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LEGALIZING FILE-SHARING: AN IDEA WHOSE TIME HAS COME – OR GONE?

Report from the Information Influx Conference 2014

Rapporteur: João Pedro Quintais
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http://informationinflux.org/#panel11 /// Friday, 4 July – 10.30-12.30

Rapporteur: João Pedro Quintais[1]

On 2-4 July 2014 Information Influx, the 25th anniversary conference of the Institute for Information Law (**IViR**) was held in Amsterdam. Integrated in the conference, on Friday, 4 July a panel entitled "Legalizing file-sharing: an idea whose time has come – or gone?" met.

The panel's moderator was Professor Bernt Hugenholtz (University of Amsterdam, IViR) and the panelists were scholars with groundbreaking research on the topic for the past decade: Professor Neil Netanel (University of California, Los Angeles), Professor Alexander Peukert (University of Frankfurt), Dr. Philippe Aigrain (La Quadrature du Net), Professor Séverine Dusollier (SciencesPo./École de droit).

The panel was divided into four parts, which this report reflects. First, the moderator introduced the topic and the panelists. Second, IViR member Mr. Balázs Bodó offered a short presentation of an ongoing research project on the topic of debate. Third, each panelist commented on the topic from different perspectives. The panel discussion was then opened for comments from the audience and responses from the panel.

1. Topic and issues

Professor Hugenholtz kicked off the proceedings by noting that legal scholarship and empirical research over the past decade show a disconnect between copyright law and different regulatory institutions of the networked environment, such as market, technology and social norms. Internet users easily access and share copyrighted works without payment, which translates into significant legal, economic and social challenges for policy makers, rights holders, intermediaries and individual users.

Among the copyright reform proposals debated to solve this impasse are so-called Alternative Compensations Systems (**ACS**). Simply put, these are legal mechanisms that forsake the need for direct authorization of end-user acts – downloading, uploading, sharing, modifying –, while simultaneously ensuring compensation to creators or all rights holders. There is significant research on schemes external to copyright but with similar

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effects.[2] For the sake of simplicity, "ACS" is adopted as an umbrella term to refer also to those proposals.

Since the early 2000's legal and economics scholars, advocacy groups and political parties have come forward with ACS proposals under different labels: tax-and-royalty systems, *license globale*, content/culture flat-rate, creative contribution, file-sharing levy, sharing license or alternative reward systems. At EU level, interest in ACS idea has recently been re-ignited by the *ACI Adam* judgment of the Court of Justice of the European Union (**CJEU**)[3] as well as proposals to study the possibility of levying levy cloud services.[4] At Member State level, an ACS-type of proposal to regulate online uses through a "radio" model was advanced inter alia by the Dutch consumer association.[5]

The panel speakers are among the most prominent of those scholars; several of the panelists have proposed some form of ACS at a very early stage of the academic discourse on the topic. ACS are designed to legalize and monetize online copyright restricted acts of distributing and consuming content. Empirical evidence shows that especially younger end-users support paying flat-rate fees for the ability to legally download and share content. So what prevents us from introducing such schemes? What will it take for stakeholders (users, rights holders, intermediaries and politicians) to "buy into" such type of reform?

The aim of the panel is to debate the future of ACS in light of current legal, business and technology trends. The debate is topical given current efforts in the EU and US to reform copyright and the increased awareness that online enforcement (e.g. through measures like website blocking injunctions) does not provide an adequate response to mass unauthorized online uses of digital content.[6]

2. The IViR Research Project: preliminary results

Since 2012 IViR is conducting an interdisciplinary research project on the legal and socio-economic feasibility of legalizing file sharing.[7] One of the project members, Balázs Bodó, presented the design challenges and first results of the study on the *acceptance of* and

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[2] A notable example is that of the proposal advanced by P. Aigrain, explained below at 3.3.

[3] ECJ Case C-435/12 – *ACI Adam BV and Others v. Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding* (10 April 2014), ECLI:EU:C:2014:254.

[4] European Parliament resolution of 27 February 2014 on private copying levies (2013/2114(INI)), especially para. 30, available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0179&language=EN&ring=A7-2014-0114.

