Copyright on the Internet
by
Evi Werkers

In the 21st Century new technological developments - more specifically digitization and convergence - enable us to share enormous amounts of information and works protected by copyright through broadband networks at a very high speed and low transaction costs. For copyright holders the emergence of the Internet had both positive and negative consequences. On the one had it led to a proliferation of new creative content online and provided a new distribution tool for cultural or information content providers. After a short period of reticence, the media and entertainment business started to adapt their business model to the new digital context and sought new ways to attract customers by offering interactive on-demand services. On the other hand authors, performers, publishers and producers are faced with a considerable challenge since the Internet also facilitated the reproduction, communication and distribution of high quality copies of copyrighted works (music, movies, books, articles, photographs etcetera) resulting in plagiarism and piracy on a larger scale than they have ever been confronted with.

The past decennium copyright holders have successfully pleaded for more regulatory measures resulting in a considerably extended copyright protection in terms of the duration of protection, the material scope, exploitation rights, and last but not least, the legal protection of digital right management techniques. In addition, the Enforcement Directive - adopted in 2004 - requires all Member States to apply effective, dissuasive, proportionate, fair and equitable measures, procedures and remedies against those engaged in counterfeiting and piracy in the EU. Despite the legislator's efforts to provide an effective legal framework to protect and enforce copyright and related rights in the new electronic environment, a fierce battle continues against the endless stream of copyright infringements on the Internet. This has especially become clear in the legal disputes of copyright holders against peer-to-peer software developers (e.g. Dailymotion), video sharing websites (e.g. Google Video) and social networks (e.g. MySpace).

However, taking matters to court seems to have a minor impact on the volume of illegal copies or infringing uses. As a consequence, right holders have begun to explore new paths to enforce their rights and have directed themselves to ISPs to adopt preventive or repressive measures when confronted with copyright infringements. This led to several new legislative initiatives on different levels. On international level the adoption of a multilateral Anti-Counterfeiting Trade Agreement (ACTA) is being negotiated, aiming at creating a new standard of intellectual property enforcement and an increased international cooperation. A recently leaked document provides indicates that the content industry is asking for new legal regimes to encourage ISPs to cooperate with right holders in the removal of infringing material. On European level several amendments related to copyright enforcement have been introduced to the review of the European Regulatory Telecoms Framework (“Telecoms Package”) - voted

---

1 Evi Werkers works as legal researcher at the Interdisciplinary Centre for Law and ICT (ICRI – KULeuven, IBBT), where she specializes in copyright and media law with focus on e-culture, e-publishing and e-journalism. She is currently involved in the IWT-SBO project FLEET (FLEmish E-publishing Trends) and the IBBT-project CUPID (Cultural Profile Information Data) More information: http://www.law.kuleuven.be/icri/people.php?id=100


3 Databases, computer programs.

4 The reproduction, communication of works to the public and distribution right.


7 Court of First Instance 13 July 2007.

8 Court of First Instance Paris 9 October 2007.

9 Court of First Instance Paris 22 June 2007.


by the Parliamentary Committees on 7 July 2008 - mandating ISPs to comply with the Enforcement Directive. On national level the most interesting development took place in France, where an inter-professional agreement was closed uniting the sector of music, film and ISPs in the battle against piracy and counterfeiting and installing a three strike approach. By order of a public authority an ISP shall send a warning to his client to end his (illicit) activities. In case of recidivism the client risks having his Internet connection suspended or even shut down entirely by the ISP and his name being added to a "black list" database.¹²

The fear has been expressed that the abovementioned proposals will enter in conflict with the exoneration regime of liability for mere conduit, caching and hosting activities undertaken by ISPs (as protected by the E-commerce Directive¹³) and with the fundamental rights of Internet users (right to privacy, freedom of expression, right to information). Furthermore, the E-commerce Directive determines that Member States cannot impose a general obligation to monitor on ISPs since it is practically impossible for them to check the content passing on their network. If ISPs would be induced to seek for facts or circumstances indicating copyright infringements, this would cause a serious chilling effect on Internet communications.¹⁴ That exoneration regime now risks to be blindsided by the recent legislative initiatives.¹⁵

