Kluwer Copyright Blog

Experience concerning new restrictions of the private copying rule from the German perspective – a complimentary comment on the Blog Post: And the private copy war continues: news from the Dutch front! (by Lucie Guibault)

Till Kreutzer (iRights.info) · Wednesday, May 25th, 2011

As reported by the Dutch commentator Lucie Guibault in her recent Blogpost the Dutch government (in the person of the secretary of state, Fred Teeven) plans to restrict the private copying limitation. Downloads from "obviously illegal sources" shall be declared unlawful. In Germany such a rule exists already, implemented in the course of the first and the second "Reform of the German Copyright in the Information Society" (the so called First and Second Basket). So far this step yielded no positive effects for the creators or the content industry. Quite the contrary!

No benefit for the rights holders whatsoever: The technical reason

On the one hand, the restriction of the private copying rule (Art. 53 section 1 of the German Copyright Act – Urheberrechtsgesetz (UrhG)) to copies from legal (or better: non–evident illegal) sources cannot be enforced for technical reasons. Different from the people, who make protected works available in filesharing networks the mere downloader cannot be identified by his or her IP–Address. Therefore it is not possible to track the downloaders.

No benefit for the rights holders whatsoever: The practical reason

On the other hand the industry has not even an interest of tracking and pursuing downloaders (whether they copy from obviously illegal sources or not). Regarding the mass of copyright violations in filesharing networks it is simply not possible to pursue every single infringer. Thus the industry has to let the "small fishes" go and limit there enforcement activities to copyright infringements on a large scale, i. e. to those people who act as multipliers by providing the files that fill the music libraries of the users in the whole world.

The apparent effect is that (as far as it is known) not a single of the thousands of legal actions taken by the music, games, film and software industry against the users of filesharing networks based on the mere download of protected works from obvious illegal sources. The restriction of the private copying rule has therefore apparently no benefit for the creators or rights holders at all.

Collateral damages of the restriction to legal sources: Financial drawbacks for the rights holders

On the other hand the revision of the private copying limitation caused a number of collateral damages. In the first place it has an impact on the levies that are due for the production, import and sale of reproduction devices and copying media (like CD–ROMs or HD recorders). As a rule a levy system cannot compensate illegal copies. Such levies are owed as a compensation for the competence of private users to make (legal) copies of copyrighted works. A remuneration for illegal uses cannot be claimed since the users would pay for uses that could be as well pursued as copyright infringements. Therefore the numerous private copies that are actually made from illegal sources – notwithstanding that they are illegitimate – have to remain out of consideration when it comes to the calculation of the reproduction levies.

The bereaved are especially the creators who derive (more or less) in many cases a significant part of their income from the levy payments.

Collateral damages of the restriction to legal sources: Legal uncertainty for the users

The second main drawback of the restriction of the private copying rule is the increasing incomprehensibility of the law. What “obviously illegally made copies” or “obviously illegal sources” are, is still unsolved even among copyright experts. How shall a user decide about these complex issues, e.g. regarding the aspects arising from Private International Law that are always involved? An example: Before one can decide whether a copy or source is illegal one has to determine what national law is applicable and therefore governs the relevant questions. This requires knowing what legal systems are actually involved – in other words: where and under what legal order the source in question was made or is made available. Questions no private user can ever decide. Is then a source or copy ever “obviously illegal”?

The bottom line

Reductions of the private copying rules will never solve the problem of illegal uses on the Internet. The indication that led long ago to the enactment of private copying limitations in most countries of the world is still true: Private copying cannot be controlled, neither if they are made nor under what circumstances. Restricting the freedom to private copying has therefore no positive effect for the creators or the rights holders. Contrariwise they only lead to legal uncertainty among the population and to a decreasing interest in and acceptance of the copyright system itself.
Furthermore they even cause financial drawbacks especially for the creators who are dependent on payments derived from alternative (levy) compensation systems. The Dutch government should be very aware of these findings and experience before they take any decision in that direction.

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