

PopCatcher AB
Skeppar Olofs gränd 2
SE – 111 31 Stockholm
SWEDEN

Our ref.
GSO/TET

Your ref.

Stockholm
March 10, 2009

POPCATCHER – LEGAL OPINION

This document addresses the legitimacy of The PopCatcher AB music technology (the “Technology”) within the European Union and the US.

To summarize, **the Technology is fully legal in the US and in Europe.**

In the US, Ireland, UK and Cyprus certain conditions on the products need to be fulfilled (see details below).

Background

The Swedish high-tech development company PopCatcher AB has developed a technology for radio that enables a small, self-learning system to separate music from DJ talks and commercials in all languages and all types of music. The Technology allows the listener to record songs played on the radio and automatically saves them as separate music tracks.

ALBIHNS AB

Box 5581, Linnégatan 2, SE-114 85 STOCKHOLM, Sverige. Tel. +46 (0)8-59 88 72 00.

Fax +46 (0)8-59 88 73 00 (Pat/Des) +46 (0)8-59 88 73 19 (TM). Registered Office: Stockholm. Org.Reg.No.: 556664-8480. E-mail info.stockholm@albihns.se
www.albihns.com

The Technology is made for, for example, mobile phones with a radio inside. If used in a mobile phone, the application enables the phone to record music played on the radio as separate mp3-files. The analog audio signal is sent to the mobile phone and results in a digital audio file, recorded and stored on the mobile phone's memory. Thus, the Technology can not make second-generation copies of the digital audio files or transfer or upload such files to another device or to the Internet.

US and the AHRA

United States Copyright law, title 17 (17 USC), governs the legally enforceable rights of creative and artistic works under the laws of the United States. The Audio Home Recording Act of 1992 (AHRA) amended the 17 USC by adding chapter 10, "Digital Audio Recording Devices and Media". AHRA was the legislated compromise between songwriters, music publishers, record companies, and other music copyright proprietors, on the one hand, and manufacturers, importers, distributors, and consumers of audio home recording equipment, on the other hand, meant to balance the interests of the various parties. AHRA is a combination of legal and technological protection for sound recordings and enabled, among others, the release of recordable digital formats such as Sony and Philips' Digital Audio Tape without fear of contributory infringement lawsuits.

The balance between the various parties is fundamentally achieved in the AHRA with three legislated mandates:

1. For the consumer electronics industry and its consumers, AHRA grants **immunity** from copyright claims arising out the manufacture, importation, distribution, or non-commercial, private use of audio home recording equipment.

2. For the music industry, AHRA requires importers and manufacturers of digital audio recording equipment to make **royalty payments** to compensate the affected parties for lost revenue due to home recording.
3. Also for the music industry, the Act requires implementation of the “**Serial Copyright Management System**” (SCMS, an early form of digital rights management, or DRM) for digital audio recording equipment to prevent multi-generational copying of digital musical recordings.

As seen above, the AHRA requires a **SCMS** in all digital audio recording devices and digital audio interface devices imported, manufactured or distributed in the US. Such a system allows unlimited first generation digital copying of sound recordings, but prevents the making of digital copies from copies. The AHRA also establishes a **royalty system** through which importers and manufactures of digital audio recording devices and digital audio recording media make royalty payments on each device or medium they distribute. In exchange for these benefits, the AHRA provides manufactures and importers of audio equipment, seller of digital recording devices, marketers of blank recordable media and consumers with prescribed statutory **immunity from suits for copyright infringement**:

Section 1008 of the AHRA

No action may be brought under this title [Title 17] alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the non-commercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

By its terms, Section 1008 disallows two kinds of actions for copyright infringement. The first are actions “based on the manufacture, importation or distribution” of the specified recording device and the recording media. The second are actions “based on the non-commercial

use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings”. Section 1008 bars any action for copyright infringement “under Title 17 USC based on these activities.

The legitimacy of the Technology in the United States

AHRA’s goal is to facilitate consumers’ right to copy copyrighted music for private, non-commercial use. Our conclusion regarding the distribution in the US, the Technology is consistent with the AHRA; on condition the Technology follow the requirements of the AHRA. A device with the Technology that follows these requirements is therefore fully legal, and as a result, manufactures and importers of audio equipment, seller of digital recording devices, marketers of blank recordable media and consumers are **immune from suits for copyright infringement**.

EU and the Copyright Directive

The copy right law of the European Union has arisen in an attempt to harmonize the differing copyright laws of European Union member states and consists of a number of Directives, which the member states are obliged to enact into their national laws, and by the judgments of the European Court of Justice and the Court of First Instance. The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, commonly known as “**the Copyright Directive**”, is a European Union directive in the field of copyright law, made under the internal market provisions of the Treaty of Rome. It is intended to implement the WIPO Copyright Treaty, to which the European Union is a party. The Copyright Directive’s aim is to harmonise discrepancies in the copyright exceptions and limitations of the EU Member States’ national laws. The implementation of the Copyright Directive and namely, its Article 5(2) b was a significant step of seeking to harmonize the “**private copying exception**” in the European Union.

The Copyright Directive, Article 5

Exceptions and limitations

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

Article 5(2) b of the Copyright Directive, in essence, provides for an option for the EU Member States to adopt exceptions from and limitations to the reproduction right (Article 2 of the Copyright Directive) with respect to copies on any medium which are made by a natural person for **private use and neither directly or indirectly intended for commercial purposes**, provided that rightholders receive fair compensation.

As the wording of Article 5(2) b indicates, Member States have the choice whether to provide for such an exception, and they are free to determine (within the limits of Article 5(2) b and the 3-step test, see Article 5(5)) the scope of such an exception.

