 12.3.

¹⁶⁵ *Id.* at 12.3.2.

¹⁶⁶ *Id.* at 12.3.2.

¹⁶⁷ *Id.* at 12.3.2

Based on this rationale, the court concluded that Logistep's collection of personal data was justified by an overriding private and public interest as defined by Article 13 of the FADP and therefore decided to dismiss the case against Logistep AG.¹⁶⁸

2. The Federal Supreme Court's Decision in 2010

The Federal Data Commissioner subsequently appealed the Federal Administrative Court's ruling to the Federal Supreme Court. In his appellate brief, the Commissioner argued that the text of Article 12(2) prohibits the court from taking the justifications in Article 13 into account, if, as in this case, one of the general data protection principles has been violated.¹⁶⁹ The Federal Commissioner warned that affirming the interpretation of the Federal Administrative Court would significantly decrease the level of data protection in Switzerland, because the question of whether someone's privacy has been violated would automatically be reduced to whether a justification exists, regardless of the respective tools that have been used by the data processor.¹⁷⁰

In the first part of the decision, the Federal Supreme Court confirmed that the IP addresses processed by Logistep qualified as personal data within the meaning of Article 3(a) of the FADP, but clarified at the same time that this finding did not rise to a general rule.¹⁷¹ According to the statutory provision, IP addresses can only qualify as personal data if they relate to an identified or identifiable person.¹⁷² In the court's opinion, finding such a relation would require more than a mere possibility of identification and depends

¹⁶⁸ *Id.*

¹⁶⁹ Ursula Sury, *Beschwerdeschrift des EDÖB gegen Logistep AG* 17 (Jan. 9, 2008), available at http://www.edoeb.admin.ch/datenschutz/00628/00664/index.html?lang=de&download=NHzLpZeg7t,lnp6lONTU042l2Z6lnlacy4Zn4Z2qZpnO2Yuq2Z6gpJC DdYJ7gGym162epYbg2c_JjKbNoKSn6A--.

¹⁷⁰ *Id.* at 28.

¹⁷¹ Bundesgericht [BGer] Sep. 8, 2010, 1C_285/2009, at 3.8.

¹⁷² *Id.* at 3.2.

on the circumstances of the case.¹⁷³ Given that Logistep's business model was based on de-anonymizing users of file-sharing services, however, the court concluded that the statutory requirement of identifiability had been met.¹⁷⁴ The Federal Supreme Court further affirmed the holding that Logistep's collection of personal data violated the principles of transparency and expediency and therefore constituted a breach of privacy.¹⁷⁵

Regarding the applicability of the justifications in Article 13 of the FADP for violations of the general data protection principles, the Supreme Court observed that the legislative history was insufficiently instructive and that the relevant legal literature tended to reveal partially divided opinions.¹⁷⁶ Thus, the Federal Supreme Court started its analysis by considering Article 13 of the Federal Constitution of the Swiss Confederation, which grants to every person the right to privacy in their private and family life and in their home, and in relation to their mail and telecommunications, and the right to be protected against the misuse of their personal data.¹⁷⁷ Because this entitlement against misuse represents the core of the FADP, the court cautioned that possible justifications should only be applied with great restraint.¹⁷⁸ After affirming the Administrative Court's finding that an overriding private or public interest was the only eligible justification in the case, the Supreme Court held that Logistep's interest was purely economic, seeking remuneration for an activity that—due to the lack of a statutory basis—could lead to great uncertainties with regard to the proper procedure and the proper scope of collecting and processing personal data in the Internet.¹⁷⁹ Reluctant to apply an overbroad justification, the Federal Supreme Court thus decided that the

¹⁷³ *Id.* (As an example, the court held that the element of identifiability might not met if the identification requires so much effort that an actual identification by the data processor is not foreseeable under the circumstances.)

¹⁷⁴ *Id.* at 3.5.

¹⁷⁵ *Id.* at 3.8, 4.

¹⁷⁶ *Id.* at 5.2.1, 5.2.2.

¹⁷⁷ *Id.* at 6.3.1.

¹⁷⁸ *Id.* at 6.3.1.

¹⁷⁹ *Id.* at 6.3.3.

public interest in effective suppression of online copyright infringement would not compensate the uncertainties mentioned above.¹⁸⁰ The court's most fundamental statement was expressed in the final words of the decision:

“It shall be noted that this case only covers the respondent's method of data processing, and is not intended to generally give priority to privacy law over copyright law. It will be for the legislator, and not for the judiciary, to take the appropriate steps to provide for a system of copyright protection that conforms to the new technologies.”¹⁸¹

Based on this unequivocal statement in support of a clear separation of powers, the Federal Supreme Court vacated the Federal Administrative Court's decision and enjoined Logistep AG from processing any personal data in P2P networks, and from transferring already-collected data to the affected copyright owners.¹⁸²

C. The Impact of “Logistep” on Copyright Enforcement

1. The Legal Appreciation

The 2010 Supreme Court decision in *Logistep* became the subject of a highly controversial debate. While some commentators applauded the Supreme Court for increasing the pressure on the legislature by clarifying that one infringement does not justify another,¹⁸³ others claimed that the decision might end up as a pyrrhic victory for data protection, reasoning that such radical points of view might turn data protection into offender

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 6.4.

¹⁸² *Id.* at 7.

