

Faculty of Law
Research Paper No. 1/2023

WIPO ALERT – A Reason to Be Alerted?

*Alexander Peukert**

Published in: Susy Frankel/Margaret Chon/Graeme B. Dinwoodie/Barbara Lauriat/Jens Schovsbo (eds.), *Improving Intellectual Property. A Global Project*, 2023, 450-462

Proposed citation: Peukert, *WIPO ALERT – A Reason to Be Alerted?*, Research Paper of the Faculty of Law of Goethe University Frankfurt/M. No. 1/2023, para.

Abstract: This article provides an overview and critical assessment of WIPO ALERT. It locates this initiative in the broader context of transnational IP enforcement schemes on the Internet. These initiatives are classified into two categories according to their point of attachment and geographical effect. Whereas source-related measures (e.g. website takedowns) tend to have a transnational and possibly even a global effect, recipient-related measures (e.g. website and ad blockings) typically mirror the territorially fragmented IPR landscape. This fragmentation is where WIPO ALERT comes into play. It can be understood as a matching service which interconnects holders of information about copyright infringing websites (“Authorized Contributors”) and actors of the online ad industry who want to avoid these outlets (“Authorized Users”). The critical assessment of WIPO ALERT calls for more transparency and the establishment of uniform substantive and procedural standards that have to be met if a new “site of concern” is added to the global ad blacklist.

* Dr. iur., Professor of Law, Faculty of Law, Goethe University Frankfurt am Main.

I. Introduction

1 A major theme in Rochelle Dreyfuss's oeuvre is the "mismatch between the territoriality of intellectual property law and the global dimension of intellectual production, exploitation, and use".¹ This problem is particularly acute online. Whereas intellectual property (IP) subject matter can, in principle, be made available to a global audience at virtually no cost via the Internet,² IP rights (IPRs) remain strictly territorial in nature.³ One mechanism to mitigate the transaction costs following from the global legal IP mosaic are international IP treaties, which make it possible to acquire 190+ local IPRs in, e.g. a motion picture or a well-known trademark.⁴ Yet when it comes to the enforcement of these rights, "on the whole, territoriality governs".⁵ IPRs requiring registration, such as patents, can be adjudicated in full only in the country of registration. Multistate copyright infringements may be decided by the courts in the defendant's domicile, but even these courts are, in principle, bound to apply all IP laws of the states for which protection is sought. Proposals to reduce the number of laws applicable to ubiquitous online copyright infringements to one, namely the law of the closest connection with the (direct) infringement, have not yet been taken up by any court or legislator.⁶

¹ Rochelle C. Dreyfuss, *Enforcing Intellectual Property Claims Globally When Rights Are Defined Territorially*, in THE INTERNET AND THE EMERGING IMPORTANCE OF NEW FORMS OF INTELLECTUAL PROPERTY 15, 16 (Susy Frankel & Daniel Gervais eds., 2016).

² *Google Inc v. Equustek Solutions Inc.*, SCC 34 (2017), 1 SCR 824 (2017), ("The Internet has no borders — its natural habitat is global."). *But see* Jerker B. Svantesson, PRIVATE INTERNATIONAL LAW AND THE INTERNET 57-8 (2016) (relative borderlessness of the Internet).

³ Alexander Peukert, *Territoriality and Extraterritoriality in Intellectual Property Law*, in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 189, 189-91 (Günther Handl, Joachim Zekoll & Peer Zumbansen eds. 2012).

⁴ *See, in particular*, GRAEME B. DINWOODIE & ROCHELLE C. DREYFUSS, A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME (2012).

⁵ Dreyfuss, *supra* note 1, at 33. On conflicts of laws in IP matters see, in particular: AMERICAN LAW INSTITUTE, INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (2008); Dreyfuss et al, International Law Association's Guidelines on Intellectual Property and Private International Law ("Kyoto Guidelines"): Jurisdiction, 12 J. Intell. Prop. Info. Tech. & Elec. Com. L. 13, 13 (2021).

