

# Key Note - SECOND DAY

## *Watchdog and bodyguard: a call for a WIPO mission*

Special address to "Facilitating Access to Culture in the Digital Age" - WIPO  
Global Meeting on Emerging Copyright Licensing Modalities  
Geneva, 4 and 5 November, 2010

Ladies and Gentlemen,

Before you find a composer of art-music, a remnant of the 'Jurassic Park' of music history or a *living* sample of - as Sting once called it - "the very beautiful, ancient and awe-inspiring cathedral of music".

"We have to open its walls", he added.

And that is the reason why I am here: I intend to draw your attention on some - perhaps less visible - aspects concerning your deliberations from yesterday and today.

I will not do so to defend the interests of my own group of surviving 'classical' dinosaurs, but I come up for the interests of *all* authors of music: for the fundament of all our deliberations is called "authors' right", and nothing else.

I speak to you in my personal capacity. Perhaps not all of what I say therefore is *per se* a view of Buma/Stemra, the Dutch music authors' organisation - or any other one. I speak for the authors of music, the composers and songwriters.

Looking at the rich menu of your agenda and its main purpose, the analysis of "emerging licensing models" (in the digital age), it might perhaps be obvious to approach all the underlying problems on a strict legal base. However, it seems to me that this legal base has been troubled to such an extent during the last century, that the time has come, to reexamine it in the most profound way. You only can do this by carefully analyzing the *economic* structures underlying our actual problems and by looking not less carefully to the power-structures which are hidden below the economical surface.

Where in our European - and later in the American - history, forms of legal protection arose, they always were the result of quarrels within the markets of *reproduction* of works of art: The London Guild of publishers defending its privilege mainly against (cheaper) concurrence from other parts of the Kingdom, The French system of (royal) privileges which tried to close the inner market for

(foreign, mostly Dutch) re-prints (until the French Revolution introduced the artist as initial right-owner), or the late German legal dispositions since the foundation of the "Reich" in 1871, which at least recognized a visible role for the author, they all dealt with commercial, not with artistic problems. Where up to the 18th century, the German publisher regarded the author as nothing more than a supplier of raw material"<sup>ii</sup>, on the same level as the supplier of the paper, it was a long way until the "Berne Convention" (1886), the Constitution which at least recognized the Author as the *sole and sovereign proprietor* of his own works. Congratulation of ALL authors to WIPO as it continues to defend the Berne Convention as the *core of all* artistic production and public manifestation. Whatever will be decided on the political and thus the economical level, must be measured with the provisions of that Convention. For a very simple reason: for the first time in modern history, the Berne Convention defined the rights of the authors *without* linking them to the rights of those exploiting their works.

"Berne" was formulated around the time of the invention of a modern technology which brought turmoil to the entire system of music dissemination. For the first time in human history it had become possible to *reproduce the reproduction* of music. This hour of birth of music *industry* has had two main consequences, which have not changed until our days: a) the reproduction industry urged for a proper and incessant expansive intellectual property protection and b) with the never-ending vertical mergers of that industry, its - political - power increased to such an extent that this industry often claimed the position of main rightholder. After having listened to Jacques Demarny's warnings to the "International Council of Authors of Music" (CIAM) since the early nineties of the previous century, as well as Roger Wallis', Rob du Bois' and Francisco Aguileras' analyses of the increase of the industrial value chain, CIAM already in 1993 adopted a resolution expressing "its concern in the face of the ever greater discordance to be noted between the technological developments (...) and the forms of protection currently used for authors"<sup>iii</sup>.

The advent of the digital industry has completely deteriorated the traditional relation between *value* and *price* that was already under a growing pressure since the "industrialisation" of the music profession. Any artistic creation aims at *essence* and thus produces *value*. The reproductions of

reproductions and their massive multiplications aim at a *market* and thus, a *price*. Value and price stand in no relation with each other any more. If the authors' revenue is 9 €-cent in a iTunes business model, the same track generates 4/hundredth of a cent in a free of charge' streaming centre, that is a factor 200 less. The value-price relation being completely out of balance, we could ask ourselves to which extent the mass commercial and the *astronomic* illegal exploitation of musical works have already intruded the core of the moral and material authors' rights. Certainly, the industry has an idea about "value" too; their idea however concerns *shareholder-value*, and to believe that value in this capitalistic sense is usually beneficial for the artistic value, is a mistake.