¹⁸³ Marc Frédéric Schäfer & Elsa Dordi, *Über die Rechtfertigung von Persönlichkeitsverletzungen*, *Medialex* 03/2011 142, 148.

protection.¹⁸⁴

For his part, the Federal Data Commissioner welcomed the decision as a warning against the private sector's increasing tendency to take on certain tasks that must remain the prerogative of the State.¹⁸⁵ In particular, the Supreme Court had reproached Logistep, not only for having taken advantage of the uncertainties created by the company itself in order to demand excessive civil damages, but for having done so before any copyright infringement had been certified by a criminal court in a manner commensurate with the requirements of the rule of law.¹⁸⁶ The lack of prior criminal adjudication had been the Commissioner's main reason for filing the complaint with the Federal Administrative Court; during a presentation at the general meeting of SUISSIMAGE¹⁸⁷ in 2014, the Commissioner explained that he had conducted several inquiries before filing the complaint against Logistep AG and learned that the procedures adopted by other copyright holders in pursuing alleged copyright infringement differed from the Logistep case in this essential point.¹⁸⁸ Further, he mentioned that the umbrella organization IFPI Switzerland¹⁸⁹ had always waited for a

¹⁸⁴ David Rosenthal, *Wenn Datenschutz übertrieben wird oder: Hard cases make bad law*, Jusletter (Sep. 27, 2010).

¹⁸⁵ The Federal Data Commissioner (FDPIC), *Internet exchanges: decision by the Federal Supreme Court*, Annual Report 18 (2010/2011), available at <https://www.edoeb.admin.ch/dokumentation/00153/00184/00196/index.html?lang=en>.

¹⁸⁶ The Federal Data Commissioner (FDPIC), *Internet file-sharing networks—the legal situation after the Logistep ruling*, Annual Report 19 (2011/2012), available at <http://www.edoeb.admin.ch/dokumentation/00153/00154/00170/index.html?lang=en>.

¹⁸⁷ Swiss Author's Rights Cooperative for Audiovisual Works

¹⁸⁸ Hanspeter Thür, *Urheberrechtsverletzungen im Internet—Der Stand der Dinge* (Apr. 25, 2014), available at http://www.suissimage.ch/fileadmin/content/pdf/9_News/Urheberrechtsverletzungen_im_Internet-Stand_der_Dinge_2014_def.pdf.

¹⁸⁹ According to their website, IFPI is the voice of the recording industry worldwide, representing the interest of 1,300 record companies from across the globe. See *About – IFPI – Representing the recording industry worldwide*, International Federation of the Phonographic Industry (last visited on Sept. 23,

definitive criminal conviction before suing copyright infringers for damages in a civil court, which, in the Commissioner's view, did not constitute a violation of the Federal Data Protection Act.¹⁹⁰

When IFPI Switzerland and the Swiss Anti-Piracy Federation ("SAFE") contacted the Commissioner after the *Logistep* ruling, he advised them that a violation of privacy rights as a result of data processing might still be justified, provided that (1) the collection and recording of data does not go beyond what is absolutely necessary to file a criminal complaint; that (2) negotiations regarding claims for damages between the copyright holders and the alleged infringers take place only if an enforceable conviction had been pronounced by the courts (or on the alleged infringers initiative); and that (3) the copyright holders must "step up" their efforts to ensure that the collection of personal data and the purpose of their processing is made as clear as possible to the persons concerned.¹⁹¹ Following this statement, the Federal Data Commissioner concluded that "under these conditions...copyright infringers on the Internet may continue to be prosecuted in a manner which respects data protection rules."¹⁹²

2. Non-Enforcement and Diplomatic Implications

Despite the Federal Data Commissioner's legal assessment, most law enforcement authorities in Switzerland interpreted the *Logistep* decision very narrowly and refused to conduct further investigations upon criminal copyright complaints, reasoning that they would not have the legal basis to retrace the alleged infringer's IP addresses.¹⁹³ This refusal was mainly based on the Supreme Court's deliberate silence as to whether the prosecution

2016), available at <http://ifpi.org/about.php>.

¹⁹⁰ Thür, *supra* note 188.

¹⁹¹ See *supra* note 187.

¹⁹² *Id.*

¹⁹³ Ronny Nicolussi, *Druckversuche der USA sind vorerst nicht zielführend*, *Neue Zürcher Zeitung* (Feb. 15, 2014), available at <http://www.nzz.ch/schweiz/druckversuche-der-usa-sind-vorerst-nicht-zielfuehrend-1.18243844>.

authorities would still be allowed to make use of the information obtained by Logistep in violation of the FADP.¹⁹⁴

The fact that copyright owners in Switzerland were in effect barred from enforcing their statutory rights against file-sharers drew attention from the United States.¹⁹⁵ An official report was discreetly released on a sub-site of the Federal State Secretariat for Economic Affairs (“SECO”) in February 2014, which contained a summary of the confidential round table between the SECO, the Embassy of the United States in Bern, SAFE, Universal Music, and Walt Disney.¹⁹⁶ According to the report, the subject matter of copyright protection on the Internet was brought to SECO’s attention by the U.S. Embassy in Bern within the framework of the 2011 “Swiss-U.S. Trade and Investment Cooperation Forum.”¹⁹⁷ The roundtable’s declared objective was to examine how copyright infringement on the Internet could be determined and criminally pursued in compliance with data protection laws.¹⁹⁸ As a result of the round table’s classified discussions, the participants set up a working group, which subsequently set out to clarify the scope of the *Logistep* decision by initiating a model case proceeding.¹⁹⁹ IFPI Switzerland subsequently filed criminal charges against an unknown file-sharer in January 2013.²⁰⁰ Upon receipt of the complaint, the Public Prosecution Department of the Canton of Zurich requested a user’s identification based on the alleged infringer’s IP address, but ultimately entered a *nolle prosequi*, reasoning that—because of the *Logistep* decision—the obtained personal data would not be admissible in any civil or criminal procedure due to privacy

¹⁹⁴ BGer, *supra* note 171 at 6.3.3.

