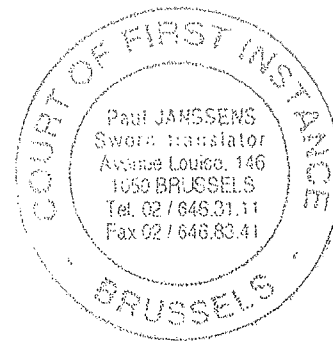


A.R. 07/70/A

16 AUG 2007



No. 07/6149 Rep.

Judgement of 16 August 2007

THE PRESIDING JUDGE OF THE COURT OF FIRST INSTANCE IN THE DISTRICT OF COURTRAI, PROVINCE OF WEST FLANDERS, ADJUDICATING IN SUMMARY PROCEEDINGS, HAS PRONOUNCED THE FOLLOWING JUDGEMENT:

In case no. A.R. 07/70/A:

AUVIBEL B.V. ovv C.V.B.A, Brussels Commercial Registry no. KBO 0453.673.453,
With head office at Vilain XIV straat 53-55, B-1000 BRUSSELS;

- CLAIMANT -
- Represented by their counsel Mr. L. GOOSSENS, Advocate, of Av. Louise 99, B-1000 BRUSSELS (Ref. Auvibel)

Versus:

1. _____, a company founded under English law with head office at _____, BIRMINGHAM B18 6EW (United Kingdom),
- FIRST DEFENDANT -
2. _____, a company founded under English law with head office at _____, BIRMINGHAM B15 1TS,
- SECOND DEFENDANT -
both represented by their counsel Mr. _____ Advocate of _____ B-3300 Tienen (Ref. --),
3. _____, a company founded under German law, with head office at Anton Mungen strasse 6, D-50170 KERPEN (Germany),
- THIRD DEFENDANT -
- DEFAULTING -

The arguments of the parties were heard in a public hearing on 23 May 2007, after which the debates were closed and the case taken into consideration.

The documents were examined, in particular the writs of summons dated 13 November 2006, served by Herman VAN VALCKENBORGH, Court Bailiff of Courtrai.

The third defendant, although duly summoned, failed to appear at the hearing and was not represented; this defendant was therefore held to be in default, which is permissible.

I. Exclusion of pleadings

The following deadlines for pleadings were noted in the court minutes of 10 January 2007:

- For the defendants: up to and including 9 February 2007
- For the claimant: up to and including 9 March 2007
- For the defendants: up to and including 30 March 2007
- For the claimant: up to and including 20 April 2007
- For the defendants: up to and including 5 May 2007.

The defendants submitted their pleading to the Clerk of the Court on 9 February 2007 and the defendant on 9 March 2007. The defendants and the claimant allowed their respective pleading deadlines, respectively 30 March and 5 May 2007, to expire, after which the defendants finally submitted a "summary pleading" on 3 May 2007, and supplemented their list of exhibits with two additional exhibits.

The claimant maintains that this last pleading should be excluded from the debates.

Since the defendants allowed a deadline for pleading to expire, and waited till the last moment to submit a final pleading in which they develop new arguments, which they support with the aid of two additional exhibits, by which they deny the claimant the opportunity to respond to their arguments and in so doing infringe rights of the claimant to uphold his arguments, this pleading by the defendants submitted to the Clerk of the Court on 3 May 2007 must be excluded from the debates, together with Exhibits 5 and 6 of the defendants.

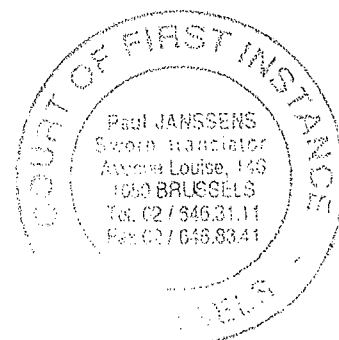
After all, this last pleading by the defendants is not in reply to the argumentation of the other side, but a discussion of new arguments.

