

THE REPRODUCTION RIGHT AND COLLECTIVE MANAGEMENT IN THE CONTEXT OF THE INFORMATION SOCIETY

**(The right to remuneration for private copy;
The ring tones and the Internet)**

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ABSTRACT

The main aim of this article is to present a survey on several issues concerning Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 “on the harmonization of certain aspects of copyright and related rights in the Information Society.” Furthermore, the article deals with the thought-provoking findings of the Hungarian Council of Copyright Experts from 2006. This is a unique copyright administrative institution in international comparison, which examines in depth copyright questions concerning the copyright status of private copying from illegal sources.

ÖZET

Bu makalenin ana amacını, Avrupa Parlamentosu ve Konseyinin 22 Mayıs 2001 tarihli Bilgi Toplumunda Telif Hakları ve İlgili Hakların Uyumlaştırılması 2001/29/EC

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Direktifine ilişkin çeşitli konular hakkında yapılmış bir araştırmayı ortaya koymak oluşturmaktadır. Bunun yanı sıra, çalışma, Macar Telif Uzmanları Konseyinin 2006 yılından bu yana elde ettikleri bulgulara da yer vermektedir. Macaristan Telif Uzmanları Konseyi, hukuka aykırı kaynaklardan yapılmış özel kopyalama halinde telif statüsüne ilişkin telif hakları sorunlarını derinlemesine inceleyen idari kurumudur.

KEYWORDS

European Community Law, Copyright Law, Information Society Directive, Right to Reproduction, Hungarian Council of Copyright Experts

ANAHTAR KELİMELER

Avrupa Topluluğu Hukuku, Telif Hakları Hukuku, Bilgi Toplumu Direktifi, Çoğaltma Hakkı, Macar Telif Uzmanları Konseyi

Introduction

“I reached into a drawer and pulled out an actual notebook, one with quadrille pages for graphs and maps, which I had bought for my statistics course a few week before I came across the book but had not used. I turned to the first page and inhaled its clean white smell, and taking out my ballpoint pen I began writing all the book imparted to me, sentence by sentence, into the notebook. After writing down each sentence from the book I went on to next sentence and then to the next. When the book started a new paragraph, I too intended a new paragraph, realizing after a while that I had written exactly the same paragraph as in the book. This was how I re-animated everything that the book imparted to me, paragraph by paragraph, but after a while I raised my head to study the book and the notebook. I'd written what was in the notebook, but the content was exactly the same as what was in the book. [...] I was the person who oriented himself on the road leading to the new life he sought by sitting down and copying the book sentence by sentence into his notebook.”¹

That was a Nobel Prize awarded writer's, Orhan Pamuk, passionate confession on reproduction, a confession how the copying of a book changes life. Although the quoted copying is not contradictory to existing international copyright law, the reproduction in the context of the Information Society often occurs as copyright infringements, but there is nothing new under the sun. The 'most fundamental' as well as 'historically the oldest' way of infringing

¹ Orhan PAMUK, *The New Life*, Translated by Güneli GUN, Faber & Faber, London, 2002, Chapter 3.

copyright is to make copies without the copyright holder's consent: to make unauthorized copies. Infringement, in this case, is assessed on the basis of an alleged illicit 'copy': the infringing object.² Yet, the earliest copyright laws, the Queen Anne's Statue from Britain 1710 and the French Law from 1793, do not contain any definition of what constitutes such an infringing object. These historical copyright acts based on the dichotomy of authorized and unauthorized copies of the books, derived from the royal privileges.

This fundamental dichotomy accounts for the limited scope of copyright until the nineteenth century. That time the opposition 'authorized copy – unauthorized copy' was replaced by the dichotomy 'original work – 'copy' with the adoption of the new meaning of 'reproduction' into the copyright law.