¹⁹⁵ SECO, *Roundtable zum Urheberrecht im Internet* (Jan. 23, 2014), available at https://steigerlegal.ch/wp-content/uploads/2014/02/20140123_seco_roundtable-urheberrecht_bericht.pdf.

¹⁹⁶ Nicolussi, *supra* note 190.

¹⁹⁷ SECO, *supra* note 192 at 3.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 5.

violations.²⁰¹ IFPI appealed the *nolle prosequi* to the High Court of the Canton of Zurich,²⁰² which invalidated the Prosecutor’s decision to dismiss the proceedings in its decision issued in February 2014. The court acknowledged that the alleged infringer’s IP address had been obtained unlawfully, but clarified that Art. 141 of the Swiss Criminal Procedure Code (“CrimPC”)—which deals with the admissibility of unlawfully obtained evidence—only applies to evidence obtained by law enforcement agencies.²⁰³ The court also held that it was not sufficiently clear whether unlawfully obtained evidence could be admissible if such evidence was obtained by private parties.²⁰⁴ The court pointed out that while criminal courts must follow the principle of leaving doubt for the accused, prosecution authorities must adhere to the principle that, in cases of doubt, criminal charges must always be brought.²⁰⁵ Since criminal proceedings can only be abandoned if the inadmissibility of the evidence is manifest, the court decided that the question of admissibility must be decided in a criminal proceeding by the criminal court, and remanded the case to the Public Prosecution Department.²⁰⁶

Although the High Court of the Canton of Zurich effectively greenlit criminal copyright enforcement in early 2014, things remained surprisingly quiet after the model case proceeding. One possible reason behind this may be that the legislature eventually responded to the Federal Supreme Court’s request,²⁰⁷ and decided to examine the possibilities of a new legislative

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Obergericht des Kantons Zürich [OGer ZH], III. Strafkammer, UE130087-0/U/br (Mar. 4, 2013) at 5.1.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 5.2.

²⁰⁶ *Id.*

²⁰⁷ In its 2010 Management Report, the Federal Supreme Court has repeated its unease with the current regulatory framework and expressly called on the legislator “to take appropriate steps to guarantee copyright protection in the context of the new technologies.” Bundesgericht, Geschäftsbericht 2010 [Management Report] 17, available at http://www.bger.ch/2010_d.pdf.

solution.

D. The Legislative Proposal

1. The AGUR12 Working Group

In August 2012, Federal Councillor Simonetta Sommaruga, Head of the Swiss Federal Department of Justice and Police, invited several interested associations and administrative units to cooperate in a working group on copyright modernization²⁰⁸ called “AGUR12”. The Councillor instructed the group to identify possibilities for adapting copyright law to recent technical developments by the end of 2013.²⁰⁹ Of particular interest is the fact that, unlike the group of invitees to the House Judiciary Committee hearing on SOPA, AGUR12 was not merely comprised of artists and industry representatives, but included several members who represented the interests of users and consumers.²¹⁰

In December 2013, AGUR12 published its final report and recommended several measures to improve copyright protection on the Internet, emphasizing that “while there is consensus regarding the overall package, this is not always the case for individual recommendations.”²¹¹ AGUR12 determined that copyright owners should have the right to process Internet connection data for the

²⁰⁸ In full, the group was described as: a working group on the optimization of the collective management of copyright and related rights; *see supra* note 5.

²⁰⁹ *Final Report 8*, AGUR12 (Dec. 6, 2013), *available at* <https://www.news.admin.ch/NSBSubscriber/message/attachments/33019.pdf>.

²¹⁰ The working group AGUR12 was comprised of six creative artist representatives, three producer representatives, three user representatives, three consumer representatives, and three representatives from the Federal Administration who represented the Federal Office of Culture, the Federal Office of Communications, and the State Secretariat for Economic Affairs. The Internet Service Providers did not directly participate in the discussion but were consulted as technical experts. *See* AGUR12, *supra* note 209 at 6-7.

²¹¹ AGUR12, *Proposals of the AGUR12 1* (English translation), *available at* https://www.ige.ch/fileadmin/user_upload/Urheberrecht/e/Schlussbericht_der_AGUR12_Empfehlungen_EN.pdf.

purpose of investigating copyright infringement to enforce their rights prior to notifying the connection's owner.²¹² If the subscriber of the Internet connection does not take action to prevent further infringement upon notification, AGUR12 recommended that the access provider should be obliged to disclose the identity of the subscriber for the purpose of initiating civil proceedings.²¹³

Although this recommendation would arguably be sufficient to solve the problems raised by *Logistep*, AGUR12 did not hesitate to propose regulations beyond the issue of initial identification. In keeping with the demands of the copyright-based industries, AGUR12 suggested the implementation of a “take down and stay down” system, which would require host providers to not only take down infringing material upon notice, but to take all reasonable measures to prevent any further illegal uploading of such content.²¹⁴ AGUR12 also recommended blocking access to web portals that feature obvious illegal sources by means of IP and DNS blocking,²¹⁵ a suggestion reminiscent of the dire provisions included in the disfavored SOPA as discussed above.

In view of these proposals, the working group's initial recommendation that downloads from illegal sources should remain legal²¹⁶ provides little comfort from a user and Internet community perspective. This raises an important question: how is it possible that a working group that includes both user and consumer representatives agree on such far-reaching regulations?

One possible answer came from the Internet community, which—despite AGUR12's self-portrayal as a broad conglomerate of diverse interests—was denied the opportunity to participate in the working group's discussions.²¹⁷ In reaction to their exclusion, members of the Swiss network policy association Digitale Allmend publicly criticized AGUR12's final proposal, concluding that the

²¹² *Id.* at 4.

