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## File Sharing – Frequently Asked Questions

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## File Sharing FAQ

### WILDE BEUGER SOLMECKE – Attorneys at law

#### 1 General Questions

##### 1.1 *What has happened?*

If you have received a letter from a law firm (such as Rasch, Waldorf Frommer or Kornmeier, etc) the music or film industry has you in their sights. The rigorous pursuit of internet file sharing was set in motion in May 2006 by the International Federation of the Phonographic Industry (IFPI). Since then the number of file-sharing cases has increased daily. According to annual statistics published by the Association Against Excessive Warning Practices (Verein gegen Abmahnwahn) around 575,800 copyright infringement warning letters were sent in 2010. The estimated value of these infringement claims is around €412 million. The music industry continues to vigorously pursue file sharers and there are no signs it intends to stop. The legal position in such copyright infringement warning cases is unclear.

##### 1.2 *Which law firms regularly send copyright infringement warning letters?*

The following lawyers frequently send copyright warnings:

Auffenberg, Petzhold, Witte; Baumgarten & Brandt; Bindhart, Fiedler, Zerbe; CSR; Daniel Sebastian; Denecke Haxthausen & Partner; Fareds; Johannes Rübenach; Kornmeier & Patner; Lihl; Lutz Schroeder; Marcus Meier; Marko Schiek; Negele; Nümann und Lang; Paulus; Philipp Marquort; Rainer Munderloh; Rasch; Reichelt, Klute, Aßmann; Sasse und Patner; Schalast & Patner; Scheuermann, Westerhoff, Strittmatter; Schutt, Waetke; SKW Schwarz; U+C; Vahrenwald & Kretschmer; Waldorf Frommer; WeSaveYourCopyrights; Winterstein; Zimmermann & Decker.

##### 1.3 *Who is behind the company, Infoscore?*

*Infoscore is a debt collection company which also engages in recovering compensation. The company's demands for payment often contain horrendous legal costs, supposedly incurred by the law firm Schutt & Waetke for sending a copyright infringement warning letter. Many people, who have received demands for payment from Infoscore, protest that they never received a copyright infringement warning letter from Schutt & Waetke. Don't be intimidated by Infoscore's demand for payment, but do seek legal advice.*

##### 1.4 *Has there been anything similar in Germany before?*

The way in which the music industry is currently pursuing copyright infringement claims in Germany is new. By contrast, the number of criminal proceedings being brought for copyright infringement is declining; but this has no bearing on the number of civil based copyright infringement warning letters being sent.

##### 1.5 *Do I need a lawyer?*

As there are currently a large number of unanswered legal questions concerning file sharing copyright infringement, it is almost impossible as a layman to mount an effective defence against

the music industry. You should seek professional legal advice. When looking for a lawyer, you should ensure he has knowledge of copyright law. A fee should be agreed before any work is undertaken and if possible this should be a fixed fee.

#### *1.6 What steps does WILDE BEUGER SOLMECKE take in such a matter?*

The first step any person should take if they receive a copyright infringement warning letter is to contact us by telephone on 0049 (0) 221 9515 6352 for an initial interview. During this initial interview, we can determine together, whether it is worth mounting a defence against the music industry's demands. The next step we take on behalf of our clients is to draw up and send to the opposition law firm, a modified declaration to cease and desist. We inform the opposition law firm that, based on the documents they have sent, there is no evidence that the IP Address and its owner have been correctly identified.

In most cases it is not our clients who have breached copyright law, but someone else (such as the client's children). In the majority of cases such as this, our clients are not obliged to pay compensation. We make sure the law firm which sent the copyright infringement warning letter knows this and we present the legal situation from our point of view.

#### *1.7 What happens next?*

##### **1.7.1 What happens if I sign the declaration to cease and desist?**

Law firms which send copyright infringement warning letters often enclose a pre-typed declaration to cease and desist. These pre-typed declarations should not be signed, without first having been altered, so as to include more favourable terms for the person who is being warned. But, be careful: if you chose to make the alterations yourself, the declaration may be rejected by the law firm. Therefore, it is advisable to seek legal advice before making alterations. If you have already submitted the pre-typed declaration to cease and desist, then in most cases you have also accepted the obligation to pay compensation. Whether or not you can now refuse to make the payment will need to be assessed and will depend on the individual circumstances.

##### **1.7.2 What happens if I do not sign the declaration to cease and desist and I refuse to pay?**

Due to the current uncertainty concerning the legal situation, we would strongly advise you not to stick your head in the sand and do nothing. If you do so, the opposition law firm may seek an injunction against you. Injunction proceedings are extremely costly and carry a lot of legal risks. As a result, they should be avoided at all costs. This is why we would advise you, at the very least, to submit a modified declaration to cease and desist to the law firm which sent you the copyright infringement warning letter. Whether or not the demand for compensation must be satisfied is another question. In most cases the amount demanded is hugely inflated.

##### **1.7.3 For how long are the claims for compensation and legal costs valid?**

A claim for compensation and recovery of the legal costs, with regard to an alleged infringement of copyright may be brought within three years following the date on which the alleged act became known. However, the three year duration, begins at the end of the year in which the act becomes known (i.e. 31.12).



#### **1.7.4 Will I also face criminal proceedings?**

In the past, copyright infringement warning letters from law firms were usually preceded by criminal proceedings. This has recently changed, thanks to the introduction of regulation that allows law firms to obtain a court order requesting an internet service provider to disclose the details of an IP Address holder. As a result, criminal proceedings no longer need to be commenced in order to discover the details of an IP Address holder. In practice criminal proceedings are now only brought against people who have made several thousand pieces of information available for download. It may be the case that the police have already commenced proceedings to press charges. If this is so, then we would strongly advise you to seek legal assistance BEFORE you give any statements to the police. Ill-considered statements given to the police can seriously damage the chances of success in a later civil case. You will find details on criminal proceedings in chapter three of these FAQs.