Most of the EU Member States have implemented Article 5(2) b, i.e. the exception of copying for private use. Out of the 27 EU member states, 24 states have implemented the private copy exception in their national law.

The legitimacy of the Technology in European Union

In short, copying music from the radio for private use is permissible. The artists are however expected to receive a “fair compensation”. In case of a lawsuit against radio music ripping technologies, the argumentation will be about the

meaning of the term "*fair compensation*" and not about the legality of the copying.

It can be argued that Radio stations are already paying a fair compensation to artists as they know their songs might be copied. Moreover, in an increasing number of EU member states, importers are charged a private copying levy on the purchase of recordable media (mp3 players, writable CDs or DVDs). The tax or levy is usually administrated by copyright collectives.

Thus, the Technology is permissible in the countries where the exception has been implemented. The distribution of the Technology is therefore fully legal within the major part of the EU, given that the rightholders receive fair compensation.

The legality of the Technology is also shown by the distribution of other products on the European market with similar functions. Thus, the introduction of this new software and techniques has lead to some legal debates, even if it is permitted to record music from the radio for private use in most countries. Notable is that a similar debate arose when introducing the cassette recorder technology during the early 1980s. Like the current situation with this new technology, the old cassette recording technology was not considered as copy right infringement.

"Exception" from the private copying exception

Regarding the EU Member States that yet have not implemented the private copying exception, the distribution of the Technology may cause some issues. This, however, concerns the **UK, Ireland and Cyprus** only. While these countries do not permit private copying of copyrighted material, the Technology, with its current functions, could constitute an infringement of copyright.

UK and Act 1988

(Note: Same main argumentation as for UK found below, is valid also for Ireland and Cyprus).

The current copyright law of the United Kingdom is to be found in the Copyright, Designs and Patents Act 1988 (the 1988 Act). Various amendments have been made to the original statute, mostly originating from European Union directives. However, the UK regulation regarding copyright is in many aspects in contrast to the position in other European jurisdictions.

In spite of the fact that the 1988 Act does not generally permit private copying, it does except a few acts from the exclusive rights through copyright: a limited private copying exception which allows **time-shifting**.

1988 Act, Section 70

Recording for purposes of time-shifting

The making for private and domestic use of a recording of a broadcast or cable program solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or cable program or in any work included in it.

According to 1988 Act, Section 70, recording a broadcast in domestic premises for the sole purpose of allowing the broadcast to be listened to at a more convenient time is legal in the UK, under condition the recording is made for private use. However, this does not create a 'right to copy'. Therefore, the exception does not cover for example format-shifting, which seems to be one of the functions included in the Technology.

The legitimacy of the Technology in UK

As established above, time-shifting does not infringe any copyright in the UK. To make the Technology in line with 1988 Act, time-shifting must therefore be

the purpose of the use of the Technology. If you explicitly state, regarding the distribution of the Technology in the UK that the purpose of the Technology is to time-shift the broadcast (i.e. not to format-shift the music) the Technology should be considered legal.

The numerous products offering time shifting in the UK as well as relevant copyright legislation is a clear mark that time shifting evidently is considered legal in the UK. Relevant case law of the legality of time shifting programming is further proven by a landmark court case of Universal Studios versus Sony Corporation, a case from the US but nevertheless relevant for the overall legality of time-shifting.

The case shows that time-shifting does not constitute copyright infringement: Sony argued successfully that the advent of its Betamax video recorder in 1976 did not violate the copyright of the owners of shows which it recorded. In 1979, Universal sued Sony, claiming its timed recording capability amounted to copyright infringement. However, the district court found that noncommercial home use recording was considered fair use and ruled in favor of Sony. In appeals, the United States Court of Appeals reversed this decision in 1981 giving the edge to Universal, but the Supreme Court of the United States reversed it yet again in 1984, and found in favor of Sony 5-4. The majority decision held that time-shifting was a fair use, represented no substantial harm to the copyright holder, and would not contribute to a diminished marketplace for its product.

In respect of the situation in the UK, 1988 Act provides that a person is liable if he **authorises another to infringe the copyright in a work without the license of the copyright owner**. The service provider therefore may find itself in breach of the 1988 Act if it is found to be authorising the illegal transfer of music. The main barrier with such an action in the UK is in the case CBS Songs versus Amstrad (UK).

In this case, Amstrad successfully argued that although it was possible for people to make unauthorised copies of the cassettes, this was not encouraged or authorised by Amstrad, and, crucially, it was also possible for users to make perfectly lawful copies. By this argumentation Amstrad avoided being liable for any copyright infringement.

By this argumentation, applied on the Technology, following can be concluded: The Technology provides a facility that can be used for perfectly lawful means, such as time shifting, listen to radio, etc. On top of this, it contains another function that results in private copying (and is illegal in the UK). If the distribution of the Technology is seen as “for lawful purposes and do not encourage or authorize unlawful copying” – it does not constitute any copyright infringement. However, in the UK, the Technology with its current functions could actually be seen as encouraging unlawful copying. Yet, if you explicitly state in the instruction manual etc. that your product must **not be used for illegal purposes, that you do not encourage or authorize unlawful copying and that it is the users’ sole responsibility to make sure that they are using the Technology and the music they obtain from it for only legal uses**, the Technology will most likely be seen as legal (if the court follows its earlier statements).

To conclude, by this statement on the Technology you may successfully argue, like the CBS Songs vs. Amstrad case, that illegal actions is not encouraged or authorised by you, the purpose of the Technology is time-shifting and therefore not constitutes a copyright infringement.

Stockholm as above,

Albihns International IP & Law Offices

Göran Starkebo/Therese Engkvist