The digital environment brings some danger to copyright protection. Information in digital form is intangible and can be reproduced instantaneously with total accuracy and little effort. Digital copies are different from printed copies, because there is no difference between original work and copy. Analogue technology is not compatible with multigeneration copying, but with digital technology, copies can be made indefinitely with no loss of quality. Digital technology increases the ability to copy works and related subject-matter, the quality of the copies, the potential to manipulate and modify the work and the speed with which copies can be delivered to the public.

The EU and its Member States are bound by the framework of international copyright law conventions and treaties. Although all of these instruments and most of the European directives contain provisions regarding the right of reproduction, let me focus on Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 "On the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society" (hereinafter: the "InfoSoc Directive").³ The InfoSoc Directive initiated the 'second generation' of European copyright directives, which harmonize copyright law more horizontally. The objectives of the Directive were twofold: (1) to adapt legislation on copyright and related rights to reflect technological developments, and (2) to transpose into Community law the main international obligations arising from the WIPO Copyright Treaty (WCT)⁴ and WIPO Performers and

² Stina TEILMANN, "On Real Nightingales and Mechanical Reproductions", in Helle PORSDAM (ed.), *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity*, Edward Elgar, Cheltenham UK, Northampton MA, USA, 2006, pp. 23-40, at p. 27.

³ OJ L 167, 22.6.2001, p.10-19.

⁴ For details see at <http://www.wipo.int/treaties/en/ip/wct/index.html>, 06.06.2007.

Phonograms Treaty (WPPT).⁵ The Directive harmonizes several essential rights of authors and those of four neighboring right holders, as well as limitations and exceptions of these rights.

Art 2 of the Directive harmonizes the broadly defined exclusive right of reproduction:

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

The right of reproduction encompasses reproductions in both analogue and digital form. It does not matter by which means or on what kind of carrier material the reproduction is created. A reproduction also occurs if the form of the work is substantially changed during the copying process. Examples of reproductions include photographs, photocopies, copying by hand, CD or DVD burning, as well as copies of works in the RAM memory of a computer.

This article distinguishes reproductions into three categories:

- direct or indirect;
- temporary or permanent;
- whole or partial.

⁵ For details see at <http://www.wipo.int/treaties/en/ip/wppt/index.html>, 06.06.2007.

Among them, the temporary or permanent copies are particularly relevant for digital technologies and have been the focus of lengthy debates in many countries worldwide.⁶

The right of reproduction is in a sense broader than the right of communication to the public (Art. 3), as it is *prima facie* infringed independently of whether a work is communicated in the course of a reproduction. It thus covers acts such scanning, digitising and even certain kinds of temporary reproduction within electronic equipment. The reproduction right is thus adapted to allow rightholders to protect their distribution channels against online piracy.⁷ The broad scope of the reproduction right, the right of communication to the public and the making available right (Art. 4) implies that in some situations these rights might overlap. An unauthorized service that captures signals and allows for digital download would, for example, infringe both the reproduction and the making available rights of all relevant rightholders.⁸

Reproduction right and collective management

Art 5 of the Directive enacts an exhaustive list of exceptions and limitations which the Member States must or may provide in their national copyright laws. While Member States are required to implement the copyright limitation of Article 5(1) (the case of temporary copies), they are allowed, but not required, to implement the limitations to the right of reproduction found in Article 5(2). There is a recent case law on this issue. Copiepresse, a collecting society for Belgian publishers of French and German language daily newspapers, brought an action for copyright infringement against Google Inc on the ground that with the two activities of Google, i.e. its cache memory and the Google News service (copying and storage of news articles and press photographs in the cache memory of Google servers), infringed the reproduction right. In the case a number of open questions remain, whether a cache copy made by a search engine and not communicated to the public can come under Article 5 (1).⁹

⁶ Stefan BECHTOLD, "Information Society Directive", in Thomas DREIER, P. Bernt HUGENHOLTZ (eds.), *Concise European Copyright Law*, Kluwer Law International, The Netherlands, 2006, pp. 343-405, at p. 358 (note 2).

⁷ DG Internal Market and Services Working Paper, First evaluation of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the Information Society, Manuscript 2007, p. 12.

