Copyright and shared networking technologies

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Abstract

The technological zeitgeist has transformed the social-cultural, legal and commercial aspects of society today. Networking technologies comprise one of the most influential factors in this. Although this transformation can be discounted as a mere historical phenomenon dating back to the advent of the printing press, empirical data concerning usage of these technologies shows that there has been a radical shift in the ability to control the dissemination of copyright works. Networking technologies allow, in an unprecedented manner, user-initiated activities including perfect replications, instantaneous dissemination, and abundant storage. They are immune to technological attempts to dismantle them, and impervious to legal attempts to control and harness them. They affect a global audience, which in turn, undermine at negligible costs, the legal and business parameters of copyright owners.

The problem is whether it will now be possible to establish a copyright framework which balances the interests of the following groups: (a) copyright owners in their control of the dissemination of their works; (b) authors demanding remuneration for the exploitation of their works; (c) users wishing to consume works with clear immunity guidelines using networked technologies; (d) technologists striving to continuously innovate without legal and policy restrictions.

Copyright law is *not* a mechanism for preserving the *status quo* or a particular business model. It is, as suggested above, a reflection of the needs and interests of authors, copyright owners, entertainment industries, users and technologists. This thesis examines whether the balance between these actors can be achieved and, if so, how it can be implemented within international, regional and national copyright laws. It finds that a balance *can* be struck; but that this balance should be aligned along three key concepts: user integrity; technological innovation; and authors' and owners' remuneration. The proposal is that the optimal method for achieving this triptych is the introduction and global implementation of a reasonable and unobtrusive system of remuneration.

Table of Contents

Chapter Four - Contextualising Networking Technologies within a Legal-Socio-Economic Perspective

Chapter Five - Alternative Solutions

Chapter Six - A Way Forward

Table of Figures

Chapter One

Chapter Two

Chapter Three

Chapter Four

Chapter Five

Chapter Six

Conclusion

Table of Abbreviations

Acronyms

BPI ……...…… British Phonographic Industry
DRM ……..……. Digital Rights Management
ECJ …….. European Court of Justice
EU ……..…….. European Union
MPAA ……...……...…….. Motion Picture Association of America
RIAA ……...…… Recording Industry Association of America
UGC ……...……. User-Generated Content
UK ……..……. United Kingdom
US …….. United States of America
WIPO ……...…… World Intellectual Property Organisation
WTO ……..…….. World Trade Organisation

Journals

A.C.M. ……...……...… Communication of the Association for Computer Machinery
A.E.L.J ……...……...….. Cardozo Arts & Entertainment Law Journal
B.T.L.J. ……...……. Berkley Technology Law Journal
C.L.S.R. ……....……. Computer Law and Security Review
C.R.I. ……...……... Computer Law Review International
C.T.L.R. ...……..… Computer & Telecommunications Law Review
E.I.P.R. ……...……. European Intellectual Property Review
Ent.L.Rev. ……...……..…… Entertainment Law Review
I.I.C. ……...… International Review of Intellectual Property and Competition Law
I.J.L.&I.T. ……..…….. International Journal of Law and Information Technology
I.P.Q. ……...……...…….. Intellectual Property Quarterly
I.Rev.L.C.&T. ……...…….……. International Review of Law, Computers & Technology
J. ……. Journal
J.C.S.U.S.A. ……...…….. Journal of the Copyright Society of USA
J.I.P.L. ……...…….. Journal of Intellectual Property Law
J.I.P.L.&P. ……..…….. Journal of Intellectual Property Law & Practice
J.O.L.T. ……...……...…….. Harvard Journal of Law and Technology
L.J. ……...……..……. Law Journal
L.Rev. …… Law Review
O.J.L.S. ……...……...……. Oxford Journal of Legal Studies
R.I.D.A. …….. *Revue Internationale du Droit d'Auteur*

Legislation

International

'Berne'	Berne Convention for the Protection of Literary and Artistic Works, Paris Act of 24 July 1971, as amended on 28 September 1979.
'Rome Convention'	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 26 October 1961.
'TRIPs'	Agreement on Trade-Related Aspects of Intellectual Property Rights of 15 April 1994.
'WCT'	WIPO Copyright Treaty and Agreed Statements Concerning the WIPO Copyright Treaty, adopted in Geneva on 20 December 1996.
'WPPT'	WIPO Performances and Phonograms Treaty, adopted in Geneva on 20 December 1996.

European Union

'Copyright Directive'	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.
'Database Directive'	Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.
'Data Retention Directive'	Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.
'E-Commerce Directive'	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.
'Enforcement Directive'	Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, aimed at enforcing intellectual property rights through criminal measures [2004] OJ L195/16.
'**Personal Data Directive'**	Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications [2002] OJ L201/37.
'Rental and Lending Directive'	Council Directive 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L346/61. Codified version: Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L276/28.
'Resale Directive'	Directive 2001/84 on the resale right for the benefit of the author of an original work of art [2001] OJ L272/32.
'Satellite & Cable Directive'	Council Directive 93/83 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15.
'Software Directive'	Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer Programs [1991] OJL122/42.

National

'CDPA'	UK –Copyright, Design and Patent Act, 1988.
'DMCA'	US - Digital Millennium Copyright Act, 1998.
'CPI'	France - *Code de la propriété intellectuelle*, 1992, as last amended (French Intellectual Property Code).
'LdA'	Italy – *Legge sul Diritto d'Autore* n. 633, 22 April 1941 (Author's Right Law)
'UrhG'	Germany - *Gesetz über Urheberrecht und verwandte Schutzrechte -Urheberechtsgesetzes vom*, 9 September 1965, as last amended (Law on Author's Rights and Neighbouring Rights)
'USC'	US - United States Code

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Introduction

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'We are all pirates'[1]

Problem Review

The development of copyright[2] law has been profoundly shaped by a succession of 'new technologies'[3] benefitting society, expanding the means of expression of human creativity, and often upsetting the established patterns of production, distribution and the consumption of goods. Those who base their existence or survivability upon pre-existent technologies do not generally welcome new ones[4]. Not surprisingly, the music and film industries (hereinafter referred to as the entertainment industries[5]) appear to attempt to stop, circumscribe, and control new technologies that undermine their businesses[6].

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[1] '*Nous sommes tous des pirates*', Le Nouvel Observateur, 2100, 3-9 February 2005.

[2] The term 'copyright' in this work will generally include the author's right and related rights. When appropriate, distinction will be drawn.

[3] Suthersanen, U. [2006], *Technology, time and market forces: the stakeholder in the Kazaa era*, in Pugatch, M. ed. [2006], *The intellectual property debate: perspectives from law, economics and political economy*, Edward Elgar, 230-231; Suthersanen, U. [2000], *Collectivism of copyright: the future of rights management in the European Union*, in Barendt-Firth (ed.) [2000], *Yearbook of copyright and media law*, Oxford University Press, 15-42.

[4] During the industrial revolution, for instance, Ned Ludd and his followers destroyed factories and machineries, protesting against the technologies that were leaving workers unemployed. Thompson, E.P. [1980], *The making of the English working class*, 3rd ed. Penguin.

[5] The term 'entertainment industries' refers to the music, film and videogames industries.

[6] The following examples will be later discussed: *White-Smith Publishing Co. v. Apollo Co.*, 209 US 1, (1908); '*Grundig*', *Bundesgerichtshof* (German Federal Supreme Court), ZR 8/54; 17 BGHZ 266; [1955] GRUR 492, 18 May 1955; '*Personalausweise*', *Bundesgerichtshof* (German Federal Supreme Court), ZR 4/63; [1965] GRUR 104, 29 May 1964; *Teleprompter Corporation v. Columbia Broadcasting System, Inc.*, 415 US 394, 181 USPQ 65 (1974); *Sony Corporation of America v. Universal City Studios Inc.*, 480 F.Supp. 429 (CD Cal. 1979), 659 F.2d 963 (9th Cir. 1981), 464 US 417, 220 USPQ 665 (1984); *CBS Song Ltd. v. Amstrad Consumer Electronics Plc*. [1988] AC 1013; [1988] 2 W.L.R. 1191; [1988] 2 All.E.R. 484; [1988] 2 FTLR 168; [1988] RPC 567; (1988) 132 SJ 789; affirming [1988] Ch. 61; [1987] 3 WLR 144; [1987] 3 All.E.R. 151; [1987] 1 FTLR 488; [1987] RPC 429; (1987) 84 LSG 1243; *Recording Industry Association of America v. Diamond Multimedia System Inc.*, 180 F.3d 1072, 51 USPQ 2d 1115 (9th Cir. 1999); *A&M Records Inc. v. Napster Inc.*, 114 F Supp 2d 896 (N.D. Cal. 2000); 54 USPQ 2d 1746 (N.D. Cal. 2000); 239 F 3d 1004; 57 USQP 2d 1729 (9th Cir. 2001); WL 227083 (ND Cal. 5 March 2001); 284 F.3d 1091 (9th Cir. 2002); *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 259 F Supp 2d 1029, 65 USQP 2d 1545 (C.D. Cal. 9 January 2003); 2003 WL 1989129 (C.D. Cal. 25 April 2003); affirmed 380 F.3d 1154 (9th Cir. 2004); 125 S.Ct. 2764 (2005); on remand 454 F.Supp. 966 (C.D. Cal. 2006); *Universal Music Australia Pty. Ltd. v. Sharman License Holding Ltd.*, [2005] F.C.A. 1242, (2005) 65 IPR 289; '*Pirate Bay*', Verdict B 13301-06, 17 April 2009, Stockholm District Court, Division 5, Unit 52; *Twentieth Century Fox Films Corp. & Others v. Newzbin Ltd.*, [2010] EWHC 608 (Ch), 29 March 2010; *Viacom International Inc. v. YouTube Inc.*, 07-Civ-2103 and *The Football Association Premier League v. YouTube Inc.*, 07-Civ-582 (SDNY 23 June 2010).

'*The relationship of copyright to new technologies that exploit copyrighted works is often perceived to pit copyright against progress*'[7].

In the 19th Century, the problem was the piano roll[8]. Later, the entertainment industries attempted to control the manufacture of cassettes[9], videocassette recorders[10], and blank tapes[11], arguing that such devices facilitated copyright infringements.

'I'm scared and so is my industry. Changing technology is threatening to destroy the value of our copyrights and the vitality of the music industry'[12].

However, the entertainment industries are alive and thriving, and these technologies have helped to expand the relevant markets more so than any degree of threat[13]: the cassette recorder has increased the music industries' market share, promoting and helping the distribution of music to a wider audience[14]; videocassette recorders have opened up the film industry to the home videos market[15].

Historically, copyright had to accommodate a number of new technologies which caused broadly similar issues[16]: some technologies created new subject matters of protection[17]; some created new uses of existing works[18]; and, finally, some jeopardised the control over the dissemination of works, thereby making infringements cheaper and

[7] Ginsburg, J.C. [2001], *Copyright and control over new technology of dissemination*, 101 Columbia L.Rev. 1613-22, 1613.
[8] *White-Smith Publishing Co. v. Apollo Co.*, 209 US 1, (1908). Coover, J. [1985], *Music publishing, copyright and piracy in Victorian England*, Mansell Publishing, 9.
[9] '*Grundig*', *Bundesgerichtshof* (German Federal Supreme Court), ZR 8/54; 17 BGHZ 266; [1955] GRUR 492, 18 May 1955; *CBS Song Ltd. v. Amstrad Consumer Electronics Plc*. [1988] A.C. 1013; [1988] 2 W.L.R. 1191; [1988] 2 All.E.R. 484; [1988] 2 F.T.L.R 168; [1988] R.P.C. 567; (1988) 132 S.J. 789; affirming [1988] Ch. 61; [1987] 3 W.L.R. 144; [1987] 3 All.E.R. 151; [1987] 1 F.T.L.R. 488; [1987] R.P.C. 429; (1987) 84 L.S.G. 1243.
[10] *Sony Corporation of America v. Universal City Studios Inc.*, 480 F.Supp. 429 (CD Cal. 1979), 659 F.2d 963 (9th Cir. 1981), 464 US 417, 220 USPQ 665 (1984).
[11] *C.B.S. Inc. v. Ames Records & Tapes Ltd.*, [1981] RPC 307.
[12] Statement of J. Valenti, president of the RIAA. Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705, 97th US Congress 297-563 (14 April 1982), 311.
[13] The original adversity eventually evolved into a '*mutually beneficial interdependence*'. Fessenden, G. [2002], *Peer-to-peer technology: analysis of contributory infringement and fair use*, 42 IDEA, 391-416, 391-393.
[14] Plumleigh, M. [1990], *Digital home taping: new fuel strokes the smouldering home taping fire*, 37 UCLA L.Rev. 733-759. From 1978 to 1988 unit sales of records rose 8% and continued to rise until 1990, declining only in 1993 when CDs dominated the unit sales. Krasolovsky–Shemel [1995], *The business of music*, Billboard, xx-xxi.
[15] Sciorra, N.E. [1993], *Self-help and contributory infringement: the law and legal thought behind a little 'black box'*, 11 A.E.L.J. 905, 918.
[16] Hardy, I.T. [1998], *Project looking forward: sketching the future of copyright in a networked world*. www.copyright.gov/reports/thardy.pdf. [15/08/2010].
[17] The list of copyright's 'subject matters' expanded steadily to accommodate new technologies, the changing perceptions of existing ones or of the need for protection them. *Ibid.*
[18] For instance, musical compositions as such were protected before the advent of radio. *Ibid.*

more difficult to discover than before[19]. Notably, networking technologies[20] belong to this last category. Unauthorised restricted acts can be generally categorised as infringements, but users[21] continue to share protected works, notwithstanding the increasing number of infringement cases arising in courts on a worldwide scale. Moreover, software and service providers continue to create more powerful and secure tools to increase the security and secrecy of sharing networks. The picture becomes more unclear when considering the speediness of technology innovations and the borderless nature of the environment.

Networking technologies seem to be constantly 'a step ahead of the law', as the law has been reacting slowly to technologies which are promptly 'circumventing' it. Napster, for example, was held liable because of its centralised 'file-search' system[22]. Immediately after the court made its ruling, file-sharing software providers delivered products without centralised file-searching systems in order to avoid liability. Advocates within the entertainment industries argued that this made little difference, since these new softwares were still used for facilitating infringing activities. In *Grokster*[23], the US Supreme Court, reversing the appealed decisions, held that:

> '*One who distributes a device with the objective of promoting its use to infringe copyright,* […] *going beyond mere distribution* […]*, is liable for resulting acts of infringement by third party using the device, regardless of the device's possible lawful uses*'[24].

However, this decision did not stop the distribution of file-sharing applications. For instance, notwithstanding US law may recognise contributory and/or vicarious liabilities in a greater range of circumstances, it could be argued that anyone who merely distributes a device *without* the objective of promoting its infringing uses is *not* considered to be liable under the 'active inducement' theory for resulting acts of infringement by someone using the device[25]. Accordingly, the entertainment industries decided to take direct action against individuals sharing files[26] without authorisation,

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[19] The photocopier and the cassette and videocassette recorders are obvious examples, as well as digital technologies. *Ibid*.

[20] The term 'networking technologies' refers to technologies that facilitate the exchange of content and information over a computer network, such as peer-to-peer file-sharing and Web 2.0.

[21] The term 'users' refers to individuals using the technologies under discussion. The term includes file providers, downloaders, and accessors.

[22] *A&M Records Inc. v. Napster Inc.*, 114 F Supp 2d 896 (N.D. Cal. 2000); 54 USPQ 2d 1746 (N.D. Cal. 2000); 239 F 3d 1004; 57 USQP 2d 1729 (9th Cir. 2001); WL 227083 (ND Cal. 5 March 2001); 284 F.3d 1091 (9th Cir. 2002).

[23] *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 125 S.Ct. 2764 (2005).

[24] *Ibid.* 2774.

[25] Para. 3.3.3.2.

[26] The term 'file' refers to a collection of data or information stored in a computer.

thereby serving thousands of users of file-sharing networks with lawsuits. A number of cases have been decided so far, but new file-sharing softwares have been created and distributed with the specific intent of guaranteeing users privacy and security, which enables them to share content[27] protected by copyright without fear of being 'caught by the law'.

Moreover, the internet is close to a 'no man's land'. Complex private international law problems arise: for instance jurisdiction, applicable law, and enforcement. Networking technologies make the situation critical. 'Sharing' through networking technologies is a global phenomenon and has therefore become difficult to regulate networks expanding beyond one country. A global solution must be quickly found, as the continuous growth in popularity of these technologies is not likely to cease.

With the aforementioned discussion in mind, this thesis will examine and analyse the causes and effects of the previously outlined problems.

Objectives and Scope of Study

This thesis studies the networking technologies phenomenon worldwide, with particular focus on the EU, US, Canada and Australia. The desirability to protect copyright works and to fairly compensate accordingly copyright owners in this environment is not disputed, nor discussed, within the thesis. However, it will be underlined how a balance[28] must be struck so as to ensure that authors and other copyright owners are granted their due and justified rights, whilst ensuring that excessive enforcements of the rights do not have detrimental effects on society. This thesis proposes to achieve such a critical balance by introducing a remuneration right, and employing a reasonable and unobtrusive remuneration system. Due to the potential of networking technologies as a form of the distribution of works and the borderless environment, this work must examine whether or not the proper balance can be achieved and, if so, how it can be implemented within international, regional and national copyright laws.

The primary considerations of this thesis are to describe the networking technologies phenomenon, their evolutions, the reasons as for why they have become so popular, and accordingly to analyse the problems arising in terms of copyright law.

[27] The term 'content' generally refers to various categories of works, including literary and musical works, films, and videogames.

[28] For an analysis of the introduction of the concept of 'balance' in copyright law, *see* Dinwoodie, G. [2007], *The WIPO Copyright Treaty: a transition to the future of international copyright lawmaking?* 57(4) Case Western Reserve L.Rev. 751-766, 754-758.

Using old rules to regulate new phenomena has the obvious disadvantage that they will not necessarily fit the current situation adequately: for instance, the dissemination of copyright works in digital form is hardly controllable, and some traditional copyright concepts do not fit well with the new environment and therefore need to be reinterpreted and adjusted as necessary[29]. Furthermore, it is not clear how to exercise—and subsequently enforce—rights over the internet, whether limitations exceptions and defences apply to file-sharing, and how, and also how to apply remedies and penalties in respect of infringing activities, which take place simultaneously in many different countries. Furthermore, where there are any perceived weaknesses and lacunae in the existing laws, this thesis will offer recommendations.

The second major consideration is to explore whether or not new regulations, compensation systems or even new rights are justifiable. The objective is to analyse whether—and, if so, how—a compensation system could solve the problems created by networking technologies, and how such a system could be implemented on an international basis. This task has always been difficult. The challenge was stated over two hundreds years ago:

> *'We must take care to guard against two extremes; the one that …* [authors] *… may not be deprived of their just merits* […]*; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded'*[30].

It will be described how stronger and more uncontrollable networking technologies have emerged since Napster and how a new regime may be required. Firstly, however, we need to consider whether or not a different regime is justifiable and deemed necessary for electronic representation as well as traditional forms; in particular, in relation to the duplication of legitimately acquired representations for personal retention, and subsequent sharing. This involves the assessment of the justification of protection and, following that, the justification for specific exceptions. Secondly, we need to explore whether new regulations, compensation systems or even new rights are justifiable and, moreover, possible. This thesis will analyse, compare and criticise the solutions already proposed; it is then hoped that a solution, both logically just and politically acceptable, will emerge.

It will be the author's contention that the struggle between networking technologies and the entertainment industries should not continue. In the past, the industries have profited from the advent of new technologies, and now they should not

[29] Concepts such as reproduction, communication, distribution, making available, publication, *etc*.
[30] Lord Mansfield in *Sayre v. Moore*, (1785) 1 East 361.

prematurely dismiss the idea of embracing networking technologies and using them to their own advantage. A new way of compensating authors and other copyright owners needs to be determined. This thesis will explore whether and how a compensation system could solve the problems under consideration, and how such could be implemented on an international basis. The drafting of this compensation system will involve analysis of the entire entertainment business, collecting society structures, political and social lobbies and, most importantly, international, regional and national copyright laws.

The thesis aims only at providing a feasible theoretical tool in order to address the issue of the unauthorised sharing of protected materials over the internet. Notably, it does not purport to provide technical or empirical guidelines concerning how to test such a theoretical tool.

Methodology, Sources and Limitations

In developing the arguments and recommendations set out in the thesis, the work had to draw upon several economic, technical and social propositions, all of which have served as theoretical justificatory basis. However, the recommendations made within the thesis have, at all the times, been primarily inspired and influenced by the inherent trends that exist within copyright statutory and case law. The theoretical tools of economics, computing engineering and sociology merely provide the explanatory basis of the law.

An applied comparative law approach is deemed appropriate[31] for analysing and interpreting the existing international, regional and national laws. Accordingly, the analysis adopted in the thesis is based on two main sources of reference:

1. Legislative statutes and reported judicial decisions from various jurisdictions. References to statutes[32] and judicial decisions from several countries' jurisdiction have been made. However, due to the superfluity of referencing every country's

[31] '*Experience shows that this is best done if the author first lays out the essentials of the relevant foreign law, country by country, and then uses this material as basis for critical comparison, ending up with the conclusion about the proper policy for the law to adopt which may involve a reinterpretation of his own system*'. In respect of applied comparative law, one should investigate how '*a specific problem can most appropriately be solved under the given social and economic circumstances*'. Zweigert–Kötz [1992], *An introduction to comparative law*, Claredon Press, 6, 12.

[32] Citations and references to statutes currently in forces have been based on the official WIPO translations. References to repealed legislation have been based on such statutes, legal commentaries and treatises.

national law[33], the thesis has concentrated on the law of countries which have a mature copyright law, which have offered considerable legal thought and jurisprudence to networking technologies, and which also distinctly advocate different approaches to their solution. These countries are Australia, Canada, France, Germany, Italy, the UK, and the US. Furthermore, references have also been made to the sources of international treaties and EU Law.

2. Legal literature, legislative reports and consultation documents. Wide ranges of public sources were consulted in the writing of this work. Legal literature, commentaries, treatises, committee reports, legislative reports and consultation documents from the various jurisdictions have all been relied upon as basis of comparison and upon which recommendations can be made. Recommendations and measures adopted in relation to these jurisdictions have been used, where appropriate, to fill any apparent lacunae in the existing law.

The subject matter at hand has been approached from the perspective of copyright law—in particular, the economic rights of reproduction and communication to the public, including making available and distribution. The issues relating to moral rights reach beyond the scope of this thesis, and are therefore mentioned throughout the work, but not are deeply analysed. However, where deemed necessary, various references have been made to communication law, e-commerce law, privacy and data-protection law, private international law, and competition law.

Chapters Outline

The thesis is divided into six Chapters.

The first Chapter provides a brief historical description of the inter-relationship between technology developments and copyright. The Chapter further concentrates on the history and laws of the US, the UK, France and Germany.

Chapter Two aims to provide clear definitions concerning networking technologies, and further provides a description of the applications involved in the latest copyright cases, underlining, when appropriate, how the legal decisions have contributed to the technology evolution.

[33] '*Here sober self-restraint is in order, not so much because it is hard to take account of everything as because experience shows that as soon as one tries to cover a wide range of legal systems, the law of diminishing returns operate*'. Zweigert–Kötz [1992], *op.cit.* 39-40.

Chapter Three analyses substantive copyright law issues with networking technologies, with particular consideration to the economics rights of reproduction, communication to the public, making available, distribution, primary and secondary copyright infringement, the concepts of authorisation and inducement, and exception, limitations and defences. The relevant cases are analysed and accordingly commented.

Chapter Four shortly describes the relevant actors and their needs, and proceeds to explore various analytical approaches in order to determine whether new rights or levies could be a viable solution from socio-economic and philosophical perspectives.

Chapter Five is dedicated to the proposed solutions and alternatives. It discusses and analyses licensing, proposed legislations, enforcement actions, online distribution, digital rights management, monitoring and filtering.

Chapter Six preliminarily explores levies systems, compulsory licensing, and collective administration in order to introduce the author's proposal for a remuneration right.

The thesis is based on the law and materials available as of 1 July 2010.

Chapter One

A History of Decreasing Control over Dissemination

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'If there was no such thing as change which takes place through the passage of time, there would be no events for historians to analyse and therefore no history. It is therefore necessary to consider the concept of change and its relevance to intellectual property law'[34].

1.1 - Introduction

This Chapter contains a brief, non-exhaustive, historical analysis of selected technologies which undermine authors' and other copyright owners' control over the dissemination of their works. The analysis shows that, when a new technology undermines control, copyright attempts to restore the balance[35]:

> '*Creators should maintain sufficient control over new markets to keep the copyright incentive meaningful, but not so much as to stifle the spread of the new technologies of dissemination*'[36].

This equilibrium has been recalibrated over time; however, with the advent of networking technologies, there is wide concern that copyright is failing to adjust to the new environment[37].

1.2 - Printing Press

Prior to the printing press, the possibilities of making multiple copies of literary works were minimal[38]. During the Greek and Roman civilisation, scribes or slaves generally

[34] Phillips–Simon [2005], *Going down in history: does history have anything to offer today's intellectual property lawyer?* 3 I.P.Q. 225-235.

[35] Litman, J.D [2001], *Digital copyright*, Prometheus Books, 77-88; Fitzpatrick, S. [2000], *Copyright imbalance: US and Australian responses to the WIPO DCT*, 22(2) E.I.P.R. 214, 216; Landes-Posner [1989], *An economic analysis of copyright law*, 18(2) Journal of Legal Studies, 325, 326; Vinje, T. [1999], *Copyright imperilled?*, 21(4) E.I.P.R. 192, 194; Samuelson, P. [1998] *Does information really have to be licensed?*, A.C.M. September, 15.

[36] 144 Cong. Rec. S11,887, S11,888. Senator Ashcroft quoted in Ginsburg, J.C. [2001], *op.cit*. 1613.

[37] Ginsburg, J.C. [2001], *op.cit*.; Litman, J.D. [2001], *op.cit.* 81-86; Cohen, J.E. [1999], *WIPO Copyright Treaty implementation in the United States: will fair use survive?* 21 E.I.P.R. 236, 237-8; Denicola, R.C. [1999], *Freedom to copy*, 108 Yale L.J. 1661, 1683-86; Denicola, R.C. [2000], *Mostly dead? Copyright law in the new millennium*, 47 J.C.S.U.S.A. 193, 204-07; Patterson, L.R. [2000] *Understanding the copyright clause 47*, J.C.S.U.S.A. 365, 387-89; Samuelson, P. [1999], *Intellectual property and the digital economy: why the anti-circumvention regulations need to be revised*, 14 B.T.L.J. 519, 566; Samuelson, P. [1999], *Good news and bad news on the intellectual property front*, A.C.M. March, 19, 24; Benkler, Y. [2001], *The battle over the institutional ecosystem in the digital environment*, A.C.M. (February), 84, 86.

[38] Olmert, M. [1992], *The Smithsonian book of books*, Smithsonian Institution Press.

reproduced manuscripts. In the Middle Age, the primary keeper and reproducer of books was the Church, which used to rely upon the labour of monks. Later on, universities started controlling the business of producing manuscripts using paid scribes[39]. The potential market for manuscripts was limited to those who could both afford the services of scribes and who could read—commonly being the Church, the nobility and the professional class[40]. Hence, a structured system of laws for protection against unauthorised copies was lacking[41]. During such times, physical control over the original volume meant control to access and copy that work[42]; there was no practical need of separate rights on the work contained in the volume[43].

In the late 15th Century, Gutenberg developed the movable type printing press, thereby providing the means to make multiple copies of works[44]. Within a few years, the economic importance of the printing industries grew dramatically. The state authorities soon realised the need of controlling this new communication medium, and arrogated the sole right of printing, and granting permissions to print[45]. In England, the Crown had the right to publish a specified work or group of works, as an exercise of the royal prerogative, namely 'the printing patent', and, in 1556, with a Royal Charter empowered the Stationers' Company to regulate the book trade[46].

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[39] Atticus, an ancient Roman literary patron, with his slaves allegedly could produce one thousand copies of a small volume in a single day. Ransom, H. [1956]. *The first copyright statute*, University of Austin Press, 17-20.

[40] Ricketson, S. [1999], *The law of intellectual property: copyright, designs and confidential information*, 2nd ed. LBC Information Services, 4.4.

[41] Prior to the printing press the concept of 'authorship' was not well developed. Instead, it was the owner of the copy who was compensated for the right to reproduce the book. Boorstin, D.J. [1983], *The discoverers: a history of a man's search to know his world and himself*, Publishing Mills, 492-493.

[42] An early record of an 'owner's right' case is *Finnian v. Columba* in 567 AD. Bowker, R.R. [1912], *Copyright: its history and its law*, Houghton Mifflin, 9.

[43] Burke, J [1985], *The day the universe changed*, British Broadcasting Corporation, 107; Kaplan, B. [1967], *Copyright: an unhurried view*, Columbia University Press, 27; Boyle, J. [1996], *Shamans, software and spleens: law and the construction of the information society*, Harvard University Press, 53. Interestingly, one concept extensively debated in ancient times was plagiarism. Dock, M.-C. [1963], *Etude sur le droit d'auteur*, Paris, 36-40. For a catalogue of act of plagiarism through the ages, *see* Paull, H.M. [1928], *Literary ethics*, Butterworth.

[44] Burke, J. [1985], *op.cit.* 113; Steinberg, S.H. [1955], *Five hundred years in printing*, Penguin.

[45] Generally Deazley, R. [2004], *On the origin of the right to copy: charting the movement of copyright law in eighteenth century Britain* (1695-1775), Hart Publishing; Deazley, R. [2006], *Re-thinking copyright: history, theory, language*, Edward Elgar. Apparently, the first 'printing privileges' were the 'Venetian Privileges' in the 15th Century. Sterling, J.A.L. [2008], *op.cit.* 1.04. For the history of granting privileges, Brown, H.F. [1891], *The venetian printing press, an historical study*, J.C. Nimmo; Putman, G.H. [1962], *Books and their makers during the Middle Ages*, 2nd ed. New York; Witcombe, C.L.C.E. [2004], *Copyright in the Renaissance*, Brill Leiden.

[46] The printing press is generally accepted to have arrived in England in 1476. Ransom, H. [1956], *op.cit.* 6. However, there is some evidence of a printing press in Oxford in 1468, Ricketson, S. [1999], *op.cit.* 4.4; Holdsworth, W. [1937], *A history of English law: volume VI*, 2nd ed. Methuen &Co. 362-365; Blagden, C. [1960], *The Stationers' Company: a history, 1403-1959*, G. Allen & Unwin, 33; Feather, J. [1980], *The book trade in politics: the making of the Copyright Act of 1710*, 8 Publishing History 19, 20-37; Rose, M. [1993], *Authors and owners: the invention of copyright*, Harvard University Press, 14;

The concept of a 'right' to 'copy' emerged not directly owing to the printing press, but rather as a consequence of concerns raised by the proliferation of the written word, which the printing press made possible[47]. Authors were sometimes granted printing privileges, but the beneficiaries of the rights to print and sell books were mainly assigned to printers and publishers[48]. Only in the 17th Century, the principle of granting rights to authors was developed[49]. During the 18th Century, two distinct systems evolved, namely 'copyright' and 'author's right'[50]. The copyright system was based on the Statute of Anne of 1710, and spread throughout the British dominions and the US[51]. In continental Europe, the author's right system developed from the French Laws of 1791 and 1793. In the 19th Century, the concept according to which the right of the author on his/her works was directly related to his/her personality evolved in France and Germany[52].

The printing press enabled the mass reproduction of works with a consequent decrease of control over dissemination of copies[53],

> '*A legal mechanism was needed to connect consumers to authors and publisher commercially. Copyright was the answer*'[54].

Feather, J. [1995], *Publishing, piracy and politics: an historical study of copyright in Britain*, Mansell.

[47] In considering the emergence of a 'copy-right' in the late 17th Century, the concerns of several powerful interest groups must be kept in mind: the Crown, the Church, and the book printers and booksellers. From these '*independent and occasionally clashing interests [i.e. censorship and monopoly] sprang copyright*'. Birrel, A. [1971], *Seven lectures on the law and history of copyright in books*, Rothman Reprints, 49-51; Woodmansee, M. [1984], *The genius and the copyright: economic and legal conditions of the emergence of the 'author'*, 18th Century Studies 17, 446-48.

[48] Eisenstein, E.L. [1997], *The printing press as an agent of change: communications and cultural transformations in Early-Modern Europe*, Cambridge University Press.

[49] Rose, F. [1993], *op.cit.* The first law that recognised a general right of authors to control printing of their works was the Statute of Anne of 1710 (The word 'copyright', however, is not used in the Act, the first statutory use of it being in Copyright Act 1801), followed by Denmark's Ordinance of 1741, the US Law of 1790, and the French Decrees of 1791 and 1793. For an historical overview Sherman–Strowel [1994], *Of authors and origins*, Clarendon; Ricketson, S. [1991], *The concept of originality in Anglo-Australian copyright law*, Copyright Reporter 1; Stewart, S.M. [1989], *International copyright and neighbouring rights*, Butterworths, 2nd ed.; Feather, J. [1995], *op.cit.*; Woodmansee–Jaszi [1994], *The construction of authorship*, Duke University Press. Also Sterling J.A.L. [2008], *op.cit.*

[50] There are a number of remarkable differences between the two systems, but the most important relate to the emphasis on the protection of the work in the copyright system and on the author in the author's right system. Sterling, J.A.L. [2008], *op.cit.* Burkitt, D. [2001], *Copyright culture– the history and cultural specificity of the western model of copyright*, 2 I.P.Q. 146.

[51] This system, traditionally based on J. Locke's theories, grants a right called 'copyright', which embraces a number of rights as defined in the specific laws. Some authors argue that copyright is basically a right of a commercial nature, enabling authors to control and profit from the exploitation of their work. Deazley, R. [2004], *op.cit.*

[52] This right has two aspects: the moral one and the economic one. Traditionally the continental *droit d'auteur* has a subjective nature that Hegel takes from Kant, considering the work of the human mind as a manifestation of his/her personality. Sterling, J.A.L. [2008], *op.cit.*

[53] Dutfield–Suthersanen [2008], *Global intellectual property law*, Edward Eldgar, 237.

[54] Goldstein, P. [2003], *Copyright's highway: from Gutenberg to the celestial jukebox*, Revised ed. Stanford University Press, 21.

1.3 - Phonograph & Broadcasting

In the UK, musical works were originally included in the category of books[55], since they were printed and distributed on 'music-sheets'[56]. This situation did not change until Edison invented the phonograph machine in 1877[57]. At this time, authors and publishers, anxious that the new technology would undermine their income[58], attempted to prevent the distribution of the piano roll in the US[59]. However, the Supreme Court maintained that piano rolls were not infringing copies since the musical composition was not directly appreciable from the perforations[60]. The 1909 US Copyright Act[61] introduced the first compulsory licence regime, thereby compensating authors whilst simultaneously permitting the development of the recording industry[62]; however, the music-sheet market for home sales was quickly supplanted by the phonograph and, later, by the radio[63].

Marconi invented the radio in 1895, whilst the first television set was commercialised in the 1930s[64]. The advent of broadcasting gave a new dimension to the concept of exploiting authors' works, since broadcasters extensively used copyright materials[65]. In the US, questions arose concerning whether authors had the right to control new uses[66], and it was ultimately understood that the only viable solution was to

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[55] The Statute of Anne included them in the term 'books' conferring a right to print and reprint the music. *Bach v. Longman* (1777) 2 Cowp. 623. Only later musical works were explicitly mentioned as subject matter of protection. For instance, the UK Musical Act 1902 or the Canadian Copyright Act 1924.

[56] This was the primary source of income for composers. 'Playing music in the home', at that time, meant a family member playing the piano using music-sheet. Brylawski, E.F. [1976], *Legislative history of the 1909 Copyright Act*, F.B. Rothman, Part H, 24.

[57] US Patent 200, 521, 19 February 1878. He successfully mechanically recorded and played the first words to be recorded: '*Mary had a little lamb*'. The earliest known sound-recording device was the *phonautograph*, invented by Scott and patented on 25 March 1857. It could write down sound to a visible medium, but could not to play it back. Generally, Welch-Brodbeck [1994], *From tinfoil to stereo: the acoustic years of the recording industry 1877-1929*, 2nd ed. University Press Florida.

[58] Ginsburg, J.C. [2001], *op.cit.* 1622; Brylawski, E.F. [1976], *op.cit.* Part H, 333.

[59] *White-Smith Publishing Co. v. Apollo Co.*, 209 US 1, (1908).

[60] *Ibid*. 18.

[61] US Act of 4 March 1909, 35 Stat. 1075, § 1(e).

[62] Ginsburg, J.C. [2001], *op.cit.* 1626-1627.

[63] '*By January 1933, the sheet music business* […] *was practically extinct*'. Gelatt, R. [1965], *The fabulous phonograph: from Edison to stereo*, Cassell &Co.

[64] Greenfield, J. [1977], *Television: the first fifty years*, Harry N Abrams Inc.

[65] Makeen, M. [2000], *Copyright in a global information society: the scope of copyright protection under International, US, UK and French Law*, Kluwer, 33-57, 61-80, 85-92, 140-149, 164-168; Shumaker, W.A. [1924], *Radio broadcasting as infringement of copyright*, 28 Law Notes 25; Bladeck, S.T. [1938-1939], *Radio broadcasting as an infringement of copyright*, 27 Kentucky L.J. 295; Loosli, C.C. [1931-1932], *Copyright: radio performance for profit*, 20 California L.Rev. 77. The exclusive right to authorise broadcasting was recognised by international copyright law in 1928. Rome Act of the Berne Convention 1928, article 11-bis.

[66] Cases involving this technology include: *M. Witmark & Sons v. L. Bamberger & Co*., 291 F. 776 (D.N.J. 1923); *Messager v. British Broadcasting Company* [1927] 2K.B. 543; [1928] 1K.B. 660; [1929] AC 151; *Mellor v. Australian Broadcasting Commission* [1940] AC 491; *PRS v. Hammond's Bradford Brewery Company* [1934] Ch. 121; *Thompson v. Warner Brothers Pictures Ltd.* [1929] 2Ch. 308; *Ernest*

grant blanket licences to radio and television stations. In certain special circumstances, authors' control was limited by compulsory licences schemes[67].

One of the major problems associated with these technologies was the decreased capability of monitoring and policing infringements. The methods previously used to police the dissemination of printed copies were impractical; thus, collective systems of management and enforcement—in particular, through collecting societies—were created[68].

1.4 - User-Accessible Copying Technologies

The development of user accessible copying technologies dramatically decreased the authors' and industry's control over dissemination. In 1938, for instance, it became possible to cheaply and efficiently make copies of any document without having to pass through the process of making a new printing press plate. The new printing process was invented by Carlson[69] and dubbed '*Xerography*'[70]. The new technology proved to be revolutionary, but the photocopying machine did not seriously threaten the book market since the cost and labour involved in making copies was still great enough to prevent photocopying from harming publishing industries[71]. Nevertheless, there were some exceptions[72].

Turner Electrical Instruments Ltd. v. PRS, [1943] 1 Ch. 167; *Twentieth Century Music Corporation et al. v. Geroge Aiken*, 422 US 151 (1975); *WGN Continental Broadcasting Company v. United Video*, 693 F.2d 622 (1982).

[67] For instance, §111 17 USC 1976 for cable retransmission; or §176 UK CDPA for TV schedules, and §135A-G for needle-time licenses. *ITP v. Time Out*, [1984] FSR 64; *News Group Newspapers v. ITP*, [1993] RPC 173; *The Association of Independent Radio Companies v. Phonographic Performance* [1994] RPC 143; *Phonographic Performance v. AEI Rediffusion Music* [1998], RPC 335. Compulsory licenses may also be made available by the EU Commission when the authors is found in breach of article 82 EC Treaty. *Radio Telefis Eireann and Independent Television Publication v. Commission*, [1995] 4 CMLR 18 ('Magill case'). In the US, copyright owners of the television programmes being retransmitted by cable-televisions unsuccessfully demanded royalty payments. Mayer Phillips, M.A. [1972], *CATV: a history of community antenna television*, North-western University Press. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 US (1968); *Teleprompter Corporation v. Columbia Broadcasting System, Inc.*, 415 US 394, 181 USPQ 65 (1974).

[68] It is a system where certain rights are administered by an organisation empowered to authorise specific uses of members' works without individual consultations. Freegard, M. [1985], *Collective administration*, Copyright 443. Article 1(4) of the Satellite and Cable Directive. Also §116(2) CDPA. Garnett, K. *et al.* [2005], *Copinger & Skone James on copyright*, Sweet & Maxwell, Ch. 28, Laddie-Prescot-Victoria [2000], *Modern law of copyright and design*, 3rd ed. Butterworths, 15.14-38.

[69] US Patent 2.297.69 (6 October 1942).

[70] From ξέρος, the Greek word for 'dry', and γράφειν, 'to write'.

[71] While making copies of protected works may be a copyright infringement, the inability of the copyright owners to control photocopying has not significantly undercut their business.

[72] For instance, in the US: *Williams & Wilkins Co. v. US*, 487 F.2d 1345, affirmed 420 US 376 (S.Ct. 1975); *Addison-Wesley Publishing Co. Inc. v. New York University* (82 Civ. 8333, S.D.N.Y); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1995). In Australia: *Moorhouse v. University of*

'*Until the advent of the photocopier, copyright owners substantially controlled the production and dissemination of copies of works of authorship, as the public could not obtain the work without purchasing a copy or borrowing one from a library or a friend*'[73].

Photocopying machines became popular during the 1950s and 1960s, and questions subsequently arose over their significance in terms of copyright law. One result was that certain actors—principally libraries—were essentially protected from liability, despite providing photocopying facilities. The liability of users was left to be assessed as a matter of fair use, fair dealing, and private copying[74]. Most countries dealt with the reprography problem in different ways, but copying was generally condoned[75]. The solutions involved owners' concessions, voluntary licensing schemes[76] and statutory provisions[77]. However, the levies approach method is favoured in most European countries and in Canada[78]. The Copyright Directive allows Member States to provide limitations and exceptions for private and non-commercial copying, '*on condition that the right holders receive fair compensation*'[79], therefore the introduction on levies on equipments and blank tapes, as discussed below.

Another widely recognised threat to copyright law was the invention of the cassette and videocassette recorders; in particular, the difficulties in controlling domestic copyright infringement.

'*Before mass market audio and video recording equipment, copyright owners also controlled access to works made publicly available through performances and transmissions, because the public could not see or hear the work without attending a licensed live performance, or viewing or listening to it through licensed media*'[80].

It was considered impractical to stop the copying that took place in private homes[81]; thus, the entertainment industries tried to stop the production and distribution

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South Wales, 6 ALR 193, [1976] RPC 151 (High Court of Australia). In Canada: *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004], 1 SCR 339. In France: *Rannou-Graphie v. Comité National pur la Prévention des Reproductions Illicites et al.*, Cass. 1re civ. 7 March 1984, (1984) 121 RIDA 151.

[73] Ginsburg, J.C. [2001], *op.cit.* 1614.

[74] Kolle, G. [1975], *Reprography and copyright law: a comparative law study concerning the role of copyright law*, 6 I.I.C. 382.

[75] *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, affirmed 420 US 376 (S.Ct. 1975).

[76] '*A blanket licence obliterates the need to determine whether the photocopying in question is outside the fair dealing exception and thus subject to a licence fee*'. Suthersanen U. [2003], *Copyright and educational policies: a stakeholder analysis*, 23(4) O.J.L.S., 585-609.

[77] *Ibid.* Also Kolle, G. [1975], *op.cit.* 382.

[78] §79-88, Canadian Copyright Act 1997.

[79] Article 5(2)(b).

[80] Ginsburg, J.C. [2001], *op.cit.* 1614.

[81] The Dutch Government during the discussion of the bill which changed the Dutch Copyright Act in 1972 said: '*Developments in technology and society have come to the point where the purchase of the* […] *equipment is within reach of large section of the population. We see no grounds for a negative*

of cassette recorders. In Germany, for example, although the 1901 Author's Right Act expressly allowed copying for personal use, the Supreme Court nevertheless ruled that this exception was not applicable to audio copying[82]. As a result, in 1955, home-taping formally required consent, and GEMA[83] accordingly offered a licensing scheme[84]. However, the system became exponentially more difficult to enforce as the number of owners of cassette-recorder increased. In the new 1965 Act, home-taping was no longer considered to be infringement, whilst the right owners were compensated through a 5% levy on hardware, which was soon extended to blank tapes[85].

In the UK, the House of Lords made a distinction between granting 'the power to copy' and 'the right to copy'[86], and held the sale of cassette recorders as not constituting authorisation to make infringing copies, given that the element of control over the use was absent once the cassette recorders were sold[87]. Not satisfied by the court ruling, the BPI launched the campaign '*home taping is killing music*'[88]. Notwithstanding this rhetoric, home taping appears to have increased music sales, promoting music to a wider audience[89].

Videocassette recorders have been developed and used since the 1950s, but only in 1975 did they become suitable for the home market. The first one was the Sony Betamax. Once again, it became almost impossible to stop the copying that took place in private homes, or, as Valenti[90] famously argued:

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appreciation of this development as such [...]. *Moreover* […] *the effective control* […] *will present great practical problems. Proof of infringements can only be found through investigation of activities that usually go on inside the domestic circle, which in our opinion should not be encouraged*'. Visser, D.J.G. [1996], *Copyright exemptions old and new: learning form old media experience*, in Hugenholtz, P.B. [1996], *The future of copyright in a digital environment*, Kluner, 49-56, 49.

[82] *Gema v. Grundig, Bundersgerichtshof*, Judgement of 18th May 1955, GRUR 1956, 492.

[83] *Gesellschaft für musikalische Aufführungs und mechanische Vervielfältigungsrechte*, the German Collective Society.

[84] Apparently thousands of tape-recorder's owners requested and were granted one. Spoor, J.H. [1996] *The copyright approach to copying on the internet: (over)stretching the reproduction right?* in Hugenholtz, P.B. [1996], *The future of copyright in a digital environment*, Kluner, 67-79.

[85] *Ibid*. 74.

[86] '*Amstrad conferred on the purchaser the power to copy but did not grant or purport to grant the right to copy*'. *CBS Songs Ltd. v. Amstrad Consumer Electronics Plc.*, [1988] R.P.C. 567, 604.

[87] *Ibid.* 605.

[88] This slogan became popular due to its many parodies, such as the addendum '*and it's about time too!*', used by 'The Ex'; '*Home taping is killing big business profits. We left this side blank so you can help*' used by 'Dead Kennedys'; or the more recent '*Home Taping is Killing the Music Industry, And It's Fun*', used by 'Downhill Battle'. Finally, the Pirate Bay's logo appears inspired by this campaign. More recently, Bainwol (Chairman and CEO of the RIAA) shared the same opinion about CD-burning.

[89] Plumleigh, M. [1990], *op.cit.* 733-759 (explaining how home taping generates more sales). '*From 1978 to 1988 unit sales of records and tapes rose eight percent and continued to rise until 1990, but by 1993 CDs dominated unit sales and record and tapes sales declined*'. Krasolovsky–Shemel [1995], *op.cit.* xx-i.

[90] The president of the MPAA until 2004.

'*I say to you that the videocassette recorder is to American film producer and American public as the Boston Strangler is to the woman at home alone*' [91].

Consequently, in the US, the film industry tried to stop the selling and distribution of the Betamax[92]. The Supreme Court held that the sale of videocassette recorders did not constitute contributory infringement[93], and that users' practice of reproducing a television programme to watch it at a more convenient time (time-shifting) would constitute fair use[94]. As a result, VHS quickly replaced the Betamax and opened one of the most lucrative markets of the film industry: home videos[95].

In summary, the advent of the aforementioned technologies undermined right holders' control over dissemination, simply because they were no longer able to enforce their exclusive rights in relation to private copying. The fact that enforcement is not feasible does not mean that infringement should be permitted; thus, the legislative intervention in some countries is to provide proper remuneration for owners whose rights have been infringed through a right to remuneration under a levy system administered by collecting societies in order to compensate them for the losses[96]. The system, which originally started in Germany[97], was later adopted in other European countries[98] with the exception of the UK, Ireland, Malta and Cyprus. It is present in Canada and, to a limited extent, in the US[99].

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[91] Testimony in front of the US Congress in 1982, quoted in Castonguay, S. [2006], *50 years of the video cassette recorder*, 6 WIPO Magazine.

[92] *Sony Corporation of America v. Universal City Studios Inc.*, 480 F.Supp. 429 (CD Cal. 1979), 659 F.2d 963 (9th Cir.1981), 464 US 417, 220 USPQ 665 (1984). The film industry also lobbied to impose royalties on the sale of VCR and blank tape. Home Recording of Copyrighted Works, US 97th Congress 12 April 1982. *Conf. RCA Records v. All-Fast System Inc.*, 594 F.Supp. 335; 225 USPQ 305 (SDNY 1984).

[93] *Ibid.* 428-456. Unless the sale it is accompanied by the supply of other materials necessary for counterfeiting'. *A&M Records v. General Audio Video Cassettes*, 948 F. Supp. 1449 (C.D. Cal. 1996), 1456-57. In recognising that there were 'substantial non-infringing uses' for videocassette recorder, the court did not impute constructive knowledge. Randle, P. [2002], *Copyright infringement in the digital society*, 13(1) Computers & Law, 32-5.

[94] 17 USCA §107.

[95] Sciorra, N.E. [1993], *op.cit.*; Castonguay, S. [2006], *op.cit.*

[96] Visser, D.J.G. [1996], *op.cit.* 50. Davies-von Rauscher auf Weeg [1983], *Challenges to copyright and related rights in the European Community*, ESC Publishing Limited, 151.

[97] Article 53-54h UrhG. Dietz, A. [2010], *Germany*, in Nimmer-Geller ed. [2010], *International copyright law & practice*, M. Bender, §8(2); Weimann, J. [1982], *Private home taping under §53(5) of the German Copyright Act of 1965*, 30 J.C.S.U.S.A. 153; Kreile, R. [1992], *Collection and distribution of the statutory remuneration for private copying with respect to recorders and blank cassettes in Germany*, 23 I.I.C. 449.

[98] Art. 5(2)(a-b) Copyright Directive. Dietz, A. [2002], *Legal regulation of collective management of copyright (collecting societies law) in Western and Eastern Europe*, 49 J.C.S.U.S.A. 897; Gaita-Christie [2004], *Principle or compromise? Understanding the original thinking behind statutory license and levy schemes for private copying*, I.P.Q. 422. Hugenholtz-Guibault-van Geffen [2003], *The future of levies in a digital environment*, Institute for Information Law, Faculty of Law, University Amsterdam www.ivir.nl/publications/other/DRM&levies-report.pdf. [10/08/2010].

[99] Audio Home Recording Act (AHRA) of 1992, Pub.L. No. 102-563, 106 Stat. 4237; Leaffer, M.A. [2005], *Understanding Copyright Law*, 4th ed. Butterworths, §8.30; Nimmer-Nimmer, [2002], *Nimmer on*

1.5 - The Digital Revolution

In 1854, Boole suggested the possibility of reducing all algebraic values to either 'false' or 'true'. Subsequently, in 1945, combining Boole's logic, mathematical theory and electronics, von Neumann built Eniac[100], the first modern computer, thereby paving the way for the 'digital revolution'[101]. The computer was unique amongst electronic devices in being programmable. Any information could be modified in practically any manner, which was the reason for its success, but there was also the crucial factor in many of the current concerns regarding copyright. As an immediate consequence, computer technology dramatically increased the simplicity, speed, and quality of the copying process, the ability to manipulate, and subsequent delivery to the public'[102], works '*liberated from the medium that carries them*'[103] with huge potentials for domestic and commercial piracy.

Digital technology permits the storage, transmission, access to and manipulation of authors' works and other materials in ways, and to an extent, previously unknown. Technology and case law evolved rapidly, with the first CD being introduced in 1979, followed by the development of the digital audiotape technology. The first low-cost easy-to-use CD-burner was commercialised in the 1990s[104], and the first software Mp3[105] player, Winplay3, was released in 1995; however, only in 1998 was the first portable player device commercialised by Diamond Multimedia in the US. In *Diamond*[106], the court held that users of Mp3 Players merely make copies in order 'space-shift', or render portable, files already stored on their computers; therefore, this

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copyright, Matthew Bender, §8B.01[C]; Fisher, W.W. [2004], *Promises to keep: technology, law and the future of entertainment*, Stanford University Press, 83-87. The AHRA covers only digital audio recording devices. *Recording Industry Association of America v. Diamond Multimedia System Inc.*, 180 F.3d 1072, 51 USPQ 2d 1115 (9th Cir. 1999); *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004, 1024-25 (9th Cir. 2001).

[100] Eckert–Mauchly, US Patent 3120606: Application 1947, Graduation 1964.

[101] The synergetic relationship between digitisation and networking wiped out some distinctions important for copyright, thus creating the basis for the digital revolution. Samuelson, P. [1990], *Digital media and the changing face of intellectual property law*, 16 Rutgers Computer & Technology L.J. 323; Stokes, S. [2005], *Digital copyright law and practice*, 2nd ed. Hart, 9.

