

REDE ZUM INTERNATIONAL IP ENFORCEMENT SUMMIT BERLIN 2017, KLAUS MÜLLER, HEAD OF VZBV

Dear Commissioner Bienkowska (Commissioner for Internal Market, Industry, Entrepreneurship and SMEs),

Dear Mr Campinos (Executive Director, European Union Intellectual Property Office (EUIPO)),

Dear Mr Billen,

Dear Ladies and Gentlemen!

Thank you very much for the kind invitation. I am absolutely delighted: As I see it, the fact that I can address you at the beginning of this event highlights the growing importance of consumers when it comes to intellectual property and copyright in particular. I appreciate that, and the consumer perspective is absolutely central.

Let me briefly say a few words about my organisation, the Federation of German Consumer Organisations, or vzbv. We are the umbrella organisation for more than 40 consumer organisations throughout Germany and represent the interests of German consumers vis-à-vis policymakers, the private sector and in public. Vzbv is also a founding member of BEUC, the European Consumer Organisation.

When I was invited, I was asked to highlight the **shared interests of consumers and right holders**. "Poor guy" some of you may think now. But there are shared interests. And they are larger than commonly assumed.

Let me put something right straight away: Consumers are willing to pay for legal access to content. This is not about the creation of a 'free lunch' culture like the former Commissioner for the Digital Economy and Society, Günther Oettinger suggested¹. Just think about the success and wide adoption of film- and music streaming subscription services. Where these services are made available, piracy rates drop significantly. Today, nearly one third of the German online users use paid-for Video-On-Demand services. This is up from 22% in 2016. Worldwide, more than 50 million users pay for Spotify's premium service.

In short: Consumers **are willing to pay** for these services, and this willingness to pay will increase as the services improve. As a result, there is a strong potential to earn money with those services and the potential revenue is likely to grow in the future. The recent market developments show that the industry's efforts to provide attractive legal offers pay off and are widely adopted. In the end, this benefits all parties involved: Artists, right holders and consumers.

¹ wie es Herr Oettinger jüngst mal formulierte: „Die Nutzer wollen alles umsonst. Freibier für alle“ vgl. z.B hier: <http://www.golem.de/news/leistungsschutzrecht-oettinger-will-nur-auf-verlegerverbaende-hoeren-1610-123904.html>

Right after consumers' interest in high-quality content and their willingness to pay comes users' **strong desire to legal certainty**.

The internet has reinforced users' legal uncertainty and confusion with regard to intellectual property. And I am not talking about complicated matters here. I refer to ubiquitous, everyday online activities:

- ❖ May I post this link?
- ❖ May I share this picture?
- ❖ May I share my holiday video with my friends and family on facebook or youtube?

Maybe this is typically German, but: In case of doubt the answer to all these question must be "No, rather not!" in order to be on the safe side.

Because I *might* infringe the right of an author or rights holder. And I certainly don't have the time and knowledge to ask all potential right holders for their permission to use the content. But this is exactly what I would have to do if I wanted to be legally safe. This is not only completely detached from real life – it increasingly becomes a stumbling block. The consequence is that new exciting possibilities for communication and interaction will remain underused. The result a straight forward loss of welfare.

Watching legislators being unwilling to take action, my hope for long rested with the European Court of Justice to provide clarity and legal certainty. That hope has not materialised. On the contrary: After the last court decisions on the linking of content and the liability of Wi-Fi hotspot operators, we find ourselves in a situation where these decisions raise more questions than they answer.

My perception is, leaving consumers in limbo has yet another effect that should not be underestimated: If it becomes increasingly difficult in daily life to behave in conformity with the law we run the risk to completely undermine the **acceptance of copyright law**.

That is why I fear that a further push for strengthening exclusive rights will actually lead to a rebound effect: From a copyright that is not understood, impractical to apply and hence largely ignored – it is only a small step to questioning the legitimacy of the concept as a whole. This will hurt the acceptance and respect of copyright law more than it will help right holders.

We must strongly oppose this development. Unfortunately, in Germany, efforts are still insufficient: Still, an enormous amount of warning letters are sent to consumers every day, threatening them with juicy fines. Hence, advice around how to deal with warnings are still one of the main activities of our regional consumer centres.

That is one of the reasons why the legitimacy of intellectual property rights and its enforcement in a digitalised world are increasingly questioned by society at large. Most people affected perceive the massive enforcement as excessive.

From their perspective, the claims for damages are disproportionately high, primarily serving profit maximisation of mandated lawyers. This cannot be a solution we want. Don't get me wrong here: vzbv does not try to downplay copyright infringements - or the damages resulting therefrom.

But I do not think that a disproportionately strong focus on enforcement is suited to address the challenges the digital era poses for intellectual property rights. In order to help copyright to be met with greater acceptance it is crucial to improve the relationship between users and the creative industry. I am convinced that this can be achieved in two ways:

We need to improve access to affordable digital content

From a consumer perspective the central problem is that supply does not match user preferences. As soon as users have access to the large variety of offers online that are available across Europe their willingness to pay will increase. This is straight forward: A larger variety of offers can better cater to the individual tastes. To be clear: I talk about access across borders, any time, at fair prices and under transparent terms and conditions.

Proof that this works has been provided by video-on-demand-services like Netflix or music streaming companies like Spotify. Where they enter a market, piracy declines dramatically and industry profits increase. This is also confirmed by the study of your own organisation, Mr Campinos (*er ist Executive Director, EUIPO*): the IP Youth scoreboard 2016. On page 15, it says that the availability of affordable products is by far the primary reason to stop using illegal sources.