Moreover, it appears that the additional exhibits which the defendants invoke were already known to them before 30 March 2007, so that the defendants were perfectly able to work these exhibits into a pleading for which the deadline was 30 March 2007, and after which the claimant would still have had the opportunity to respond thereto before their deadline of 20 April 2007.

II. Exclusion of statement of costs

At the hearing of 4 June 2007, the claimant submitted a statement of costs. The defendant requested that this document be excluded from the debates.

The detailed statement of costs and disbursements as described in Art. 1021 of the Judicial Code may be submitted at any stage in the proceedings, so there is no reason to exclude this statement from the debates.



III. The claims

1. According to the summons of 13 November 2006, supplemented in pleadings submitted to the Clerk of the Court on 9 March 2007, the plaintiff asks the Court:

to pronounce that the plaintiff's claim, based on article 87, §1 of the Copyright Law is admissible and grounded, and consequently:

- to confirm that the defendants have breached article 55 of Copyright law by offering and/or selling carriers used for reproducing audio and audiovisual works to the Belgian public, without submitting the necessary declarations to Auvibel (on time – i.e., by the legal deadline stipulated in Art. 5 §1 of the RD of 28 March 1996) and without paying the remuneration for copying for private purposes and consequently
- to order the immediate cessation of the breach under penalty of a daily fine of 5,000 EUR per breach or, if the amount of the remuneration owed on the transactions for which no timely and correct declaration was made should be higher, twice the amount of the remuneration due and per day that the breach persists.
- in accordance with article 87 §1 , paragraph 6 of the Copyright Law to order the publication of the judgement in two periodicals to be chosen by the Plaintiff.
- to order the release of the deposit of €3,800 given in consignment by the plaintiff in connection with the seizure order concerning counterfeit on 5 November 2006 at Courtrai;
- to hear the judgement to intervene pronounced provisionally enforceable notwithstanding any appeal and with the exclusion of the possibility of the cantonnement¹ option;
- to declare the defendants' counter-claim inadmissible, or at least groundless;
- to order the defendants to pay the costs of the proceedings, including the costs of the seizure, the expert's fees and the judicial procedure.

2. In their pleading submitted to the Clerk of the Court on 9 February 2007, the defendants ask the Court:

- To declare the plaintiff's claim inadmissible;

¹ Option to pay, after a provisionally enforceable judgement, the amount due to the "Caisse des dépôts et consignations" or into the hands of a bailiff.

- To lay an injunction upon AUVIBEL to present its entire accounts for the last five years, with all underlying supporting documents – and at the first request of the defendants to have them explained by a person with knowledge of their affairs and to answer questions – including a photocopy of all bank account statements, so that the defendants can examine whether the contributions demanded by AUVIBEL are actually being used for the purpose they assert is intended by the law, on penalty of a fine of €25,000 per day of delay and per missing document and per infringement;
- To lay an injunction upon AUVIBEL to present all those documents (and to explain them upon first request) from which payments or benefits can be seen to third parties, including partners, directors, employees, consultants and associated companies or associations, on penalty of a fine of €25,000 per day of delay and per missing document;
- To lay an injunction upon AUVIBEL to grant access for representatives of or counsel for the defendants, whether alone, jointly, and/or assisted by one or more accountants of their choice to their premises, files and documents, for the purpose of checking the proper compliance with the foregoing, on penalty of a fine of €25,000 per day of delay in the proper compliance therewith and per word or deed of hindrance.