⁶ AMERICAN LAW INSTITUTE (*supra* note 5), § 321(1); Annette Kur, IN CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, THE CLIP PRINCIPLES AND COMMENTARY paras 3:603.C01-3:604.C22 (European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) ed. 2013).

- 2 All the more important are transnational “other rules” beyond formal IP laws, which are implemented by non-state actors.⁷ In the following, I want to shine a spotlight on a fascinating yet unexplored example of this approach, which brings together private parties from different branches (right holders, online advertising industry), member state authorities, and the World Intellectual Property Organization (WIPO) as an international organization: WIPO ALERT.⁸

II. Introduction

- 3 Before taking a closer look at WIPO ALERT, it seems useful to locate this initiative in the broader context of transnational IP enforcement schemes on the Internet. These initiatives can be classified into two categories according to their point of attachment and geographical effect.⁹

1. Source-related Measures

- 4 One category of measures targets the source of an infringement. If a certain URL or content is taken down or deleted, no-one is able to access it, irrespective of the location of the recipient and the legality of the content under the law of that country. Accordingly, source-related enforcement measures tend to have a transnational and possibly even a global effect.
- 5 One example for this type of IPR enforcement are court orders to cease and desist making a certain content available on the Internet. If such an order is executed or complied with, all Internet users lose the possibility to access the respective source data. Unless explicitly limited by the court, takedown orders thus have de facto global effects.¹⁰ The

⁷ See generally PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956); Alexander Peukert, *Transnational Intellectual Property Governance on the Internet*, in *THE LAW OF GLOBAL DIGITALITY* (Matthias Kettemann, Alexander Peukert & Indra Spiecker eds., forthcoming June 2022), <https://ssrn.com/abstract=3738261>.

⁸ WIPO ALERT, <https://www.wipo.int/wipo-alert/en/>. As of 7 April 2022, searches for “WIPO ALERT” in German legal information databases, Westlaw International, and Google Scholar did not produce any significant results. See also RESEARCH HANDBOOK ON THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: THE FIRST 50 YEARS AND BEYOND (Ricketson ed., Edward Elgar Publishing, 2020).

⁹ See Peukert, *supra* note 7.

¹⁰ MARKETA TRIMBLE, *The Territorial Discrepancy Between Intellectual Property Rights Infringement Claims and Remedies*, 23 LEWIS & CLARK L. REV. 501, 503–04 (2019).

same is true if online intermediaries adopt source-related measures on the basis of transnational regulations and/or their own terms of service. The classical case for this scenario is the “Uniform Domain Name Dispute Resolution Policy” (UDRP), which allows for the expulsion of bad faith trademark “cybersquatters” from the global domain name system.¹¹ Host providers also operate at the source of an infringement. By preventing uploads *ex ante*, by taking them down and by making sure they stay down, they are able to prevent IPR infringing communication *ab initio*.¹² Similarly, search engines can reduce the findability of an illegal source by removing infringing URLs from the search index.¹³ These IPR removals typically have service-wide and thus transnational effects. In particular, U.S. big tech companies have globalized their homegrown notice and takedown procedures for all countries in which they operate.¹⁴

- 6 Finally, “follow the money” initiatives involving online payment services like PayPal, Visa or Mastercard also target the source of an infringement. If counterfeiters and pirates are cut off from the online payment system, their illegal business models collapse. This strategy is pursued by an initiative called “RogueBlock®”, which was launched in 2012 under the auspices of the U.S. government and now includes many of the biggest payment providers in the world. RogueBlock® offers members of the International AntiCounterfeiting Coalition (IACC) the possibility to report online sellers of counterfeit or pirated goods directly to credit card and financial service companies with the goal of facilitating prompt action against those merchants. According to the IACC, the program has terminated over 5,000 merchant accounts and impacted over 200,000 websites.¹⁵ The geographical scope of the scheme is global in the sense that it does not matter where the “rogue” websites are hosted or the “rogue” merchants domiciled.¹⁶ Instead,

¹¹ 23 LEWIS & CLARK L. REV. 501, 503–04 (2019).

