**P2P and privacy: lessons from history**

Some sixty years ago, Grundig, the German electronic equipment manufacturer, introduced a revolutionary new device: the magnetophone. With this analogue recording device one could record music from a gramophone player or from radio broadcasts. With the growing popularity of the magnetophone, concerns mounted about diminishing sales with music copyright holders. In 1955, the German collecting rights society GEMA decided to bring suit against Grundig, despite the fact that there was no actual proof that the use of the magnetophone led to a loss of income. GEMA claimed that Grundig acted unlawful towards the music organization, since it had designed a device that enabled consumers to copy musical works. GEMA insisted that Grundig would inform its customers that home recording is unlawful. At the time the German Copyright Act allowed for the reproduction of copyrighted works for private use. Nevertheless the German Supreme Court awarded GEMA´s claim. The Court considered that the Copyright Act was drafted at a time when the legislator could not have foreseen the advent of recording devices such as the magnetophone. It therefore was free to outlaw home recording by statutory interpretation. Grundig argued that any rule that outlawed private copying was necessarily flawed, since it could not be effectively enforced in the privacy of the home of consumers. The Court did not agree. "[T]here is no general principle in copyright law that maintains that the claims of the copyright holder should stop short of the private sphere of the individual.", the Court stated.

In 2000 a Dutch internet start-up company introduced a revolutionary piece of software: KaZaA. The software enabled consumers to share any type of files with one another, including MP3 music files. With the growing popularity of KaZaA, concerns mounted about diminishing sales with music copyright holders. In 2001, the Dutch collecting rights society Buma/Stemra decided to bring suit against KaZaA, despite the fact that there was no actual proof that the use of its file-sharing software led to a loss of income. Buma/Stemra claimed that KaZaA acted unlawful towards the music organization, since it had designed a device that enabled its users to copy and share musical works. Sound familiar?

To cut a long story short, Buma/Stemra lost its case. On 19 December, last, the Supreme Court of the Netherlands in final instance denied Buma/Stemra´s claims. Minutes after the ruling representatives from Buma/Stemra stated that the decision did not give the collecting rights society any other choice than to go after the ones that were using KaZaA to share

copyrighted music files, i.e. consumers. The Dutch anti-piracy organization Brein has already announced its proposed pursuit of consumers on several occasions. In the United States the major record companies, assembled in the RIAA, have also taken legal action against consumers. Among the more than 500 individuals that were taken to court were a 12-year old school girl and a 66-year old grandmother who describes herself as a computer neophyte. Granny did not even own filesharing software. Needless to say, that these events are a public relations´ nightmare for the record companies. As though their reputation was not bad enough, they decide to bring suit against their own consumers.

More importantly, these actions also raise legal concerns. To illustrate this, I once again take you back in time, again to Germany. Nine years after the afore-mentioned Grundig-case, there was another clash over recording devices before the German Supreme Court. This time GEMA attempted to force electronic equipment vendors to register the names and addresses of its magnetophone buyers. This would enable GEMA to go by the houses of magnetophone consumers to check whether they were engaging in any unlawful copying. In denying GEMA´s claims, the Court reasoned that although home copying was unlawful, the enforcement of copyright law in the homes of consumers would be contrary to the *Unverletzlichkeit des häuslichen Bereichs,* i.e. the right to be let alone in the privacy of one´s home.

Of course, digital is different. In the case of infringements via KaZaA, the copyright holders need not enter the homes of KaZaA-users to assess copyright infringement. In cyberspace the music industry can employ special software robots to pry into the computers of KaZaA-users. In most European countries peeping into the bookcase of your host to assess his taste in books is considered rather impolite. Information about one´s reading habits is considered personal information that one likes to keep to himself. Similar privacy concerns can be raised when the music industry detects copyrighted files on the computers of KaZaA-users.

But it goes even further. If the robot tracks infringing copies of music files, it registers the IP address of the particular KaZaA-user. An IP address is a unique number that is communicated by a computer when it is connected to the Internet. The address makes is possible to distinguish one computer from the other online. You can compare it to a telephone number. The IP address alone of the KaZaA-user is of not much help to the music industry. In order to

take actions against the consumers, the music industry requires the identity of the owner of the IP address. This is where Internet service providers come in to place.

If you obtained a single telephone number without a record of its owner, the telecommunications company that provided the number can perform a reverse search in order to determine its owner. The same applies to IP addresses. The Internet service provider through which the owner of the IP address is connected to the Internet can determine the identity of the person behind the address. As a result, the music industry needs the cooperation of ISPs for the prosecution of individual KaZaA-users. So-far ISPs have been reluctant to co-operate and rightfully so.

Under European data protection laws, IP addresses are considered personal data. The procession and collection thereof is only permitted under limited circumstances. The harvesting of IP addresses without the owners consent for the purpose of filing suit against its owner is not one of these circumstances. The fact that the IP addresses are communicated publicly by the KaZaA-users does not alter this. They are not communicated by its owners for the personal use of the music industry.

In 2001 word came out that IFPI Belgium had designed a search robot that it employed to track down unlawful uses of Napster, the notorious predecessor of KaZaA. IFPI announced that in due time it would hand over thousands of IP addresses to the public prosecutor in order for him to file suit against the Napster-users. Minister of Justice, Verwilghen, did not appreciate the gesture. Instead of cooperating with IFPI, he ordered the investigation into its conduct. Some months later the Belgium privacy board, the commission for the protection of privacy, issued its report. The commission left no room for doubt whatsoever: IFPI acted contrary to Belgian privacy laws.

In the United States courts have also recognized the privacy of users of filesharing software and refused the easy prosecution by the music industry, as I´m sure Sarah Deutsch will discuss more in-depth.

Law suits against consumers are not the solution to the problem of filesharing. 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 with filesharing. Consumers have changed into distributors of copyrighted material. Copyright law is not apt to deal decentralized, non-commercial use by consumers. The law cannot be effectively enforced.

What can be done? Again, the German GEMA-cases can set an example. When the German Supreme Court rendered its second GEMA decision and denied the enforcement of copyright law in the privacy of the homes of consumers, the German legislator acted expediously. In order to make sure that copyright holders were not derived from income, it designed the first statutory right to equitable remuneration for home taping through the imposition of a levy on the sale of sound recording equipment. Let us learn from past lessons: consider a levy for the use of filesharing technology.

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