⁸ First evaluation (2007), p. 43.

⁹ *Google Inc v Copiepresse SCRL* [2007] E.C.D.R. 5, p.125.

All limitations must pass the “three-step-test,” which became part of the regulation of intellectual property rights, for the first time, as a result of the 1967 Stockholm revision of the Berne Convention for the Protection of Literary and Artistic Works. Article 9(2) of the Convention provided, and still does so in its latest version, the 1971 Paris Act, that the national legislation of the countries of the Berne Union (i) may only permit the reproduction of literary and artistic works in special cases; (ii) if it does not conflict with a normal exploitation of the work; and (iii) if it does not unreasonably prejudice the legitimate interests of the author.

Article 13 of the TRIPS Agreement has extended the application of the “three-step test” to all economic rights of owners of copyright. This provision of the TRIPS Agreement contains the same three conditions as Article 9(2) of the Berne Convention. The InfoSoc Directive introduces the “three-step-test” into Community Law.¹⁰

If a Member State decides to implement the limitations of Article 5(2) (a), (b) and (e), it is required to provide for fair compensation for the right holders. It introduced a new terminology, the so-called “fair compensation”, however, there is limited guidance on the scope of what constitutes “fair compensation” in recital. Thus, we can say that there is no harmonisation and no uniform tariffs.

In many Member States, the fair compensation requirement is implemented by levy systems, or by compulsory licensing schemes which are administered by collecting societies.

Compulsory licensing generally referred to a statutorily granted license to do an act covered by an exclusive right, without the prior authority of the right owner. Art.13 of the Berne Convention permits States to introduce compulsory licenses without the author’s consent, but only where such recording of the work has already been duly authorized.

The right of remuneration of private copying

The timeliness of this issue is that the Commission would like to reform the copyright levies applied to equipment and media used for private copying by consumers and others. In autumn 2006, a recommendation on fair compensation for private copying would have been published; however, the final draft was removed from the agenda of the College of Commissioners’ meeting on 20 December 2006. This decision followed closely the Council working group on IP, during which 13 Member States requested the Commission to make the

¹⁰ See Art.5 (5) and Recital (44) of the Directive.

impact assessment on copyright levies available and to engage a real debate on this issue. The French Prime Minister wrote to the President of the Commission to ask him to postpone the adoption of the recommendation and to start a broad consultation of all interested parties.

The history of the copyright levy system began in Germany with Josef Kohler, one of the “godfathers” of intellectual property law, who, in 1907, declared that, as a matter of principle, copyright did not extend to the private sphere. That was a tenable position for many years; however, it gradually became less tenable politically and economically as home-recording equipment became amply available in the 1950s and 1960s.

That time, the German Federal Supreme Court (*Bundesgerichtshof*) decided in a series of landmark cases on home taping. These cases were brought by the German collecting society (GEMA) against manufacturers and retailers of home-taping equipment. What the German Supreme Court said was that home-taping was indeed a copyright infringement that the legislators could not foresee.¹¹

Germany introduced its levy system in 1965, Hungary in 1983, Poland in 1994, Slovenia in 1995, Slovakia in 1997, Czech Republic, and Latvia in 2000. There are two systems: in the *single systems*, levies are only claimed for one type of object. In practice this always applies to media, such as blank tapes, CD-Rs or flash memory cards. In the *dual systems* the levies apply both to media and recording equipment such as CD writers, CD burners, and mp3 devices.

What we see today are lots of levies. Levies differ from one country to another. Despite some attempts in the 1990s, the legal framework of levy systems has never been harmonized at the EU level.¹²

In Hungary, organizations created by the right holders arrange for the authorization to broadcast programs and for the exercise of rights (collection, distribution and documentation of royalties). The best-known cases are the enforcement of claims for royalties or flat-rate royalties for the public use of music, defined differently depending on the place, type and character of the use and of other royalty claims specified by the Copyright Act (CA). Royalty claims specified by CA include those for the repeated reproduction and

¹¹ See BGHZ 17, 266 – Grundig-Reporter and BGHZ 18, 14 – Fotokopie.