¹² Cf. 17 U.S.C. §512(c); CJEU Case C-324/09, L’Oréal SA and Others v. eBay International AG, ECLI:EU:C:2011:474, paras 125-44; Directive 2019/ 790, of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92.

¹³ 17 U.S.C. §512(d); CJEU Case C-131/12, Google Spain v. AEPD, ECLI:EU:C:2014:317, paras 80-8; Google Inc v. Equustek Solutions Inc, *supra* note 2.

¹⁴ Peukert, *supra* note 7, with further references.

¹⁵ IACC RogueBlock, <https://www.iacc.org/online-initiatives/rogueblock>; Annemarie Bridy, *Internet Payment Blockades*, 67 Fla. L. Rev. 1523, 1529–30 (2015); Aniket Kesari and others, *Deterring Cybercrime: Focus on Intermediaries*, 32 BERKELEY TECH L.J. 1093, 1128 (2017).

¹⁶ THOMAS HOEREN & GUIDO WESTKAMP, STUDY ON VOLUNTARY COLLABORATION PRACTICES IN ADDRESSING

RogueBlock® is triggered as soon as goods offered through a website do not comply with IP laws in either the country of origin or the country of destination/recipients.¹⁷

- 7 In sum, source-related IP enforcement measures (domain name cancellations, takedowns, delistings, termination of payment accounts) are typically transnational or even global in geographical scope. From a legal perspective, this finding can be justified with the focus of all regimes on plain infringements (cybersquatters, piracy, counterfeiting, “rogue” merchants). There appears to be a rough global consensus that such activity shall have no place on the Internet.¹⁸

2. Recipient-related Measures

- 8 The second category of transnational IP enforcement initiatives attaches to the endpoint of an infringing online communication. Whereas the source remains intact, recipients are prevented from receiving certain information. The geographical scope of such a measure tends to be more limited than a source-related measure because it targets recipients acting at a certain real-world location.
- 9 The prime example for this type of IP enforcement concerns measures implemented by access providers. After the general abandonment of so-called “graduated response” procedures targeting hard-core file sharers, which were not well received by the general public,¹⁹ website blocking gained prominence. The landmark CJEU ruling in UPC Telekabel supports collaboration between right holders and access providers to make sure that blocking measures are effective, also if the infringing content is moved to another domain.²⁰ The geographical reach of such schemes is, however, rather limited.

ONLINE INFRINGEMENTS OF TRADE MARK RIGHTS, DESIGN RIGHTS, COPYRIGHT AND RIGHTS RELATED TO COPYRIGHT 346 (2016).

¹⁷ Critical of this extraterritorial effect Bridy, *supra* note 15 (calling for a “zoning” of online payment blockades to only apply to transactions involving US customers).

¹⁸ On the concept of “rough consensus and running code” see DAVID G. POST, IN SEARCH OF JEFFERSON’S MOOSE 136-7 (2009); GRALF-PETER CALLIES & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE 135-6 (2010).

¹⁹ See Christophe Geiger, *Honourable Attempt but (ultimately) Disproportionately Offensive against Peer-to-Peer on the Internet (HADOPI) – A Critical Analysis of the Recent Anti-File-Sharing Legislation in France*, 44 INTL. REV. OF INTELL. PROP. AND COMP. L. 457, 457 (2011).

²⁰ See CJEU Case C-314/12, UPC Telekabel Wien v. Constantin Film Verleih, ECLI:EU:C:2014:192, paras 32, 64; HOEREN & WESTKAMP, *supra* note 16, 269 et seq. (Danish code of conduct); for Germany see

The reason is that only the customers of certain access providers who offer their services within clearly defined areas, typically within a nation state, will be affected. Website blocking thus occurs country-by-country, based on the local IPR regime.²¹