[102] Lehman, B. [1996], *Intellectual property and the national and global information infrastructure*, in Hugenholtz, [1996], *The future of copyright in a digital environment*, Kluner, 104.

[103] Barlow, J.P. [1994], *The economy of ideas*, Wired Magazine, Issue 2.3 March.

[104] Cases regarding this technology are for instance: *Sony Music Entertainment Ltd. and Others v. EasyInternetcafé*, High Court [2003] E.W.H.C. 62 (Ch D.); and '*Coin-operated CD burner machine*', LG Munich I, 7 November 2002, 7018271/02, Munich Court of Appeal, 20 March 2003, case 29U549/02, note in [2004] Ent.L.Rev. N-28.

[105] Mp3 is a common digital audio encoding format.

[106] *Recording Industry Association of America v. Diamond Multimedia System Inc.*, 180 F.3d 1072, 1081, 51 U.S.P.Q. 2d 1115, 1123 (9th Cir. 1999).

reproduction is considered to be fair use[107]. The DVD reached the market in 1997 with two access control measures: Content Scrambling System (CSS) and regional code[108]. In 1999, a teenager wrote the DeCSS, a software which 'hacks' through these access control measures and copies the unscrambled data into the computer hard drive[109]. The DeCSS was immediately associated with mass copyright infringement, since it opened access to unencrypted source video and accordingly provided the possibility to copy without degradation. A newer video format is already on the market and is slowly replacing the DVD: the optical disc storage Blue-Ray disc.

Finally, the issue of digital libraries should be mentioned. These projects aim to record the contents of libraries in digital forms in order to facilitate online access and to preserve the works for future generations[110], thereby challenging numerous aspects of copyright law[111].

1.6 - Origins of Networking Technologies

The early idea of a network to allow general communication between computers was formulated by Licklider[112]. In the 1960s, the Advanced Research Projects Agency of the US Department of Defence (ARPA) developed a prototype network between many decentralised computers, 'Arpanet', in order to solve the vulnerability problems[113] linked with the existent star-shaped networks used for military communication[114]. In 1982, Cerf and Kahn defined the transmission control (TCP) and internet protocols (IP), subsequently creating the basis for the internet. In 1990, Arpanet was decommissioned as a military project and was allowed to develop as a civilian enterprise. In 1991,

[107] *Ibid.* 1079. Dutfield–Suthersanen [2008], *op.cit.* 245.
[108] Consequently, users could not use DVDs on computers running an open-source system such as Linux, and were unable to watch any DVD purchased in one country on a DVD player purchased in another one.
[109] The author, still a teenager at the time, was put on trial in a Norwegian court for violation of §145 Norwegian Criminal Code. He was acquitted of all charges in 2003. *Public Persecutor v. Johansen*, Borgating Appellate Court, 22 December 2003 [2004] ECDR 17.
[110] For instance, the European 'i2010: Digital Libraries', European Commission Communication (20 September 2005, 465 Final); Google Library Project, and British Library-Microsoft.
[111] Including ownership, licensing, and infringement. Sterling, J.A.L. [2008], *op.cit.*, 6.20. For instance, *The Authors Guild, Inc. Association of American Publishers, Inc. et al. v. Google Inc.* Case 1:2005cv08136 (SDNY 20 September 2005). The case is currently waiting for the court approval of the settlement agreement. www.googlebooksettlement.com. [15/08/2010].
[112] The 'galactic network' concept. Leiner, B.M. *et al.* [1997], *Brief history of the internet*, Internet Society. www.isoc.org/Internet/history/brief.shtml. [15/08/2010].
[113] Anything rendering the central switching computer inoperative would simultaneously render the entire network inoperative.
[114] Hardy, I.T. [1998], *op.cit.* 36-37. In the early 1980s, the National Science Foundation (NSF) funded its own network 'NSFNet' to connect a number of university networks, thus creating the first non-prototyped version of the Internet. Leiner, B.M. *et al*. [1997], *op.cit.*

Berners-Lee[115] launched the World Wide Web[116], thereby opening the internet to its true multimedia capability[117]. The internet has grown exponentially over recent decades (Figure 1), with its success mainly based on its major uses: accessing content, and transferring files between computers (Figure 2).

Figure 1 - Internet Statistic[118]

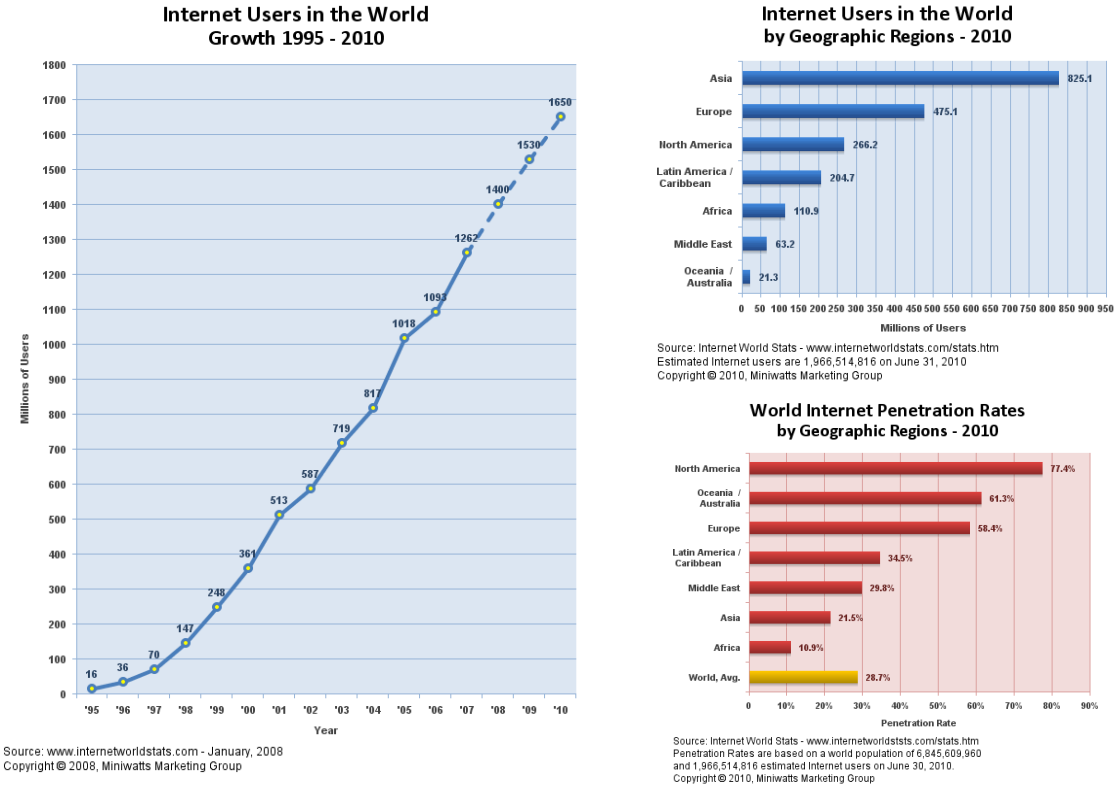
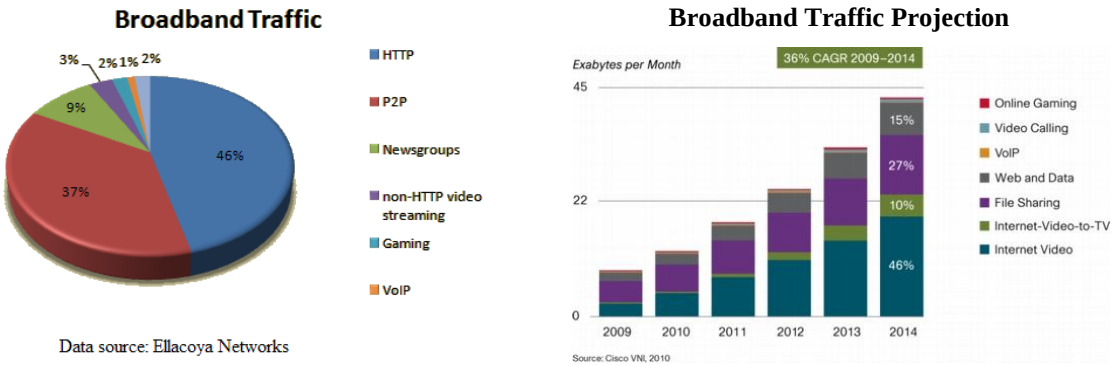


Figure 2 - Internet Usage[119]



[115] Berners-Lee convinced the CERN of Geneva to renounce the patent, as the Internet should not be propriety of anyone.

[116] Back in 1989, Berners-Lee developed the Hypertext Markup Language (HTML), the Hypertext Transfer Protocol (HTTP), and the Universal Resource Locator (URL). Berners-Lee, T. [1999], *Weaving the web: the original design and ultimate destiny of the World Wide Web by its inventor*, Harper.

[117] Weiser, M. [1991], *The computer for the 21st Century*, Scientific American, vol. 265(3), 94.

[118] Figure from www.internetworldstats.com/stats.htm. [15/08/2010]. Copyright © 2008-2010, Miniwatts Marketing Group.

[119] Figures from arstechnica.com (left), and www.cisco.com (right). [15/08/2010].

Although much of the internet runs over facilities provided by telephone companies, it nevertheless differs from the telephone network, which is a 'connection-oriented' network. The internet is a 'point-to-point packet-based' network based on links between dedicated computers known as 'routers'[120]. The data are broken into 'packets' and then transmitted from the sender to the receiver[121]. The salient point is that these 'packets' are continuously 'copied' as they progresses from their origin to the their destination, and they may travel through different routes to reach their destination[122], passing through a large number of computers, controlled by different users in different countries[123].

1.7 - Web 1.0 & Pre-File-Sharing Technologies

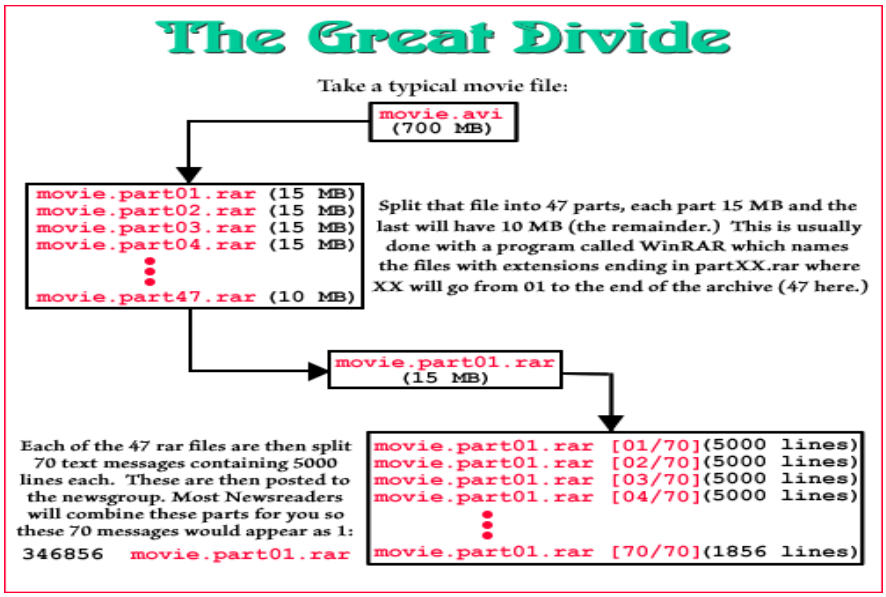
The main characteristic of the internet relevant to this work is that every internet transmission inevitably involves constant reproduction of content[124]. One of the first results of the synergy between digitisation and the internet was MP3.com[125], a popular music-sharing service. MP3.com offered 'My.MP3.com', a service that enabled users to register their CD collections and listen to music online from a different place than that at which the original copy was held. The record industry successfully sued MP3.com for copyright infringement by reproduction and promotion of copyright infringements[126], and MP3.com consequently discontinued the service[127].

Another pre-file-sharing technology worth mentioning, as it pre-dates the World Wide Web and is still active, is 'Usenet' or 'newsgroups'. These are interest groups that share information using a system similar to a bulletin board[128]. Although Usenet was

[120] Stevens, W.R. [1996], *TCP/IP illustrated*, Addison-Wesley.
[121] The destination IP address in each packet determines what route the packet should. This decision is made separately for each packet; therefore, the packets of a transmission may travel different paths through the network. *Ibid*.
[122] This mechanism contrasts with the telephone network: phone calls travel over a single route for the duration of a call.
[123] Hardy, I.T. [1998], *op.cit.* 33-34. Generally on the related copyright issues: Ginsburg, J.C. [2002], *Berne without borders: geographic indiscretion and digital communications*, 2 I.P.Q. 110-122.
[124] For this reason, the internet is often nicknamed the 'giant copy-machine'.
[125] Today this is a website operated by CNET Networks (www.cnet.co.uk), but in 1999 the same web address hosted the progenitor of all .mp3 related website.
[126] *UMG Recordings Inc. v. MP3.com Inc*., F.Supp 2d 349 (S.D.N.Y. 2000). The 'space-shifting' defence was rejected. *Recording Industry Association of America v. Diamond Multimedia System Inc.*, 180 F.3d 1072, 1081, 51 U.S.P.Q. 2d 1115, 1123 (9th Cir. 1999).
[127] Music publishers filed a separate lawsuit against MP3.com with their own claims of payment due. Close to bankruptcy, MP3.com was sold to Vivendi Universal in 2001 that dismantled the original site and sold all of its assets including the web address and logo to CNET in 2003.
[128] Each one of news server stores all the messages of the newsgroups posted by its users. The servers periodically connect to each other exchanging all messages that are missing. Eventually any message sent by any user will be copied to every server. www.slyck.com/newsgroups_guide_intro. [15/08/2010].

designed to transfer only text files, this system is ideal for sharing content by simply converting the digital file in order to appear as a text message. The message can then be distributed through the newsgroup, downloaded and converted (decoded) back into the original file type. In order to avoid extremely long text messages[129], the file is divided into smaller parts, as shown in Figure 3 below.

Figure 3 - Newsgroup Divide[130]



Notwithstanding the simplicity and the vast use of this sharing technique, newsgroups did not attract the attention of the entertainment industries until very recently[131].

1.8 - Conclusion

> '*A review of past confrontations between copyright and new technological means of dissemination suggests that courts often are reluctant to restrain the public availability of new technologies, even when those technologies appear principally designed to exploit copyrighted works*'[132].

It is said that digital technology creates an 'unprecedented' threat to copyright law, simply because it allows the creation of perfect copies; however, the main difference between analogue and digital appears to be in relation to the cost of making a competing substitute copy and, as a result, if something raises the costs of copying a

[129] For instance, a 700 MB film would take around 15 Million lines if it was encoded into one message, and no news servers would accept it, since the maximum accepted is 10.000 lines.
[130] Figure from www.slyck.com/Newsgroups_Guide_Intro. [15/08/2010].
[131] *Arista Records LLC. v. Usenet.com Inc.*, Case no. 07-Civ-8822, 2009 WL 187389 (SDNY), 633 F.Supp.2d 124 (SDNY 2009); and *Twentieth Century Fox Films Corp. & Others v. Newzbin Ltd.*, [2010] EWHC 608 (Ch), 29 March 2010.
[132] Ginsburg, J.C. [2001], *op.cit.* 1616. '*This does not mean, however, that courts refuse protection, or that* [legislators impose] *a compulsory license, each time copyright encounters new technology*'. *Ibid.*

work—i.e. levies or taxes on products and services which facilitates the copying—the difference between digital and analogue would decrease[133].

It is submitted that advances in technology alone did not cause the issues discussed in this work. Technology cannot be held responsible for mass consumerism and for the change of perception of what *should* be legitimate:

> '*It may be more accurate to state that technologies exacerbate existing problems inherent in attempting to balance the varied interest of authors, publishers and consumers*'[134].

Historically, the legal systems have responded in a number of ways, from increasing sanctions to compulsory licenses. The issues surrounding the history of the relationship between copyright and new technologies that decrease control are mainly two: first, enforcing copyright becomes more difficult; and second, users perceive that 'control' over distribution should stop at the private sphere of individuals. Notably, in the past—irrespective of the outcome of the discourse on private copying—a levy system turned out to be a balanced compromise[135]. Consequently, when it is not practical to 'control' the dissemination of copyright works, an alternative for remuneration is advisable.

> *'One might therefore conclude that when copyright and new technology conflict the copyright owner's right to control the disposition of the work must yield to a greater public interest in promoting its unfettered (if not always unpaid) dissemination*'[136].

History has largely repeated itself, and the law has been forced to adapt to every technological development. With the advent of networking technologies, this interaction appears reversed and, notably, an unpredictable phenomenon is occurring. Rather than the law adapting to technology, it can be said that, today, the law remains the master, and it is technology which is sub-servant to the law. Conversely, a more cynical view states that technology will always circumvent the law. Technology changes rapidly: court decisions or legislative responses became quickly inapt or irrelevant. Past predictions are no longer valid, and future predictions may no longer be possible.

We investigate these dilemmas in the following Chapters. Chapter Two begins this investigative journey by critically defining networking technologies.

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[133] Hardy, I.T. [1998], *op.cit.*
[134] Dutfield–Suthersanen [2008], *op.cit.* 237.
[135] An additional rationale for compulsory license schemes is reduction of the transaction costs that negotiated licenses would impose. Cassler, R. [1990], *Copyright compulsory licenses- are they coming or going?*, 37 J.C.S.U.S.A. 231, 249.
[136] Ginsburg, J.C. [2001], *op.cit.* 1616.

Chapter Two

An Introduction to Networking Technologies

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'…history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine or an MP3 player. Thus, it is prudent for courts to exercise caution…'[137]

2.1 - Introduction

Networking technologies have contributed to producing a radical shift in terms of the ability to reproduce and distribute content, and have accordingly dramatically reduced the entertainment industries' control in relation to dissemination[138]. Everyone with an internet connection has the capability and the opportunity to access and copy content—theoretically, without limit—and from anywhere on the planet[139]. With this in mind, this Chapter presents an analysis of file-sharing and the Web 2.0 phenomena, providing a description of the technologies involved in the relevant copyright cases by noting, when appropriate, how litigation has driven the technology evolution. This understanding of the underlying technologies driving the current phenomenon is crucial, as it allows appreciation of the opportunities and challenges facing copyright law, as discussed in the following Chapters.

2.2 - Peer-to-Peer File-Sharing

Although the exact definition of peer-to-peer file-sharing is debateable, 'peer-to-peer' mainly depends upon the participation of equal standing computers—'peers'— who contribute the resources on which the network is constructed[140]. Importantly, there are many applications which employ peer-to-peer technologies: for instance, distributed computing[141], collaboration[142], and, most importantly, content sharing. This last category includes several applications, the most common of which is 'file-sharing', a

[137] *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154(9th Cir. 2004), 1159.
[138] Potemkin, D. [2005], *The pirates, or the navy?*, 147 World Copyright, 10-12.
[139] However, this can be limited using filtering technologies such as geo-blocks.
[140] '[It] *is a class of applications that takes advantages of resources available at the edge of network*'. Barkay, D. [2001], *Peer-to-peer computing: technologies for sharing and collaborating on the net*, Intel Press.
[141] Applications where the peers cooperate in order to solve computational problems. *Ibid.*
[142] In these applications, users interact with each other in real-time. For instance, instant messaging, audio and visual communications. *Ibid.*

term which means to pass a copy of a file on to someone else. All file-sharing systems have the similar goal of facilitating the location and sharing of files stored on the individual users' computers—i.e. 'peers'—amongst all the users connected through the network. The most popular method of sharing files is the use of dedicated software to access a network. Once the software is in use and the computer is connected to the internet, the user can then share files with all the other users connected to the same network, while retaining the original copy of the file.

2.2.1 – 'Generations'

File-sharing networks are generally described by their 'generation'[143]; however, the definition of which software belongs to which generation is often unclear. The author prefers using the following categorisation, based on how peers locate files and others crucial differences.

2.2.1.1 - Centralised file list. - This class is characterised by the users being connected to a central server which indexes the files that each user is sharing. In order to download a particular file, the user asks the central server to search the network. The central server 'searches' the keywords in its list of known files, and accordingly provides the user with the location of files as shown in Figure 4 below. Upon receiving the results, the user initiates the download directly from another user.

Figure 4 - Centralised File-Sharing System

This model is efficient in handling searches, but requires a central server in order to function, otherwise the network is broken, and no sharing is possible. *Napster*[144] made this category redundant.

[143] Steinmetz–Wehrle ed. [2005], *Peer-to-peer systems and application*, Springer; Nwogugu, M. [2006], *The economics of digital content and illegal online file-sharing: some legal issues*, CTLR 5-13, 5; Saroiu, S. *et al.* [2001], *A measurement study of peer-to-peer file sharing systems*, www.cs.washington.edu /homes/gribble/papers/mmcn.pdf. [15/08/2010].

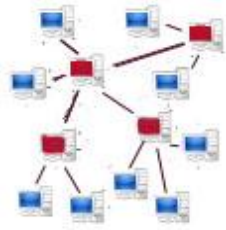
[144] *A&M Records Inc. v. Napster Inc.*, 114 F Supp 2d 896 (N.D. Cal., 2000); 239 F 3d 1004 (9th Cir. 2001); WL 227083 (ND Cal. 5 March 2001); 284 F.3d 1091 (9th Cir. 2002).

2.2.1.2 - Gnutella/FastTrack. - This class is characterised by decentralised file lists[145]: users are directly connected to each other. In order to download a particular file, the user interrogates everyone connected to the network until the file is found and the download is initiated, as shown in Figure 5 below[146].

Figure 5 - Gnutella

The major advantage of such a system is the lack of centralised control: the network is active as long as two peers are connected. However, the disadvantages are many: for instance, searches are slower, and the network is fractured often in small sub-networks which are not connected to each other. This forced the introduction of 'SuperNodes'. FastTrack, as opposed to working with a network where every user is an equal 'peer', promotes certain users to SuperNodes, which act like a central server coordinating searches and providing a list of users connect, as shown in Figure 6 below.

Figure 6 - FastTrack



This new technique proved to be successful, and quickly became the standard[147], notwithstanding some of the software providers being found liable under authorisation and inducement to copyright infringement theories[148]. Gnutella/FastTrack networks can be easily monitored on a large scale, thereby making it relatively easy for the entertainment industries to search and find users sharing unauthorised materials.

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[145] To be precise a third network belongs to this category: eDonkey2000. It is decentralised, but uses central servers set up directly by the users.

[146] To connect the peer sends a 'handshake' to the central server waiting for authorisation. Once received it, the peer sends a 'ping' announcing his presence. The second peer reply with a 'pong', explaining its IP address and the list of shared files and retransmits the received ping to other peers. Every 'pong' is collected by a 'hostcatcher', which reveal the IP addresses of all the available peers.

[147] For instance LimeWire, Kazaa, Morpheus, eMule, *etc*.

[148] *Universal Music Australia Pty. Ltd. v. Sharman License Holding Ltd.*, [2005] F.C.A. 1242, (2005) 65 IPR 289; *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 125 S.Ct. 2764 (2005); on remand 454 F.Supp. 966 (C.D. Cal. 2006).

2.2.1.3 – BitTorrent. - This class is peculiar because of its 'one file-one network' structure. Rather than creating a network between all the connected users, BitTorrent creates a network for every file shared, as shown in Figure 7 below.

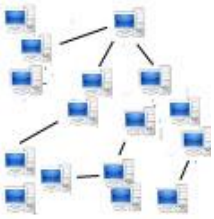
Figure 7 - BitTorrent

Servers running tracker programs keep these networks online. In order to share ('swarm') a file, the user (the 'seeder') creates a .torrent file[149] and disseminates it over the internet[150]. The BitTorrent software then starts a 'seed node' allowing other users (known as 'lechers') to connect to the seeder and to start downloading. Every lecher automatically 'reseeds' the file, therefore becoming additional sources. In order to download a file, users must simply obtain the relevant .torrent file and open it with the BitTorrent software. The .torrent file tells the software the address of one of the trackers which maintain a list of the users sharing the file and where the file—or one of the file's parts, i.e. blocks—resides[151]. As soon as all of the blocks are obtained, the software then reassembles them and the download is complete. It is important to note how each block can be downloaded from different seeders. Furthermore, the BitTorrent software will connect to as many seeders as available to download several blocks at once, even in random order. BitTorrent networks cannot be monitored on a large scale; however, if connecting to a tracker, it is possible to obtain the list of every IP address that participates in one swarm. Importantly, BitTorrent does not offer its users anonymity; however, softwares have been created so as to encrypt transmissions[152], and the trackers can then be hidden[153].

[149] A '.torrent' is a small file which containing the name and size of the file to be shared, the address of a 'tracker', and the information to divide, identify and reassemble each block in which the file is divided.
[150] Often through email, newsgroups, or posting it on a website, such Pirate Bay or MiniNova, or even through a FastTrack network, such as LimeWire, which provides a built-in .torrent search facility.
[151] The software considers the blocks available from each available source and requests the rarest one needed. As soon as the block is downloaded, the software checks the consistency with the .torrent file specifications and begins searching for someone to who upload the block to.
[152] Such as Torrent Privacy. https://torrentprivacy.com. [15/08/2010].
[153] http://torrentfreak.com/bittorrent-hydra-anonymous-hidden-tracker-via-tor-09072. [15/08/2010].

2.2.1.4 - Private Networks. - This class's principal feature is the creation of 'virtual private networks' with in-built anonymity features. In order to share, users must firstly create a private network inviting other users they trust—i.e. 'friends'. These softwares do, in fact, allow only 'trusted' people to share files directly within each other. In order to download a file, the user sends a request to the connected friends, who then transmit the request to their friends, and so on, until the file is found and the download starts, as shown in Figure 8 below.

Figure 8 - Private Network



Notably, owing to the high level of secrecy and the exclusivity of the network, it is difficult to monitor the data transmitted or to identify members of the network. In addition, various softwares create a cryptographic key which encrypts the user's IP address to increase security[154] and to reduce the risks of traffic analysis[155].

2.2.2 – Softwares

Below follows a list of file-sharing softwares relevant to this work, which rely upon the aforementioned networks schemes[156].

2.2.2.1 – Napster. - Napster is commonly referred to as the first file-sharing software, although alternative methods of sharing files were already relatively popular[157]. The software created by Fanning was freely available, and enabled users to share audio files (.mp3). As previously mentioned, Napster's architecture was built upon a central server directing the traffic between registered users, thereby making Napster a convenient legal target under indirect or 'secondary' liability which, in the US, can take on the forms of contributory infringement and vicarious infringement[158].

[154] For instance, OneSwarm. Para. 2.2.2.9.
[155] Such as Tor. Para. 2.2.2.9.
[156] For a constantly updated list of file-sharing softwares ranked by popularity, *see* www.p2pon.com/file-sharing-programs. [15/08/2010].
[157] For instance the distributed Internet discussion systems such as IRC, Hotline, and Usenet.
[158] Para 3.3.3.2.

In *Napster*[159], the Court found the software's users were infringing copyright. Napster had knowledge, control, and had '*materially contributed*' to the infringing activities. It was also reasonable to believe that Napster had a '*direct financial interest in the infringing activities of its users*'[160]. The case was partially settled: Napster was shut down, and users migrated to different file-sharing softwares. In order to avoid similar court rulings, software providers needed to find a way of remaining independent from central server, thereby avoiding control over the content shared[161]. The first fully distributed alternative was Gnutella[162], but it quickly disappeared, generating a variety of softwares based on the same technology.

2.2.2.2 – Aimster[163]**. -** Aimster enabled its users to share files with other users registered as 'friends'. In *Re Aimster*[164], the court held that Aimster's users were infringing copyright, and that the provider had constructive knowledge of the infringements, was materially contributing to the activity, and was also influencing and encouraging direct infringement amongst its users. A preliminary injunction was granted, and the company was consequently closed down[165].

2.2.2.3 – Kazaa. - Kazaa is a file-sharing software created by Consumer Empowerment[166]. In 2001, a Dutch court ordered Kazaa to prevent its users from infringing copyright[167]. Consumer Empowerment sold Kazaa to Sharman Networks. The Amsterdam Court of Appeal later held Kazaa not liable for the infringements of its users[168], and the Supreme Court upheld the decision[169]. In 2004, however, the

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[159] *A&M Records Inc. v. Napster Inc.*, 114 F Supp 2d 896 (N.D. Cal. 2000); 54 USPQ 2d 1746 (N.D. Cal. 2000); 239 F 3d 1004; 57 USQP 2d 1729 (9th Cir. 2001); WL 227083 (ND Cal. 5 March 2001); 284 F.3d 1091 (9th Cir. 2002).

[160] *Ibid.*

[161] Similar 'pure' applications and networks have been in use for many years, but are rare; examples include Usenet (1979) and FidoNet (1984). Most networks and applications described as peer-to-peer actually contain some non-peer elements, use multiple protocols, or use stronger peers.

[162] Gnutella was a project developed in early 2000 by J. Frankel and T. Pepper of Nullsoft after their company's acquisition by America Online.

[163] Aimster was later renamed Madster. D'Errico, R.A. [2002], *Aimster changes name to resolve AOL suit*, The Business Review, January, 25.

[164] 252 F.Supp 2d 634 (ND Ill., 2002); affirmed 334 F.3d 643 (7th Cir. 2003).

[165] Apparently in June 2009 all claims were dismissed as to whether there was contributory or vicarious copyright infringement. However, the author is unable to confirm the information posted on blogs, such as http://en.wikipedia.org/wiki/Aimster. [15/08/2010].

[166] The software can be downloaded free of charge, and it is financed by attached adware and spyware. For this reason, unauthorised spyware/adware-free versions, such as Kazaa-lite resurrection, are popular.

[167] *Vereniging Buma and Stichting Stemra v. Kazaa BV*. Unreported, Amsterdam District Court, 29 November 2001.

[168] *Kazaa BV v. BUMA/STEMRA*, CA Amsterdam, 29 March 2002. [2002] E.I.P.R. N-130.

Australian Record Industry Association sued the new owner of Kazaa[170] for authorising copyright infringements. The following year, the Federal Court of Australia held that Sharman had encouraged users to participate in file-sharing activities through its website[171], and that the defendant authorised the copying and communication of protected recordings to the public, with such authorisation therefore constituting infringement[172]. The court ordered Sharman to disable the download of Kazaa in Australia. As a result, Australian users were greeted with the following notice (Figure 9) when visiting the Kazaa website[173]:

Figure 9 - Kazaa Notice

In 2006, Sharman Networks agreed a global settlement with the entertainment industries[174] and sold Kazaa, which is now a licensed subscription-based music download service[175], but it is only available to users in the US.

2.2.2.4 - File Rogue, WinMX (WinNY), Soribada, & Kuro. - File Rogue was a software provided by YK MMO. Users had to create an account and a 'personal catalogue' of files they wanted to share. The list was then uploaded to the 'global catalogue' on the File Rogue server[176]. Users could then search the catalogue and download the files directly from other users. In both *Columbia Music Entertainment KK v. YK MMO Japan*[177] and *JASRAC v. YK MMO Japan*[178], the provider was held liable of infringement owing to its conduct, knowledge[179], control/supervision of users' conduct[180], and financial advantage.

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[169] *Vereniging Buma and Stichting Stemra v. Kazaa BV* AN7253 Case No. C02/186HR, Supreme Court of the Netherlands.
[170] *Universal Music Australia Pty. Ltd. v. Sharman License Holding Ltd.*, [2005] F.C.A. 1242, (2005) 65 IPR 289.
[171] The website had warnings against file-sharing, however the court held them to be ineffective.
[172] The company was ordered to modify the software within two months (a ruling enforceable only in Australia), but failed to meet the deadline. *Ibid*. with Corrigendum dated 22 September 2005.
[173] news.com/sharmancutsoffKazaadownloadsinAustralia/2100-1027_3-5983455.html. [15/08/2010].
[174] www.sharmannetworks.com/content/view/full/323. [15/08/2010].
[175] www.kazaa.com. [15/08/2010].
[176] OpenP2P.com. www.oreillynet.com/pub/d/438. [15/08/2010].
[177] Tokyo District Court, 29 January 2003, [2003] E.I.P.R.. N-90, [2003] CTLR N-69, and 17 December 2003; Tokyo High Court, 31 March 2005.
[178] Tokyo District Court, 29 January 2003, [2003] E.I.P.R.. N-91; Tokyo High Court, 31 March 2005.
[179] The defendant knew and expected that the software would be used for infringing activities.
[180] The users infringed the reproduction and public transmission rights of the respective right owners. The personal use exception under the Japanese Copyright Act was not applicable.

WinMX was the first software to implement 'multi-point download', allowing users to download the same file simultaneously from several sources. The arrest of some users[181] and the increasing presence of 'dummy' files subsequently led to the development of WinNY[182]—a server-less encrypted implemented version of WinMX. In 2005 in the US, RIAA asked the software provider[183] to implement filters to prevent users from downloading protected material. Under the threat of litigation, the network and the homepage were discontinued[184]. The implemented version (WinNY) has been involved in two cases. In *WinNY 1*[185] the defendant used WinNY to share films and was held guilty of infringement of the public transmission right. In *WinNY 2*[186], the court held that WinNY had enabled copyright infringement by developing and distributing the software. However, in October, 2009, the Osaka High Court overturned this ruling[187]:

> '*merely being aware of the possibility that the software could be abused does not constitute a crime of aiding violations of the law, and the court cannot accept that the defendant supplied the software solely to be used for copyright violations*'[188].

Soribada was the first Korean file-sharing software, and was held to be abetting copyright infringement[189] by facilitating users' infringement through the distribution of software and provision of services[190]. It was discontinued in 2005 because of the lawsuit, but it was re-launched in 2008 as a subscription-based licensed music download service[191].

Kuro was a commercial, subscription-based file-sharing service, mainly based in Taiwan. In *Kuro Software*[192], the court held that a technology provider which is fully aware that its technology may be used for infringement but still encourages the use of such technology, could ultimately foresee that it would be used for criminal purposes, and thus has a general intention to commit a crime. The court held that the software providers knew the files shared were protected and the copying was unauthorised. The defendants were aware, and could foresee, that providing the Kuro software, network

[181] www.slyck.com/story1043_P2P_Wrapup_for_2005. [15/08/2010].
[182] N comes after M, Y comes after X.
[183] Frontcode Technologies.
[184] However users were able to download a working software patch for WinMX from www.winmxgroup.com and www.vladd44.com/mx. [15/08/2010].
[185] Kyoto District Court, Heisei 15(Wa) 2018, 30 November 2004.
[186] Kyoto District Court 2007. Non-official report at www.japanfile.com/modules/smartsection/item.php?itemid=494. [15/08/2010].
[187] [2009], 195 Copyright World, 8.
[188] Http://mdn.mainichi.jp/mdnnews/news/20091008p2a00m0na016000c.html. [15/08/2010].
[189] Korean Copyright Act, article 591(1).
[190] *Korea Association of Phonogram Producers v. Soribada Inc*. Seoul District Court, 29 August 2005 Docket 2004 Ka Hap 3491.
[191] www.soribada.com. www.theregister.co.uk/2008/03/14/soribada_korea_legal_p2p. [15/08/2010]
[192] Taipei District Court, Criminal Division, 21 September 2005.

search and download access facility to its users could ultimately result in copyright infringement[193].

2.2.2.5 - Morpheus (Grokster). - Morpheus reached worldwide popularity in 2003 when the providers, Grokster and StreamCast, obtained in the US a ruling stating they were not liable for secondary infringement[194]. When questioned, the US Supreme Court agreed to hear the case[195], and ruled that:

> *'One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties'*[196].

The Supreme Court noted that Grokster took 'active steps' to encourage infringement and held that a person:

> *'is liable of contributory infringement by intentionally inducing or encouraging direct infringement, and is liable of vicarious infringement by profiting from direct infringement while declining to exercise a right to stop or limit it'*[197].

The remanded District Court consequently found the provider liable for inducing infringement of copyright[198].

As today the network is still relatively active and the software can be downloaded from download.com[199], however accompanied by the following message:

> '*editor's note: the publisher of Morpheus is no longer in business*'[200].

2.2.2.6 – eMule. - eMule is a popular open-source software[201] featuring the direct exchange of links between users, and which further adopts a credit system to reward frequent uploaders increasing their download speed[202]. Hundreds of modifications of

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[193] They also formed a criminal association together with the user, being joint principals in the crime of unauthorised reproduction. The court, also, held that the user had infringed copyright by using Kuro software to download copyright protected materials.
[194] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 259 F Supp 2d 1029, 65 USQP 2d 1545 (C.D. Cal. 9 January 2003), affirmed 380 F 3d 1154 (9th Cir. 2004).
[195] Summarising, the defendant distributed a file-sharing program, had no control over its users' activities, but had notice from the claimants that users were engaged in copyright infringements.
[196] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 125 S Ct 2764 (2005), 2766.
[197] *Ibid.* 125 S Ct 2764 (Supreme Court 2005).
[198] *Ibid.* on remand 454 F Supp 966 (CD Cal., 2006).
[199] download.cnet.com/Morpheus/3000-2196_4-10057840.html. [15/08/2010].
[200] *Ibid.*
[201] For a definition of 'open-source software', *see* opensource.org/docs/osd. [15/08/2010].
[202] Large files are divided and downloaded in parts. The downloaders automatically share the obtained parts until the download is complete. eMule automatically decreases the download speed of the users who attempt to decrease the uploading speed. www.emule-project.net. [15/08/2010].

eMule are available; however, so far, none of them has apparently been involved in any lawsuits[203].

2.2.2.7 – LimeWire. - LimeWire was first released in 2000. Later, it was upgraded in order to allow users to search and share files using BitTorrent. LimeWire providers attempted to avoid liability by making the users fully aware that:

> '*Everything you share with the P2P Network* […] *becomes public and given sufficient resources, is trackable. To use LimeWire legally, you must have the permission of the owner of the copyright rights in the file for each file in your LimeWire shared Library*'[204].

LimeWire also provide an opt-in content filter, whereby users can have LimeWire actively attempting to filter out protected content from being shared. Nevertheless, LimeWire was sued in the US[205] and subsequently filed a counterclaim on a on a number of grounds, stating that the entertainment industries impetus to shut down file-sharing services is an attempt

> *'to destroy any online music distribution service they did not own or control, or force such services to do business with them on exclusive and/or other anticompetitive terms so as to limit and ultimately control the distribution and pricing of digital music, all to the detriment of consumers'*[206].

The counterclaims were rejected, and the court granted a summary judgement and found LimeWire liable for inducing copyright infringement, common law copyright infringement, and unfair competition[207]. In June 2010, the US National Music Publishers Association filed a new lawsuit against Limewire[208]. Nevertheless, Limewire is still online, and it is expected to 'evolve' soon into a cloud computing[209] subscription-based music service[210].

2.2.2.8 – BitTorrent. - BitTorrent, written by Cohen, is a global standard for disseminating files over the internet and the leading sharing software[211]. Its unique

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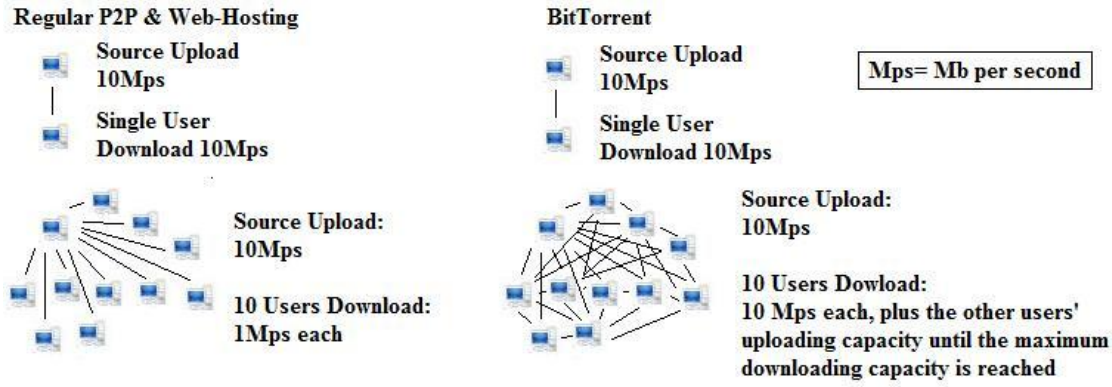
[203] As today is the most downloaded open-source file-sharing software. sourceforge.net. [15/08/2010].
[204] www.limewire.com/legal/copyright. [15/08/2010].
[205] *Arista Records LLC. v. LimeWire LLC,* no 06-cv-05936, 2010 WL 1914816 (SDNY 11 May 2010).
[206] Answer and counterclaims, 18. www.digitalmusicnews.com/legal_docs/arista_limewire. [15/08/2010].
[207] *Arista Records LLC. v. LimeWire LLC,* no 06-cv-05936, 2010 WL 1914816 (SDNY 11 May 2010).
[208] *EMI Music Inc. & Others v. LimeWire LLC,* no. 10-cv-04695, (SDNY). www.nmpa.org/pdf/whats_new/LimeWireFiled.pdf. [15/08/2010].
[209] For a description of cloud computing, *see* Para. 2.4.2.
[210] www.cloudtweaks.com/2010/06/limewire-p2p-file-sharing-moving-to-the-cloud. [15/08/10].
[211] Malcom, J. [2005], *The BitTorrent effect,* Wired Magazine 13.01. Official website: bittorrent.com. A guide to BitTorrent is at www.mp3newswire.net/stories/2003/bittorrent.html. BitTorrent-related activities

network and architecture make it is possible to download copies of large files—such films and softwares—in a fraction of the time it takes on regular peer-to-peer networks. The major distinguishing feature of BitTorrent is that the downloading speed increases with a higher number of users[212]. In the case of a regular file-sharing network or web-hosting site, the number of users downloading and the downloading speed/capacity is limited by the uploading speed/capacity of the source. However, BitTorrent circumvents the problem by taking advantage of the uploading speed/capacity of every user participating in the swarm of the file, as described in Figure 10.

Figure 10 - Regular P2P & Web-Hosting versus BitTorrent



For instance, when a large number of users attempt to download a large file through the use of regular file-sharing or web-hosting, should the source may exceed its uploading limit, it would eventually collapse. BitTorrent avoids this risk by sharing the bandwidth burden between the downloaders.

BitTorrent is popular for its legal uses, mainly the distribution of softwares[213]. Some use the software for infringing activities, but BitTorrent, apparently, has not been directly involved in a lawsuit, and it is open to doubt whether BitTorrent software providers would be liable for the infringements of their users[214]. BitTorrent appears to have substantial non-infringing use—there is no control over users' activities—and the consensus appears to be that Cohen has cautioned sufficiently users against using BitTorrent to infringe copyright in order to make it obvious how the actual intent is not

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are estimated to be 35% of the entire internet traffic, more than all the other file-sharing networks combined. www.chachelogic.com. [15/08/2010].

[212] Silver–Young [2006], *Warner Bros movies to feature on BitTorrent*, 17(7) Ent.L.Rev. 189-195, 191.

[213] For instance, GNU/Linux distributions, large film trailers. Warner Bros' video, for instance, use BitTorrent for movie distribution. Silver–Young [2006], *op.cit.*

[214] Giblin-Chen [2005], *Rewinding Sony: an inducement theory of secondary liability*, 27(11) E.I.P.R. 428-436; Ganley, P. [2006], *Surviving Grokster: innovation and the future of peer-to-peer*, 28(1) E.I.P.R. 15-25.

to promote or authorise copyright infringements[215]. However, local tests for liability will be considered in Chapter Three. As of today, the entertainment industries are left to prosecute the weakest links: users, tracker providers, and websites hosting .torrent files.

BitTorrent does not offer its users anonymity. The software generally assigns to a tracker[216] the job to identify which users have a copy of a requested file, and to accordingly ensure users upload and download such in the most efficient way possible. By accessing the tracker, it is possible to obtain the IP addresses of all users connected to it. In 2005, a BitTorrent user was convicted in Hong Kong for uploading three films' .torrent files to a newsgroup. He appealed on the grounds that no copies were made within the meaning of §118(1)(f) of the Hong Kong Copyright Ordinance (Cap 528), and that no distribution of copies took place[217]. Both defences were rejected.

Importantly, BitTorrent does not offer facilities to search files: users need to find the .torrent files by other means, i.e. from the numerous websites which host them. These websites have consequently become a vulnerable target of lawsuits, since most of the time they offer both an index and a tracker[218]. The position of these websites is increasingly precarious. For instance, in 2004, Supernova was discontinued under the threat of litigation[219]; LokiTorrent shortly followed, and the website was changed to display a message (Figure 11 below) intended to intimidate users. In 2005, the FBI in the US shut down elitetorrents.org[220]. In 2008, the provider of OiNK.cd was arrested and charged with conspiracy to defraud in the UK, but was later acquitted of all charges[221]. In 2009, Pirate Bay was at the centre of a criminal case in Sweden. The court held the defendants of being accessories to a crime against author's right law[222]. Nevertheless, the Pirate Bay's website and tracker are still online[223].

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[215] Giblin-Chen [2005], *op.cit.* 434; Ganley, P. [2006], *op.cit.* 18; Baggs, S. [2005], *The UK view - how the Supreme Court ruling in Grokster will affect the approach taken to authorisation cases in the UK*, 153 Copyright World, 20-24. In *Grokster*, the court described actual intent as '*purposeful, culpable expression and conduct*'. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 125 S.Ct 2764, 2780.

[216] Para 2.2.1.3.

[217] *Chan Nai Ming v. HKSAR*, Court of Final Appeal, HK S.P.R. Facc no.3 of 2007, [2007] 3 H.K.C. 255.

[218] A BitTorrent index is a list of .torrent files available and must be differentiated from a tracker since the latter merely coordinate communication between peers.

[219] www.theregister.co.uk/2004/12/14/finnish_police_raid_bittorrent_site. [15/08/2010].

[220] In collaboration with the Immigration and Customs Enforcement. Apparently, one of the reasons of this enforcement action was the website's early release of Star Wars Episode III: Revenge of the Sith.

[221] *R. v Ellis (Alan)*, unreported 15 January 2010, Crown Ct (Teesside).

[222] '*Pirate Bay*', Verdict B 13301-06, 17 April 2009, Stockholm District Court, Division 5, Unit 52. The case is now under appeal.

[223] However, users are quickly moving towards open-source trackers, such as OpenBitTorrent and PublicBitTorrent. torrentfreak.com/openbittorrent-tracker-muscles-in-on-the-old-pirate-bay-090705; torrentfreak.com/publicbt-tracker-set-to-patch-bittorrents-achilles-heel-090712. [15/08/2010].

Figure 11 - '*You can click but you can't hide*'[224]

Technical solutions to the anonymity and .torrent file-hosting liability problems have been implemented already and will be discussed in the following; however, these are limited examples. The BitTorrent technology is so efficient that the entertainment industries themselves favour it to distribute content[225].

2.2.2.9 – WASTE, OneSwarm, Tor & Torrent Privacy. - WASTE[226] is a 'virtual private' or 'friend-to-friend' file-sharing software, which creates a network between groups of trusted users and encrypts the files shared[227]. Users' activity cannot be easily monitored; therefore, the likelihood of case law over this software is, at present, improbable.

OneSwarm is a file-sharing software expressly designed to 'resist' the monitoring of those sharing files[228]. The software creates a cryptographic key, which encrypts the user's IP address[229] and, as opposed to transmitting data from the sender to receiver, it transmits data through a number of intermediaries, thereby obscuring the identities of both the sender and receiver, thus creating something similar to a friend-to-friend sharing network, but more secure. However, OneSwarm only preserves user privacy when sharing files using the friend-to-friend network provided.

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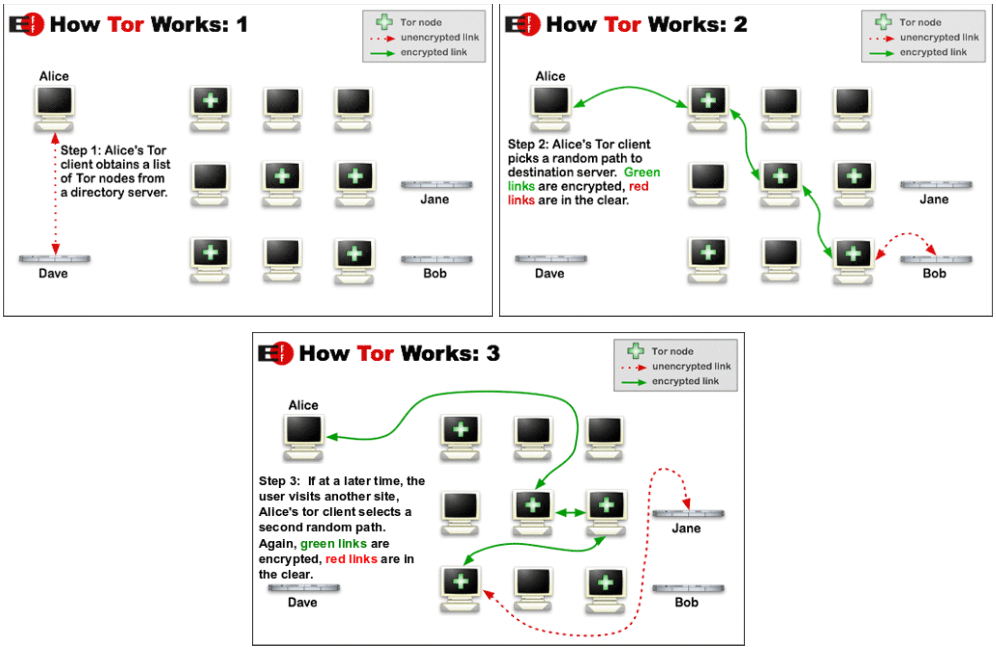
[224] Figure from the campaign '*Respect Copyrights*'.
[225] Osborne, D. [2008], *User-generated content: trade mark and copyright infringement issues*, 3(9) J.I.P.L.&P. 555-562, 557.
[226] WASTE is an acronym for 'We Await Silent Tristero's Empire', a reference to T. Pynchon's novel *The Crying of Lot 49*. It was developed by J. Frankel at Nullsoft in 2003, and it is currently being further developed by SourceForge. www.sourceforge.com. [15/08/2010].
[227] Users sharing their RSA public keys and connecting to the ring can form a 'WASTE ring'. WASTE randomly generates private and public keys. Once connected to the ring, the user can see everyone's virtual ID (nicknames and public key hashes) in the ring. www.sourceforge.com. [15/08/2010].
[228] oneswarm.cs.washington.edu/index.html. [15/08/2010].
[229] Isdal, T. *et al.* [2009], *Friend-to-friend data sharing with OneSwarm*. oneswarm.cs.washington.edu/f2f_tr.pdf. [15/08/2010].

Tor is an anonymous communication service, which can be used to share files. It protects the identities of users and hosting services running and maintaining the trackers, concealing the IP addresses[230]. The technology has been nicknamed 'Onion Routing'[231]. The aim is to reduce the risks of traffic monitoring by distributing transactions over several 'places' on the internet, so that no single point can link the user to a destination. The system uses alternatively encrypted and clear random paths in order to maximise secrecy, as shown by Figure 12 below.

Figure 12 - Tor[232]



In particular, for file-sharing through BitTorrent, there are already softwares which configure automatically themselves, such as Torrent Privacy[233]. Upon installation, this software creates secure connections (tunnels) to most of the world trackers, encrypting all traffic. The tracker will therefore register TorrentPrivacy IP address instead of that of the user[234]. As a result, users' IP addresses are kept hidden.

'*Nothing is hidden except for the purpose of having it revealed*'[235].

However, 'revelation' in this context may be cost-inefficient as it will be discussed in Chapter Five.

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[230] Dingledine, R. *et al.* [2009], *Tor: the second-generation Onion router*, git.torproject.org/checkout/tor/master/doc/design-paper/tor-design.pdf. [15/08/2010].
[231] It was originally developed by the US Navy to protect government communications. www.torproject.org /torusers.html.en. [15/08/2010].
[232] Figure from www.torproject.org/overview.html.en#thesolution. [15/08/2010].
[233] https://torrentprivacy.com. [15/08/2010].
[234] The company is based in the Russia; the servers are in US, Canada and the Netherlands. They do not save logs of the connection. https://torrentprivacy.com/index.php?mod =how_it_works. [15/08/2010].
[235] Mark 4:22, International Standard Translation 2008.

2.3 - Web 2.0

> '*Web 2.0 is a trend in the use of World Wide Web technology and web design that aims to facilitate creativity, information sharing, and collaboration among users*'[236].