¹² The EU-level harmonization was particularly problematic when tackling sensitive policy issues, just like the private copying cases. For more details, see Annabelle LITTOZ-MONNET, Copyright in the EU: *droit d'auteur* or right to copy? *Journal of European Public Policy*, April 2006, pp438-455, at p.447.

distribution of already disclosed non-dramatic musical works, lyrics for music parts of these musical-dramatic works by the producer of the sound recording, the creator of the multimedia work or the producer of the electronic database ("*mechanical fee*" [CA Article 19]), for the private-purpose copying of authors' works and sound recordings ("*empty cassette fee*" [CA Article 20]) and for the simultaneous and unchanged re-broadcasting of the works ("*cable television fee*" [Article 28]). The CA--in compliance with international legal practice -- incorporates certain modes of transmission to the public (e.g. access to works via the Internet) into the range of the collective management of rights, when it lays down that it is the organizations performing the collective administration of rights that shall conclude contracts with the users with respect to the authorization of uses and to the extent of fees to be paid.

Only one society may be registered nationwide for the collective management of authors' rights and neighboring rights related to each special group of works or performances. For the purpose of enforcing right holders' right of autonomy and to increase efficiency in the management of rights, the categorizations defined by Act may be disregarded, and societies established for the collective management of rights not contained in the Act may also be registered. However, only one society may be registered for the management of the same right of the same group of right holders. Since 2003, seven registered organisations concerned with collective administration of rights operate in Hungary (ARTISJUS – Society Hungarian Bureau for the Protection of Author's Rights; HUNGART – Society of Visual Artists Performing Collective Administration of Rights; FILMJUS – Hungarian Society for the Protection of Audio-Visual Authors' and Producers' Rights; EJI – Association of Arts Unions -- Bureau for the Protection of Performers' Rights; MAHASZ – Association of Hungarian Record Companies (Hungarian Group of IFPI); RSZ – Hungarian Alliance of Reprographic Rights; MASZRE – Reprographic Society of the Hungarian Book and Periodical Writers and Publishers).

In the sense of Article 90 (1)-(2) of the CA, the amount of royalty levies are determined annually in tariff charts by the society responsible for collective management of rights and administration of that levy. Before the tariff charts are published in the Hungarian Official Gazette, they must be approved by the Minister of Education and Culture. The tariff charts shall be defined in agreement with the societies of all right holders concerned; likewise organizations performing collective administration of rights for the affected authors, performers and producers of sound recordings. Before the approval of the Minister the major users and their representative organizations shall be consulted. Since the amendment of the CA on the date of Hungary's Accession to the European Union, the President of the Hungarian Patent Office shall also be consulted after the users. Similarity since the 1st of May 2004, mandatory

collective administration has been also introduced into the Hungarian copyright law.

The frequency and intensity of photocopying and other reproductions of printed works required that royalty fees due on private copying had to be extended over works distributed in print. It was necessary to establish separate regulations concerning the activities of enterprises providing photocopying services for a fee. The provisions of CA governing the fees due on so-called reprography came into force on 1 September 2000.

In 2006, the Hungarian Copyright Experts Council¹³ was asked to give an opinion on the copyright status of private copying from illegal sources (Opinion No.17/06/1).¹⁴ In answering the questions, it was necessary to interpret the relevant provisions of the InfoSoc Directive – Article 5(2)(b) and (5) – from this viewpoint. The former provision, as quoted above, reads as follows: “Member States may provide for exceptions and limitations to the reproduction right... in respect of reproduction on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes into account the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.” According to Article 5(5), however, this limitation is not applicable if it, in the concrete case, does not correspond to the “three-step test.”