[5] See *Brief Consumentenbond*, mede namens Ntb en FNV KIEM aan Vaste Kamercommissie V&J tbv AO Auteursrecht 19 juni 2014, available at http://www.ie-forum.nl/?/Brief+thuiskopieregeling+en+downloadverbod////32820/.

[6] On copyright reform in the EU and US see, respectively: *Public Consultation on the review of the EU copyright rules*, at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm; and U.S. Department of Commerce, *Copyright policy, creativity, and innovation in the digital economy*, at http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf. For a report of the discussion at the Information Influx Conference on copyright injunctions in the EU, see C. Angelopoulos, *Filtering away infringement: copyright, injunctions & the role of ISPs*, available at http://kluwercopyrightblog.com/2014/07/23/filtering-away-infringement-copyright-injunctions-the-role-of-isps/.

[7] See *Copyright in an Age of Access: Alternatives to Copyright Enforcement*, http://www.ivir.nl/research/projects/acs.html. On the project's interdisciplinary approach, see http://www.ivir.nl/research/acs/Revisiting_Alternative_Compensation_Schemes.pdf.

willingness-to-pay (**WTP**) for various ACS. The presentation's aim was to demonstrate that ACS are a feasible proposition for users, setting the stage for the subsequent debate on the political and legal hurdles to implementation.

The study examines ACS adoption in the Dutch market, defining these models from the perspective of users. It attempts to identify factors affecting ACS acceptance and measure WTP. To do so, the study uses a discrete choice experiment with multiple attributes and levels per attribute, together with different scenarios. The attributes selected were the following: allowed uses, subject matter, catalogue completeness, monitoring, distribution of revenues and price. Scenarios include, for example, mandatory or voluntary user participation.

In the experiment, a representative sample of the Dutch population had to choose between different types of compensation systems by selecting their preferred attributes and levels. The preliminary analysis focused on music content and yielded the marginal WTP for different attributes. The results showed that, for a *music only ACS*, consumers preferred a model where they can download and share a temporally restricted catalogue, with no monitoring of uses and no guaranteed share of artists' revenue. For example, for a mandatory participation flat-fee ACS, the monthly payment (added on the internet access subscription) required to fully compensate rights holders is € 1.8, whereas users' mean WTP is €9.25. These results were calculated on the basis of a 100% substitution effect of the net revenues of rights holders (including private copying levies). Even considering WTP overestimation, any amount between those price points (€1.8 – €9.25) would increase societal welfare.[8]

3. Panel Discussion

Following Mr. Bodó's presentation and some comments from the audience, the moderator gave the floor to each invited speaker, in the following order: Prof. Neil Netanel, Prof. Alexander Peukert, Dr. Philippe Aigrain, Prof. Séverine Dusollier.

3.1. The NUL revisited

Professor Netanel focused his presentation on a recasting of his 2003 proposal for a non-commercial use levy (**NUL**), possibly the first detailed ACS proposal in academia.[9] He considers the NUL to be a blueprint for a possible ACS, which remains a viable idea in 2014. In general terms, the NUL was designed to enable unhindered non-commercial peer-to-

[8] The full presentation can be accessed at: http://prezi.com/qbsswhhgvgl_/?utm_campaign=share&utm_medium=copy&rc=ex0share.

[9] See Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*. As published in Harvard Journal of Law & Technology, Vol. 17, December 2003. Available at SSRN: http://ssrn.com/abstract=468180 or http://dx.doi.org/10.2139/ssrn.468180

peer (**P2P**) file sharing for the majority of copyrighted works, excluding software and unpublished works.[10]

It would do so by imposing a levy on the sale of products/services whose value is substantially enhanced by P2P, and distributing the resulting proceeds to rights holders in proportion to the amount of downloads and uses of works, as measured by digital tracking and statistical sampling.

The NUL would cover acts of uploading, downloading, streaming, and digital adaptations (including remixes). Users would have a *right* (or a *protected legal privilege*) to engage in these acts and rights holders could not impose DRM in relation thereto.