²¹³ *Id.*

²¹⁴ *Id.* at 3.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Thomas Hartwig, *AGUR12: Die nicht gehörte Meinung*, Digitale Allmend (2014), available at <http://www.enterag.ch/hartwig/AGUR12.pdf>.

so-called “consensus regarding the overall package” was in fact a simple imposition of interests attributable to the right-owners’ numerical superiority.²¹⁸ Well-known Swiss attorney Martin Steiger, whose work focuses on information technology, intellectual property, and media law, also criticized AGUR12’s final proposal. In his view, an implementation of AGUR12’s recommendations would not only lead to a comprehensive monitoring of Internet use in Switzerland, but further allow the United States’ entertainment industry and other rights holders to exercise vigilante justice by recruiting Swiss providers as auxiliary policemen.²¹⁹

2. The 2015 Draft Bill

Despite this criticism, the Federal Council mandated in June 2014 that the Department of Justice and Police (“FDJP”) should prepare a draft bill by the end of 2015.²²⁰ The draft bill—submitted in December 2015 and left open for public consultation until March 31, 2016—mainly drew upon the recommendations of AGUR12.²²¹

In the first part of the draft bill, the proposed Article 62(a) deals with the issue surrounding the *Logistep* decision (as discussed in 4.3 *supra*), but limits the applicability of the provision to cases of serious²²² copyright infringement. Access providers

²¹⁸ *Id.* at 2.

²¹⁹ Martin Steiger, *Urheberrecht: Netzsperrern, Selbstjustiz und Überwachung*, Steiger Legal (Dec. 6, 2013), available at <https://steigerlegal.ch/2013/12/06/urheberrecht-netzsperrern-selbstjustiz-und-ueberwachung/>.

²²⁰ Media Release, *Federal Council wants to modernize copyright* (Unofficial Translation) (Jun. 6, 2014), available at https://www.ige.ch/fileadmin/user_upload/Urheberrecht/e/Media_Release_6_june_2014.pdf.

²²¹ *Id.*

²²² According to Article 62(a)(3) of the draft bill, serious copyright infringement is limited to two activities: the making accessible of “films that have not yet been released” and the making accessible of a “large amounts of copyrighted works”. In the Explanatory Report on the draft bill released in

should provide serious copyright infringers with two notifications and inform them of the legal situation and the potential consequences of non-compliance.²²³ If the users continue to infringe copyright despite these notifications, the courts will be authorized to disclose the offending user's identity to allow the copyright owner to initiate civil proceedings.²²⁴ Since criminal proceedings would no longer be necessary to obtain the user's identity, the draft bill does not criminalize users of P2P networks, particularly since the download for exclusive private use would remain permitted.²²⁵

Although the proposed changes to Article 62(a) could potentially solve the issue surrounding the *Logistep* decision, the draft bill tries to combat piracy by implementing additional measures “where they are most effective”—namely with providers who can act quickly and in a targeted manner.²²⁶ As a result, Article 66(b) includes a ‘takedown’ provision which resembles the U.S. DMCA notice-and-takedown process, but expands the process by a limited²²⁷ ‘stay down’ provision that requires service providers to prevent the same or other protected works from being made available on the same servers again. Furthermore, subprovisions (d) through (f) of Articles 66 introduce an “access block” provision, which enables copyright owners to request that

December 2015, the FDJP has not defined the term “large amount”, but has used the example in which a user of P2P networks has offered around 13,000 different copyrighted songs. See generally *Erläuternder Bericht zu zwei Abkommen der Weltorganisation für geistiges Eigentum und zu Änderungen des Urheberrechtsgesetzes*, Eidgenössisches Justiz- und Polizeidepartement (Dec. 11, 2015), available at <http://www.ejpd.admin.ch/dam/data/ejpd/aktuell/news/2015/2015-12-11/vn-berd.pdf> (hereinafter “Explanatory Report”).

²²³ Media Release, *supra* note 220.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ In the Explanatory Report, the FDJP clarified that the duty to assure a “stay down” is limited to technical and economic feasibility and proportionality, reasoning that a comprehensive surveillance would be unsuitable and not compatible with data protection and privacy laws. See Explanatory Report, *supra* note 222.

the Swiss Federal Institute of Intellectual Property block access to a foreign website, upon making a prima facie case that the website in question mainly contains infringing material. Like the ‘stay down’ provision in Article 66(b), the ‘access block’ provision seeks a balance between copyright law, due process, and free speech by allowing the affected foreign access provider to file a written objection within 30 days, and clarifying that objections will have a suspensory effect.

Although the FDJP mainly followed the recommendations of AGUR12 and included a total of three new measures to combat piracy, the draft bill tries not only to uphold the principle of proportionality, but further limits the applicability of the provisions to severe cases. Based on their conflicting interests, it is likely that neither the Internet community nor the copyright-based industries will be fully satisfied with the proposed compromise. Whether or not the amended Copyright Act will ultimately include these provisions, however, there are good reasons for the FDJP to steer a middle course.

E. Direct Democracy vs. Public Choice

1. Direct Democracy—An Overview

As previously illustrated, legislative lobbying is not unique to the United States. The vehemence with which copyright-based industries are currently trying to influence the development of Swiss copyright law is strongly reminiscent of the legislative process in the United States described by Litman. However, owing to the fact that Switzerland and the United States use vastly different systems of democratic governance, the similarities end where they begin.