The development of such facilities has greatly increased the sharing of contents, uploading them to websites, aggregating them into reference websites, and creating virtual worlds comprising individual contributions[237]. Web 2.0 creates copyright issues which are not easily solved[238]. In particular, notwithstanding Web 2.0 service providers usually obtain warranties and indemnities from users[239], it is arguable whether or not they fall in the definition of 'information society service providers'[240], and are therefore entitled to the safe harbour provisions. Their legal position varies depending on the services provided, on the *modus operandi*, and on the jurisdiction, as will be discussed in the following and in Chapter Three. For instance, in France and the US, Google was held to merely host infringing videos and was entitled to enjoy protection from liability since the content was expeditiously removed[241]. In contrast, however, in Italy, Google has not been accorded the same privilege in relation to hosting offensive video due to privacy and data protection[242]. Importantly, there are three aspects of Web 2.0, which deserve to be analysed separately:

1. semantic web: the use of software to analyse and index the web content;
2. user-generated content: wikis (Wikipedia); content-sharing sites (YouTube); social-networks (Facebook);

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[236] O'Reilly, T. [2005], *What is Web 2.0. Design patterns and business models for the next generation of softwares.* www.oreillynet.com/lpt/a/6228. [15/08/2010]. These concepts have led to the development and evolution of web-based communities and hosted services, such as social-networking sites, wikis, and blogs. OECD [2007], *Participative Web and user-generated content: Web 2.0, Wikis and social networking*, 29. The term gained popularity after the Media Web 2.0 conference in 2004. Graham, P. [2005], *Web 2.0*, www.paulgraham.com/web20.html. [15/08/2010].

[237] Web 2.0 has numerous definitions, but according to O'Reilly: '*Web 2.0 is the business revolution in the computer industry caused by the move to the internet as platform, and an attempt to understand the rules for success on that new platform*'. O'Reilly, T. [2006], *Web 2.0 compact definition: trying again*. http://radar.oreilly.com/archives/2006/12/web_20_compact.html. However, some experts argue the term is meaningless. Anderson, N. [2006], *Tim Berners-Lee on Web 2.0: 'nobody even knows what it means'.* http://arstechnica.com/news.ars/post/20060901-7650.html. [15/08/2010].

[238] Even if not the focus of this work, it is worth mentioning here the problems in defining authorship, determine moral and economic right infringements, licensing, and applying limitations and exceptions. Web 2.0 activities have real world effects on users and on third parties, but the scenario is still unclear and questions arise about which laws apply to Web 2.0, and whether new laws are needed.

[239] Para. 3.4.5.

[240] Article 2(b) E-Commerce Directive.

[241] *Zadig Production v. Google Inc.* Paris District Court 19 October 2007; *Flach Film v. Google France and Google Inc.* Paris Commercial Court 20 February 2008. *Viacom International Inc. v. YouTube Inc.*, 07-Civ-2103 (SDNY 23 June 2010-LLS).

[242] *Vivi Down v. Google*, Court of Milan, 1972/2010, 24 February 2010. Google executives have been sentenced for defamation and violation of privacy for hosting a video showing an boy being abused. http://speciali.espresso.repubblica.it/pdf/Motivazioni_sentenza_Google.pdf. [15/08/2010].

3. virtual worlds (Second Life, World of Warcraft).

2.3.1 - Semantic Web

The semantic web makes it possible to gather and index online content automatically in order to satisfy requests from users. The most common semantic web applications are the search engines' 'crawlers' which provide a compilation of reference items concerning a particular subject matter, giving the links to the corresponding webpage[243]. In the Belgian case of *Copiepresse v. Google*[244], Google's crawlers made copies of article titles and brief extracts from news items made them available on the internet by the members of Copiepresse, without permission, in order to feed the Google News site, with consequent reproduction and communication of such material to the public. The court held that Google had breached the author's right law, rejecting Google's defences based on freedom of expression[245], citation exception[246], and news reporting[247]. Furthermore, in Germany, a court held that, because of the way in which the internet works, there is a general implied licence to link to legitimate content placed on the internet, unless this activity is explicitly revoked or prevented by technological measures[248]. In China, Yahoo! China's search engine, has been held liable for not filtering out links to infringing materials[249].

2.3.2 - User-Generated Content (UGC)

The term 'UGC' includes various forms of works created and/or uploaded by users[250]. There is no common agreed upon definition[251], but UGC has been categorised by the content provided (Figure 13).

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[243] The most used of this web searching engines is without doubt Google search, which receives about a billion queries each day through its various services, according to www.compete.com. [15/08/2010].
[244] TFI Brussels, 13 February 2007. www.copiepresse.be/copiepresse_google.pdf. [15/08/2010].
[245] With regard to the claim that Article 10 of the European Convention on Human Rights legitimates Google News, the Court held that freedom of expression may be limited by author's right and does not hinder the protection of originality by which the author expresses his ideas and concepts. *Ibid.*
[246] Conditions not fulfilled (analysis, comparison or criticism being necessary). *Ibid.*
[247] Conditions not fulfilled (presentation, comment and accessory nature of report being absent). Moreover, Google infringed the moral right of the authors of the respective articles, failing to attribute the names and modifying the works. *Ibid*. The decision is under appeal. www.copiepresse.be, and http://ipkitten.blogspot.com. [15/08/2010].
[248] *Verlagruppe Holtzbrick v. Paperboy*, German Federal Court of Justice, 18 June 2003. Osborne D. [2008], *op.cit.* 561.
[249] *IFPI v. Yahoo! China*, Beijing No.2 Intermediate people's Court, 10 April 2007.
[250] Akester, P. [2008], *A practical guide to copyright*, Sweet & Maxwell, Para. 4-170.
[251] OECD [2007], *op.cit.* 17. However, Wikipedia refer to it as: '*various content, publicly available, uploaded by users usually to websites*'. en.wikipedia.org/wiki/user-generated_content. [15/08/2010].

Figure 13 - Types of User-Generated Content[252]

Type of Content	Description	Examples
Text, novel and poetry	Original writings or expanding on other texts, novels, poems	Fanfiction.net, Quizilla.com, Writely
Photo/Images	Digital photographs taken by users and posted online; Photos or images created or modified by users	Photos posted on sites such as Ofoto and Flickr; Photo blogging; Remixed images
Music and Audio	Recording and/or editing one's own audio content and publishing, syndicating, and/or distributing it in digital format	Audio mash-ups, remixes, home-recorded music on bands websites or MySpace pages, Podcasting.
Video and Film	Recording and/or editing video content and posting it. Includes remixes of existing content, homemade content, and a combination of the two.	Movie trailer remixes; Lip synching videos; Video blogs and videocasting; Posting home videos; Hosting sites include YouTube and Google Video; Current TV
Citizen journalism	Journalistic reporting on current events done by ordinary citizens. Such citizens write news stories, blog posts, and take photos or videos of current events and post them online.	Sites such as OhmyNews, GlobalVoices and NowPublic; Photos and videos of newsworthy events; Blog posts reporting from the site of an event; Cooperative efforts such as CNN Exchange
Educational content	Content created in schools, universities, or with the purpose of educational use	Syllabus-sharing sites such as H20; Wikibooks, MIT's OpenCourseWare
Mobile content	Content that is created on mobile phones or other wireless devices such as text messaging, photos and videos. Generally sent to other users via MMS (Media Messaging Service), emailed, or uploaded to the Internet.	Videos and photos of public events, environments such as natural catastrophes that the traditional media may not be able to access; Text messages used for political organising.
Virtual content	Content created within the context of an online virtual environment or integrated into it. Some virtual worlds allow content to be sold. User-created games are also on the rise.	Variety of virtual goods that can be developed and sold on Second Life including clothes, houses, artwork

A significant amount of UGC is uploaded on hosting and storing services, which provides an online space where users can access content. These services have been categorised by the type of platform (Figure 14).

Figure 14 - Platforms for User- Generated Content[253]

Type of Platform	Description	Examples
Blogs	Web pages containing user-created entries updated at regular intervals and/or user-submitted content that was investigated outside of traditional media	Popular blogs such as BoingBoing and Engadget; Blogs on sites such as LiveJournal; MSN Spaces; CyWorld; Skyblog
Wikis and Other Text-Based Collaboration Formats	A wiki is a website that allows users to add, remove, or otherwise edit and change content collectively. Other sites allow users to log in and cooperate on the editing of particular documents.	Wikipedia; Sites providing wikis such as PBWiki, JotSpot, SocialText; Writing collaboration sites such as Writely
Sites allowing feedback on written works	Sites which allow writers and readers with a place to post and read stories, review stories and to communicate with other authors and readers through forums and chat rooms	FanFiction.Net
Group-based aggregation	Collecting links of online content and rating, tagging, and otherwise aggregating them collaboratively	Sites where users contribute links and rate them such as Digg; Sites where users post tagged bookmarks such as del.icio.us
Podcasting	A podcast is a multimedia file distributed over the Internet using syndication feeds, for playback on mobile devices and personal computers	iTunes, FeedBruner, iPodderX, WinAmp, @Podder
Social Network Sites	Sites allowing the creation of personal profiles	MySpace, Facebook, Friendster, Bebo, Orkut, Cyworld
Virtual Worlds	Online virtual environment.	Second Life, Active Worlds, Entropia Universe, and Dotsoul Cyberpark
Content or Filesharing sites	Legitimate sites that help share content between users and artists	Digital Media Project

[252] Figure from OECD [2007], *op.cit.* 32.
[253] *Ibid.*, 33.

There are a number of copyright issues relating to UGC[254], and so it is therefore deemed necessary to distinguish between:

- works created by users,
- mash-ups (i.e. works recombining and modifying existing works, which might be copyright protected), and
- unauthorised protected works.

Notably, this work will focus on 'unauthorised protected works'—i.e. the scenario in which the uploader is not the author or who otherwise lacks the necessary authorisation to upload. Chapter Three will focus on the potential liabilities of users and service/platform providers. Whether user-generated content platforms enjoy the so-called 'safe-harbour' exceptions is an on-going question[255] which will later be addressed[256].

2.3.2.1 – Wikis. - A well-known example is Wikipedia, an online encyclopaedia which allows users to access, amend, and collectively contribute to, content[257]. The position of wikis as a merely hosting service has been successfully used as a defence in court[258]. However, in August, 2009, the National Portrait Gallery in London sued Wikipedia because a user had uploaded images from the gallery's collection website without permission[259]. The dispute has not yet been resolved.

2.3.2.2 - Content-Sharing Sites. - Generally, such sites allow users to upload content, and to provide storage and other facilities. The most popular example is YouTube, a video sharing-site[260]. The terms of service states that:

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[254] Some of which go beyond the scope of this work. For instance, issues regarding authorship and ownership, orphan works, intellectual property provisions in the term of services of user-generated content's platforms and websites, *etc*.

[255] Sterling, J.A.L. [2008], *op.cit.* Para. 13.49. Akester, P. [2008], *op.cit.* Para. 4-169–4-189.

[256] Para 3.4.3.

[257] Its name comes from *wiki* (Hawaiian word for 'quick') and *encyclopedia*. It is the most popular general reference work currently available, notwithstanding its creators (J. Wales and L. Sanger) 'makes no guarantee of validity' of its content. en.wikipedia.org/wiki/Wikipedia:General_disclaimer. Kittur, A. [2008], *Power of the few vs. wisdom of the crowd: Wikipedia and the rise of the bourgeoisie*, www.viktoria.se/altchi/submissions/submission_edchi_1.pdf. Wales, J. [2005], *Wikipedia is an encyclopaedia*. lists.wikimedia.org/pipermail/wikipedia-l/2005-March/020469.html. All texts are covered by GNU Free Documentation License. http://en.wikipedia.org/wiki/Wikipedia:Copyrights. [15/08/2010].

[258] *Barbara Bauer et al. v. Jenna Glatzer, et al.*, L-1169-07 (SCNJ 2007).

[259] www.openrightsgroup.org/blog/2009/national-portrait-gallery-vs-wikipedia. [15/08/2010].

[260] These sites generally allow users to upload video clips. The video host will then store the video on its server, and allow others to view this video. It has been reported that in January 2008, 79 million users accessed 3 billion YouTube videos. Yen, Y.W. [2008], *YouTube looks for the money clip*.

'*Users may upload videos only with permission of the copyright holder and people depicted in the videos*'[261].

Users may only access videos—downloading or copying is not permitted. Google constantly attempts to legitimise its content through licensing[262] and filtering; However, in the US, Viacom and the FA Premier League filed two separate lawsuits against YouTube and Google in the respect of copyright infringement for content uploaded by users—in particular, for inducing copyright infringement[263]. YouTube is not an isolated project; hundreds of similar sites are easily accessible. The phenomenon is so spread out and difficult to police that a group of entertainment industries and content-sharing sites' providers[264] set-up some 'principles' so as to reduce infringements[265].

However, various websites, such as Megavideo or YouKu, are popular for hosting thousands of films—allegedly without authorisation—which shield themselves thanks to a complex system of linking though linking sites, such as Surfthechannel or Project Free-TV. This complex system of linking renders the search of protected content on the hosting-site increasingly more expensive for the copyright owners. Films are often divided into smaller sections of 15-30 minutes each, and registered under non-recognisable tags. Consequently, even knowing that the server hosts the film, the retrieval of such is complex[266]. Importantly, link providers facilitate this task by posting the list of the links to access the desired content[267]. The disclaimer commonly adopted summarises the position of the linking site:

'The author is not responsible for any contents linked or referred to from his/her pages. […]. *X.com does not host any content. All X.com does, is linking to content that was uploaded to popular online video hosting sites.* […] *By clicking on any links to videos while surfing on X.com you leave X.com.* […] *X.com cannot take the responsibility for any content hosted on other sites*'[268].

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http://techland.blogs.fortune.cnn.com/2008/03/25/youtube-looks-for-the-money-clip. Curiously, it has been calculated that YouTube consumed in 2007 as much bandwidth as the entire internet in 2000. www.telegraph.co.uk/news/main.jhtml?xml=/news/2008/04/07/nweb107.xml. [15/08/2010].

[261] www.youtube.com/t/terms. [15/08/2010].

[262] For instance, the deals with MCPS-PRS Alliance. Osborne, D. [2008], *op.cit.* 556.

[263] *Viacom International Inc. v. YouTube Inc.*, 07-Civ-2103, and *The Football Association Premier League v. YouTube Inc.*, 07-Civ-582 (SDNY 23 June 2010). For a comment on *The Football Association Premier League v. YouTube Inc.*, US Federal Court, 7 July 2009, *see* Peilow, G.A. [2009], *Cold shoulder for the Berne Convention*, 194 Copyright World, 16-17.

[264] Including CBS, Disney, Fox, Microsoft, and MySpace. Osborne, D. [2008], *op.cit.* 556.

[265] Generally, they agreed that if the site adheres to the principles with good faith, the industry would not assert a claim. *Ibid.*

[266] The film 'The Goodfellas' could be hosted as 'tGf0A1', 'tGf0A2', 'tGf0A3', 'tGf0A4'.

[267] Searching 'The Goodfellas' would result in 4 links, 'Part 1', 'Part 2', 'Part 3', and 'Part 4' respectively linking to 'tGf0A1', 'tGf0A2', 'tGf0A3', and 'tGf0A4'.

[268] For instance, www11.alluc.org/alluc/imprint.html. [15/08/2010].

This 'lack of responsibility' of the link provider has not been recognised by courts worldwide[269], as will be discussed in Chapter Three.

2.3.2.3 - Social-Networks. - Social networking sites allow users to create a personal page where they can post content, as well as send other users messages, and write or post content on other users' pages. The issue is that this content may be protected and that, owing to social interaction, an unauthorised copy posted immediately creates an infinitive number of unauthorised reproductions. The most popular social networking sites include Facebook and MySpace. Facebook[270] has been involved in a number of controversies due to the concerns relating to surveillance, data mining[271], and the site's privacy agreement[272]. Finally, and most importantly for the objective of this study, is the ability to post and share any kind of content, which raises a number of copyright concerns. MySpace offers services similar to those of Facebook, but also provides dedicated facilities for musicians where they can upload content[273]. Universal Music has sued MySpace in the US for videos posted by its users, claiming MySpace encourages, facilitates and participates in the infringements carried out by its users[274]. The decision of this suit is still pending. Finally, Flickr should also be mentioned, which is the most popular photo management and sharing website[275].

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[269] Australia: *Universal Music Australia Pty Ltd. v. Cooper* [2005] FCA 972; [2006] FCAFC 187. Belgium: *IFPI Belgium v. Beckers* Court of First Instance, Antwerp, 21 and 24 June, 21 December 1999, [2000] ECDR 440; Court of Appeal, First Chamber, Antwerp 26 June 2001. China: *Sony v. Yuebo*, Beijing No.1 Intermediate People's Court 2004/428, 23 April 2004; Appeal: Beijing Higher People's Court 2004/714, 12 December 2005. *Go East v. Yuebo*, Beijing No.1 Intermediate People's Court, 2004/400, 23 April 2004; Beijing Higher People's Court, 2004/713, 2 December 2004. Denmark: *KODA, NCB, Dansk Artist Forbund and IFPI Danmark v. Anders Lauritzen and Jimmy Egebjerg* Vestre Landset (Western High Court), 20 April 2001, [2002] ECDR 25. France: *Lafesse v. Myspace* TGI Paris, 22 June 2007, interlocutory injunction. *Nord-Ouest Productions v. DailyMotion* TGI Paris, 13 July 2007. Text available at www.gazettedunet.fr). *Zadig Productions v. Google Vidéo* TGI Paris, 19 October 2007. www.gazettedunet.fr. Germany: '*MP3 Links*' *Landgericht* (District Court) Berlin, 14 June 2005, [2005] ZUM-RD 398. Netherlands: *Stichting Bescherming Rechten Entertainment Industrie Nederland (BREIN) v. Techno Design 'Internet Programming' B.V.* Court of Appeal, Amsterdam, Fifth Division for Civil Matters, 15 June 2006, [2006] ECDR 21. Norway: *TONO and others v. Bruvik* Supreme Court, 27 January 2005, [2006] IIC 120. Sterling, J.A.L. [2009], *op.cit.* UK: *TV-Links*, http://torrentfreak.com/tv-links-triumphs- with-landmark-e-commerce-directive-ruling-100212. [15/08/2010].

[270] The website, created by M. Zukerberg, has more than 250 million users. www.facebook.com/press/info.php?statistics. [15/08/2010].

[271] Data mining is a technique to gather information. For instance, one could search through FaceBook's data to determine its users' preferences.

[272] www.facebook.com/policy.php. [15/08/2010].

[273] www.myspace.com. [15/08/2010].

[274] *UMG Recordings et al. v. MySpace Inc.* No. 06-cv-07361.

[275] www.flickr.com. [15/08/2010].

2.3.3 - Virtual Worlds

Virtual Worlds—or, more appropriately termed 'networked virtual environments'[276]—are computer-based simulations inhabited by avatars, i.e. textual, two-or three-dimensional graphical representations, by which users can interact with each other[277]. Users access a computer-simulated world that they can manipulate and model, thereby experiencing a type of virtual-life[278]. Virtual worlds incorporate and rely upon individual contributions[279], which may be protected by copyright, related rights or, in the EU, by the database *sui generis* right[280]. The legal issues posed by virtual worlds are numerous[281]. In particular, the issues associated with copyright law include determining authorship, publication, infringement, limitation, exceptions, defences, and applicable law[282]. The contents uploaded to a virtual world can be infringing; thus, virtual world providers tend to shield themselves from liability with clauses in the end-user license agreements and terms of service, such as the following:

> '*you agree that you shall not take any action or upload, post, e-mail or otherwise transmit Content that infringes or violates any third party rights*'[283]; and *'Copyright-infringing materials found within the world of Second Life can be identified and removed via Linden Lab's DMCA compliance process listed at http://secondlife.com/corporate/dmca.php, and you agree to comply with such process in the event you are involved in any claim of copyright infringement to which the DMCA may be applicable*'[284].

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[276] Duranske, B.T. [2008], *Virtual Law*, ABA, 4.

[277] Popular ones are Second Life, World of Warcraft and Ultima Online, respectively 14, 11 and 3 millions users. www.secondlife.com, www.worldofwarcraft.com, www.ultimaonline.com. [15/08/2010].

[278] Such worlds may mimic the real world or depict fantasy worlds. Many are videogames, generally defined 'massively multiplayer online games', but not all, for instance: www.seriousgaming.com. [15/08/2010].

[279] Including characters ('avatars'), places (plots of land) objects (houses, vehicles, shops, merchandise, clothing, sounds, images, films, cartoons, machinimas). Machinima is a form of filmmaking using videogame technology to shoot films in the virtual reality.

[280] Examples of protectable items could be: the platform's software, the website, particular items, texts created by the system provider or by the users; website showing the virtual world presentations; rights in software provider's databases; rights in avatars created by users; rights in user's original depictions of places, objects and other virtual items; rights in user's original texts and music, still and moving images, and sound recordings; rights in material contributed by users. Sterling [2008], *op.cit.* 6.23.

[281] Immediate questions arise considering they are powerful tools for e-commerce activities. Consumer's right and e-commerce rules are confusing when it comes to virtual worlds.

[282] *Eros LLC v. Robert Leatherwood and John 1-10 Does*, No. 08-cv-01158, Florida Middle District Court, 3 July 2007; *BlackSnow Interactive v. Mythic Entertainment Inc*, No. 02-cv-00112 (C.D. Cal. 2002); *Antonio Hernandez v. IGE US LLC*, Florida case No. 07-21403-Civ-Court/Snow; *Micro Star v. Formgen Inc.* 154 F.3d 1107 (9th Cir. 1998); *Li Hongchen v. Beijing Arctic Ice Technology Development Co. Ltd.*, Beijing Chaoyang District People's Court, 19 December 2003; *Bragg v. Linden Research Inc. and Philip Rosedale*, Case 2:06-cv-04925; *Blizzard Entertainment Inc. and Vivendi Games Inc. v. Michael Donnelly*, Case 2:06-cv-02555.

[283] Second Life ToS, article 4.1.

[284] *Ibid.* article 4.3.

2.4 - Future Synergies

It is difficult to predict the evolution of shared networking technologies; however, various new threats to copyright can already be addressed. For instance, with the advent of 3G mobile technology[285], users can share content between mobile phones through the internet, Bluetooth or infrared technology. Software providers are developing applications designed for facilitating this task. A mobile phone's application that should to be mentioned is BarTor[286]. The application allows users to scan product barcodes with a phone's camera, and then connect to the internet, which then makes it possible to retrieve information about the scanned product, to search for cheaper prices—or to search a .torrent file of the product and instruct the BitTorrent client on a previously programmed computer to download the related file. With this in mind, a user could theoretically visit a shop, scan the barcodes of favourite products, and start downloading the desired files.

2.4.1 – Broadband

> '*The development of broadband has indeed transformed the internet into a vast network where one can exchange protected works, reduced to simple computer files, from one computer to another with the greatest of ease. However, as internet users began to unlock its potential, the negative effects attached to such potential also became apparent*'[287].

It is difficult to quantify the impact of broadband on the copyright market in consideration of the global scale[288]. Ten years ago, to download a complete CD (70 Mb) was technically impossible whilst today, owing to high-speed internet access[289], entire DVDs (5Gb) can be obtained within few minutes. The internet traffic worldwide in

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[285] Third Generation International Mobile Telecommunications allows wireless voice and video communications, internet access, and mobile TV.

[286] A software released in 2009. http://androidandme.com/2009/03/news/bartor-10. [15/08/2010]. As today is only available on Android, the Google's GNU/Linux-based mobile phone.

[287] Bernault-Lebois [2005], *Peer-to-peer file-sharing and literary and artistic property*, 4/68, www.privatkopie.net/files/Feasibility-Study-p2p-acs_Nantes.pdf. [15/08/2010].

[288] SABIP [2009], *Copycats? Digital consumers in the online age*, www.sabip.org.uk/sabip-ciberreport. pdf. Final Report, SABIP [2010], *Consumer attitudes & behaviour in the digital age*, www.sabip.org.uk/ home/research/research-digitalage.htm. [15/08/2010]. However, the relationship between the increase of copyright infringements and broadband diffusion appears obvious to some commentators. Gillen, M. [2006], *File-sharing and individual civil liability in the United Kingdom: a question of substantial abuse*, Ent.L.Rev. 7-14, 8. Hansell, S. [2006], *At last, movies to keep arrive on the internet*, New York Times, 3 April. www.nytimes.com. [15/08/2010].

[289] Typically contrasted with dial-up access over modems which are generally only capable of a maximum bit rate of 56 Kb per second and require the full use of a telephone line, whereas broadband technologies supply up to 50 Mb per second without disrupting telephone use.

2006 was approximately five terabytes[290] per second[291], but now continues to grow due to ever-improving broadband connections, lower prices of such services, and wider availability[292]. The importance of a global access to the internet has been recently emphasised at the World Summit for the Information Society 2010[293], which established the ITU-UNESCO Broadband Commission[294], aiming at granting global access to the internet by 2015[295]. The US government recently published '*Connecting America: the national broadband plan*'[296], defining broadband as the '*the great infrastructure challenge of the early 21st century*'[297]. A number of issues beyond the scope of this work are associated to the expansion of broadband[298]. Nevertheless, it is submitted that the future of broadband and, in general, access to the internet, is linked to the solution to problems discussed in this thesis. Copyright law and, in particular, enforcement or alternative systems, play a fundamental role in determining the future of networking technologies.

2.4.2 - Cloud Computing

The idea behind cloud computing is simple: running software applications and storing data on someone else's computer and access them through the internet[299]. Web-based e-mails, social-networking sites, and virtual worlds are just a handful of examples; soon, everything will be accessible with a web-browser or smart-phone. Much computing and storing will no longer be on personal computers, but in the 'cloud'—i.e. online. Everything will be stored on data centres hosting hundreds of servers in different

[290] A 'terabyte' is equal to 1.099.511.627.776 bytes.
[291] Telegeography's World Broadband Report (2006). www.telegeography.com. [15/08/2010].
[292] BPI [2005], *Online music piracy: the UK record industry's response*, 10-11.
[293] WSIS Forum 2010. www.itu.int/wsis/implementation/2010/forum/geneva. [15/08/2010].
[294] www.broadbandcommission.org/index.html. [15/08/2010].
[295] www.ip-watch.org/weblog/2010/05/10/itu-unesco-broadband-commission-aims-at-global-internet. [15/08/2010]
[296] www.broadband.gov/download-plan. [15/08/2010].
[297] *Ibid*. Executive Summary. download.broadband.gov/plan/national-broadband-plan-executive-summary .pdf. [15/08/2010].
[298] For instance censorship ('*internet censorship and surveillance are growing global phenomena'*. opennet.net) and net-neutrality ('*Today the internet is an information highway where anybody – no matter how large or small, how traditional or unconventional – has equal access. But the phone and cable monopolies, who control almost all Internet access, want the power to choose who gets access to high-speed lanes and whose content gets seen first and fastest. They want to build a two-tiered system and block the on-ramps for those who can't pay*'. www.google.com/help/netneutrality_letter.html. Lately Google changed its approach to the issue. googlepublicpolicy.blogspot.com; www.savetheinternet.com). Also Hindley-Makiyama [2009], *Protectionism online: internet censorship and international trade law*, ECIPE Working Papers 12/2009, www.ecipe.org/publications/ecipe-working-papers/protectionism-online-internet-censorship-and-international-trade-law/PDF. [15/08/2010].
[299] The definition of cloud computing and the analysis of the related issues are beyond the scope of this work. Generally, *see* Katz, A. [2010], *The cloud and the law*, 196 Copyright World, 24-26.

countries. Most of the transmissions will be encrypted. The consequences for copyright cannot be easily assessed[300]; however, it appears clear that monitor infringements and enforced copyright will continue to become increasingly complex[301].

2.5 - Conclusion

Chapter One highlighted the fact that the movable type printing press, the photocopying machine, the piano roll, sound recording, the radio, the cassette and videocassette recorders, films and television, all appeared as technologies that would test the limits of copyright. However, the nexus between copyright and technologies has been without difficulties, despite concerns expressed by the entertainment industries. This Chapter has shown that networking technologies permit users to share huge quantities of data and are constantly evolving. File-sharing and Web 2.0 are not the first and will probably not be the last challenges to face copyright. However, the phenomenon started by Napster shows no signs of demise, with new programs and networks appearing almost every week. The ever-widening availability of broadband has made sharing technologies even more prevalent, since increasing download speeds means that the distribution of entire films and other large files is now possible. This modified the impact of networking technologies over the content industries. Until a few years ago, only the music industry saw itself threatened by file-sharing. Nowadays, as shown in this Chapter, owing to faster connections and improved compression, the film and software industries have been forced to face the problem as well.

Nevertheless, the advent of networking technologies questions more traditional copyright approaches, thereby creating problems that need to be analysed in the following Chapters. Chapter Three continues the investigative journey.

[300] Audiogalaxy offers already a cloud-based streaming service. www.audiogalaxy.com. [15/08/2010]. LimeWire will offer soon a cloud computing service. Para. 2.2.2.7.

[301] For instance, in the near future, someone could offer an open-source cloud-based BitTorrent file-sharing network. The sharing would be from cloud to cloud making HADOPI-like legislation pointless (Para 5.3.1). Users' access to the cloud would be encrypted and it would appear as a streaming transmission in case of monitoring. Enforcement would be extremely complex/costly, if not impossible.

Chapter Three

Contextualising Networking Technologies within Copyright Law

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Dura lex, sed lex[302]

3.1 – Introduction

Analogue technologies allow the management of copyright with some degree of certainty[303]. Today, works are often created digitally, and content is designed in such a way so as to be interactive and likely to be copied, manipulated and modified. This evolution in terms of human creativity and interactivity combined with the lack of clear policies and the massive growth of laws and cases, all contribute to making it arduous to decide borderline cases. The debate is still on going[304], and changes in copyright law, enforcement and international collaboration would probably be appropriate[305]. Nevertheless, in the networking technologies' context, the rights principally involved are economic rights of reproduction, the right of communication to the public, including making available, the right of distribution, and the moral rights of integrity and attribution. Notably, liability can arise in relation to committing, but also assisting, authorising, facilitating, inciting, or otherwise helping those acts[306]. The following actors are involved:

1. users: the uploader or sharer[307], and the downloader or accessor[308];
2. facilitators[309]: the software provider[310], and the intermediaries[311].

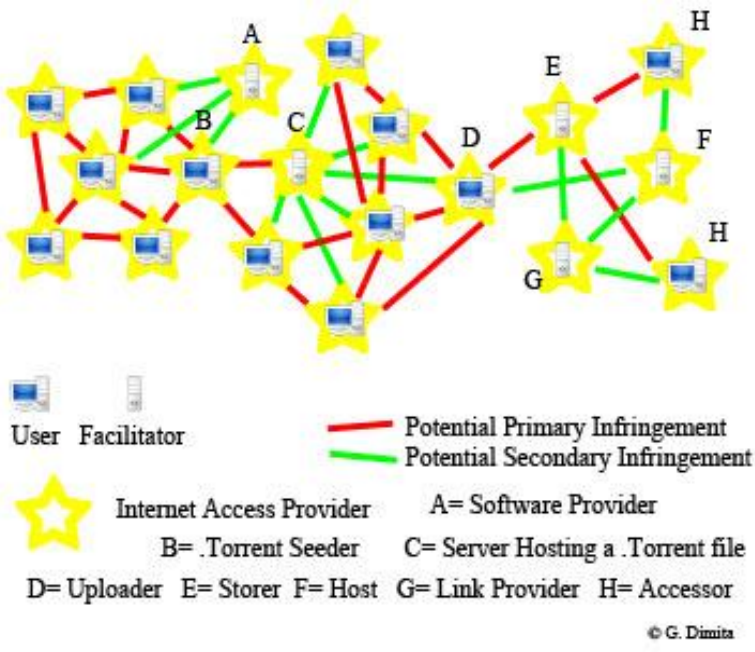
[302] Ulpian, E.D. [553], *Digestio*, 40,9,12,1. '*Even if valid law is bad law, we have some obligation to obey it simply because it is law'*. Feinberg, J. [1985], *Offense to others*, Oxford University Press.
[303] May–Sell [2006], *Intellectual property rights–A critical history*, Lienne Rienner Publisher.
[304] Larusson, H.K. [2009], *Uncertainty in the Scope of Copyright: the Case of Illegal File Sharing in the UK*, E.I.P.R. 3, 124-134. Nasir, C. [2005], *Taming the beast of file-sharing - legal and technological solutions to the problem of copyright infringement over the internet: Part 1 & 2*, 16(3) Ent.L.Rev. 50-55, 16(4) Ent.L.Rev. 60-68.
[305] Fitzgerald, B. [2008], *Copyright 2010: the future of copyright*, 30(2) E.I.P.R. 43-49.
[306] Sterling, J.A.L. [2008], *op.cit.* 13.28, 13A.01.
[307] The person uploading the material or allowing others to download it from his/her hard-drive.
[308] The person downloading the material online or accessing it.
[309] The term 'facilitators' refers to the entities providing the technology which permits or facilitate users' activities. The term includes file-sharing software providers and administrators, Web 2.0 platforms providers, internet access providers and the telephone cable companies.
[310] Para. 3.3.

The tables below describe these actors' potential infringements (Figure 15), and the complexity of the environment in which the analysis will be conducted (Figure 16).

Figure 15 - Actor's Potential Infringements

Act	Description	Actor	Potential Infringement
Ripping	The process of copying audio or video content to a hard disk	User	Primary - Reproduction
Sharing	The act of copying a file to a folder which is publicly available; or the act of uploading a file to a hosting website; or the act of creating and distributing a .torrent file over the internet.	User	A. Economic: Primary – Reproduction, Communication to the Public (Making Available); Distribution of copies (?); Secondary – Facilitating Reproduction, Communication B. Moral: Attribution; Integrity
Downloading	The act of downloading a file from a website, or another user's hard drive; or the act of accessing a file from a hosting website through streaming technology	User	Primary – Reproduction; Secondary – Facilitating all the above
Streaming	The act of transmitting in a continuous stream of data a work which is played as it arrives.	Facilitator	A. Economic: Primary – Reproduction, Communication to the Public (Making Available); Distribution of copies (?), Public Performance (?); Secondary – Facilitating Reproduction, Communication B. Moral: Attribution; Integrity
Facilitating	The act of providing software and other ancillary services that facilitate the above activities, or the act of providing a link to an infringing file or software and other ancillary services that facilitate the above activities	Facilitator	Primary – Authorising all the above; Secondary – Facilitating all the above

Figure 16 - Potential Primary and Secondary Infringements in a Network



[311] Para. 3.4.

This Chapter seeks to contextualise networking technologies within copyright law. It is meant to be more illustrative than exhaustive and it aims to demonstrate how various copyright rules and practices—mostly evolved in the world of physical artefacts—are not suitable in this environment. Furthermore, as the volume of traffic on networking technologies increase, questions arise as to which of the activities may be infringing copyright, and which of the actors involved should be liable and on which grounds. The analysis will focus on the rights of reproduction, communication to the public (including making available), and distribution. The remaining Chapters of this work will analyse possible technical and legislative solutions, including compensation systems.

3.1.1 – Moral Rights

In this work, the emphasis is placed on economic rights; however, the importance and application of moral rights in the context of online dissemination should also be briefly highlighted[312]. Sharing unauthorised protected works may infringe the moral rights of authors and performers—in particular, the right of attribution and integrity—by omission of relevant names, distortion, *etc*. of the work or performance[313]. In some jurisdictions, such as France, for example, the sharing of an unpublished work may infringe the moral right of dissemination[314].

3.1.2 - Reproduction Rights

Copyright traditionally deals with copying[315]. The 'exclusive right to reproduce the work in a material form'[316] is the oldest right granted to copyright owners,[317] and is

[312] Françon, A. [1999], *Protection of artist's moral rights on the internet*, in Pollaud-Dulain (ed.) [1999], *Perspectives on intellectual property: the internet and author's rights*, Sweet & Maxwell; Lea, G. [1999], *Moral Rights and the Internet: some thoughts from a Common Law Perspective*, in Pollaud-Dulain (ed.) [1999], *Perspectives on intellectual property: the internet and author's rights*, Sweet & Maxwell; Sprawson, R. [2006], *Moral rights in the 21st Century*, 17(2) Ent.L.Rev. 58-64.

[313] Article 6-*bis* of the Berne Convention; Article 5 of the WPPT, and applicable national laws.

[314] As mentioned in the introduction, the means of detection and prevention of infringement of moral rights in networking activities do not form part of the exposition, since this work focus on the economic rights. However, such infringement is of concern to authors and performers, as it will be mentioned in Para. 4.2.1.

[315] Under the UK Literary Copyright Act 1844, 'copy' was not defined. The term 'reproduce' was introduced in the Copyright Act 1911, but not defined. In the 1956 Act the terminology was retained. Only in the 1988 Act, the restricted act 'to copy' the work was defined as 'reproducing' the work in any material form. The term is also contained in Berne, Roma, TRIPs, Nafta and Cartagena, but without a definition. All national laws contain references to 'reproduction', but they seldom contain a definition of the term. For instance, Article L122-3 of the 1992 French Intellectual Property Code and §106 US Copyright Act. Article 14 of the Dutch Copyright Act, instead, refers to a right of multiplication.

[316] Commission of the European Communities [1995], *Green Paper- 'Copyright and related rights in the information society'*, Brussels, Com (95) 382 final, 49.

required by the Berne Convention[318], the WPPT[319], as well as the Copyright Directive[320] in the EU. In the world of physical artefacts, the use of a work does not involve reproduction, and making a copy requires explicit intent and carefully selected actions. With the advent of the computer, even routine access to information invariably involves making copies[321]. Nevertheless, apparently:

> *'The reproduction right* […] *fully applies in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of article 9 of the Berne Convention'*[322].

The international community failed to produce a more specific definition[323]; thus, a correct interpretation should be the key to resolving any ambiguities in the context of networking technologies. However:

> '*using old rules has the obvious disadvantage that the rules will not necessary fit the current situation very well*'[324].

For instance, various jurisdictions have determined difficulties in recognising infringements concerning works existing only in digital form[325].

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[317] The 1710 Statute of Anne first granted the right to print to books.
[318] Article 9(1).
[319] Articles 7 and 11.
[320] Article 2. Also Article 4(1)(a-b) Computer Program Directive, and Article 5(a) Database Directive. The ECJ has given a broad interpretation of Article 2 in *Infopaq International A/S v. Danske Dagblades Forening*, Case C-5/08, 16 July 2009. Cook, T. [2010], *EU intellectual property law*, Oxford University Press, 3.98-101.
[321] Ginsburg, J.C. [2000], *From having copies to experiencing works: the development of an access right in US copyright law*, in Hansen, H. ed. [2000], *US intellectual property: law and policy*, Sweet & Maxwell. '*Digitalization has radically changed the economics and easy of reproduction*'. Computer Science and Telecommunications Board, National Research Council [2000], *The digital dilemma: intellectual property in the information age*, National Academy Press, Washington D.C., 3.
[322] WIPO Agreed Statement, 20 December 1996.
[323] Clark, R. [2009], *Sharing out online liability: sharing files, sharing risks and targeting ISP*, in Strowel, A. [2009], *Peer-to-peer file-sharing and secondary liability in copyright law*, Edward Eldgar, 196-228, 199.
[324] Litman, J.D. [1996], *Revising copyright law for the information age*, 75 Oregon L.Rev. 19.
[325] For instance, in Ireland in cases such *News Datacom Ltd. v. Lyons* [1994] 1 ILRM 450, and *Gormley v. EMI* [1999] 1 ICRM 154. Clark, R. [2009], *op.cit.* 199. Other concepts in need of clarification beyond the scope of this work are, for instance, whether there can be reproduction without multiplication, or whether the mere act of making a work potentially perceivable can be considered reproduction living aside the multiplication in copies. *Théberge v. Galerie d'Art du Petit Champlain Inc.,* [2002] SCC 34, [2002] E.I.P.R. N-108. *PCM v. Euroclip and ors.* Amsterdam District Court, 4 September 2002, Copyright World, November 2002, 11. *Copiepresse v. Google*, TFI Brussels, 13 February 2007. Litman, J.D. [1996], *op.cit*, 177. Computer Science & Telecommunication Board National Research Council [2000], *op.cit*, 230. Miller–Feigenbaum [2002], *Taking the copy out of copyright*, in *Proceedings of the 2001 ACM Workshop on Security and Privacy in Digital Rights Management*, Lecture Notes in Computer Science, vol. 2320, Springer, Berlin, 233-244.

3.1.3 – Communication to the Public

This right has traditionally included a wide range of activities; however, it needs to be re-shaped in the light of networking technologies[326]. In particular, it is difficult to determine what constitutes 'public': for instance, there is debate concerning whether a single individual outside the domestic circle is 'the public', where he/she receives a transmission of the work[327]. Article 8 of WCT, along with the WPPT, introduced the on-demand making available right[328] as an attempt to terminate the debate concerning whether or not making a work available over the internet constituted a restricted act. This right form part of the general author's right to communicate the work to the public[329]; however, the situation differs for performers and phonogram producers, since article 10 and 14 WPPT do not directly refer to any general right of communication to the public[330]. Consequently, the Copyright Directive requires Member States to:

> *'provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them'*[331].

In Recital 27, the Directive specifies that:

> '*the mere provision of physical facilities for enabling or making a communication does not itself amount to communication within the meaning of this Directive*'[332].

Thus, the new right appears not directly aimed towards the services of intermediaries, i.e. internet access providers and/or, arguably, online service providers, who simply provide the '*physical facilities*'; however, there is no international agreement—or agreement within the EU—concerning the scope and application of the on-demand making available right, and many questions therefore still remain unanswered. In particular, there are the following:

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[326] International conventions do not define the terms 'communication' and 'public', therefore the debate on their interpretation is still ongoing.

[327] Makeen, M. [2000], *op.cit*. *SOCAM v. Canadian Association of Internet Providers and others* (2002) FCA 166; (2004) SCC 45; *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10; 54 USPQ2d 1569 (2nd Cir 2000). The right to authorise public performance, by the contrary, in most jurisdiction requires a physical presence of 'the public'. Sterling, J.A.L. [2008], *op.cit*. 9.10.

[328] The exclusive right to authorise 'any communication to the public of a work'.

[329] Cook, T. [2010], *op.cit.* 3.102

[330] Ficsor, M. [2002], '*The law of copyright and the internet-The 1996 WIPO Treaties, their interpretation and implementation*', Oxford University Press, 628-632; Reinbothe-von Lewinski [2002], *The Wipo Treaties 1996*, Butterworths, 333-341. §20 and §182CA of the CDPA created the entirely novel 'communication to the public right' and the 'making available right for performers'.

[331] Article 3(1). Article 3(2) mandates a similar right for performers and phonogram and film producers.

[332] Recital 27 should be read in the light of *Sociedad General de Autories y Editores de Espana (SGAE) v. Rafael Hoteles SA* (ECJ 7 December 2006). Cook, T. [2010], *op.cit.* 3.102-105.

- Which acts are involved in making available on-demand, and how do materials have to be placed online in order to be made available on-demand?
- Who makes available on-demand, and when and where?[333]

Litigation against infringers could ultimately fail on the fact that the above parameters are questionable[334]. Moreover, rendering a file accessible by others using networking technologies may not constitute 'making available', since it might be argued that:

- the word 'public' is undefined, and applying national definitions is likely to create discrepancies[335];
- it is debatable whether actual transmission is required, or whether mere potential is deemed sufficient[336];
- it is debatable whether, in a file-sharing network, 'time' and 'place' are 'chosen' by the members of the public, or by the file provider[337]; and
- it is doubtful whether providing a .torrent file constitutes making available of the relevant file.

3.1.4 – Distribution Right

This right covers issuing to the public copies of the work, including the original[338]. The distribution right in a particular copy is exhausted[339] once the copy has been lawfully

[333] *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10; 54 USPQ2d 1569 (2nd Cir 2000), cert denied 26 March 2001; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers and others* (2002) FCA 166; (2004) SCC 45; *Radio Monte Carlo*, CA Paris, 19 December1989; *Tele-Uno* case, OLG Graz, 6 December1990; *Direct Satellite Broadcasting II*, OLG Vienna, 27 June 1991; *Direct Satellite Broadcasting III*, OGH, 16 June 1992. Reinbothe-von Lewinski, [2002], *op.cit.* 108-109; Ficsor, M. [2002], *op.cit.* 405.

[334] For an in-depth analysis, Sterling, J.A.L. [2008], *op.cit*, 9.31-9.35.

[335] In the UK, for example, sharing of a specific link between small groups of users may fall outside the definition of public. *PRS* v. *Harlequin Record Shops* [1979] 2 All ER 828; *Harms (Inc) & Chappell &Co* v. *Martans* [1927] 1 Ch. 526.

[336] The European Commission's view is that no transmission needs to take place. However, US courts disagree with this interpretation. *LondonSire Records, Inc., et al. v. DOE 1 et al*., No. 04cv12434-NG. 31 March 2008.

[337] *Sony Music Entertainment (UK) Ltd* v. *Easyinternetcafé Ltd* [2003] W.L. 116984 made a similar point. Shiell, W.R. [2004], *Viral online copyright infringement in the US and UK: the end of music or secondary copyright liability? Part 2*, 15(4) Ent.L.Rev. 107-113. The Hague Court of Appeal referred to this in *Church of Spiritual Technology v. Dataweb BV* [2004] ECDR 258 [269], as well as a French court in *Perathoner v. S. Joseph Société Free* [2003] ECDR 76. Generally, Gervais, D.J. [2009], *The tangled web of UGC: making copyright sense of user-generated contents*, 11(4) Vanderbilt J. of Entertainment and Technology Law, 841-870. The most authoritative analysis is in *Canadian Association of Internet Providers v. Society of Composers, Authors and Music Publisher of Canada*, Copyright Board of Canada (1999) 1 CPR (4th) 417; Federal Court of Appeal (2002) 215 DLR (4th) 118.

[338] For instance, Article 6(1) of the WCT, Article 4(1) of the Copyright Directive, and §18 of the UK CDPA. *Peek & Clopppenburg KG v. Cassina SpA* (ECJ 17 April 2008). Cook, T. [2010], *op.cit.* 3.120. Philiphs-Bently [1999], *Copyright issues: the mystery of section 18*, 21(3) E.I.P.R. 133-141.

[339] Distribution '*through online services*' does not exhaust the right. *Report from the Commission ... on the implementation and effects of the Directive 91/250/EEC*, COM (2000) 19 Final, 10 April 2000.

released to the public. Notably, exhaustion can be national[340], regional[341] or, in some jurisdictions, international[342]. The right appears to particularly apply to the transference of the ownership of 'tangible copies'[343]; however, a wider interpretation has been suggested[344]. It is questionable whether the definition of distribution includes making available on-demand and, in particular, whether sharing files or web hosting involves distribution[345]. Nevertheless, it has been argued that 'distribution' should not be limited to the transmission of material objects, and that the right should therefore apply to transmission *in which* a material object is created at the end[346].

3.1.5 – Other Rights

It is open to debate whether or not other rights might be involved/infringed: for instance, the right of adaptation[347], the right of equitable remuneration[348], as well as other economic rights, such as public performance[349], rental and lending rights[350], and dealing with infringing copies[351].

3.1.6 – Infringement

When unauthorised material is shared over a network, there is the potential for infringement to take place. However, in particular borderline cases, it seems difficult to determine precisely which rights are infringed, and to determine consequently any

[340] For instance in the UK, §18 CDPA; in the US, §109(a) 17 USC, the first sale doctrine. *Quality King Distributors v. L'Anza Research International* 118 S.Ct. 1125 (1998).
[341] Article 4(2) Copyright Directive. Garnet, K. *et al.* [2005], *op.cit.* 7-106.
[342] For instance in New Zealand. The concept of international exhaustion has been rejected in the EU by the ECJ. *Laserdiisken ApS v. Kulturministeriet* (ECJ 2 September 2006). Cook, T. [2010], *op.cit.* 3.120.
[343] Philiphs-Bently [1999], *op.cit.* In the US however, it has been held (prior to DMCA) that the operator of a bulletin board service was responsible for distributing unauthorised material to the public. *Playboy Enterprises Inc v. Frena* 839 F. Supp. 1552, 1556 (M.D. Fla., 1993). §106(3) 17 USC.
[344] *Commission Staff working paper on the review of the EC legal framework in the field of copyright and related rights*, SEC (2004) 9995, 17 July 2004. Cook, T. [2010], *op.cit.* 3.118.
[345] *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001); *Capitol Records Inc. v. Thomas*, 579 F.Supp.2d 1210 (D.Minn. 2008). By the contrary, other US courts held that making available is not distribution. *Capitol Records v. Thomas-Rassett*, D.Minn. 15 June 2009; *London-Sire Records Inc. v. Doe 1*, D.Mass, 31 March 2008. In Hong Kong, the transmission of files over the internet constitutes distribution. *Chan Nai Ming v. HKSAR*, Court of Final Appeal of Hong Kong S.P.A. FACC No.3 of 2002, [2007] 3 H.K.C. 255. Koo, A. [2008], E.I.P.R. N-74. Ting Low, W. [2006], *Tackling online copyright infringers in Hong Kong*, 17(4) Ent.L.Rev. 122-124, Tofalides-Fearn [2006], *BitTorrent copyright infringement*, 17(2) Ent.L.Rev. 81-83.
[346] For instance, *London-Sire Records v. Doe*, D.Mass. 31 March 2008.
[347] Digital process permits to add, delete and modify content easily.
[348] Rome Convention 1961, Article 12; Directive 92/100/EC, Article 4.
[349] *United States v. ASCAP*, 485 F.Supp.2d 438 (SDNY 2007)
[350] *C.B.S. Inc. v. Ames Records & Tapes Ltd.*, [1981] RPC 307.
[351] §23 UK CDPA. Gillen, M. [2006], *op.cit.*; Shiell, W.R. [2004], *op.cit.* 108; Laddie-Prescott-Vitoria [2000], *op.cit.* 40.9.

exceptions and defences under particular national laws[352]. Unfortunately, the latest cases do not help in terms of finding a clear answer[353]: for example, in a BitTorrent scenario where a .torrent file of protected material—but not the file itself—is disseminated, it could be argued not to infringe copyright[354]. Moreover, when content is transmitted through the use of streaming, the fragments copied are arguably too small to constitute a substantial part[355].

Furthermore, it is unclear whether or not an actual dissemination could be deemed necessary to infringe the making available right[356]; this is relevant since the only piece of evidence of 'actual infringement' in most networking technologies-related cases are the file downloaded by the plaintiffs' agents[357]. One could then subsequently argue that, if these agents had not downloaded the file, no other actual infringement could be proven in court[358]. This activity appears similar to a 'police trap'[359], with the consequent legitimacy questions of whether, and under which circumstances, such a form of investigation may be justified.

3.1.7 – Limitations, Exceptions and Defences

Limitations, exceptions and defences are an essential aspect of copyright law; however, a number of myths and legends circulate over the internet, there by exacerbating the

[352] In this Chapter aspects of civil liability are considered, but the possibility of criminal sanctions must be taken into account in analysing any particular case under the provisions of a particular national law. For instance: France, CPI 1992, Book III, Chapter V; Germany, UrhG 1965, Articles 106-180b; UK, CDPA 1988, §107; US, USC 1976, §506; TRIPs 1992, Article 61. The application of principles of criminal law could result also in charges of conspiracy or joint participation in a criminal operation. For instance, the imposition of severe criminal penalties. '*Pirate Bay*', Verdict B 13301-06, 17 April 2009, Stockholm District Court, Division 5, Unit 52.

[353] *Capitol Records Inc. v. Thomas*, 579 F.Supp.2d 1210 (D.Minn. 2008)*; Capitol Records v. Thomas-Rassett*, D.Minn. 15 June 2009; *London-Sire Records Inc, op.cit; Electra Entertainment Group inc. v. Barker*, SD NY 31 March 2008*; Atlantic. Recording Corp. v. Howell*, No. CV06-2076-PHX-NVM, 6 (D.Ariz. 29 Apr. 2008), 2008 WL 1927353.

[354] This borderline scenario has not been tested in court with the exception of Iceland, Para. 3.4.6.10. The situation would be different in the case an actual transmission of the protected file occurs.

[355] Excluding the case of 'buffering'. This refers to the process of downloading extra amount of data before playing the file. *Australian Video Retailers Association Ltd. v. Warner Home Video Pty Ltd* [2001] F.C.A. 1719 (7 December). The counterargument could be that any part is 'substantial'- notwithstanding the size-since every part of a transmission is necessary in order for the receiver to access the work. *See* further Para. 3.2.6.1 and 3.4.6.9.

[356] Para. 3.1.2.

[357] These 'downloads' have been authorised by the copyright holder, however, the agents' authorisation do not validate the third party's unlawful conduct. In the US: *Olan Mills, Inc. v. Linn Photo Co*., 23 F.3d 1345, 1348 (8th Cir. 1994); *Atlantic. Recording Corp. v. Howell*, 554 F.Supp. 2d 976, 985 (D.Ariz. 2008).

[358] A parallelism could be done with a fire brigade setting a fire in order to be able to extinguish it.

[359] The police trapping system places temptation in the way of certain individuals, in order to make them commit a crime.

already confused scenario[360]. Limitations, exceptions and defences have been commonly considered a matter of national legislations, which may fundamentally differ in terms of definitions and applications. In the past, there has been no general rule to govern the constant attempt of the government and courts to balance the interests of right owners, technology providers, and users. Today—at least for the reproduction right—the 'three-step' test[361] governs the way in which limitations and exceptions should be tested for validity[362]. However, it is ultimately difficult to accommodate limitations and exceptions to networking technologies[363].

> '*Only a very small number of limitations included in the* [copyright] *Directive seems to be the result of a specific attempt to adapt the system* […] *to the digital environment*'[364].