- 10 Less rooted in the physical layer of the Internet yet still only recipient-related are enforcement initiatives aimed at advertisements appearing on infringing websites. Although there is no established case law holding advertisers and/or providers of online ad services such as Google AdSense indirectly liable for IP infringements committed by the owners of websites on which ads are displayed,²² the online ad industry has in the second decade of the 21st century also become the target of “follow the money” approaches.²³ In several countries, right holder associations, advertisers (brand owners), and providers of online ad and consumer tracking services have agreed to procedures that aim at avoiding the placement of ads on copyright and trademark infringing websites “which have no substantial legitimate uses”, thereby restricting the flow of revenue to such sites.²⁴ To this end, right holders, sometimes in collaboration with public authorities such as the London Police Intellectual Property Crime Unit, compile databases of infringing websites and share this information with advertisers, who in turn instruct online intermediaries (e.g. Google) to prevent the appearance of their ads on blacklisted outlets.²⁵

<https://cuii.info> (“Clearing House Copyright on the Internet”).

²¹ See, e.g., Dirk Visser, *Conclusions Sought: Blocking Orders – A View from the EU*, in COPYRIGHT IN ACTION, 326-9 (Ysolde Gendreau ed., 2019) (describing how rightholders achieved that the “Pirate Bay” website was blocked by all Dutch access providers).

²² Cf. Matthias Leistner, in URHEBERRECHT § 97 UrhG, paras 138-209 with further references (Ulrich Loewenheim et al. eds., 2020); CJEU Cases C-236/08 to C-238/08, Google France and Google, ECLI:EU:C:2010:159, paras 55-6, 116-20 (Google does not “use” signs as part of its AdWords service and benefits from the host provider safe harbor provision in the E-Commerce Directive); see also Perfect 10, Inc. v. Visa Int’l Serv. Ass’n, 494 F.3d 788 (9th Cir. 2007) (no indirect IP infringement liability of payment services).

²³ European Commission, *Towards a modern, more European copyright framework*, COM (2015) 626 final; at 11 (9. Dez. 2015); European Commission, *Report on the functioning of the Memorandum of Understanding on online advertising and intellectual property rights*, SWD (2020) 167 final/2, at 3; Bridy, *supra* note 15, 1529-1530.

²⁴ EU Memorandum of Understanding (MoU) on online advertising and IPR, Section I 1, (2018), *available at* <https://ec.europa.eu/docsroom/documents/30226>; WIPO Advisory Committee on Enforcement, *The building respect for intellectual property database project*, WIPO/ACE/14/9, para 2 (June 18, 2019) (“pirate websites”).

²⁵ HOEREN & WESTKAMP, *supra* note 16, 103 et seq. (Austrian “ethics code”), 147 et seq. (UK “Good Practice Principles for the Trading of Digital Display and/or Audio Advertising”); WIPO Advisory Committee on Enforcement, *supra* note 24, para 2; JOANNE GRAY, GOOGLE RULES 120-1 (2020).

11 Despite the fact that the ad industry has an economic interest in applying such blacklisting practices across its services, the self-regulatory codes on IP enforcement explicitly take a country-by-country approach. The memorandum facilitated by the European Commission is limited to services provided in the European Economic Area, an Austrian ethics code only covers pirate websites directed to an Austrian audience, UK Good Practice Principles apply to websites targeting UK users, and so on.²⁶ Thus, IP ad blacklists mirror the fragmented global IPR landscape.

III. The WIPO ALERT Project

12 This fragmentation is where WIPO ALERT comes into play.

1. Overview

13 Throughout its existence, WIPO has successfully “shepherded the international intellectual property regime through major political and institutional changes”.²⁷ For quite some time, these efforts have included the establishment and maintenance of public-private partnerships (PPPs) that “allow the enterprise sector and civil society to share their expertise to tackle borderless global challenges”.²⁸ In this context, WIPO acts as a kind of broker that brings together holders of IPRs or of IP-related information and interested users, in particular in the areas of medicine and green technologies.²⁹

14 WIPO ALERT can also be understood as a PPP matching service which connects holders of information about copyright infringing websites (“Authorized Contributors”) with actors of the online ad industry who want to avoid these outlets (“Authorized Users”). The project, initially named the “Building Respect for Intellectual Property Database (BRIP Database)”,

²⁶ EU MoU, *supra* note 24, para 2; European Commission, STUDY ON THE IMPACT OF THE MEMORANDUM OF UNDERSTANDING ON ONLINE ADVERTISING AND INTELLECTUAL PROPERTY RIGHTS ON THE ONLINE ADVERTISING MARKET 9 (2020); HOEREN & WESTKAMP, *supra* note 16, 111, 180; WIPO Advisory Committee on Enforcement, *supra* note 24, para 2.

