

**RECOMMENDATIONS FROM
THE COMMITTEE ON COPYRIGHT ON THE INTERNET**

Ministry of Culture
April 2011

Recommendations from the committee on copyright on the internet

The task of the Committee has been to examine concrete initiatives and models that can strengthen the enforcement of copyright on the Internet and to investigate the possibilities for promoting the development of new business models and legal services for creative content on the Internet.

As previously noted¹, the Ministry of Culture deems the expression “illegal upload (illegal file sharing)” of copyright material, which is used in this report, to also include other future forms of illegal digital distribution of copyright material.

As described in chapter 6 of the Committee report, the Committee has considered, among other things, so-called compensation models. The Committee does not see cause for presenting a proposal for legalising the file sharing of copyright material without consent in exchange for a compensation scheme, for the very reason that this would contravene international conventions and EU directives.

Furthermore, the Committee’s deliberations have been structured around four primary focus areas: enforcement of copyright on the Internet, legal business models, increased consumer awareness and sending information letters.

1. Efficient enforcement of copyright on the Internet

As a rule, copyright infringement is subject to private prosecution, i.e. it is up to the right holders to make claims for damages or penalties against potential infringers. It is only in particularly serious cases e.g. cases involving piracy, that the prosecution service can make claims on its own for penalties in the form of fines or imprisonment.

In 2006 the Director of Public Prosecutions formulated a referral procedure for cases involving the infringement of intellectual property rights, including copyright infringement committed under particularly aggravating circumstances. A revised referral procedure² was drawn up in November 2010. The purpose of the referral procedure is, among other things, to establish uniform and effective responses in regard to the fight against serious copyright infringement and the illegal import of copyright works and similar infringements of the other intellectual property rights.

Among other things, the referral procedure means that the police districts must inform the State Prosecutor for Serious Economic Crime when they receive a report of an infringement of the copyright law. The State Prosecutor assists with advice and guidance and in certain circumstances can take over the investigation of the case when the extent or nature of the case puts it within the jurisdiction of the State Prosecutor. The Committee has gathered information on how the Swedish police and the Swedish prosecution service work to fight copyright infringement.

¹ The report, page 10

² The Director of Public Prosecutions instruction no. 5/2010

In the course of its work, the Committee has not pointed out particular regulatory challenges or initiatives regarding the current enforcement efforts. Individual Committee members have questioned the appropriateness of the regulations in those cases where the right holder petitions the Bailiff's court to block access to a website containing material that infringes a copyright. The *Retsplejerådet* (Standing Committee on Procedural Law) is currently considering the question of how Bailiff's court cases are handled, including the question of improving the opportunities for third parties to safeguard their interests in Bailiff's court cases. The deliberations of the *Retsplejerådet* are not expected to be concluded before the Committee finishes its work.

Recommendation:

- The Committee finds that the prosecution service has formulated referral procedures for cases of intellectual property rights infringement. The purpose of the referral procedures is to ensure that serious cases of copyright infringement are handled in a uniform and effective way. The revised referral procedures contribute to appropriate working procedures within the police and the prosecution service.
- *The Danish Producers Association, IFPI Denmark, the Council for Protection of Intellectual Property, the Danish Publishers Association and the Danish Bar and Law Society* find, moreover, that there is a need for redistributing the existing economic resources. The resources should be earmarked for fighting infringements of intellectual property rights and should be used to establish special intellectual property rights units within the police and the prosecution service in order to train investigators and prosecutors in the field of intellectual property rights infringement and in the long term should ensure a targeted organisation of the efforts in line with the Swedish example.
- The Committee has noted that the *Retsplejerådet* is considering the question of how Bailiff's court cases are handled, including the question of improving third party opportunities for safeguarding their interests in connection with Bailiff's court cases.

2. Legal business models

The work of the Committee has shown that the development of legal business models with creative content is undergoing rapid growth. New services and business models that help to ensure that music, film, literature etc. can be legally distributed to consumers are appearing all the time. The Government has a focus on this development and has, among other things, helped to establish *Musikzonen* (the Music Zone), which is a network organisation consisting of stakeholders from the music industry and the business community, including the Danish Musicians Unions, KODA, Dansk Industri/ITEK (the Danish ICT and electronics federation for IT, telecommunications, electronics and communication enterprises), IFPI Denmark and TDC. The aim of *Musikzonen* is to promote knowledge, innovation and network creation as well as to support growth and development in the Danish music industry. This is done, for example, by providing motivation for new areas of cooperation, exchanging experience and creating a greater

awareness of the music industry's potential. At the same time, *Musikzonen* focuses on collecting and sharing knowledge in order to identify areas of potential within the music industry and demonstrate new business models and modes of use. Similarly, the Government has assisted in establishing *Computerspilzonen* (the Computer Game Zone), which is a parallel initiative. The Committee has not identified significant regulatory barriers to the development of new business models and other legal services, which is why the Committee has not proposed any concrete initiatives.

