

BCC response to the Trade with Switzerland: call for input

Thinking about potential future trade negotiations between the UK and Switzerland, which of the following trade-related areas best describe the provisions of the current trading relationship that the Government should aim to keep the same?

Upcoming trade negotiations with Switzerland, notably the UK's 8th largest trading partner, should prioritize reviewing and where possible, strengthening intellectual property (IP) related considerations. This is especially critical given that intellectual property represents 20% of Swiss export and 15% of the Swiss import economy. Furthermore, over the course of 2021, IP was included in the top 5 service types exported from the UK to Switzerland representing a cumulative value of £748 million (or 6.2% of total exports).^{1 2}

Switzerland is a signatory to many key international copyright treaties including but not limited to:

- The Berne Convention for the Protection of Literary and Artistic Works.
- The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).
- Convention Establishing the World Intellectual Property Organization (1967).
- The WIPO Copyright Treaty (WCT).
- The WIPO Performances and Phonograms Treaty (WPPT).

Defending current international standards, such as the Berne Convention's Three Step Test, and ensuring that new FTAs do not undermine, or dilute existing IP rights is of paramount importance as the UK embarks on these new conversations. Care should also be taken to discuss provisions that could be made to support the effective enforcement of existing rights – for example by continuing to promote good practice and increasing awareness of copyright related matters. We explore these opportunities for improvement further in the following section.

In addition, following amendments to its 1992 copyright act, Switzerland has signed on and ratified both the Beijing Treaty on Audiovisual Performances and the Marrakesh Treaty to

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/108304/5/switzerland-trade-and-investment-factsheet-2022-06-17.pdf

² ONS, (2021). UK trade in services: service type by partner country, non-seasonally adjusted (Accessed: 25th November 2021)

Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.^{3 4} Given that the UK government intends to implement and ratify the Beijing Treaty, this is an opportunity to engage more closely with Swiss counterparts regarding the opportunities and challenges they faced throughout the process.

³ https://www.wipo.int/treaties/en/notifications/beijing/treaty_beijing_32.html

⁴ https://www.wipo.int/about-wipo/en/dg_gurry/news/2020/news_0009.html

Which of the following best describe the areas of the UK-Switzerland trading relationship that the UK government should consider changing or improving during future negotiations?

Extending the terms of protection for photographs

We recognise that there have been several recent amendments to the Swiss Copyright Act which came into force in 2020 which have been positive. This should be recognised and where possible, expanded to be in line with UK copyright standards. For example, the amended Act extends the protection to all "photographic reproductions and reproductions of three-dimensional objects created by similar methods, irrespective of any individual character". However, while this is a welcomed development, the current term of protection for photographs only covers 50 years from the date of their creation in contrast with the 70-year term afforded to literary or fine art works after the death of their author. These terms should at the very least match the UK's copyright duration to prevent any erosion of IP rights for rightsholders and therefore is a matter which needs to be urgently addressed.

Advocating for the artist resale right

In addition, although Switzerland is a signatory to the Berne Convention, it has not implemented the artist resale right (ARR) in its national laws.⁵ Traditionally, unlike other creators, such as musicians, screenwriters, and authors, artists only earn money from the initial sale of their works. However, art is often actively traded on the secondary market and can substantially increase in value over time which risks creating a situation where the originator of a creative work is left unfairly recompensated. The ARR was developed to address this gap and ensures that artists benefit from the subsequent economic value creation of their work.

In the UK, legislation and guidance have been implemented to provide artists with a royalty when their copyright protected works is resold through art market professionals such as galleries, auction houses and art dealers. However, even though there have been at least four attempts by Swiss members of the parliament to introduce it, there is no ARR or equivalent law in Switzerland.⁶ This means that when UK artists' works are purchased on the secondary market in Switzerland, these sales do not result in a payment for the artist and no royalties are returned into the UK economy. It is worth emphasising that the ARR exists in 80 countries worldwide, and the UK's usage of it is by no means an exception on the global market. Encouraging Switzerland to include the ARR in future Swiss Copyright amendments would bring it in line with globally recognised standards and current commercial practices in the UK art market.

Addressing complexities and barriers to enforcement

⁵ The ARR was introduced as an optional provision in article 14ter of the Berne Convention for the Protection of Literary and Artistic Works (1948).

⁶ <http://www.proteuslaw.eu/index.php/news/44-the-visual-artists-resale-right-arr-an-overview-of-its-application-in-the-eu-and-in-switzerland>

Since its departure from the EU, the UK is no longer a signatory to the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1988. While the UK did apply to (re)join the Lugano Convention in April 2020, the European Commission formally blocked this via a communication to the Swiss Federal Council, in its role as Depositary of the Convention.⁷ Consequently, individual creators and organisations who obtained civil or commercial judgments in either country, and who wish to enforce judgments in the other, will need to consider the domestic rules of each jurisdiction which results in a more complex proposition than the process that was previously permitted under the Lugano Convention. Even though civil judicial cooperation between both countries remains regulated by the Hague Conventions, this can pose additional challenges to UK parties seeking to assert their rights in Switzerland.

In regard to copyright, unless a dispute is based on a contractual matter where the contract provides for pre-agreed non-enforcement options and/or dispute resolution mechanisms, holders of intellectual property rights can enforce their rights in civil court proceedings. That being said, the costs of enforcement proceedings in Switzerland can vary depending on the complexity of the case and the forum in which it is filed given that the 26 cantonal courts each operate under their own court tariff system.⁸ It can be challenging for rightsholders to navigate this process.