In the opinion of the council, permission for private copying from illegal sources – either as a free use or against a right to remuneration – would be in conflict with all the three “steps” of the “three-step test.” From this position, according to the “the levy does not legalize piracy” thesis, it would follow that the right to remuneration could not be applied in respect of such copying.

It can be seen already at first sight that this cannot be deduced – at least not in a direct manner – from the above-quoted provisions of the InfoSoc Directive or from its relevant Recitals (in particular, Recitals (38) and (39)). These texts

¹³ The Copyright Experts Council has been founded in 1970. Its function, the framework rules of its structure and operation are laid down again in the CA. According to Article 101 (1), the Council operates next to the Hungarian Patent Office and separately from the official judicial expert system. According to the CA and the Government Decree, the Council proceeds in connection with professional questions that arise in copyright disputes at the request of courts or authorities, or on out of court commission in matters in connection with the exercise of use rights.

¹⁴ Opinion No. 17/06/1. („A jogellenes forrásból történő másolás kérdése”) only available in Hungarian, *Iparjogvédelmi és Szerzői Jogi Szemle*, 1. (111.) évfolyam 3. szám, 2006. augusztus, pp. 228-248.

do not contain any direct, or even indirect, reference to copying from illegal sources. Thus, while it is clearly stated in Article 5(2)(b) that, at the fixation of the remuneration (“fair compensation”), the application or non-application of technological measures must be taken into account, there is no indication whatsoever that the legal or illegal nature of the source of copying would also have to be taken into account for this purpose (although there would not have been any obstacle for the drafters of the Directive to state this, if this would have been the intention).

Therefore, the need to narrow the application of, or even the abolishment of, the right to remuneration in view of private copying from illegal sources, could not be based on a mere grammatical interpretation, but only on some other methods of (extensive) interpretation.

The same may be said about Articles 20 and 33(2) of the CA, which are in accordance with the Directive. There is no textual rule in these provisions either that could serve as a basis to narrow the scope of application, or to abolish the right to remuneration because the blank audio and audiovisual carriers on which levies are to be paid are used (also) for private copying from illegal sources.

After an in-depth analysis, the council was of the view that it may be deduced from the international, community and national norms on copyright that private copying from illegal sources is not permissible, neither as a free use nor on the basis of the limitation of the exclusive right of reproduction to a mere right to remuneration.

The council has found furthermore that

- (i) in view of private copying from illegal sources, it is not justified to decrease the remuneration levied, by virtue of Article 20 of the CA, on audio and audiovisual carriers for the possibility of private copying (and the abolition of the right to such remuneration is particularly not justified);
- (ii) for the calculation of damages to be paid for the infringement committed by private copying from illegal resources, it should be taken into account if the infringer has paid a levy as part of the price of the audio or audiovisual carrier used by him for such copying.

The council completely agreed with the petitioner’s remark, namely “the legal nature of a free use is not that it is a right of users, but that it is a restriction of the exclusive rights of copyright owners.”

The ring tones and the Internet

The global value of mobile music

A UK-based company, *Mobile Music*, identifies Asia-Pacific as the leading mobile music market regionally. The region is predicted to have music-related mobile revenues of \$6.4 B, 80% of which will come from just four countries, (China, India, Japan, and Korea) and account for 49% of total mobile music content revenues. The second largest regional mobile music market in 2011 is predicted to be Europe, which at \$7.75 B¹⁵ will account for 30% of total mobile music content revenues. The report notes that North America, with predicted mobile music content revenues of \$2.4 B in 2011, which represents 18.5 % of total mobile music revenues, remains primarily an online digital market. The report points to Brazil and Mexico as the most significant mobile music markets outside of the major regions.¹⁶

Other analysts, *Frost & Sullivan*, forecast that the value of the European mobile music market will rise from EUR 1.56 B in 2004 to EUR 7.85 B in 2011. With this they predict that the European ring tone market will be worth EUR 3.01 B and that the full-track music market will reach EUR 4.83 B.¹⁷