Recommendation:

- The Committee deems that legal business models on the Internet contribute greatly to the development and prevalence of creative content for the Internet, to the benefit of consumers. Therefore, the Committee encourages the relevant stakeholders, including public authorities, right holders and the other market players to continue to maintain a strong focus on developing and distributing new business models and legal services for creative material on the Internet.

3. Increased consumer awareness

The Committee's work has established that an extensive amount of information about copyright is presently available through a number of sources. The existing communication effort is characterised by the fact that it is largely based on websites and broad-based information campaigns. The Committee deems that there is a need for an increased information effort in regard to consumers. The effort should be "proactively outreaching" instead of "passive information" on a website and should concentrate partly on what is legal and illegal and partly on the background and reasons for copyright, thereby creating a broader understanding and acceptance of the copyright as an incentive for producing new creative material. The information effort should, moreover, target youth consumer groups.

In order for the initiative to have the greatest possible impact, the Committee finds that an information campaign should be conducted as a collaboration between all the significant stakeholders, including the right holders, the Internet service providers, the Danish Consumer Council and the Ministry of Culture.

The Ministry of Culture has allocated funds for an information campaign, which is to be realised on condition that the right holders participate in financing the campaign on an equal basis with the Ministry of Culture.

Recommendation:

- The Committee finds that an information campaign should be carried out as a collaboration between all the significant stakeholders, including the right holders, the Internet service providers, the Danish Consumer Council and the Ministry of Culture.

- The Committee finds that the information campaign should be a proactive, outreaching information campaign, targeting youth consumer groups. The information campaign should provide information about what is legal and illegal on the Internet in terms of copyright as well as enhance knowledge and understanding about the copyright as an incentive for producing new creative material.

4. Sending information letters

The Committee has investigated possibilities for a model for sending targeted information to consumers through whose Internet connections copyright infringements have, according to right holders, taken place. The Committee's considerations are presented in chapter 8 of the report.

The aim of sending information letters should be that a certain percentage of consumers who are made aware through a such a letter that, according to the right holders, copyright infringements have taken place through their Internet connection will act on the problem and ensure that it does not happen again. At the same time, it is clear that an information letter will probably not have a significant impact on the behaviour displayed by the most inveterate copyright infringers.

With the models the Committee has studied, information letters are sent on the basis of the legal monitoring of file sharing systems that the right holders already perform and which is approved by the Danish Data Protection Agency. The models do not involve having Internet service providers or any public agency monitor or perform surveillance of Internet subscribers' behaviour on the Internet. All of the models discussed involve exchanging and handling personal data, which will necessitate a specific statutory codification.

Right holders are free, generally or in relation to specific infringements of the law, to choose whether they will take advantage of the regular law enforcement tools or the letter model. If the right holders have initiated a procedure through the letter model in relation to a specific subscriber, the right holders will refrain from utilizing the normal law enforcement tools with regard to the subscriber in question until the procedure for sending the information letter is completed.

Moreover, the Committee take the view that, according to applicable law, right holders can use the fact that information letters have been sent during a possible court case, and it is up to the court to determine the evidential weight of the information in accordance with the general principles for the free assessment of evidence.

The Committee has agreed that the letter should have the character of an information letter without sanctions. Moreover, the information letter should make it clear that the question of copyright infringement has not been reviewed by a court.

The Committee's concluding deliberations have focused on a model that contains the following basic elements:

1. Right holders investigate which IP addresses (i.e. Internet connections) have been used for uploading copyright material through illegal file-sharing services. This information is passed on to the relevant Internet service provider, along with an envelope containing the information letter from the right holder and a pamphlet from the Ministry of Culture with information about the letter model.
2. The Internet service provider identifies, if possible, the name and mail address of the subscriber behind the IP address in question by using its own IT systems, if necessary created for this purpose. If the Internet service provider determines that it no longer have a subscription relationship with the subscriber behind the IP address (for example if it has been resold) or if it is not possible to identify the subscriber behind the IP address, the right holder organisation that has filed the complaint is then notified. Other possible exceptions may be considered.
3. The Internet service provider investigates whether the subscriber has previously received information letters as part of the letter model. If the subscriber has previously received two letters, the Internet service provider is not to send a third letter to the subscriber but instead inform the right holder organisation which has filed the complaint that the subscriber behind the IP address in question has already received two letters as part of the letter model.
4. Thus, the Internet service provider is responsible for sending – unless it is the third time – an information letter to the subscriber from the right holders, i.e. on the right holders' stationery, along with a pamphlet from the Ministry of Culture providing information about the letter model. There are two possible options with regard to sending letter number 2. The simplest solution consists in sending an identical text both the first and second time, seeing as it is made clear in the text that if the letter is received a second time, there is a risk of legal proceedings being initiated by the right holder. Alternatively, the Internet service provider can send either a letter number 1 or a letter number 2, with different wordings, depending on whether it is the first or second time the subscriber in question is receiving an information letter. It is expected that this will increase the impact of the information letter. However, it also increases the administrative burden on the Internet service provider. The envelope is to be blank, and the Internet service provider simply attaches a label with the name and mail address of the subscriber who is to receive the information letter. Neither the envelope nor its content indicates that it originates from the Internet service provider.
5. The right holders establish a central helpdesk that is to handle enquiries from subscribers who have received an information letter as part of the letter-model process.