²⁷ Dreyfuss/Reichman, *WIPO’s Role in Procedural and Substantive Patent Law Harmonization, in RESEARCH HANDBOOK ON THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: THE FIRST 50 YEARS AND BEYOND* 108, (Sam Ricketson ed. 2020).

²⁸ <https://www.wipo.int/cooperation/en/>.

²⁹ <https://www.wipo.int/pat-informed/en/>;

<https://www.wipo.int/research/en/>;

<https://www3.wipo.int/wipogreen/en/>.

was initiated in September 2017, when the WIPO Secretariat invited a group of Member States “active in the field” of ad-related enforcement schemes “to discuss the possibility of establishing an online platform to coordinate the sharing of information about copyright-infringing websites with the advertising sector”.³⁰ At that time, the European Commission also worked on its MoU “on online advertising and IPR”, which was signed in June 2018.³¹ Since then, the WIPO Secretariat has maintained close cooperation with the European Commission.³² WIPO ALERT eventually went live in September 2019.³³ Its key features can be summarized as follows:

- 15 In order to be able to upload infringing sites to the WIPO ALERT database, “Authorized Contributors” have to sign a “Letter of Understanding” with WIPO.³⁴ Details for six of in total ten Contributors have been published “in the interests of transparency”.³⁵

Authorized Contributor	Legal status	Website selection criteria	Procedure
Italy: Italian Communication Regulatory Authority (AGCOM)	Public authority	Amount of infringing works, actuality, announcements of provider, revenues	Request of removal filed with AGCOM, request communicated to website host, order addressed to Italian access providers to disable

³⁰ WIPO Advisory Committee, *supra* note 24, para 6.

³¹ Memorandum of understanding on online advertising and IPR, https://ec.europa.eu/growth/industry/strategy/intellectual-property/enforcement-intellectual-property-rights/memorandum-understanding-online-advertising-and-ipr_de.

³² WIPO Advisory Committee, *supra* note 24, para 24.

³³ WIPO Advisory Committee, *supra* note 24, para 27.

³⁴ WIPO Advisory Committee, *supra* note 24, para 9.

³⁵ https://www.wipo.int/wipo-alert/en/operating_procedures.html. In January 2021, WIPO reported that contributors from Brazil, Ecuador, Peru and the Ukraine also participated in WIPO ALERT; see https://www.wipo.int/wipo-alert/en/news/2021/news_0001.html.

			access to website, order can be challenged in the administrative courts
Japan: Content Overseas Distribution Association (CODA)	Non-public (right holder association)	Scale and seriousness of infringements, willingness of the site operators to remove infringing content on request	“Infringing Website List” is updated approximately once every two months with data provided by CODA member companies and associations
Lithuania: Radio and Television Commission of Lithuania (RTCL)	Public (independent body accountable to parliament)	Purpose and principles of the website at stake, type of information published, attitude of website operator	Application by right holders, blocking order by RTCL, mandatory approval by the Vilnius Administrative Court within three calendar days, RTCL and website operator can appeal
Republic of Korea:	Non-public (government-	> 70% copyright infringing content and the purpose of	KCOPA adds site to the “Infringing Website List”,