#### *1.8 Will my legal protection insurance cover the costs?*

Legal protection insurance providers in Germany do not generally cover the costs where the criminal act of copyright infringement alleged. They will also not cover the costs of a declaration to cease and desist in a civil claim. Many legal insurance providers, however, cover the costs (up to €190 + VAT) for an initial interview. Please check with your legal protection insurance provider for details.

#### *1.9 Does the consumer advice centre offer advice?*

In general, the consumer advice centre does not offer advice with regard to copyright infringement. It may, however, be worth visiting the consumer advice centre to obtain a general explanation of what your case is about. However, such information is not a satisfactory replacement for advice given by a specialist copyright lawyer.

#### *1.10 Which legislation is relevant here and where can I find it?*

The relevant sections of law can be found in the Copyright Act (Urheberrechtsgesetz, UrhG) and the Lawyers' Fees Act (RVG).

- Copyright Act in the version of German Civil Code 1 | 1965, 1273; current status: last amended by Act dated 17.12.2008

- § 15 UrhG
- § 16 UrhG
- § 19a UrhG
- § 53 UrhG
- § 97 UrhG
- § 97a UrhG
- § 101 UrhG

- Lawyers' Fees Act in the version of German Civil Code 1 | 2004, 718, 788; current status: last amended by Act dated 08.07.2006

- § 13 UrhG
- § 14 UrhG
- Fees table

### *1.11 What penalties will I face in criminal proceedings?*

In most cases, there are no penalties to be faced in criminal proceedings. As long as you offered no more than 3,000 pieces of music (or other files) through a file-sharing programme, criminal charges will usually be dropped due to the lack of seriousness in the case. However, many people confuse the criminal proceedings with civil claims and assume that the compensation being demanded by the music industry or the law firm which sent the copyright infringement warning letter is a penalty. The criminal and civil procedures are completely separate.

### *1.12 What is the difference between the criminal and civil procedure?*

Penalties imposed following criminal proceedings are done so by the State. However, as many of the copyright infringements perpetrated through file sharing are minor offences, criminal proceedings are often dropped. The civil claim sought by the copyright holder is one for compensation. Previously criminal proceedings were commenced, only as a vehicle to obtain the address and details of alleged infringers.

### *1.13 If criminal proceedings are no longer being commenced, where did the opposition law firm get my address from?*

Copyright law in Germany was amended in 2008. Paragraph 101 UrhG (Copyright Act) was inserted. This provision gives a copyright holder a civil-based right to disclosure of information. Once a copyright holder has a file-sharer's IP-address, they can request the details, including the address, of a connection owner from an Internet Service Provider. However, as the file sharer's "traffic details" are often included in such information, the copyright holder must seek a judicial order permitting the use of such information. These judicial orders are often attached to the copyright infringement warning letter received from the opposition law firm. Generally, the right to information can only be exercised by the copyright holder once a "commercial level" of sharing has been reached. However, some courts have decided that a commercial level is achieved, once one album or work has been exchanged; although the particular case referred to a recently released album. According to the latest case law, a commercial level is reached if files are uploaded or downloaded during a "relevant shelf-life period". A relevant shelf-life period is when a particular work is new (e.g. 6 months following release) or when it has a surge in popularity (e.g. after winning a prize).

### *1.14 I thought file-sharing websites were financed through advertising*

It is true that advertisements are often shown on file-sharing websites. These advertisements only finance the file-sharing websites themselves. They do not finance the exchange of music. The advertisement argument may well be of use in criminal proceedings, but it has little bearing on the outcome of civil proceedings.

### *1.15 Isn't some material non-copyright?*

A lot of music on the internet is free to use. Such music is not "copyright free" but is under licence, which means the user is permitted to download the music and share it with other people. The most well known free licence is the Creative Commons Licence. Current chart music is rarely offered to the public under such a licence.

*1.16 What about copying something for private use and what is the position regarding copy-protected CDs?*

In general it remains possible, and legal, to copy music from friends, if it is for private use. You can also borrow a CD from a friend, which they have copied for private purposes, and copy that for your own private use. Currently, downloading music for private purposes is also legal. Uploading music, on the other hand, is illegal. However, a change in copyright law is planned. Copy-protected CDs may not be copied.

*1.17 I have copied lots of music off of a friend, is that legal?*

You may copy music from friends as long as it is for private use. You may also give these copies to friends. If you know, that your friend has illegally obtained the music, you may not copy it.

*1.18 Am I permitted to convert music from my CDs into MP3 format to create a private library of music?*

Yes: this is permitted. Also permitted, is copying the MP3s back on to CD to create a mixed album. It is also legal if you copy these mixed albums for friends.

*1.19 What about radio-recording software, Rapidshare, YouTube and Mailvideo*

There are plenty of other places to find music on the internet. As a general rule of thumb, you are allowed to download music. You are not allowed to upload music and thus offer it to other people. But, watch out! The law here was changed at the beginning of 2008: If it is obvious that files are being illegally offered, then these files may not be downloaded. It is currently being debated among legal practitioners as to when it is obvious to a lay person that a piece of music is being illegally offered. Where files are offered on Rapidshare, it can be taken as given that the material is obviously being offered illegally.

*1.20 Am I permitted to download concerts using file-sharing software?*

No: concerts are to be treated in the same way as any other piece of music.

*1.21 Am I liable for my children's actions, even though I knew nothing about their activities?*

There is an old saying applicable here, namely: ignorance is no excuse. If your children use your internet connection, you are liable for any copyright infringements committed. However the case law varies depending on which court is hearing the case. The district courts of Mannheim and Hamburg are of differing opinions. The Mannheim district court takes the view that parents cannot be made liable for their children's actions where they have explained the situation to their children and have forbidden them from sharing music through file-sharing software. The Hamburg district court takes a stricter view saying that, if necessary, parents should go so far as to pay for an IT expert to set up the computer in such a way as to prevent their children from sharing files. In our opinion the latter view is incorrect; as file sharing in itself is not illegal. Only if a work is copyright protected, does it become illegal to share it using file-sharing software. Either way, the latest case law makes it clear, that parents are under an obligation to explain the risks to their children and to control them. If you do not fulfil this obligation on a regular basis, you are liable for your children's activities.