Recommendation:

- *The Ministry of Culture, the Ministry of Justice, the Ministry of Economic and Business Affairs and the Ministry of Science, Technology and Innovation, the Danish Producers Association, IFPI Denmark, the Council for Pro-*

tection of Intellectual Property, The Danish Publishers Association, the Telecommunications Industry Association in Denmark (TI), the Danish IT Industry Association (ITB), DI ITEK, Musikzonen and the Danish Bar and Law Society support a letter model as described above. The support of the individual Committee members is dependent upon finding an acceptable financing model, c.f. paragraph 5. The Committee members also find that a letter model should be evaluated after a two-year period.

- *The Danish Consumer Council* does not find that a letter model is a relevant initiative for reducing illegal file sharing because the Consumer Council feels that there is a lack of proportionality between the letter models that have been discussed and the respective uncertainty factor and costs for Internet subscribers. Moreover, the expected benefits for the creative industries – particularly the music industry – are not specified in the Committee’s work. This also applies to the possible application of the letter model in connection with forms of infringement other than “illegal upload (illegal file sharing)”. The Consumer Council proposes instead that the industry promotes the development of new business models and increased general consumer information.

5. Financing the letter model

The letter model outlined in paragraph 4 would involve costs for the right holders to identify information about which IP addresses are used for illegal file sharing as well as costs for generating a standard letter to send to the Internet service providers. The Internet service providers will incur costs relating to developing an IT system which can automatically link information about an IP address with the physical address of the Internet subscriber with the IP address in question as well relating to an advisory letter to right holders in cases when a subscriber has already received two information letters. All parties involved will incur expenses for ongoing operations. Moreover, the right holders will bear the costs of providing the helpdesk function where Internet subscribers can direct enquiries regarding the background for information letters they have received. Furthermore, a letter model will involve costs for paper, envelopes and postage. Implementing a letter model is dependent on ensuring this financing.

As a part of the work of the Committee, the Ministry of Culture has ordered a technical report³ from Netplan, which includes an estimate of the costs for looking up IP addresses in the Danish broadband net. The results of the report are described in chapter 8.8 of the Committee report.

According to the Committee’s Terms of Reference, any possible extra expenses that result from Committee proposals must be covered within the respective existing economic frameworks of the ministries involved.

³ The report is reprinted as annex VIII in the Committee’s report.

Various models of financing were considered during the Committee's deliberations, including financing by the right holders and the Internet service providers according to a contribution key to be agreed upon in more detail.

Recommendation:

- *The Ministry of Culture, the Ministry of Justice, the Ministry of Economic and Business Affairs and the Ministry of Science, Technology and Innovation* recommend that a model for sending information letters should be completely user-financed by the right holders, including having the right holders bear the majority of the costs incurred by the Internet service providers. When determining the details for the distribution of costs, it is relevant to strive for an incentive structure that will help limit the costs for both the right holders and the Internet service providers.
- *TI, ITB, DI ITEK and the Danish Consumer Council* recommend that the costs are distributed such that the right holders cover their own costs associated with finding and forwarding IP addresses as well as the costs of ultimately sending the information letters to the consumers from the Internet service providers, i.e. postage and enveloping. The right holders cover all costs for establishing the necessary technical databases (LID databases) and systems for establishing registers with Internet service providers of previous letters that have been sent. The Internet service providers cover their own costs associated with finding the physical addresses of Internet subscribers, including costs for maintaining the LID databases.
- *The Council for Protection of Intellectual Property, IFPI Denmark, the Danish Producers Association and the Danish Publishers Association* recommend that the costs be distributed such that the right holders cover their own costs associated with finding and forwarding IP addresses and information letters to the Internet service providers. Additionally, the right holders cover 50% of the postage expenses for sending the information letters to the final recipient. The Internet service providers cover their own costs associated with finding the physical addresses of Internet subscribers, including costs related to establishing and maintaining LID databases.
- *The Danish Bar and Law Society and Musikzonen* do not have an opinion regarding the question of financing a letter model.