We must simplify copyright rules and we have to invest in consumer education

In the current situation, we cannot assume that consumers know where legality ends and illegality starts. How should they? Even copyright experts cannot always unanimously tell what's legal and what's not. Let me give you two examples:

BEUC, the umbrella organisation of the European consumer associations, together with its members, initiated a survey among copyright law professionals with various backgrounds: Collecting societies, academics, officials in ministries, right holders and digital rights organisations. They came to completely different conclusions when being confronted with the same everyday situations.

One situation we asked them to comment on was: A consumer wants to use a song of his favourite band on his family Christmas video and upload it, so his family and friends can enjoy it:

- 4 experts said this was “legal”
- 18 said this was “illegal”
- 7 said the situation was “unclear”

When even these experts – some even from the same country - cannot clearly establish whether an act is legal or not - how should consumers know what they are allowed to do? This shows how overly complex the rules are and that we urgently need to simplify the current copyright framework.

Another example are video streaming platforms. Very often, it is not possible to determine with certainty whether a specific offer is unlawful. Where shall consumers intuitively draw a meaningful line? When a film is still screening in the cinemas users can quite safely assume that its availability on a free platform is illegal and

recognise it as such. But what about older, even historic movies? What about platforms such as YouTube where everyone can upload videos? If you go there, you will find some films in full length. The wide variety of available streaming portals, makes an assessment by an individual consumer more confusing and difficult than ever.

This shows: We urgently need a continuous and well-structured consumer -- education. Policy-makers and educational institutions should be obliged to initiate education campaigns and develop corresponding curricula for schools.

Therefore, I especially appreciate the work of EUIPO. Your studies and initiatives provide important empirical knowledge and educational work in the area of intellectual property rights².

What do policy makers offer?

First of all, I am curious to see what the upcoming revision of the European intellectual property enforcement framework will look like. As mentioned before: I am sceptical whether a one-sided, unbalanced strengthening of law enforcement at the expense of consumer interests is a helpful approach at this moment.

I would like to ask you to look at that in the context of the current copyright review: Judging on the basis of the current state of the debate, I don't see copyright being weakened. On the contrary:

- ❖ The proposal to limit geoblocking of online TV and radio programmes - and especially its country-of-origin principle - seems to be dead at arrival. Even this – however minimal - limitation of copyrights seems to be off the table. Consumers were promised something they will not get.
- ❖ The EU copyright Directive (“Digital Single Market Directive”) will more likely result in a – useful or not - strengthening of copyright. On the one hand, there is the proposed introduction of a neighbouring right for press publishers at European level. And on the other hand, this is accompanied by a fundamental shift in the liability regime of online platforms.

I can hardly call this a balanced approach – let alone if it is complemented with a tighter law enforcement regime purely at the expense of consumers.

But no one knows yet what the final texts will look like. In my view, we should make sure that the liability principles of the E-Commerce Directive remain unaffected. This is not to say that in the case of legal infringements we still need to work out certain clarifications for the “notice-and-take-down” and the “stay-down” principles. However: in general, we should stick to the principle of Article 15 E-Commerce Directive: There ought not to be general monitoring and filtering obligations for platforms.

² Bei Nachfragen, was der vzbv beiträgt: vzbv has developed the “Educational Material Compass” for consumer education. The aim of that project is that our experts test and evaluate educational materials. Via a platform, teachers can find out which material are fit for their educational purpose. Intellectual property right is of course one of the topics.

http://www.verbraucherbildung.de/suche/materialkompass/field_subjects/informatik-technik-3008

It is also clear, that a clarification of the term “commercial scale” is required. This is needed in order to prevent that private acts, not motivated by profit seeking, can be subsumed under the category of “commercial scale” activities. Massive reporting procedures where consumers’ identities are given out by providers to law firms for sending out warning letters must be put to a hold!

We must look beyond the narrow focus of a) enforcing copyright infringements and b) making the Enforcement Directive more rigorous:

Copyright law has long become part of consumers’ everyday lives. It is therefore high time for the legitimate interests of users to be enshrined in European copyright law. The amendments currently under discussion do not really improve consumers’ situation. Here, we have to put our hope on the ongoing legislative process, although the general prospects are not promising. At best, we might hope to maintain the status quo. Improvements for consumers in the sense of extending copyright exceptions and limitations to the reality of the digital age are nowhere to be seen.

Yet in a report published back in 2015³, the European Parliament made very clear its expectation that the Commission would enshrine clear and binding consumer rights into copyright when adapting it to the digital age. The Commission’s proposals fall short of this mark.

Some MEPs have recognised this discrepancy between copyright law and the digital reality and proposed a corresponding amendment on User Generated Content. Unfortunately, it remains unclear whether this amendment will be carried by a majority. From my point of view, it is urgently needed. It is the only way to reflect the new and altered digital possibilities adequately in copyright law.

End

Dear Ladies and Gentlemen. It is obvious that we must not leave the market for access to digital content to illegal platforms or providers of VPN services. But today, this is all too often the case! Improving legal and affordable ways of accessing digital content is key to increase the willingness to pay and unearth the treasure of consumers’ demand for high quality entertainment and information.

In many cases, the interests of consumers and rights holders are aligned, in some they might collide. In any way: vzbv is always open to a constructive dialogue at national and at European level. We look forward contributing to the current revision of the legal framework on copyright as well as to the review of the framework for enforcing intellectual property rights.

Thanks again for having me here today and for your attention.

The spoken word shall be binding

³ On the harmonisation of certain aspects of copyright and related rights in the information society (Reda Report) <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2015-0209&language=ENE> (last accessed on 18/10/2016)

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