*1.22 I am liable as the owner of my internet connection if it was an unsecured wireless (Wi-Fi) connection?*

For a long time there was uncertainty surrounding this problem. Now, the case law appears to have developed some clear principles. In the case of “The Summer of Our Lives” (“Sommer unseres Lebens”) the German Federal Supreme Court decided that every person who owns an internet connection is under an obligation to ensure that it is secured.

From the moment a Wi-Fi connection is installed it must be secured. The level of security must fulfil the technical standards at the time of setting up the connection. The obligation does not extend to updating the security level, where technical standards become more advanced.

If the wireless connection was unsecured, but the owner can conclusively prove that they were not the perpetrator of a copyright infringement (e.g. because they were not at home at the time the download took place), then they will not necessarily be liable as the perpetrator, but will nevertheless be strictly liable for causing a nuisance.

*1.23 I shared files whilst abroad. What is the legal position?*

If you have been caught sharing files abroad, you should contact a lawyer with copyright knowledge in that country.

*1.24 What if I only downloaded part of a file?*

If you only downloaded part of a music file, then we consider that to be a “waste file”. In our opinion exchanging such “waste-files” cannot represent a copyright infringement. There are, however, practitioners and judges who take the view that even the exchange of “parts of files” is criminally punishable.

*1.25 Is file sharing still safe?*

That depends what you see as “safe”. It is definitely inadvisable to disseminate copyright-protected material using file-sharing software.

*1.26 Is it risky to talk about file sharing in forums?*

In general, discussing this topic on forums is not punishable. The music industry continues to attempt to portray file sharing itself as illegal. It often overlooks the fact that file-sharing software offers only the technical means for exchanging files. Linux, the free operating system, is exchanged in such a manner. Also, licence-free music is exchanged via file-sharing websites. As file sharing itself is not illegal, it is safe to discuss it in forums.

*1.27 What is the current position in the case law on the topic of file sharing?*

It is necessary to differentiate between the civil and criminal positions. The criminal side of file sharing has recently been relaxed. House searches and criminal proceedings are brought only in the most serious of cases (e.g. where in excess of 3000 files are shared) and so are generally an exception.

This is because the state prosecution service has realised that the criminal process was previously being used only as a vehicle to obtain the details of IP address owners. In the meantime a civil law right to disclosure of the personal details of IP address owners has been created and, as a result, an

aggrieved copyright holder no longer needs to bring criminal proceedings to obtain the information they are looking for.

The legal picture in the civil context is still developing. A tricky matter is if you refuse to submit a declaration to cease and desist. If taken to court, the value of the claim itself is used as a basis for calculating procedural costs. Currently there is a tendency, where individuals are concerned, to reduce the value of the claim, which in turn, reduces the procedural costs of bringing a claim for copyright infringement; but even still, procedural costs can be high. Many claims concerning the declaration to cease and desist have been brought.

To avoid such costly claims, we would strongly advise to submit a modified declaration to desist.

A different matter is if a dispute arises as to the payment of compensation. We are only aware of several claims which have been brought in this area. In theory the music industry has three years, beginning from the end of the year in which the copyright infringement was discovered, to bring a claim for compensation. After that a claim is debarred.

#### *1.28 Does Clemens Rasch conduct “mass letter-sending”?*

Not as such. Clemens Rasch represents a large number of copyright holders from the music industry, which leads to a large amount of copyright infringement warning letters being sent. These letters are not, as sometimes asserted on the internet, illegal or improper. However, it is questionable, whether the full amount of lawyer’s fees can be demanded for every single copyright infringement warning letter. The courts take different views on this point.

#### *1.29 Is it possible to join together in a class action lawsuit?*

Class action lawsuits are not permitted in Germany. Although the German Federal Court of Justice did allow a collective action by a consumer organisation to be brought, the case did not concern file sharing.

#### *1.30 Isn’t it unfair that the internet service providers receive money for providing information and the State has to pick up the bill?*

According to paragraph 113, sub paragraphs 2, sentences 2 and 3 of the Telecommunications Law internet service providers may demand payment for providing copyright holders with information concerning IP addresses. However, as copyright holders now have a civil right to disclosure of information they must pay court costs in advance amounting to €200. It is difficult to say whether the €200 refers to each IP Address or each downloaded work, as the courts themselves disagree. The Regional Court of Appeal in Frankfurt am Main took the view in the past that the costs for the disclosure of information related to each individual infringement and not the IP Address. Whereas, the Regional Court of Appeal in Cologne decided that procedural costs relating to the disclosure of information are payable, but procedural costs for obtaining a judicial order are not. The Regional Court of Appeal in Düsseldorf, on the other hand, decided that just the court fees were payable, regardless of how many IP addresses were at issue.

*1.31 Is the information which is obtained about my IP Address existing data or connection data?*

*What is the difference?*

Existing data are those which are contained in the contract between the internet service provider and the customer. Connection data are those which are created each time you connect to the internet and include dynamic IP Addresses (an address which is supplied to a connection each time it is connected to the internet).

## **2 Questions about the technical aspects**

*2.1 How does the exchange of files using file-sharing software work?*

The exchange of files using file-sharing software works as follows: When a user wants to download a music file he sends a message to a server. The server finds a user who has the file saved on their hard drive and who is offering that file and establishes a direct connection between the two users. What many users do not realise: is that while they are downloading a file, they simultaneously upload it and thus offer it to others for download via the internet. It is this action which leads to criminal liability.

*2.2 What software is there?*

There are various kinds of software which enable the exchange of files. The oldest software programme was called Napster. This programme now works in a completely different way to how it used to and offers users the possibility to download rental music for a monthly fee. Examples of the most commonly used file-sharing software programmes include: Kazaa, Limewire, Bearshare, Bittorrent, Edonkey, Emule, Azureus, µTorrent and Shareaza. These programmes are linked via file-sharing networks such as: Gnutella, Bittorrent, Fasttrack and eDonkey2000.