Before addressing any questions, we must first determine the scope of the subject matter in this proceeding, based on a dispute between the Recording Industry Association of America (RIAA) and the right holders from 2006, reported by the US Copyright Office. According to RIAA, a ring tone is a digital file, generally no more than 30 seconds in length, played by a cellular phone or other mobile device to alert the user of an incoming call or message. RIAA states that, initially, mobile carriers and other ring tone vendors distributed synthesized ring tones that embodied versions of musical works, but not recorded performances by featured recording artists. It states that these earlier forms of ring tones are commonly known as “*monophonic*” ring tones (having only a single melodic line) and “*polyphonic*” ring tones (having both melody and harmony). RIAA explains that typical commercial monophonic and polyphonic ring tones consist of a segment of the musical work representing its “hook,” or most memorable portion of the melody, with little or no revision. RIAA states that advances in technology now allow mobile devices to play digital copies of commercial sound recordings. As a result, mobile phone manufacturers are incorporating the functionality of stand-alone portable digital music players, thus permitting consumers to download sound recordings via the

¹⁵ Converted from original GBP 3.9 B.

¹⁶ Music & Copyright, 02 August 2006.

¹⁷ Music & Copyright, 01 February 2006.

Internet or a computer connected to the Internet. RIAA states that, in addition to full song downloads of commercial recordings to such phones, there is consumer demand for downloads of shorter (partial-copy) excerpts of sound recordings for use as ring tones. These ring tones are commonly referred to as “*mastertones*.” RIAA asserts that mastertones are displacing monophonic and polyphonic ring tones as the ring tone of choice amongst consumers. RIAA believes that record companies and ring tone vendors must obtain licenses to reproduce and distribute the relevant musical works in ring tones and that Section 115 exists to enable use of musical works when licenses are not otherwise available.

In the dispute, right holders describe ring tones as ten-to-thirty-second “snippets” of full-length musical works that are created to serve as ringers on cell phones and other mobile devices. Right holders alternatively describe a ring tone as a ten-to-thirty-second derivation of a musical work, sometimes repeated in a “looping” sequence and sometimes not. Right holders assert that the creation of ring tones, including mastertones, involves “substantial” creativity and “significant” changes to the underlying work. They state, for example, that making a ring tone requires creative determinations as to which portions of the work should be selected to best capture the “hook” of the full length recording and also to be most appealing as ring tones. They further state that many mastertones are designed to be looped, repeating the selected portions of the song multiple times until the phone or mobile device is answered. Some songs have multiple hooks, each of which can be made into a separate ring tone. Other ring tones, they assert, include new content not present in the underlying work.¹⁸

The Case of Hungary

In 2001 The Hungarian Copyright Experts Council was asked for their opinion regarding the legal nature of the ring tones. Their expert opinion No. 37/01 stated that the access to the digital signs carrying mobile ring tones is available to the public in such a way that the members of the public can choose the place and time of the access individually (so called on-demand type of access).¹⁹

The subscribers can download the ring tone to their own computer from a web page or they can send their request for ring tones eligible and triable on the

¹⁸ <http://www.copyright.gov/fedreg/2006/71fr64303.html>, 06.06.2007.

¹⁹ Opinion No. 37/01 only available in Hungarian, in *A szerzői jog a gyakorlatban, a Szerzői Jogi Szakértő testület véleményeinek gyűjteménye (1997-2003)*, KJK-Kerszöv Jogui és Üzleti Kiadó kft, Budapest, 2004, pp. 287-293, at p.288.

Internet in an SMS to the supplier, who will send the chosen ring tone to the subscriber's mobile phone.

In so far that the utilization of the chosen music works according to Article 26 (8) of the CA qualifies as a downloading utilization, determined by the Act to be the right of communicating the work to the public beside broadcasting and cable transmission of the work, substantially is homogeneous utilization.

