

3 Strikes-out: Is It a Good Answer to P2P Downloading?

SUN lei

1. Versions

- 1.1. Contract: ISPs and Right Holders (Ireland)
- 1.2. Governed by Law
 - 1.2.1. Right holders issue claims → ISPs send notices to subscribers → Government orders → ISPs execute “out” (South Korean)
 - 1.2.2. Right holders issue claims → ISPs send notices → Courts make decision (France)
 - 1.2.3. Right holders file claims → ISPs issue notices and execute “out” (China Taiwan)

2. Efforts Made to Cope with P2P Downloading before 3 Strikes-out

- The challenge to copyright is becoming increasingly serious as the development of digital technology and popularity of Internet, especially the prevalence of P2P.
- The overspread of internet upgrades the user's strength to access and diffuse works, and makes corresponding rights lose control.

2.1. Target P2P Service Providers

- 2.1.1. Good News
- Copyright holders aimed at P2P service providers, and news of victory came again and again.
- A & M Records, Inc. v. Napster, Inc.
- MGM Studios Inc. v. Grokster, Ltd.
- Universal Music Australia Pty Ltd v. Sharman License Holdings Lt.

- 2.1.2. Different Vioce from Netherlands
- BUMA & STEMRA v. Kazaa.

2.2 Target P2P Users

- 2.2.1
- Recently, some right holders targeted P2P users directly, and achieved what they wish in some cases.
- Alain O v. SACEM.
- Polydor Limited and Others v. Brown and Others.

- 2.2.2
- Different voice from France.
- SCPP v Anthony

2.3.the Effect

- Objective is to make “chilling effect”.
- Outcome is not as copyright holders’ wish.
- IFPI: + 40 billion files were illegally file-shared in 2008, giving a piracy rate of around 95%.
- Copyright holders have to explore a new way to deal with the issue of P2P downloading, and lay their account with ISPs’ further participation.

3. Advantages

- Right holders: don't need to face the uncertainty of lawsuit against ISPs, and avert their glance from the face of users.
- ISPs: don't worry about the accusation launched by right holders.
- Users: 2 or 3 times of strikes are required before the "out" incident.

4. Disadvantages

- 4.1
- It is a little too premature in coming to the conclusion that P2P downloading is illegal.
- Common understandings have not been reached on the nature of P2P downloading.

- 4.2
- The rule involves the freedom of receiving information.
- Universal Declaration of Human Rights article 19.
“Everyone has the right to freedom of opinion and expression; this right includes freedom to seek, receive and impart information and ideas through any media and regardless of frontiers.”
- France Minister, “No constitution or jurisdiction in the world claims that Internet access is a fundamental freedom.”
- France Constitution Council, “the language covers free access to public communications services online, and thus only a judge should be allowed the power to bar an individual from accessing the Internet”.

- 4.3
- The rule faces the dilemma of copyright and personal privacy.
- The hard truth is that courts' views vary on the issue whether or not ISPs have the right to disclose users information.
- RIAA v. Verizon Internet Services.
- Band Rammstein, OLG Hamburg (5 U 156/04).

- 4.4
- The enforcement of 3 strikes-out may punish the wrong target.
- IP address is unchangeable, PC users may be different. It is especially true to the cyber café and dormitory.
- Punish PC or human being?

- 4.5
- Internet is boundless, and the law is characterize by national frontier.
- WCT “national treatment” question.

- 4.6
- The civil contract is not powerful enough to oppose internet users.
- Let us think about the reason why the French revises the HADOPI bill, and the revised version bestows the power of disconnecting internet to the court, instead of the government or ISPs .

- 4.7
- The France version makes the rule nonsense in practice.
- Will the judge adjudicate whether the P2P downloading infringes copyright or not?

5. Epilogue

- Though the rule of 3 strikes-out has been accepted by some ISPs and legislators, its effect in practice deserves our observation, and its disadvantages should have our attention.
- The copyright system requires balance, instead of violence.

A blue-tinted photograph of a vast ocean under a cloudy sky. The word "Thanks" is centered in white text.

Thanks