*2.3 Where can I find file-sharing software on my computer?*

Generally speaking file-sharing software does not install itself on a computer. You should ask your children whether they have downloaded and installed the software on the computer. Otherwise you could try searching the computer files for names such as “Limewire”, “Bearshare” or “Emule” which are the file-sharing programmes most often used. However, there are many other file-sharing programmes which can be used to exchange music.

*2.4 What is an IP-Address?*

An IP-Address serves as a unique address for computers and gadgets which use an IP-Network. The address is usually a 32 or 128 digit binary code. The IP-Network within which the IP-Addresses are used is the internet. As such, an IP-Address is like a telephone number within a telephone network.

*2.5 Is my IP-Address similar to genetic fingerprint on the internet?*

Most often, the copyright infringement warning letters which are sent by law firms contain IP-Addresses which are dynamic. The unique character of a dynamic IP-address means that it shows that someone on that date and at that time used the internet service provider’s internet connection (e.g. T-Online) to access the internet. The name and address of the person accessing the internet cannot be directly obtained from this information. As a result, an IP-Address is not really a genetic fingerprint.

## *2.6 How is my IP-Address tracked?*

IP-addresses are recorded. The internet service provider then receives an e-mail requesting the information to be saved for criminal prosecution purposes. The police then press charges against an “unnamed person” which leads to the personal details behind the IP-Address which are saved by the internet service provider being passed on to the criminal prosecutor. The law firm is then able to obtain the details by requesting access to the police file. Alternatively a civil request is made for the details of an IP-Address owner. Here the telecoms provider is obliged by court order to send the information directly to the copyright holder or their lawyer.

## *2.7 When my IP-Address is traced, can my whole computer be viewed or just a specific folder?*

The only file which is visible if your IP-Address is traced is the file which you made accessible through file-sharing software. Some file-sharing programmes, however, make the entire computer accessible to third parties.

## *2.8 Doesn't this method represent unauthorised spying on data?*

The way in which the lawyers obtain the information does not amount to unauthorised spying on data as they do not retrieve the information themselves. Their clients' actions would also fall short of being unauthorised retrieval of data, as an anti-piracy company is often engaged. Furthermore the act of retrieving the data secures evidence and protects the copyright holder against criminal acts. Also, the user has often knowingly allowed their computer to be used for transferring data via a file-sharing programme, which further excludes the possibility of the lawyer's/copyright holder's actions being classed as unauthorised spying.

## *2.9 Is the provider allowed to simply pass on my details?*

The internet service provider is not permitted to simply pass on personal details; but must do so if presented with a civil court ruling. This obligation arises out of § 101 UrhG which contains a civil law right to disclosure of information.

## *2.10 What happens if my IP-Address has been illegally saved?*

Several courts have found that service providers are not permitted to save their flat-rate customers' personal information. As far as we have been able to establish, many service providers save their customers' details nevertheless, if only for a very short period (for example: a few days). This period is usually sufficient for the State prosecutors to begin pursuing a case. Some providers abide by the legal requirements and do not save customer details (e.g. Arcor, according to our information). Even though an IP-Address may have been illegally saved and then disclosed, the State Prosecution Service may nevertheless make use of the information; the information remains admissible as evidence. Only time will tell, as to whether a civil claim for compensation against an internet service provider for illegally saving information will be successful. Here it is worth noting that a Data Retention Law will soon come into force in Germany which will mean that all service providers will be obliged to save customers' personal information for six months.

## *2.11 I pay a fee to Usenet, Alphaload, Firstload. Is that legal?*

The above-named services offer access to the so-called Usenet. The provision of such access is not illegal, as Usenet operates in a similar way to the internet. The majority of practitioners agree that downloading music via Usenet leads to neither criminal nor civil consequences, as such downloads are covered by the right to make private copies. Some courts, on the other hand, have reached the

decision that downloading music via a Usenet-server can be illegal. However, only server operators may legally be pursued. Downloading music via a Usenet should be done with caution, as there are many sham-providers on the market.

*2.12 I am a Napster customer and pay a monthly fee. I convert my Napster music with Tunebytes so that the music I download from Napster is still available after my subscription has ended. Is that illegal?*

In the opinion of most practitioners, this set of facts revolves around the “analogue loop-hole”. Here, it would have also been possible to record the music onto a cassette. The majority of practitioners agree that it is therefore permissible to reload the music onto your computer with Tunebytes. The recording is covered by the right to make private copies and the music therefore does not need to be deleted following the expiry of the Napster subscription.

*2.13 Am I allowed to send music via ICQ and e-mail?*

Yes. You may send music to friends via e-mail and ICQ. In theory, this is an upload, but as the exchange of music takes place within the private sphere, it is legal.

*2.14 Am I allowed to download TV series and films on the internet?*

Programmes that are shown on television (including feature films, series and TV shows) are protected by copyright law. The same rules apply as to those for music and film. Currently, downloading such programmes is legal. It is only when these programmes are offered to the public, that criminal and civil culpability arises.

### **3 Questions about the criminal procedure**

#### *3.1 House Search Questions*

If you have made more than 3,000 pieces of music publicly available via file-sharing software, some state-level prosecution services in Germany issue a search warrant. The following information describes what to do if this happens to you.

##### **3.1.1 Do I have to let the police into my flat?**

In general, you are under no obligation to help the police with their search. However, it is advisable, at the very least, to allow the police into your flat. Otherwise they may gain access by calling a locksmith. The police will then ask where the computer is. Again, to avoid the whole flat being searched, it is advisable to show them.

##### **3.1.2 Are the police allowed to confiscate my computer?**

Yes. The police are generally entitled to confiscate items suspected to be in connection with a crime. Should it later be discovered that the computer has been used to perpetrate copyright infringements, it may well be retained as evidence. In most cases, such measures are considered to be disproportional and most people are given their computer back later. The downloaded music is normally deleted. You have a right to make copies of any files which are of personal necessity (e.g. work, school, university files).



### **3.1.3 Do I have to answer the questions the police ask?**

No, you are not obliged to answer any questions; and we would advise against answering questions. You will have opportunity later, to give a statement and explain your views on the case. We often see cases where clients later regret their having said anything to the police. You do not even have to react if you later receive a summons.