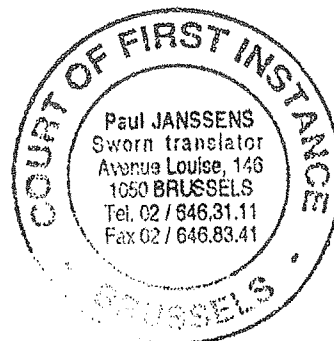
In subordinate order, at least to reject the plaintiff's claim as unfounded;

In more subordinate order, to ask the following prejudicial question of the Court of Arbitration, before giving judgement:

"Does Article 55 of the Copyright Law of 30 June 1994 (B.S. 27 July 1994), as last amended by the Law of 22 May 2005 (B.S. 27 May 2005), violate Articles 10 and 11 of the Constitution insofar as that provision is interpreted in the sense that the fair compensation arrangement is considered to be applicable to empty data-carriers that are not necessarily intended for storing sound recordings or audiovisual works, so that buyers of such empty data-carriers who wish to store data thereon which are not protected by copyright, or data other than sound recordings or audiovisual works have to pay contributions destined for persons who might not be the author of the data stored on the empty disks nor the rightful recipient intended by the Law of the payments in implementation of the aforementioned fair compensation arrangement?"

In any case,

- to order the plaintiff to pay compensation to the defendants for provocative and foolhardy proceedings, amounting to €12,500;
- to order the plaintiff to pay all the costs of the case, including advocates' fees, to be adjusted to any increase in the index.



4. Relevant facts

The defendants and the summoned party are foreign companies that mainly sell data-carriers at specialist trade fairs, among others, in Belgium that can be used for reproducing sound recordings and audiovisual works.

AUVIBEL was given the task under Art. 55, para. 5 of the copyright law of collecting and distributing the payments for the reproductions for personal use due under Art. 55, para. 2 of the copyright law when selling media in Belgium that could be used for reproducing sound recordings and audiovisual works.

At various *Dipro* trade fairs (up to January 2006 by the summoned party; from January 2006 by the second defendant and from October 2006 by the first defendant) Auvibel's representative confirmed that the prices for these media displayed by the defendants and the summoned party did not include any payment for copying for personal use, of which a report was drawn up. Auvibel did not receive any declaration, either.

In consequence of such observations, Auvibel drew up invoices in which the payment due was calculated, but these invoices were not paid, in spite of repeated demands.

In a decision given on 12 October 2006 by the judge in cases of distraint at the Court of First Instance in Louvain, permission was granted to Auvibel to lay a distraint order concerning counterfeit upon the second defendant at the *Dipro* trade fair on 15 October 2006 at Louvain. This seizure could not be carried out, because the persons active behind the scenes of the defendants and the summoned party were present at the aforementioned trade fair in the person of the first defendant.

In a decision given on 31 October 2006 by the judge in cases of distraint at the Court of First Instance in Courtrai, permission was granted to Auvibel to lay a distraint order concerning counterfeit upon the defendants and the summoned party, together with any other company with which Mr. N O was associated as manager or representative.

On the occasion of this seizure, a sum of €3,800 was given in consignment by Auvibel.

No opposition was lodged against this decision.



5. Discussion

5.1 Admissibility

The first and second defendants dispute the admissibility of the claim because in their opinion this concerns a claim *ad futurum*, since the contribution is first due after the purchase by the consumer, after which the seller has a period of thirty days in which to make a declaration of the sales.

According to Art. 18 of the Judicial Code, a party must have an immediate interest, already obtained, in order to institute a claim.

It is not disputed that Auvibel has an intellectual right.

Auvibel make a convincing argument that its rights are likely to suffer, since the data-carriers sold can at least be used for copying for personal use, even if this might not be final in a (limited) number of cases.

Article 87 of the Copyright Law expressly provides the possibility for claiming the cessation of certain dealings if there is an infringement of copyright or a neighbouring right.

Neither can the argument be sustained that Auvibel would no longer have any legitimate interest now that they have already obtained a measure from the judge in cases of distraint with an accompanying fine: under Art. 1488 of the Judicial Code, Auvibel must after all institute a claim on the merits within one month after the distraint order concerning counterfeit, with the risk that the consequences of the decision of the distraint judge might lapse.

Moreover, the aim of the present claim – in contrast to the measure ordered by the distraint judge – is to obtain a definitive and general cessation of the intended sale of the litigious media by the defendants and the summoned party.