Furthermore, while there is no limitation period for actions to cease and desist from infringement, in Switzerland these rights can be considered forfeited if the copyright holder waits for a long time before acting on knowledge of the infringement. A claim for infringement can be declared unenforceable by Swiss courts if the claimant has knowledge of the infringement but does not act on this knowledge for a long period of time without good reasons (acquiescence). This places a high and unfair burden on creators from both a time and financial perspective to pursue enforcement claims.

Piracy

As the British Copyright Council has outlined in past responses, the creation and consumption of online works continues to increase and is an important creative and economic driver of copyrighted works. However, there is a need to ensure that both domestic and international user-upload platforms and digital services are clear on their requirement to acquire and procure licences for the use of copyrighted works (such as illustrations, images, music, or poems for example) offered by their platforms and services.

Furthermore, piracy and unauthorised uses of copyright works are rife and increasing in many countries including Switzerland which, until recently, was listed on the United States Special

⁷ [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)698797](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)698797)

⁸ Based on the Swiss Civil Procedure Code, each of the 26 Swiss cantons has designated a court to handle IP disputes as the sole instance (in the cantons of Zurich, Bern, Aargau and St. Gallen, “commercial courts” have jurisdiction). Individual courts decide on the procedural costs in its final decision.

301 Report.⁹ This is due inter alia to the scale of criminal activities, the fragmentation of the digital landscape, and the reality that many legal systems do not have enough resources to effectively enforce IP rights, and current penalties are too low to act as a meaningful deterrent. All these elements pose an ongoing danger to the creative sector, and it is critical that they be discussed as the UK continues to develop its ongoing trading relationship with Switzerland given that online and broadcast piracy remains a challenging copyright enforcement issue in Switzerland (as outlined in the section above).

It is however worth noting that under the new Article 39d of the Swiss Copyright Act, hosting providers now have a duty to prevent a protected work from being made publicly available again if:

- (1) The work was already made available in the past on the same hosting service
- (2) The provider was made aware of the copyright infringement
- (3) The hosting service has "created a particular risk for such infringements, notably through a technical solution or an economic orientation that favours infringement"

While Article 39d is a step in the right direction, the "stay-down" obligation proposed is not absolute and could be strengthened. For example, currently, hosting providers must only take measures reasonably required from a technical and economic viewpoint while considering the potential risk of infringements (article 39d, para. 2). The Copyright Act also does not include content-blocking obligations applicable to access providers since this was considered to form an unnecessary restriction to digital trade that access providers could not bear.¹⁰ This undermines legal incentives to enact structural barriers such as IP blocking, DNS blocking or URL blocking which would cripple the large-scale content piracy found in Switzerland.¹¹

Furthermore, even with Article 39d, it is worth underlining that the download of copyrighted works remains legal under the amended Swiss Copyright Act, irrespective of whether the source of the download has been authorized by the right holder. Digital copyright infringement is considered private use under the Swiss exception regime. As a result, there is little incentive for consumers to shift to shift their behaviors away from illegally downloading/streaming films or music for private use on "peer-to-peer" sharing sites without the copyright-holder's consent towards seeking legitimate content providing sources. This poses a large-scale existential challenge to creators and rightsholders and a committed investment in consumer awareness campaigns, public education, and voluntary stakeholder initiatives to deter the consumption and distribution of pirated content is needed.

⁹ The 301 Report is prepared annually by the Office of the United States Trade Representative (USTR) to identify countries which do not provide "adequate and effective" protection of intellectual property rights or "fair and equitable market access to United States persons that rely upon intellectual property rights."

¹⁰ This view was substantiated in a Swiss Federal Supreme Court (FSC) 2019 ruling which concluded that internet access provider Swisscom could not be obliged to block copyright infringing content unlawfully uploaded by third parties on online portals (FSCD 4A_433/2018). Therefore, under Swiss law, access providers cannot be held jointly liable for copyright breaches committed by third parties over the internet.

¹¹ https://www.swissinfo.ch/eng/downloading-and-uploading_what-the-new-swiss-copyright-law-means-for-consumers-of-pirated-online-content/45305402

Copyright and innovation

Lastly, we are heartened by the UK's recent "declaration of intention" regarding its aim to have greater collaboration with Switzerland on IP matters.¹² There is an opportunity to leverage these trade negotiations to continue building on a mutual exchange of information which could be used to develop public awareness programmes on intellectual property rights aimed at different population groups; conduct joint training activities, seminars, workshops and programmes on intellectual property; deploy expert industry knowledge regarding matters linked to copyright and innovation especially in the areas of artificial intelligence.

On the latter point especially, we must stress that promoting and encouraging innovation cannot take place through the erosion of rights of creators and copyright holders which is a matter we cover in greater detail in our recent response to the IPO's call for evidence on AI which can be accessed here:

<https://www.britishcopyright.org/wp-content/uploads/January-2022-BCC-IPO-AI-Consultation-response-form.pdf>

Conclusion

In summary, the British Copyright Council is unequivocal in its belief that IP Chapters in all FTAs should include provisions which promote transparency, good governance and support the effective management of copyright across different national jurisdictions. A robust and functioning IP system is crucial and must be comprised of several building blocks including legislation, a transparent registration system, a clear and consistent judicial system, and widespread education and public awareness. In line with our concerns outlined above, the UK should use the opportunity offered by upcoming negotiations to encourage Switzerland to:

- Uphold the right of creators, copyright owners or exclusive licensees to file a claim for copyright infringement across its cantonal court system.
- Affirm that current law does not permit copying from unauthorized sources.
- Implement adequate civil and criminal enforcement tools such as access blocking.
- Increase liability for all platforms and services that facilitate, encourage, and profit from infringement.
- Engage service and access providers in the fight against online piracy.
- Educate the Swiss public on copyright

¹²<https://www.gov.uk/government/news/greater-collaboration-between-the-uk-and-switzerland-on-ip>