<p>Korea Copyright Protection Agency (KCOPA)</p>	<p>affiliated right holder association)</p>	<p>the website is to distribute such content</p>	<p>taking into account decisions of the Korea Communication Standards Commission (public authority)</p>
<p>Russian Federation: Federal Service for Supervision of Communications, Information Technology and Mass Media (Roskomnadzor)</p>	<p>Public</p>	<p>Website repeatedly published infringing content or information on how to infringe copyright</p>	<p>Right holders apply to Moscow City Court for an interim or permanent blocking order, the Court orders Roskomnadzor to block access to the website, Roskomnadzor notifies host provider of order, Roskomnadzor orders Russian access providers to block the website</p>
<p>Spain: Directorate General for Cultural Industries, Intellectual Property and</p>	<p>Public</p>	<p>Copyright-infringing content is made available and not removed upon request, unsuccessful</p>	<p>Right holder applies for blocking order with DGCI, DGCI notifies website operator, DGCI applies for an order from an</p>

Cooperation of the Ministry of Culture and Sport of Spain (DGCI)		efforts to remove infringing content	Administrative Court, Court orders access providers to suspend access to website for a year
--	--	--------------------------------------	---

51 The overview of ALERT Contributors' procedures firstly confirms that advertisement and website blocking initiatives are structured in parallel. Both rely on blacklists of infringing websites that are implemented on a recipient-based, country-by-country approach by the ad industry or access providers respectively. Secondly, the table shows that neither the substantive criteria nor the procedural rules for blacklisting a website are uniform.³⁶ As to substantive copyright law, WIPO expressly refuses to claim "that any particular site has, as a matter of law, infringed copyright".³⁷ Instead, WIPO only speaks of "sites of concern", defined as

"an online location which is reasonably suspected by an Authorized Contributor of deliberately infringing or facilitating the infringement of copyright and related rights, whether in its country of establishment or elsewhere".³⁸

52 A footnote³⁹ explains that this definition is "inspired" by section 115A(1) of the Australian Copyright Act, which allows for "injunctions against carriage service providers providing access to online locations outside Australia" on the condition that the primary purpose of the respective website is to infringe copyright, "whether or not in Australia".⁴⁰ This reference again confirms the close links between website and ad blocking measures.

53 As to the user side, the ALERT database is open to "any genuine advertising industry business".⁴¹ According to WIPO's Performance Report, eight ad intermediaries had joined

³⁶ WIPO Advisory Committee, *supra* note 24, para 11 ("criteria applied may differ").

³⁷ WIPO Advisory Committee, *supra* note 24, para 10.

³⁸ *Id.*

³⁹ *Id.*, at fn. 5.

⁴⁰ *Copyright Act 1968* (Cth) Sect. 115A(1) (Austl.), available at <https://www.legislation.gov.au/Details/C2017C00180>.

⁴¹ <https://www.wipo.int/wipo-alert/en/faqs.html>.

the initiative by 2020.⁴² Before authorizing a user, WIPO undertakes a “bona fides” check and requires the acceptance of a “User Agreement” which provides that the data obtained through WIPO ALERT will be used exclusively for preventing the misplacement of advertising on copyright-infringing websites and will be kept confidential.⁴³ The blocking effect is ideally achieved “entirely seamless[ly]” and without human intervention.⁴⁴ An advertiser’s algorithm consults the ALERT database, and if the database replies that the site is listed, the algorithm will not serve an ad to that site.⁴⁵ The geographical scope of WIPO ALERT is thus potentially global, reaching beyond the territory of the WIPO copyright acquis.

2. Critical Assessment

- 54 A critical assessment of WIPO ALERT has to acknowledge, on the one hand, that the scheme addresses a real problem and that it has been smoothly operating for years without producing significant complaints about false positives. This fact indicates that WIPO ALERT is, irrespective of the small number of active “Contributors”, supported by a “rough” global consensus, which is generally sufficient for transnational cyberlaw.⁴⁶ And indeed, effectively all states agree that making a current motion picture available on the Internet without the authorization of the respective right holders is illegal.⁴⁷ Regarding “copyright piracy on a commercial scale”, Art. 61 TRIPS even obliges all WTO members to provide for criminal procedures and penalties. In light of this international law acquis, private global enforcement measures against hardcore IP infringements also appear acceptable.

⁴² WIPO Program and Budget Committee, *WIPO Performance Report (WPR) 2020*, WO/PBC/32/2, 41 (2021).