At its beginning, the United States represented the only fully functioning democracy in the Western world.²²⁸ Today, most industrial countries have adopted a democratic model that allows

²²⁸ K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, Temple University of the Commonwealth System of Higher Education, 79 Temp. L. Rev. 821, 822 (Fall 2006).

citizens to participate in one way or another, and every continent contains countries with this form of government.²²⁹ As the number of democracies has grown, the “undemocratic” nature of the United States governmental system—such as the inherent prevention from electing Senators and electors for the Presidential election—has become increasingly apparent.²³⁰ Although some of these undemocratic elements have been removed from the system over time, the federal government still lacks a key component of a democracy: a system that allows the people to participate in the legislative process directly.²³¹ Despite its longstanding democratic tradition, the United States remains one of the few democracies in the world that has never held a federal referendum or mass electorate vote on a public issue.²³²

By contrast, European countries have a long history of referendums, both at the local and national level.²³³ This is particularly true for Switzerland. Like most other Western countries, Switzerland is a representative democracy in which citizens with the right to vote elect public officials who effectively represent the general public. But, unlike a majority of other countries, Switzerland employs several direct democratic instruments that allow the general public to intervene in the law-making process, not only on a federal level, but on all political levels, including twenty-six sovereign cantons and more than 2,000 autonomous municipalities.²³⁴ A detailed discussion of all these instruments would go beyond the scope of this Article; however,

²²⁹ *Id.* at 822 (quoting Steve Muhlberger, *The View of Tatu Vanhanen*, in *Chronology of Modern Democracy* (2003), available at <http://www.nipissingu.ca/departement/history/muhlberger/histdem/vanhanen.htm> (citing Tatu Vanhan, *The Emergence of Democracy: A Comparative Study of 199 States, 1850-1979* app. At 137-159 (1984))).

²³⁰ DuVivier, *supra* at 229 at 822.

²³¹ *Id.* at 823.

²³² *Id.* at 823.

²³³ *Id.* at 834.

²³⁴ Bruno Kaufmann, *How direct democracy makes Switzerland a better place*, *The Telegraph* (May 18, 2007), available at <http://www.telegraph.co.uk/news/1435383/How-direct-democracy-makes-Switzerland-a-better-place.html>.

two direct democratic instruments play an important role in the course of the ongoing revision of the Swiss Copyright Act: the constitutional right to hold an optional referendum and the statutory right to participate in the mandatory consultation procedure.

2. The Optional Referendum

Although the vast majority of federal laws and legislative acts in Switzerland enter into force without being contested in a popular vote, every citizen who is eligible to vote has the constitutional right to oppose any act of parliament by launching an optional referendum.²³⁵ Article 141(a) of the Federal Constitution of the Swiss Confederation states that any federal act²³⁶ shall be submitted to a vote of the People if, within 100 days of the official publication of the enactment, any 50,000 persons eligible to vote—or any eight cantons—request it.

Since the adoption of the Federal Constitution in 1848, Switzerland has held 180 optional referendums, in which a total of 102 legislative proposals were rejected by the voters.²³⁷ In the first half of 2016, Switzerland held optional referendums against the addition of a second tube to the existing Gotthard tunnel,²³⁸ the

²³⁵ The Swiss Authorities Online, *Referendums*, (last visited May 27, 2016), available at <https://www.ch.ch/en/referendum/>.

²³⁶ The optional referendum in Art. 141 applies to (a) federal acts, to (b) emergency federal acts whose term of validity exceeds one year, (c) federal decrees, provided that the Constitution or an act so requires, and (d) international treaties that are of unlimited duration and may not be terminated, provide for accession to an international organization, or contain important legislative provisions or whose implementation requires the enactment of federal legislation.

²³⁷ See, e.g. Federal Statistical Office, *Angenommene und verworfene Abstimmungsvorlagen, nach Typ* (last visited August 31, 2016), available at http://www.bfs.admin.ch/bfs/portal/de/index/themen/17/03/blank/key/eidg__volksinitiativen.html.

²³⁸ Voted on Feb. 28, 2016. The referendum against the addition of a second tube to the Gotthard tunnel was rejected by 57% of the People. See *Bundesgesetz über den Strassentransitverkehr im Alpengebiet (Sanierung Gotthard-Strassentunnel)*, Schweizerische Eidgenossenschaft Confederation

proposed revision of the Federal Asylum Act,²³⁹ and the proposed revision of the Federal Act on Medically Assisted Reproduction,²⁴⁰ all of which were initiated by public interest groups but were rejected by a clear majority of voting citizens.

As these examples suggest, the optional referendum is an instrument primarily used to challenge legislative decisions relating to highly controversial topics. Allowing the general public an opportunity to voice their opinions in these often-emotional questions is a core element in Swiss politics.

Despite their many advantages, however, optional referenda are accompanied by at least two shortcomings. First, the power of referenda is limited in the sense that they are able to destroy, but not to generate, legislative proposals and solutions. This problem is comparable to the SOPA protests. The opponents of SOPA had a clear goal that was easy to deliver, and even easier to follow by the general public: stop the bill.²⁴¹ As demonstrated by the ultimate success of the SOPA protests, preventing legislation is much easier than enacting it.²⁴² Further, as a result of their accessibility, optional referenda can also be invoked by smaller groups that might be perceived as controversial, which

suisse Confederazione Svizzera Confederaziun svizra (Feb. 28, 2016), *available at* <http://www.bfs.admin.ch/bfs/portal/de/index/themen/17/03/blank/key/2016/014.html>.

²³⁹ Voted on Jun. 5, 2016. The referendum against the revision of the Federal Asylum Act was rejected by 66.8% of the People. *See Abstimmungen – Indikatoren*, Schweizerische Eidgenossenschaft Confederation suisse Confederazione Svizzera Confederaziun svizra (Jun. 5, 2016), *available at* <http://www.bfs.admin.ch/bfs/portal/de/index/themen/17/03/blank/key/2016/025.html>.