According to Article 27 of the CA, in the name of writers, composers and lyricists (with the exception of the use of dramatic and dramatic-musical works, or scenes or overviews thereof, the organization performing collective management of rights in literary and musical works shall conclude contracts with users on the authorization of uses covered by Article 26--including the authorization of the use covered by Article 26 (8)--of already disclosed musical works, furthermore users on the authorization of the broadcasting of already disclosed works and on the remuneration to be paid for it.

This rule counts the uses covered by Article 26 (8) to be the collective management of rights. This means that in the case of the already disclosed literary and musical works (with the exception of the use of dramatic works) ARTISJUS Hungarian Author's Right Protector Bureau Association (instead of the author or his/her assignee) is entitled to manage the authorization and remuneration rights, based on the legislative provisions of the collective management.

The Case of Germany

In 2002, *Oberlandesgericht Hamburg* (OLG Hamburg – high court and court of appeal in Hamburg) decided in a similar manner on the legal nature of the ring tones. It was decided that use of the ring tone is technically and commercially a new form of the work according to the German Copyright Act (UrhG.) Article 31(4).²⁰

A few years later, OLG Hamburg dealt again with the issue of ring tones.²¹ Plaintiff 1 was the composer (hereinafter: "right holder") of the song ("*Rock my life*"), plaintiff 2 was the music publisher and the defendant was the beneficiary. Between the composer and the music publisher there was an author-exclusive licence agreement, but between the plaintiffs and the beneficiary there was no licence agreement concluded. The beneficiary derived his rights in connection with the use of the song as mobile phone ring tones from his framework

²⁰ Decision of Oberlandesgerichts Hamburg from 02 February 2002, available in the original German version in ZUM 2002, p. 480.

²¹ Decision of Oberlandesgerichts Hamburg from 18 January 2006, available in the original German version in ZUM 2006, p. 336. See also the comment by POLL, ZUM 2006, p. 379.

agreement concluded with SUISA (collecting society from Switzerland) and the repertoire-exchange agreement between SUISA and the German collecting society, GEMA.

The scope of the original licence agreement between GEMA and the composer only covered the “classical” types of use – excluding the use of the song as mobile phone-ring tones - of the original song, i.e. not the adapted version. Due to the modification of the agreement, its scope covered the use of the song as mobile phone-ring tones also.

Plaintiffs’ claim focused on the prohibition of the use of the song as mobile phone ring tones.

The main issue of the case was whether the availability of songs on Internet for listening and downloading for a consideration should be permitted by the right holder or if this was a part of the general licence-agreement concluded between the right holder and collecting society, GEMA.

The decision mentions the so-called two-steps licence proceedings, whereby one step means the reproduction right and performance right while the second one means the adaptation right which shall be collected by the right holder.

According to the decision, use of a song as mobile phone ring tone is regarded as an intervention in the moral rights of the right holder. The main reason given by the court is that the song will not only be shorted by a few beats and digitally transformed, but the song will be supplied with a pure functional signal tone which usually does not cover the original purpose of the right holder, like providing sensual-sounding experience by the song. Thus, this might derogate the intention of the right holder.

In the decision, it was also stated that the use of song as mobile phone ring tones is closer to merchandising-use rather than use of work in a general sense. The court decision highlighted that the use of mobile phone ring tones can be compared to the use of a song in a commercial advertisement, where beside the licence agreement between the beneficiary and the collecting society, the permit of the right holder shall also be collected. Mobile phone ring tones shall then contribute to the increase of sales not only of mobile phones, but also of other connected products and services.