3.1.8 – Jurisdiction and Applicable Law

> '*Services that employ peer-to-peer technology create vast, global networks of copyright infringements*'[365].

Copyright protection is territorial[366]; therefore, dealing with networking technologies usually involves cross-territorial actions raising questions of jurisdictional competence, applicable law and eventual enforcement of judgements in other countries[367]. The issues are not new; however, they have been exacerbated[368].

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[360] www.spa.org/piracy/legends.htm, www.audiodreams.com/mtvhits. For a complete list, http://208.240.90.53/html/top_10_myths/myths_index.html. [15/07/2010].

[361] Article 9 of the Berne Convention, Article 13 of TRIPS, and in the EU, Article 5(5) of the Copyright Directive.

[362] Westkamp G. [2008], *The 'three step test' and copyright limitations in Europe: European copyright law between approximation and national decision making*, J.C.S.U.S.A, 56(1); Senftleben, M. [2004], *Copyright, limitations and the three step test: an analysis of the three step test in the international and EC copyright law*, Kluwer Law International.

[363] Dussolier-Ker [2009], *Private copy levy and technical protection of copyright: the uneasy accommodation of two conflicting logics*, in Derclaye, E. [2009], *Research handbook on the future of EU copyright*, Eldgar Elgar, 349-372; MacQueen, H.L. [2009], *Appropriate for the digital age? Copyright and the internet*, in Waelde-Edwards ed. [2009], *Law and the internet*, Hart, 183-225.

[364] IVIR [2007], *Study on the implementation and effect in Member States' laws of Directive 2001/29/EC*, IVIR, 43-44. www.ivir.nl.

[365] *Protecting innovation and art while preventing piracy*, Hearings on S-2560, The Intentional Inducement of Copyright Act of 2004, Before the Sub-committee on the Judiciary, US Senate.

[366] For instance, *Quality King Distributors Inc. v. L'Anza Research International Inc.* 523 US 135, 154 (1998).

[367] Dinwoodie-Dreyfuss-Kur [2010], *The Law applicable to secondary liability in intellectual property cases*, ssrn.com/abstract=1502244. [15/08/2010]. Austin, G.W. [2009], *Global networks and domestic law: some private international law issues arising from Australian and US liability theories*, in Strowel, A. [2009], *op.cit.* 124-147; Wollgast, H. [2007], *IP Infringements on the internet– Some legal considerations*, WIPO Magazine, 1/2007; Ginsburg, J.C. [2002], *op.cit.* 111-122; von Eechoud, M. [2003], *Choice of law in copyright and related rights: alternatives to the lex protectionis*, Kluwer.

[368] Schultz, T. [2008], *Curving up the internet: jurisdiction, legal orders, and the private/public international law interface*, 19 International J. of International Law, 779. *Subafilms Ltd v. MGM-Pathe*

'*Private international law was invented as a mechanism for the reconciliation of higher level natural law with the existence of diverse laws*'[369].

A full examination of these issues is beyond the scope of this work[370]. Nevertheless, even leaving aside all considerations in terms of jurisdiction and applicable law, in the online environment, the enforcing of rights under domestic law inevitably has consequences in foreign countries[371]. Furthermore, courts are often silent on the international consequences of their decisions[372]; it would be useful to identify common values in order to assist courts and legislators to deal with the differences between copyright systems[373].

3.2 – The Users

Networking technologies seem to adapt quickly, thereby making it increasingly more difficult to dismantle such—both technologically and legally. Some users are engaged in potentially infringing activities[374]; therefore, the question concerning whether all these actions can be considered authorised or otherwise permitted under copyright law

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Communications Co. 24 F.3d 1088 (9th Cir. 1994), 1095-9; Austin, G.W. [2002], *Valuing 'domestic self-determination' in international intellectual property jurisprudence*, 77 Chicago-Kent L.Rev. 1155. The possibility of mirror national borders on the internet with filters and firewalls goes beyond the scope of this work. Spang-Hansee [2004], *Cyberspace and international law on jurisdiction: possibility of dividing the cyberspace into jurisdictions with the help of filters and firewall softwares*, DJOF Publishing, 7-90.

[369] Mills, A. [2008], *The dimensions of public policy in private international law*, 4(2) Journal of Private International Law, 46.

[370] The current judicial approaches in dealing with network technologies-related infringements are the following. 'Real and substantial connection' - an infringement takes place in the country were a significant portion of the infringing activities have taken place- place of harm, *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers and others* (2002) FCA 166; (2004) SCC 45. Leong-Lim Saw [2007], *Copyright infringement in a borderless world– Does territoriality matter?* 15(1) I.J.L.&I.T. 38-53. 'Host server' - an infringement takes place where the host server is based, the location of the users is irrelevant; 'country of origin' - an infringement takes place in the country of the sharer or uploader. Smith, G. [2007], *Here, there or everywhere? Cross-border liability on the internet*, 13(2) C.T.L.R. 41-51. 'Country of receipt' - an infringement takes place in the country of the provider or downloader/accessor. For a description of the private international and applicable law issues related to copyright, *see* Sterling, J.A.L. [2008] *op.cit.* 3.15-3.31

[371] Generally, Fawcette-Torremans [1998], *IP and private international law*, Clarendon Press, Ch. 1-8.

[372] '*The WCT is silent* [on the extra-territorial reach] *of the communication right'*. Austin G.W. [2009], *op.cit.* 131. According to §10 of the Australian Copyright Act 1968, 'public' includes people outside Australia. In the US, the 'predicate act' theory makes pecuniary relief available for foreign infringements. *Sheldon v. Metro-Goldwyn Picture Corp.* 106 F.2d 45, 52 (2nd Cir, 1939), 309 US 390 (1940). In the UK, *Abkco Music & Record Inc. v. Music collection International Ltd* [1995] RPC 657.

[373] Austin, G.W. [2009], *op.cit.* 144. Higgins, R. [1994], *Problem and process: international law and how we use it*, Oxford University Press, 74-77. Steinhardt, R.G. [1990], *The role of international law as a canon of domestic statutory constriction*, 43 Vanderbilt L.Rev. 1103. Story A. [2003], *Burn Berne: why the leading international copyright convention must be repealed*, 40 Houston L.Rev. 763.

[374] *Societe Belge des Auteurs, Compositeurs at Editeurs v. SA Scarlet (formerly known as Tiscali),* Tribunal de Première Instance de Bruxelles, 29 June 2007, [2007] ECDR, 19. BPI, [2006], *UK courts rule file-sharers liable in landmark legal cases*, www.bpi.co.uk; IFPI [2008], *Digital music report*, 19, www.ifpi.org. [15/08/2010].

becomes persistent. A straight general answer is difficult to formulate[375]. Undoubtedly, the different approaches in the debate over users' liability are left to a case-to-case analysis at a national level. In summary, users potentially infringe copyright by initiating, or partaking in, a number of activities, namely reproducing work, making it available, issuing copies to the public, dealing with infringing copies, failing to observe the attribution and integrity rights[376], permitting, helping, inducing or otherwise authorising other users to copy the work to make it available on-demand, and acting as joint tortfeasor with other users in the respective infringements[377].

3.2.1 - Infringement by Copying

Copyright infringement by copying is a 'peculiar feature' of the digital age, with users frequently duplicating materials without questioning whether the activity in itself may or may not be legal. Nevertheless, as soon as the download of an unauthorised file is complete, the reproduction right is infringed, subject to exceptions. The situation is more complex in the case of an incomplete transmission from multiple sources, as it may actually be impossible to determine whether single packets or how many of them constitute a substantial part of the work. Courts may not accept that

> '*it is legitimate to arbitrarily cut out of a large work that portion which has been allegedly copied and then to call that the copyright work.* […] *The fact that one copyright work may be made up by blending together a number of smaller copyright works does not justify taking one large discrete copyright work and notionally splitting it into a myriad of artificial smaller parts, none of which existed as a discrete work in reality, simply as a means for avoiding the substantiality requirements of section 16(3) of the Act*' [378].

This may become of extreme relevance when it comes to multi-source file-sharing, as the small file portion shared by a single user may not constitute an infringement[379]. Notably, multiple criteria have been traditionally used in order to determine whether or not a part taken is considered to be 'substantial'[380]: the quantity of

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[375] Different jurisdictions have taken different approaches in addressing these issues. Piasentin, R.C. [2006], *Unlawful? Innovative? Unstoppable? A comparative analysis of the potential legal liability facing P2P end-users in the US, UK and Canada*, 14(2) I.J.L.&I.T. 195-241

[376] Only authors and performers.

[377] Sterling, J.A.L. [2008], *op.cit.* Para 13.A.01.

[378] *Hyperion Records Ltd. v. Warner Music (UK) Ltd.* Unreported, 17 May 1991. However, the ECJ ruled that 11 words could be protected if they are '*the expression of the intellectual creation of their author*'. *Infopaq International A/S v. Danske Dagblades Forening*, Case C-5/08, 16 July 2009.

[379] Gillen, M. [2006], *op.cit*.

[380] Cracksfield, M. [2001], *The hedgehog and the fox, a substantial part of copyright Law*, 23(5) E.I.P.R. 259-262. *Ravenscroft v. Herbert* [1980] R.P.C. 193, 203; *University of London Press Ltd. v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601, 608. *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd*

the portion taken[381], the quality of the portion taken[382], competition with the original work[383], the intention of the defendant[384], the capability of attracting copyright in itself, and repeatedly taking[385]. In relation to networking technologies, most of these criteria are impracticable, simply owing to the size of the data packets: it is impossible to determine whether or not the portion shared is qualitatively important, whether the data in each packet would be capable of being protected by itself, and whether it competes with the original, being too small[386]. With this discussion in mind, the following analysis will therefore be based on the assumption that the portions shared are substantial; otherwise, there would be no infringement.

3.2.2 – Infringement by Communicating to the Public (including Making Available and Distribution)

To what extent the right to communicate to the public is infringed by the unauthorised dissemination over a network is not straightforward[387]. For instance, it is still arguable whether it includes letting someone download a file from a shared folder (which is different from uploading)[388], or whether the right covers posting on the internet a .torrent file[389]. Moreover, ancillary acts may theoretically constitute making available: for instance, linking to another's copy of the work or otherwise indexing portions of the work already available on the internet[390]. It is submitted that this right has been

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[1964] All E.R. 465, *Designers Guild Ltd. v. Russell Williams Ltd* [2000] 1 W.L.R. 2416; [2001] 1 All E.R. 700; [2001] E.C.D.R. 10; [2001], *Hyperion Records Ltd. v. Warner Music (UK) Ltd.* Unreported, 17 May 1991.

[381] *Francis Day & Hunter Ltd. v. Bron (Trading as Delmar Publishing Co.)*, [1963] 2 All E.R. 16 (C.A.), *Alan Sillitoe v. McGraw-Hill Book Co.*, [1983] F.S.R. 545, *Bramwell v. Halcomb*, 40 E.R. 1110 (1836).

[382] *Hawkes v. Paramount Film Service, Ltd.* [1934], 1 Ch. 593.

[383] *Chappell & Co. Ltd. v. Thompson & Co. Ltd.*, [1924-1935] Mac C.C. 467.

[384] *Jarrold v. Houston*, 69 E.R. 1294, 1298 (1857), *Cary v. Kearsley*, 170 E.R. 679 (1802).

[385] Gillen, M. [2006], *op.cit.* Other considerations would include the intention of the author, the level of independence of the portions concerned, and the commercial form in which the work is made available. *Electronics Techniques (Anglia) Ltd* v. *Critchley Components Ltd* [1997] F.S.R. 401 December 19, 1996.

[386] This would leave open only the criteria of intention and repeated taking. Gillen, M. [2006], *op.cit*.

[387] In Canada, for instance, transmitting a facsimile of a work is not communication to the public. *CCH Canadian Ltd. v. Law Society of Upper Canada*, (2004) 236 DLR (4th) 395. Gervais, D.J. [2004], *Canadian Copyright Law Post-CCH*, 18 IPJ 131.

[388] Uploading involves 'copying' the file on a website, while in a file-sharing scenario the user copies the file in a 'shared-folder' on his/her own computer's hard drive. However, in *Polydor Ltd. v. Brown* [2005] EWCH 3191 (Ch); (2006) 29(3) I.P.D. 29021, the judge held the copying a file in a shared-folder of a computer connected to a file-sharing network sufficient for the infringement of §20 CDPA.

[389] Mostly because these activities are not on demand, as one does not choose time and place, and the file is not *always* available online, but only at the time and place chosen by the provider.

[390] *Twentieth Century Fox Films Corp. & Others v. Newzbin Ltd.*, [2010] EWHC 608 (Ch), 29 March 2010.

designed for the act of posting a file on a website; this causes problems when it comes to more complex networking technologies[391].

As mentioned[392], disseminating protected works over networking technologies arguably does not amount to 'distributing' copies of the works[393]. However, some decisions, which will be later discussed, show different approaches, particularly in the US[394], Canada[395] and Hong Kong[396].

3.2.3 – Limitations and Exceptions

Limitation and exceptions to copyright are frequent in national laws are discussed in the following paragraphs[397]. Preliminarily, it should be noted that despite concepts such as fair use, fair dealing, private use or private copying exist in most copyright laws as exceptions[398], 'fair' and 'private' lack proper definition. Moreover, these concepts have been, and continue to be, debated[399]. An important part of the argument is the controversial approach they are not defences, but affirmative rights of the 'public'[400].

Notably, harmonisation is lacking—even within the EU. For instance, in the UK, there is not a general concept of 'private copying'[401]. Although the Copyright Directive's option of including a 'home copying exception' for private non-commercial

[391] Some commentators refer to this right as being designed for file-sharing.
[392] Para. 3.1.4.
[393] The agreed statement concerning the WIPO Treaties declare that the words 'copies' and 'original and copies' in Article 6 WCT and Articles 8 and 12 WPPT refers to 'fixed copies'. Similarly, Recital 29 of the Copyright Directive specifies 'exhaustion' does not arise in the case of online services. Sterling, J.A.L. [2008], *op.cit.* 9.05. However, in the UK, sharing computer games amounted to a restricted act of 'distribution'. *Irvine* v. *Carson* (1991) 22 I.P.R. 107; *Irvine* v. *Hanna-Rivero* (1991) 23 I.P.R. 295.
[394] Para. 3.2.5.3.
[395] Para. 3.2.5.7.
[396] Para. 2.2.2.8.
[397] Para. 3.2.5.
[398] In France by virtue of Article L.122-5-2, the author may not prohibit the reproduction for the private use of the copier. In Germany, Article 53 of Copyright Law states a specific limitation (*Schranken*) in case of reproduction for private and certain personal uses.
[399] For instance, in the US, the Supreme Court states that 'fair use' is necessary for promoting knowledge, whilst other jurists nevertheless argue that fair use it not 'fair' because it limits the copyright owners' control over their works. *Campbell v. Acuff-Rose*, 114 S Ct. 1164 (1994).
[400] Geiger, C. [2008], *The answer to the machine should not be the machine, safeguarding the private copy exception in the digital environment*, 30(4) E.I.P.R. 121-129. The question has been answered negatively in France by the *Cour de Cassation* in '*Mulholland Drive'*, 05-15.824, 05-16.002 *Arrêt* n. 549, 28 February 2006, *Cour de cassation, Première chamber civile*. In the US this point is at the centre of *Stefanie Lenz v. Universal Music Corp.*, 07-Civ-3783 JF, 20 August 2008. No answer is available yet.
[401] C-III, Pt I CDPA contains a number of 'fair dealing' exceptions. §29 deals with 'private study'.

uses[402], the UK Government declined to give full effect to such a broad exemption, instead amending the existing 'time shifting' provision[403].

3.2.4 – Stealth Technology, Privacy Shields and Counterattacks

In cases of networking technologies, it is problematic to determine whether an infringing activity is taking place-or took place previously-, in addition to the identity of the infringer. Thus, a distinction is needed between the technique utilised in order to collect evidence[404], and subsequent court applications for the purpose of obtaining the names and addresses of potential infringers, which will be discussed later[405]. In order to collect evidence, the plaintiff must firstly determine the IP address of the alleged infringer's computer, and must then accordingly monitor the data stored in the computer and transmitted through that address. However, monitoring users' activities in their home is arguably an intrusion of the private sphere[406].

In 1964, GEMA experienced a similar problem in Germany. Grundig was supplying the *magnetophone*, but GEMA had no means to control whether users had subscribed for a licence to use it or whether they were unlawfully copying[407]. Therefore, GEMA attempted to obtain from Grundig the names and addresses of *magnetophone*'s buyers to search their houses directly. Although home copying was unlawful, the German *Bundesgerichtshof* rejected GEMA's arguments[408], simply because the request was deemed contrary to the 'immunity' of the residence[409]. Some argue that 'digital is different'[410]: special software crawlers can be employed to search users' computers to assess infringements[411] without violating the 'immunity' of their residence. For instance, the US agency, MediaSentry, constantly monitors volume uses and identifies

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[402] Article 5(2)(b).
[403] §70 and Para.17 of Schedule 2 CDPA.
[404] For instance in the UK when the evidence is illegally obtained courts have the discretion to consider any privacy intrusion. Regulation of Investigatory Power Act 2000, §1-2*Jones v. University of Warwick* [2003] 3 All ER 760. In Ireland *Universal City Studios v. Mulligan* [1999] 3 IR 392. McGrath J.C. [2005], *Evidence*, Thomson Round Hall, Ch.7; Clark, R. [2009], *op.cit.* 220.
[405] Para. 3.3.10.
[406] Visser [1996], *op.cit.* 49-50.
[407] This licensing scheme was implemented as a consequence of '*Grundig*', *Bundesgerichtshof* (German Federal Supreme Court), ZR 8/54; 17 BGHZ 266; [1955] GRUR 492, 18 May 1955.
[408] '*Personalausweise*', *Bundesgerichtshof* (German Federal Supreme Court), ZR 4/63; [1965] GRUR 104, 29 May 1964.
[409] '*Unverletzlichkeit des häuslichen Bereichs*'. *Ibid.*
[410] Koelman-Bygrave [2000], *Privacy, data protection and copyright: their interaction in the context of copyright management systems*, in Hugenholtz, P.B. (ed) [2000], *Copyright and electronic commerce*, The Hague Kluwer Law, 59-123, 101; Visser, D.J.G. [1996], *op.cit.* 4, 49-56, 50.
[411] Para. 5.2.4.2.

potential infringements[412]; however, the use of softwares to monitor personal information is morally questionable, and therefore still raises privacy concerns[413]. Moreover, the crawlers, which track the unauthorised copies of files, register the users' IP addresses, which may be considered personal data[414]. Importantly, EU data protection laws permit the collection and processing of personal data only under limited circumstances[415], which doubtingly includes the harvesting of IP addresses for filing lawsuit[416]. Moreover, various data-collection methods may be challenged under privacy provisions[417]: for instance, it appears that the interception of communication may be unlawful in the EU[418], as well as the collection of data[419]. In *Sharman*, Wilcox J. told the witness from MediaSentry:

'*you are in effect spying on a person who is in the act of downloading*'[420].

In France, the automated monitoring of users was forbidden, since the harvesting of personal data spans beyond what is necessary for fighting piracy[421]. In contrast, this argument did not succeeded in Canada and Ireland[422]. In the UK, right owners must use disclosure orders or similar civil procedures in order to secure an internet access provider to disclose the data[423]. In Germany, the *Bundesgerichtshof* allowed the use of data collected from a WIFI-spot for the enforcement of author's rights [424]. In the US, courts tend to recognise users' privacy, thereby requiring separate subpoenas for each

[412] Clark, R. [2009], *op.cit*. 219.
[413] In 2001 rumors spread that IFPI Belgium had deployed a search robot to track down unlawful uses of Napster and IFPI announced that was ready file law suit against thousands of IP addresses. The Minister of Justice at the time, Verwilghen, immediately ordered an the investigation and shortly after the Belgium privacy board issued a report declaring that IFPI acted contrary to Belgian privacy laws. http://news.zdnet.co.uk/internet/0,1000000097,2084466,00.htm. [15/08/2010].
[414] Static IP addresses are personal data, while the situation is more complex for the dynamic IP addresses. A guide to IP addresses and UK Data Protection Law is available at www.out-law.com/page-8060. [15/08/2010].
[415] Generally, Walden, I. [2007], *Privacy and data protection*, in Reed-Angel [2007], *Computer law*, Oxford University Press, 459-504. Personal Data Directive, as amended by Data Retention Directive.
[416] Vincents, O.B. [2008], *When rights clash online: the tracking of P2P copyright infringements vs. the EC Personal Data Directive*, I.J.L. & I.T., 16(3), 270-296.
[417] In some member state also under constitutional guaranties. For instance in Ireland: *Kennedy v. Ireland* [1987] IR 587, *Atherton v. DPP* [2006] 2 ILRM 153. The argument that users are communicating their IP addresses publicly lacks basis, therefore right holders need a legal basis to obtain the relevant details from the internet access provider of the alleged infringer. Clark, R. [2009], *op.cit*. 220. The issue becomes of extreme importance considering the easiness to obtain disclosure (Article 6) and seizure (Article 9.2) with the implementation of the Enforcement Directive.
[418] Clark, R. [2009], *op.cit*. 220.
[419] *Stichting Bescherming Rechten Entertainment Industrie Nederland (BREIN) v. Techno Design Internet Programmin' B.V.* Court of Appeal, Amsterdam, 5th Division, 15 June 2006, [2006] ECDR 21.
[420] *Universal Music Australia Pty. Ltd. v. Sharman License Holdings Ltd*., (2005) 65 IPR 289, 348.
[421] CNIL Decision, 24 October 2005. Hugot, J.P. [2006], *The DADVSI Code: remodelling French copyright law for the information society*, 17(5) Ent.L.Rev. 139-144, 139.
[422] *EMI Records (Ireland) Ltd* v. *Eirecom Ltd* [2006] ECDR 40. Clark, R. [2009], *op.cit*. 219.
[423] §35 UK Data Protection Act 1998.
[424] '*WiFi-Spot*', *Bundesgerichtshof* (German Federal Supreme Court), ZR 121/08, May 2010.

alleged infringer[425]. However, a district court ordered a search engine to collect information concerning users' activities, simply because of electronic discovery obligations[426]. In Switzerland, the Supreme Court lately held that:

- IP addresses are personal data within the meaning of data protection law;
- the collection of these IP addresses, without the users' consent, violates data protection law;
- copyright enforcement does not justify the violation of data protection law.

'*The interest of internet users in the protection of their personality rights prevails over the interest of right owners to enforce their rights against them*'[427].

The legal scenario remains unclear; therefore, methods have been implemented in order to 'protect' privacy further. Users may 'mask' their IP Addresses[428], use a 'Network Address Translator'[429], or may become 'accidental' internet access providers[430]. Besides, new generations of softwares have been designed in such a way so as to make it virtually impossible to monitor and harvest IP addresses using stealth technologies[431]. As the slogan of one of this software mockingly states (Figure 17)[432]:

Figure 17 - ES5

3.2.5 – National Approaches

3.2.5.1 – UK. – British copyright law has its foundation in the CDPA 1988 as amended, most significantly to implement the EU Directives and the WIPO Treaties, and in court

[425] *Verizon Internet Services Inc. v. RIAA.*, 240 F.Supp2d 24, 257 F.Supp.2d 244 (D.Columbia, 2003); 351 F.3d 1229 (CA D.Columbia, 2003); cert. denied 125 S.Ct. 309, 125 S.Ct. 347. *London-Sire Records Inc. v. Doe 1*, D.Mass, 31 March 2008, FN1, 4.
[426] *Columbia Pictures, Inc et al. vs. Justin Bunnell*, CD Cal. 2:06-cv-01092, 2007.
[427] Decision of 8 September 2010, motivations not yet published. News and quote from IPKat. ipkitten.blogspot.com/2010/09/swiss-supreme-court-data-protection.html. [10/09/2010].
[428] 'IP masquerading' is the technique used to hide an IP address behind another one.
[429] The process of modifying the IP address during transmissions.
[430] For instance, a user can run a Wi-Fi router, providing wireless network access to a small area, and choose to assign IP addresses dynamically, rotating a fixed number of addresses randomly among a group of users connected to the network, and to delete the assignment logs promptly. This would make it impossible to determine which user was linked to the address at a given time in case of a request to disclosure the identity of a given IP address. www.eff.org/pages/user-privacy-isps-and-accidental-isps. [15/08/2010].
[431] Such as the Secure Socket Layer. Some softwares can also encrypt the entire shared folder.
[432] This is the slogan of ES5. '*It is the Holy Grail of file sharing: users have no more to worry about what they share and with whom*'. www.earthstation5.com. [15/08/2010].

rulings[433]. The parameters of the CDPA 1988, as amended[434], remain largely untested since most of the cases brought against users for copyright infringement have been settled out of court[435]. Users are most likely to infringe copyright by copying the work[436] and subsequently communicating it to the public[437]. However, UK legislation may not be appropriate regarding networking technologies[438]. The crucial point lies in the adoption of the words 'by electronic transmission' in §20 CDPA, as opposed to international instruments 'by wire or wireless means'[439]. The word 'transmission' is defined as a:

'conveyance from one person or place to another'[440].

Therefore, with this definition, the making available right[441] fits in the scenario of user uploading to a hosting site, since a transmission takes place from the user computer to the hosting site. However, it has been argued that storing a file into a folder to be shared over a file-sharing network arguably may not constitute 'transmission'[442]. The problem would have been avoided had the more appropriate term of 'by electronic means' be utilised[443]. A better terminology is present in §10 of the Australian Copyright Act 1968 (as amended), where 'communicate' is defined as 'make available online *or* electronically transmit'. The issue was omitted in *Polydor Ltd. v. Brown*[444]. The judge simply held that:

'connecting a computer to the internet, where the computer is running a peer-to-peer software, and in which some music files containing copies of the claimant's copyright works are placed in the shared directory, falls within an infringing

[433] For an analysis of British copyright law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Geller-Davies [2005], *op.cit.;* Bentley-Cornish [2010], *United Kingdom*, in Nimmer-Geller [2010], *International copyright law and practice*, New York, Matthew Bender.
[434] By the Copyright and Related Rights Regulations 2003.
[435] Helmer-Davies [2009], *File-sharing and downloading: goldmine or minefield?* 4(1) J.I.P.L.&P. 51-56. Or the charges acquitted due to lack of evidence.
[436] §17 CDPA. Reproduction includes storing, even transiently, the work by electronic means. §17(6) and §182(A)(1). This may be altered depending on the interpretation of the meaning of substantial. Gillen, M. [2006], *op.cit.*; Shiell, W.R. [2004], *op.cit.* 107-113.
[437] §20 CDPA. Further, users may be liable under §16(2), §18 and §21.
[438] Gillen, M. [2006], *op.cit.*
[439] Article 3.1 Copyright Directive. Article 8 WCT.
[440] Oxford English Dictionary, Oxford University Press, 2010.
[441] Generally on the definition of the making available right, Garnet, K. *et al.* [2005], *op.cit.* Para. 7-116.
[442] Larusson, H.K. [2009], *op.cit*, 126. The user would be still liable but under §17(2) for the act of copying the file into the computer hard-drive. The introduction of a private coping exception would not alter this position. UK Intellectual Property Office [2007], *Taking forward the Gower review of intellectual property– Proposed changes to copyright exception*, 15, www.ipo.gov.uk. [15/08/2010].
[443] For instance, §7(2): '*storing the work in any medium by electronic means*'. Larusson, H.K. [2009], *op.cit.*, 126.
[444] [2005] EWHC 3191.

act'[445].

However, a court, it is thought, would find that users directly infringe the reproduction right by downloading a file protected by copyright without authorisation. However, the situation becomes more complicated when considering a streaming scenario, where content is delivered in 'real-time'[446]. The conversion of the signal is generally instant upon reception, but the data received often exceeds the volume required, thereby causing temporary 'buffering'[447]. A temporary/transient copy may be created; however, it is open to doubt as to whether this constitutes a 'substantial part', as required by §16(3)(a)[448]. The issue has apparently so far not been discussed in UK courts in its digital form[449]; thus, most commentators prefer to refer to *Australian Video Retailer Association*[450], where these fragments were held to be too small to be 'substantial'[451]. In *Gilham*[452], however, the temporary copies created on the screen whilst playing a video game were held to be 'substantial'. Notably, whichever position is taken, basing the answer on a case-to-case substantiality test seems too arbitrary[453]. Users may also infringe by implicitly authorising each restricted acts; however, this appears doubtful, and appears not to have been argued in courts at this point. Furthermore, users potentially infringe §18[454], §24(2)[455], and could be criminally liable under §107(1), and §107(2A)[456].

The CDPA does not extend exceptions and defences to users for private and domestic unauthorised copying through the use of networking technologies. The 'time-shifting defence'[457] concerns only broadcasts or cable programmes. A private right to copy was one of the key recommendations of the *Gowers Review*[458] and, in *Digital*

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[445] *Ibid*. [7].
[446] With streaming, the work does not need to be stored onto the hard-drive before it can be accessed. Para. 3.4.6.1.
[447] The excess of the data is stored in a 'buffer' until is needed.
[448] Larusson, H.K. [2009], *op.cit*, 127.
[449] The leading cases are still *Francis Day & Hunter Ltd v. Bron (trading as Delmar Publishing Co.)* [1963] 2 All E.R. 16 (C.A.) and *Designers Guild Ltd. v. Russell Williams Ltd* [2000] 1 W.L.R. 2416; [2001] 1 All E.R. 700; [2001] E.C.D.R. 10; [2001]
[450] *Australian Video Retailer Association Ltd. v. Warner Home Video Pty Ltd.* [2001] FCA 1719.
[451] '*The little-and-often principle does not apply to buffering*'. Garnet, K. *et al*. [2005], *op.cit.* 7-19, 7-29.
[452] *R. v. Gilham* [2009] EWCA Crim 2293; [2009] WLR (D) 324
[453] Larusson, H.K. [2009], *op.cit*, 127.
[454] 'Infringement by issuing of copies to the public'.
[455] 'Providing the means for making infringing copies'.
[456] 'Criminal liability for making or dealing with infringing article, &C.'.
[457] §70 CDPA. Also Para. 17 of Schedule 2.
[458] Gowers, A. [2006], *Gowers review of intellectual property right*, HM Treasury; Recommendations 8-9; webarchive.nationalarchives.gov.uk/+/http://www.hmtreasury.gov.uk/d/pbr06_gowers_report_755.pdf. News has been reported of a government proposal to introduce an exception allowing private copying of music and films. www.out-law.com/page-8782. [15/08/2010].

Britain, the government promised to keep this issue under review[459]. However, the Digital Economy Act 2010 is silent on the issue.

3.2.5.2 – US. – Copyright law in the US has its foundation in Article 1§ 8cl 8 of the Constitution and lays principally in the Copyright Act, Aection 17 of the US Code as amended, and in court rulings[460]. The US has been constantly ahead of other countries in terms of confronting networking technologies and their consequences[461]. Case law is extensive; however, the outcomes are varied, and most actions have been settled out of court[462]. The RIAA has apparently dropped its mass lawsuits' programme in favour of cooperative enforcement agreements with a number of internet access providers[463]. Furthermore, aggressive litigation did provide noticeable effects in some areas, although the number of user-sharing files has actually increased[464]. Nevertheless, users are most likely to infringe §106(1), the reproduction right. However, it nevertheless still remains unclear as to whether they infringe §106(3), the distribution right[465]. The issue has been described as 'problematic'[466]. Specifically, the question is concerned with whether, without any copying being made, merely 'making available' without access is considered to be a copyright infringement[467]. In *Denise Barker*[468], the defendant moved to dismiss, contending that:

[459] UK Department for Culture, Media and Sport and Department for Business, Innovation and Skills [2009] *Digital Britain, Final Report,* www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf. Point 66. [15/08/2010].

[460] For an analysis of US copyright law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Schwartz-Nimmer [2010], *United States*, in Nimmer-Geller [2010], *International copyright law and practice*, New York, Matthew Bender.

[461] Most notably: *Audio Home Recording Act* 1992; *Digital Performance Right in Sound Recordings Act* 1995; *No Electronic Theft Act* 1997; *DMCA*; and the *Digital Theft Deterrence and Copyright Damages Improvement Act* 1999. However, some commentators criticise US copyright law for being 'pro-industry'. Justice Breyer in *Eldred v. Ashcroft*, 123 S.Ct. 769, 792 (U.S.S.C. 2003); Samuelson, P. [2003], *Copyright and freedom of expression in historical perspective*, 10 J.I.P.L. 319; Kretschmer, M. [2003], *Digital copyright: the end of an era*, 25(8) E.I.P.R. 333; MacMillan, F. [2002], *ThecCruel C: copyright and film*, 24(10) E.I.P.R. 483, 24; Schaumann, N. [2002], *Copyright infringement and peer-to-peer technology*, 28 William Mitchell L.Rev. 1001; Yavorsky-Haubert [2004], *Piracy: DMCA wars*, 25(3) Ent.L.Rev. 94-96.

[462] A list of cases is available at http://info.riaalawsuits.us/documents.htm. [15/08/2010].

[463] McBride-Smith [2008], *Music Industry to Abandon Mass Suits*, The Wall Street Journal (19 December). http://online.wsj.com/Article/SB122966038836021137.html. [15/08/2010].

[464] PewInternet & American-Life-Project report. www.pewinternet.org. Gillen, M. [2006], *op.cit.* 7-14.

[465] In 2001, it appeared clear that the distribution right embraced the making available right. *New York Times v. Tasini*, 121 S.Ct. 2381 (2001). Also Nimmer-Nimmer [2002], *op.cit.* Ch.8, 12[E].

[466] *Atlantic Recording Corp. v. Brennan*, 534 F.Supp. 278 (D.Conn. 2008).

[467] In practice whether having a work in a shared folder is an infringement, even if no one ever downloads it. Generally on the issue The Patry Copyright Blog. http://williampatry.blogspot.com. [15/08/2010].

[468] *Elektra Entertainment Group, Inc. v. Denise Barker*, Case No. 05-CV-7340 (SDNY 31 March 2008).

'*the allegation of 'making available' did not 'state any known claim under the Copyright Act*'[469].

The judge accepted the argument, but ultimately gave the opportunity to amend the defective pleading into

'*offering to distribute for purposes of distribution*'[470].

This theory was later rejected in *Brennan*[471], where the judge held the complaint to be insufficient because:

'*distribution requires an 'actual dissemination' of a copy*'[472]

In *LondonSire*[473], the court agreed that 'files' are 'material objects', and can be 'distributed' when shared but, unless a 'distribution' actually occurred, the right is not infringed[474]. In *Howell*[475], the court rejected the 'making available' and the 'offer to distribute' theories:

'*Merely making a copy available does not constitute distribution* [...] *The statute provides copyright holders with the exclusive right to distribute 'copies' of their works to the public 'by sale or other transfer of ownership, or by rental, lease, or lending'* […] *Unless a copy of the work changes hands in one of the designated ways, a 'distribution* […] *has not taken place*. […] *An offer to distribute does not constitute distribution*'[476].

The court affirmed the notion that the distribution right is not infringed when the file is simply stored in a shared folder, unless the file has been actually distributed to the public[477].

Thomas[478] provided the opportunity of clarification when the plaintiff submitted the 'Proposed Jury Instruction n. 8':

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[469] *Ibid.*

[470] However, the judge accepted the allegations of 'actual downloading' and 'actual distributing'. Thus leaving the main question unanswered. In the interpretation given, 'distribute' overlapped with 'publication' under §101 – '*Publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending*'. http://williampatry.blogspot.com/2008/04/recent-making-available-cases.html. [15/08/2010].

[471] *Atlantic Recording Corp. v. Brennan*, 534 F. Supp.2d 278 (D. Conn. 13 February 2008).

[472] *Ibid.* As already stated in *Perfect 10, Inc. v. Amazon.com, Inc*., 508 F.3d 1146, 1162 (9th Cir. 2007).

[473] *LondonSire Records Inc. v. Doe 1*, D.Mass, 31 March 2008.

[474] Thus finally shifting the argument to what distribution actually means and if it includes the right described in Article 8 WCT and Article 10 WPPT. The distribution-publication equation was also rejected. However the logical connection between the above propositions remains unsatisfactory. Patry on his blog and in, Patry, W.F. [2007], *Patry on Copyright*, § 13:9.

[475] *Atlantic v. Howell*, 534 F.Supp.2d 278, 06-Civ-02076 (D.C. Arizona). www.eff.org/files/filenode/atlantic_v_howel/Atlantic%20v%20Howell%20SJ2%20order.pdf. [15/08/2010].

[476] *Ibid.*

[477] *Ibid.* Para. 8.

[478] *Capitol Records Inc. v. Thomas*, 579 F.Supp. 2d 1210 (D.Minn. 2008).

'the act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown'[479].

This definition was rejected by the District Court, subsequently concluding that it was a manifested error of law, and accordingly ordered a re-trial. In the renamed *Thomas-Rassett*[480], the judge did not define that which constituted distribution, but the defendant was nevertheless held liable of infringing the right of reproduction.

In *Rodriguez*[481], the theory was dismissed as 'speculation', and the complaint was accordingly amended not to refer to such, but nevertheless reintroduced the 'offer to distribute' theory[482]. No definite answer is therefore presently available, thereby leaving commentators free to speculate as to whether or not the US has implemented correctly the WIPO Treaties. In order to complete the scenario, users may also be liable under §106(4), the right of public performance. However, in *ASCAP*[483], downloading a music file has been held not to constitute performing the work publicly.

Moving on to defences, the main limitation to copyright in the US is fair use[484], but a number of courts[485] have constantly held that this notion does not apply to networking technologies:

'*user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester*'[486].

Rather, it appears that all the factors considered by courts[487] when striving to determine whether or not a use is 'fair' held against file-sharing. The files shared are 'highly creative' and mere substitute of the originals[488]. Users copy entire works. The

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[479] *Ibid.* 1212.
[480] *Capitol Records Inc. v. Thomas-Rassett*, No. 06-1497 (D.Minn. 15 June 2009).
[481] *Interscope v. Rodriguez*, Case No. Cv-06-2485-b-nls, SD Cal. www.ilrweb.com/viewILRPDF.asp?filename=interscope_rodriguez_061114Complaint. [15/08/2010].
[482] *Interscope v. Rodriguez*, Case No. Cv-06-2485-b-nls, SD Cal. www.ilrweb.com/viewilrpdf.asp?filename=interscope_rodriguez_070823amendedcomplaint. [15/08/2010].
[483] *United States v. American Society of Composers, Authors and Publishers*, 485 F.Supp.2d 438 (SDNY 2007). The decision in under appeal. Case no. 09-0539 (2nd Cir).
[484] §107 USC.
[485] *A&M Records Inc. v. Napster Inc.*, 114 F Supp 2d 896 (N.D. Cal. 2000); 54 USPQ 2d 1746 (N.D. Cal. 2000); 239 F 3d 1004; 57 USQP 2d 1729 (9th Cir. 2001); WL 227083 (ND Cal. 5 March 2001); 284 F.3d 1091 (9th Cir. 2002); *UMG Recordings, Inc. v. MP3.com, Inc.* 92 F.Supp.2d 349 (S.D.N.Y. 2000); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2001); *Universal City Studios, Inc. v. Reimerdes*, 82 F.Supp.2d 211 (S.D.N.Y. 2000); *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 259 F Supp 2d 1029, 65 USQP 2d 1545 (C.D. Cal. 9 January 2003); 2003 WL 1989129 (C.D. Cal. 25 April 2003); affirmed 380 F.3d 1154 (9th Cir. 2004); 125 S.Ct. 2764 (2005); on remand 454 F.Supp. 966 (C.D. Cal. 2006).
[486] *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004, 1015.
[487] *Campbell v. Acuff-Rose Music, Inc*. 510 U.S. 569, 579 (1994).
[488] *American Geophysical Union v. Texaco, Inc*. 60 F.3d 913, 919-920 (2d Cir. 1994).

use is not transformative and commercial[489]. Furthermore, in order to determine fair use, the use should not be harmful to the market; the harm is presumed as such when the use is commercial, thereby leaving the users to prove otherwise[490]. Thus, it is not likely that sharing protected works constitutes fair use. In fact, in *Gonzalez*[491], the Court of Appeals rejected the fair use defence[492]. The situation may be different for user-generated content; in particular, when the work uploaded has been modified by the user, or when a protected work is simply incidentally included in a new one[493].

In a limited scenario, the so-called 'space-shifting' defence[494] may apply[495]. Finally, in *Brennan*[496], the Court itself suggested numerous other possible defences: for instance, anticompetitive behaviour constituting copyright misuse[497] and, most importantly, unconstitutionally excessive damages[498]. Damages awarded to plaintiffs in the US have been claimed to be:

> *'not only astronomical,* [but also] *offensive to* [the] *Constitution and offensive generally'*[499].

It seems that there is a tendency in the US to over-punish users with exemplary damages schemes on the motto of 'strike one to educate one hundred'[500]. The framework designed by the Supreme Court[501] appears to have been abandoned[502]:

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[489] As to the commercial nature of the use, '*users are getting something for which they would otherwise have to pay; they are obtaining an economic advantage through the use of technology thereby converting non-commercial use to commercial use*'. Piasentin, R.C. [2006], *op.cit.*

[490] For an analysis of the issue of market harm, Para. 4.4.

[491] *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

[492] However, this is of limited applicability since the defendant admitted copying and downloading over one thousand songs from other unauthorised users, thus making the argument she was merely 'sampling' the works for possible future purchase preposterous.

[493] Great expectations are posed in *Lenz Stefanie Lenz v. Universal Music Corp.* Case No. C 07-3783 JF (N.D. Cal. 20August 2008), where this issue will be decided, possibly also finally answering the more general—and still controversial—question of whether fair use is an affirmative right.

[494] *Recording Industry Association of America v. Diamond Multimedia System Inc.*, 180 F.3d 1072, 51 U.S.P.Q. 2d 1115, 1123 (9th Cir. 1999).

[495] Defendants would need to prove they already own all the works downloaded, and that they downloaded to use the digital copy in a different place. However, in Napster the argument was unsuccessful. *A&M Records Inc. v. Napster Inc.*, 114 F Supp 2d 896 (N.D. Cal., 2000); 54 USPQ 2d 1746 (N.D. Cal. 2000); 239 F 3d 1004; 57 USQP 2d 1729 (9th Cir. 2001); WL 227083 (ND Cal. 5 March 2001); 284 F.3d 1091 (9th Cir. 2002).

[496] *Atlantic Recording Corp. v. Brennan*, 534 F. Supp.2d 278 (D. Conn. February 13, 2008) FN2.

[497] *Lava Records LLC v. Amurao*, No. 07-321 (S.D.N.Y. Jan. 16, 2007); *Assessment Techs. of WI, LLC, v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir.2003).

[498] *UMG Recordings Inc. v. Lindor*, No. 05-1095, 2006 WL 3335048, 3(EDNY 2006) (finding the defence non-frivolous); *Zomba Enters. Inc. v. Panorama Records Inc*. 491 F.3d 574, 588 (6th Cir.2007). Generally, Evanson B. [2005], *Due Process in Statutory Damages*, 3 Geo.J.L.&P.P. 601, 637.

[499] *Ibid*. Successful Defendant Motion for Retrial, 12.

[500] Italian *Brigate Rosse*'s motto. Attributed to Mao Zedong.

[501] *BMW of North America Inc. v. Gore* 517 U.S: 559 (1996); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

punitive damages 500 times—or even 145 times—the compensatory damages were deemed

'*grossly excessive* […] *and a violation of the defendant's due process right*'[503].

In the instance of *Thomas-Rassett*[504], the punitive damages were over 228,000 times the compensatory damages[505]. Finally, in *Noor Alaujan*[506] and *Joel Tenenbaum*[507], it was also argued that the Digital Theft Act[508] 1999 is unconstitutional[509]. The debate remains on-going.

3.2.5.3 – France. - French author's right law is codified in the Intellectual Property Code 1992, as amended[510]. Most of the recent amendments were required to implemented the EU Directives and to introduce the so called 'graduated response' mechanism[511]. In 2005, it was held that file-sharing was legal because all users enjoyed a private copy exception[512]. The decision was later reversed on appeal[513]. Thus, notwithstanding the private copy exception, users in France may be liable for infringing the reproduction right[514] by downloading a protected work, whilst uploading or sharing a protected work may infringe the right of communication to the public[515]. Since *Roche and Battie*[516] with regard to uploading mp3 files to a website, few decisions have been held by French courts with regard to file-sharing[517]. The majority of the cases are

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[502] Generally Samuelson-Wheatland [2009], *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, William & Mary L.Rev. Forthcoming; UC Berkeley Public Law Research Paper No. 1375604. SSRN: http://ssrn.com/abstract=1375604. 4/3/10.
[503] *BMW of North America Inc. v. Gore* 517 U.S: 559 (1996), 574.
[504] *Capitol Records v. Thomas-Rassett*, D.Minn. 15 June 2009.
[505] Thomas was ordered to pay $ 1.92 million for infringement of copyright in 24 songs, while the actual damage was assessed to be $ 16.80. A third trial has been ordered to specifically address this point on 10 May 2010.
[506] *Capitol Records Inc., et al. v. Noor Alaujan***,** Civ. Act. No. 03-CV-11661-NG.
[507] *Sony BMG Music Entertainment, et al. v. Joel Tenenbaum* Civ. Act. No. 1:07-cv-11446-NG.
[508] Digital Theft Deterrence and Copyright Damages Improvement Act of 1999.
[509] blogs.law.harvard.edu/cyberone/files/2008/10/2008-oppositiontomotiontodismiss.pdf. [15/08/2010].
[510] For an analysis of French author's right law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Lucas-Plaisant [2010], *France*, in Nimmer-Geller [2010], *International copyright law and practice*, New York, Matthew Bender.
[511] Para. 5.3.1.
[512] *Societé Civil des Producteurs Phonographiques v. Anthony G.* 31éme chamber/2, 8 December 2005.
[513] *Societé Civil des Producteurs Phonographiques v. Anthony G.* Cour d'Appel, Paris, 13ème chambre, sec. B Arrêt 27 April 2007. www.legalis.net/jurisprudence-decision.php3?id_Article=1954. [15/08/2010].
[514] Article L 122-3 and L 212-3.
[515] Article L 212-3 for performers, L 213-1 for phonogram producers and L 215-1 for film producers. The right to perform could be also infringed. Article L 122-2.
[516] *SACEM and others v. Roche and Battie*, TGI Strasbourg, February 3, 1998 (1999) I.I.C. 974; Tribunal de Grande Instance, Saint-Etienne, 3e Chambre, 6 December 6 1999, (2000) 184 RIDA 389.
[517] Tribunal de Grande Instance, Vannes, 29 April 2004; Court d'Appel, Montpellier, 10 March 2005; Tribunal de Grande Instance, Châteauroux, 15 December 2004; Tribunal de Grande Instance, Pontoise, 2 Feb 2005. Tribunal de Grande Instance, Meaux, 21 April 2005; Tribunal de Grande Instance, Toulouse 10

criminal[518], and courts have rendered somewhat conflicting decisions[519], all of them related—either directly or indirectly—to the private copying exception[520]. Article L.122-5 lists five series of exceptions; of particular relevance are the two regarding private gratuitous performances within the family circle, and private copy[521]. '*Mulholland Drive*'[522] gave the *Cour de Cassation* an opportunity to redefine private copying in the digital environment[523]: in France, private copying is a legal exception to the rights of authors and other right owners, but not an absolute right of the users. Moreover, the *Conseil d'Etat*[524] specified that, notwithstanding private copy levies are applied to a wide range of media[525], the private copying exception should not be interpreted broadly, and accordingly introduced the distinction between legally copied and illegally copied files[526].

It may be argued that such an exception is applicable to file-sharing, since users are enjoying the copied works in the privacy of their own home and are not making commercial use of them[527]. However, networking technologies are not 'passive': users incite to share and download from each other, thus contextually reproducing and making files available[528]. Courts have struggled with these two acts: with respect to

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May 2005; Tribunal de Grande Instance, Créteil, 19 May 2005; Tribunal de Grande Instance, Lyon 8 July 2005; Tribunal de Grande Instance, Bayonne, 15 November 2005; Tribunal de Grande Instance, Châteauroux, 16 November 2005. www.juriscom.net. [15/08/2010].

[518] Article L.335-2. The mere violation of a right holder's exclusive rights is a criminal offence: the number of works reproduced is not relevant for the use to be commercial.

[519] The Paris court found not guilty of copyright infringement a file-sharer who had downloaded and uploaded protected works. The user had no intention to violate the law by sharing the works he had downloaded: '*there is no felony or misdemeanour in the absence of intent to commit it*'. Tribunal de Grande Instance, Paris, 8 December 2005. Under Article 121-3 of the French Criminal Code. Although in infringement cases the French Supreme Court has consistently held that criminal intent is *presumed*, this presumption may nevertheless be overcome. Since most softwares automatically share the downloaded files, the criminal intent threshold may not be met. Hugot, J.P. [2006], *op.cit.*

[520] Hugot, J.P. [2006], *op.cit.*

[521] Even though a literal interpretation could mean that only the person making the copy may enjoy this copy, courts admit that friends and family can enjoy it. Hugot, J.P. [2006], *op.cit*

[522] 05-15.824, 05-16.002 Arrêt n.549, 28 February 2006, Cour de Cassation- Première chamber civile. www.courdecassation.fr/jurisprudence2/premiere_chambre_civile_568/_16.002_8777.html. [15/08/2010]

[523] Also the French Conseil d'Etat decision of 11 July 2008.

[524] *Conseil d'Etat*'s decision of 11 July 2008.

[525] For instance, the Private Copy Commission's decisions of 20 July 2006, and of 9 July 2007, applied the private copy remuneration to USB keys and external hard-drives.

[526] The reasoning behind was apparently the advice of the *Commissaire du Gouvernement* who considered that applying the private copy remuneration to illegal downloading would create a 'global licence'. Thus, it appears that, when considering digital reproduction, copying from an original copy is legal and the author is fairly compensated, whilst in the case of a copy being made from an unauthorised copy, the author not only suffers infringement but he/she is also forced to file a lawsuit in order to obtain the deserved prohibitions and damages. Ruelle, J. [2008], *Does the private copy levy include remuneration for illicit copies?*. www.twobirds.com/English/news/articles/pages/Private_copy_levy_remuneration_illicit_copies.Aspx. [15/08/2010].

[527] Furthermore, users contribute to the just compensation fee purchasing blank CD or DVD.

[528] Hugot, J.P. [2006], *op.cit.*

reproduction, courts tend to apply the private use exception[529]; in contrast, the issue of the dissemination of the works to the public through networking technologies has led to almost unanimous rulings, since the exception regarding performances with friends and family may not be deemed applicable, where the work is communicated to an entire network[530].

Notably, in most cases, users were sentenced to pay a small fine but greater civil damages[531]. It appears that downloading (even without uploading) from an online service will not qualify as private copying. However, such a case may create difficult discrepancies in the private copy exception: many previously lawful acts may be unlawful under the current law[532]. For instance, copying for private use from an unlawful source is probably deemed unlawful. Furthermore, it might also be considered unlawful to copy a work lawfully accessed, as already detailed in *Mulholland Drive*[533]. The introduction of HAPODI[534] appears not to provide any advantage to the right holders[535], as will be discussed in Chapter Five.

3.2.5.4 – Germany. - German author's right law most important legislative source is the *Gesetz über Urheberrecht und verwandte Schutzrechte -Urheberechtsgesetzes vom*, 9 September 1965, as amended, mainly to implement the EU Directives and the WIPO Treaties[536]. In Germany, the file provider and the uploader to a webhosting site infringes the author's right to make the work available on-demand[537]. However, downloading or otherwise accessing through streaming has different legal consequences. The private copy exception operating in Germany applies to private copy of a protected work,

[529] Tribunal de Grande Instance, Rodez, 13 oct. 2004, Cour d'Appeal, Montpellier, 10 March 2005; Tribunal de Grande Instance, Meaux 21 April 2005; Tribunal de Grande Instance, Havre, 20 September 2005; TGI Toulon, 13 October 2005; Tribunal de Grande Instance, Créteil, 2 November 2005. www.juriscom.net. [15/08/2010].
[530] '*Ministere Public v Aurelien D.*', 5 September 2007, Cour d'Appel, Aix an Provence, 30 May 2006, *Cour de Cassation*, unreporterd. Geiger, C. [2008], *Legal or illegal? That is the question! Private copying and downloading on the internet*, 39(5) I.I.C. 597-603.
[531] With the implementation of the DADVSI Code, users are only subject to fine—the amount of which ultimately depends on whether users are downloading or sharing protected works. The fines are collected by the state—not the right holders. The fine is 38 Euro for downloading and 150 Euro for sharing.
[532] For instance, although it is lawful to tape a song broadcast on the radio, it might arguably be unlawful to copy the same song broadcast at the time by the same radio station using software such as Stationripper. www.stationripper.com. [15/08/2010]
[533] Cassation Civile 1er, 28 February 2006.
[534] HADOPI I & II will be discussed in Chapter 5.
[535] Hugot, J.P. [2006], *op.cit.*
[536] For an analysis of German author's right law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Dietz, A. [2010], *op.cit.*
[537] Article 17 UrhG.

unless the copy is made from an evidently illegal or unlawful source[538]. However, interestingly enough, file-sharing (from a criminal law perspective) has been defined a *Bagatellkriminalität* (petty offence) by German courts[539]. Moreover, currently, if the criminal prosecution authorities know the name and postal address of a user, it is open to doubt whether right owners are then allowed to view this information as part of their right to inspect files. The *Landgericht München I*[540] and the *Landgericht Saarbrücken*[541] prohibited the public prosecutor's office from granting to the right holders the authority to inspect the alleged infringing files in a file-sharing case, since the violation of personality rights weighed more heavily than 'rights under civil law'. Both courts referred to Article 406(e) of the *Strafprozessordnung* (Code of Criminal Procedure), under which the right to inspect files should be refused if violating the legitimate interests of the alleged infringer[542]. Finally, it must be noted how Germany—along with Greece—was one of the first European states to extend the private copy levy to computers and printers[543].