The non-commercial nature of uses would eliminate secondary liability for the provision of related products/services, which would however subsist for commercial uses, considered excluded from the NUL's scope. The exclusion is justified by the political challenges in restricting exclusivity for such uses.

Because of the proposed payment structure, product and service suppliers would likely not support the NUL. Therefore, from a feasibility perspective, the best option is to spread the payment obligation among a wide pool of debtors and targets, subject to the "substantially enhanced value" criterion. Potential candidates include: Internet access subscriptions, P2P platform providers, personal computers, tablets, CD burners, MP3 players, blank CDs, mobile phones, and mobile phone data plans.

The NUL rate is set through negotiation of interested stakeholders under the threat of mandatory arbitration and pursuant to a "fair income/return" standard. The latter would not only recognize the contribution of P2P devices/services but also of authors to the creative sphere, while maximizing public access to works and securing a "reasonable remuneration" to rights holders.

In its initial five years of existence, the NUL amount should be set on the basis of the adjusted *net* revenues displaced by P2P. This criterion takes into consideration that not all P2P displaces copyright revenues, that the system should not finance pre-digital models or ensure oligopoly profits, and that consumers should be empowered in digital markets.

Once the amount is set and collected, it must be distributed to *rights holders*. Here, two challenges arise. First, at "inter-industry" level: how to allocate proceeds among categories of rights holders, such as film and record studios? Second, at "intra-industry" level: how to distribute amounts to rights holders within each category? Although there are no simple answers, current technology provides solutions to measure uses and allocate revenues, based on digital tracking of actual uses (including downloading and actual views/listens) and sampling.

However, the main problem with the NUL is that of adaptation of the system overtime in setting the overall amount of the levy, as the baseline net revenues numbers initially used will no longer serve a market proxy function. Using data from 2003, the speaker estimated that imposing a 5.5% levy plus a $50 fee per University student[11] would generate an aggregated NUL of $3 Billion, which would more than compensate for the estimated $2.1

[10] The original proposal did not include books as in 2003 there were no established practices or markets for e-lending of digital books.

[11] As these account for a high percentage of P2P uses.

Billion of adjusted losses from P2P. In fact, a 4.06% NUL would suffice to compensate for such adjusted losses.

After explaining the mechanics of the system, Professor Netanel opined that an ACS would not be politically feasible in the US. In fact, recent debates on US copyright reform go in the opposite direction, mostly due to the prevailing "market and bargaining ideology". An example is the current debate on music licensing in the US where stakeholders are advocating models that move away from compulsory licensing, as they believe they could extract more value from direct licensing agreements. Also regarding the voluntary collective licensing of US performing rights organizations ASCAP and BMI, music publishers are pushing to opt-out and asking for reconsideration of the consent-decrees pursuant to which these organizations operate. On the enforcement side, major publishers still believe they can offer legal alternatives while simultaneously pursuing infringers. This is also related to an ideological reluctance from the side of rights holders to legitimize uses they perceive to be "piracy".

Given the above, is a NUL proposition still valid? Is it still a good idea for online music, where services like Spotify seem to be providing attractive legal offers? Professor Netanel answers in the affirmative based on the notions that consumers want full ACS-type offers and creators fairly remunerated. On both counts the market (including flagship ventures like Spotify) has been unable to deliver.

3.2. A two-tiered EU copyright system

Professor Peukert addressed the potential impact of ACS on the current EU copyright reform debate from a legal perspective.[12] In his view, EU copyright law allows for such a system in support of non-capitalist, non-market based modes of file-sharing. This can be seen as a two-tier copyright system based on coexistent compensation schemes.

The first tier combines exclusive rights and DRM protection. It institutionalizes a culture of exclusivity by enabling commercialization of works through access control and registration, such as occurs with Spotify, Netflix, and databases of scientific publishers (e.g. Westlaw and LexisNexis). Remuneration is secured through a *pay-per-use* model based on *individual* payments or related advertisement linked to content usage.