### *3.2 Questions about police interviews*

The house search will be followed by a formal interview by the police.

#### **3.2.1 Do I have to go to the interview?**

In general you are under no obligation to go to the interview, but it is advisable to submit your opinion on the charges against you. It can be very helpful at this point to hand in a written opinion, drafted by a lawyer. It is not advisable to go alone to the police.

#### **3.2.2 How will the interview be conducted if I am being represented by my lawyer?**

A lawyer will not appear at the police interview in person. Instead, they will give a written statement as to the charges. As such, a statement can be drafted in peace. The lawyer will also draw the prosecutor's attention to evidence which supports your statement. The aim of the statement is to convince the police to drop the charges against you.

### *3.3 Questions about the State Prosecution Service's investigation*

After the police have completed their investigations they pass on the results to the State Prosecution Service.

#### **3.3.1 Criminal investigations, about which I have not been informed, are clearly being led. Should I not be being kept informed?**

If no house search takes place, then it is rare that you will be interviewed by the police. Where no interview with you as a suspect takes place and where the investigation is dropped, the police do not need to keep you informed that any investigations were being conducted. Often people only find out the criminal investigations have taken place, after the music industry has exercised its civil law right to disclosure. The criminal investigations in such cases have often already been discontinued. It is rare for the State Prosecution Service to write to you, once you have been contacted by the music industry.

#### **3.3.2 When does the State Prosecution Service get involved?**

The State Prosecution Service gets involved once a lawyer or their clients press charges.

#### **3.3.3 Why have criminal proceedings been brought against me?**

For a long time criminal proceedings were only used by law firms as means of gaining access to the connection owner's address and details. In general it is of no concern to the music industry that you are being punished by the State.

This should be considered differently where people have uploaded current popular music in large quantities.

### **3.3.4 I have already received a warning letter from a lawyer. Is that the end of the criminal proceedings?**

If you receive a warning letter from a law firm or from the music industry, and you have not yet heard anything from the State Prosecution Service, it is most likely that the criminal proceedings against you have already been discontinued.

### **3.3.5 Why does the State Prosecution Service discontinue criminal proceedings?**

In general each prosecution service can decide when to discontinue criminal proceedings. As far as file sharing is concerned, state prosecutors are regulated by directives which are constantly being updated. As a general rule of thumb, criminal proceedings are discontinued if less than 500 music files have been made available to the public through the use of file-sharing software. Should less than 3,000 music files have been made available to the public, then criminal proceedings are usually discontinued upon payment of a small donation to charity. If you have uploaded and made more than 3,000 music files available to the public from your hard drive, criminal proceedings may well be carried through to conclusion. Sometimes the state prosecutors also differentiate between how popular a particular song is which means that criminal proceedings can be brought, even where only a few files have been shared.

### **3.3.6 What will happen to me during criminal proceedings in the worst case scenario?**

We have seen several rare cases, where a fine of €4,500 has been handed down. The fine was payable in €50 instalments over a period of 90 days. The instalment amount is based on your income. This scenario, however, concerns the worst cases, where several thousand music files had been shared. And even in these cases, we were able to achieve a reduction in the daily instalment amount. Please note: if a fine of more than 90 day instalments is handed down, this is entered in the convicted person's criminal record.

### **3.3.7 Can youths also be prosecuted?**

The age of criminal responsibility in Germany is fourteen. At this age a person can be prosecuted under the Youth Criminal Act.

### **3.3.8 My children are still in education. Can the criminal proceedings have negative consequences?**

Criminal proceedings are brought against children in only the rarest of cases. Normally, criminal proceedings are brought against the parents as owners of the internet connection. Even when criminal proceedings are brought against children, the punishment is usually so small that there is no need to fear negative consequences on the child's education.

### **3.3.9 I didn't know that files were being uploaded and made publically available. Will this argument help in criminal proceedings?**

Usually, arguing lack of knowledge is no defence. However, for criminal liability to arise, an intention must lay behind an act. Where there is lack of knowledge, there is lack of intention; and this argument can be useful in criminal proceedings. Lack of knowledge does not, on the other hand, offer a defence in civil proceedings. This is because intention is not a prerequisite of a civil based claim to compensation.

## **4 Questions about the civil procedure**

Copyright holders can instigate civil law actions, usually with the help of their lawyers, to protect their rights. On the one hand they can demand compensation and on the other a declaration to cease and desist in making protected material and works available to the public.

### *4.1 General questions about copyright infringement warning letters*

#### **4.1.1 What is a copyright infringement warning letter?**

Warning letters in this context concern a formal demand to stop doing a particular activity. The idea behind such warning letters is to settle disputes directly and cheaply, without resorting to taking claims to court.

#### **4.1.2 Is the copyright infringement warning letter a demand or a warning?**

The copyright infringement warning letter is an out-of-court settlement offer by copyright holder or their lawyer, which you can accept or reject.

#### **4.1.3 I received the letter in the normal post and it was not registered. Can I ignore it?**

No do not ignore it. The law firm is only under an obligation to prove that the letter was sent. It is irrelevant whether the letter was franked or registered.

#### **4.1.4 There was no power of attorney attached to the copyright infringement warning letter.**

##### **Does that mean it is ineffective?**

No, the letter is not ineffective. The lawyers have been empowered by their clients to send the copyright infringement warning letters. The case law states that a power of attorney is not a prerequisite for the copyright infringement warning letter to be effective.

#### **4.1.5 The copyright infringement warning letter contained a deadline of just 7 days. Is that not too short?**

Although, often, the copyright infringement took place months ago, a warning letter regularly contains a very short deadline for signing the declaration to cease and desist. It is particularly disadvantageous if the warning letter was delivered whilst you were on holiday. Nevertheless, the courts recognise such short deadlines.

### *4.2 Questions about the declaration to cease and desist*

#### **4.2.1 What is a declaration to cease and desist?**

A declaration to cease and desist is an obligation to stop doing a particular activity in the future. The declaration does not necessarily need to be submitted in light of an underlying claim.