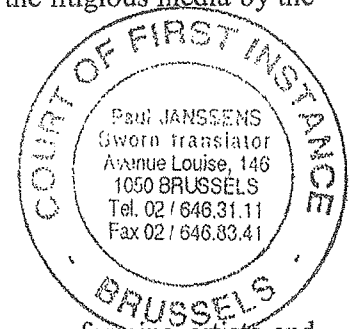
The claim is consequently admissible.

5.2 The merits

- The principal claim

In accordance with article 55, section 4 of Copyright law the authors, performing artists and producers of phonograms and audiovisual works have a right to remuneration for the reproduction for private purposes of their works and performances.

The purpose of this legislation is to give compensation, in the form of a right to remuneration, to authors and performing artists whose sound recordings or audiovisual works are copied for personal use.



The remuneration due, pursuant to article 55, section 1 of Copyright law must be paid by the manufacturer, importer or intracommunity purchaser of the data-carriers to be used for reproducing sound recordings and audiovisual works or the manufacturer, importer or intracommunity purchaser of the machines with which such reproduction is made possible.

In execution of the aforementioned article, it is further stipulated in the Royal Decree of 28 March 1996 (B.S. 6 April 1996) that this remuneration is due at the date on which those data-carriers or machines were brought on to the market in Belgium.

The date of "bringing on to the market" is defined, for intracommunity purchasers which are not exclusive and whose main business consists of providing end-users with data-carriers from another member State of the European Union, as the moment when such carriers arrive in Belgium.

Article 5 also lays down the further rules for collecting the remuneration, including the obligation for all contribution-payers to provide a monthly declaration.

Based on the details to hand and the aforementioned principles, there can be no dispute that the defendants and the summoned party must be considered as an intracommunity purchaser as described in Article 55 section 1 of the Copyright Law.

It can be seen from the various observations by Auvibel that they after all offer data-carriers originating from another EU member State, more specifically the United Kingdom and Germany, for sale at various trade fairs/markets in Belgium.

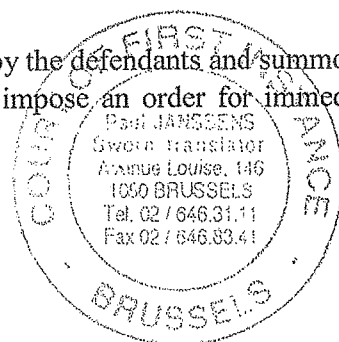
By marketing their products in Belgium the defendants and the summoned party are not only obliged to make a declaration, but also to pay the remuneration specified in Art. 55 of the Copyright Law, which they have neglected to do.

Since the fear that the defendants and summoned party will disregard the present decision, since it appears that they have already tried to avoid paying the remuneration in every possible manner in the past for commercial considerations, the fine being claimed seems appropriate here.

Finally, there is no reason whatsoever for putting a prejudicial question to the Court of Arbitration.

The establishment of a right to remuneration on all data-carriers that might be used for reproducing sound recordings or audiovisual works does not create an unconstitutional discrimination. All buyers of data-carriers that might be used for reproducing sound recordings or audiovisual works, regardless of their ultimate purpose or use thereof, must pay the same remuneration, while there is reasonable justification for the identical treatment of the buyers of the media concerned.

Since it is clear from the foregoing that there is an infringement by the defendants and summoned party of Article 55 of the Copyright Law, it is appropriate to impose an order for immediate



cessation on penalty of a fine per infringement, as requested, as well as publication of this sentence in two Dutch-language periodicals.

The pronouncements issued in a claim for cessation are provisionally enforceable *ipso jure* in application of Art. 87 §1, section 4 of the Copyright Law. There is no reason to order bail.

Auvibel do not demonstrate that they would suffer serious disadvantage resulting from delayed enforcement, so that there is no reason to exclude the right to *cantonnement*².

- The counter-claim

Within the current remit, it is not up to the Court to decide whether Auvibel have fulfilled their task as laid down in the aforementioned enforcement decision.