²⁴⁰ Voted on June 5, 2016. The referendum against the revision of the Federal Act on Medically Assisted Reproduction has been rejected by 62.4% of the People. *See Abstimmung vom 5. Juni 2016: Fortpflanzungsmedizingesetz*, Schweizerische Eidgenossenschaft Confederation suisse Confederazione Svizzera Confederaziun svizra (Jun. 5, 2016), *available at* <http://www.bfs.admin.ch/bfs/portal/de/index/themen/17/03/blank/key/2016/024.html>.

²⁴¹ *Id.*

²⁴² Lev-Aretz, *supra* note 14 at 243.

requires the implementation of safeguards that prevent the optional referendum from being abused and the legislative process from being blocked by recurring challenges. This is where the mandatory consultation procedure comes into play.

3. The Consultation Procedure

Despite broad direct-democratic opportunities to intervene in the lawmaking process, only around seven percent of all federal legislative decisions in Switzerland actually lead to a referendum.²⁴³ The low ratio of legislative challenges is due to a process that not only seeks parliamentary compromise, but reduces the risk of referenda²⁴⁴ by incorporating into the process all political forces within the country that are legally permitted and capable of launching them.²⁴⁵

The incorporation of such forces happens primarily during the pre-parliamentary phase of the legislative process, which is divided into two stages. In the first stage, the Federal Council nominates an expert committee—such as the working group AGUR12, in the case of the revisions to the Copyright Act—that consists of experts and participants who represent the stakes of affected interest groups.²⁴⁶ After the committee’s report, the first draft of the bill is sent to the cantons, the political parties, and relevant interest groups in order to collect their views.²⁴⁷ The process of sending the draft bill to parties beyond the administrative body for the purpose of commenting is referred to

²⁴³ Wolf Linder, *Das politische System der Schweiz*, in Wolfgang Ismayr, *Die politischen Systeme Westeuropas* 455, 467 (4th ed. 2009).

²⁴⁴ A good example for such a risk reducing compromise is the newly proposed Article 62(a), limiting the duty to notify and de-anonymize users to cases of “serious” copyright infringement. *See supra* at Part 4.5.

²⁴⁵ Linder, *supra* note 243.

²⁴⁶ Fritz Sager & Christine Zollinger, *The Swiss Political System in Comparative Perspective in SWITZERLAND IN EUROPE—CONTINUITY AND CHANGE IN THE SWISS POLITICAL ECONOMY* 37 (Christine Trampusch, André Mach ed., 2011).

²⁴⁷ *Id.*

as the ‘consultation procedure’. Though time-consuming, this procedure is an effective instrument in enabling the general public—and interest groups that lack the budget and network for strategic lobbying—to participate in the federal legislative process, because it ultimately allows anyone subject to the law to express an opinion.

Despite its importance and storied history as a tradition of Swiss governance, the consultation procedure in Switzerland was not statutorily regulated until 2005, when the Federal Act on the Consultation Procedure (“CPA”) was enacted.²⁴⁸ According to Article 2 of the CPA, the purpose of the consultation procedure is to allow the cantons, political parties, and interest groups to participate in the shaping of opinion and the decision-making process of the Confederation by providing information on material accuracy, feasibility of implementation, and public acceptance of a federal project.²⁴⁹ While the official invitation to participate in the consultation procedure is limited to the parties mentioned above, Article 4 of the CPA clarifies that anyone and any organization may submit an opinion. Once an opinion has been submitted, it must be acknowledged, considered, and evaluated by the authority in charge of conducting the consultation procedure, which is either the Federal Council or the Federal Department that proposes the bill.

According to the Federal Council’s dispatch on the revision of the CPA in 2013, these limited rights do not confer a legal entitlement to being substantively considered in the legislative decision.²⁵⁰ Since the revision in 2013, however, the authority in charge of the procedure is bound to summarize the results of the consultation procedure in a report that responds to all submitted opinions and summarizes their content clearly and without bias.²⁵¹ Further, all submitted opinions must be made publicly available by permitting their inspection, providing copies, or publishing them in

²⁴⁸ Botschaft zur Änderung des Vernehmlassungsgesetzes (Botschaft) (Nov. 6, 2013), BBl 8880 (2013).

²⁴⁹ Consultation Procedure Act, *supra* note 12.

²⁵⁰ Botschaft, *supra* note 248 at 8905.

²⁵¹ *Id.* at 8906.

electronic form.²⁵² As a consequence, the consultation procedure not only allows engaged citizens to be heard, but also provides interested citizens a summary of all arguments made both against and in support of the proposed legislation.

4. Direct Democracy in Application

Granting direct democratic tools such as the consultation procedure is not without consequences. A study conducted in 2006 showed that the pre-parliamentary phase stage in Switzerland lasts an average of three years, followed by a parliamentary phase of approximately another year.²⁵³ Assuming that legislators are generally interested in rapidly bringing their projects to a close, it is justifiable to ask whether the benefits of broader public participation effectively offset the disadvantages affiliated with legislative delay. But while answering this question largely comes down to a matter of priorities, it would be wrong to assert that the Swiss legislature has been inactive in recent years. Bearing in mind that copyright legislation is a highly complex task that is further complicated by the divergent interests of the parties involved, it should come as no surprise that the ongoing revision of the Swiss Copyright Act does not constitute an exception to the excessively long duration of federal legislative projects.

Following the proposals of the working group AGUR12, the Federal Council mandated the FDJP in June 2014 to prepare a draft bill by the end of 2015.²⁵⁴ The draft bill was submitted on December 11, 2015 and was open for public consultation until March 31, 2016.²⁵⁵ Based on their results, the two chambers of the federal parliament will separately debate both the draft bill and the arguments brought forward during the consultation procedure. Once both chambers agree on a joint version, the parliament will pass a final version of the bill, which will be subject to the optional

²⁵² Consultation Procedure Act, *supra* note 13, art. 9(2).