#### **4.2.2 Should I sign the pre-formulated copy the opposition lawyer sent me?**

As the declaration to cease and desist is part of an out-of-court offer which can be rejected, there is no obligation to sign it. If you decide to accept the out-of-court offer, do not sign the pre-sent copy of the declaration to cease and desist, as it is formulated in a very unfavourable style. It is advisable to seek legal assistance and to modify the declaration, which can then be signed and sent to the opposition law firm.

#### **4.2.3 Can I download and sign a model declaration from the internet?**

You may find examples of modified declarations to cease and desist on the internet. However, caution is needed, as there are often examples of modified declarations to cease and desist which do not fulfil all the necessary legal requirements. Should the declaration be too narrowly formulated the opposing law firm may decide to reject it and seek an injunction to enforce their pre-formulated declaration to cease and desist. As a result, the content of the declaration should be carefully considered. The declaration should contain as much information as necessary and as little information as possible. If in doubt, it is advisable to seek legal assistance with this very important (and possibly expensive) aspect.

#### **4.2.4 What will happen if I don't sign anything?**

The opposing law firm will take the claim further, starting by insisting that you sign the declaration to cease and desist they sent to you. The law firm may also decide to instigate injunction proceedings against you, which can be very costly.

#### **4.2.5 Can parents sign a declaration to cease and desist on behalf of their children?**

Demands for children to sign a declaration to cease and desist are rare. The legal field is currently debating whether it is at all possible for parents enter their children into such far-reaching legal obligations. It is also sometimes discussed, whether the agreement of the Minors Court is required. You should seek legal assistance if your child is being asked to sign a declaration to cease and desist.

#### **4.2.6 Am I not /pleading guilty if I sign the declaration to cease and desist?**

Whether a declaration to cease and desist is considered to be equivalent to a guilty plea depends on its wording.

#### **4.2.7 How long am I bound by the declaration to cease and desist?**

If the declaration is silent on this point and has not been modified, you are bound by it for thirty years.

#### **4.2.8 What happens if I am caught again?**

If you sign the declaration to cease and desist you are bound by it and must abide by it in the future. This means you will not be allowed to share music using file-sharing software, which belongs to the law firm's clients. Should you be caught sharing files, you will face a horrendously high contractual penalty.

#### **4.2.9 What happens if I have made a lot of files publicly available?**

If you have shared a lot of files, you should be prepared to receive further copyright infringement warning letters from other law firms. Each copyright infringement warning letter only refers to the particular work stated.

#### **4.2.10 Can I receive several copyright infringement warning letters from the same firm?**

Yes. Many law firms send more than one copyright infringement warning letter, often with delays in between each letter. It is not unusual for file sharers to receive several copyright infringement warning letters from the same law firm but for different works.

#### **4.2.11 How can I protect myself against future copyright infringement warning letters?**

The first step in protecting yourself against future copyright infringement warning letters is to voluntarily sign a preventative declaration to cease and desist. WILDER BEUGER & SOLMECKE also composes a declaration to cease and desist with validity for all copyright holders represented by the law firm in question. Should you receive further copyright infringement warning letters from that law firm, that letter will no longer be valid, as you have already voluntarily signed a declaration to cease and desist. Thus, the opposing law firm is prevented from sending further copyright infringement warning letters and demanding payment of the full legal costs each time. Only the claim for compensation remains. Our clients often ask if they are not shooting themselves in the foot by voluntarily signing such preventative declarations to cease and desist. To obtain the answer to this question see the information below.

#### **4.2.12 The criminal proceedings against me have been dropped. Should I still submit a preventative declaration to cease and desist?**

This is one of the main situations in which you should submit a declaration to cease and desist. It is highly likely that you will receive a copyright infringement warning letter. However, it is not always certain that it was the music industry that initiated the criminal proceedings. If you are not sure that whether it was the music industry which commenced proceedings against you, you should instruct a lawyer who can demand access to the police files and be able to tell you to whom to send the declaration to desist.

#### **4.2.13 Having submitted a preventative declaration to cease and desist, you will no longer have to pay legal costs, but will still have to pay compensation. How much can this be?**

To date, claims for compensation in their own right have been made by the music industry in isolated cases. This is because the law in this area is complex and has not yet been sufficiently clarified. The amount of compensation demanded, varies on the period over which file sharing took place. The music industry must provide proof of the time period. In isolated cases the music industry has demanded €150 per song. The Cologne Regional Appeal Court found in one decision that the GEMA-Tariff can be used as a basis for assessing the level of compensation. As a result future compensation claims could be reduced to several Euro cents per song. Any demands from the music industry for compensation over and above this amount have to be supported by proof, which can be difficult to obtain in single cases.

#### **4.2.14 Will I not draw the attention of the music industry if I submit a preventative declaration to desist at this point?**

Worries about this are understandable. The following information should be useful:

Should you already be in the music industry's sights and it has already started making preparations to serve a copyright infringement warning letter, you will improve your position if you submit a preventative declaration to desist. File-sharing websites are being so closely monitored by the music industry that it is extremely likely they will turn to their lawyers. If, contrary to expectations, the music industry has not yet initiated proceedings against you, you will not harm your position if you submit a preventative declaration to desist. The declaration should be worded properly, so as to ensure that it contains no indications as to who may be guilty of sharing music. It is extremely

advisable to submit a preventative declaration to cease and desist if you have uploaded and therefore offered a large number of files to the public using file-sharing software.