Remarkably, the European Court of Justice recently ruled in a recent case of the Spanish right holder group Promusicae against the ISP Telefónica¹⁶, that it cannot be derived from European legislation that Member States are obliged to install a duty to provide personal data in the context of a civil procedure to ensure the effective protection of copyright. The Court decided that Community law requires that Member States - when transposing the directives - must strike a fair balance between the various fundamental rights protected by the Community legal order in conformity with other general principles of Community law, such as the principle of proportionality.¹⁷ The importance of this principle is also expressed by the Council of Europe that went one step further in its Recommendation adopted on 26 March 2008,¹⁸ and that listed a number of guidelines to fully protect the exercise

---

¹² Resulting from this agreement an Internet and Creation Law – initiated by the French Minister of Culture C. Albanel – was approved by the French government, enclosing the three strike policy and installing an independent authority with the name HADOPI (Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet). This authority will have the power to demand from ISPs, at the request of copyright holders, the identity of copyright infringing users, followed by a three steps policy ; O. Dumonis, "Mission Olivennes: signature de l'accord sur fond de grincements de dents", Le Monde, 23 November 2007 ; http://www.culture.gouv.fr/culture/actualites/index-olivennes231107.htm ; "Piratage: le Conseil d'Etat critique le projet Albanel", Le Figaro, 17.06.2008 ; http://www.zdnet.fr/actualites/Internet/0,39020774,39381916,00.htm


¹⁴ Article 15 E-commerce Directive ; Moreover the Copyright and Enforcement Directive do not harm the E-Commerce Directive, see Recital 16 Copyright Directive and Recital 15 Enforcement Directive.


¹⁷ Also referred to in Article 8 § 1 Copyright Directive which states that measures, sanctions and remedies against infringements to intellectual property rights should not only be effective and dissuasive but also “appropriate”, “proportionate”, “loyal” and “fair”.

¹⁸ Recommendation CM/Rec(2008)6 of the Committee of Ministers to Member States on measures to promote the respect for freedom of expression and information with regard to Internet filters, adopted by the Committee of Ministers on 26 March 2008 on the 1022nd Meeting of the Ministers’ Deputies ; The Recommendation explicitly refers to the need to ensure the proportionality of limitations to fundamental rights resulting from the use of filters and stresses the need for Member States to take into account Article 10, paragraph 2 by a) introducing regulatory provisions where appropriate and necessary for the prevention of intentional abuse of filters to restrict access to lawful content b) ensuring the assessment of filters both before and during their implementation to ensure the effects of the filtering are appropriate to the purpose of the restriction and thus necessary in a democratic society in order to avoid unreasonable blocking of content c) provide for effective and readily accessible means of recourse and remedy including suspension of filters in cases where users and/or authors of content claim
of the right to freedom of expression and information of Internet users in the context of filters. Still, one might wonder whether the “hot potato” of seeking a new balance between all the fundamental rights at stake could so easily be passed on to the Member States, causing probably even more fragmentation and legal uncertainty than before. To be continued...

content has been blocked unreasonably and d) avoid the universal blocking of illegal content for users who justifiably demonstrate a legitimate interest to access such content under exceptional circumstances.

19 When confronted with filters, users must be informed that a filter is active and, where appropriate, be able to identify and control the level of filtering (or even deactivate them). Different tools as such were put forward, such as a) regularly review and update filters in order to improve their effectiveness, proportionality and legitimacy in relation to the intended purpose b) raising awareness of the social and ethical responsibilities of the actors designing, using and monitoring filters and c) to provide clear and concise information and guidance regarding the manual overriding of an activated filter namely whom to contact when it appears that content has been unreasonably blocked and for what reasons a filter may be overridden for a specific type of content.