3.2.5.5 – Italy. - Italian author's right law is codified in the Law 633 of the 22 April 1941, as amended. Users in Italy potentially infringe Article 16(1) the right of communication to the public and Article 13, the reproduction right, nothwithstanding the private copying exception under Article 71-sexties[544]. Copyright infringement in Italy can be both a civil and a criminal offence. However, the *Suprema Corte di Cassazione* acquitted, owing to a lack of profit, two students who made protected content available on a university website. The behaviour was not considered to be 'criminal', whilst it nevertheless remains a 'civil' offence[545]. In 2004, the so-called

[538] Article 53 UrhG.
[539] *Amtsgericht Offenburg* (Offenburg Local Court) of 20 July 2007, Az. 4 Gs 442/07. Para. 6.4.6.4.
[540] Munich District Court I, decision of 12 March 2008 (case no. 5 Qs 19/08).
[541] Saarbrücken District Court, decision of 28 January 2008 (case no. 5 (3) Qs 349/07)
[542] Kuhr, M. [2008], *File-sharing networks between telecommunications and criminal law*, IRIS 6:6/7.
[543] *VG Wort v. Hewlett Packard*, Regional Court of Stuttgart, File No. 17 0 392/04, *VG Wort v. Fujitsu Siemens*, Regional Court of Munich, File No. 7 O 18484/03. Vormann-von Kupsch [2005], *Counting the costs*, 149 Copyright World, 15-17.
[544] [544] For an analysis of Italian author's right law and a description of the legal framework in which the cases discussed in this paragraph have been decided *see* Musso-Fabiani [2010], *Italy*, in Nimmer-Geller [2010], *International copyright law and practice*, New York, Matthew Bender.
[545] *Corte Suprema di Cassazione, Sezione III penale – Sentenza* 149/07. www.ictlex.net/?p=565. [15/08/2010]. The decision was based on the state of the law in 2000, when the case was started, before the introduction of the 'Decreto Urbani'. An early case regarding file-sharing is '*Kouvakis Emmanouil*', Tribunale di Palermo, 9 October 2001.

'*Decreto Urbani*'[546] modified the LdA—in particular, article 171-ter of the LdA—changing the wording '*a scopo di lucro*', meaning for profit, into '*per trarne profitto*', meaning for the purpose of gaining an advantage. With this modification, even private, non-commercial file-sharing is a matter of criminal law in addition to the administrative sanctions[547]. The situation may change depending on the interpretation that could be given to paragraph 1bis to article 70 of the LdA added by the Law of 9 January 2008, no. 2. This refers to a limitation regarding use without profit on the internet of low-resolution images and degraded music for teaching and scientific purpose[548].

3.2.5.6 – Spain. - Users in Spain potentially infringe the right of exploitation (*Derechos de explotación*) under Article 17 of the *Ley de Propiedad Intelectual* as amended, which includes the right of reproduction and the right of communication to the public[549]. However, in 2006, it was held that a user who downloads copyright protected files for personal use should not be punished, since it is

> '*a practised behaviour where the aim is not to gain wealth but to obtain private copies*'[550].

This called for immediate lobbying from the entertainment industries to amend the law, which was subsequently successful. Under the new *Ley de Propiedad Intelectual*[551], unauthorised file-sharing is unlawful notwithstanding the private copy exception[552],. However, the situation is not clear, in particular, owing to Article 270 of the Criminal Code[553], which refers to commercial copying

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[546] D.L. nr.72/04. '*Interventi per contrastare la diffusione telematica abusiva di materiale audiovisivo, nonché a sostegno delle attività cinematografiche e dello spettacolo*'. Later converted into Legge n. 128 del 21.05.2004.

[547] It should be noted that Italy is on the International Intellectual Property Alliance's 'Piracy Watch List'. www.iipa.com/rbc/2010/2010SPEC301ITALY.pdf. [15/08/2010]. The Alliance denounced deficiencies in the enforcement system. Notably the 'Cirelli Law 2005', the 'Pecorella Law 2006' and the 'Pardon' of 296 had a dramatic effect of the enforcement system. A description of these laws in English is available at www.iipa.com/rbc/2008/2008SPEC301ITALY.pdf. [15/08/2010]

[548] Art 70 (1-bis). '*È consentita la libera pubblicazione attraverso la rete internet, a titolo gratuito, di immagini e musiche a bassa risoluzione o degradate, per uso didattico o scientifico e solo nel caso in cui tale utilizzo non sia a scopo di lucro. Con decreto del Ministro per i beni e le attività culturali, sentiti il Ministro della pubblica istruzione e il Ministro dell'università e della ricerca, previo parere delle Commissioni parlamentari competenti, sono definiti i limiti all'uso didattico o scientifico di cui al presente comma*'.

[549] For an analysis of Spanish author's right law and a description of the legal framework in which the cases discussed in this paragraph have been decided *see* Bercovitz-Berkovitz-del Corral [2010], *Spain*, in Nimmer-Geller [2010], *International copyright law and practice*, New York, Matthew Bender.

[550] Court of Santander, No. 3 Penal Court, 1 November 2006, unreported. www.theregister.co.uk/2006 /11/03/spanish_judge_says_downloading_legal. [15/08/2010].

[551] Approved in the Congress of Deputies on 22/06/2006.

[552] The law also introduces a small levy on all blank media including mobile phones and memory stick. Computer hard disks and ADSL lines have been left out. www.tmcnet.com/usubmit/2006/06/27/

'*for profit and to the detriment of a third party*'[554].

It could be argued, however, that users realise a profit and detriment the entertainment industries. Nevertheless, in 2009, the Criminal Court of Pamplona acquitted a defendant of author's right infringement charges because there was no evidence that he profited from sharing and downloading the files[555].

3.2.5.7 – Canada. - Canada has a unique approach to networking technologies issues[556]. The Copyright Act[557] provides that a copyright owner has the

> '*sole right to produce or reproduce a work or any substantial part of a work in any material form whatever*'[558].

However, §80(1) provides users in Canada with a broad private copying exception[559], and the Supreme Court clarifies that exceptions should be broadly interpreted since they are an 'integral part' of the Act[560]. It therefore appears that downloading is permissible[561]. With regards to making a work available, in *BMG Canada*[562], copying a file on a shared folder connected to a file-sharing network does not constitute distribution in itself[563]. For distribution to occur:

> '*there must be a positive act by the owner of the shared directory, such as sending*

1696993.htm. [15/08/2010]. *SGAE (Sociedad General de Autores y Editores) vs. Jesus Guerra*, n 879/2009, 11 May 2010, however suggests a different interpretation. It is of interest the parallelism made by the Court of Madrid between lending and file sharing. *'..since ancient times there has been the loan or sale of books, movies, music and more. The difference now is mainly on the medium used – previously it was paper or analog media and now everything is in a digital format which allows a much faster exchange of a higher quality and also with global reach through the internet'.* Translation from torrentfreak.com/ judges-liken-p2p-to-the-ancient-practice-of-lending-books-100608. [15/08/2010].

[553] As amended by the ordinance 15/2003 of 25 November.

[554] As translated in *Commission of the European Communities v. Kingdom of Spain* C-58/02, 7 January 2004.

[555] http://torrentfreak.com/downloading-3322-movies-is-okay-in-spain-090529. [15/08/2010].The case concerned a sharing activity during 2003-2004, thus the 2006's amendment of the law was not applied.

[556] For an analysis of Canadian copyright law and a description of the legal framework in which the cases discussed in this paragraph have been decided *see* Gendreau-Vaver [2010], *Canada*, in Nimmer-Geller [2010], *International copyright law and practice*, New York, Matthew Bender.

[557] R.S., c. C-30, as amended.

[558] §3.

[559] However, §80(2) specifies that the exception is inapplicable when the purpose of the user's copy is '*selling, distributing, communicating to the public', etc.* §82 deals with the levy system.

[560] *Canadian Ltd. v. Law Society of Upper Canada* [2004] S.C.C. 13 (*CCH*), 10. The court also clarified some other key issues, including authorisation, fair dealing, and distribution.

[561] This approach was confirmed in *Canadian Private Copying Collective v. Canadian Storage Media Alliance* (F.C.A.) 2004 FCA 424, (2004), [2005] 2 F.C.R. 654.

[562] *BMG Canada Inc. v. John Doe*, [2004] FC 488 affirmed, 2005 FCA 193.

[563] *Ibid.* Para. 26. However it may seem plausible to consider copying a file in a shared-folder as an act of distribution; still, there is no transference of ownership.

out the copies or advertising that they are available for copying'[564].

The Federal Court of Appeal upheld this interpretation. However, the court noted that technology should not be allowed to

'obliterate those personal property rights which society has deemed important'[565].

Notably, the Federal Court Trial Division refused to grant access to the identities of alleged file-sharers to the Canadian Recording Industry Association (CRIA) because no evidence of infringement was provided[566]. Following this pro-user approach of Canadian courts, the CRIA is lobbying to amend the copyright legislation[567]. Furthermore, although Canada ratified the WIPO treaties in 1997, these have yet to be implemented into domestic law.

In June 2010, an amendment to the Copyright Act[568] has been proposed and it is currently under discussion[569].

3.2.6 – User Status

Summarising, the international consensus appears to be that users are potentially liable for the infringement of the right of communication to the public (including making available and distribution) for the unauthorised acts of sharing and uploading of protected materials; and they are potentially liable for the infringement of the reproduction right for the acts of downloading and accessing unauthorised materials.

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[564] *Ibid.* Para. 28. In *SOCAM*, it was further specified that, in order to communicate to the public, *'the person posting a file must intend it to be accessed by some segment of the public, and certainly more than a single recipient'. Society of Composers, Authors, and Music Publishers of Canada v. Canadian Association of Internet Providers and others,* [2002] FCA 166; [2004] S.C.C. 45.

[565] *Ibid.*

[566] *Ibid*

[567] The suggested changes include the implementation of the WCT, and anti-circumvention provisions. Standing Committee on Canadian Heritage [2004], *Interim report on copyright reform*, May. www.parl.gc.ca/InfocomDoc/Documents/herirp01-e.pdf. [15/08/2010]. Piasentin, R.C. [2006], *op.cit.*

[568] Bill C-32, 2 June 2010. www2.parl.gc.ca/housepublications/publication.aspx?docid=4580265&language=e&mode=1. [15/08/2010].

[569] Under Amendment 29.21, entitled 'User-Generated Non-Commercial Content': '*It is not an infringement of copyright for an individual to use an existing work* […], *which has been published or otherwise made available to the public, in the creation of a new work* […], *and for the individual* […] *to use the new work* […] *or to authorize an intermediary to disseminate it, if: a) the use of, or the authorization to disseminate, the new work* […] *is done solely for non-commercial purposes; b) the source* […] *of the existing work […]or copy of it are mentioned […]; c) the individual had reasonable grounds to believe that the existing work* […]*was not infringing copyright; and d) the use of, or the authorization to disseminate, the new work* […] *does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work* […] *or on an existing or potential market for it, including that the new work* […] *is not a substitute for the existing one*'.

There are arguably no limitations, exceptions or defences applicable[570]. However, as illustrated above, different jurisdictions approach networking technologies differently. Notwithstanding new legislations and extensive case law, the scenario still remains unclear and arguably successful. It is submitted that copyright law appears not to cope well with decentralised, non-commercial activities, and that enforcement against users is not the solution to networking technologies; in actual fact, enforcement against such a large number of potential infringers may even disrupt the judiciary systems[571]. When a similar problem emerged in Germany in the 1960s, the legislator made sure that copyright holders were not deprived from their rightful income, introducing a right to equitable remuneration. A similar approach would be appropriate considering how easily users can avoid lawsuits using softwares and sites which allow stealth technologies, encrypting or codifying file names, avoiding large amounts of files in the shared folder, sharing only on-demand, and using non-registered internet access. Nevertheless, it is submitted that a successful global strategy should focus on balancing the interests of the actors involved[572] in order to determine a system to which views all such unauthorised uses of protected material profitable for the right owners, as will be later discussed[573].

3.3 – The Facilitators: Software Provider

> *'Such software permits the exchange of any sort of digital file* […] *There may be other now-unforeseen non-infringing uses that develop for peer-to-peer software, just as the home-video rental industry* […] *developed for the VCR. But the foreseeable development of such uses, when taken together with an estimated 10% non-infringing material, is sufficient to meet Sony's standard'*[574].

It is submitted that file-sharing softwares are not expressly aimed at the exchange of infringing files; however, in the event that they are used for infringing purpose, the software providers may become potentially liable by permitting, aiding, authorising or

[570] With the exception of the private copy exceptions in a limited number of jurisdictions. For instance, the Netherlands. *FTD BV v EYEWORKS FILM & TV DRAMA BV*, The Hague District Court, case number/docket number: 366481/KG ZA 10-639, 2 June 2010. Interestingly the issues of authorisation and secondary liabilities of users appear to be still unexplored by courts worldwide.

[571] In the UK, during 'Operation Ore', police and courts handled with extreme difficulties 7,000 alleged criminal offenders. www.theregister.co.uk/2006/08/21/operation_ore_class_action. [15/08/2010]. The estimated number of copyright infringers in the UK is 7 million.

[572] Weatherall, K. [1999], *An end to private communications in copyright? The expansion of rights to communicate works to the public: Part 2*, 21(8) E.I.P.R. 398.

[573] In the remaining Chapters of this thesis.

[574] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 125 S.Ct. 2764 (2005), 2789-2790. Also Merges, R.P., [2004], *A New Dynamism in the Public Domain*, 71 Chicago L.Rev. 183.

otherwise inducing users' infringing activities; and for acting as joint tortfeasor with the file provider and the file receiver in the respective infringements[575].

The first case regarding software providers was that of *Napster*[576]. The court held that Napster's users were infringing copyright[577], and Napster's success was based on these infringements; thus, it was liable for contributory and vicarious infringement[578]. Napster's defences were rejected based on the software's non-infringing uses, fair use[579] and §512(a) and (d) DMCA[580]. Napster, however, was hardly a neutral service provider[581]. The preliminary injunction caused the bankruptcy of Napster, and the court did not reach a final decision, but spelled out some guiding principles concerning liabilities for contributory[582] and vicarious infringement[583]. These guidelines were used to implement a new 'generation' of softwares, designed to avoid liability[584]. Notwithstanding

> *'the possibility that* [software providers] *may have intentionally structured their business to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares'*[585],

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[575] Moreover softwares using a central index may be liable for failing to observe the author's attribution and integrity moral rights (only authors and performers). For a complete list, Sterling, J.A.L. [2008], *op.cit.* 13.01.

[576] Even before that the company could officially launch the product into the market. *A&M Records v. Napster Inc.*, 114 F.Supp. 2d 896 (N.D. Cal 2000); 54 USPQ 2d 1746 (N.D. Cal 2000). Suthersanen, U. [2002], *Napster, DVD and all that: developing a coherent copyright grid for internet entertainment*, in Barendt–Firth (ed.) [2002], *Oxford yearbook of copyright and media law*, Volume 6, Oxford University Press, 207-250.

[577] The copying and distribution of music files was a direct infringement of copyright. The use was not 'fair' within the meaning of §107 USC. Act. *A&M Records Inc. v. Napster Inc.*, 114 F Supp 2d 896 (N.D. Cal. 2000); 54 USPQ 2d 1746 (N.D. Cal. 2000); 239 F 3d 1004; 57 USQP 2d 1729 (9th Cir. 2001); WL 227083 (ND Cal. 5 March 2001); 284 F.3d 1091 (9th Cir. 2002). Randle [2002], *op.cit*, 33-34.

[578] The court claimed that 'financial benefit exists where the availability of infringing material acts as a draw for customers', and the growing user base makes the company more attractive to investors. *Ibid.*

[579] In particular, Napster argued that the file transfer was completely legal because individuals were merely making personal non-commercial copies of music permitted by the US Audio Home Recording Act, by fair use and by 'space-shifting'. *Ibid.*

[580] However, the information did not go through the Napster system (§512(a)), and Napster had 'actual knowledge' (§512(a)). McEvedy, V. [2002], *The DMCA and the E-Commerce Directive*, 24(2) E.I.P.R. 65-73.

[581] Reichman-Dinwoodie-Samuelson [2009], *A reverse notice and take down regime to enable public interest uses of technically protected copyrighted works*, in Strowel, A. [2009], *Peer-to-peer file sharing and secondary liability in copyright law*, Edward Elgar, 229-304.

[582] Napster was required to take 'reasonable steps to prevent further distribution of the work' after receiving notice from a copyright owner in order to avoid been held liable for contributory infringement.

[583] '*Napster…should bear the burden of policing its system within the limits of the system*'. *A&M Records Inc. v. Napster Inc.*, 57 USQP 2d 1729 (9th Cir. 2001). Napster had the duty to terminate the account of the infringing users. Beyond that, the court never fully resolved the problem. von Lohmann F. [2003], *Peer-to-peer file-sharing and copyright law: a primer for developers*, TPS Berkeley, 5.

[584] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 259 F Supp 2d 1029, 65 USQP 2d 1545 (C.D. Cal. 9 January 2003). Even if these softwares are conceptually analogous to Napster, they neither '*operate a centralized file sharing network*', nor they '*provide the site and facilities for direct infringement*'. *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004, 1022.

[585] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 259 F Supp 2d 1029, 1046.

such new softwares do not provide a 'central index', nor do they depend upon any interventions initiated by the provider[586], nor can they successfully filter and block the content shared[587]. Theoretically, they were not liable under secondary liability theories because the

> '*Sale of copying equipment […] does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it needs merely to be capable of substantial non-infringing uses*' [588].

Nevertheless, two high profile cases in the US and Australia found the software providers liable for copyright infringement. The courts interpreted different laws and accordingly reached their conclusions owing to different reasoning[589]. However, it is submitted that such cases did not judge the software *per se*, but the way in which it was distributed and advertised[590].

Grokster had 'substantial non-infringing uses'[591], did not 'materially contribute' to, or had 'actual knowledge' of, its users' infringements[592]. Grokster's involvement was simply concerned with providing the software[593]. Even if the providers would have:

> '*closed their doors and deactivate all computers within their control, users of their products could continue sharing files with little or no interruption*'[594].

The US Supreme Court reversed the appeal decision, and relied upon its decision concerning the theory of inducement drawn from patent law[595]: a software provider who actively induces copyright infringement is liable, notwithstanding its potential non-infringing uses or lack of material contribution[596]. The court justifies this apparently

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[586] Sullivan-Bell [2005], *To the Top*, Copyright World 148, 8-9.
[587] *Kazaa BV v. BUMA/STEMRA*, CA Amsterdam, 29 March 2002 [2002] E.I.P.R. N-130
[588] *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Circuit 2003).
[589] Jackson-Shelly [2006], *Black hats and white hats: authorisation of copyright infringement in Australia and the United States*, 14(1) I.J.L. & I.T., 28-46.
[590] The Australian Federal Court's decision was handed down on 05/09/2005, after the publication of *Grokster*. However, the Australian court was quick to point out that, notwithstanding the similarities between the two softwares, the conduct of the providers was different. In addition, there are substantial differences in the statutory framework within which the courts gave their judgments.
[591] Grokster relied on *Sony Corp of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984): '*the distribution of a commercial product capable of substantial non-infringing uses do not rise contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge*'.
[592] Flint, D [2005], *Stemming the peer-to-peer outflow at source – maybe*, 16(8) Ent.L.Rev. 199-200.
[593] The non-infringing uses of the software were also emphasised by the Supreme Court. *Metro-Goldwyn-Mayer Studios Inc v. Grokster Ltd.* (S.Ct, 2005), 2789-91. Merger, R. [2004], *op.cit.* 183. Grokster was not vicariously infringing.
[594] *Metro-Goldwyn-Mayer Studios Inc v. Grokster Ltd.*, 259 F.Supp.2d 1029 (C.D. Cal. 2003) 1041.
[595] 35 USC §271.
[596] Reichman-Dinwoodie-Samuelson [2009], *op.cit*. Giblin-Chen, R. [2007], *On Sony Streamcast, and smoking guns*, 29(6) E.I.P.R. 215-226.

abandonment of *Sony*[597] with the evidence that Grokster went beyond merely providing the software: Grokster's statements and actions encouraged and promoted infringements; the defence of *Sony* does not apply when the infringing uses are

'*not only expected but invoked by advertisement*' [598].

Notably, the Supreme Court found that *Sony* should not be interpreted broadly[599]; however, it should be noted that *Sony* would have probably been applied if Grokster's intent was not to 'actively induce copyright infringement'[600].

Furthermore, in Australia, *Sharman Networks* was held liable for authorising copyright infringements[601]. The claim was that Sharman had provided Kazaa

'*knowing and intending that, or being recklessly indifferent to whether* […] *Kazaa's users downloaded infringing files*'[602];

and accordingly authorised the users' infringements[603]. Sharman responded that it could not control the users' activities, that the software had 'substantial non-infringing uses' and was 'content neutral'[604]. Sharman argued that there is:

'*a critical distinction between giving a person the power to do an infringing act and purporting to grant to a person the right to do that act*'[605].

However, the evidence illustrated that Sharman encouraged, rewarded, and was profiting from infringing activities[606]. Moreover, Sharman advertised the software through a campaign entitled 'Join the Revolution', and on the website one could read:

'30 years of buying the music they think you should listen to ... Over. With one single click'.

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[597] *Sony Corp of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984). The Betamax was '*capable of commercially significant non-infringing uses'*; thus the court held Sony not liable of the copyright infringements of the Betamax's users.

[598] Common law principle. *Kalem Co v. Harper Brothers*, 222 U.S. 55, 62-63 (1911).

[599] *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 259 F Supp 2d 1029, 65 USQP 2d 1545 (C.D. Cal. 9 January 2003); 2003 WL 1989129 (C.D. Cal. 25 April 2003); affirmed 380 F.3d 1154 (9th Cir. 2004); 125 S.Ct. 2764 (2005); on remand 454 F.Supp. 966 (C.D. Cal. 2006). The court also noted how Grokster aimed '*to satisfy a known demand for copyright infringement'*, '*did not attempt to filter or diminish the infringement activities*' and '*made profit with advertisement as a consequence of these activities*'.

[600] Reichman-Dinwoodie-Samuelson [2009], *op.cit*.

[601] *Universal Music Australia Pty. Ltd. v. Sharman License Holding Ltd.*, [2005] F.C.A. 1242, (2005) 65 IPR 289. The court also found that Sharman and other defendants '*had entered into a common design to carry out, procure or direct such authorisation*'. The so-called difference between 'blue files' and 'gold files', and the position of Altanet are not relevant to this work and therefore not analysed.

[602] *Ibid.*

[603] Also Sharman '*had acted as joint tortfeasors with Kazaa users*'. *Ibid.*

[604] It was unable to discriminate the infringing files from the non-infringing ones. *Ibid*

[605] *Ibid*. Similarly, *CBS Song Ltd. v. Amstrad Consumer Electronics Plc*., [1988] 2 All ER 490.

[606] Sharman's business model relied mainly on advertising revenues. Although the Kazaa was free to download, the more people use it, the more attractive the network becomes to advertisers.

The Australian Copyright Act[607] explains that, in order to assess 'authorisation', a court should consider[608]: the power to prevent infringement; the nature of the actors involved and whether reasonable steps have been taken to prevent infringement[609]. In the case of *Sharman*, the court considered previous case law[610] in conjunction with §101, and further stated that Sharman actively encouraged infringement by inviting users to 'Join the Revolution' by using Kazaa in order to share their files[611]. The court also maintained that Sharman had the power to control users' infringing activities[612], and although copyright infringement's warnings were displayed[613], this was not sufficient.

Notwithstanding the differences between Australia and US copyright systems, the courts in both countries found that software providers were liable if they were to reach beyond merely providing the software: *Grokster* and *Sharman* actively encouraged, and financially benefited from, users' infringing activities, and accordingly failed to adopt filters to prevent such infringements. However, with the diffusion of open-source decentralised file-sharing software offering user anonymity and secrecy, the relevance of these cases was reduced, hence the on-going arguments over filtering technologies[614], which will be covered in Chapter Five.

3.3.1- Potential Defences

Potentially, file-sharing softwares provide the same duality function as the Betamax[615] or Amstrad[616]. However, in the US, the presence of 'substantial non-infringing uses' appears to be irrelevant when the provider has knowledge, control, derives a financial benefit, or induces its users to infringe copyright[617]. However, *Grokster* did not provide any guidelines in consideration of determining the lawfulness of file-sharing

[607] 1968 as amended by the Copyright Amendment Act 2000.
[608] §101.
[609] Daly, M. [2007], *Life after Grokster: analysis of US and European approaches to file-sharing*, 29(8) E.I.P.R. 319-324.
[610] In particular, *University of New South Wales* v. *Moorhouse* (1975) 133 C.L.R. 1. (Authorisation means '*to sanction, approve or countenance*' an act). *APRA* v. *Metro on George Pty Lid,* (2004) 61 I.P.R. 575. (the respondents authorised the infringement because they had control of the premises and could have taken sufficient steps to prevent infringement).
[611] (2005) 65 IPR 289, 384-6.
[612] (2005) 65 IPR 289, 387.
[613] Such as posting warnings and including warning text in the software's EULA.
[614] Zittrain, J. [2006], *A history of Online Gatekeeping*, 19 1 J.O.L.T. 253-298.
[615] *Sony Corp. of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984).
[616] *CBS Song Ltd. v. Amstrad Consumer Electronics Plc.*, [1988] 2 All ER 490.
[617] *A&M Records Inc. v. Napster Inc.*, 293 F.3d 1004, 1011-13 (9th Cir. 2001); *In Re Aimster Copyright Litigation, Appeal of John Deep*, 334 F.3d 642, 646-47 (7th Cir. 2003); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 125 S.Ct. 2764 (2005).

software[618], nor did it re-define the *Sony* defence in the light of file-sharing softwares or services[619]. With this in mind, Grokster was disqualified from the defence since it was inducing copyright infringement[620]. It appears, therefore, that the defence would still apply when a software provider does not go beyond providing the software, and

> '*unless the technology in question will be used almost exclusively to infringe copyrights*[621].'

In the UK, although the argument was rejected in the case of *Newzbin*[622], it still remains uncertain whether Amstrad defence[623] could be applied to software providers. In the Netherlands, for example, the simple unchallenged academic opinion that *Kazaa* could not control the infringing activities was enough to succeed against BUMA/STREMA's motion for summary judgement[624]. The defence for the same software was rejected in *Sharman*[625].

Software providers appear not to be included in the definition of internet services providers enjoying the DMCA[626] and E-Commerce Directive's 'safe harbour' defences[627]. Courts have rejected other defences[628].

3.3.2 - Dodging Lawsuits

A non-legal defence largely used by some software providers concerns trying to virtually disappear behind 'Chinese-boxes', i.e. businesses based in improbable locations. Kazaa, for example, argued that

> *'because we are everywhere, we are nowhere'*[629].

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[618] Samuelson, P. [2005], *Legally speaking: did MGM really win the Grokster case?* 48 A.C.M. 19. www.ischool.berkeley.edu/~pam/papers. [15/08/2010].
[619] Reichman-Dinwoodie-Samuelson [2009], *op.cit*.
[620] *Ibid.* Samuelson, P. [2005], *op.cit.*
[621] *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 125 S.Ct. 2764 (2005). Breyer J. concurring, 10.
[622] *Twentieth Century Fox Films Corp. & Others v. Newzbin Ltd.*, [2010] EWHC 608 (Ch), 29 March 2010.
[623] *CBS Song Ltd. v. Amstrad Consumer Electronics Plc.*, [1988] 2 All ER 490.
[624] Declaration of Professor Huizer (18 February 2002), *Kazaa v. Buma/Strema*, No. KG 01/2264 OdC (Amsterdam Ct. of Justice, 29 November 2001), reversed, No. 1370/01 (Amsterdam Ct. of Appeal, 28 March 2002), affirmed, No. C02/186 (Netherlands S.Ct. 19 December 2003).
[625] *Universal Music Australia Pty. Ltd. v. Sharman License Holding Ltd.*, [2005] F.C.A. 1242, (2005) 65 IPR 289.
[626] 17 USC §512.
[627] They are discussed in Para 3.4.3.
[628] Such as the following: lack of control, lack of understanding of the system, lack of knowledge. Dixon, A.N. [2009], *Liability of users and third parties for copyright infringements on the internet: overview of international development*, in Strowel, A. [2009], *Peer-to-peer file sharing and secondary liability in copyright law*, Edward Elgar, 12-42, 40-41.
[629] www.kazaa.com. [15/08/2010]

Kazaa was originally based in the Netherlands, but transferred to Vanuatu. The domain name is registered in Australia [630]. Other companies prefer to set their headquarters and servers in the West Bank[631] or in Russia and the Ukraine.

3.3.3 – National Approaches

3.3.3.1 – UK. - Copyright is infringed when a person without licence '*authorises another to do any of the acts restricted by the copyright*'[632]. The House of Lords in *Amstrad*[633] held that '*to grant the power to copy*' is not 'authorisation', as it is different than '*to grant or purport to grant the right to copy*'[634]. The High Court has since confirmed that mere distribution of a product, irrespective of whether or not it could be used to infringe copyright, is not deemed to be authorisation when there is no '*further control over the use of the product*'[635]. The analogies between *Amstrad* and software providers are clear[636]; however, the exact legal position remains uncertain:

> '*The problem is this: it is the end-user that directly carries out the restricted act, not the software or access provider. This means that a copyright owner would have to show in court that a peer-to-peer operator* […] *had authorised the carrying out of the restricted act and, given the uncertainty that has resulted from* [Amstrad], *to date right holders have perhaps be unwilling to embark upon costly, time consuming and risky litigation*'[637].

[630] The servers are in Denmark, the control of the software code is shared between the UK and Estonia.
[631] Tang, P. [2005], *Digital copyright and the 'new' controversy: is the law moulding technology and Innovation?*, 34 Research Policy, 852-871.
[632] §16(2) CDPA. For an analysis of British copyright law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Geller-Davies [2005], *op.cit.*; Bentley-Cornish [2010], *op.cit.*
[633] *C.B.S. Songs Ltd. & Ors v. Amstrad Consumer Electronics Plc. & Anor* [1988] AC 1013. The House of Lords held that Amstrad did not sanction, approve or countenance an infringing use and that authorise for the purposes of the Copyright Act meant '*grant or purported grant, which may be express or implied, of the right to do the act complained of*'. *Ibid.*
[634] *Ibid*, 574-575; the court substantiated this reasoning by approving a passage from the earlier decision of *C.B.S. Inc. v. Ames Records & Tapes Ltd.*, [1981] RPC 307, where the court had held that '*an authorisation can only come from somebody having or purporting to have authority and that an act is not authorised by somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act*'.
[635] *Philips Domestic Appliances & Personal Care BV v. Salton Europe Ltd, Salton Hong Kong Ltd and Electrical & Electronics Ltd* [2004] EWHC 2092 (Ch).
[636] British Copyright Council [2006], *Gowers review of intellectual property, follow-up submission on peer-to-peer issue and potential legislative solutions*, 1. www.britishcopyright.org. [15/08/2010].
[637] *Ibid.* 1.

Some commentators concluded that '*English courts might not follow Amstrad*[638], whilst others state that a court would not need to move away from it in order to find software providers liable[639]. Decisions in other common law jurisdictions are of limited guidance[640]. However, various parallelisms can be found with the Australian *Sharman*[641]. The issue in discussion is the one of 'control', more than incitement since,

> '*Amstrad's advertisement was deplorable* […]. [It] *was cynical because* […] *advertised the increased efficiency of a facility capable of being employed to break the law*'[642].

This was not different from Sharman's advertisement campaign. 'Control', however, in the sense of 'ability to prevent the infringement', would mainly depend upon the architecture of the software itself. Napster would have probably been found liable, but not the providers of new generation softwares. It has been since argued that the authorisation theory in *Sharman* would have a '*narrower application*' in the UK[643] since

> '*authorisation must be by way of advertisement and give rise to a specific infringement as a result of the communication to an individual infringer*'[644].

However, the recent *Newzbin*[645] appears to have broadened this approach[646]. Nonetheless legal uncertainty in this field remains.

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[638] Cornish–Llewelyn [2007], *Intellectual property: patents, copyright, trade marks and allied rights*, Para. 20-67; Sparrow, A. [2006], *Music distribution and the internet– A legal guide for the music business*, Gower, 42; Strokes, S. [2005], *Digital copyright*, 2nd ed. Hart Publishing, 134-135.

[639] Larusson, H.K. [2009], *op.cit*, 129.

[640] *Napster* and *Grokster* in the US found liability on contributory/vicarious infringement and inducement theories, which would be inappropriate to evaluate under UK law. *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 125 S.Ct. 2764 (2005).

[641] *Universal Music Australia Pty. Ltd. v. Sharman License Holding Ltd.*, [2005] F.C.A. 1242, (2005) 65 IPR 289. Decision based on *University of New South Wales v. Moorhouse* 1975 HCA 26; (1975) 133 CLR 1 (1 August 1975). A decision neither followed or rejected in *Amstrad*, but rejected by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339; (2004) SCC 13.

[642] *CBS Song Ltd. v. Amstrad Consumer Electronics Plc*., [1988] R.P.C. 567, 574.

[643] The interpretation of 'authorise' in *Amstrad* appears narrower than the previous test in *Falcon v. famous Player Film Co* [1926] 2 KB 474. In *Amstrad* at 1054, authorise is defined as '*a grant, or purported grant, which may be expressed or implied, of the right to do the act complained of*'. *CBS Song Ltd. v. Amstrad Consumer Electronics Plc*., [1988] A.C. 1013. While in Falcon the focus was on whether the authoriser 'sanctions, approves or countenances' infringement by others'. In Australia authorisation did not require the granting of an express or active permission to infringe, control and infringing use appear to be enough to authorise, whether or not an infringement takes place. *University of New South Wales v. Moorhouse* 1975 HCA 26; (1975) 133 CLR 1 (1 August 1975). In *Sharman* this was expanded. Kazaa 'authorised' with the exhortation to infringe copyright through the 'join the revolution' page. *Universal Music Australia Pty. Ltd. v. Sharman License Holding Ltd.*, [2005] F.C.A. 1242, (2005) 65 IPR 2899. This approach was confirmed in *Cooper*. Austin, G.W. [2009], *op.cit.* 126. However, the 'narrower' UK test has been quite flexible since courts have some times identified 'joint-ventures' between suppliers and infringer when there is a common purpose to infringe. Laddie-prescott-victoria [2000], *The modern law of copyright and design*, 3rd ed., Butterworths, 1176.

[644] Daly, M. [2007], *op.cit*.

3.3.3.2 – USA. - Notwithstanding *Grokster*[647], the legal position of software providers is still uncertain[648]. The decision was based on facts limited to *Grokster*, and consequently left many questions unanswered. The court attempted to explain that the providers fell under the new inducement standard[649], since they '*communicated an inducing message to their software users*'[650] in the following ways: advertising[651]; absence of filtering[652]; and revenue model[653]. However, notwithstanding knowledge remains relevant to secondary liability for contributory and vicarious infringement, 'active inducement' is arguably a third basis for secondary liability in which

> '*it seems that the knowledge requirement has been replaced with intention*' [654].

Apparently, when a provider promotes infringement, the *Sony*[655] doctrine does not preclude liability[656]. Grokster promoted its product as a mean of infringing copyright and the court noted that it was superfluous to prove any further link between the inducement and the users' copyright infringements. Therefore,

> '*one, who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties*'[657].

A general rule concerning how this could be determined was not definitively addressed[658]; however, the court acknowledged that mere distribution is not considered adequate, even when the provider has knowledge of users' infringing activities[659].

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[645] *Twentieth Century Fox Films Corp. & Others v. Newzbin Ltd.*, [2010] EWHC 608 (Ch), 29 March 2010. Para 3.4.6.1.

[646] Finally providing software may amount to secondary infringement under §24, even thou this section does not apply to general purpose copying devices *C.B.S. Songs Ltd. & Ors v. Amstrad Consumer Electronics Plc. & Anor* [1988] AC 1013, 1055.

[647] *Metro-Goldwyn-Mayer Studios Inc v. Grokster Ltd*., 125 S.Ct. 2764 (2005).

[648] For an analysis of US copyright law and a description of the legal framework in which the cases discussed in this paragraph have been decided *see* Schwartz-Nimmer [2010], *op.cit*.

[649] Ganley, P. [2006], *op.cit.* 15-25.

[650] *Metro-Goldwyn-Mayer Studios Inc v. Grokster Ltd*., 125 S.Ct. 2764 (2005), 2780.

[651] However this was limited to StreamCast sending messages to Napster's users and advertiser introducing their software as similar to Napster. *Ibid.* 2773. Moreover, the name 'Grokster' apparently derives from Napster itself; and the company '*attempted to divert search queries for Napster to its website*'. *Ibid.*

[652] This, according the court, '*underscores Grokster's and Streamcast's intentional facilitation of their users' infringement*'. *Ibid.* 2781

[653] Both companies derived revenue from selling advertising space and by directing adverts to users' computers. *Metro-Goldwyn-Mayer Studios Inc v. Grokster Ltd*., 259 F Supp 2d 1029, 1040.

[654] Daly, M. [2007], *op.cit*.

[655] *Sony Corp. of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984).

[656] In *Sony* no evidence was introduced to indicate intent to promote infringing uses. Daly, M. [2007], *op.cit*.

[657] *Metro-Goldwyn-Mayer Studios Inc v. Grokster Ltd*., 125 S.Ct. 2764 (2005), 2780.

[658] *Ibid.*

The Supreme Court did not conclude on the admissibility of file-sharing software. Thus, a number of infringement proceedings against software providers have been filed since 2005[660], in particular *Arista v. LimeWire*[661], in which the record companies separated the distinct theories into three different complaints for indirect liability: contributory, vicarious, and inducement of copyright infringement. Summary judgement was granted for inducing copyright infringement, and the court held LimeWire liable for committing a 'substantial amount of copyright infringement', inducing users to commit infringements, and engaging in unfair competition. However, summary judgement was denied for contributory and vicarious infringement[662]. The court did not mention 'Safe harbour' defences[663]. In an earlier summary judgement[664], however, it was specified that 'inducement' to infringe copyright eliminates the eligibility for the 'safe harbour' defences[665].

3.3.3.3 – France. - The legal landscape in France surrounding software providers did not expressly support the possibility of a similar finding to that of *Grokster* and *Sharman*[666]. There was no offence of author's law infringement by inducement under the French Intellectual Property Code[667]. However, article 1382 Civil Code could possibly be applied:

> '*an act whatever of man, which cause damages to another, obliges the one by whose fault has occurred, to compensate it*'.

The situation has changed following the adoption of the DADVSI Act[668] under which software providers are liable when

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[659] '*The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise*'. *Ibid.*

[660] For instance, *Arista Records LLC v Usenet.com*, 633 F.Supp.2d 124 (SDNY 2009); *Columbia Pictures Industries, Inc., v. Fung*, 2:06-cv-05578-SVW-JC (C.D. Cal. 21 December 2009). A complete list is available at http://info.riaalawsuits.us/documents.htm. [15/08/2010].

[661] *Arista Records LLC et al. v. LimeWire LLC*, 2010 WL 1914816 (SDNY 11 May 2010). online.wsj.com/public/resources/documents/051110limewireop.pdf. [15/08/2010]. Goldman, E. [2010], *LimeWire smacked down for inducing copyright infringement- Arista Records v. Lime Group* (13 May). http://blog.ericgoldman.org/archives/2010/05/limewire_smacke.htm. [15/08/2010].

[662] *Arista Records LLC et al. v. LimeWire LLC*, 2010 WL 1914816 (SDNY 11 May 2010).

[663] §512 17 USC.

[664] *Columbia Pictures Industries, Inc., v. Fung*, 2:06-cv-05578-SVW-JC (C.D. Cal. 21 December 2009).

[665] *Ibid.* Goldman, E. [2009], *Torrent site induce infringement and lose DMCA safe harbor- Columbia v. Fung* (30 December). http://blog.ericgoldman.org/archives/2009/12/torrent_sites_i.htm. [15/08/2010].

[666] For an analysis of French author's right law and a description of the legal framework in which the cases discussed in this paragraph have been decided. *see* Lucas-Plaisant [2010], *op.cit.*

[667] The only equivalent action in France would have been under the criminal law. Daly, M. [2007], *op.cit.*

[668] *Loi n. 2006-961 du 1 août 2006, Droit d'auteur et aux droits voisins dans la société de l'information*. www.legifrance.gouv.fr/affichtexte.do?cidTexte=legitext006054152&datetexte=20090819. [15/08/2010].

'*they knowingly publish, make available to or communicate to the general public in any form whatsoever, software obviously intended to provide unauthorised access to protected works or objects; or knowingly encourage, including through advertisements, the use of such software*'[669].

This provision appears to be inspired by *Grokster*[670].

3.3.3.4 – Germany. - Under German law, the distribution of file-sharing software *per se* does not appear to imply liability for author's right infringement[671]. However, the Higher Regional Court of Hamburg[672] maintained that software providers have a responsibility to provide suitable and reasonable measures to protect the copyright material[673]. Generally, article 830 of the German Civil Code provides that, where an unlawful action is jointly committed by several persons and consequently causes damages, each person is accordingly considered responsible for the damage. The provision also covers the person/persons who induce or contribute to the action[674].

3.3.3.5 – Australia. - In Australia, authorisation only requires to control and make available the means by which the infringement takes place[675], whether or not the 'authorised' person actually infringes[676]. In *Sharman*[677], the court notes that, since Kazaa was used for sharing music files, copyright infringements were necessarily involved: authorised transmissions alone would not have sustained the enormous traffic on the Kazaa system[678]. The court held that six out of the ten defendants were liable of

[669] Article L.335-2 Intellectual Property Code. Hugot, J.P [2006], *op.cit.* 140.
[670] Benabou-Torremans [2008], *Letter from France*, 30(11) E.I.P.R. 463-469, 466.
[671] There is, however, a duty of care imposing '*indirect liability where actions or omissions of a party contribute to a third party's infringement*'. Factors determining the extent of this duty of care include the likelihood of the software been used to infringe author's right, the extent of the provider's control over its users' infringements, and financial interest. Daly, M. [2007], *op.cit*. For an analysis of German author's right law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Dietz, A. [2010], *op.cit.*
[672] '*Cybersky*', OLG, Urt.v.08.02.2006, Az:5 U 78/05.
[673] Daly, M. [2007], *op.cit*.
[674] Courts consider the person's intention, the knowledge of the action, the degree of control, and whether the person had a duty of control or monitor the infringer. Sterling, J.A.L. [2008], *op.cit*, 13.09.
[675] *University of New South Wales* v. *Moorhouse* [1976] R.P.C. 151.
[676] Austin, G.W. [2009], *op.cit*. 127. The *Sharman* court argued that '*this was still good law*', 'elucidated' by §101(1A) of the Copyright Act as it has been already mentioned in Para. 3.3. *Universal Music Australia Pty. Ltd. v. Sharman License Holding Ltd.* [2005] F.C.A. 1242. For an analysis of Australian copyright law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Sherman-Lahore [2010], *Australia*, in Nimmer-Geller [2010], *International copyright law* and *practice*, New York, Matthew Bender.
[677] *Universal Music Australia Pty. Ltd. v. Sharman License Holding Ltd.* [2005] F.C.A. 1242.
[678] *Ibid.* [184] and [186].

the authorisation of the infringement[679], simply because they provided and maintained the means for infringement; they had knowledge of the infringement, financial interest, and exhorted users to infringe copyright with their 'Join the Revolution' campaign. Kazaa was accordingly held to have predominant infringing uses: the warnings on the website and in the EULA[680] were ineffective, and filtering was not implemented because it would decrease the file-sharing traffic, which was able to generate revenue from advertisements[681]. Thus, it appeared that the list of factors in the Act was not exhaustive in terms of what should be considered by the court when deliberating whether authorisation of infringement has occurred. It is probable that, with a different advertising and less control, the authorisation theory would not apply. This appears to have been confirmed in *Cooper*[682] and *iiNet*[683]; however, with different outcomes, as will be discussed later[684].

3.3.4 – Software Provider Status

In summary, file-sharing softwares are not illegal *per se*, and courts worldwide have experienced difficulties in terms of holding software providers liable under traditional secondary liability provisions. There is no international consensus over the nature of the liability; the spectrum ranges from primary infringments such as the authorisation theory in the UK and other common law jurisdictions, to secondary liabilities such as contributory and vicarious infringement and inducement theory in the US, to general civil liability, such as in Germany. Moreover, finding a software provider liable does not stop the network from being used for infringing activities, nor does it prevent the distribution of the software in other jurisdictions or by other providers; however, it has been noted how regardless of the applicable law and factual differences, a common set of elements to determine the software providers' liability, can be broadly suggested[685], as summarised in Figure 18 below.

[679] Hyland, M [2006], *Judicial pragmatism prevails in Sharman ruling*, 12(4) C.T.L.R., 98-108
[680] End User Licence Agreement.
[681] The parties settled the litigation in 2006. IFPI [2006], *Kazaa settles with record industries and goes legitimate*. www.ifpi.org/content/ section/_resources/piracy-report-current.html. [15/08/2010].
[682] *Cooper v. Universal Music Australia* [2006] FCAFC 187.
[683] *Roadshow Films Pty Ltd & Ors v. iiNet Ltd* [2010] FCA 24
[684] Para. 3.4.6.8.
[685] Dixon, A.N. [2009], *op.cit.* 37-40.

Figure 18 – Factors in Court Decisions[686]

	Grokster	**Sharman**	**Kazaa (Buma)**
Relationship with the User	Minor	Minor	Minor
Involvement with the Infringing Activity	Minor	Minor	Minor
Knowledge	Minor	Major	Minor
Intention	Major	Major	Minor
Substantial Non-Infringing Uses	Major	Major	Major
Financial or Other Benefit	Major	Major	Major
Faliure of Duty of Care/ Ability to Prevent or Deter Infringements	Major	Major	
Liability	YES	YES	NO

The case law discussed suggests that, in order to avoid liability, it is fundamental to lack both knowledge and control. Thus, the network has to be decentralised and the provider has to avoid any involvement with the users beyond merely providing the software. It also appears important that business models be avoided whereby the revenues directly depend upon the traffic to the network. Finally, it appears that the reasons and intents behind software creation and distribution are deemed relevant in determining liability. Consequently, BitTorrent appears to be the ideal software, simply because the burden of liability shifts to others 'facilitators' as described in the following.

3.4 – The Facilitators: Intermediaries

3.4.1 - Definition

Networking technologies have led to the appearance of a number of actors providing users with internet access and a range of various other services. These are broadly referred to as 'internet service providers', 'online service providers', 'information society service providers', 'intermediary service providers' or, simply, 'intermediaries'. The E-Commerce Directive defines them as:

> *'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'*[687].

[686] *Ibid.* 39.

[687] Article 2(a) E-commerce Directive refers back to Article 1(2) Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations. The definition is further discussed in Recitals 17 and 18.

The rights and responsibilities of these actors have not been clearly defined, as their activities vary and are ultimately dependent on the service provided. Thus, it is necessary to specify that:

1. internet access providers are companies which provide users with access to the internet, such as BT-Broadband, Virgin, AOL, Freeserve, *etc*.;
2. online service providers are websites and Web2.0 applications which can potentially host, store or link[688] to protected materials, such as websites, content-sharing sites, web-hosting sites, online networking sites, blogs, wikis, online auctions, and virtual worlds;
3. communication network providers are those companies providing connections and bandwidth to the internet access providers, i.e. British Telecom.

Traditionally, different degrees of control fundamentally determine different responsibilities and liabilities[689]. In this scenario, it remains to be clarified whether such intermediaries should be liable for their users' activities.

3.4.1.1 – Internet Access Providers. - They

> *'are the gatekeepers of the internet and have a vital role to play in curbing copyright abuse. They have the technical ability to do so, and increasingly the commercial incentive as well. The full cooperation of ISPs could lead to a very significant change in the music sector's ability to tackle copyright infringements while reducing the amount of litigation needed to deal with online piracy'*[690].

The issues concerning the collaboration of internet access providers will be discussed later in Chapter Five. However, it is worth mentioning here how they are not passive intermediaries; being the 'gatekeeper' involves a much more active role[691]. Internet access providers grant users, software providers and online service providers with access to the internet, and accordingly reproduce whatever is transmitted over the internet. Moreover, their profits increase parallel with the increase of online content distribution and, most of the time, they are also online service providers, providing users with online storage space and similar services.

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[688] The issue of hyper-links will be not in-dept analysed. Generally on the issue, Strowel-Hanley [2009], *Secondary liability for copyright infringement with regards to hyperlinks*, in Strowel A. [2009], *Peer-to-peer file-sharing and secondary liability in copyright law*, Edward Elgar, 71-109; Harrold-McClenaghan [2010], *Steering clear of hyperlink trouble*, 199 Copyright World, 13-19.

[689] Generally on the evolution of internet service providers' liability, Hays, T. [2006], *The evolution and decentralisation of secondary liability for infringement of copyright-protected works: Part 1*, 28(12) E.I.P.R. 617-624.

[690] IFPI [2008], *op.cit.* 21.

[691] Zittrain, J. [2006], *op.cit.* 253-298.

3.4.1.2 - Online Services Providers. - Complex issues arise when considering online service providers' liability for content transiting or being stored on their servers[692]. Protected material may be uploaded on the server without authorisation; therefore, not only the uploader but also the online service provider potentially infringes copyright by reproducing, communicating to the public, making available, permitting, helping or inducing the uploader and accessor to make the work available on-demand and copying the work, authorising or contributory or vicariously infringing by providing a link to another site, and acting as joint tortfeasor with the uploader and the accessor in the respective infringements[693].

Online service providers mainly participate in activities classified as 'mere conduit' transmitting content through the internet, 'caching', intermediate and temporary storage of content on their servers, and 'hosting', storage of content. Moreover, they can also provide links and aggregate content[694]. Online service providers normally use softwares which automatically process data without obtaining—or trying to obtain—information on the content status. Thus, the online service provider may not know that infringing materials are hosted on its servers. However, this lack of knowledge does not render them immune from legal actions[695]. For instance, in *Aimster*[696], the court noted that:

'*Wilful blindness is knowledge, in copyright law*'[697].

Thus, a provider that knows or even suspects its users are infringing copyright will not automatically be precluded from liability[698].

3.4.1.3 – Communication Network Providers. - Phone companies and broadband suppliers are the main intermediaries in the communication of contents worldwide. It is, therefore, necessary to mention their potential liability.

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[692] Sutter, G. [2007], *Online intermediaries*, in Reed-Angel [2007], *Computer law*, Oxford University Press, 233-79.
[693] In limited scenarios, also failing to observe the author's attribution and integrity moral rights (only authors and performers).
[694] Content aggregation can be infringing if the content aggregated is protected. *Copiepresse v. Google*, TFI Brussels, February 13, 2007.
[695] Sutter, G. [2007], *op.cit.* 240.
[696] *In Re Aimster Copyright Litigation* 334 F. 3d 634 (7th Cir. 2003).
[697] *Ibid.* [4].
[698] Daly, M. [2007], *op.cit*.

3.4.2 – Disclosure of Personal Data

The information required in order to identify alleged infringers can only be obtained from the respective internet access providers; it is only such entities that can link IP addresses to the names and addresses of individuals[699].

3.4.2.1 – EU. - The ECJ held that

> '*European Law does not require Member States to lay down an obligation to disclose personal data in civil proceedings*'[700].

Thus leaving Member States to decide whether or not to impose an obligation. This would be equally entirely consistent with EU Law[701]. In the UK, copyright owners have the powerful 'Norwich Pharmacal Order'[702], which achieves a disclosure obligation on internet access providers[703]. Similar obligations are present in Ireland[704] and the Netherlands[705]. In Germany, courts have been more reluctant to order such disclosure[706]. In Italy, the issue remains controversial[707].

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[699] Wollgast, H. [2007], *op.cit.* Article 47 of TRIPS agreement includes an optional provision regarding the right of information in civil proceedings; however, it does not apply to third parties.

[700] *Productores de Musica de España (Promusicae) v. Telefonica de España SAU*, case C-275-006 (26 January 2008). The decision of the court in Spain is still pending. Hetherington, L. [2008], *Peer-to-peer File-Sharing–ISP and disclosure of user identities*, 19(7) Ent.L.Rev. 81; Coudert-Werkers [2010], *In the aftermath of the Promusicae case: how to strike the balance*, 18(1) I.J.L.&I.T., 50-71.