Capitalist operations concerning music are quite old. The first printer of sheet-music, Ottaviano Petrucci had certainly capitalist intentions when printing the first volumes of motets and lighter songs more than 500 years ago. The Italian Opera in the 17th up to the 19th century was run on an astonishing modern capitalist base, comparable to the actual football-industry<sup>iv</sup>. The rise of the concert as an institution in England was based on an advanced system of capitalist subscriptions. Our entire "classical" music-cathedral was built upon operations of capitalist maecenasses or investors who had an intrinsic interest in music.

Well, the music industry of today was really put to the test when confronted with the explosive advent of digital technology and of communication through computers. The confrontation resulted in a severe and still lasting disarray. That was the moment, when de historic decline of the so-called "Majors" began, the Appetite for Self-Destruction" as Steve Knopper described it in his amusing book<sup>v</sup>. In the meantime, the "majors" of the record-industry (Universal, Warner, Sony/BMG and EMI) have been completely overrun by some new "majors": Google/YouTube, Apple, Microsoft and perhaps the digital pinscher Facebook, who behave as the feudal autocrats of the rights of the creators. Where it was always extremely difficult to safeguard the income and integrity of the creator when the industry was wrestling to overcome new technological challenges, the digital industry mammoths taking over the marketplace is a foreboding of a complete erosion of the creative foundation of music.

As Joeri Mol stated, the "institutionalized share of value captured is disproportionately high relative to its contemporary share of value creation"<sup>vi</sup>, in simple words: the cow which one expects to milk tomorrow is already being slaughtered today. Moreover, as Gunnar Petri has observed in 2002 already<sup>vii</sup>, the risk that authors refuse to expose their works on the Internet "unless some effective form of protection can be achieved" increases from day to day. Where the industry behaves as its own grave-digger, the erosion mentioned above comes from different directions of the social and political field actually.

I will not mourn about the myriads of illegal downloaders. This for two reasons: Nobody ever has been able to explain what these kids are stealing, because the stolen object (the "track") remains undamaged on the original server. OK, that argument may be a bit too simple, but what is the real motive of these kids? Is it a refusal to bow to laws of a market which nobody understands anymore? Do they desperately need music as an acoustic dope? Unless we have carefully analyzed the real motive(s) we should be cautious in criminalizing nearly a complete generation that is in an ideological sense victim of the devaluation of music. In the digital world it is much more important to chase the illegal *disseminator* than the so-called 'thief'. Pirate Bay's of this world, and Internet Service Providers who vehemently deny a responsibility that cannot be more obvious, are the true thieves. Where actually "pirate parties" and similar populist political movements propagate the abolition of authors' rights at all, they should be opposed by all possible means, because they try to implant law-breaking into the law itself. Where they beat the sack instead of the donkey, their vague "anti"-capitalist emotions should better be concentrated on the simple fact, that it is not the authors who make the big money, but *everybody* else in the production- and dissemination chain. The third party is a group of well-remunerated intellectuals - like Lawrence Lessing or William Gibson who - while propagating the cut-and-paste techniques as the generator of future creativity - shamelessly propagate the expropriation of authors in a material and moral sense. If some composers, writers or painters would occupy the houses of these gentlemen for purposes of artistic creativity (production), I am sure, Lawrence Lessing would enthusiastically welcome this intrusion as the most inventive interpretation of *Creative Commons*... Last but not least: even the highest political

institutions of our continent reduce (in their official documents) works of art – so the real thing - to "content" (what a disgusting term, as if a song or a symphony would be just washing powder). This kind of semantic aberrations threatens to become the basic language of political deliberations and decisions: the Authorities who are supposed to protect artistic and cultural value slip helplessly into the role of benefactor of shareholders-value.

Semantics are part of ideology. We expect our political representatives to carefully watch their own language. Please let them not forget the old - and still actual - remark by Honoré de Balzac: "Works of art are palaces, built upon the point of a needle"<sup>viii</sup>.