The second tier – supportive of a sharing culture – comprises open content models, namely open source, creative commons and open access. Its lawfulness depends on rights holders' authorization (typically at the author level), but is not contingent upon access control, registration requirements or even *individual* payments. Second-tier models can be remunerated through a form of *collective* payment if applicable laws have in place levy systems for digital private copying, as occurs in most EU Member States. This, Professor Peukert argues, amounts to an ACS under EU law.

Its legal basis is art. 5(2)(b) Copyright Directive (2001/29/EC), which allows Member States to "legalize" digital private copying (through a limitation/exception) on condition

[12] For Professor Peukert's main work in the area, see Alexander Peukert, *A Bipolar Copyright System for the Digital Network Environment*, 28 Hastings Comm. & Ent L.J. 1 (2005).

that they impose a levy to ensure fair compensation; the levy, for its part, must take into account the application of DRM and, therefore, the culture of exclusivity.

The provision has been interpreted multiple times by the CJEU, most recently in *ACI Adam*, where it is stated that the limitation does not apply to copies from **an illegal source**, for example P2P networks. As such, EU law does not fully endorse an ACS for digital private copying.

In *VG Wort*, the CJEU decided that the private copying levy is due if rights holders have (expressly or implicitly) authorized the reproduction act.[13] In other words, if an author has made available a work online (whether or not under a creative commons license) s/he has a claim for fair compensation under the levy system. However, a question remains: is the levy also due if the authorized content has been subject to *individual* payment?

The answer should be provided in the pending *Copydan Bandkopy* case.[14] In the recent Opinion of Advocate General Cruz Villalon, if the authorized content has been subject to "a payment or other form of fair compensation" no private copying levy is due as that would lead to an unjustified double payment.[15] Professor Peukert agrees with this interpretation and argues that it recognizes the two-tier copyright system:

- Where rights holders impose access controls and registration requirements for the use of their works, only *individual payments* from consumers or advertisers are admissible as compensation for use;
- Where those restrictions are not in place (e.g. Wikipedia), rights holders are entitled to receive *collective payment* under a private copying levy system.

Authors/rights holders can choose and switch between tiers, and even present parallel offers. This results from the CJEU judgments that exclude illegal and remunerated copies from the scope of the digital private copy levy. Because opting for *individual payments* excludes rights holders from the levy system, the more authors opt for this model, the lower the overall amount of levies collected – this constitutes a *phase-out* scenario for levies. Conversely, the more authors adopt an open and sharing culture, the bigger the levy pie, leading to a levy *phase-in* scenario.

The main theoretical implication of the above analysis is the realization that a two-tier copyright system of *exclusivity vs. access* is not an alternative but rather a complementary proposition. A major consequence is a dramatic change in the role of collective management organizations (**CMOs**), which relevance (as administrators of levy amounts) is now tied to the growth of the access and sharing culture. Therefore, growth of the exclusivity culture poses an existential risk to CMOs.

Regarding levy targets, because the imposition of liability on devices has proven problematic, with the administrative/judicial process for their establishment often extending beyond the market lifespan of the device, Professor Peukert argues for a switch to levying on internet access services, to be paid primarily by access providers. This would amount to a monthly "culture flat-rate" on open access, mandatory for users but voluntary

[13] ECJ Joined Cases C-457-460/11 –*VG Wort v. Kyocera and Others* (27 June 2013), ECLI:EU:C:2013:426.
[14] Case C-463/12, *Copydan Båndkopi v. Nokia Danmark*, O.J. 2012, C 399/13–14.
[15] See Opinion of A.G. Villalón in *Copydan Båndkopi* (18 June 2014), ECLI:EU:C:2014:2001 [not available in English].

for rights holders. The higher the fee is set, the greater the incentives for rights holders to opt for this second tier instead of exclusivity.

Despite the advantages, strong challenges remain for the survival of a sharing culture. First, systems of *collective* compensation may be phased-out in favor of exclusivity models. Second, CMOs may reject their new role. Third, debtors of levies on internet access will reject payments arguing it is an unecessary tax to support open content. If these challenges subsist, it is possible that the commodification trend in copyright continues and that the sharing culture is marginalized by the proliferation of "premium Internet services" controlled by access providers. The main hope to reverse such trend is to rely on authors to opt into the sharing culture. The second tier collective compensation scheme outlined above could function as an incentive to that end.

