

Copyright as an Individual Author's Right and Collective Licenses – part II

INDIVIDUALISTIC COLLECTIVISM?

I have been pleased to notice that my article “Copyright as an Individual Author's Right and Collective Licenses” (IPRinfo 1/2004) has been considered interesting. I hereby reply to Vappu Verronen and at the same time continue and define my argumentation more accurately.

The European copyright concept has traditionally been regarded as being based on values rising from natural rights and emphasizing the freedom of an individualistic author to master the use of his/her property. Collective licensing is a system that was developed due to practical reasons, in order to solve the licensing problem. From an authors viewpoint problems caused by it affects three groups of authors: the members of the collective society, the non-members and authors from other fields of art.

The problems concerning those who are members of the society are the following. It should be obvious that the idea of a collective society, which represents tens of thousands (through its subsidiaries possibly even millions) of authors, which would at the same time carry out their personal wills in mastering the use of their works, is curious. Grounds for allocating collected compensations are not unambiguous either.

A decision of the Finnish Copyright Council (1998:15) serves as an example how the views of individual authors may differ: a late artists son and brother had opposite opinions what would be proper use of a certain work. Then again, if we believe that individual authors are not anymore interested in individually mastering the use of their works, one may ask why do we grant them copyright in the first place – only that they could assign it to a society? Thus from the authors viewpoint collective licensing must also mean lack of opportunities. Surely collective licenses have economically beneficial effects for authors under their scope as well – they would hardly exist if they did not. (Thus, I am not saying that they exist only in order to benefit users, as

Verronen seems to misinterpret me, but I rather question this one sided argument that tends to constantly appear.)

However, the justification that they do exist in order to benefit the authors disappears, if the society refuses to grant the license: no compensation to distribute is paid and the authors cannot present their works. Additionally, in a case of refusal to license one cannot argue that the system exist in order to assist the users either since no permission to use is granted. The clause that grants a society a right to refuse from licensing cuts of the branch collective license system itself is sitting on. (Two previous sentences added to English version). Allowing individual licensing in a situation where a society refuses to grant the license would not solve the problem. The existence of mass licenses is reasoned with the impossibility of individual licensing.

THE RIGHT TO BAN AND ASK FOR COMPENSATIONS DO NOT SOLVE THE PROBLEM

The problems that the so-called “compulsory license effect” of the contractual license lay on the non-society members are even clearer. Right to ban the use or ask for compensation cannot remove them. If it were always possible to individually ban the use of rights (which it is not), individual licensing ought to be possible as well – if you can ban, why can not you license? Thus as it comes to non-society members the situation is in practice comparable to compulsory license. According to Verronen the small number of bans only explain how functional the system is. However, this argument leads us back to the problem explained before: if individual right holders do not regard it important to personally master the use of their works, why do we grant them such exclusive right?

A non-society members right to ban and ask for compensations are minimal requirements in the light of copyright theory that embraces individuality – not a factor granting the non-society member “a better position”. If the mentioned rights would not exist, it would not be meaningful to argue that the copyright system is for what it is said to be: individual authors exclusive right to master the use his/her works. When I speak of dead letters of law I especially refer to the difficulty of a non-society member to individually supervise and collect compensations for the use of his/her

rights. Thus I am not talking of those who are members in a society – an impression one gets when reading Verronen’s article. There would not be need for collective licenses if it were possible for individual right holders to supervise and collect compensations afterwards for all the uses of his/her rights. On the other hand if later compensation from collecting societies is regarded sufficient, one may ask why an exclusive right is granted to individual authors to master the use of their works in the first place and on what grounds stemming from individualistic copyright theory can we criticise compulsory license? (Two previous sentences added to English version.)

Limiting the right to ban only to situations of “primary use” is problematic. It is impossible to know when an individual author wants to ban the use – perhaps especially when the use is described to be “secondary”. What defines the line between “primary” and “secondary” use?

As it comes to the authors from other fields of art not administered by a certain society, I continue to elaborate the questions relating to the fulfilment of constitutional rights. For example if Teosto [a collective society in Finland administering use of musical works] would decide not to grant a license to Yleisradio [publicly funded radio and television company], Yleisradio could not present movies (music in the background). Now, would the movie directors, scriptwriters or other right holders copyright or right of freedom of speech/expression be fulfilled? This last problem arises since the area of a single society’s administration is limited to a certain field of art.

ENFORCING COPYRIGHT OR DISTRIBUTING COMPENSATION?

According to the headline of the chapter 2 in the proposed Government Bill 28/2004 the contractual license system seems to separate from limitations/exemptions of the copyright law. This proposed amendment might be approached with several simple questions. Is it in general possible that restrictive features in a certain legal system in practice disappear (“black turns into white”) if only stated in some law? The courts tend to interpret limitations in copyright narrowly (in favour of the right holders). Should this rule for interpretation be applied, if contractual license is not seen as a

limitation anymore? When do legislators of the copyright law regard something “undeniably an important limitation in copyright in principle” and when do they not?

Since the Committee for Education and Culture explicitly required in their statement of 18.2.2003 that expansions of the contractual license system should be reconsidered, one may regard the situation questionable. It is possible that authors do not consider it important to master individually the use of their works – it is more important to get compensations. Then we, however, come back to the above-mentioned question: why do we grant them an exclusive right to do so?

If we accept that collective licensing is practically about distributing compensations, we return to the discussion for alternative mechanism to secure economical interests of the right holders. Then would it not be rational to examine the situation from the perspective of free markets/competition. Since collecting societies in practice artificially get their dominant market/monopoly position, one may e.g. ask if this is healthy in the light of free competition?

COMPETING SOCIETIES ONLY IN THEORY

The claim that anybody could found a competing collecting society remains pure theory. According to the Government Bill 28/2004 (p. 95) the Ministry of Education must approve the society that grants collective licenses. By this, one wants to avoid a situation where: “several domestic and foreign societies could present *at different times different negotiation and compensation claims against users*” (emphasize authors own). Does this clause not explicitly prevent competition between societies? Curiously the Government Bill argues that this system (which explicitly confirms this monopolistic position): “first and foremost protects the *user* [payer] of protected content” (emphasize authors own). (Previous sentence added to English version.) Furthermore, actual possibilities to collect sufficient commissions from right holders of a certain field of art in order to found a competing society are insignificant.

The provision governing mandatory arbitration/court proceedings seals in its own way the problems of collective licenses. Article 6 of the European Convention on Human Rights secures everyone a right to “fair public hearing within a reasonable time by an

independent and impartial tribunal established by law”. However, according to Verronen, as it comes to contractual licenses one should remove the references to the provision in copyright law that grants this right. Personally I do not regard such line of thought justified where a party would be deprived from his/her right to fair and public hearing if another party endangers his/her rights. If we want to discuss of cherishing culture and civilization, the appliance of the mentioned article in the European Convention on Human Rights is a minimum requirement.



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