²⁵³ Pascal Sciarini, *Le processus législatif*, in *Handbuch der Schweizer Politik* 501 (2006).

²⁵⁴ Media Release, *supra* note 220.

²⁵⁵ *Id.*

referendum.

Despite this clear roadmap, the International Intellectual Property Alliance (“IIPA”) has long recommended placing Switzerland on the USTR’s Watch List, arguing that Switzerland “makes no claim that it lacks the resources or technological expertise to make swift change.”²⁵⁶ In the IIPA’s view, the “fact that online piracy continues to escape any liability in Switzerland can only be attributed to a reluctance on the part of Swiss leadership to live up to its obligations under international agreements.”²⁵⁷

While the IIPA’s criticism seems to go only to the slowness of Switzerland’s system, its choice of words ultimately reveals a lack of understanding or sympathy for Switzerland’s direct democratic approach. That Switzerland has not made a ‘swift change’ has nothing to do with resources or technological expertise; rather, it is based on the reality that proper policymaking in a functioning democracy requires a spirit to compromise and the willingness to take the time needed to find a proper balance of interests. Since the deliberations between the copyright owners and the general public have not yet revealed a consensus, the policy change requested by the IIPA is much more than a matter of mere implementation. The legislature in Switzerland understands that the functioning of a democratic state governed by the rule of law is not measured by the substance of the law, but rather by the procedure that leads to its enactment.

Unfortunately, the USTR recently decided to follow the IIPA’s unilateral requests, and placed Switzerland on the Watch List in 2016. In its Special 301 Report, the USTR justified the decision as follows:

“The United States welcomes the steps taken by Switzerland in response to this serious concern [...]. However, more remains to be done and the United States continues to encourage the Swiss government to move forward expeditiously with concrete and effective

²⁵⁶ IIPA, *supra* note 5.

²⁵⁷ *Id.*

measures that address copyright piracy in an appropriate and effective manner, including through legislation, administrative action, consumer awareness, public education, and voluntary stakeholder initiatives.”

By putting Switzerland on the Special 301 Watch List, the U.S. government has demonstrated its eagerness to observe the revisions to the Swiss Copyright Act. Assuming that the U.S. is acquainted with the legislative process in Switzerland, however, it is unclear what value such encouragements are supposed to contribute to the current debate. As a result of its direct democratic instruments, the federal legislative process in Switzerland is to a large extent immune from being influenced by foreign authorities. While applying soft pressure might work on a government-to-government level, the Swiss public's opinion will at most be negatively affected by reading about admonitory commentary from the other side of the Atlantic. Unsurprisingly, the Head of the Federal Institute of Intellectual Property recently declared that further procedure with regard to the ongoing revision will depend on the result of the consultation procedure, and not on the placement on an American Watch List.²⁵⁸ Thus, instead of criticizing Switzerland for seeking a workable compromise among its citizens, the United States government might be well-advised to shift its focus on the advantages of the Swiss system, and consider whether they might in fact help solve some of its own issues.

IV. LEARNING FROM SWITZERLAND

In a paper on the policymaking dynamics of ACTA and SOPA/PIPA, Annemarie Bridy draws on German sociologist and philosopher Jürgen Habermas' discourse theory of procedural democracy. She concludes that copyright policymaking requires

²⁵⁸ Jon Mettler, *Urheberrecht: Neuer Konflikt mit den USA in Sicht*, Berner Zeitung (May 14, 2016), available at <http://www.bernerzeitung.ch/ausland/amerika/Urheberrecht-Neuer-Konflikt-mit-den-USA-in-Sicht/story/21383943>.

both informal and formal mechanisms for allowing members of the public to “talk back” to the government.²⁵⁹ Recognizing that political compromise is necessary, Bridy argues that a democratically legitimate compromise cannot be reached in an “epistemic vacuum where corporate interests are the primary drivers of policy formation, while other concerns are viewed as irrelevant or incidental.”²⁶⁰ To secure democratic legitimacy in the policymaking process, the public must be able to participate directly, which requires not only a right to know, but also a right to be heard.²⁶¹ Building on this groundwork offered by Bridy, this Article tries to propose a solution that might enhance the democratic legitimacy of the legislative process in the United States.

The strong public opposition which ultimately led to the defeat of SOPA and PIPA emphasizes the importance of counterbalancing the influence of lobbyists and special interest groups in the legislative process. As such, Congress should consider the events surrounding SOPA/PIPA as a valuable lesson in policymaking for three distinct reasons. First, they illustrate that the exclusion of certain groups, such as engineers and the legal community, from the lawmaking process—intentional or unintentional—can have drastic consequences for the success of legislation. Second, the overwhelming public opposition that materialized during the SOPA/PIPA protests illustrated that the public, once sufficiently informed, demands an opportunity to be heard and will not refrain from expressing its disapproval of legislative proposals by signing petitions, sending emails, and making phone calls to representatives. Third, and most importantly, Internet companies such as Facebook, Twitter, and Google have not only become increasingly active in the lobbying field,²⁶² but have also demonstrated their ability to successfully

²⁵⁹ Bridy, *supra* note 93, at 163

²⁶⁰ *Id.* at 162

²⁶¹ *Id.* at 163 (quoting Habermas, *supra* note 1 at 318).

²⁶² Facebook’s lobbying budget for 2015 was nearly 10 million USD, while Google spent nearly 17 million USD during 2015. See Brian Fung, *This one thing could hurt Apple’s case in Washington*, The Washington Post (Feb.

shape public opinion.²⁶³

As previously discussed, the Swiss legislature has successfully narrowed the susceptibility of its legislative process to lobbying by enacting the Federal Act on the Consultation Procedure in 2005. The CPA fulfills two equally important functions. While the Act allows each citizen or interest group to submit their opinions in the drafting phase, it also ensures that the opinion's content is summarized in a clear and unbiased manner and that all such summaries are made available to the public.