Also in 2006, GEMA set standards for an up-to-date, modern system of online licensing and administration. It will bring benefits for all rights holders, who have entrusted GEMA with the administration of their rights. As can be read in the report of their Annual Meeting:

“The intention of a recommendation by the EU dating from October 2005 is that all right owners should in future only be able to pass on their so-called online rights, especially for the licensing of ring tones and Music-on-Demand, to a single authors' society for sole, i.e. exclusive, administration in Europe and that these rights will therefore have to be removed from the system of reciprocal agreements. It is then up to the authors' societies to organise themselves in such a way as to offer the providers a wide repertoire from a single source in the future as well, in other words, from a one-stop shop. Together with its British sister society PRS/MCPS and EMI Music Publishing, GEMA has developed a concept for a one-stop shop to license the Anglo-American repertoire of EMI Publishing Europe-wide for use on the Internet and in the mobile sector and this concept will be implemented. The new system is also open to other rights owners. Other major publishers have also expressed their interest in Europe-wide licensing from a single source.”²²

The US - Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceedings - October 2006

On September 14, 2006, the Copyright Royalty Board (“Board”), acting on a request by the Recording Industry Association of America, Inc. (“RIAA”), and pursuant to 17 U.S.C. § 802(f)(1)(B), referred two novel questions of law to the Register of Copyrights (“Register”). Specifically, the Board requested a decision by the Register as to the following:

1. Does a ring tone, made available for use on a cellular telephone or similar device, constitute delivery of a digital phonorecord that is subject to statutory licensing under 17 U.S.C. § 115, irrespective of whether the ring tone is monophonic (having only a single melodic line), polyphonic (having both melody and harmony), or a mastertone (a digital sound recording or excerpt thereof)?

2. If so, what are the legal conditions and/or limitations on such statutory licensing?

In sum, it was stated that ring tones (including monophonic and polyphonic ring tones, as well as mastertones) qualify as digital phonorecord deliveries (“DPDs”) as defined in 17 U.S.C. § 15. Apart from meeting the formal requirements of Section 115 (e.g., service of a notice of intention to obtain a compulsory license under Section 115(b)(1), submission of statements of account and royalty payments, etc.), whether a particular ringtone falls within

²² http://www.gema.de/engl/press/news/n174/mv_2006.shtml , 06.06.2007.

the scope of the statutory license will depend primarily upon whether what is performed is simply the original musical work (or a portion thereof), or a derivative work (i.e., a musical work based on the original musical work but which is recast, transformed, or adapted in such a way that it becomes an original work of authorship and would be entitled to copyright protection as a derivative work).²³

Final remarks

A modern device for reproduction, the iPod, branded by the Apple, is the first cultural consumer icons of the 21st century; it represents a perfect marriage between aesthetics and functionality, of sound and touch – the auditory world in the palm of the hand. The iPod is the cultural equivalent of the Citroen DS written so elegantly about by Roland BARTHES in 1957:

“I think that cars today are almost the exact equivalent of the great Gothic cathedrals: I mean the supreme creation of an era, conceived with passion by unknown artists and consumed in image if not in usage by a whole population which appropriates them as a purely magical object.”

From Gothic cathedral to Citroen DS to Apple iPod – A Western narrative of increasing mobility and privatization.²⁴

Although there has been discussion about the music-capable mobile phone as the “iPod killer” it is likely that the market for both dedicated portable music players and music-playing mobile phones will grow substantially.

New opportunities lie in the exploitation of live content via handsets, song recognition services, digital audio broadcasting (DAB), visual radio and mobile TV. Ultimately the mobile music market will allow artists both to reach a wider audience and to win back the younger audience by reaching them in a new way.²⁵

²³ <http://www.copyright.gov/fedreg/2006/71fr64303.html> , 06.06. 2007

²⁴ Michael BULL, *Iconic Designs: The Apple iPod*, Third International Workshop on Mobile Music Technology University of Sussex, Brighton, UK, 2-3 March 2006. The author mentioned that BARTHES, in his analysis of the Citroen DS had already reduced the scale of the cultural icon from the size of a Gothic cathedral to that of a five seat automobile – and of course, one could inhabit and privately occupy the Citroen in a way that you could not inhabit the cathedral – the DS was something not merely to be looked at or desired, it was something to be owned and travelled in – an icon of social and physical mobility.

²⁵ IFPI:06 Digital Music Report 2006, p.12, available at <http://www.ifpi.org/content/library/digital-music-report-2006.pdf> , 06.06. 2007.