⁴³ WIPO Advisory Committee, *supra* note 24, para 13; <https://www.wipo.int/wipo-alert/en/faqs.html>. It is, however, possible to check whether a domain name has been listed on WIPO ALERT via a publicly accessible search form; see WIPO ALERT DATABASE SEARCH, <https://www.wipo.int/wipo-alert/en/database-search.jsp>. This feature apparently has the purpose of enabling website operators to check whether they are blacklisted.

⁴⁴ WIPO Advisory Committee, *supra* note 24, para 22.

⁴⁵ *Id.*

⁴⁶ CALLIES & ZUMBANSEN, *supra* note 18.

⁴⁷ Trimble, *supra* note 10, 540–41.

- 55 On the other hand, WIPO ALERT is too significant for global communication to continue to operate below the radar of scholarly and general public attention. A first reason of concern is that WIPO ALERT is only based on an assumption that a website of concern infringes unspecified copyrights, be it under the law of the country of the “Contributor” that flagged the site or under any other copyright law.⁴⁸ WIPO furthermore asserts that “in practice the sites targeted by national databases are invariably flagrant facilitators of copyright infringement”.⁴⁹ Yet this focus on hardcore copyright pirates is merely a shared practice of Authorized Contributors, not a consequence of WIPO rules. The legitimacy of WIPO ALERT as an enforcement mechanism with global reach can also not be based on the fact that most Contributor states are contracting parties to the Berne Convention, the WCT, the WPPT, and the Beijing Treaty on Audiovisual Performances, which oblige them to grant authors, performers, and producers of phonograms exclusive rights on the Internet.⁵⁰ The reason is that the geographical scope of WIPO ALERT depends on the place of activity of the users of the system, i.e. the ad industry. Their participation in the system may well affect online communication in countries that have not signed WIPO’s Internet treaties.
- 56 This brings me to the second reason for concern: The system’s rules and operations are opaque. The standard letters/agreements used by WIPO vis-à-vis Contributors and Users are not public. This level of secrecy appears inadequate for a specialized agency of the UN, also compared to the mandatory disclosure requirements to which private copyright collective management organizations are subject under EU law.⁵¹ At a minimum, the WIPO Secretariat should prepare an annual report of ALERT operations. In addition, all WIPO member states should have access to the blacklist in order to be able to check whether their local online communication might be affected.

⁴⁸ *Supra* note 42.

⁴⁹ WIPO Advisory Committee, *supra* note 24, para 11.

⁵⁰ See <https://wipolex.wipo.int/en/treaties/summary>.

⁵¹ *Cf.* Directive 2014/26, of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, 2014 O.J. (L 84) 72.

57 And this effect can be significant. Being blacklisted for advertising purposes can substantially impact the operation of a website. The other recipient-related enforcement measure – website blocking via access providers – is considered by the European Court of Human Rights an “extreme measure” that “deliberately disregards the distinction between the legal and illegal information the website may contain, and renders inaccessible large amounts of content which has not been identified as illegal”.⁵² To cut off a website from the global ad market can and indeed is meant to have this very effect. Accordingly, the EU MoU “on online advertising and IPR” stresses that it recognizes “other fundamental rights, in particular freedom of expression and information and freedom to conduct a business”, and that it is not intended to impede “the freedom of commercial communication and competition at all levels of trade, including the purchasing and selling of advertising”.⁵³

58 In order to safeguard these legitimate third-party interests, WIPO should firstly define and implement via the ALERT authorization process uniform substantive and procedural standards that have to be met if a new “site of concern” is added to the database. Thereby, WIPO ALERT would not only facilitate the efficient protection of copyright “throughout the world”, but also contribute to the harmonization of transnational law in this field.⁵⁴

⁵² *Flavus v. Russia*, App. No. 10795/14, Eur. Ct. H.R. para 37 (2020).

⁵³ EU MoU, *supra* note 24, at 1.

⁵⁴ *Cf.* Convention Establishing the World Intellectual Property Organization art. 4(i), July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3.