3.3. Re-framing (and serving) cultural rights in the digital age?

Philippe Aigrain started his intervention by stating that cultural rights in the digital age should be framed with reference to arts. 27 Universal Declaration of Human Rights (**UDHR**) and 15 International Covenant on Economic, Social and Cultural Rights (**ICESCH**).[16]

In his view, end-user decentralized non-market sharing of works (including remixes and re-uses) is covered by the fundamental cultural right to "take part in cultural life" recognized in both the UDHR and ICESCH. As these sharing acts are within the scope of a fundamental cultural right of *users*, they should not be subject to compensation but rather re-framed so as to safeguard *creators*' material and moral social rights.

To accept this proposition, it is necessary to recognize, protect and incentivize the non-market sphere, rejecting considerations of sharing as market failure. In doing so, Mr. Aigrain proposes the implementation of a social *right to share*. This right is defined as including

> "decentralization (of files) in storage spaces that are under sovereign control of individuals, the right to link, including for commercial provision of means to non-market sharing, and restrictions on any interference of centralized intermediaries with the sharing itself".[17]

This right is to be external to the copyright framework, which in fact is beneficial to the material interests of creators. On the one hand, it recognizes the small contribution of copyright revenues to remunerating creators. On the other hand, it is independent of the copyright model of audience-related income, which will inevitably decrease as the qualitative and quantitative supply of works grows at a faster pace than audiences' reception time.

In this changing landscape, the only model that can provide an additional income source is *mutualism*. Having come to this realization, Mr. Aigrain has developed an

[16] The extended version of Philipe Aigrain's intervention is available at http://paigrain.debatpublic.net/?p=8850&lang=en.
[17] Id.

adaptable model of "statutory mutualism", which he labels the *creative contribution*.[18] The model relies on payments by households and aims not only at rewarding creators, but at enabling the financing of cultural projects and added-value intermediaries; in all instances, preferential treatment is given to those contributing to the non-market sharing sphere.

From a legal standpoint, the *creative contribution* could be enabled by copyright reform at EU level. The most effective way to do recognize a right to share is to amend art. 3(3) Copyright Directive by allowing for digital exhaustion of exclusive rights for non-market uses.[19]

3.4. Problematizing ACS in Europe

Professor Séverine Dusollier started her intervention by stating that she is indecisive about the desirability of ACS in light of market developments showing improved offers of music and audiovisual content. On the one hand, it is important to preserve nonmarket spaces; on the other, from a legal perspective, implementing an ACS would be challenging and would require significant legal changes.

After briefly introducing her previous research on the topic, Professor Dusollier noted that the conclusions from such studies were that the EU copyright framework does not fully allow ACS reform.[20]

In general terms, the proposals to implement an ACS present significant challenges. First, where an ACS relies on a levy model based on a limitation or exception to copyright, it will likely infringe the three-step test. Even where it does not, ACS will usually rely on CMOs to collect and distribute amounts. ACS that rely purely on collective rights management do so through mandatory or extended collective licensing. Here it is arguable that the three-step test does not apply but the restrictions imposed on rights holders exclusive rights are not simple to overcome. Furthermore, some scholars have argued that, should an ACS rely on registration of works, it will be in violation of the Berne Convention prohibition of formalities. This is not convincing though.

Beyond these primary hurdles, that can be overcome by legal adaptations, it is possible to map out other mostly practical challenges. One is that ACS proposals afford a central role to internet service providers (**ISPs**), which raises problems due to the complexity of the applicable legal rules (such as existing safe-harbors) and the contractual framework required to implement this model (supposing that the ACS is not based on a compulsory license but on a contractual license). The license will grant rights to share to users but will it be entered directly by users or by ISPs on behalf of users?