#### **4.2.15 What is the position if I have submitted a declaration to cease and desist but refuse to pay compensation?**

In the past, law firms which send copyright infringement warning letters have been cautious about bringing civil claims for compensation. They have preferred to exert pressure out of court on the people they warn, in order to try to encourage them to pay. Due to the difficulty of obtaining proof to support a claim additional demands for compensation have rarely been made. It is difficult for a law firm which sends copyright infringement warning letters to claim compensation as they often have to rely on licensing analogies. It is more often the case that civil proceedings have been brought to recover the costs involved in sending copyright infringement warning letters. The amount of costs recoverable is linked to the value of the “cease and desist claim”. Information on this can be found in the Lawyers’ Fees Act (Rechtsanwaltsvergütungsgesetz). It is possible to defend against these claims for recovery of legal costs by arguing that there is no proof of liability of the connection owner and that the costs are unjustifiably high. Luckily the court costs for the claim to recover legal costs are much lower than the court costs for claims brought as a result of trying to enforce a cease and desist order. Normally only a couple of hundred Euros are at issue. This contrasts with value of a cease and desist claim itself which can be up to €10,000. But even here the courts have begun to recognise a much lower claim value than previously. The Regional Court of Appeal in Cologne recently decided that the claim value of €10,000 for a single title was disproportionate and lowered the sum to €3,000.

### *4.3 Questions about court proceedings in general:*

#### **4.3.1 Who pays the costs of a court action?**

In general the losing party has to pay all costs of a court action. These include their own legal costs, the opposition’s legal costs, court fees and, if required, witness and expert witness costs.

#### **4.3.2 How high will the costs be if the opposition sues for reimbursement of €600 pre-court legal costs?**

Should the opposition sue for the reimbursement of pre-court legal costs of €600; the losing party will have to pay the overall costs of a court action. These amount to €420.36 and include own lawyer’s fees (but not any pre-court representation), the opposition lawyer’s fees and court fees. Witness and expert witness costs are additional and can often exceed those of the court action itself.

#### **4.3.3 Can I still reach a settlement agreement, once court proceedings have started?**

As long as both parties are prepared to settle, a settlement can be reached at any point during legal proceedings. If the opposition refuses the offer of a settlement, they cannot be forced to settle.

#### **4.3.4 Who pays the litigation costs if I reach a settlement with the opposition?**

The parties can agree between themselves, who should pay the litigation costs. Often, settlements provide for each party to pay their own lawyer’s costs.

#### **4.3.5 What can I do if the opposition sues me and I require legal aid?**

To receive legal aid you will need to apply to the relevant court. Where the losing party receives legal aid, costs for their lawyer and court costs are either paid by the state or by the losing party in instalments (for a maximum 48 months).

#### **4.3.6 How can I reply to the opposition's statement of claim if I am sued?**

WILDE BEUGER SOLMECKE has produced a specimen "statement of defence" (Muster-Klageerwiderung) which you can find at <http://www.wbs-law.de> in the "file sharing special" section. Please note: The district courts (Landgericht) are subject to a statutory requirement to be represented by a lawyer. As a result the statement of defence must be adapted by a qualified lawyer to suit the case. You may not submit the statement of defence yourself.

### *4.4 Questions about my lawyer's costs for out-of-court representation*

#### **4.4.1 How much does it cost for WILDE BEUGER SOLMECKE to represent me?**

For our out-of-court representation, we agree a fixed-fee with our clients. The fixed-fee is based on the complexity of the case. If you call us and tell us about your case, we can then give you an estimate of our out-of-court costs.

#### **4.4.2 What happens if the music industry writes to me again later? Do I have to pay again?**

Various different law firms send copyright infringement warning letters concerning illegal file sharing. The law firm Rasch represents major record companies in Germany. Smaller labels have also engaged law firms to send copyright infringement warning letters. So it is possible to receive copyright infringement warning letters from several different law firms. In this case, it will be necessary to submit separate declarations to cease and desist. There have also been cases where a law firm sends a second warning letter for a previous copyright infringement. Such warnings are generally an abuse of procedure.

### *4.5 Questions about the claim for compensation*

#### **4.5.1 The copyright infringement warning letter contains a lot of numbers. What am I really being threatened with?**

In the copyright infringement warning letter you are being threatened with an extremely high claim value. The law firms which send copyright infringement warning letters generally assert that the claim value per piece of music is €10,000. This leads people to worry that compensation of €10,000 is being sought. However, the claim value is not the amount of compensation. It is a sum based upon which lawyers' costs are worked out. The courts tend to recognise a maximum entire claim value of €100,000 in private copyright infringements. The district court in Cologne caps entire claim values at €400,000. The music industry often sends warning letters for three to four pieces of downloaded music meaning that the claim value is between €30,000 and €40,000.

However, recent case law has recognised a much lower claim value of around €3,000 per song.

#### **4.5.2 What elements is the compensation composed of?**

The compensation in this claim is composed of two elements: Compensation for the damage caused by sharing files using file-sharing software and lawyer's fees. The actual damage caused by sharing files will be difficult to prove. On the other hand, the fact that lawyer's fees have been incurred can

be easily proven. However, the magistrates' court in Mannheim decided that where the law firm had reproduced the same letter thousands of times, they cannot demand their full fee thousands of times. As a result there may be a possibility of escaping having to pay any compensation at all. With regard to damages, only the person who actually perpetrated the copyright infringement can be forced to pay damages. Thus, if parents are faced with having to take responsibility for their children's actions in a claim they will be liable to pay the other side's lawyers' fees but not compensation for the damage caused. If the music industry knows the names of the children they can assert their right to compensation against them, even if they are minors. Whether the children will have to pay depends on their capacity to understand their actions. Furthermore, children have to be at least eight years old to be liable for damage they do.

#### **4.5.3 What does "claim value" mean?**

The claim value is the amount which represents the copyright holder's economic interest in preventing the copyright infringement from occurring again. To assess the level of economic interest the copyright holder's rights of use and exploitation are taken into consideration. The claim value does not refer to the price of the piece of music downloaded.

#### **4.5.4 What is a statutory lawyer's fee?**

The fees a lawyer can demand when sending a copyright infringement warning letter are set by statute (a statutory lawyer's fee). The fees are calculated based on the Lawyer's Fees Law (Rechtsanwaltsvergütungsgesetz, RVG). Furthermore a standard fee of €20 may be payable for post and communication costs. The annex to the RVG contains a minimum and maximum amount within which lawyer's fees can be calculated depending on activities conducted.

