

Debate/débat

WILLIAM CORNISH

Thank you very much. Ladies and gentlemen, the floor is open for your reactions to the views of our panelists. You may pose a question, make a comment, or launch an attack you feel moved.

FRÉDÉRIC GOLDSMITH

Oui, permettez-moi de faire une courte intervention en français. Je suis Frédéric Goldsmith, je suis directeur juridique du Syndicat national de l'édition phonographique en France. Nous faisons partie de l'IFPI.

D'abord, je voudrais dire que j'ai été très sensible à ce qu'a dit Pierre Sirinelli sur l'unité des ayants droits. Je crois que c'est vraiment un objectif vers lequel il faut tendre, qui est complexe à atteindre, difficile. Mais je crois que c'est un point très important parce que les débats font rage au niveau international et donc plus on parle d'une seule voix, plus on est fort.

Dans cet esprit, je pense que l'ALAI a certainement un rôle à jouer et se doit d'être présente au niveau international. Je pense notamment au sommet mondial sur la Société de l'Information qui va se tenir à Genève en décembre, qui est co-organisé par l'ONU et l'Union Internationale des Télécommunications, ce qui veut tout dire. J'appelle vraiment l'ALAI à être présente comme organisation non-gouvernementale, comme va l'être la Chambre de Commerce Internationale. Je crois que l'ALAI a un rôle important à jouer pour être un peu provocatrice dans un sens favorable au droit d'auteur. On entend tellement de provocations dans l'autre sens que cela ferait un peu de bien de corriger le tir, de rééquilibrer.

Dernière chose, pour rectifier une petite chose. Pierre Sirinelli a évoqué tout-à-l'heure un projet qui serait celui de l'industrie phonographique de tarifier l'upload. Il faut dire que certaines entreprises au sein de l'industrie phonographique pensent à cette possibilité. Ça n'est pas une position de l'industrie phonographique en général. En tout état de cause, c'est une réflexion en matière de régulation des Télécoms, c'est à dire de régulation tarifaire pour ralentir l'appel d'air en faveur du téléchargement illégal. C'est donc simplement une réflexion en cours. Merci.

ROBERT STUYT

Thank you, Mr. Chairman, I would like to come back very briefly to what has been said earlier this afternoon about the, of course, highly admirable moral standard according to which copyright should not benefit from illegal copies.

I think that this is very correct. The problem, however, comes from the side of the manufacturers and importers of recording equipment or blank carriers. You will have to anticipate the reaction that, if it will not be the case that one have to pay for both legal copies or illegal ones, then the amount or the percentage of the levies should go down. These manufacturers and importers are always complaining that too much is put on their products and there will certainly be a pressure by them that the levies in existence should be reduced. It is something that we have to face. We cannot be surprised if that reaction comes.

CHARLOTTE WAELDE

Charlotte Waelde, University of Edinburgh. I have been struck by the consensus amongst the members of the panel this afternoon that there should not be double payment based on levies, on the one hand, and on digital rights management systems, on the other. And I wondered which – if any – interest group was actually pushing for such double payment? Or is it really just a question of when, at what point, the levies are phased out when the digital rights management system becomes effective?

ALAIN STROWEL

Let me answer this question concerning the double payment issue. Your question was whether there is already a push forward to introduce on top of existing levies some form of remuneration through technical means of protection. I am not sure that I got the question, sorry, I have some difficulties in responding here. But definitely, I think there is no case of double payment at the moment.

ANKE SCHIERHOLZ

I am Anke Schierholz from the Collecting Society for the Visual Artists in Germany. And I am really struck by the consensus that digital rights management might phase out levies. To me, it seems that digital rights management is mainly a marketing tool. Copyright has traditionally concentrated on the relationship between the author and the distributor and the focus on digital rights management system, in my perception, shifts the focus from the distributor to the end-user who traditionally has nothing to do with copyright. Therefore, I am stunned that we have a copyright debate on digital rights management systems which I

never saw as a system that is actually working. The criteria that Bernt Hugenholtz put up are to me by far too soft to really secure a fair remuneration for the authors. I mean the criteria that if technological protection is available and if it is theoretically applicable there must not be a levy, is too soft; it may result in shifting from the existing levy-system to a rather insecure digital rights management system where all the codes have always been broken within days.

Another thing I wanted to say is that it is not correct what has been repeatedly said about collecting societies; namely that the way they distribute levies only guarantees a rough justice. It is wrong, because the system of how we are distributing the levies is fairly elaborate. We are constantly conducting studies to be, as far as possible, able to distribute private copying levies as individually as possible. I have my serious doubts whether digital rights management systems could make a better distribution than that.

GÜNTHER POLL

I have a comment according to which GEMA is asking for payment for illegal copying. I believe there is some in-built logic in this practice if you take the position that consumers have a basic or even a constitutional right to make private copies. It follows from this that there is an opposition to narrowing the scope of the compulsory license which allows private copying. If, in particular, you are opposed to making the legal source of copies a requirement and if you have the political clout of GEMA and the consumers' associations – and that is the position of GEMA and consumers' associations throughout the legislation process in Germany – then, at a certain point, the exclusive reproduction right becomes virtually annihilated and erased. Somehow, it is logical that you want to have a compensation for it, is not?

GEMA's position means turning rough justice not into justice but into some kind of short-term satisfaction; financial satisfaction, at least. The price you have to pay for this may become due only later and maybe it has to be paid by somebody else.

