

The NIP 2013 Case:

New era of making available content online and creating business models that respect copyrights, yet have a balance in interest of users, content owners and service providers, sometimes requires disputes to be settled.

In this case, Scandinavian Service Provider (“SSP”) has developed and launched a software application product (with variants that can be installed on a PC, tablet or a smartphone) and a service enabling consumer publication and leveraging the many-to-many distributions models facilitated by networked devices and the Internet. The software application and service are offered in a business-to-consumer environment, over the public Internet, to consumer-level customers (“End User”).

In more detail, SSP’s offering consists of

A) a software application product (licensed to End Users against a one-time license fee) enabling content creation and editing (including modification, revision and alteration of pre-existing third party content). This means that End Users can, for example, take samples from different songs and make remixes to their liking (so called mash-ups). It is likewise possible to take samples from other types of content (such as music videos, documentaries and movies). It is also possible to combine original End User content with third party materials.

B) a hosting service providing upload/download and streaming technologies for content created by End Users (“User Generated Content” or “UGC”). The UGC may reside on SSP’s servers and/or on the End Users’ own servers, depending on End Users’ choices. All UGC is searchable through the service.

Additionally, the End Users also have the opportunity to sell the UGC hosted by SSP to the general public through the service. In other words, SSP offers its End Users a possibility to make UGC available to the general public over the Internet free of charge or, if the End User so wishes, against payment of a fee to be determined by the publishing End User and to be paid by the consumer. In such cases, SSP takes a per transaction “facilitation fee” of one euro cent (0.01EUR).

SSP’s hosting service also carries and displays third party advertising. This means, in short, that the website where UGC is hosted displays banner ads (as websites in general tend to do) and contextual word/graphic ads (similar to ads displayed next to Google search results and the displayed ads being selected on the basis of the key words assigned to the content being searched and/or viewed) where SSP collects revenue on the basis of how many users click the ads and thus visit the advertisers website.

To leverage its continuously growing customer base and realize more profitable business opportunities, SSP has been negotiating a license agreement with Scandinavian Content Owner (“SCO”), which is a major Nordic media house, to allow SSP to distribute SCO's entire content catalog, consisting of music, music videos, documentaries, photographs and movies from the past 100 years over the Internet (through SSP's services), without any digital rights management technology re-

stricting its use, to SSP's End Users in the European Union under a non-exclusive license against a "per download" fee and/or a monthly subscription fee enabling unlimited downloads and use. The license requires, in all simplicity, SSP to pay a license fee for such use of the copyrighted works that otherwise would be regarded as a copyright infringement in the light of Nordic copyright law. SCO is, for all intents and purposes, the holder of all economic rights afforded by copyright law in and to the relevant content, through various contractual assignments SCO has entered into with the original authors/creators.

Currently SSP and SCO are at a standstill in the negotiations. The parties have agreed the core principles and have agreed that for each item of SCO original content downloaded and/or viewed by an End User, SSP shall be liable to pay SCO a certain royalty. Both parties recognize the opportunities and have thus strong motivation to enter into an agreement. However, the parties are unable to resolve which items of UGC (making use or reference to SCO proprietary content), SSP should be liable for a per unit royalty. Further, the parties are unable to agree whether SSP should pay a share of the advertising revenue its service generates to SCO.

Therefore, the parties have – after considering also other alternative dispute resolution methods, such as mediation - entered into an arbitration agreement to obtain a declaratory judgment on the legal basis on which the analysis is to be performed and specific rules for the parties to follow in the implementation of the day-to-day business relationship. According to the arbitration agreement the Rules of the Arbitration Institute of the Central Chamber of Commerce of Finland (available at http://www.arbitration.fi/FCCC_Rules.pdf) are to be applied. The place of arbitration is Helsinki and the language of the proceedings is English.

In the proceedings SSP is the claimant and SCO the defendant. The request for arbitration has been filed, the arbitral procedure has been commenced and the arbitral tribunal has been appointed. The arbitral tribunal has requested the claimant SSP to submit the statement of claim no later than 7 October 2013 and the respondent SCO to submit the defense no later than 4 November 2013.

The parties have agreed that the arbitral tribunal shall take a position on the general Nordic copyright law and its application to the current context (i.e. a license fee is due if there is an infringement in the light of Nordic copyright law and SSP is to be regarded as liable for the infringement). In particular, the tribunal is to examine the following six specific types of UGC and determine, whether and on what basis a license fee would be due to SCO:

- 1) A video clip with the duration of one minute and thirty seconds and containing a continuous loop of ten seconds of a music video by an SCO artist, with a voice over of a short story penned by the End User who uploaded the clip to SSP service;

- 2) A song where the End User has taken the lyrical content of an SCO-supplied recording and “mashed” it together with the musical content of an independent artist to produce a new recording;
- 3) An entire SCO-supplied four minute music video clip with the text “Commercial Record Labels Destroy Artistic Freedom. Boycott SCO.” being displayed for fifteen seconds both at the beginning and end of the clip.
- 4) A highly critical review of an SCO-supplied movie made by a student of arts and film. The 20-minute review consists of a video recording, which includes 5 clips from the movie, the shortest clip being 5 seconds and the longest 2 minutes, in total 5 minutes. The clips are preceded and followed by commentary.
- 5) Still pictures taken from a documentary film on the rain forests. The still pictures depict persons interviewed in the documentary. The colors in the pictures have been distorted to the degree that only the contours of the persons are visible. The “distorted” still pictures have been made into a slide show combining the pictures and spoken texts written by the End User.

Naturally SSP has the interest to ensure that the application of the exclusive right granted under copyright law is interpreted narrowly to provide as much freedom to its End Users as possible (while obviously having also a positive impact on the profit margin of SSP). SCO on the other hand is determined to extract as much revenue in the form of copyright royalties as the law allows.

It should be noted that the copyright / neighboring right collecting societies are not relevant due to certain underlying contractual arrangements.