Consumer expectations vis-à-vis consumption and re-use of works are probably more compatible with all encompassing limitation-based mandatory ACS and less with voluntary

[18] For greater developments, see P. Aigrain, *Sharing: Culture and the Economy in the Internet Age* (Amsterdam University Press, 2011), available at http://www.sharing-thebook.com/.
[19] For additional detail on this proposal see La Quadature du Net, *Elements for the reform of copyright and related cultural policies*, at https://www.laquadrature.net/en/elements-for-the-reform-of-copyright-and-related-cultural-policies#collectiveuse.
[20] For the most recent work see Severine Dusollier & Caroline Colin, *Peer-to-Peer File Sharing and Copyright: What Could Be the Role of Collective Management?*, 34 Colum. J.L. & Arts 809 (2011).

models, where repertoire fragmentation will hardly yield "global licenses". Such models would need to secure the clearance of a plethora of rights fragments from different rights holders involved in each work covered by the licensing scheme. For example, rights in a musical composition are managed both individually and by CMOs, while related rights holders manage their respective entitlements in the phonogram/sound recording directly or through intermediaries created for that purpose. All these rights are fragmented at a territorial level, so that clearance requirements multiply by the number of EU member states where coverage is desired. The territorial nature of rights does not fit digital exploitation of works (e.g. P2P), which is by definition borderless. Perhaps the best solution at a EU level would be to designate a European CMO as a one-stop-shop for users or ISPs, managing a network of national CMOs with reciprocal representation agreements.

In addition, for audiovisual works, media chronology rules and territorial distribution practices hinder the feasibility of ACS that seek to legalize online sharing practices occurring prior to the end of the embargo period. These rules, increasingly regulated by contractual arrangements in Europe, are difficult to explain to consumers.

For Professor Dusollier, the key point on which ACS feasibility hinges is that of fair remuneration of authors. In this respect, even successful online ventures such as Spotify are lacking. Creators should be fairly remunerated for online uses and ACS are probably the best model to achieve that goal. The current copyright framework is however ill-equipped to enable such collective remunerated uses.

4. Audience debate and concluding remarks

In the discussion that followed, besides clarifications by speakers on certain aspects of their interventions, the crux of the debate centered around whether an ACS based on a levy systems and/or collective right management could work in practice and on whether it amounted to abolishing copyright online.

On the first point, the recent case of *ACI Adam* was mentioned as an anecdotal example of the poor functioning of the private copying levy system. In this respect, it was noted that the litigation was so morose that the company ACI Adam declared bankruptcy 3 months prior to the publication of the CJEU decision. In what regards the functioning of CMOs, despite general recognition of their value, several audience members pointed out efficiency and transparency issues that raised doubts about the smooth application of collective rights management in the context of ACS.

On the second point, arguments were made that ACS in essence replaces copyright by a cultural tax. Professor Neil Netanel responded that this was not true, as many forms of exclusive copyright exploitation remained, namely most of those concerning commercial uses, like representation in theaters, commercial download/streaming services, etc. All these services would be able to compete in a normal market context. Mr. Aigrain added that the key point was that the entertainment industry, when faced with the legalization of file-sharing services, would simply have to provide added-value offers to attract consumers. In fact, competition with non-commercial file-sharing could be based by offering high quality services with superior user-experience.

The panel concluded with the following questions from Professor Hugenholtz to the speakers: if ACS are such a good idea, why has one not been adopted yet? What is missing to make ACS work?

Professor Neil Netanel believes that, in the US, the reason for non-adoption of ACS lies with ideology and a strong belief in the market. Professor Alexander Peukert attributes such failure to the capitalist commodification trend. Philippe Aigrain believes there are several reasons for this: first, most proposed schemes are designed to compensate harm caused to defensive industries by sharing practices, rather than addressing the new challenges of digital culture; second, with the public's new awareness of the scale of state and company surveillance of individual behavior, any centralized collection of data (even anonymous) is met with caution; third, and maybe foremost, the proposed reward systems constitute a radical reform aiming at social justice, and the incumbent stakeholders have succeeded in blocking all such reforms. For Professor Séverine Dusollier the answer is "lack of imagination". The copyright crux should be focused on a redefined notion of exploitation of works where the persons extracting value out of works, beyond mere consumption, should remunerate authors.

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