When the drummer says "no"

Today, one week ago, the Advocate General, rendered its opinion in the infamous case of Buma/Stemra, the Dutch collecting rights society, against KaZaA, the originally Dutch file sharing company. The Advocate General advises the Supreme Court of The Netherlands how to decide its cases. Reaching his conclusion to deny Buma/Stemra´s claims, he writes the following:

"Even though new technologies may (temporarily) be to the detriment of certain professions and industries, legislators and judges alike have been reluctant – in my opinion rightfully so -- to outlaw these technologies or hamper their development. At the danger of risking the objection that any comparison is flawed, I would like to note that the introduction of the railway was to the detriment of the shipping industry. But also this: phonographic music (Edison c.s.) and the radio were to the detriment of small individual performing artists and musicians. The composers (assembled in Buma/Stemra), the star phonographic performers and the phonographic industry benefited (enormously) from these new technologies. One may appreciate these benefits, although I shed a tear thinking of the fate of the small street and bar musicians as a result hereof. No legislator or judge, however, took interest in their fate."

This sounds even better in Dutch, but I will spare you that.

The opinion of the Advocate General is the strongest in a series of blows the music industry incurred in the last two years. Earlier the Amsterdam Court of Appeals did not consider the offering of the decentralized KaZaA software unlawful towards the music industry (Buma/Stemra), and a similar ruling was rendered by District Court of California in the Grokster case. The recent change of focus from peer-to-peer technology companies to individual users of the technology seems to indicate that the music industry has accepted its losses. Law suits against individuals are being prepared in numerous countries throughout the world, including the U.S., Germany, Spain, The Netherlands and Denmark.

The tactics that the music industry engages in its pursuit of individual users of peer-to-peer technologies is one of "shock and awe". The music industry is hoping that one big blow will stop individuals from sharing music via peer-to-peer technology. So far these scare tactics seem to be successful. The use of KaZaA has decreased with 41 percent, recent statistics

show. However, a realistic view of life in general teaches us that it will be impossible to outlaw peer-to-peer use altogether.

More litigation is not the solution to the problem. For one, it's simply impossible to police the millions of users of peer-to-peer technologies. In addition, the cases tried will be difficult to win. Privacy concerns are mounting when the music industry is prying into the computers of individual consumers. In Belgium, IFPI received a stern warning from the Ministry of Justice and the Privacy Board when word came out that it was systematically collecting data from Napster users, who were permanently under the surveillance of IFPI. Finally, litigation is a bad idea from a public relations point of view. Already, the RIAA accidentally went after a 66 year old woman, who did not even own a computer.

The difficulty of a litigious approach is the result of the decentralized nature of the peer-to-peer system. We have built our copyright laws for a world with commercial and centrally organized intermediaries that engage in copyrighted acts: the reproduction, distribution and making available of copyrighted works. Printers, theatre owners, movie houses and broadcasting companies are reasonably easy to control. The existence of these central, commercial entities in the distribution chain of copyrighted works allow copyright owners to enforce their rights. In the analogue world consumers simply consume copyrighted works; they read books, listen to music and watch movies. This is not the case in a peer-to-peer environment. Consumers have changed into distributors of copyrighted material. As such, the use of peer-to-peer technologies is more an enforcement issue than a copyright issue.

As said, the answer to the problem is not more litigation. Many have suggested that the only way out for the music industry is to allow a legitimate alternative to compete with the current "free" peer-to-peer systems. In 2000 Forrester Research, an Internet research company, wrote that "[n]either digital security nor lawsuits will stop Internet theft of content. Regardless of whether they consider Napster right or wrong, traditional publishers must focus on beating Napster at its own game. They must create compelling services with the content consumers want, in the formats they want, using the business models they want."

A legitimate alternative has a number of advantages. First and foremost, artists and other rights holders get paid. Second, consumers will learn to understand that it is "normal" that

copyright owners are compensated for the use of their work. Third, it will decriminalize the millions of peer-to-peer users worldwide.