#### **4.5.5 Can the music industry prove damage has been caused at all?**

It cannot be denied that the music industry has sustained losses due to file-sharing activities. However, quantifying the damage caused can be extremely difficult. In particular the level of profits lost cannot be clearly established. On the other hand, an ex post payment for downloading a song, calculated in accordance with the GEMA-Tariff, can be demanded. Any claim for damages beyond this would need to be supported by evidence in court, on a case-by-case basis and producing such evidence extremely difficult. See the court decision: OLG Köln, Beschluss vom 30.09.2011, Az. 6 U 67/11.

#### **4.5.6 What fees do the copyright holder's lawyers charge? Are these fees justifiable?**

Some copyright infringement warning letters contain a single payable sum and it is not possible to discern how what portion is the lawyer's fee. As a result it is not possible to answer the question whether these fees are justifiable. Other lawyers expressly state the fees they are demanding. The level of the fee is calculated based on the claim value. Whether the fee demanded is justifiable depends on a number of different factors.

#### **4.5.7 Aren't the opposition law firm's fees capped at €100?**

A cap on lawyers' fees of €100 is contained in paragraph 97a UrhG. However, this cap only applies to minor offences. Dispute has arisen on this point and some courts have already rejected the application of the cap in copyright infringement cases based on file-sharing activities. As a result it would be inadvisable to rely on this cap.



#### **4.5.8 What will happen if I don't pay at all?**

If you submit a declaration to cease and desist (which we strongly advise) and then refuse to pay any compensation, the opposition can initiate court proceedings to force you to pay. In our experience only a few actions for payment have been commenced. But, the opposition lawyer has three years, beginning at the end of the year in which the infringement was perpetrated, in which to bring a claim for payment.

#### *4.6 Questions about strict liability in nuisance*

##### **4.6.1 I did not commit the copyright infringement. Do I have to do anything?**

If you are the owner of an internet connection via which copyright infringements have been perpetrated, you are obliged to submit a declaration to cease and desist; especially if it could have reasonably been expected of you to prevent the infringement. A case-by-case analysis is required in order to assess whether this applies to you.

##### **4.6.2 Am I liable even though no one was present and the computer was switched off?**

Strict liability is excluded here. If you are able to prove that no one was present and that your computer was switched off, it implies that the copyright holder made a mistake when obtaining the IP Address. Strict liability is excluded on the grounds that you fulfilled your obligation as owner of the internet connection to exercise due care. This does not apply if the computer was left online whilst you were not present or if your internet connection was not sufficiently secure.

##### **4.6.3 Are parents liable for their children's actions?**

Parents are under a general obligation to prevent their children from undertaking illegal file-sharing activities online. The courts are of differing opinions concerning what can reasonably be expected of parents. The district court in Mannheim decided that parents are not liable for their children's behaviour if they have taken the precaution of forbidding their children from sharing copyright protected files.

The magistrates' court in Magdeburg was of a different opinion, deciding that parents should go so far as to ensure their adult children know not to share copyright-protected files.

The district court in Düsseldorf decided recently that parents are under an obligation to forbid their children to file share and that they must constantly control their children, even where no suspicions of file-sharing have arisen.

##### **4.6.4 We live in a shared flat. What is the legal position?**

The legal position concerning file sharing where a flat is shared remains unclear. The Hamburg District Court is of the opinion that the connection owner can be held responsible through strict liability in nuisance, if it was reasonable for him to prevent the file-sharing activities of their flat mates and they did not do so. We believe that the connection owner cannot reasonably be asked to monitor their flatmates' activities. Whether our legal position will find solid ground in the case law remains to be seen.

#### **4.6.5 I live together with my boyfriend. He is the one who perpetrated the copyright infringement. I am liable for his actions?**

In general, there is a distinction to be made between the liability for ensuring copyright infringement is not conducted again (i.e. to cease and desist) and the liability to pay compensation for the damage caused. If a person is not the perpetrator of the infringement, they cannot, under any circumstances, be held liable to pay compensation. They may however be liable to pay for not having prevented the infringement. In our opinion, it is impossible for a girlfriend to constantly control their boyfriend's internet activities. The courts hold various different views on this matter.

#### **4.6.6 My Wi-Fi network is open, am I liable?**

If you run an open Wi-Fi network, people can log on to your network and use your IP-Address to perpetrate copyright infringements. As you are responsible for ensuring that people who use your network do not break the law, the courts have decided that you are liable for their criminal behaviour. It remains to be seen, whether this line of decision will establish itself.

#### **4.6.7 My Wi-Fi connection is a secured connection, am I liable?**

If your Wi-Fi connection is protected by WEP-encryption, you have done everything in your power to ensure your network is sufficiently protected. However, unbeknown to many, such connections can be hacked within minutes. If your neighbours have hacked into your internet connection, you are not liable for copyright infringement. If you use WPA-encryption, it is highly unlikely that your connection will have been hacked, as this type of encryption is currently considered secure.

#### **4.6.8 My children's friends swapped music in my house, am I liable?**

If your child's friends use your internet connection, you are under an obligation, according to German case law, to constantly monitor their activities; which means you are liable where your children's friends use file-sharing websites.

#### **4.6.9 We run a hotel and offer our guests internet via an unsecured Wi-Fi network. Are we liable for copyright infringements perpetrated by our guests?**

The question arises, whether you are technically acting as an access provider (e.g. Arcor or t-online). Access providers have almost no means of preventing copyright infringements and as a result are not liable. In small hotels, it is possible to install a firewall which can block most of the file-sharing websites. If you have not taken such precautionary measures, you are at risk of being held liable for your guest's copyright infringements.

#### **4.6.10 I run a business and think that my employees have shared music. Who should submit the declaration to cease and desist?**

In general, the business (represented by management) should submit a declaration to cease and desist in its name. It should then be ensured that music can no longer be shared. Such cases are very particular and it is advisable to seek legal assistance.

#### **4.6.11 I downloaded films and software and saved them to my hard drive. Am I at risk?**

The film and software industries are also very active and send masses of copyright infringement warning letters. If those law firms which send copyright infringement warning letters already have you in their sights, it is highly likely that you will also receive warning letters as a result of illegally

downloading films, games and software. In particular, games which require an activation code have been heavily pursued.