[701] Casas Vallés, R. [2008] *In the courts: pursuing the pirates– Balancing copyright and privacy rights*, WIPO Magazine 2, 11.

[702] Based on *Norwich Co. Pharmacal and others v. Custom & Excise Commissioner*, [1974] AC 133. The High Court gave a judgment in 2004 allowing the BPI to obtain from internet access providers disclosure of personal data regarding potential infringers. The actual prosecutions ended in out-of-court settlements. Hopkins, N. [2004], *Fans to walk plank over pirating on the internet*, The Times, 8 October; and Hopkins [2004], *Piracy suits vindicated*, The Times, 27 November.

[703] Helmer-Davies [2009], *op.cit*, 53.

[704] *EMI Records (Ireland) Ltd. And ors v. Eirecom Ltd. and another*, [2006] ECDR 5. The Irish High Court indicated clearly the procedures and safeguards that are to be observed when copyright owners seek disclosure of potential infringer details. Clear proof of wrongdoing is necessary and although privacy considerations are important, the High Court has ruled that privacy must give way to intellectual property interests where the activities of others threaten to erode these rights.

[705] In 2006, the Danish Supreme Court held that internet access providers could be obliged to close down the connections of subscribers who uploaded material illegally. *IFPI v. TDC*, Danish Supreme Court, 10 February 2006. In 2007 BREIN, succeeded in forcing disclosure of third party personal data from the largest ISP in the Netherlands, KPN. *Brein v. KPN*, The Hague District Court, 5 January 2007, LJN: AZ5678. www.book9.nl/getobject.aspx?id=2678. Also *Church of Scientology v. XS4ALL*, Rechtbank, Court of The Hague, 9 June 1999.

[706] Public prosecutors generally refuse to collect IP address-related information from providers. *Amtsgericht Offenburg* (Offenburg Local Court) of 20 July 2007, Az. 4 Gs 442/07. Consequently, the German Parliament had to approve a new law requiring the internet access providers to divulge information regarding users who share files on commercial scale to right holders. The Data Retention Law. www.edri.org/edrigram/number5.22/german-retention-law. 20/9/09.

[707] *Peppermint v. Telecom Italia*, Tribunal of Rome, 18 August 2007; *Peppermint v. Wind*, Tribunal of Rome, 16 July 2007, [2008] Ent.L.Rev. N-29. Prospetti, E. [2006] *Peppermint 'Jam': peer-to-peer goes to court in Italy*, 17(8) Ent.L.Rev. 280.

3.4.2.2 – US. - In early 2003, the RIAA attempted use of the controversial subpoena provisions[708] in order to obtain the names of subscribers of Verizon[709]. The District Court of the District of Columbia ordered the disclosure, but Verizon successfully appealed later the same year[710]. As a result, the RIAA had to use the more conventional, expensive, and procedurally slow 'John Doe'[711] application processes when striving to unmask anonymous infringers. Under these proceedings, internet access providers are obliged to disclose the identities of the alleged infringers[712].

3.4.3 - Potential Defences

The E-Commerce Directive provides various safe-harbour provisions for a number of categories of intermediaries, exempting them from monetary damages (but not from injunctive relief) for specific activities deemed essential[713]. Comparable provisions in the DMCA operate in the US[714]. The following are the provided defences under the E-Commerce Directive[715]:

> 'Mere Conduit'- Article 12. - '*The service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission*'.

Arguably, however, such service providers would be an 'involuntary copier' anyway[716], or a 'neutral carrier' such as the Post Office or the telephone company[717].

> 'Caching'- Article 13. - '*The service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that* [the provider]*: (a)* […] *does not modify the information; (b)* […] *complies with conditions on access to the information; (c)* […] *complies with rules regarding the updating of the*

[708] §512 17 USC.
[709] *Re: Verizon Internet Services, Inc.*, 240 F.Supp.2d 24 (D.C.D.C. 2003).
[710] *Recording Industry Association of American Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (C.A.D.C. 2003), cert denied 125 S.Ct. 309, 125 S.Ct. 347.
[711] 'John Doe' applications require a copyright owner, who has only an IP address, to file an action against the unknown user asking the court to compel the internet service providers to identify him. If the court issues such an order, the applicant can then sue the user directly for copyright infringement.
[712] *Arista Records LLC v. Does*, 85 USPQ 2d 2018, 2020 (D.C. W.D Oklahoma, 2007); *Arista Records v. Does*, 246 F.R.D. 28, DDC, 2007; WL 185 1772 (D.D.C. 2008).
[713] Articles 12-15 E-Commerce Directive. Cook. T. [2010], *op.cit.* 10.03-08.
[714] Including a safe harbour for 'information location tools'. DMCA, §512(d).
[715] EC Directive 2000/31 of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
[716] Cook, T. [2010], *op.cit.* 10.04.
[717] *Bunt v. Tilley* [2006] EWHC 407 (QB). Edwards, L. [2009], *The fall and rise of intermediaries liability online*, in Edwards-Waelde [2009], *Law and the internet*, 3rd ed. Hart, 47-88, 64.

information […]*; (d)* […] *does not interfere with the lawful use of technology,* […]*, to obtain data on the use of the information*.

The 'notice and takedown' provision (e) qualifies this defence.

(e) […] *acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge* […]'.

However, it appears that Article 5(1) of the Copyright Directive has resolved the issue of liability for caching, since arguably these activities are excluded by the reproduction right. There are still doubts that these two provisions are reconcilable[718].

'Hosting'- Article 14. - '*The service provider is not liable for the information stored at the request of a recipient of the service, on condition that* [the provider]*: (a)* […] *does not have actual knowledge* […]*; or (b)* […]*, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information*'[719].

This defence also depends on the compliance to the 'notice and takedown'.

'No General Obligation to Monitor'- Article 15. – (1) *Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.* (2) *Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements*[720].

The Directive and DMCA 'safe harbour' defences have been criticised for lack of foresight[721] in terms of the complexity of the definition of the eligible providers[722].

[718] van der Net, C. [2003], *Civil liability of internet providers following the Directive on Electronic Commerce*, in Snijders-Weatherill [2003], *E-Commerce law*, Kluwer, 53.

[719] A number of cases dealt with the 'hosting' defence with different outcomes. In EU: *Godfrey* v. *Demon Internet Ltd*, [2001] Q.B. 201 (UK); *Hit Bit Software GmbH* v. *AOL Bertelsmann Online GmbH & Co Kg*, [2002] E.C.C. 15 (Germany); *Societe Belge des Auteurs, Compositeurs at Editeurs v. SA Scarlet (formely known as Tiscali)*, Tribunal de Première Instance de Bruxelles, 29 June 2007, [2007] ECDR, 19 (Belgium); *Scientology*, Court of The Hague, June 9, 1999 [1999] *Informatierecht/AMI* 110 (the Netherlands); In US: *Religious Technology Center v. Netcom*, 907 F. Supp. 1361 (N.D. Cal 1995), *Playboy Enterprises v. Frena*, 839 F.Supp 1552 (MD Fla, 1993).

[720] Recital 48, however, specify that the Member States may require a reasonable 'duty of care' from internet service providers '*to detect and prevent certain types of illegal activities*'.

[721] Lubitz, M. [2002], *Liability of internet service providers regarding copyright infringement-Comparison of U.S. and European Law*, 33 I.I.C. 26. 39.

[722] Some new intermediaries would not fit the definition. Von Lohmann, [2003], *op.cit.* 8. For instance, Virtual World platform providers.

Moreover, it is not clear whether or not they are defences or immunities[723]. In the EU, the scenario is further complicated by the necessity to balance a number of different Directives covering similar grounds[724]: e-commerce, copyright, enforcement, and personal data. The issue was addressed by the ECJ in *Promusicae*[725] and *LSG*[726].

3.4.4 – Take-Down Notice

As previously noted, the moment an online service or internet access provider has knowledge of an infringement taking place, they are required to speedily remove the material from their host server under the penalty of liability. There are basic differences between the EU and US. In summary, the EU rules are more general, whereas those of the US are more practical; however, both leave unanswered various important issues. For instance, the content and scope of the take-down notice itself, where it should be notified, whether it should include the identity of the infringer, whether it should prove the validity of the claim[727], whether the identity of the claimer should be verified, how long the provider has to remove the content, and the consequence with contract between the user and the provider[728]. Finally, it is controversial what 'expeditious' means in Article 14(1)(b) of the Directive, since no guidance is provided[729]. The answers to these questions have been left to the right owners and providers to determine on a national basis. Notably, owing to the obvious risk of confusion and conflicting solutions in the EU, the Commission has established a project—the Rights Watch—to study the possible alternatives[730].

3.4.5 – User-Generated-Content Licence

Various Web 2.0 service providers enable users to upload user-generated content but tend to shield themselves from liability by requiring users to agree to a 'click-wrap'

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[723] Even thou in *Scarlet* they were considered defences. *SCRL Societe Belge des Auteurs, Compositeurs et Editeurs v. SA Scarlet (formerly known as Tiscali)*, Tribunal de Première Instance de Bruxelles, 29 June 2007, [2007] ECDR 19.
[724] Cook, T. [2010], *op.cit.* 10.07.
[725] *Productores de Musica de España (Promusicae) v. Telefonica de España SAU*, case C-275-006 (26 January 2008)
[726] *LSG-Gesellschaft Zur Warnehmung Von Leistunschutzrechteen GmbH v. Tele2 Tellecommunication GmbH*, case C-557/07 (19 February 2009)
[727] *Stefanie Lenz v. Universal Music Corp* Case No. C 07-3783 JF (N.D. Cal) 20 August 2008.
[728] Sterling, J.A.L. [2008], *op.cit*, 13.43.
[729] In the UK some guidance is given by the Terrorism Act 2006, which prescribes that takedown must take place within 2 days. Edwards, L. [2009], *op.cit.* 66.
[730] www.rightswatch.com.

licence containing a range of warranties and undertakings[731]. For instance, users may be required to guarantee that infringing material is not uploaded[732], or to otherwise agree to indemnify the provider against all losses suffered because of the user's infringing activities, and often coupled with broad exclusions or limitations of the provider's liability[733]. These clauses, however, may not be sufficient to protect the provider[734].

3.4.6 – National Approaches

3.4.6.1 – UK. - A significant action was the shutdown of Oink, a website facilitated file-sharing[735]. However, on criminal grounds, the website administrator was found not guilty of conspiracy to defraud and copyright infringement[736]. On civil grounds, more recently, the High Court held the operator of a Usenet indexing website liable for infringement of copyright by authorisation, communication to the public, and procurement and engagement with its users in a common design to infringe copyright[737]. Curiously, the case involved one of the first content-sharing techniques based on a technology (Usenet) which not only pre-dates file-sharing, but also the world wide web. In this scenario, human control over the service provided is high and, therefore, it is still questionable as to what extent this decision would be relevant to file-sharing softwares, such as BitTorrent and Web 2.0 platforms.

In particular, concerning authorisation, the key elements of *Amstrad*[738] appear to have been confirmed. The *Amstrad* court differentiated between 'conferring the power to copy' and 'granting the right to copy'[739] and Newzbin was held to have reached beyond merely providing the means to copy. However, Kitchin J. concluded:

> *I am entirely satisfied that a reasonable member would deduce from the defendant's activities that it purports to possess the authority to grant any*

[731] Miles, J. [2007], *Distributing user-generated content: risks and rewards*, 18(1) Ent.L.Rev. 28-30.
[732] Many sites do not operate a pre-moderation regime, but instead rely on post-moderation or moderation on a reactive basis. *Ibid.*
[733] *Ibid.*
[734] *Ibid.*
[735] Helmer-Davies [2009], *op.cit*, 53. For an analysis of British copyright law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Geller-Davies [2005], *op.cit.;* Bentley-Cornish [2010], *op.cit*.
[736] *R. v. Ellis (Alan)*, Unreported, 15 January 2010, Crown Ct (Teesside). Fry, R. [2010], *Criminal charges fail to stick in copyright case*, 197 Copyright World, 14-15.
[737] *Twentieth Century Fox Films Corp. & Others v. Newzbin Ltd.*, [2010] EWHC 608 (Ch), 29 March 2010. Dimita, G. [2010], *Newzbin held liable for copyright infringement*, 6 Journal of Business Law, 532-535.
[738] *CBS Song Ltd. v. Amstrad Consumer Electronics Plc*. [1988] A.C. 1013.
[739] Para. 3.3 and 3.3.3.1.

required permission to copy any film that a member may choose from the Movies category […][740].

Arguably, whether a 'reasonable' member would believe that Newzbin had the authority to grant permission to copy is far from convincing[741].

In regard to communication to the public, since §20 is silent on the point, some argued that is the user who makes content available, and the service provider is therefore a mere intermediary; with this in mind, the latter does not make content available to the public[742]. However, the judge held that Newzbin was not remotely passive but materially intervened to make the works available to a new audience, with full knowledge of the consequences of its activities, and accordingly concluded that it was making the works available[743].

Moreover, online service providers could be liable under §178 CDPA; however, the question remains problematic[744]. On the issue of defences, Article 17 of the E-Commerce Directive has been successfully applied to websites linking to unauthorised content[745], although the application of §28A CDPA[746] and its relationship with Regulation 17 of the E-Commerce Regulations 2002[747] nevertheless remains controversial[748]. §28A CDPA appears to relate only to 'reproduction' and it has been argued that if

'as part of the same process, the work is communicated to the public […]; there is no defence under this provision to the act of communication'[749].

[740] *Twentieth Century Fox Films Corp. & Others v. Newzbin Ltd.*, [2010] EWHC 608 (Ch), [102].
[741] Arguably, most members were aware of the nature of Newzbin activity notwithstanding the disclaimer. Moreover, considering the complexity of downloading a film from a Usenet server, a 'reasonable' member would probably 'suspect' that Newzbin lacked of authority.
[742] *Polydor Ltd. v. Brown* [2005] EWHC 3191 (Ch). Davies-Harbottle [2007], *Second Cumulative Supplement to Copinger and Skone James on Copyright*, Sweet & Maxwell, 7-155. Also *Union des Associations Europeennes de Football (UEFA) v Briscomb*, [2006] EWHC 1268 (Ch).
[743] It is interesting to note the parallelism between the Newzbin's premium members and the clientele of Rafael Hoteles in *Sociedad General de Autores v. Editores de Españ*a *(SGAE) v. Rafael Hoteles SA* Case C-306/05 (7 December 2006).
[744] Sutter, G. [2007], *op.cit*. 248.
[745] TV-Links. Unreported. Ticehurst J. The Judge also ruled that there was no evidence that TV-Links made available to the public the films and Television shows. http://torrentfreak.com/busted-tv-show-site-in-limbo-as-authorities-back-off-081121.
[746] 'Making of temporary copies'. §28A transposes Article 5(1) of the Copyright Directive.
[747] 'Mere conduit'. Electronic Commerce Regulations 2002 (SI 2002/2013). Regulation 17 of the E-Commerce Regulations transposes art.12 of the E-Commerce Directive.
[748] Larusson, H.K. [2009], *op.cit*, 130.
[749] Garnet, K. *et al*. [2005], 9-16.

If this is correct, an internet service provider would never benefit from §28A CDPA since it is involved in both copying and making files available[750]. Some commentators also argue that this provision overlaps with Regulation 17[751].

3.4.6.2 – US. - The issue of hosting and the online service provider's liability in general has been extensively analysed by courts in the US—both before and after the DMCA[752]. Nowadays, with the introduction of the DMCA, the 'safe harbour' defences are in place and some potentially infringing online service providers' activities have been held to be fair use[753]. However, a search engine dedicated to index .torrent files has been held liable for the inducement of copyright infringement, contributory and vicarious infringement[754]. Two cases are of interest: *Google Book*[755] and *Viacom*[756].

The first case concerns 'Google Book Search', a tool that searches for books previously scanned and stored in a digital database by Google. The plaintiffs claim reproduction by digital copying of the plaintiffs' works without the copyright holders' permission. Google's argument is based on 'fair use'. The case is currently awaiting court approval of the settlement agreement[757]. However, it would have been of great interest to have the case resolved by a court ruling. The second concerned YouTube. Viacom claimed that Google and YouTube

[750] Larusson, H.K. [2009], *op.cit.* 130.
[751] Garnet, K. *et al*. [2005], *op.cit.* Para. 9-17. For an opposite opinion, Larusson, H.K. [2009], *op.cit*, 130.
[752] Few pre-DMCA examples are *Playboy Enterprise v. Frena* 839 F. Supp. 1552 (M.D. Fla. 1993); *Religious Technology Center v. Netcom* 907 F. Supp. 1361 (N.D. Cal 1995); *Playboy Enterprise v. Webbworld*, 968 F.Supp 1171 (N.D. Tex. 1997). For an analysis of US copyright law and a description of the legal framework in which the cases discussed in this paragraph have been decided *see* Schwartz-Nimmer [2010], *op.cit*.
[753] *Los Angeles Times v. Free Republic*, 54 USPQ 2d.1453; 56 USPQ 1862 (C.D. Cal 2000). In *Kelly* v. *Arriba Soft*, 280 F.3d 934 (9th Cir. 2002) the court ruled that the use was fair, even if the use was commercial, when a search engine crawls the internet and capture images, converts them into low-resolution 'thumbnail', catalogues and subsequently displays them in response to users' queries. Sableman, M. [2001], *Link law revisited: internet linking law at five years*, 16 B.T.L.J. 1273; Ginsburg, J.C. [2002], *How copyright got a bad name for itself*, Columbia Law School, Public Law & Legal Theory Research Paper Group, Ganley, P. [2004], *op.cit.* 282-332, Stokes, S. [2005], *op.cit.* §7.78.
[754] *Columbia Pictures, Inc et al. vs. Justin Bunnell,* US District Court, CD Cal., 2:06-cv-01092 FMC-JCx, 19 August 2008. The case is under appeal.
[755] *The Authors Guild, Inc., Association of American Publishers, Inc., et al. v. Google Inc.* 1:2005cv08136, filed on 20 September 2005, SDNY.
[756] A separate claim was also brought by The Football Association Premier League. *Viacom International Inc. v. YouTube Inc.*, 07-Civ-2103, and *The Football Association Premier League v. YouTube, Inc.*, 07-Civ-582 (SDNY 23 June 2010-LLS). Case documents at news.justia.com/ cases/featured/new-york/nysdce/1:2007cv02103/302164. [15/08/2010]. However, many commentators speculated that the case was a 'smoke screen' because of the unsuccessful undergoing negotiations for a blanket licence or simply because the two companies in reality benefit from each other. For instance, *see* Edwards, L. [2009], *op.cit.* 70.
[757] books.google.com/booksrightsholders/agreement-contents.html. [15/08/2010].

> '*wilfully infringe copyrights on a huge scale* […] *profiting from the illegal conduct of others as well*. […]. [They] *know and intend that much of the content on the YouTube site consists of unlicensed infringing copies of copyrighted works* [and they] *actively engage in, promote and induce this infringement*[758].

YouTube claimed that it could not monitor the files it hosts, but it discourages users' infringing behaviours[759]. Moreover, complying with the take-down notices, YouTube claimed to be 'immune' from liability under §512. However, on this point, it was important to determine whether YouTube: (a) had 'actual knowledge' of the infringing material hosted on its servers[760]; (b) received 'a financial benefit directly attributable to the infringing activity'[761]; and (c) removed the material 'expeditiously' upon notification of the potential infringement.

In June 2010, a summary judgement was granted for Google. The judge held that general knowledge of infringements of copyright is not enough not to benefit from §512. In particular, the judge specified that in order to disqualify from the safe harbour, a service provider must have:

> '*knowledge of specific and identifiable infringements of particular individual items. Mere knowledge of prevalence of such activity in general is not enough*'[762].

Notably, the judge indicated that file-sharing software provider cases[763] were not relevant to determine the eligibility to §512 of an internet service provider which is unaware of item-specific infringing activities[764].

> '*Grokster, Fung and Lime Group involved peer-to-peer file-sharing networks which are not covered by the safe harbour provision of the DMCA defence under*

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[758] *Viacom International Inc. v. YouTube Inc.,* 07-Civ-2103, and *The Football Association Premier League v. YouTube, Inc.*, 07-Civ-582 (SDNY 23 June 2010-LLS). Kuppers, M.A. [2010], *Mooring YouTube*, E.I.P.R. Forthcoming.

[759] Helmer-Davies [2009], *op.cit*, 55.

[760] §512(c)(1)(a) 17 USC.

[761] §512(c)(1)(b) 17 USC.

[762] *Viacom International Inc. v. YouTube Inc.,* 07-Civ-2103, and *The Football Association Premier League v. YouTube, Inc.*, 07-Civ-582 (SDNY 23 June 2010-LLS). The judge cited: the Senate Judiciary Committee Report and the House Committee on Commerce Report, H.R.Rep. No.105-551 (1998) discussing the 'applicable knowledge standard'; *Perfect 10 Inc. v. Amazon.com Inc.*, 508 F.3d. 1146 (9th Cir. 2007); *UMG Recordings Inc. v Veoh Networks Inc.*, 665 F.Supp.2d 1099 (C.D. Cal 2009); *Corbis Corp. v Amazon.com Inc.*, 351 F.Supp.2d 1090 (W.D. Wash. 2004); *Tiffany (NY) Inc. v eBay Inc.*, 600 F.3d 93 (2nd Cir. 1 April 2010).

[763] *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 259 F Supp 2d 1029, 65 USQP 2d 1545 (C.D. Cal. 9 January 2003); 2003 WL 1989129 (C.D. Cal. 25 April 2003); affirmed 380 F.3d 1154 (9th Cir. 2004); 125 S.Ct. 2764 (2005); on remand 454 F.Supp. 966 (C.D. Cal. 2006); *Arista Records LLC. & Others v. Usenet.com Inc.*, Case no. 07-Civ-8822, 2009 WL 187389 (SDNY), 633 F.Supp.2d 124 (SDNY 2009); *Columbia Pictures Industries, Inc., v. Fung*, 2:06-cv-05578-SVW-JC (C.D. Cal. 21 December 2009); *Arista Records LLC. et al. v. LimeWire LLC*, 2010 WL 1914816 (SDNY 11 May 2010);

[764] *Viacom International Inc. v. YouTube Inc.,* 07-Civ-2103, and *The Football Association Premier League v. YouTube, Inc.*, 07-Civ-582 (SDNY 23 June 2010-LLS), 12-13.

> *§512(c)*[765]. […] '*The differences between YouTube's behaviour and Grokster's is staggering*'[766]

Consequently, it is questionable whether the 'inducement theory' applies to the internet service providers. In particular, whether an internet service provider eligible to §512 is nevertheless 'immune' from liability when it induces its users to infringe copyright. Furthermore, it is open to discussion whether §512 would apply to a file-sharing software provider

> '*who furnishes a platform on which its users post and access all sort of materials as they wish, while the provider is unaware of its content, but identifies an agent to receive complain of infringement, and removes identified material when he learns it infringe*'[767].

Notwithstanding these doubts, the main finding of *Viacom* appears to be the clarification that the burden of monitoring infringements lays on the right owners and not the service providers.

3.4.6.3 – France. - Article 6-I-2 of LCen[768] excludes internet service providers from liability when they have no actual knowledge and promptly remove the material or render access impossible as soon as they gain such knowledge[769]. Few cases are of particular interest[770]. In *Lafesse*[771], for example, MySpace was held to be an editor/publisher and not a host, simply because it predetermines the presentation of the user's pages and includes advertisements on such; therefore, it was not eligible for the hosting immunity. In contrast, *DailyMotion*[772] was sued for author's right infringement[773] but was held not to be a host or publisher[774], but was still held liable for providing users with the means to commit infringement, because of the site's structure and business model. It was the duty of the provider to check *a priori* the content hosted. The court also held that providers inducing and generating infringing activities could

[765] *Ibid.* 21.
[766] Viacom's General Counsel email quoted in the judgement. *Ibid*. 22.
[767] *Ibid.* 23. To such an internet service providers '*the DMCA gives a safe harbour*'. Notably such file sharing software model appears similar to Napster. *See* Para. 2.2.1.1.
[768] *Loi n 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique* (Law no. 2004-575 of 21 June 2004 on confidence in the digital economy)
[769] For an analysis of French author's right law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Lucas-Plaisant [2010], *op.cit.*
[770] The extracts from these cases are from *Bird & Bird IT and E-Commerce Law Bulletin*, October 2007, www.twobirds.com/english/publications/newsletters/upload/43288_1.htm. [15/08/2010.
[771] *Lafesse v. MySpace*, Tribunal de Premiere Instance, 22 June 2007.
[772] *Nord-Ouest Productions v. DailyMotion* TGI Paris, 13 July 2007.
[773] And parasitic conduit. Article 1382 of the French Civil Code.
[774] This was further confirmed in *Lafesse v. Daily Motion* TGI de Paris, 3ème chambre - 1ère section, 15 April 2008. www.juriscom.net/documents/tgiparis20080415-Lafesse.pdf. [15/08/2010].

not invoke 'safe harbour' defences. These decisions have been criticised for the classification of host providers as editors/publishers[775] and the controversial interpretation of the monitor obligations[776].

Other courts have accepted online providers as mere hosts[777]. In particular, two decisions confirm that there is no general obligation to monitor, but subsequently suggested an obligation to monitor particular works after an infringement takes place[778]: *Tranquillity Bay*[779] and *Le Monde selon Bush*[780]. In both cases, infringing content was uploaded to Google Video by users, was removed by Google after notification, and subsequently uploaded again by users. Both courts agreed that Google was merely hosting the content and was protected from liability by Article 6-I-2. However, in both cases, this limitation of liability was held to apply only for the first uploading—not for subsequent ones. The argument was that, after the first notice, the host acquires knowledge and has the obligation to prevent further infringements. In *Le Monde selon Bush*, the court rejected the argument that it is technically impossible to monitor content, since Google is able to trace and block other illegal content[781]. These decisions show how the legal framework for online service providers in France remains uncertain[782].

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[775] French Parliament has warned against this 'temptation'. *Rapport d'information depose en application de l'Article 86, alinéa 8, du Règlement par la Commission des affaires économiques, de l'environnement et du territoire sur la mise en application de la loi n. 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, et présenté par M. Jean Dionis du Séjour et Mme Corinne Erhel, Députés* (Report on the application of the Act No. 2004-575 of 21 June 2004 on confidence in the digital economy). www.assemblee-nationale.fr/13/rap-info/i0627.asp. [15/08/2010].

[776] Article 15 of the E-Commerce Directive. Valgaeren-Roland [2007], *YouTube and user-generated content platform– New kids on the block?*, in IRIS Special [2007], *Legal aspects of video on demand*, European Audiovisual Observatory; Hardouin, R. [2007], *Observations sur les nouvelles obligations prétoriennes des hébergeurs*, www.juriscom.net/documents/resp20071108.pdf. [15/08/2010].

[777] For instance: *Cristian Carion v. Daily Motion* TGI Paris, 13 July 2007; *Zadig Production v. Google Vidéo*, TGI Paris, 19 October 2007; *Dargaud Lombard (Lucky Comics) v. Tiscali Media*, Cour d'appel de Paris, 7 June 2006; Few cases, even decided before 2004, reached the same conclusions: *Art Music France v. Ecole National Siperieure des Telecommunications*, TGI Paris 14 august 1996 (1997) 171 RIDA 361; *Group Progrès v. Sydacate National des Journalistes*, Lyon, CA, December 9, 1999 (2000) 171 RIDA 282; *Perathoner and others v. Paumier and others*, TGI Paris, 3e ch., may 23, 2001 (2002) 191 RIDA 308, [2003] ECDR 76.

[778] Cabrera Blázquez, F.J. [2008], *User-generated content services and copyright*, European Audiovisual Observatory. www.obs.coe.int/oea_publ/iris/iris_plus/iplus7_2008.pdf.en. [15/08/2010].

[779] *Zadig Productions v. Google Vidéo*, TGI, 19 October 2007. www.juriscom.net/documents/tgiparis20071019.pdf. [15/08/2010].

[780] *Flach Film et al. autres v. Google France, Google Inc.* Tribunal de commerce de Paris (8e ch.), 20 February 2008. www.legalis.net/jurisprudence-decision.php3?id_Article=2223. The video is available at www.tagtele.com/videos/voir/56112. [15/08/2010].

[781] For instance, child-pornography and video inciting to hate, racism, or crime against humanity.

[782] Cabrera Blázquez, F.J. [2008], op.cit. These judicial decisions '*appear to be 'backwards', i.e. starting from a conviction that the platform provider should be held liable* […] *and then crafting a 'legal' reasoning to do so*'. Valgaeren-Roland [2007], op.cit.

3.4.6.4 – Germany. - German Law may oblige online service providers to monitor the content hosted on their servers[783]. Despite heavy criticism, the Federal Supreme Court reaffirmed this position in 2007[784], but nevertheless went on to stress that online service providers should not be imposed unreasonable obligations to monitor. In practice, however, it is difficult to predict what courts will consider 'reasonable'[785]. For instance, in *Gema v. RapidShare*[786], the court maintained that it is a legal duty of an online service provider to ensure that no copyright infringement takes place through the service provided[787]. Moreover, online service providers may be liable for providing facilities to download[788] and for linking[789], but not for providing searching facilities[790].

3.4.6.5 – Belgium. - Notwithstanding the doubts concerning whether the decision will be confirmed on appeal[791], in the case of *Scarlet*[792], the court ordered the internet access provider to block and filter infringing transmission[793]. The court specified how these technical measures are necessary to prevent copyright infringement, and they are not 'monitoring' within the meaning of article 15 E-Commerce Directive[794]. Interestingly, SABAM did not demonstrate that Scarlet's customers were actually infringing the rights of any of SABAM's members[795]; the court simply accepted that, considering the market share of the internet access provider, it was statistically inevitable that a portion of

[783] '*BGH Rolex Ricardo*', *Bundesgerichtshof* (German Supreme Court), 11 March 2004. For an analysis of German author's right law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Dietz, A. [2010], *op.cit*.
[784] '*eBay*', *Bundesgerichtshof* (German Supreme Court), 19 April 2007.
[785] Krieg, H. [2007], *Online intermediaries obligation monitor user-posted content*, www.twobirds.com/german/news/articles/seiten/online_intermediaries_obligation_monitor_user-posted_content.aspx. [15/08/2010].
[786] Geschäfts-n 310-0-938, Landesgericht Hamburg, 6 June 2009 www.gema.de/fileadmin/inhaltsdateien/presse/pressemitteilungen/GEMA_RapidShare_Urteil_LG_Hamburg_vom_12062009.pdf. [15/08/2010].
[787] Apparently, the judge referred to a statement from GEMA claiming filtering software to detect copyright infringing material was already available. http://ipkitten.blogspot.com/2009/07/file-sharing-site-rapidshare-vs-gema.html. [15/08/2010].
[788] *'Cybersky'*, OLG Hamburg, February 8, 2006, Case 5 U 78/5, (2006) IIC 989.
[789] *MP3 Links* Landgericht (District Court) Berlin, 14 June 2005, [2005] ZUM-RD 398, *'Real World Links'*, LG Hamburg, July 15, 2005, case 300 0 379/05.
[790] *'Paperboy'*, BGH July 17, 2003 (IZR 259/00) [2005] ZUM-RD 398.
[791] Helmer-Davies [2009], *op.cit*, 54.
[792] *Societe Belge des Auteurs, Compositeurs at Editeurs v. SA Scarlet (formely known as Tiscali)*, Tribunal de Première Instance de Bruxelles, 29 June 2007, [2007] ECDR, 19.
[793] For an analysis of Belgiam author's right law and a description of the legal framework in which the case discussed in this paragraph has been decided, *see* Strowel-Corbet [2010], *Belgium*, in Nimmer-Geller [2010], *International copyright law and practice*, New York, Matthew Bender.
[794] Helmer-Davies [2009], *op.cit*, 54.
[795] Rousseau, S. [2005], *Belgium: intellectual property – copyright*, 11(5) C.T.L.R. N56-57.

Scarlet's customers had infringed the rights of SABAM's members[796]. The case has been referred to the ECJ on two questions[797]:

> 1) Does the EU Law frameworks[798] '*allow Member States to authorize a national court,* […] *to order an ISP to put into place, vis-à-vis all of its customers, in abstracto and as a preventive measure, at the expense of the ISP and without limitation in time, a system filtering all electronic communications,* […], *passing through its service, in particular by means of peer to peer software, with the aim to identify the circulation on its network of electronic files containing a musical, cinematographic or audiovisual work to which the claimant alleges to enjoy rights and to then block the transfer thereof, either at the request or at the time it is sent?*
>
> 2) *If question 1 is answered in the positive, do these directives require that the national court,* […] *applies the principle of proportionality when it is asked to rule over the efficacy and the dissuasive effect of the requested measure?'*

An answer to these questions is awaited.

Finally, online service providers have been held liable for infringing author's right by 'crawling'[799], hosting[800], and linking[801].

3.4.6.6 – Italy. - In *Corte di Cassazione* 33945/06[802] two online service providers were charged for freely broadcasting soccer matches through the use of linking, software and various streaming techniques for internet users, thereby violating Sky Italia's exclusive broadcasting rights on the Italian '*Serie A*' and '*Serie B*' leagues[803]. The *Corte di Cassazione* held that, in order to be liable for the distribution of infringing content, the LdA does not require a specific conduct or technology. Liability comes from the fact of someone's actions to make content visible over a computer network. This means that

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[796] Bernault-Lebois [2005], *op.cit*, 8.

[797] Brussell Court of Appeal. Ruling at www.timelex.eu/userfiles/files/pub2010/2010%2001%2028-tiscali-scarlet.pdf. Translation from Frech by IpKat. http://ipkitten.blogspot.com/2010/02/sabam-v-tiscali-goes-to-ecj-on-isp.html. [15/08/2010].

[798] Copyright Directive, Enforcement Directive, Personal Data Directive, *etc*., interpreted with regard to Articles 8 and 10 of the European Convention on Human Rights.

[799] *Copiepresse v. Google*, Brussels, TFI, February 13, 2007, [2007] ECDR 5. www.copiepresse.be Turner-Callaghan [2008], 30(7) E.I.P.R. 34.

[800] *Association des Journalistes professionels de Belgique v. Central Station*, Brussels, CFI. Oct. 16, 1996, RIDA 172, 238 (1997), note in Kéréver [1997] RIDA 172, 216.

[801] *IFPI Belgium v. Beckers*, Antwerp, CFI, June 21 and 24 December 1999, [2000] ECDR 440; Court of Appeal, First chamber, Antwerp 26 June 2001. *N.V. Belgacom Skynet v. VZW IFPI Belgium and N.V. Universal*, Brussels, CA (Eight Division), 13 February 2001, [2002] ECDR 5.

[802] *Corte Suprema di Cassazione, III Sezione Penale*, 4 July 2006 no. 33945. www.penale.it/page.asp?mode =2&IDcat=7&IDcat2=2. [15/08/2010]. For an analysis of Italian author's right law and a description of the legal framework in which the cases discussed in this paragraph have been decided *see* Musso-Fabiani [2010], *op.cit.*

[803] The website administrators of *www.calciolibero.it* and *www.coolstreaming.it* were accused of violating Article 171(1)(a-bis) of the LdA. '*Making available to the public, through a system of computer networks, using any kind of connection, a protected work of art, or part of it*'.

also aiding the distribution of unlawful/infringing content through computer networks may result, in the Court's opinion, in sanctions under article 171. This potentially establishes criminal liability under Article 171 for an online service provider—and arguably for a software provider—who intentionally provides links to or, as in this case, advances information concerning how to connect to, an unauthorised streaming of protected content[804].

3.4.6.7 – Spain. - A number of decisions make it possible to argue that file-sharing is accepted in Spain[805]. In particular, linking to files available on file-sharing networks and hosting .torrent files is not a criminal offence in absence of profit[806].

3.4.6.8 – Sweden. - In *Pirate Bay*[807], the defendants' website provided a catalogue of .torrent files and a tracker[808]. The plaintiffs claimed complicity in breach of the §2 Swedish Author's Right Act ('making available to the public'), and under Chapter 23, §4 of the Swedish Criminal Code (Act of Complicity). The defendants presented an argument based on 'mere conduit'[809]. The Court concluded that Pirate Bay's users infringed author's right. Pirate Bay was an accomplice and facilitated the execution of the principal offence, regardless of any knowledge concerning the infringements. The defendants' negligence to take action prevented them from benefiting from the E-Commerce Directive protection. The court held the defendants guilty of being accessories to a crime against the author's right law, strengthened by the commercial and organised nature of the activity[810]. The 'Pirate Bay' is still online, and the decision is currently on appeal; however, in the meantime, a number of recording companies have attempted to obtain an injunction against an internet access provider to block

[804] Prosperetti, E. [2007], *Are you liable for your links?* 18(5) Ent.L.Rev. 189-192.
[805] Para. 3.2.5.6. For an analysis of Spanish author's right law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Bercovitz-Berkovitz-del Corral [2010], *op.cit.*
[806] For instance, *SGAE (Sociedad General de Autores y Editores) vs. Jesus Guerra*, n 879/2009, 11 May 2010; and *Columbia Tristan Home Entertainment v. CIA SRC et Otros*, n 582/08, 18 September 2008.
[807] Verdict B 13301-06, 17 April 2009, Stockholm District Court, Division 5, Unit 52 For an analysis of Swedish author's right law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Karnell, G. [2010], *Sweden*, in Nimmer-Geller [2010], *International copyright law and practice*, New York, Matthew Bender.
[808] Edström-Nilsson [2009], *The Pirate Bay verdict– Predictable and yet ..*, 31(9) E.I.P.R. 483-487. Manner-Siniketo [2009], *The Pirate Bay ruling– When the fun and games end*, 20(6) Ent.L.Rev. 197-205.
[809] Article 12 of the E-Commerce.
[810] English translation (commissioned by IFPI, but not endorsed by the Stockholm District Court) at www.ifpi.org/content/library/Pirate-Bay-verdict-English-translation.pdf. [15/08/2010].

users' access to the website. In *Telenor*[811], the court held that internet access providers have no duty to monitor or investigate how their customers use the internet, and accordingly concluded that Telenor contribution to the users' infringing activities:

> '*either active or passive, cannot be regarded as unlawful. As the contribution is not regarded as unlawful, it is not necessary for the court to consider whether liability and causality exist. Nor is it necessary to consider whether basis for provisional measure exists. The petition has not been heard, and will subsequently be rejected*'[812].

3.4.6.9 – Australia. - In *Cooper*[813], the Federal Court of Australia ruled that online service providers are liable under the authorisation theory when they provide links to infringing files. The finding of authorisation was based on knowledge of infringing activity and acquiescence in its occurrence[814]:

> '*Cooper has permitted or approved, and thereby authorized, the copyright infringement by internet users who access his website and also by the owners or operators of the remote websites from which the infringing recordings were downloaded*'[815].

Cooper could not control the presence of infringing files on his website; however, this was not considered to be the relevant inquiry when determining whether he had authorised infringements by internet users[816].

> '*The issue is whether Cooper had sufficient control of his own website to take steps to prevent the infringement. In my view, Cooper clearly did have sufficient control regarding both the user accessing his website and the remote operator placing hyperlinks on the website*'[817].

In *iiNet*[818], an internet access provider was claimed as having authorised its users to infringe copyright by downloading and sharing files using peer-to-peer softwares—in particular, BitTorrent. The plaintiffs claimed breach of copyright by failing to take steps to prevent account holders from engaging in unlawful file-sharing and, in particular, by refusing to forward the plaintiff's complaints to the relevant users. The judge recognised

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[811] *Bonnier Amigo Music Norway AS et al. v. Telenor Telecom Solutions AS*, Case number 09-096202TVI-AHER/2, pronounced on 06.11.2009.
[812] *Ibid.*
[813] *Universal Music Pty Ltd v. Cooper* [2005] FCA 972 (14 July 2005). For an analysis of Australian copyright law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Sherman-Lahore [2010], *op.cit.*
[814] Williams-Seet [2006], *Authorisation in the digital age: copyright liability in Australia after Cooper and Kazaa*, 12(3) C.T.L.R. 74-77.
[815] *Ibid.* 84.
[816] *Ibid.* 86.
[817] *Ibid.* 86.
[818] *Roadshow Films Pty Ltd & Ors v. iiNet Ltd* [2010] FCA 24

that users were infringing copyright on a wide scale, but ultimately dismissed the claim because the internet access provider did not control, nor was responsible for, the BitTorrent system, and it could therefore not prevent the infringements. Moreover, the internet access provider merely provided users with internet connection and did not 'sanction, approve or countenance copyright infringements'[819].

3.4.6.10 – Canada. - SOCAM[820] brought action against the Canadian Association of Internet Service Provider[821] to obtain the payment of royalties, basing the claim on the fact that internet service providers contribute to users' infringements. The Supreme Court of Canada ruled that internet service providers are not liable[822], since merely transmitting data without knowledge of the content does not constitute ground for liability[823]:

> '*the preconditions to copying and infringement are set up … the element of authorization is missing*'[824].

Notably, even if the case did not directly address networking technologies, in *Law Society of Upper Canada*[825], paraphrasing in technology neutral terms, the Court ruled that providing copying technologies does not constitute infringement nor authorisation of infringement when the copying falls within the fair dealing defence.

As mentioned[826], Bill C-32 has been proposed in June 2010[827], and it is currently under discussion. The proposed §27(2.3) makes it an infringement to:

> '*provide, by means of the internet or another digital network, a service that the person knows or should have known is designed primarily to enable acts of copyright infringement if an actual infringement of copyright occurs*.

[819] *Ibid.*
[820] The Society of Composers, Authors and Music Publishers of Canada.
[821] http://www.cata.ca/Communities/caip. [15/08/2010].
[822] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet providers and* others, [2002] FCA 166; 2004 CSC 45. For an analysis of Canadian copyright law and a description of the legal framework in which the cases discussed in this paragraph have been decided, *see* Gendreau-Vaver [2010], *op.cit.*
[823] Article 2.4(1)(b) Copyright Act.
[824] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet providers and* others, [2002] FCA 166; 2004 CSC 45, Para. 27. The judge noted how there is little difference with a library providing a photocopy machine.
[825] *Canadian Ltd. v. Law Society of Upper Canada* [2004] S.C.C. 13 (*CCH*).
[826] Para. 3.2.5.7.
[827] Bill C-32. www.digital-copyright.ca/billc32/blog. [15/08/2010].

3.4.6.11 – Iceland. - In Iceland, a case against a BitTorrent file-sharing site, 'Torrent.is', was dismissed by the District[828] and the Supreme Court[829] due to the .torrent files provided having been held not to be protected by author's right law[830]. Therefore, online service providers appear not to be liable for providing BitTorrent facilities, such as tracker and databases of .torrent files.

3.4.7 – Intermediaries Status

It could be argued that, until recently, intermediaries could not control the use of the technologies they provided, nor were they legally obliged to do so. Moreover, they could not be held liable or 'morally' responsible for the actions of their users[831]. However, late decisions—such as *BREIN*[832], *Scarlet*[833] *or Pirate Bay*[834]—as well as new legislation[835] are all putting the intermediaries in a new position. The reasons for this change of perception over the intermediaries' activities and liability are multiple, but can be summarised as the following:

- the increased belief that technology may permit automatic filtering[836];
- the increased belief that intermediaries profit from their users' infringing activities[837], and therefore should be liable;
- the increased demand for pre-emptive filtering over the take-down notice.

Generally speaking, communication networks providers appear not be liable for the infringements taking place using their networks. Their activities generally do not go beyond merely providing connection and bandwidth to the internet access providers.

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[828] *ÚRSKURDUR Héraasdóms Reykjaness* fimmtudaginn 27 march 2008 í málinr. E-2836/2007: *Samtök myndréttahafa á Íslandi Framleiendafélagi-SÍK Félag hljómplötuframleienda*. The District Court ruling is available in the original language at domstolar.is/domaleit/nanar/?ID=E200702836&Domur=3&type=2 &Serial=2. [15/08/2010]. Morris, P.S. [2009], *Pirates of the internet, at intellectual property's end with torrents and challenges for choice of law*, 17(3) I.J.L.&I.T. 282-303.

[829] *Samtök myndrétthafa á Íslandi Framleiðendafélagið – SÍK Samband tónskálda og eigenda flutningsréttar og Félag hljómplötuframleiðenda v. Istorrent ehf. og Svavari Lútherssyni*, Fimmtudaginn (Supreme Court) 8 May 2008. There is no available official translation, the decision in the original languare is available at www.haestirettur.is/domar?nr=5153. [15/08/2010].

[830] They are 'meta-data'. Para. 2.2 and 2.2.12. What it might be protected is the content of the files they facilitated the transmission of.

[831] Clark, R. [2009], *op.cit.* 222. Edwards, L. [2009], *op.cit.* 84.

[832] *Stichting Bescherming Rechten Entertainment Industrie Nederland (BREIN) v. Techno Design Internet Programmin' B.V.* Court of Appeal, Amsterdam, 5th Division, 15 June 2006, [2006] ECDR, 21

[833] *Societe Belge des Auteurs, Compositeurs at Editeurs v. SA Scarlet (formely known as Tiscali),* Tribunal de Première Instance de Bruxelles, 29 June 2007, [2007] ECDR, 19.

[834] '*Pirate Bay*', Verdict B 13301-06, 17 April 2009, Stockholm District Court, Division 5, Unit 52.

[835] Proposed and passed to impose on intermediaries a more proactive role in monitoring and preventing infringements. These will be later discussed in Chapter Five.

[836] Para. 5.2.4.

[837] Para. 5.3.7.

Internet access providers are generally not liable for the infringements committed by their users and enjoy safe harbour protections. However, there are some exceptions and their legal position is evolving due to the emerging consensus over the so-called graduated response approach[838]. Online service providers complying with the notice and take down regime generally appear to be shielded from liability.

However, notwithstanding the issue of further harmonisation, the question concerning whether intermediaries' liability should be resolved with traditional or new laws is still unanswered[839]. Importantly, it is difficult to determine a general rule for facilitators' liability worldwide; the assessment has to therefore be conducted on a case-by-case basis. It appears that[840]:

- 'ignorance is a blessing', but may not be enough to avoid liability: the absence of specific knowledge of infringing acts together with the non-obligation to monitor shields a vast range of intermediaries, however questions arise regarding the obligation to monitor further infringements when a notice has been served and regarding services expressively designed to facilitate infringing activities;
- courts tend to apply a broader set of considerations in order to determine liability, including the nature of the service, the relationship with the users; the degree of human intervention in providing the service, and to some extent the intention of the provider;
- the inducement and authorisation theories overlap, and have been interpreted more broadly; and
- it is important to ensure that the products/services are not advertised or solicited in a way that is suggestive of infringing use[841].

The picture that emerges is complex due to the increasing number of previously unknown actors involved, which may not fall within the definition of intermediaries [842], as well as by the unclear definition of 'financial gain'. Copyright infringing activities obviously increase users' bandwidth demand and permit a new range of internet services to flourish, but whether this implies that intermediaries directly 'profit' from their users' infringing activities is still open to debate.

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[838] Para. 5.3.
[839] Professor G. Dinwoodie opening the panel session at the UCL IBIL seminar, 24 February 2010. ipkitten.blogspot.com/2010/02/trade-mark-law-and-internet-ibil.html. [15/08/2010].
[840] Dixon A.N [2009], *op.cit.* 35.
[841] Daly, M. [2007], *op.cit*.
[842] Search engines, informationa management tools, *etc*. Edwards, L. [2009], *op.cit.* 87. The latest example is the unreported fine of a British pub for providing wi-fi facilities to its customers. http://news.zdnet.co.uk/communications/0,1000000085,39909136,00.htm. [15/08/2010].

3.6 - Conclusion

> *'Judges have no specialized technical ability to answer questions about present or future technological feasibility or commercial viability where technology professionals, engineers, and venture capitalists themselves may radically disagree and where answers may differ depending upon whether one focuses upon the time of product development or the time of distribution'*[843].

The purpose of this Chapter has been to identify the challenges that networking technologies present for copyright, and accordingly to analyse the reasons associated with legal uncertainty governing these new technologies. It has been shown that:

- it is difficult to enforce copyright in an environment in which copyright infringements are widespread and difficult to detect;
- the applicability and extension of making available and distribution rights are unclear;
- limitations, exceptions and defences may not apply; and
- facilitators are in an unclear legal position.

This legal uncertainty has a detrimental effect over technology innovation since software, services and internet access providers tend to focus on avoiding liability for the infringements committed by their users, instead of developing faster and more reliable networks[844]. Users suffer a restriction of their right of privacy by the monitoring of their activities online[845] and of their right of freedom of expression by the filtering of their transmissions[846]. Finally, authors and other copyright owners are in the exasperating position of having to enforce their rights through court orders to receive the deserved compensation for the dissemination of their works online.

Moreover, it should be noted how courts show a tendency to rely upon technologically inaccurate opinions, thereby making the analysis of the legal liability arguable[847]. The law is also so uncertain that the operators of public domain sites—such as Project Gutenberg—feel they should post notices similar to the following:

> '*Copyright laws are changing all over the world, be sure to check the copyright laws for your country before posting these files!*'[848]

This has led commentators to ask:

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[843] *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 125 S.Ct. 2764 (2005), Breyer J. concurring.
[844] Para. 2.2.2.9.
[845] Para. 3.2.4 and 5.2.4.2.
[846] Para. 5.2.4.2.
[847] For instance in Scarlet and PirateBay.
[848] www.gutenberg.org/dirs/etext00/0ws2310.txt. [15/08/2010].

> *'What measure does the intellectual property industry propose to counter this development? A ban on the technology? Obligatory surveillance programmes on every private PC?'*[849]

A number of possible solutions to this legal uncertainty have been proposed; they provide the focus for the following Chapters. Chapter Four continues the investigative journey by defining the actors involved, and analyses the relationship between copyright and networking technologies from a philosophical and social-economic perspective.

[849] K. Sigfid, Swedish MP, commenting on the development of anti-tracking file-sharing softwares. Quoted in E-commerce Law & Policy 2009, 11(3), *One Swarm to end file-sharing tracking by monitoring agents*, www.e-comlaw.com/lp/archive/volume_11_issue_3.htm. [15/08/2010].

Chapter Four

Contextualizing Networking Technologies within a Legal-Socio-Economic Perspective

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'*if thought corrupts language, language can also corrupt thought*'[850]

4.1 - Introduction

In the on-going war between the entertainment industries and new technologies, something has been misplaced[851]. A legislative or technical outcome to the threats which networking technologies pose to copyright is still awaited[852]; however, in the meantime, copyright law palpably entered the mainstream consciousness, causing sometimes emotive complaints from users[853], preoccupied by the extreme—whilst sometimes bizarre—deterrents to piracy[854]. Networking technologies are transforming everyday life[855], allowing perfect replications, instantaneous transmission and abundant storage. They reach a global audience virtually inexpensively, in the process undermining the existent copyright commercial structure[856].

The debate is starkly polarised, whilst some wish to ensure that copyright holders capture '*all value that can derive from property*'[857]. They associate networking

[850] Orwell G. [1946], *Politics and the English language*, www.mtholyoke.edu/acad/intrel/orwe1146.htm. [15/08/2010].
[851] The term 'war' is used on the instruction of several noted copyright scholars. Litman, J.D. [2002], *War stories*, 20 A.E.L.J. 337; Patry W.F [2009], *Moral panic and copyright wars*, Oxford University Press; Yu, P.K. [2004], *The escalating copyright wars*, Public Law & Legal Theory, Research Paper 01-06, ssrn.com/abstract=436693. [15/08/2010].
[852] Ganley, P. [2004], *Digital copyright and the new creative dynamics*, I.J.L.&I.T., 12(3), 282-332.
[853] *Stefanie Lenz v Universal Music*, 572 F.Supp.2d 1150 (ND Cal. 2008).
[854] For instance, the CD copy protection which was overridden simply pressing the shift-key on the keyboard. Napoli, L. [2003], *Shift key opens door to CD and criticism*, www.nytimes.com. [15/08/2010]. Or the Sony Key2audio system, which that can be bypassed by obscuring the disc's edge with a pen. Perritt, J. [2003], *Protecting technology over copyright: a step too far*, 14(1) Ent.L.Rev. 1.
[855] Castells, M. [2001], *The internet galaxy*, Oxford University Press; Shapiro, A. [1999], *The control revolution*, Public Affairs.
[856] Networking technologies *'create a new, transparent market place where buyers and sellers can be matched quickly and at minimal costs'*. Malone, T.W. *et al*. [1987], *Electronic Markets and Electronic Hierarchies*, 30 A.C.M. 6; [1989], *The Logic of Electronic Markets*, Harvard Business School Review, 166-170.
[857] Goldstein, P. [2003], *op.cit.* 11. Also, Stefik, M. [1999], *The internet edge: social, technical, and legal challenges for a networked world*, MIT Press, Cambridge; Bell, T.W. [1998], *Fair Use-v-Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 North. Carolina L. Rev. 557; Dam, K.W. [1999], *Self Help in the Digital Jungle*, 28 J. L. Stud. 393; O'Rourke, M. A. [1997],

technologies with an unprecedented spread of copyright infringements, a '*highly-infectious micro-organism*'[858], which undermines the legal rights of authors and other copyright owners, and which negatively affects the market. They promote expanded rights, technical barriers, additional rights structures, and stronger enforcement powers[859]. They consider the failure to provide a robust copyright protection an offence against the '*international order*'[860]. On the opposite side, however, others claim that copyright has never been a '*one-sided entitlement*'; it is not based on '*unassailable societal norm'* and should not be a mechanism for preserving the *status quo*: if new technologies produce new useful means of creation and dissemination, then whoever was responsible for exploiting the old ones then has the choice of joining the new technology or otherwise stepping aside[861].