After all, the judge ordering cessation under Art. 87 §1 of the Copyright Law is only authorised to confirm the existence of a breach of copyright or a neighbouring right, and if so, to put an end to it.

Moreover, the defendants do not cite what interest they might reasonably have in instituting such a claim.

As far as this component is concerned, the counter-claim is consequently inadmissible.

In view of the foregoing, Auvibel's claim is neither provocative nor foolhardy.

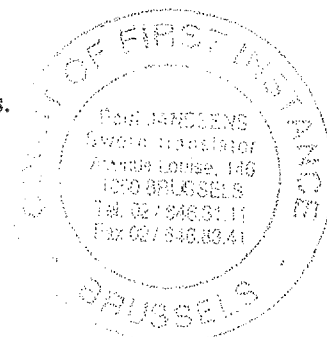
This component of the counter-claim must consequently be rejected as groundless.

ON THESE GROUNDS,

THE PRESIDING JUDGE,

Giving judgement after hearing the arguments with regard to the claimant and the first and second defendants, and in the absence of the summoned party,

Considering Articles 2, 37 and 41 of the law of 15 June 1935 on the use of languages in legal cases;



² Option to pay, after a provisionally enforceable judgement, the amount due to the "Caisse des dépôts et consignations" or into the hands of a bailiff

Excludes from the debates the submission of ... and
, presented to the Clerk of the Court on 3 May 2007, together with their exhibits numbered 5 and 6;

Declares the principal claim admissible and grounded to the following extent;

Confirms that ... and ... have breached article 55 of Copyright law by offering and/or selling carriers used for reproducing audio and audiovisual works to the Belgian public, without submitting the necessary declarations to Auvibel (on time – i.e., by the legal deadline stipulated in Art. 5 §1 of the RD of 28 March 1996) and without paying the remuneration for copying for private purposes;

Consequently orders the immediate cessation of the breach under penalty of a fine of 5,000 EUR per breach or, if the amount of the remuneration owed on the transactions for which no timely and correct declaration was made should be higher, twice the amount of the remuneration due and per day that the breach persists;

In accordance with article 87 §1 , paragraph 6 of the Copyright Law, orders the publication, at the expense of ... and ... of the judgement in two Dutch-language periodicals to be chosen by AUVIBEL, a limited liability company in the form of a cooperative partnership;

Orders the release of the deposit of €3,800 given in consignment by AUVIBEL, a limited liability company in the form of a cooperative partnership in relation to the distraint order concerning counterfeit on 5 November 2006 in Courtrai;

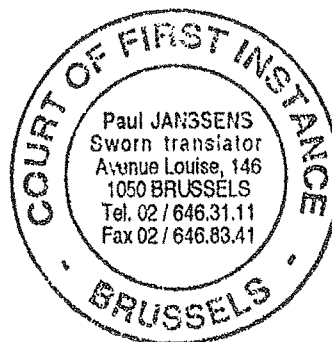
Declares inadmissible the counter-claim with regard to the submission of the accounts and documents by Auvibel and to provision of access to the latter's premises;

Rejects the rest of the counter-claim as without grounds;

Awards the costs of the case against ... and ... , estimated on

AUVIBEL's side to be:

- submission of unilateral petition: €52.00
- issue of court decision: €39.00
- service of court decision: €387.90
- distraint concerning counterfeit: €898.11
- expert: €5,810.40
- summons in emergency proceedings: €470.11
- translation of summons: €962.30
- judicial procedure: €242.94



and on the side of _____ and _____
impossible to estimate for lack of a statement.

Hereby handed down and pronounced in the Courts of Courtrai, in a public hearing on the
SIXTEENTH OF AUGUST TWO THOUSAND AND SEVEN.

Present: M.V. PICALET, Presiding Judge officiating,
D. KOOPMAN, Clerk of the Court.

[signatures]

D. Koopman

M.V. Picavet