### **Ladies and Gentlemen,**

I will not interfere into your technical deliberations. Historical experience teaches us, that at the very moment somebody has contrived a new business model, technology and its economical configurations have already speeded lightyears ahead. Every day, the media report on new mergers, take-overs by hedge- or equity-funds, foundations of new companies, bankruptcies, lawsuits, plagiarism procedures, - after all a gigantic cemetery for the arts. "On 100 persons " - to quote Balzac once again - "who pay the last honour to a poor defunct devil, 99 speak about business and pleasure in the middle of the church"<sup>ix</sup>. By the way, if you need a clear analysis of the actual market-hysteria, read, or reread Balzac's "La maison Nucingen", written some 160 years ago and still extremely up to date. All the actual turbulences are nothing more than the new clothes of a quite old emperor. You must not expect, that authors wish to be involved in this turmoil. They are concentrated "from the sweat of their creative brow and the disciplined use of their talent" (as Andrew Keen once has formulated<sup>x</sup>) to add the only value to human culture which really counts. And they want to be remunerated for the use of their work in a decent, human way. Not less, not more. They are fed up to be treated as vicarious agents of macro-economic speculations. They want their collective rights managers to perform in an optimal way, and whatever will be decided in the near future about centered online-portals for licensing, or the reshuffle of CRM's, they insist on a perfect performance of the organisations which serve them (and which they pay). And they insist on a remuneration which does not whip them into the poorhouse.

**I've come to my concluding remarks.**

As WIPO always has expressed "the desire to promote creativity by protect the works of the mind", authors strongly express the wish that WIPO defends the core element of Authors' Rights, the "Berne Convention". The dispositions of this Convention should be imposed on everybody, analogue or digital, who believes that art, the work of the creators, is just a commodity. WIPO must bother to prevent that the new players in the digital market, the Googles, Microsofts, Nokias, Apples or other global octopusses get into their heads to usurp the role of the traditional publishers. No way: the new digital barons may distribute our works at *our* conditions. WIPO, and everybody involved in the future global warfares should put all their efforts, knowledge and intelligence together, to prevent that the authors are pushed back to the middle ages and to the role of bondmen of modern technology and its robber-knights.

WIPO should help to put every structural market development or political decision under the microscope of the Berne Convention.

Whatever the transformations in the digital world, WIPO should watch over enforcement of the Berne-code and demand its application, in spite of lethally seducing songs from commercial or political Lureley's.

**Artists need WIPO as watchdog *and* as bodyguard.**

And if you really want to facilitate "Access to Culture in the Digital Age", please always remember the statement of the former President of Iceland, Vigdis Vinnbogadottir: "It is better to sell fish with culture than culture with fish".

Thank you for your kind attention.

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<sup>i</sup> Interview with Sting in: "mobil", July 2010, p. 8

<sup>ii</sup> see Eckhard Höffner, *Geschichte und Wesen des Urheberrechts*, München 2010, page 1220vv; see also: Mr. D. Peepkorn: "De lange geschiedenis van het auteurs-contractenrecht" (The long history of authors' contract-rights), in: AMI, 5 sept./oct. 2010, p. 167-170

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- iii CIAM/93/1533, "The author and technological developments"
- iv see: John Rosselli, *The Opera Industry from Cimarosa to Verdi*, Cambridge University Press, Cambridge 1984, passim
- v Steve Knopper: *Appetite for Self-Destruction*, London 2009
- vi Joeri Mol, *Non Random Exchange: Value, Uncertainty, and Strategy in the Market for Popular Music*, Labyrinth Publications, Ridderkerk 2005, p. 42
- vii Gunnar Petri, *The Composer's Right, A History of the Value in Music*, Atlantis, Sockholm 2002, p. 146
- viii Honoré de Balzac, *La Maison Nucingen*, (part 12 of "La comédie humaine) Omnibus, Paris 2007, p. 563
- ix Balzac, op. cit, p. 559
- x Andrew Keen, *The Cult of the Amateur*, Doubleday, NY, London 2008, p. 144