Obviously, the aforementioned argument provides an extreme simplification of the opposite factions. The most critical point in the debate is that no reliable comprehensive method of data collection is available; accordingly, both arguments are theoretically sustainable. This Chapter therefore aims to clarify some preliminary key issues in order to help to determine the more suitable solution to the problems described in the previous Chapters.

4.2 - Actors

Technology has constantly changed the relationship between creators, industries, and the users. Today, this triumvirate appears to be corrupted by a number of new entities, jeopardising the old established positions[862]. History, however, shows us that this triumvirate has remained consistent, and that the market usually compensates for any

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Copyright Pre-emption After the ProCD Case: A Market Based Approach, 12 Berkeley Tech.L.J. 53; Hardy, I.T. [1996], *Property (and Copyright) in Cyberspace*, University Chicago Legal F. 217.

[858] *Universal Music Australia Pty Ltd. v. Cooper*, [2006] FCA FC 187, [32].

[859] Ganley, P. [2004], *op.cit*.

[860] Austin, G.W. [2009], *op.cit.* 146-147.

[861] Lessig, L. [2001], *The future of ideas: the tale of the commons in a connected world*, Random House; Litman, J.D. [2002], *op.cit*; Cohen, J.E. [1998], *Lochner in cyberspace: the new economic orthodoxy of rights management*, 97 Michigan L.Rev. 462; Boyle, J. [2000], *Cruel. Mean. or Lavish? Economic analysis, price discrimination and digital intellectual property*, 53 Vanderbilt L.Rev.; Benkler, Y. [2000], *From consumers to users: shifting the deeper structures of regulation towards sustainable commons and user access*, 52 Federal Communications L.J. 561; Ku, R.S.R. [2002], *The creative destruction of copyright: napster and the new economics of digital technology*, 69 University of Chicago L.Rev. 263; Austin, G.W. [2009], *op.cit.* 146-147.

[862] It is complex to define who the main actors are in the extensive list of players active in the market: authors, copyright owners, publishers, sound-recording companies, film industries, software providers, internet access providers, online service providers, telephone companies, media players, broadcasters, browsers, samplers, listeners, potential purchasers, freedom fighters, online (and offline) retailers, collective societies, copyright organizations, and academics.

shift in control and power caused by technological improvements[863]. It is essential for copyright legislation to balance this triumvirate's different interests[864]; however, public choice[865] and collecting actions'[866] theories show how the policy-making process tends to satisfy the interests of the better-organised groups of actors—the entertainment industries—at the expenses of the groups which are less organised-authors and performers- or dispersed-users[867].

'*As a result copyright law is unlikely to reflect users' interests*'[868].

4.2.1 – The Authors and the Performers

Authors and performers do not necessarily play an active role in the formation of copyright laws; however, they have nevertheless become active participants, and thereby form their own associations when they perceive unfair exploitation[869]. Authors and performers have conflicting responses to networking technologies and the tactics of their associations; some enjoy their creations being shared[870]. Some market or otherwise test the quality of their creations via disseminating their works, free of charge, through their websites or various other channels[871]; others accept the potential of online distribution, but are concerned with the impact on their incomes[872], and/or fear that their moral rights may be infringed[873]. A small group is generally seen to be against online

[863] Suthersanen, U. [2006], *op.cit*.
[864] Hilty-Geiger (eds) [2006], *The balance of interests in copyright law*, Max Planck Institute, www.intellecprop.mpg.de. [15/08/2010].
[865] Stigler, G. J [1971], *The theory of economic regulation*, 2 Bell Journal of Economics and Management Science, 359; Buchanan-Tollison-Tullock (ed.) [1980], *Towards a theory of the rent-seeking society* Texas A&M University Press; Buchanan-Tullock, [1962], *The calculus of consent: logical foundations of constitutional democracy*, University of Michigan Press.
[866] Olson, M. [1971], *The logic of collective action: public goods and the theory of groups*, revised ed. Harvard University Press.
[867] Tamura, Y. [2009], *Rethinking copyright institution for the digital age*, WIPO J. 1, 63-74, 69.
[868] *Ibid.*
[869] Jardine, L. [1996], *Wordly goods— A new history of the Renaissance*, Macmillan, 244-245. Generally, authors regard themselves as benefiting from dissemination of their works and benefiting even more from access to each other's works. Suthersanen, U. [2003], *Copyright and educational policies - A stakeholder analysis*, 4 O.J.L.S. 586.
[870] '*How can a 14-year-old who has an allowance of $5 a week feel bad about downloading music produced by multimillionaire musicians and greedy record companies?*' www.moby.com. [15/08/2010]. On the other hand, in *Something for Nothing*, Loudon Wainwright III has a more cynical approach: '*It's O.K. to steal, cuz it's so nice to share*'.
[871] For instance, Bob Dylan, Grateful Dead, Moby, Alanis Morrisette, *etc*.
[872] For instance, Metallica, Rolling Stones, The Who, Pearl Jam, Robbie Williams, *etc*. Notwithstanding the main income of authors and performers is rarely royalties. An extensive survey has been conducted in 2007, Kretschmer–Hardwick [2007], *Authors' earnings from copyright and non-copyright sources: A survey of 25,000 British and German writers*, Centre for IP Policy & Management. www.cippm.org.uk. [15/08/2010].
[873] Content online is often credited wrongly; and before a work is released, early versions are often available. Notably, users may download them under the misconception that they are finished products.

distribution, thinking it may undermine the very sense of acquiring and enjoying content itself[874]. Moreover, in all likelihood, few authors privately wish networking technologies would disappear, though they prefer not to admit it publicly[875].

Much of the discourse surrounding networking technologies has centred on the revenues authors and performers—in addition to the entertainment industries—are potentially losing. The entertainment industries' anti-piracy campaigns are substantially based on the assumption that sharing is stealing, which consequently undermines creativity[876]. Notwithstanding the arguments that the industry alone—not authors and performers—is losing revenues[877], it is submitted that creativity is not driven only by profit. A more detailed analytical map is therefore required in order to assess authors' own intrinsic motivations[878].

Some commentators argue that authors and performers are insufficiently supported by the rewards that copyright systems promise, yet they still create new works[879]. Profits are merely one variable; the gratification of creating in itself combined with the gratification of being acknowledged and appreciated by the public-rewards, are also important variables[880]. It could be argued that even a non-proprietary model that exalts the value of hedonic and socio-psychological rewards can guarantee production and thereby allow dissemination of creation without the need for copyright monopoly incentives[881]. The extent of this correlation should not be overstated; however, profit alone is likely to prove insufficient to stimulate creation[882]. In this sense, from a creator's perspective, networking technologies could be argued to diminish the economic return in exchange for other benefits: for instance, a wider audience[883]. Nevertheless, it is argued that individuals are naturally creative beings who engage in

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Moreover, users share unreleased contents and performances that some authors would prefer not to be disclosed.

[874] For instance, Beatles, Radiohead, AC/CD, Led Zeppelin, *etc*.

[875] The situation has become so complex that some authors decline to comment on the topic, afraid to upset the industry or the users. Some musicians admitted they have been asked not to comment, or declined interviews on the subject. Strauss, N. [2003], *File-sharing battle leaves musicians caught in middle*, The New York Times, 14 September, www.nytimes.com. [15/08/2010].

[876] For instance, J. Black promo video for the Tenacious-D film. www.youtube.com. [15/08/2010]. *See* Para. 4.5.

[877] An interesting reading of the data published by PRS and BPI is available on the Times Online. labs. timesonline.co.uk/blog/2009/11/12/do-music-artists-do-better-in-a-world-with-illegal-file-sharing. [15/08/2010].

[878] Benkler, Y. [2002], *Coase's penguin, or, Linux and the nature of the firm*, 112 Yale L.J. 369, 426-434.

[879] Boyle, J. [1996], *op.cit.* 39-40. Moglen, E, [1999], *Anarchism triumphant: free software and the death of copyright*, 4 First Monday 8 (August).

[880] Benkler, Y. [2002], *op.cit.* 426-427.

[881] *Ibid.* 430-431.

[882] *Ibid.*

[883] O' Reilly [2002], *Piracy is a progressive taxation, and other thoughts on the evolution of online distribution*. www.openp2p.com/lpt/a/3015. [15/08/2010].

their scientific and artistic activities for diverse reasons and rewards, notwithstanding the legal and technological framework provided[884].

4.2.2 – The Industries

The entertainment industries are the principal investors in authors—not only recording their creative effort, but also marketing them. Without a copyright system to guarantee return for investment, the industry would stop investing, which would be disadvantageous to society in its entirety[885]. The industry strategy is concerned with maximising returns, and accordingly appears to concentrate on three factors: expanding the boundaries of the law so as to capture more and more intellectual property goods[886]; supporting the creation, manufacture and distribution of a variety of goods[887]; and protecting the pre-existent distribution network in some cases by preventing the entrance of new services and products[888].

Networking technologies have had a considerable impact on the industries' control over the distribution networks, satisfying several types of consumers' demands, previously unanswered by the industries[889]. The result of this approach has been the opening of new lucrative markets, which—either directly or indirectly—profit from the lack of enforcement of copyright laws. New industries have also entered the market as a result of networking technologies, namely file-sharing software providers, online service providers and, most importantly, internet access providers. These new players represent relevant competitors to the old industry since, notwithstanding their liabilities under the law[890], they are 'profiting' from widespread copyright infringements. In a sense, they could be considered the next generation broadcasters[891]. Instead of

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[884] '*Human creativity is … very difficult to standardize and specify in the contracts necessary for either market-cleared or hierarchically organized production*'. Benkler, Y. [2002], *op.cit*, 414.
[885] Suthersanen, U. [2006], *op.cit*.
[886] Dutfield–Suthersanen [2004], *The innovation dilemma: intellectual property and the historical legacy of cumulative creativity*, 4 I.P.Q. 379, 391.
[887] The industry invests widely in a plethora of cultural goods, and the few works, which do produce profits finance the rest of the products. Scherer, F.M. [2001], *The innovation lottery*, in Dreyfuss–Zimmerman [2001], *Expanding the boundaries of intellectual property*, Oxford University Press.
[888] Fagin, M. *et al*. [2002], *Beyond Napster: using antitrust law to advance and enhance online music distribution*, 8 Boston University Journal of Science & Technology Law, 451, 464-465.
[889] Download single music tracks, films, software, browsing, streaming and watching or listening, sampling to create new types of music, films, or software, *etc*. Simply put, file-sharing and Web2.0 gave '*the Wookie what he wants*'. Quoting Han Solo in the first 'Star Wars' film. More importantly, the late interest in networking technologies by the industry—and even their 'attitude' towards the consumers—has been seen by the users as an attempt to outweigh the market consequences of an industry's lethargy.
[890] Para. 3.3 and 3.4.
[891] Page-Touve [2010], *Moving Digital Britain forward, without leaving Creative Britain behind*, 19 Economic Insight. www.prsformusic.com. [15/08/2010].

competing with or otherwise trying to impose royalties on such services, the entertainment industries firstly attempted to 'shut down' networking technologies services in the courts, and only lately began collaborating with internet access providers[892]. An interesting point to consider is that the entertainment industries and these new players often belong to the very same business conglomerates[893].

A recurring question is how to convince users to buy something they can get free of charge. It is submitted, however, that the main question should be how to compensate the copyright owners for the unauthorised online usage of their protected materials. New media have historically supported pre-existing media in the short-term to replace them later. Opportunities exist to arbitrate between the different distributions mediums[894].

4.2.3 – The Users

> '*What makes the constitution of a state really strong and durable is such a close observance of (social) conventions that natural relations and laws come to be in harmony on all points, so that the law … seems only to ensure, accompany and correct what is natural*'[895]

International copyright law is complex, and it is often complicated in order to determine whether some activities are copyright infringements or are otherwise permitted. Moreover, users appear to know that existing copyright regulations are increasingly unenforceable within the internet, and the likelihood of being punished for such sharing activities is remote. Solid knowledge concerning file-sharing is rare, but the following graph (Figure 19) attempts to illustrate the percentage of internet users who file-share without authorisation[896]. In Finland, for example—which has one of the highest rates of access to the internet[897]- 87% of all internet users are file-sharers[898]

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[892] As it will be later discussed in Chapter Five, the choice is not the most fortunate.

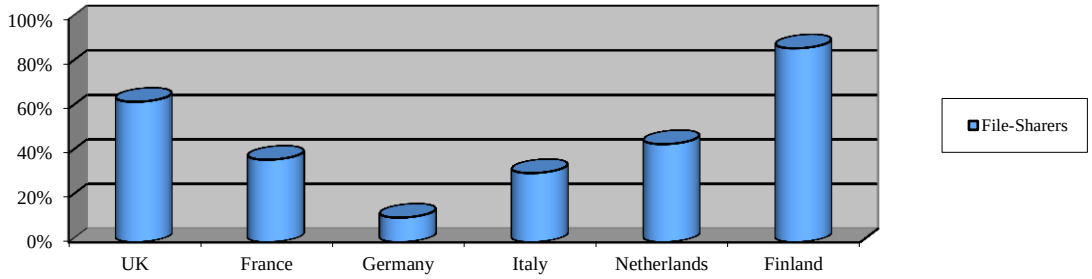
[893] AOL Time Warner owns Warner Bros. Records. Mann, C.C. [2003], *The year the music dies*, 2003. www.wired.com/wired/archive/11.02/dirge_pr.html. [15/08/2010]. Sony is a member of both the Consumer Electronics Association and the RIAA. Thus, in the Napster litigation it was on both sides. Sony also joined the lawsuit against Launch Media, an internet radio service that Sony partially own. Rose, F. [2003], *The Civil War Inside Sony*, www.wired.com/wired/archive/11.02/sony.html. [15/08/2010]. Similar conflicts exist within Vivendi Universal and the Bertelsmann Polygon. Proschinger J. [2003], *Piracy is good for you*, 14(5) Ent.L.Rev. 97-104.

[894] As it will be discussed in Chapter Six.

[895] Rousseau, J.J. [1763], *The social contract*, 1968 ed. Penguin Classics.

[896] The graph has been design by the author with the data provided by the latest researches. British Music Right [2008], *Music experience and behaviour in young people* (Spring), www.futureofmusicbook. com; TNS-Sofres [2009], *Les Français et le Téléchargement Illégal sur internet*, www.tns-sofres.com; IVIR [2009], *Ups and Downs. Economic and cultural effects of file sharing on music, film and games*, www.ivir.nl; Angus Reid Strategies, *File Sharing has become the new normal for most online Canadians*,

Figure 19 - File-Sharers in UK, France, Germany, Italy, NL, and Finland



These statistics are far from conclusive, but it can be safely assumed that a vast number of infringements are committed through networking technologies[899]. File-sharing is an everyday practice for a significant portion of internet users. Apparently repression, DRM, filtering and 'awareness' campaigns have shown no tangible effect[900]. By downloading, users save the purchase price of a copy of the file; however, by uploading, users do not receive any direct benefit from infringing copyright[901]; nevertheless it has become a common and 'socially-acceptable' activity[902]. An interesting academic literature explores the reasoning behind this behaviour[903], thereby explaining it with the 'neutralisation theory'[904] or the 'de-individuation theory'[905].

A different reading might be suggested. Users are used to accessing content paying indirectly for it—radio and television being perfect examples for this. Broadcasters are licensed to broadcast protected content; however, users receive contents paying for the 'right' to potentially access it by paying taxes on the potential

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www.angusreidstrategies.com; Eurostat [2007], *Data in focus: internet usage in 2007*, http://epp.eurostat.ec.europa.eu. [15/08/2010].

[897] Statistic Finland. www.stat.fi/til/sutivi/2007/sutivi_2007_2007-09-28_tie_001_en.html. [15/08/2010].

[898] Figures from Hietanen, H. *et al.* [2008], *Criminal friends of entertainment: analysing results from recent peer-to peer surveys*, 5(1) Scripted, April.

[899] On a more positive note this gave user access to content previously unobtainable, otherwise probably lost forever: old works, rare recordings, unreleased recordings, *etc*.

[900] Grassmuck, V. [2009], *The world is going flat(-rate)*, Intellectual Property Watch, 4. Users do not feel guilty sharing TV series or pop music, mainly because they consider these works purely commercial products, with little or no consideration for their actual artistic value. This could be the consequence of the industry consistently promoting commercial products instead of artistic works. '*Users are cynical as the industry has deliberately made them*'. Snyder, J.&B. [2003], *Embrace file-sharing, or die*, http://dir.salon.com/story/tech/feature/2003/02/01/file_trading_ manifesto/index.html. [15/08/2010].

[901] In some scenarios, uploading may increase the downloading speed.

[902] Para. 4.5.

[903] SABIP [2009], *op.cit*

[904] It suggests four means people use to justify their actions: denial of responsibility, denial of injury of victim, condemning the condemners, appeal to higher loyalties. Ingram-Hinduja [2008], *Neutralizing music piracy: an empirical examination*, 29 (4) Deviant Behaviour, 334-366.

[905] It suggests users avoid responsibility because no one is aware of their identities. Shang, R. *et al.* [2008], *Ethical decisions about sharing music files in the P2P environment*, 80(2) J. Business Ethics, 349-365.

reception and/or paying a TV licence. Moreover, they also pay for the content indirectly by being forced to listen to or watch advertisements during the programming. The internet is no exception. Users are, to some extent, paying for the content they access or download through the subscription to the service, and are also being forced to watch/listen to advertisements. It is arguable that such users realise that they do not compensate the correct right holders for the content enjoyed, but there is no doubt they are paying an amount in order to share/access such content. Moreover, users know sharing is an activity undertaken by millions of individuals.

4.3 – Justificatory Rhetoric

Copyright is present in the awareness of the public and is the subject of heated debates. However, its importance and relevance are increasingly undermined by the belief of some that copyright is no longer justifiable, and fundamentally places unnecessary restrictions on competing products; infringement is not harmful, and users will not experience legal consequences for infringement. Copyright is governed by a fundamental principle of balance; however, there is the general perception that the balance has shifted towards copyright holders—partly because copyright continually expands, and partly because the balance has not been recalibrated appropriately with the advent of networking technologies[906]. When a legal system[907]

> '*no longer maintain the correct balance or neglect it, then respect for system by the public erodes*'[908]

The 'sword of copyright law' has been arguably wielded too vigorously in relation to more recent technological innovations, thereby consequently undermining the aforementioned balance[909]. Some critics have subsequently adopted a strong anti-intellectual property attitude[910], which is:

> '*coalescing around frustration with the way that digital media is dealt with by the established copyright […] regime*'[911].

[906] Davidson, J. [2004], *The riddle of the digital world*, Financial Review, 14 December, 26
[907] Which is '*a carefully applied and reactionary tool to regulate occurring social injustices in a constant process*'. Bowrey, K. [1998], *Ethical boundaries and internet culture*, in Bentley-Maniatis [1998], *Intellectual property and ethics*, Sweet & Maxwell, 6.
[908] Webber, D. [2005], *Intellectual property- challenges for the future*, 27(10) E.I.P.R. 345-347.
[909] Ganley, P. [2004], *op.cit*.
[910] The most popular are probably S. Fanning, J.P. Barlow, and I. Clarke.
[911] Bowrey, K. [1996], *Who's writing copyright history?* 18(6) E.I.P.R. 322, 327.

Furthermore, some assert that the copyright system is no longer justifiable[912]: the law is incapable of keeping up with technological developments[913], and enforcement is hardly possible[914]. Therefore, it is necessary to question whether or not the current copyright system is justifiable, taking into consideration that

'*justifications supporting strong copyright protections are often very limited'*[915].

Multiple justifications theories[916] underline the need to 'strike a balance' between authors' rights, users' rights, and technology development. In a sense, the scope of copyright is to provide a system to remunerate the creators. A simple way to achieve this—although not necessarily the best—is the grant of a monopoly[917]. Thus, copyright must be limited and its justification constantly challenged, since it can be misused to engage into anti-consumer, anti-competitive, and anti-innovative behaviours. Therefore, it is unavoidable to mention the philosophical patterns dominating the copyright discourse[918].

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[912] Barlow, J.P. [1994], *op.cit.* Phan, D.T.T. [1998], *Will fair use function on the internet?* 98 Columbia L.Rev. 169, 206; Borland-Yamamoto [2000], *The P2P myth*, news.cnet.com. [15/08/2010]. Higham, N. [1993], *The new challenges of digitisation*, 15(10) E.I.P.R. 355. Ixon-Hansen, [1996], *The Berne Convention Enters the Digital Age*, 18(11) E.I.P.R. 604, 607. Interestingly, a similar notion can already be found in *Donaldson v. Beckett* [1774] 4 Burr. 2408. Lord Camden questioned what happened to thoughts '*if he speaks, and lets them fly out in private or public discourse? Will he claim the breath, the air, the words in which his thoughts are clothed? Where does this fanciful property begin, or end, or continue?'* Wiese, H. [2002], *The justification of the copyright system in the digital age*, 24(8) E.I.P.R. 387-396.

[913] Wiese, H. [2002], *op.cit*.

[914] Stone-Harrington [2000], *Is it the end of the line for copyright?* 38 Commercial Lawyer 66, 67. Shipchandler, S. [2000], *The Wild, Wild Web: non-regulation as the answer to the regulatory question*, Cornell International L.J. 436. Wiese, H. [2002], *op.cit.*

[915] Tamura, Y. [2009], *op.cit.* 63.

[916] On the philosophy of intellectual property, in particular copyright, generally: Fisher, W.W. [2001], *Theories of intellectual property*, in Munzer, S. (ed.) [2001], *New essays in the legal and political theory of property*, Cambridge University Press, 168; Menell, P.S. [2000], *Intellectual property: general theories*, in Bouckaert-de Geest (eds) [2000], *Encyclopaedia of law & economics: Volume II*, Edward Elgar, 129; Drahos, P. [1996], *A philosophy of intellectual property*, Ashgate; Boyle, J. [1996], *op.cit.*; Palmer, T.G. [1990], *Are patents and copyrights morally justified? The philosophy of property rights and ideal objects*, 13 Harvard Journal of Law & Public Policy 817; Hughes, J. [1988], *The philosophy of intellectual property*, 77 Georgetown L.J. 287.

[917] Patry, W. [2009], *op.cit.* xvi-xvii.

[918] The main sources used to philosophically justify copyright are: Locke, J. [1690], *Second Treatise on government*, edited by Laslett P. [1988], 2nd ed., Cambridge University Press, Chapter V; Kant, I. [1785], *On the injustice of counterfeiting Books*; Hegel, G.W.F. [1821], *Philosophy of rights*, Knox, T.M. [1967] translation, Oxford University Press; Foucault, M. [1977], *What is an Author* Cornell University Press. The following division is open to debate and is by no means conclusive. Moreover, the power of these theories is not limitless. Fisher, W.W. [2001], *op.cit*, 173-175, 177. It is arguable whether intellectual property theory lends itself to categorisation. It has been argued that '*no theory displays sufficient justificatory power on which to base a coherent theoretical approach to copyright*' and that only all together, the bundle of copyright theories provides the requisite theoretical framework for copyright policy and practice. Zemer, L. [2006], *op.cit*. Theories are normally divided into utilitarian and non-utilitarian, but some suggest ulterior divisions. Menell P. S. [2000], *op.cit*, 129.

4.3.1 - Utilitarianism

Utilitarianism endorses the granting of intellectual property rights to promote innovation and productivity, limiting the interests of right holders with the ones of the users[919]. It assumes that monopolies—limited in duration and scope—help innovation[920]. Thus, copyright promotes creativity granting a monopoly, justified as the economic reward for the creators' efforts[921]. This monopoly, however, has a social cost[922], which can be balanced under the utilitarian justifications alone, since these mainly focus on the property component of production[923].

4.3.2 – Labour-based Justifications

The most famous is perhaps Locke's labour theory. Notwithstanding, it does not directly refer to intellectual property, but is often quoted in modern copyright debates[924] and court references[925]. The labour theory states that,

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[919] Palmer, T.G. [1990] *op.cit*, 849-850. Utilitarian justifications can be traced back to the Statute of Anne, 1709. The title of the legislation reads: '*An Act for the encouragement of learning, by vesting the copies of printed books in the authors, or purchasers, of such copies, during the times therein mentioned*', '*for the encouragement of learning men to compose and write useful books*'.

[920] Bentham, J. [1839], *A manual of political economy*, GP Putnam, 71.

[921] Samuelson, P. [2004], *Should economics play a role in copyright law and policy*, 1 University of Ottawa Law & Technology Journal 1. For a different approach: Hugenholtz, P.B [2001], *Copyright and freedom of expression in Europe*, in Dreyfuss-Zimmerman-First (eds) [2001], *Expanding the boundaries of intellectual property: innovation policy for the knowledge society*, Oxford University Press, 343, 344.

[922] Breyer S.G. [1970], *The uneasy case for copyright*, 87 Harvard L.Rev. 291. Tyerman, B.W. [1971] *The economic rationale for copyright protection for published books: a reply to professor breyer*, 18 UCLA L.Rev. 1100; Landes-Posner, [1989], *op.cit.* 325. Gordon-Bone, [2000], *Copyright* in Bouckaert-Geest (ed.) [2000], *Encyclopaedia of law & economics: Volume II*, Edward Elgar, 189; Lunney, G. S. Jr., [1996], *Re-examining copyright's incentives-access paradigm*, 49 Vanderbilt L.Rev. 483; Sterk, S.E. [1996], *Rhetoric and reality in copyright law*, 94 Michigan L.Rev. 1197, 1204; Harris, J.W. [1996] *Property and justice*, Oxford University Press, 296-299; Hadfield, G.K. [1992], *The economics of copyright: an historical perspective*, 38 Copyright Law Symposium (ASCAP) 1; Hurt-Schuchman, [1966], *The economic rationale of copyright*, 56 American Economic Rev. 421; Plant, A. [1934], *The economic aspects of copyright in books*, 1 Economica 167. Fisher, W.W. [2001], *op.cit.* 169, 173-184; Menell, P.S. [2000], *op.cit.* 130-156; Drahos, P. [1996], *op.cit.* 119-144.

[923] Boyle, J. [1992], *A theory of law and information: copyright, spleens, blackmail, and insider trading*, 80 California L.Rev. 1413, 1447. Drahos, P. [1996], *op.cit*, 122. Landes-Posner, [1989], *op.cit*, 326. Bentham, J. [1939], *op.cit*; Pigou, A.C. [1921], *The economics of welfare*, Macmillan; Clark, J. B. [1927], *Essential of economic theory*, Macmillan. Lemley, M. A. [1997], *The economics of improvement in intellectual property law*, 75 Texas L.Rev. 989.

[924] Tully, J. [1993], *An approach to political philosophy: Locke in contexts*, Cambridge University Press; Macpherson, C.B. [1972] *The political theory of possessive individualism: Hobbes to Locke*, Oxford University Press; Tehranian, J. [2005], *Fair use? The triumph of natural-law copyright*, 38 U.C. Davis L.Rev. 465; Gordon, W.J. [2004], *Render copyright unto Caesar: on taking incentives seriously*, 71(1) University of Chicago L.Rev. 75; Lipton, J. [2004], *Information property: rights and responsibilities*, 56 Florida L.Rev. 135, 177-181; Damstedt, B.G. [2003], *Limiting Locke: a natural law justification for the fair use doctrine* 112 Yale L.J. 1179; Spinello, R.A. [2003], *op.cit.*; Craig, C.J [2002], *Locke, labour and limiting the author's right: a warning against a Lockean approach to copyright law*, 28 Queens L.J. 1.

[925] *Macmillan v Cooper* (1923) 93 L. J.P.C. 113, 117 required a 'sufficient skill, judgment and *labour* or *labour*, skill and capital. '*Men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour'*, *Sayre v Moore*

> '*everyone has a natural property right in his/her own 'person' and in the labour of his/her body*'[926]; and that '*men share a common right in all things*'[927].

Locke introduces the concept of 'expenditure of labour'[928] to justify the appropriation of an object by the labourer[929]. However, the right is not unconditional[930], and there are some limits, such as the 'no-harm principle'[931]: property is protected on the condition that it does not conflict with the common good. Copyright is never absolute, and copyright works are non-rivalrous in nature[932]. Thus, it is open to doubts whether,

> '*Lockean property theory can be re-imagined to shape a copyright system that furthers […] maximum creation and dissemination of intellectual works*'[933].

Moreover, Locke's theory could be misused in order to promote unbalanced copyright expansionisms, not valuing the socio-cultural aspects of copyright[934].

4.3.3 – The Personhood Approach

The personhood theory derives from Kantian and Hegelian philosophies[935]. It assumes

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(1785) 1 East 361n. Moreover, the Canadian Federal Court explicitly referred to Locke's theory attempting to define the scope of copyright protection in *CCH Canadian Ltd. v Law Society of Upper Canada* [2004] 1 S.C.R. 339.

[926] The famous metaphor of labour mixture. Locke, J. [1690], *op.cit.* 265-428.

[927] *Ibid*.

[928] '*Once one takes a particular item from the common, one violates the right of other commoners, to whom this particular item also belongs*'. *Ibid.*

[929] '*The act of aggregating isolated pieces of information should be the ground for protection in part because of considerations of natural right to the fruits of one's labour*' and unjust enrichment. Denicola, R. [1981], *Copyright in collections of facts: a theory for the protection of nonfiction literary works*, 81 Columbia L.Rev. 516, 519-20, 528, 530. Also Gordon, W.J. [1992], *On owning information: intellectual property and the restitutionary impulse*, 78 Virginia L.Rev. 149, 166-67, 266-273.

[930] Locke, J. [1960], *op.cit*.

[931] Gordon, W.J. [1993], *A property right in self-expression: equality and individualism in the natural law of intellectual property*, 12 Yale L.J. 1533, 1544-1545.

[932] '*Copyright works are non-rivalrous goods, which are products more like inexhaustible 'public goods' that are ordinarily un-owned, and thereby they lack problems of scarcity*'. Gordon, W.J. [2003], *Intellectual property*, in Cane-Tushnet (ed.) [2003], *The Oxford handbook of legal studies*, Oxford University Press, 617, 621. Romer, P.M. [1990], *Endogenous technological change*, 98(5) Journal of Political Economy, S71, S73-S74. Damstedt, B.G. [2003], *op.cit*, 1182.

[933] Craig, C.J. [2002], *op.cit*, 54.

[934] *Ibid.* 55. For denunciations of the Lockean concept as applied to intellectual property, Waldron, J. [1993], *From authors to copies: individual rights and social values in intellectual property*, 68 Chicago-Kent L.Rev. 842, 871, 879-880; and Kingston, W. [1990], *Innovation, creativity and law*, Studies in Industrial Organisation, Kluwer Academic Publishers, 83.

[935] For Hegel, private property is obtained by joining the individual's will to an external object. Hegel, G.W.F. [1821], *op.cit.* 44, 50, 51-58. For further analysis Stillman, P.G. [1980], *Property, freedom, and individuality in Hegel's and Marx's political thoughts*, in Pennock-Chapman (ed.) [1980], *Property*, Nomos, XXII, New York University Press, 130-167. '*The person who mixes his labour with land deserves a reward for attaching his existence to the object?*' Waldron, J. [1988], *The right to private property*, Clarendon Press, 343-38. Personality for Hegel '*does not simply require external objects for its development. Its development is its objectification through externalization of its will'*. Palmer, T.G. [1990], *op.cit*, 838.

that 'property' is part of, and is necessary for, the individual's personality[936]. Thus, copyright is justifiable, simply because it protects the manifestation of the creator's personality in his/her intellectual expressions[937]. Scholars supporting the personhood theory employ different, sometimes contrasting, approaches[938], because, in all likelihood, personality theories alone cannot justify the present copyright regime. For instance, it could be argued that copyright is not indispensable for the development of the individual's personality, or that it limits the development of the personality of others individuals, thereby imposing restriction to the dissemination of works.

4.3.4 – Social-Institutional-Planning

The social-institutional-planning theory claims that a strong civic culture can be maintained only with a balanced social and institutional intellectual property regime. It formulates '*a vision of a just and attractive culture*'[939]. Theorists of this approach advocate that a less rigid set of copyright laws will fundamentally facilitate the expansion of cultural exchange and social interaction[940].

4.3.5 – Traditional Proprietarianism

Traditional proprietarianism scholars suggest that, if copyright is a form of property[941], then ownership and the title of traditional property should be applied, thereby

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[936] Radin, M.J. [1982], *Property and Personhood*, 34 Stanford L.Rev. 957, 965.

[937] German and French Author's Right laws evolved from this philosophical underpinning. Zemer, L. [2006], *op.cit*. '*Hegelian personality theory applies more easily because intellectual products, even the most technical, seem to result from the individual's mental processes*'. Hughes, J. [1988], *op.cit*, 365. Cotter, T.F. [1997], *Pragmatism, economics, and the droit moral*, 76 North Carolina L.Rev. 8; Drahos, P. [1996], *op.cit*, 73-94; Palmer, T.G. [1990], *op.cit*, 835-849; Fisher, W.W. [2001], *op.cit*, 171-172, 184-189; Menell, P.S. [2000], *op.cit*, 158-159.

[938] For instance, Fisher, W.W. [2001], *op.cit*, 190; Netanel, N.W. [1993], *Copyright alienability restrictions and the enhancement of author autonomy: a normative evaluation*, 24 Rutgers L.J. 347, 400. In contrast, Weinreb, L. [1998], *Copyright for Functional Expression*, 111 Harvard L.Rev. 1149, 1222.

[939] Fisher, W.W. [1998], *Property and contract on the internet*, 73 Chicago-Kent L. Rev. 1203, 1215. It includes elements such as consumer welfare, abundance of information/ideas, artistic tradition, justice, cultural diversity, democracy and respect. *Ibid*. 1212-1218.

[940] Netanel, N.W. [1996], *Copyright and democratic civil society*, 106 Yale L.J. 283; and Netanel, N.W. [1998], *Assessing copyright's democratic principles in the global arena*, 51 Vanderbilt L.Rev. 217. Also Elkin-Koren, N. [1995], *Copyright law and social dialogue on the information superhighways: the case against copyright liability of bulletin board operators*, 13 A.E.L.J 345; Benkler, Y. [1999], *Free as the air to common use: First Amendment constraints on enclosure of the public domain*, New York University L.Rev. 354; Netanel, N.W. [2001], *Locating copyright within the First Amendment skein*, 54 Stanford L.Rev. 1. Coombe, R. J. [1998], *The cultural life of intellectual properties: authorship, appropriation and the law*, Duke University Press; Zemer, L. [2006], *op.cit.*

[941] Lemley challenges this approach claiming that intellectual property has come of age and justifications have not to be searched other theories such as property. Traditional utilitarian itself explains intellectual property. Lemley, M.A. [2005], *Property, intellectual property, and free riding*, 83 Texas L.Rev. 1031.

disregarding the social nature of copyright. The purpose of the approach is to emphasise that every theory relates, in one way or another, to the traditional tangible right of property[942]. Therefore, the key aspects of copyright should be entitlement and control, similar to traditional property[943]. However, according to property theories: '*property has no purpose where there is abundance*'[944].

4.3.6 – Authorial Constructionism

'Authorial constructionism' scholars analyse the copyright system from a social perspective, and accordingly criticise the notion of the 'author', arguing that 'creation' is collaborative in nature[945]. This approach to copyright, however, is more fundamentally based on the interaction of the author with other authors than with society as a whole, or by virtue of being a member of society. This view, for instance, questions authorship and its origin, but does not sufficiently challenge the author's personal creation process[946]. Notably, others criticise the idea of 'romantic authorship' and its effects on the scope of copyright in modern times[947]: authorial entities do not stand alone, but are built on contributions from various sources[948]. Explicitly or not, many scholars support this theory[949], thereby demonstrating the need to evaluate

[942] For instance, Honore, A. [1987], *Making law bind*, Clarendon Press.
[943] Zemer, L. [2006], *op.cit*.
[944] Hume, D. [1898], *An enquiry concerning the principles of morals*, cited in Plant, A. [1934], *Economic theory concerning patents for inventions*, 1 Economica 30.
[945] Kaplan, B. [1967], *op.cit.* 117. Woodmansee-Jaszi, [1994], *op.cit.* 1, 9. Woodmansee, M. [1994] *On the author effect: recovering collectivity*, in Woodmansee-Jaszi [1994], *The construction of authorship*, Duke Universitry Press, 15; Jaszi, P. [1994], *On the author effect: contemporary copyright and collective creativity*, in Woodmansee-Jaszi [1994], *The construction of authorship*, Duke Universitry Press, 29. Woodmansee, M. [1984], *op.cit.* 425.
[946] Zemer, L. [2006], *op.cit*.
[947] Boyle, J. [1990], *op.cit*. *Cfr.* Lemley, M. A. [1997], *Romantic and the rhetoric of property*, 75 Texas L.Rev. 873.
[948] They are '*socially constructed and historically contingent*'. Boyle, J. [1990], *op.cit*, 114.
[949] For instance, '*the world goes ahead because each of us builds on the work of our predecessors*'. Chafee, Z. Jr. [1945], *Reflections on the law of copyright: I*, 45 Columbia L.Rev. 503, 511; '*there is no ultimate originality*', Litman, J.D. [1990], *The public domain*, 39 Emory L.J. 965; '*artists receive a tradition and world they have not made*', Gordon, W.J. [2003], *op.cit*, 77. Similarly, Yen, A. [1994], *The interdisciplinary future of copyright theory*, in Woodmansee–Jaszi [1994], *op.cit*, 159, 166); Coombe criticises the 'propertisation' of shared symbols and cultural elements, Coombe, R.J. [1998], *op.cit*. '*Intellectual works are necessarily the products of collective labour and so ought to be owned collectively*', Craig, C.J. [2002], *op.cit*. Durham, A. [2002], *The random muse: authorship and indeterminacy*, 44 William & Mary L.Rev. 569, 616. Boyle asserts that allocation of property rights to authors has '*a clear element of existential truth - our experience of authors, inventors, and artists who do transform their fields and our world, together with the belief ... that the ability to remark the conditions of individual life and collective existence is to be cherished and rewarded*'. Boyle, J. [1990], *op.cit*, 60. However, he recognises '*the fundamental necessity of allocating property rights for authors in order to maintain stable social and cultural realities and do not reject rewards to authors in the form of property rights*'. *Ibid.* Also, Ginsburg, J.C. [2004], *The right to claim authorship in US copyright and trademarks law*, 41 Houston L.Rev. 263, 307. Although many copyright scholars purport to recognise the ideology

authorship in a social context.

4.3.7 – In Search of Clarity

Considering the development of copyright, one cannot base the system's justification on only one particular theory[950]. Only by sustaining a plurality of views can a system be secured which successfully balances competing interests and the currently underestimated social and cultural needs[951]. Humankind's fundamental freedoms include a right to be recognised and rewarded for any scientific, literary or artistic production[952]; however, the notably continuous stream of justifications resulted in an unbalanced proprietary component within copyright law over the public interest component[953]. This conclusion does not imply that the theories have no practical use; rather, they fail to provide a solution to the problems emanating from the fact that theory and practice have to be balanced.

> '*Copyright is here to stay.* […] *Copyright theories are specifically designed to criticise the moral and ethical flaws inherent in present copyright legislation*'[954].

Importantly, however, theories cannot be developed in isolation from practice[955], and practice shows that:

- Copyright works can be consumed without the supply being exhausted. Copyright artificially creates scarcity, thereby allowing the building and protection of barriers. Causes and effects should not be inverted[956].
- Content is available virtually inexpensively owing to networking technologies. Consequently, arguing for a strong deontological but impractical rhetoric based on

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behind the construction of authorship, they retain dominant stereotypes of authorship. For instance, '*Boyle does not oppose authors' rights except to the extent that romantic notions about authorship lead to inefficient or unjust legal outcomes*'. Samuelson, P. [1996], *The quest for enabling metaphors for law and lawyering in the information age*, 94 Michigan L.Rev. 2029, 2055-2056.

[950] Resnik, D.B. [2003], *A pluralistic account of intellectual property*, 46 Journal of Business Ethics 319.

[951] Suthersanen, U. [2006], *op.cit*. Dutfield-Suthersanen [2004], *op.cit*. 381-383.

[952] After the second Word War, copyright has being embraced internationally by human rights rhetoric in the Universal Declaration of Human Rights and the 1966 International Covenants. For a discussion on human rights within international copyright law, Suthersanen, U. [2005], *Towards an international public interest rule? Human rights and international copyright law*, in Griffiths-Suthersanen (eds.) [2005], *Copyright and free speech*, Oxford University Press.

[953] Suthersanen, U. [2006], *op.cit*. Fisher, W.W. [1998], *op.cit*, 194-199.

[954] Zemer, L. [2006], *op.cit*.

[955] Menell, P.S. [2000], *op.cit*, 163.

[956] '*Technology is a strange creature which enables both scarcity and abundance*'. Bethell, T. [1998], *The noblest triumph: property and prosperity through the ages*, St. Martin's Press, 263.

natural rights and personal dignity[957] might be outdated. Detailed legal rules on collective management, levies and contractual arrangements[958] could allow everyone from authors to users of the industries—or even the state—to benefit from the exploitation of copyright works[959].

- Every human creation is derivative[960].
- If there is a choice between protecting copyright and facilitating technological development[961], it must preliminarily assessed whether

> '*gains on the copyright swing would exceed the loses on the technological roundabouts*'[962].

Explicitly or not, most modern legal systems recognise legal protection for intellectual property in order to maximise creation and distribution in a socially optimal manner[963].

> '*Copyright protection […] trades off the cost of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the balance between access and incentives is the central problem in copyright law*'[964]

Therefore, the objective of a justifiable copyright system should be the successful remuneration of the creator in a 'socially optimal manner'—not to enforce out-dated methods of distribution or to favour one type of provider over another. Copyright law

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[957] *Re Neo-Fascist Slant In Copyright Works*, [1996] E.C.C. 375 (Regional Court of Appeal - Frankfurt) (confirming that author's right law has its basis in Articles 1-2, *Grundgesetz*, German Constitution); Colombet, C. [1997], *Propriété littéraire et artistique et droits voisins*, Dalloz, 12-14 (discussing the natural rights basis of French Author's Right law).

[958] Schricker, G. [2004], *Efforts for a better law on copyright contracts in Germany- A never ending story*, 35(7) I.I.C. 850.

[959] The current EU copyright law is premised on the notion that all types of private non-commercial copying must be fairly compensated. Article 5(2), Copyright Directive. Despite fair dealing and *freie benutzung* (free use) provisions within UK (§29ss CDPA) and German law (Article 24, UrhG 1965). This in effect demands a compulsory licensing system to be in place, such as the private copying levy schemes in Europe. Sterling, J.A.L. [2008], *op.cit*, Para. 10.04. US have shown interest in these schemes today. Fisher, W.W. [2004], *op.cit.* 199-258; Netanel, N.W. [2003], *Impose a non-commercial use levy to allow free peer-to-peer file-sharing*, 17 J.O.L.T. 1; Ku, R.S.R. [2002], *The creative destruction of copyright: Napster and the new economics of digital technology*, 69 University of Chicago L.Rev. 263; Lessig, L. [2004], *Free culture, how big media uses technology and the law to lock down culture and control creativity*, Penguin Press, 300-04.

[960] '*When we are asked to remember the eighth commandment, thou shalt not steal, bear in mind that borrowing and developing have always been acceptable*'. Laddie, J. [1996], *Copyright: over-strength, over-regulated, over-rated?*, 18(5) E.I.P.R. 253-260, 259.

[961] *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 125 S.Ct. 2764, 2784.

[962] *Ibid.* 2793.

[963] Watt, R. [2000], *Copyright and economic theory*, Edward Elgar, 1.

[964] Landes-Posner [1989], *op.cit.* 326. '*Put succinctly, the dilemma is that without a legal monopoly too little of information will be produced, but with a legal monopoly too little information will be used'*. Cooter-Ulen [1988], *Law and economics*, Glenview, 145.

should 'maximise value not protection'[965] whilst taking into consideration the interests of technology—not only the interests of copyright holders[966].

4.4 – Marketing Myopia[967]

This work focuses on the legal issues concerning networking technologies; however, the theoretical examination of many of these issues indicates that economic theories should be taken into account[968]. Consequently, the following paragraph presents a brief examination of some related economic issues. Entertainment industries argue that

[965] Shapiro-Varian [1999], *Information Rules: A Strategic Guide to the Network Economy*, Harvard Business School Press, 4.

[966] Griffin, J.G.H [2005], *The 'secret path' of Grokster and Corley: avoiding liability for copyright infringement*, 10(5) Journal of Computer, Media and Telecommunications Law, 147-153. Notably, the French view should be mentioned, as described by Le Chapelier: *'The most sacred, the most legitimate, the most unassailable, and if I may say so, the most personal of all properties, is the work, the fruit of the mind of a writer; yet it is a property of a totally different kind than other properties'.* Le Chapelier's report (1791), Primary Sources on Copyright (1450-1900), Bently-Kretschmer eds, www.copyrighthistory.org. [15/08/2010].

[967] Levitt, T. [1960], *Marketing myopia*, Harvard Business Review, 2.

[968] The literature on the economics of copyright in the digital age, cannot be accounted for completely: Breyer, S. [1970], *op.cit.* 281, 313; Landes-Posner [1989], *op.cit.* 325, 335; Drahos, P. [1996], *op.cit.* 1799, 1812; Boyle, J. [2000], *op.cit.* 2007, 2013; Wagner, R.P. [2003], *Information wants to be free: intellectual property and the mythologies of control*, 103 Columbia L.Rev. 995; Epstein, R.A. [2004], *Liberty versus property? Cracks in the foundations of copyright law*, University of Chicago Law & Economics, Working Paper 204, ssrn.com/abstract=529943 [15/08/2010]; Lemley, M.A. [2004], *Ex ante versus ex post justifications for intellectual property*, UC Berkeley Public Law Research Paper 144, ssrn.com/abstract=494424 [15/08/2010]; Bakos-Brynjolfsson [1999], *Bundling information goods: pricing, profits and efficiency*, 45(12) Management Science 1613; Benkler, Y. [2002], *intellectual property and the organization of information production*, 22 International Rev. of Law & Economics 81; Benkler, Y. [2004], *Sharing nicely: on sharable goods and the emergence of sharing as a modality of economic production*, 114 Yale L.J. 273; Duffy, J. [2004], *The marginal cost controversy in intellectual property*, 71(1) University of Chicago L.Rev. 37; Jain-Kannan [2002], *Pricing of information products on online servers: issues, models and analysis*, 48(9) Management Science 1123; Ku, R.S.R. [2002], *op.cit.*; Van De Ven-Zeelenberg-Van Dijk [2005], *Buying and selling exchange goods: outcome information, curiosity and the endowment effect*, 26 Journal of Economic Psychology 459; Sundararajan, A. [2004], *Managing digital piracy: pricing and protection*, 15 Information Systems Research 287; Chellappa-Shivendu [2005], *Managing piracy: pricing and sampling strategies for digital experience goods in vertically segmented markets*, 16 Information Systems Research 400; Oberholzer-Gee-Strumpf [2007], *The effect of file-sharing on record sales: an empirical analysis*, 115 Journal of Political Economy 1; Depoorter-Parisi [2002], *Fair use and copyright protection: a price theory explanation*, 21 International Rev. of Law & Economics 453; Domon-Yamazaki [2004], *Unauthorized file-sharing and the pricing of digital content*, 85(2) Economic Letters 179; Domon, K. [2006], *Price discrimination of digital content*, 93 Economics Letters 421; Lang-Vragov [2005], *A pricing mechanism for digital content distribution over computer networks*, 22(2) Journal of Management Information Systems 121; McKnight-Bailey (eds) [1997], *Internet economics*, MIT Press; Bhattacharjee, S. *et al.* [2003], *Digital music and online sharing: software piracy 2.0?* 46(7) A.C.M. 107; Meisel, J. B. [2008], *Entry into the market for online distribution of digital content: economic and legal ramifications*, 5(1) SCRIPTed 50; Rob-Waldfogel [2006], *Piracy on the high C's: music downloading, sales displacement, and social welfare in a sample of college students*, 49(1) Journal of Law and Economics, 29-62; Johnson, W. [1985], *The economics of copying*, 93 Journal of Political Economy 158; Png-Chen [2003], *Information goods pricing and copyright enforcement: welfare analysis*, 14 Information Systems Research 107; Takeyama, L. [1994], *The welfare implications of unauthorized reproduction of intellectual property in the presence of demand network externalities*, 42 Journal of Industrial Economics 155; Belleflamme, P. [2002], *Pricing information goods in the presence of copying*, Working Paper No.463, Department of Economics, Queen Mary University of London.

networking technologies harm the market, but the data presented is often inaccurate, and the catastrophic predictions not convincing[969]. The discourse is mainly based on the intuition that two following situations are related:

1. the sales of protected contents are in decline; and
2. this decline coincides with the advent of networking technologies.

The extent of the casual relationship between these two situations is not clear[970]. As a result, several authors have documented specific economic effects of user participation in unauthorised file-sharing[971], such as the consumer-welfare effect[972], the substitution effect[973], the sampling effect[974], and the wealth effect[975]. The analysis of such effects is beyond the scope of this work; however, it is nevertheless considered important to underline the difficulties in determining the market displacement caused by networking technologies.

> '*In April 2009* […] *between 44 and 79 percent of global Internet traffic is taken up with file sharing, the lower figure is for America, the higher for the region, 'Eastern Europe' – though we have found no way of measuring how much of this traffic is the up or downloading of unauthorised, unlicensed or illegal material. 16 percent of UK online consumers are said to regularly 'file share', and whilst the figure is said to have remained 'flat' in the recent past, various studies concede that the figures could be much higher. Academic research suggests that those who 'file share' are at least 30% less likely to purchase music in addition. The IFPI (2009) estimates that there were 890 million unauthorized music downloads in the UK in 2007 through file-sharing, in contrast to 140 million*

[969] Similarities with the campaign against home-taping during the 1980s can be easily spotted.

[970] Studies did show a replacement effect, but also show the contrary effect: 'music discovery'. Bergen, G.J. [2002], *Symposium: Beyond Napster- The future of the digital commons. The Napster case: the whole world is listening*, 15 Transnational Law.

[971] Meisel, J. B. [2008], *op.cit.*; Oberholzer-Gee-Strumpf [2007], *op.cit.*; US Federal Trade Commission [2005], *Peer-to-peer file-sharing technology: consumer protection and competition issues*, Staff Report, www.ftc.gov/reports/p2p05/050623p2prpt.pdf [15/08/2010]; Sundararajan, A. [2004], *op.cit.* 287; Chellappa-Shivendu [2005], *op.cit.*; Perritt, J. [2007], *New architectures for music: law should get out of the way*, 29(3) Hastings Communications and Entertainment L.J. 320; Michel, N. [2005], *Digital file sharing and the music industry: was there a substitution effect?* 2(2)(41) Review of Economic Research on Copyright; van De Ven-Zeelenberg-van Dijk [2005], *op.cit.* 459; Nwogugu, M. [2008], *Pricing digital content: the marginal cost and open access controversies*, 14(7) C.T.L.R. 198-208, 201

[972] Downloads represent '*consumption of content for which the consumer is willing to pay a price that is less than the market price but is greater than the marginal cost of distribution*'. Nwogugu, M. [2008], *op.cit.* 201.

[973] Downloads '*substitute for purchases that the consumer otherwise would have been willing to make at market price*'. *Ibid.*

[974] Downloads '*may eventually lead to the consumer paying for the content at market prices as a result of experiencing the content; and downloading content may increase the artist's/creator's name recognition and brand equity, and hence lead to future sales*'. *Ibid.* Also, Gopal-Bhattacharjee-Sanders [2006], *Do artists benefit from online music sharing?* 79(3) Journal of Business 1503; Liebowitz, S. [2005], *Pitfalls in measuring the impact of file-sharing on the sound recording market*, 51(2/3) CESifo Economic Studies 439.

[975] Downloads are '*consumption of content for which the consumer is never willing to pay the market price or the marginal cost of production, because the consumer cannot afford the content*'. Nwogugu, M. [2008], *op.cit.* 201.

paid-for downloads: this is ratio of 6:1, and does not take into account any subsequent off-line sharing using disk burning or hard-drive transfers[976].