The implementation of a public consultation procedure in the federal legislative process in the United States would most likely have prevented the SOPA/PIPA debacle. A mandatory consultation procedure based on the Swiss legislative model would have ensured that specialists were heard, eliminating the issues that arose out of the fact that no single technical expert testified regarding SOPA at the House Judiciary Committee. By taking the specialists' contributions into account, the drafters of the bill could have met their concerns by adapting or deleting the most controversial provisions. Instead, the public's unheard disapproval culminated in the SOPA protests, which had unfortunately become the general public's only real chance to be heard in the legislative process. A public consultation procedure would have empowered the Internet community to voice its opinion in a concise manner and so indicated to Congress an overall lack of acceptance that might possibly have been cured by weakening the draft.

Most importantly, the consultation procedure would have ensured that the general public had access to an unbiased summary of all arguments that have been made in support and against the proposed legislation. Following the events surrounding the SOPA protests, proponents of the bills argued that Wikipedia, Google, and others manufactured controversy by "unfairly equating SOPA with censorship" and crossed the "ethical boundary between the neutral reporting of information and the presentation of editorial

25, 2016), available at <https://www.washingtonpost.com/news/the-switch/wp/2016/02/25/apples-most-glaring-weakness-in-washington/>.

²⁶³ Lev-Aretz, *supra* note 14 at 239.

opinions.”²⁶⁴ Regardless of whether these allegations were justified, they raised an important point. Due to its accessibility, the Internet today plays a pivotal role in the procurement of information. While the Supreme Court’s holding that the Internet must be awarded the full protection of the First Amendment is to be welcomed,²⁶⁵ the widespread lack of accuracy and objectivity on social media platforms and other websites can make it difficult for individuals to form a balanced opinion. For a functioning democracy, access to unbiased information is vital. The implementation of a public consultation procedure would undoubtedly help this cause, not only by creating a platform to share information, but also by providing an impartial summary of all opinions advanced to the general public.

A mandatory consultation procedure for federal legislative proposals would further prevent Congress from passing controversial legislative proposals such as CISPA (or CISA) as part of an omnibus bill. Although a detailed analysis of the deficiencies of omnibus legislation would go beyond the scope of this Article, such legislation would naturally run afoul of any policymaking process based on Jürgen Habermas’ ideas of democratic legitimacy.

CONCLUSION

Due to the lack of consensus as to the definition of copyright infringement in the United States, the current international framework does not provide an effective solution to copyright infringement caused or facilitated by websites outside of the United States’ reach. The anti-piracy bills SOPA and PIPA, introduced in 2011, were intended to address this problem on a national level. Instead, these led to a public protest so powerful that it effectively brought copyright legislation in the United States

²⁶⁴ Cary H. Sherman, Op-Ed., *What Wikipedia Won’t Tell You*, New York Times (Feb. 7, 2012), available at <http://www.nytimes.com/2012/02/08/opinion/what-wikipedia-wont-tell-you.html>.

²⁶⁵ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

to a halt. While copyright-based industries have successfully influenced U.S. copyright legislation since the enactment of the 1909 Copyright Act, the SOPA protests brought to light a fierce resistance from various other interest groups. As a result of this resistance, the proposed votes on the bills have been postponed until a wider agreement on a solution can be found.

As explained in Part II, it is likely that the events surrounding SOPA and PIPA will remain unique. Nevertheless, the protests exposed the shortcomings of the legislative process in the United States. Combined with the divergent interests between the parties affected by copyright law, the lack of public inclusion renders a workable solution unlikely. Presuming that compromise is the only way to break this political deadlock, this Article recommends a solution using the Swiss federal legislative process as a model. Although Switzerland's mandatory procedure slows the legislative process considerably, the inclusion of citizens subject to the law endows the legislative process with the required democratic legitimacy.

Recognizing that the eventual legislative proposal cannot consider each and every opinion expressed, the consultation procedure nevertheless allows engaged citizens to be heard and provides interested citizens a summary of all arguments that are being made both in support and against the legislative proposal. The procedure further ensures that experts can be heard by the legislator. The earlier the experts' voices are heard, the bigger the odds that a controversial legislative proposal can be adjusted in time to minimize its negative impact. Last, but not least, the consultation procedure serves as an effective counterbalance to prevent special interest groups from asserting undue influence over the legislative process. Thus, the procedure enhances public acceptance of copyright law and policy.

Ultimately, this Article argues that the implementation of a public consultation procedure based on the Swiss model would: (1) make federal copyright legislation less susceptible to lobbying and thus prevent the inclusion of infeasible and ill-considered provisions; (2) enhance the U.S.'s democratic legitimacy and overall acceptance of copyright legislation by allowing citizens to

participate in public policymaking; (3) inform the general public about the actual consequences of the proposal by providing an overview of the opinions advanced in its support or opposition; and (4) ultimately help to break the existing standoff in copyright policymaking by creating a compromise that properly balances the diverging interests of copyright owners and the general public.

PRACTICE POINTERS

- With the exception of computer programs, the download of copyrighted works for private use does not constitute copyright infringement in Switzerland and is protected by the so called private use exception. The upload of copyrighted works to unknown persons, however, is not covered by this exception.
- The Federal Supreme Court in Switzerland considers IP addresses as personal data protected by the Federal Act on Data Protection, provided that they relate to an identified or identifiable person. This means that, without consent, IP addresses cannot be processed in order to de-anonymize users of peer-to-peer networks.
- The Swiss Copyright Act is currently under revision and will presumably be enacted within the following two years. As such, attorneys with Swiss interests should not base long-term advice on provisions under review