I also wanted to make a very short comment on the three-step test, which seems to be familiar to law-makers in Japan, but seems to be totally unfamiliar to some law-makers in Europe, in particular in Germany, where it is treated as an alien coming from somewhere out of space. The legislators did not make any analysis of this three-step test in the context of digital private copying, but simply declared that what they have drafted was in conformity with the three-step test.

There is also some logic in that. If they had applied the three-step test in the form of a serious analysis, they might have easily found out that digital private copying left to a limitation in the form of a right to remuneration does not comply with the first step, since it is not a special case, and, most likely it does not

comply with the second step either since it is in conflict with the normal exploitation of works. No doubts may be about that; it is clearly shown by the decline of the music industry in the last couple of years.

TIM KUIK

My name is Tim Kuik, I am working for the BREIN Foundation. We enforce copyright against on-line and off-line piracy. I have a question to Bernt Hugenholtz but also maybe for some other members of the panel. What do they think an illegal copy is? Because with the exception, perhaps, of a copy of an illegal source, I wonder what nowadays illegal copying is. It really depends on what you do with the copy; are you making it available, are you distributing it? The same questions may be asked regarding downloading. What is an illegal downloading? Or is there only illegal uploading?

BERNT HUGENHOLTZ

A lot of questions for the minus four minutes that we have. I think I will not answer all of them. But the point is, of course, that whatever way you qualify downloading from a peer-to-peer network – I think, according to the Dutch Ministry of Justice, it is legal in the Netherlands, it maybe legal in some other countries as well, and it may be illegal in other ones – unauthorized uploading is illegal under any analysis. And that is, of course, where the harm starts, where the illegal act commences. If you want to cover all that with a compulsory licensing or statutory licensing system, then what you are basically doing is stretching this way beyond any dimensions that were originally taken into account. If you would like to use arguments concerning peer-to-peer file sharing for maintaining or expanding levies, then what you are really doing is compensating rights holders for piracy. And that is the point. That is a step that we have not yet taken in the history of copyright. I would actually love to hear some collecting societies' comment on this but they have been conspicuously silent so far.

ADOLF DIETZ

I would like to say that, as far as the equipment levy is concerned, your argument is rather theoretical. Because according to the German law, you pay the levy for the possibility or the probability to make allowed uses. But nobody can exclude it that, amongst say 100 or 1000 uses you make, part of them is illegal. This is, however, irrelevant because, when you pay the levy in buying the equipment, this is so to say more or less included. Nobody cares about it. There is, in addition to

that, no possibility to state individually whether an act of use is illegal or not, because you pay the levy as a sort of lump sum. So, I think that your argument is totally theoretical.

JUKKA-PEKKA TIMONEN

My name is Jukka-Pekka Timonen and I have come from the Finnish copyright organization, KOPIOSTO. I have been working there at a service with which we were doing interviews, making a survey, concerning private copying in my country. They have showed that approximately half of the CD-ROMs are filled with music. In my country, approximately 18 million CD-ROMs are imported every year. This means that 9 million CD-ROMs are made containing music. That is what I call rough, but there is not much justice left there.

The remuneration for private copying is 20 cents per CD-ROM to the rights owners. If there were any efficient DRM system which could give the rights holders the normal level of remuneration, the rights holders would clearly choose such a DRM system. But today, unfortunately, safe DRM systems do not yet exist, and massive digital copying is going on. So, one has to do something. It has to be said that copyright owners should not gain profit or benefit from illegal uses. But is it correct that the producers of the hardware and the diskettes can profit from illegal uses? Because, as we all know it, they do. I am not saying that illegal uses should be compensated by a levy but the question is not as simple as it has been discussed here.

ANTOINE LATREILLE

Je voudrais donner mon sentiment sur les mécanismes de rémunération. J'ai l'impression que, si l'on ajoute à ce dont a parlé Alberto Bercoz la notion d'adéquation des supports ou des équipements dans laquelle l'Espagne est très avancée; si l'on ajoute en plus la question de l'augmentation du nombre et de la diversité des ayants droit, en termes de rémunération pour copie privée; si l'on ajoute le progrès technique qui va vers une fusion à la fois des médias, des équipements et des pratiques, nous sommes en train de construire une tour de Babel et l'histoire se termine mal ! Et nous finirons par transformer les juristes en épiciers!

BERNT HUGENHOLTZ

Let me recall that Adolf Dietz said that distinction made between legal and illegal use is highly theoretical and that, in fact, levies are paid up-front for equipment and, therefore, you cannot control or even know what the equipment is used

for anyway. I think that is more than a theoretical argument. If you invoke piracy losses as an argument for extending a compulsory license system, and also, obviously, as a basis for calculating the level of levies, then you are transgressing the borderline of a traditional levy system more than in a theoretical way. You are in fact asking for disaster relief. It is like a city which has been struck by a tidal wave and then gets extra subsidies and those subsidies have to be paid by consumers on their daily shopping. That has nothing to do with the levy system as we know it, which has always been related to an exemption to an exclusive right. The remuneration has always been based on the idea that it would otherwise, in a perfect market, be paid under a licensing scheme.

WILLIAM CORNISH

Ladies and gentlemen, because of our next engagements, we must draw to a close what was beginning to develop into an interesting exchange. I have some feeling, as the afternoon's umpire, that DRM was getting better representation than the continuance of levies, but I would remind you, that we are considering the levy systems as they exist. They have therefore a proven value that should not lightly be set aside.

I thank all the members of the panel for their contributions.