

Mr Chairman, Members of Parliament, interested parties, it is an honor to be given the opportunity to address you on recent developments in the field of intellectual property law. I have been given ten minutes for my address and, as time is limited, I will concentrate on copyright law and its application to the Internet.

Digital technology, most notably the Internet, has changed our lives dramatically. It has made our lives both easier and more complex. One of the domains that has been confronted with unprecedented complexity is the law of copyright. I will identify some of these complexities in my presentation before you today. In doing so, I will argue that the European legislature should devote its efforts to the issue of copyright clearance to answer the complexities of the Internet, rather than to introducing more enforcement measures.

The Internet era is sometimes heralded as the age of abundance; information abundance to be more precise. In relation to copyright the Internet has introduced new modes of exploitation, new users of copyrighted material and more territories. Although copyright was designed as a "fit-all" type of regulation, the law has developed along the lines of specific modes of exploitation, specific users and a single territory. For example, certain provisions have been designed to regulate satellite broadcasting or cable television, some provisions apply to the press or schools and, of course, the law of copyright has always been territorial by nature. This development is reflected by the creation of national collecting rights societies to clear certain types of uses. There are, for instance, specific societies for the use of musical works, use of photographs and the use of neighboring rights for radio broadcasts.

The Internet changed all that: it has introduced a multiplicity of modes of exploitation, a multiplicity of users and a multiplicity of territories. As a consequence, it has changed and upset the copyright playing field that had existed throughout the years. Most importantly, as a result of the Internet consumers have entered into the copyright equation. Before the Internet era, consumers were disregarded in the copyright playing field. As a rule consumers did not engage into any restricted acts; they did not reproduce copyrighted works, nor did they distribute or communicate them to the public. In the exceptional instance that consumers did perform a restricted act an exception to the exclusive right was introduced by the legislature, as was the case with home copying. In the majority of cases, however, consumers performed acts that were not restricted by copyright law: they listened to music, they watched television, they read books. All those activities are as free as the air we breathe.

Today, thanks to the Internet, consumers have changed from passive receivers to active distributors of copyrighted material. Whether it is through P2P technology, webcasts, weblogs or podcasts, consumers are disseminating copyrighted material by the millions. This change is unprecedented in the history of copyright. It should be stressed that copyright law was never intended to directly affect consumers. The law was designed for commercial, public entities that reproduce and communicate works to the public: printers, publishers, television and radio stations; they were performing restricted acts.

How did the European legislature respond to the increasingly complex world the law of copyright was confronted with? The obvious response would have been to make the law less complex. The European legislature, however, did precisely the opposite: it made the law more complex. It introduced even more exclusive rights in the 2001 Copyright Directive, most notably stronger neighbouring rights. The prior remuneration rights that were commonly cleared by collecting rights societies were adapted into genuine exclusive rights that (in most instances) require prior permission of the rights holder to use. A so-called three steps test was introduced to restrict the applicability of copyright exceptions in certain cases, a test that is so vague that nobody knows how to interpret it. In addition, a new access right, an anti-circumvention right, was introduced in European copyright law.

Considering the multiplicity of modes of exploitation, the multiplicity of users and the introduction of new rights, it is not surprising that the enforcement of these rights became increasingly difficult. As a consequence, the cry for more enforcement measures became louder and louder. The European legislature responded by introducing the IPR Enforcement Directive. Although the frequently asked questions section that accompanied the proposal highlighted that the Directive was not aimed at allowing the prosecution of consumers using P2P networks for "casual filesharing", we know that this will be exactly how it will be used in practice. Now Europe is considering to harmonize criminal sanctions that will introduce criminal liability for "intentional infringements" of copyright law. Is this the right response? I beg to differ.

The copyright coin has two sides: not only enforcement, but also rights clearance. If we want to combat illegitimate use of copyrighted works, we must also allow the use of those works. Without an efficient system of copyright clearance, a proliferation of enforcement measures will not have any effect. In this day and age it is almost impossible to obtain the requisite permission for the use of copyrighted material on the Internet. Legitimate users are confronted with a seemingly never-ending shopping street of rights holders, if the rights holder can be found at all. Indeed, it is increasingly difficult

to locate all rights holders. As a consequence, clearing copyrights has become a terribly cumbersome process.

It is fair to say that the European Commission has recognized the need for one-stop-licensing. It has funded numerous projects, most notably the VERDI-project, for which a prototype was developed for online rights clearing between different collecting rights societies in six European Member States. In addition, the European Commission is hoping that more competition among collecting rights societies will lead to the creation of a one-stop-shop for online music licensing. In its recent recommendation, the European Commission draws a roadmap for the development of a single European collecting rights society. Needless to say, it remains to be seen whether this will be the result. In any event the process will take years.

I will not be discussing the many pitfalls in the Commission's recommendation here. In general, the recognition of the problem of international rights clearing and the need to solve it should be applauded. I would like to point out, however, that in as far as the efforts are directed at the collecting rights societies, they are short sighted. Of course, much can be said about the improper functioning of collecting rights societies. As an attorney I have battled against collecting rights societies in court on many occasions and for various reasons, but I would like to say something in their defense.

While criticizing these organizations, we tend to forget that they have always performed a crucial role within the copyright playing field: the clearing of rights. Many collecting rights organizations were the first to recognize the need for online licensing. They allowed the development of webcasting, download websites and a ringtone market. The so-called Barcelona and Santiago agreements were a genuine attempt to create a one-stop-shop for a global licensing of musical works for the Internet. As an attorney representing filesharing company Kazaa, I have negotiated with collecting rights societies and have found that some of them were, in principle, willing to allow the creation of a legitimate P2P-market. The record companies, however, unanimously refused to cooperate.

The challenge the European legislature is confronted with is how to simplify the process of copyright clearance. It cannot simply leave this to the market, but should actively stimulate the development of the creation of a one-stop-shop for copyright licensing. It should do so by recognizing that collecting rights societies are not only part of the problem, but also part of the solution. We should learn from their experience and help

them improve their businesses. In the meantime, more critical attention should be given to rights owners that misuse their exclusive rights and refuse to create a one-stop-shop.

More enforcement is not the proper answer to the complexities of the digital world. The majority of users is willing to compensate copyright holders and to obtain the proper permissions for the use of copyrighted material. They should be given the opportunity to do so. Thank you for your kind attention.

Christiaan A. Alberdingk Thijm LL.M

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