If most of us seem to agree that the best way to deal with the problem is to create an alternative service, where is the? The Internet, heralded as the celestial jukebox ten years ago by Paul Goldstein, a copyright law professor, still has very little to offer consumers who are willing to pay for the use of good quality music. The success of Apple´s iTunes shows that viable business models do exist and that it is possible to compete with "free". Why is there not a peer-to-peer system available, through which artists get paid?

We are here today to discuss Internet licensing. It is my assumption that the music industry is not so much unwilling, but simply *unable* to license its entire music catalogue for peer-to-peer purposes. Peer-to-peer licensing involves a multiplicity of rights compared to the licensing in an analogue environment. Moreover, many owners of analogue rights are uncertain whether they also own the digital rights. Together with a multiplicity of rights, there is a multiplicity of rights owners: music composers, lyricists, recording artists, music publishers, record companies, assignees, heirs. Consider that the rights holders involved may vary from country to country. Under these circumstances it is practically impossible to create a one stop shop for peer-to-peer licensing. What if all rights holders concerned agree that licensing is a good thing, but the drummer of the band says "no" to licensing?

History suggests that my assumption is correct. Both Napster and KaZaA attempted to obtain licenses from the music industry, but have failed. Many people tend to forget that it was KaZaA who sued Buma/Stemra for their breach of contract / negotiations, and that the Buma/Stemra claim was merely a reaction to KaZaA´s claim. For more than a year, KaZaA tried desperately to obtain a license for its users for their sharing of music. After cumbersome negotiations, Buma/Stemra was only able to offer a license to the users of KaZaA in The Netherlands. That is not very helpful if the technology is offered via the Internet.[1]

Is there a way out? Advocate General Verkade hints at a solution in its opinion. First, he recalls that new technologies, such as photocopiers and audio cassette players, have never

[1] Interestingly, it appeared that Buma/Stemra´s sister organizations seemed to disagree about whether the international reciprocity Santiago agreement covered peer-to-peer licenses.

been outlawed. However, he notes, their introduction was followed by compensation models introduced by the *legislature*.

If the problem is caused by the decentralized nature of peer-to-peer use, one must again create centrality in the distribution chain. Instead of holding consumers liable for their use of copyrighted works, the legislature must revert liability to a commercial, central body in the peer-to-peer distribution chain.

A similar model is in place with regard to private copying, here in Canada and in many European countries. Since copyright holders are unable to enforce their rights in the privacy of the homes of millions of consumers who copy for their private use, legislatures have made manufacturers or importers of blank CD recordables liable to compensate copyright holders for their loss of income. Surely, the manufacturer is not engaged in any acts relevant to copyright law: he does not reproduce, distribute of make copyrighted works available to the public. Nevertheless, unlike the consumers that do perform such acts, he is a commercial, central body that is able to organize the collection of a fair remuneration to the copyright holders.

Who should be liable for the collection of remuneration? There are a number of possibilities. One can think of a levy on copying equipment, such as CD burners, or the devices for storage (blank CDs, hard disks). Alternatively, one can hold service providers, such as Internet access providers or peer-to-peer software companies, responsible for the collection of fair remuneration.

In fact, the latter is precisely what the music industry attempted in holding the manufacturers of peer-to-peer technologies liable for the infringing activities of its users. In the model I propose, however, the technology itself will not be forbidden. The model will introduce a levy system or a system of compulsory licensing from which both rights holders and consumers will benefit. Needless to say that the music industry will no longer have the right to say "no" to licensing.

When the Amsterdam Court of Appeal ruled that the offering of KaZaA should not be considered unlawful towards Buma/Stemra, the music industry was keen to describe The Netherlands as some backward, off shore country inhibited by pirates; a country were they

allow sex (prostitution), drugs and peer-to-peer. Indeed, we have created a controlled and carefully regulated environment for other aspects of life that somehow seem to be irresistible to the human species. This is also the best way out of the current situation. If you are unable to effectively police certain acts, its best to allow them in a controlled environment. If you are unable to beat them, license them.

Ottawa, 11 October 2003

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