Industries and researchers disagree concerning the effects of networking technologies over the sales of copyright goods. Some argue that sharing activities do not act as substitutes for market mechanisms, but instead exist alongside them. Furthermore, it is also argued that they are not barriers to entry to the online retail market for music[977], whereas others argue that networking technologies provide a direct challenge to the traditional models of distribution[978]. A number of studies concerning consumer behaviours have attempted to determine whether unauthorised file-sharing has a displacement effect in the sales of copyright goods[979]. It appears to be a war on figures ranging from disastrous predictions to researches claiming downloads

'*have an effect on sales that is statistically indistinguishable from zero'*[980]

The entertainment industries publish reports every year claiming losses of billions of the relevant currency[981]. Some experts claim that these figures are suspect[982], whilst others suggest that the content industries are misinterpreting their own statistics[983]. These statistics may be interpreted to indicate two types of market harm[984]:

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[976] SABIP [2009], *op.cit.* 6-7.
[977] Benkler, Y. [2002], *op.cit.* 369.
[978] Griffin, J.G.H. [2005], *op.cit.*
[979] IFPI [2008], *Digital music report*, 18, www.ifpi.org/content/library/dmr2008.pdf; Andersen-Frenz, [2007], *The impact of music downloads and P2P file sharing on the purchase of music: a study for industry Canada*, 33, strategis.ic.gc.ca/epic/site/ippddppi.nsf/vwapj/industrycanadapapermay4_2007_en.pdf; Rob-Waldfogel [2006], *op.cit.*; Rob-Waldfogel [2006], *Piracy on the silver screen*, NBER Working Paper no.12010, www.nber.org/papers/w12010. Entertainment Media Research-UK (June 2004), www.entertainmentmediaresearch.com. Siwek, S. [2007], *The true cost of sound recording piracy to the US economy*, 188 IPI Policy Report, 6-10. Informa-US (September 2003), www.informamedia.com. Forrester Research-US (September 2003); Forrester Research-Europe (August 2004), www.forrester.com; Jupiter Research-US (August 2003), www.jup.com; Enders Analysis–Europe (March 2003). www.endersanalysis.com. TNS Research-UK (March 2004), www.tns-i.com or www.bpi.co.uk. University of Pennsylvania-US (2004), http://papers.nber.org/papers/w10874.pdf. Pollara-Canada (July 2004), www.cria.ca/www.pollara.ca. [15/08/2010].
[980] Oberholzer-Gee–Strumpf [2007], *op.cit.* 1-2. However, their results have been since questioned. The research '*could at best be taken to be inconclusive'*. Liebowitz, S. [2007], *How reliable is the Oberholzer-Gee and Strumpf paper on file sharing?* ssrn.com/abstract=1014399. [15/08/2010].
[981] For instance, www.ifpi.org, www.bpi.co.uk, www.riia.com, www.mpaa.com. [15/08/2010].
[982] Patry, W.F. [2009], *op.cit.* 30-36.For instance, the BPI differentiated between commercial piracy and downloading, and declared that they are both increasing: '*commercial piracy* […] *increased 81%'; and 'the amount of music downloaded increases according to the speed of connectivity to the internet*'. BPI Anti-Piracy Unit [2003], *The BPI Piracy Report*. Admitting that downloading and commercial piracy are both increasing means that users are both downloading and acquiring counterfeited copies, while logic would suggest the opposite.
[983] Ziemann, G. [2002], *RIAA's statistics don't add up to piracy*, www.azoz.com/music/features/0008.html. [15/08/2010].
[984] BPI, www.bpi.co.uk. There are contrary views as to whether file sharing of music recordings decreases or increases sales. For instance, *see* Oberholzer–Strumpf [2007], *op.cit.*; and Liebowitz, S. [2003], *Will MP3 downloads annihilate the record industry? The evidence so far*, www.utdallas.edu/~liebowit/intprop/records.pdf. [15/08/2010].

- from the perspective of copyright owners, this downturn in purchasing may indicate that unauthorised perfect substitutes are available in the marketplace due to the sharing phenomenon;
- from the perspective of the user, this downturn may indicate that the networking technologies offer new goods in terms of alternate pricing and format.

Or two types of market benefits[985]:

- networking technologies may drive consumer demand high enough to balance or even offset the negative effects of unauthorised file-sharing;
- the browsing activities of users may replace costly marketing and promotion activities implemented by the industry, and so the industry would actually increase its profits in spite of lower revenues.

Although the entertainment industries point to networking technologies as the leading reason for the loss of sales, it has been argued that,

'*there is no proven correlation between downloads and the decline in sales*'[986].

The researches have ultimately experienced difficulties when striving to analyse and compare, since the data contained is hardly possible to retrieve elsewhere and the conclusions debateable. For instance, the falling economy and prices could also be potential reasons for the decline in sales[987].

4.4.1 – Copyright 'Goods' and Substitutability

Copyright goods, have two unique characteristics: once the good is produced, '*it is possible at no cost for additional persons to enjoy the same unit*'[988]; and one person's

[985] Peitz-Waelbroeck [2004], *File-sharing, sampling, and music distribution,* (December), International University in Germany Working Paper 26/2004. ssrn.com/abstract=652743. [15/08/2010].
[986] Cave, D. [2002], *File sharing: innocent until proven guilty*, www.salon.com/tech/feature/2002/06/23/ liebowitz, [2002], *File sharing: guilty as charged?* www.salon.com/tech/feature/2002/08/23/liebowitz_ redux. [15/08/2010].
[987] Bricklin, D. [2003], *The recording industry is trying to kill the goose that lays the golden egg*, www.bricklin.com/recordsales.htm. [15/08/2010]. In the US users can buy a song from iTunes for $0.99, in the UK they pay £0.79. At current (23/02/2009) exchange rates $0.99 equates to approximately £0.67 and Euro 0.75. In France and Germany users can download tracks from iTunes for Euro 0.99 (£0.88). Admittedly, this is an over-simplification of the situation but it is a useful illustration of why many users in the UK and elsewhere feel they are being short-changed. In the US the Department of Justice has launched an investigation into alleged price fixing of music downloads by record labels while the European Commission is examining Apple's iTunes pricing policy following a complaint by 'Which?'. In the UK, BPI executives were called before the House of Commons culture, media and sport select committee to justify the high price of music downloads. *Ibid.*
[988] Demsetz, H. [1970], *The private production of public goods*, 13 J. of Law and Economics, 293, 295.'*If nature has made any one thing less susceptible than all others of exclusive property* […]'. Letter from T.

enjoyment of the good is in no way affected by another's consumption[989]. Consequentially, rights structures should extend

> '*into every corner where consumers derive value from literary and artistic works*'[990].

The market should then create mechanisms for ensuring optimal dissemination of works, and that new works, which satisfy the consumers' preferences, are produced. Copyright markets aim to achieve efficiency by using price discrimination[991] in order to fully include exclusive rights and reduce the transaction costs[992]. Networking technologies, however, may threaten this goal by amplifying the public good characteristics of content, and it is open to doubt whether the networks can be modified to mirror market norms at a micro level[993], since networking technologies permit the dissemination of works a virtually zero marginal costs[994]. Price discrimination relies on the 'willingness to pay', clearly aligned with the ability to pay in most circumstances. However, copyright goods are not simply mere articles for consumption[995]: when assessing what consumers are prepared to pay, it is also necessary to clarify what is actually being paid for, and the positive benefits realised by purchasers. These 'positive

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Jefferson to I. McPherson, 13 August 1813, in Padover S.K. ed. [1943], *The complete Jefferson*, Duale, Sloan & Pearce 1011, 1015.

[989] In essence, '*it is hard to stop one unit from satisfying an infinite number of users at zero or close to zero* […] *cost*'. Boyle, J. [1996], *op.cit*, 2012. Also De Long-Froomkin, [1998], *The next economy?* in Hurley–Kahin-Varian (ed.) [1998], *Internet publishing and beyond: the Economics of digital information and intellectual property*, MIT Press. Ku, R.S.R. [2002], *op.cit*, 278-279; Netanel, N.W. [1996], *op.cit.* 340.

[990] Goldstein, P. [2003], *op.cit*, 216.

[991] Useful introductions to price discrimination are: Varian, H. [2004], *Pricing information goods*, people. ischool.berkeley.edu/~hal/Papers/price-info-goods.pdf.. [15/08/2010]; Boyle, J. [1996], *op.cit.* 2021-2027.

[992] Cohen, J.E. [2000], *Copyright and the perfect curve*, Georgetown University Law Centre, Working Paper Series in Business, Economics, and Regulatory Law, Working Paper No.240590, 3-8, http://ssrn.com/abstract=240590. [15/08/2010]. Gordon, W.J. [1998], *Intellectual property as price discrimination: implications for contract*, 73 Chicago-Kent L. Rev. 1367.

[993] On the regulatory effects of systems design choices, *see* Reidenberg, J. [1998], *Lex informatica: the formulation of information policy rules through technology*, 76 Texas L.Rev. 553; Lessig, L. [1999], *Code and other laws of cyberspace*, Basic Books, New York.

[994] In analysing illegal downloads of content, there are several constraints on the efficiency of systems: the cost of bandwidth, storage capacity, security, network congestion, hardware, *etc*; and the cost of enforcement. Nwogugu, M. [2008], *op.cit.*

[995] Ganley, P. [2004], *op.cit.* This perversely assumes that wealth and ability to improve are directly proportionate. Cohen, J. E. [2000], *op.cit*, 19-20; Lemley, M. A. [1997], *op.cit.* 1055-1056. Some proponents of price discrimination recognise the non-linear nature of creative processes and recommend privileging certain types of access and reuse[995]. Fisher, W.W. [1998], *op.cit.* 1241-1251; Merges, R.P. [1997], *The end of friction? Property rights and contract in the Newtonian world of online commerce*, 12 B.T.L.J. 115, 134-135. This approach, however, fails to capture the unpredictability of creative forces which cannot be modelled *ex ante*. '*We don't know who will create, when they will create, or the manner of their creative endeavours. Traditional copyright policy recognises that sometimes people are most effective when left to their own devices and ' leaks' in the copyright system provide grappling points for such enterprise. The market model cannot countenance anything being left alone in such a way'*. Cohen, J.E. [2000], *op.cit*, 17-22.

externalities' remain curiously unexplored by economic analyses in the copyright market[996]. More importantly, it can be argued that digital files are not substitutes for the 'original' goods, but rather parallel versions[997]. Notably, such arguments can be simplified with an equation (Figure 20):

Figure 20 - The Networking Technologies Equation

$\frac{P \times \$}{© \times D}$ *P* is the number of individuals who want and can obtain copyright content; *$* is the amount of money they are willing to invest in it; © is the amount of content available; and *D* is the desirability of the content itself.
Assuming *P* and © are stable, the equilibrium is determined by: $\frac{\$}{D}$
When adding networking technologies to the equation, the result is: $\frac{P \times \$ \pm NT}{© \times D \pm NT}$

Networking technologies increase the number of people who want and can access content, reduce associated transaction costs, and increase the amount and desirability of the available content. This does not mean that networking technologies did not change the way in which copyright works are obtained; in fact, they provide a direct challenge to the traditional models of distribution. Neoclassical economics posits that consumers who are unhappy with the terms offered will shop somewhere else, thereby forcing the

[996] Presumably due to faith in the market's ability to capture all value. Cohen, J.E. [2000], *op.cit*, 540. On the external values associated with information exchange *see* generally Bates, B.J. [1988], *Information as an economic good: sources of individual and social value*, in Mosco-Wasko (eds) [1988], *The political economy of information*, University of Wisconsin Press, 76; Baker, C.E. [1997], *Giving the audience what it wants*, 58 Ohio State L. J. 311; Agre, P.E. [1998], *The internet and public discourse*, First Monday, 3 March. Also, Netanel, N.W. [1996], *op.cit*, 324-336.

[997] For instance, in April 2000, Radiohead's album '*Kid A'* was already available on Napster before the official release date. The album reached number one on the charts in the first week, notwithstanding it was already been downloaded by millions of people worldwide. This was arguably a proof of Napster's promotional power. Menta, R. [2000], *Did Napster take Radiohead's new album to number 1?*, www.mp3newswire.net/stories/2000/radiohead.htmlit. [15/08/2010]. An observation of available results suggests networking technologies as the best cause for the decline in music sales, while Films and software industry seems to have coped well. Liebowitz, S. J. [2006], *File-sharing: creative destruction or just plain destruction?*, 49(1) Journal of Law and Economics 1-28. In another strand of research, simulations on consumer behaviour show that individuals prefer to download films legally, which leads to the conclusion that unauthorised file-sharing may have a minor effect on that industry. These results were obtained with a model of consumer behaviour applied to the use of KaZaA. Fetscherin, M. [2005], *Movie piracy on peer-to-peer networks- The case of KaZaA*, 22 Telematics and Informatics, 57-70. Fetscherin argued that policymakers should focus on the legal framework against illegal downloads and content providers should invest in increasing the value for consumers of legal downloads.

initial seller to reconfigure its offerings in order to remain competitive[998]. The model rests on two important assumptions: that substitute products exist; and that terms offered by producers will in fact differ[999].

Ultimately, the characterisation of copyright works as 'goods' might have damaging consequences on copyright law itself. Substitutability is empirical, and it could be suggested that copyright works are less interchangeable than traditional goods[1000]. Importantly, divergence of terms is questionable[1001]; consumer sovereignty in this instance being limited to the notion of 'take-it-or-leave-it'[1002]. Notably, users value goods accurately in other markets; however, this is impossible in context of copyright[1003].

A theoretical economic analysis, therefore, might lead to ambiguous results. On the one hand, if original and copy are close substitutes, the copy can displace the original consumption; that is, the individual consumes the unpaid copy instead of paying for the original[1004]. On the other hand, information-sharing can stimulate paid consumption[1005]. The results should be carefully considered: the data is scarce and the applied studies are contradictories. In the case of digital piracy, there are two

[998] Price is of course a key term, but with protected works, the extent of permissions to reuse, transform and redistribute may be equally important to many users.
[999] Ganley, P. [2004], *op.cit*.; Samuelson, P. [2001], *Economic and constitutional influences on copyright law in the United States*, 23(9) E.I.P.R. 409, 413.
[1000] Elkin-Koren, N. [1997], *Copyright policy and the limits of freedom of contract*, 12 B.T.L.J. 93, 110.
[1001] O'Rourke, M. A. [1995], *Drawing the boundary between copyright and contract: copyright pre-emption of software license terms*.
[1002] Cohen, J.E. [2000], *op.cit*, 523-525. Lawmakers in the EU have recognised these problems and have responded with a range of measures designed to promote consumer interests in the contractual arena: regulations deal with terms in consumer contracts which are unfair (Directive 93/13/EEC on unfair terms in consumer contracts, 5 April 1993, [1993] OJ L95); de-compilation of softwares for achieving interoperability is permitted and cannot be excluded by contract (Software Directive, Articles 6.1 and 9); and the taking of insubstantial parts of a database by a lawful user cannot be contractually overridden by a database maker (Database Directive, Article 8.1).
[1003] Generally Grossman-Stiglitz, [1980], *On the impossibility of informationally efficient markets*, 70 American Economic Review, 393. *'The economic analysis of information is beset by internal contradiction and uncertainty; information is both a component of the perfect market and a good that must be produced within that market'.* Boyle, J. [1997], *A politics of intellectual property: environmentalism for the net?*, 47 Duke L.J. 87, 95. Also Boyle, J. [1996], *op.cit*, 35-46.
[1004] Akester–Lima [2006], *Copyright and P2P: law economics and patterns of evolution*, 28(11) E.I.P.R. 576-579.
[1005] Consider two consumers, each one not willing to pay separately for a good. In this case, the seller's revenue is zero. Consider then that the same two consumers are willing to jointly buy one unit of the good and share it. In the extreme scenario of a world with only two consumers, the seller's revenue is only positive where consumers are willing to share the good. This phenomenon explains why some content providers were able to profit from the advent of photocopying technology. Instead of selling more units of the good at a lower price, they produced fewer units and set a higher price. That is still the case, for example, of some academic journals or handbooks, which are mainly sold to libraries. Individuals have access to them (thus sharing such resources) by photocopying their contents. Akester–Lima [2006], *op.cit*.

phenomena which can be hardly explained by traditional approaches[1006]: some users supply unauthorised files at zero price; whilst some users continue to pay certain price for legitimate content, notwithstanding, they could obtain an unauthorised copy at zero price. An explanation could be that the attitude and behaviours of users towards protected content online and in the physical world are very different[1007].

4.4.2 – Creative Destruction[1008]

> *'From the economic standpoint, the objective of policy makers is to achieve the optimal point at which the maximum amount of wealth is created by copyright. The challenge is that optimal conditions are contingent on and a function of a number of changing social conditions, therefore no stable point of optimal copyright policies can be identified and maintained'*[1009].

The entertainment industries—as any industry—should regard themselves as a 'customer-creating and satisfying organism' in order to achieve success:[1010]

> '*Management must think of itself not as producing products but as producing customer value satisfaction'*[1011].

A common economic assumption is that competitors will introduce new business models when there is an unsatisfied market demand[1012]. It could be argued that networking technologies' providers are competitors, but it is debatable whether they are solely market substitutive providers. Other important queries are whether copyright can be effectively used in order to eliminate competitive distribution means[1013], and whether there is real danger that anti-competitive practices may escape the competition authorities[1014]. Nevertheless, if one believes in capitalism, its evolution pattern has to be accepted.

[1006] OECD [2009], *Piracy of digital content*, 34, http://browse.oecdbookshop.org/oecd/pdfs/browseit/9309061E.PDF. [15/08/2010].
[1007] SABIP [2009], *op.cit.* One of the reasons could be that '*downloading appears to be as much a social phenomenon as an economic one*'.
[1008] Schumpeter, J. [1942], *Capitalism, socialism and democracy*, Harper and Brothers.
[1009] Picard-Toivonen [2004], *Issues in assessment of the economic impact of copyright*, 1(1) Rev. of Economic Research on Copyright Issues, 27-40, 29.
[1010] Patry, W.F. [2009], *op.cit.* 23.
[1011] Levitt, T. [1960], *op.cit.* 2.
[1012] For instance, when Napster was launched, there were no legal internet services offering music from any of the majors' catalogues. Suthersanen, U. [2006], *op.cit.*
[1013] Fagin, M. *et al*. [2002], *op.cit*, 535; Maul, A. [2003-2004], *Are the major labels sandbagging online music? An antitrust analysis of strategic licensing practices*, New York University J. of Legislation and Public Policy, 365, 369. Suthersanen, U. [2006], *op.cit*. The potential abuse of market power is especially evident in the online music industry as the essential inputs are controlled by a small number of 'Majors'.
[1014] Maul, A. [2003-2004], *op.cit*, 367. For instance, the ECJ emphasized two key elements for a healthy competitive market environment: maintaining a market structure that allows the emergence of new products; and allowing secondary or downstream markets to develop. *Radio Telefis Eireann and*

'Stabilised capitalism is a contradiction in terms'[1015].

Innovation incessantly revolutionises the business structure, destroying the old ones. Therefore, every industry '*must prepare the way for its own destruction*'[1016].

Thus, the focus should not be on the preservation of the existent entertainment industries' structure, but rather on establishing a workable solution in order to remunerate the copyright owners for unauthorised dissemination of their works. 'Control' as a business strategy appears not to be a viable solution[1017]. Moreover, securing goods and enforcing copyright is expensive: financial costs are probably not worth paying[1018]. Protecting property is, of course, a vital component of modern democracy when the 'property' in question refuses to lend itself naturally to the concept of scarcity the protection is harder to achieve and the investment has risks[1019].

> *'While copyright may operate in the market, copyright's fundamental goals are not of the market'*[1020].

Copyright laws should ultimately provide mechanisms for remunerating copyright owners without damaging the entire society; however, it has been suggested that these will prove ineffectual as long as the focus remains on the threats which networking technologies pose to the integrity of copyright law[1021].

> *'Instead, the opportunity the internet offers us to advance copyright's progress goal by encouraging creative endeavours through the wide dissemination of works requires more careful consideration'*[1022].

The debate appears to be defined by the quantifications of the economic implications of networking technologies, whilst the advances it brings to society as a whole are undisputed[1023].

Independent Television Publications Ltd. v Commission (C-241-242/91 P) (Magill), [1995] E.C.R. I-743; IMS *Health GmbH & Co OHG v. NDC Health GmbH & Co KG*(Case C-418/01), [2004] 4 C.M. L.R. 28; *Bronner GmbH and Co. KG v Mediaprint Zeitungs-Und Zeitschriftenverlag GmbH and Co. KG* (C-7/97), [1999] 4 C.M. L.R. 112. Suthersanen, U. [2006], *op.cit*. Facey–Assaf [2002], *Monopolization and abuse of dominance in Canada, the United States, and the European Union: a survey*, 70 Antitrust L.J. 513, 539-42 (discussing concept of 'joint dominance' or 'shared monopoly' and its application in the EU, the US and Canada).

[1015] Schumpeter, J. [1939], *Business cycles: a theoretical, historical and statistical analysis of the capitalism process*, McGraw-Hill, 1033.

[1016] Christensen-Raynor [2003], *The innovator's solution,* Harvard Business School Press, 42.

[1017] Para. 5.2 and 5.3.

[1018] The cost may indeed outweigh any net gains. Wiese, H. [2002], *op.cit.* 387, 393-394 (offering the utility of traffic lights, despite the opportunity road users have to ignore them, as a metaphor).

[1019] Cohen, J.E. [2000], *op.cit*, 20; Gordon, W.J. [2004], *Excuse and justification in the law of fair use: commodification and market perspectives*, Boston University School of Law Working Paper Series, Law and Economics Working Paper No. 01-22, www.bu.edu/law/faculty/scholarship/workingpapers/abstracts/2001/pdf_files/GordonW120501.pdf. [15/08/2010].

[1020] Netanel, N.W. [1996], *op.cit*, 341.

[1021] Ganley, P. [2004], *op.cit.*

[1022] *Ibid*.

'*In other words, never mind the piracy- The pirate technologies generate more growth*[1024].

The popularity of flat-rate internet access and mobile telephony should critically caution against forcing the market too much: today, content is available virtually free of charge. Moreover, the architecture and philosophy of networking technologies seems to conflict with the vertically controlled business models in use of distributing copies in the world of physical artefacts[1025]. Allied to this point there is concern regarding the integrity of decisional privacy[1026].

4.5 – Sharing

Networking technologies are important for scientific reasons[1027], and sharing activities are therefore important[1028], and have notably been proven to be of more benefit to the economy and societal development than private capital mechanisms[1029]. The internet itself has expanded due to the 'Samaritan' nature of most of its users[1030].

[1023] For instance, from an economic perspective: '*Estimates of losses from infringement of US movie and music copyrights on a global basis stand, conservatively, at $7.2 billion annually. The software industry estimates global losses of another $32 billion annually from piracy. By comparison, the US Department of Commerce estimates that domestic spending on information technology equipment and software exceeds $500 billion annually, while estimated annual sales by US information technology companies and their overseas affiliates exceed $1 trillion annually. Beyond these figures, by enhancing output across the economy, the information technology sector is estimated to have generated 28% of GDP growth in the US economy as a whole*.' Briefs in Support of Petitioners by Business Software Alliance, in *MGM Studios Inc.* v. *Grokster, Ltd*. www.copyright.gov/docs/ mgm. [15/08/2010].

[1024] Suthersanen, U. [2006], *op.cit.*

[1025] Patry, W.F. [2009], *op.cit.* 26.

[1026] Kang, J. [1998], *Information privacy in cyberspace transactions*, 50 Stanford L.Rev. 1193, 1202-1205. The entertainment industries searching user hard-drives and DRM systems promising to generate an actual record of user interactions with content are simple examples. The International Federation of Reproductive Rights Organizations describes an ideal DRM system as one which '*captur[es] a record of what the user actually looked at, copied or printed'*. Quoted in Greenleaf, G. [2003], *IP phone home: ECMS, (c)-tech, and protecting privacy against surveillance by digital works*, note 17, http://austlii.edu.au/graham/publications/ip-privacy. [15/08/2010]. Schneier, B. [2001], *The futility of digital copy protection*, Crypto-Gram Newsletter (15 May) www.schneier.com/crypto-gram-0105.html. [15/08/2010].

[1027] Many users take part in file-sharing for social reasons as well as for personal gains. Such as the SETI@home where 5.3 million users from 226 countries allow their computers to be used for analysis of radio astronomy signals as part of the search for extraterrestrial intelligence. http://setiathome.ssl.berkeley.edu/. Or Genome@home, a project dedicated to modelling new artificial genes that can create artificial proteins. www.stanford.edu/group/pandegroup/genome/. [15/08/2010]. Altruistic sharing activities permit the existence of special-purpose virtual supercomputers allowing public resource computing projects which would otherwise not be possible.

[1028] Benkler, Y. [2004], *Sharing nicely: on shareable goods and the emergence of sharing as a modality of economic production*, Yale L.J. 273, 281; Benkler, Y. [2002], *Coase's penguin, or, Linux and the nature of the firm*, 112 Yale L.J. 369, 398.

[1029] The US Government, for example, had concluded in its NII Report in 1995 that '*the scope of intellectual property rights in the digital environment had to be expanded to encourage private sector investment in the infrastructure underlying a national digital network*'. Information Infrastructure Task Force, [1995], *Intellectual property and the national information infrastructure: the report of the working*

> '*Anecdotal evidence indicates that at least for some material, untamed digital sharing turns out to be a more efficient method of distribution than either paid subscription or the sale of conventional copies. If untamed anarchic digital sharing is a superior distribution mechanism, or even a useful adjunct to conventional distribution, we ought to encourage it rather than make it more difficult*'[1031].

Sharing should not be automatically considered a potentially infringing, illegal or nefarious activity; perhaps it is just the next stage in societal development[1032]. File-sharing, in itself, is a popular entertainment option—and arguably a successful marketing tool for the creators and the industries[1033]. These days, nobody knows the precise size of the entire media catalogue with regard to music, software, and films; however, thanks to the internet, the number of works available is rapidly increasing as millions of users are 'self-publishing' online the materials they possess. Without users, copyright works fade away and disappear. In a global economy, this crucial user base can only be achieved by networking technologies. Furthermore, sharing a copyright work may also be considered to increase its value[1034].

It is, therefore, submitted that sharing is not stealing and that using terms such as 'theft' and 'piracy' to describe the unauthorised use of copyright works[1035] is

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group on intellectual property rights, 7-17, 218-38, www.uspto.gov/web/offices/com/doc/ipnii. [15/08/2010].

[1030] Suthersanen, U. [2006], *op.cit.*

[1031] Litman, J.D. [2001], *op.cit.* 90-100. The internet has evolved primarily into a consumer-to-consumer 'gift economy' and because of the disparate contributions of users; today '*one can find information that would not appear in conventional reference sources*'. Litman, J.D. [2004], *Sharing and stealing*, 27 Hastings Communications and Entertainment L.J. 9.

[1032] Suthersanen, U. [2006], *op.cit.*

[1033] The most downloaded album of all time, 'The Eminem Show', was also the 2002 best-selling album. This could indicate that when users share music, more music is sold, not less. '50 Cent' saw an advantage in having his debut album available for sharing before the release date: *'I believe word of mouth is just gonna generate more sales'.* www.vh1.com/news/articles/1459547/20030115/50_cent.jhtml?headlines=true. [15/08/2010]. A possible counterargument would be that this proves only that the relative gains remain high; however the industry is concerned with absolute gains.

[1034] For instance, it was Microsoft's dominance of the PC marketplace in the 90s that forced economists to re-examine the issue of software pricing. The dominance of Microsoft as the world's leading operating system is due to it being copied illegally before it came preinstalled on PCs, in this case, having a large illegal user base increased profitability. This shows how entertainment industries are not exactly ignorant when it comes to game theory. As a company, Microsoft, for instance, has shown an impressive willingness to modify corporate strategy because of the market, giving away its products for 'free' (Internet Explorer), but only for the greater good of achieving/maintaining a monopoly. Proschinger J. [2003], *op.cit.*

[1035] *'You wouldn't steal a car. You wouldn't steal a handbag. You wouldn't steal a television. You wouldn't steal a DVD. Downloading pirated films is stealing. Stealing is against the law'.* This is the script of a short film produced by the MPAA, which has been screened in many parts of the world for the past three years in cinemas before the beginning of all major new film releases and embedded as a trailer, which cannot be fast-forwarded through, on purchased DVDs of those films. Notably the trailer is screened to people who have in fact paid to sit in the cinema and see the film or who have purchased or hired the DVD. Pirated versions of the DVD usually do not have the MPAA trailer, with the result that the viewing experience of those who have supported 'piracy' is in fact better than the experience of those who have not.

inaccurate[1036], and it is also '*a disservice to honest discussion*'[1037]. The 'pirates' copy for profit, they make multiple copies and sell them. Sharers make copies for personal use and for sharing them within a network. They 'save money'; however, their motivation is not financial[1038]. The use of the term 'pirate' is metaphorical—but this is not the case for terms like 'theft' and 'stealing'. There is some plausibility in thinking of the relevant copying activities as really being 'theft'[1039]: copyright owners suffer a financial deprivation as a result of file-sharing[1040]. However, another view is that copyright infringement is not theft[1041].

> '*Whether unauthorised copying of a work protected by copyright is technically and legally in fact a "theft" probably depends upon the technicalities of criminal law and nomenclature in any particular jurisdiction. Although it is perhaps doubtful, there may be some jurisdictions in which "theft" is defined broadly enough to cover circumstances such as those under consideration. But that would certainly not be the legal norm*'[1042].

The use of these terms in the context of copyright infringement came under

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[1036] Loughlan, P. [2006], *Pirates, parasites, reapers, sowers, fruits, foxes … The metaphors of intellectual property* 28 Sydney L.Rev. 211. For a critical analysis of the use of 'pirate' and 'parasite' metaphors by copyright owners intent upon turning debate based on principle and policy, which they might lose, into a kind of reactive moral reflex. *'The term 'piracy' connotes general lawlessness* […] *the piracy metaphor effectively changed a policy debate into an absolutist moral drama. Theft is simply wrong'*. Sell-Prakash, [2004], *Using ideas strategically: the contest between business and NGO networks in intellectual property rights*, 48 International Studies Quarterly 143.

[1037] O' Reilly [2002], *op.cit*.

[1038] Sharing has become a life style and a passion. Most sharers only spend a fraction of their time physically using the downloaded files. For them, it is a mere sampling process: having seen 'it', being part of the elite group who has played or listened to 'It' first. '*Sharers spread the word for quality products. By testing out programs, pirates are able to objectively feedback new products. They spread computer literacy, indirectly encourage improvements, and keep the market alive, contributing far more to the industry than it is willing to acknowledge. Sharers are opinion makers, early adopters* […]'. Proschinger, J. [2003], *op.cit*. 97-104.

[1039] The latest anti-piracy campaigns use such an inappropriate terminology to be arguably challenged under The British Code of Advertising, Sales Promotion and Direct Marketing. Art 2.1: '*All marketing communications should be legal, decent, honest and truthful*'. Art 3.4 '*Obvious untruths or exaggerations that are unlikely to mislead and incidental minor errors and unorthodox spellings are all allowed provided they do not affect the accuracy or perception of the marketing communication in any material way*'. Article 6.1: '*Marketers should not exploit the credulity, lack of knowledge or inexperience of consumers*'.

[1040] The normal civil standard for calculating damages for copyright infringement is compensatory. The copyright owner is compensated for the actual harm done and that is normally calculated according to the extent to which the chose in action has depreciated in value by reason of royalties forgone. *Sutherland Publishing Co Ltd. v Caxton Publishing Co Ltd.* [1936] Ch. 323 at 336

[1041] Both the House of Lords in the UK and the US Supreme Court considered and rejected the argument that infringements of intellectual property rights were varieties of theft. *Rank Film Distributors v Video Information Centre* [1982] A.C. 380; *Dowling v United States* 473 U.S. 207 (1985). Since that time, the argument has been on the ascendant in both jurisdictions. Tapper, C. [2004], *Criminality and copyright*, in Vaver-Bently ed. [2004], *Intellectual property in the new millennium: essays in honour of William R. Cornish*, Oxford University Press, 274-276.

[1042] Loughlan, P. [2007], *'You wouldn't steal a car …': intellectual property and the language of theft*, 29(10) E.I.P.R. 401-405.

judicial scrutiny in copyright cases in Australia[1043] and the UK[1044]. The point was specifically addressed by the US Supreme Court[1045], which rejected the argument that copyright infringement was an attack on the value of a copyright owner's property or actually theft[1046]. 'Downloading is stealing' appears not to be a statement of law, but rather a statement which aims to:

> *'draw upon and mobilise the ordinary, almost instinctive response or ordinary people to dislike, disdain and despise the unauthorised user of copyright works as they would dislike, disdain and despise the ordinary thief who takes away from another ' with intent to permanently deprive'*[1047].

Moreover, in *Network Ten*[1048], the court noted how this is often used in conjunction with the rhetoric of linkage[1049] to 'stigmatise' infringing activities. Rhetoric may be used to win others over to a particular belief, '*in any given case, every available means of persuasion*'[1050]. It is nevertheless the point of this discussion that, notwithstanding infringement of copyright is a civil and criminal wrong, the use of words such as 'theft' or 'piracy' in the discourse of copyright and networking technologies appears nonetheless to be '*an inaccurate and manipulative distortion of legal and moral reality'*[1051].

4.6 - Conclusion

The impact of networking technologies on copyright is not yet clear, nor is a definitive picture of the phenomenon. The cases involving these technologies reveal a dilemma, as it is believed that they could simultaneously pose a threat and an opportunity for

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[1043] Rather, the rhetorical function of the language was recognised and its connection with equally powerful concepts of property. *Network Ten Pty Ltd. v TCN Channel Nine Pty Ltd.* [2004] 218 C. L.R. 273, HCA, [14]-[15], Waddams, S. [2003], *Dimensions of Law: Categories and Concepts in Anglo-American Legal Reasoning,* Cambridge University Press, 174.

[1044] The passage from the *Network Ten* was recently quoted and approved by the English Court of Appeal in *Lambretta Clothing Co Ltd. v Teddy Smith (UK) Ltd.* [2004] EWCA Civ 886, 37.

[1045] *Dowling v United States* 473 U.S. 207; 105 S. Ct 3127 (1985). It reversed a criminal conviction for, inter alia, interstate transportation of stolen property, holding that the National Stolen Property Act did not reach the interstate transportation of 'bootleg records'. The records were not 'stolen'.

[1046] '*The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially like infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud*'. *Ibid.* 3133,

[1047] Loughlan, P. [2007], *op.cit.*

[1048] *Network Ten Pty Ltd. v TCN Channel Nine Pty Ltd.* [2004] 218 C. L.R. 273, HCA.

[1049] '*Linkage (words repeatedly placed together or near to each other) is recognised as an important device by which the meanings associated with one word can become incorporated into or transferred to another*'. Brummet, B. [2006], *Rhetoric in popular culture,* 2ed, SAGE Publications, 120.

[1050] Aristotle, *Rhetoric,* Book 1, 1355, 27

[1051] Loughlan, P. [2007], *op.cit.*

copyright[1052]. The question is then pondered: how then should we deal with these technologies?[1053] A fundamental concern is also 'who harms the market'—the users infringing copyright or the industry with anti-competitive behaviour?[1054] Essentially, the war between copyright and technology is also one between two giant industrial sectors, each of which is in the throws of competing for market space and power: namely, the offline entertainment industries and the online service, comprising internet access providers, online service providers, and networking software providers. The heart of the problem is what has been named 'creative destruction'[1055]: innovation in products and business models displace the old ones. A healthy competitive market requires a plethora of technology to challenge existing modes and to create new modes of creation, dissemination and consumption. However, whilst the potentially infringing technologies of earlier periods were easier to control, this is no longer the case. Nowadays enforcement of copyright risks to undermine users' integrity and technological innovation while doubtfully granting copyright owners compensation for the unauthorised uses of their works over networks, as it will be later discussed[1056].

In its 300-year history, copyright law has been constantly expanding[1057]. Although networking technologies have presented fresh problems, the European Commission concludes that

> '*copyright is the most flexible and,* […] *the most appropriate, form of protection for legal needs of industry in the development of the information society'*[1058].

As a result, expanding without control, copyright has now invaded new fields, and new gaps are subsequently exposed in the law[1059]. It is submitted that the secret of this

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[1052] Technology facilitates the reproduction of works, and hence the constant calls for increased protection. However, technology also facilitates the dissemination of works; a circumstance requires an innovation-friendly copyright policy. Suthersanen, U. [2006], *op.cit*. The legislative focus thus far has centred on the former; yet it is the latter, the new creative dynamics, which are truly revolutionary. Samuelson, P. [2003], *Mapping the digital public domain: threats and opportunities*, 66 Law and Contemporary Problems, 147, 163-165, 169.

[1053] Suthersanen, U. [2006], *op.cit.*

[1054] *Ibid.*

[1055] Schumpeter, J. [1942], *op.cit*.

[1056] Para. 5.3.1.

[1057] Copyright owners need the strongest protection possible for their creations and equitable financial remuneration each time a copyright protected work is either reproduced or distributed. On the opposite side, copyright has to protect the development/diffusion of culture and knowledge, the freedom of art and science, and the freedom of circulation of idea, protecting by exclusive rights only the expression of these ideas. TRIPs Article 9.2.

[1058] Commission of the European Communities [1995], *op.cit.* 382.

[1059] Powerful interests rest behind the arguments for stronger restrictions that intimidate creators requiring them to respect 'property rights' at the expense of creative liberty. Some '*have abandoned all hope of legally constraining piracy and sampling, and have advocated a system of electronic locks and gates that would restrict access to only those who agree to follow certain strict guidelines*'. Vaidhyanathan [2001], *Copyright and copywrongs*, 2001, New York University Press, 4, 5.

'success' is the structure of copyright itself: a life plus 70 years 'monopoly' with relatively low requirements and no formalities. More precisely, copyright is a 'balanced' state-granted monopoly which has lost its balance. This so called 'technology copyright' has created the related problem of 'technology copyright monopoly' which, for some, is an 'artificial and harmful monopoly':

> *'In [the] case of copyright not only the medieval chains remain, but they have been reinforced with late 20th century steel'*[1060].

This monopoly can be dangerous for both users and creators, simply because copyright does not have pro-competition measures. The high politicisation of copyright is surely a strong and influential factor on the polarisation of the debate. There is also the tendency to offer a caricature of the debates about intellectual property as a battle between good and evil: in one extreme, the group who opposes stronger protection; on the other, the copyright holders arguing that the existing laws provide inadequate protection. In response, a number of 'No Copyright' and 'Pirate Parties' are standing up[1061]. The term 'intellectual' should be reconciled with the term 'property'[1062]. 'Property', in the sense of 'sole and despotic dominion', does not fit well with copyright, simply because exceptions and limitations continue to form a central pillar of the overall design[1063].

> *'On the internet some exceptions must be preserved, others will need to be reformulated, and wholly new ones may need to be created. Transformative uses, private use, and informational use are examples which fall into these respective categories. Allowing exceptions to be put up for sale through ubiquitous licensing characterises them as an inconvenience. In truth, they are much more important'*[1064].

Copyright should adapt to technology; however, the current adaptations—rather than welcoming the structural significance of network technologies—attempt to reinstate analogue-world barriers.

> '*Copyright law is at a crossroads*'[1065].

[1060] Laddie, J. [1996], *op.cit.* 253.
[1061] 'Digital freedom movement'. Menell, P.S. [2000], *op.cit*, 110-121.
[1062] May, C [2003], *Digital rights management and the breakdown of social norms*, 8 First Monday 11, (November), 18, 9 (discussing the 'problem' of emphasising the second term at the expense of the first when discussing intellectual property).
[1063] Unfortunately, the beneficiaries of property rhetoric are more readily identifiable, better organised, and more experienced than the diffuse, future-oriented beneficiaries of an expanded public domain. Boyle, J. [2000], *op.cit*, 108-112 (drawing an analogy between the politics of intellectual property and the environmental movement in the 1950s and 1960s).
[1064] Ganley, P. [2004], *op.cit*.
[1065] Perlmutter, S. [2001], *Convergence and the future of copyright*, 23(2) E.I.P.R. 111, 115.

The future development of copyright law ultimately remains unclear, and a number of solutions have been suggested, as will be discussed in the following Chapters. However, as interim observations, can be said that: philosophical justification for a strong copyright system are often limited[1066]; the entertainment industries—more than authors, performers and users—are the main actors in the copyright discourse, consequently leading to unbalances in the system[1067]; networking technologies are more a challenge to the old business model than to copyright in general, they increase exposure and hold significant potential for authors, industries and users[1068]; and sharing activities are perhaps the next stage in societal development[1069]. The journey continues with the analysis of the proposed—or implemented—alternative solutions.

[1066] Para. 4.3.
[1067] Para .4.2.
[1068] Para. 4.4.
[1069] Para. 4.5.

CHAPTER 5

Alternative Solutions

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'The first casualty when war comes is truth'[1070]

5.1 - Introduction

Networking technologies have vastly changed how culture is disseminated and accessed[1071]. Such an evolution of consumption of protected works in an environment

> '*where reproduction and communication is both ubiquitous and automated brings the need for a fundamental rethinking of copyright law*'[1072].

Accordingly, no comprehensive data have so far been collected on the precise effects of networking technologies; however, it is assumed that a large percentage of internet transmissions involve the unauthorised use of protected works. The 'network' became a space for sharing knowledge and creativity[1073], thereby making the global legal landscape of copyright uncertain[1074]. Several proposals have been put forward and different schools of thought have emerged. Notably, some argue that copyright adequately deals with new technologies in the past, and it will adjust to such new ones[1075]—i.e. the so-called 'wait and see' approach. Some argue that strengthening copyright protection, increasing control over the internet, and subsequently implementing new enforcement tools are the only ways of ensuring the survivability of

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[1070] Senator H. Johnson in 1917 quoted in Levy, S. [2007], *The perfect thing: how the iPod shuffles commerce, culture and coolness*, Simon&Schuster, 146.

[1071] Generally Benkler, Y. [2006], *The wealth of networks: how social production transforms markets and freedom*, Yale University Press. Fitzgerald, B. [2008], *Copyright 2010: the future of copyright*, 30(2) E.I.P.R. 43-49. Kaplan, B. [1966], *An unhurried view of copyright*, Columbia University Press, 25-26, 38-39. Atkinson, B. [2007], *The true history of copyright*, Sydney University Press.

[1072] Akester, P. [2005], *Copyright and the P2P Challenge*, 27(3) E.I.P.R. 106-112.

[1073] Geller, P.E. [2000], *Copyright history and the future: what's culture got to do with It?* J.C.S.U.S.A. 209, 210-215; Fitzgerald-Cook (ed.) [2000], *Going digital 2000*: *legal issues for e-commerce, software and the internet*, Prospect Media, 133. Samuelson, P. [2003], *Copyright and freedom of expression in historical perspective*, 10 J.I..P.L. 319, Davies, G. [2002] *Copyright and the public interest*, 2nd ed. Thomson, Ch.3.

[1074] Fitzgerald, B. [2008], *op.cit.* 45. Lessig, L. [2007], *Make way for copyright chaos*, New York Times March 18, www.nytimes.com. Online service providers are profiting from the social network and indirectly, in a sense, from copyright infringements. *Viacom International Inc. v. YouTube Inc.*, 07-Civ-2103 (SDNY 23 June 2010). *Perfect 10 Inc v. CCBill LLC* (9th Cir., 2007). *Tur v. YouTube, Inc.*, No.06-04436 (C.D. Cal. summary judgment cross-motions based on §512(c) denied 20 June 2007); *The Football Association Premier League Ltd v. YouTube, Inc*, 07-Civ-03582-UA (SDNY 23 June 2010-LLS).

[1075] They argue that the market will bring an efficient result, especially in the form of differential pricing, even if the legislature refrains to step in. US Congress, Congressional Budget Office [2004], *Copyright issues in digital media*, 28-33, www.cbo.gov. [15/08/2010].

the copyright system—the so-called 'beyond copyright model' proposing a 'digital lock up' to stop infringing uses on the internet[1076]. Others argue that an internet free from copyright is a reality that cannot be resisted, and further claim that exclusive rights in cyberspace are harmful[1077], stating that any legislative and regulatory regime should be abolished[1078]. The solution is, however, ultimately likely to rest somewhere in between such approaches. Therefore, not surprisingly, the focus is slowly turning towards legislation[1079].

Historically, entertainment industries have consistently lobbied to ensure that their interests—and those of the authors and performers—prevailed. Users rarely participate in such discussions, and their interests are often overlooked[1080]. Consequently, the copyright balance has steadily moved towards the copyright owners[1081]. Lately, it has been recognised that internet access providers should play a particular role in the debate; however, there nevertheless remain resistances in including software and online service providers. The entertainment industries have been reluctant to accept them as legitimate businesses[1082]. Irrespective of such arguments, however, the problem remains global; therefore, the solution should accordingly be global. It is submitted that this can be only achieved through cooperation amongst networking technologies providers, authors and other right owners, users and governments[1083].

[1076] For an overview on different approaches, Sobel, L.S. [2003] *Symposium: The law and economics of digital rights management- DRM as an enabler of business models: ISPs as digital retailers*, 18 B.T.L.J. 667, 670; Netanel, N.W. [2003], *Impose a non commercial use levy to allow free P2P file sharing*, 17 J.O.L.T. 1, 7-22, 74-83; Jacover, A. [2002], *I want my MP3! Creating a legal and practical scheme to combat copyright infringement on peer-to-peer internet applications*, 90 Georgetown L.J., 2209-11; Eckersley, P. [2004], *Virtual markets for virtual goods: the mirror image of digital copyright?* 18 J.O.L.T. 85, 86 ('information anarchism and information feudalism'). On filters that stop infringing uses on networks Lemley-Reese [2004], *Reducing digital copyright infringement without restricting innovation*, 56 Stanford L.Rev. 1345, 1385.

[1077] Ku, R.S.R. [2002], *op.cit.*; Nadel, M.S. [2004], *How current copyright law discourages creative output: the overlooked impact of marketing*, 19 B.T.L.J. 785.

[1078] Samuelson, P. [2007], *Preliminary thoughts on copyright reform*, Utah L.Rev. people.ischool. berkeley.edu/%EBpam/papers.html. RSA [2005], *Adelphi Charter on creativity, innovation and intellectual property*, www.adelphicharter.org. [15/08/2010]. Howkins, J. [2001], *The creative economy: how people make money from ideas*, Penguin.

[1079] Also *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1166-67 (9th Cir. 2004) (holding that to fix the flow of Internet innovation is a question to be resolved by Congress and not by the courts); *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 1999) (pointing to Congress as the right addressee for a re-examination of copyright principles in cyberspace).

[1080] Ku, R.S.R. [2002], *op.cit.*.

[1081] Sykes, K. [2003], *Towards a public justification of copyright*, 61 University of Torono L.Rev. 1, 5; Vaver, D. [2000], *Copyright law*, Irwin Law, Ch. 7.

[1082] Sullivan, A. [2004], *Music-sharing group proposes pay-to-play plan*, The Washington Post (5 February), www.washingtonpost.com; Sullivan, A. [2003], *P2P networks want to play nice*, Wired News (29 September), www.wired.com; McCullagh, D. [2003], *P2P group seeks peace but talks tough*, CNET News.com (29 September), http://news.com.com; Kapica, J. [2003], *Coalition to counter entertainment industry lobby*, The Globe and Mail (16 September), www.globetechnology.com. [15/08/2010].

[1083] Piasentin, R.C. [2006], *op.cit.* 195-241.

5.1.1 – Suggested Approach

A computer simulation of the phenomenon analysed the impact of alternative strategies, such as targeting large-scale contributors to the networks, or downloaders[1084]. The results suggest that the effective strategy for eradicating the unauthorised dissemination of protected works over networking technologies is to

> '*disturb the network by generating a constant amount of traffic which continuously worsens the infrastructure performance, in order to make the network collapse eventually*'[1085].

However, it is submitted that this approach is not 'optimal' because it does not respect the concepts that are thought to be mandatory for a solution to be satisfactory:

1. authors' and other copyright owners' compensations[1086];
2. user integrity: the respect of the users' rights including freedom of expression[1087], the right to take part in the cultural life of the community[1088], the right to enjoy the arts and to benefit from scientific progress, and the right of privacy[1089]; and
3. technological innovation.

An optimal solution should ultimately seek to acknowledge the need of all the actors involved, grant right holders with the necessary compensation, and subsequently respect users' rights without banning such technologies altogether, or otherwise stifling

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[1084] Pavlov, O.V. [2005], *Dynamic analysis of an institutional conflict: copyright owners against online file-sharing*, 34(3) Journal of Economic Issues, 633-663.
[1085] *Ibid.* 661.
[1086] Article 27(2), Universal Declaration of Human Rights, Paris, 1948; Article 15(1)(c), International Covenant on Economic, Social and Cultural Rights, 1966.
[1087] Article 19, Universal Declaration of Human Rights, Paris, 1948; Article19, International Covenant on Civil and Political Rights, 1966; Article 10, European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950; and Article 11, Charter of Fundamental Rights of the European Union, Nice, 2000. Finland, for instance, recently introduced a legal right to internet access, followed by Spain. Ahmed, S. [2009], *Fast Internet Access Becomes a Legal Right in Finland*, CNN (15 October), www.cnn.com/2009/TECH/10/15/finland.internet.rights/index.html. CBC News [2009], *Spain Makes Broadband a Universal Right*, (18 November), www.cbc.ca/technology/story/2009/11/18/spain-universal-broadband-access.html. [15/03/2011].
[1088] Article 27, Universal Declaration of Human Rights, Paris 1948; Article 15(1)(a-b), International Covenant on Economic, Social and Cultural Rights, 1966.
[1089] '*Both access to information and copyright protection are guarded by international human rights covenants. In these covenants one can find the recognition of: (1) everyone's right to freedom of expression; (2) everyone's right to take part in the cultural life of the community, to enjoy the arts and to benefit from scientific progress; and (3) the author's right to the protection of his moral and material interests resulting from his scientific, literary or artistic productions*'. Akester, P. [2010], *The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture*, 32(8) E.I.P.R. 372-381. The political parties of the 'Greens' and the 'Pirates' are planning to propose an 'Internet Bill of Rights' to the European Parlament. The draft includes three sections: 'Fundamental Rights', 'Net Neutrality', and 'Mere Conduit'. http://janalbrecht.eu/2009/11/29/let%E2%80%99s-write-an-internet-bill-of-rights. [15/08/2010].

innovation.

In the following, the proposed solutions have been grouped according to their aims and consequences. The first group of solutions focuses on 'control' over the dissemination of protected works, and it is further divided in terms of 'use with liability' and 'use without liability' approaches. These are discussed in this Chapter. The second group focuses on abandoning the idea of controlling the dissemination of protected works in order to select the most suitable approach to the problems addressed in this work[1090]. These will be discussed in Chapter Six. The arguments both in favour and against control and liability are discussed below[1091].

5.2 – Use with Control and Liability

Maintaining control and subsequently imposing liability on the use of works over networking technology has several benefits, including leaving the current *status quo* untouched. Apparently, creativity is encouraged when copyright owners feel confident that they can control their works and financially benefit from such[1092]. From a moral rights' perspective, authors will be assured that that their integrity and attribution rights are protected. Notably, in order to obtain this goal, copyright owners should ensure that the unauthorised dissemination of copyright works comes to an end[1093]; however, such an approach creates limited disadvantages. Copyright owners will have to continue increasingly investing in protection, monitor[1094] and litigation to enforce their

[1090] Samuelson, P. [2007], *op.cit.*, Lessig, L. [2004], *op.cit*; Geller, P.E. [2000], *op.cit.* 235; Fitzgerald, B *et al*. [2007], *Internet and e-commerce law*, Ch.4; Fisher, W.W. [1998], *Property and contract on the internet*, 73 Chicago-Kent L.Rev. 1203; Chafee, Z. [1945], *op.cit.* 45 Columbia L.Rev. 503, 719; Giles, K. [2005], *Mind the gap: parody and moral rights*, 18 AIPLB 69.

[1091] However, preliminarily, it should be submitted how the scope of copyright law should not be the consolidation of an absolute right to 'control', '*but rather to accord certain limited rights over some kinds of exploitations*'. Litman, J.D. [2001], *op.cit.* 81-86, Patterson, L.R. [2000], *op.cit* 365-66, 393-94; Cohen, J.R [1999], *op.cit.* 239-40, Denicola, R.C. [1999], *op.cit.* 1676-77, and [2000], 195; Benkler, Y. [2001] *op.cit.* 87; Samuelson, P. [1999], *op.cit.* 24; Litman, J.D. [2000], *The demonization of piracy*, 2, www.law.wayne.edu/litman/papers/demon.pdf; [15/08/2010]; Calandrillo, S.P. [1998], *An economic analysis of property rights in information: justification and problems of exclusive rights, incentives to generate information, and the alternative of a government-run reward system*, 9 Fordham Intellectual Property, Media & Entertainment L.J. 301, 316-23; Landes-Posner [1989], *op.cit.* 331.

[1092] '*They may be more likely to create new works and distribute them online rather than withhold them, and therefore, a wealth of new works may become available from which the public will benefit'*. Burshtein, S. [1997], *Surfing the internet: copyright issues in Canada*, 13 Santa Clara Computer & High Technology L.J. 385, 394.

[1093] Ku, R.S.R. [2002], *op.cit.* 303-4.

[1094] The costs of encryption or copy-protection measures increase constantly as circumventing technologies becomes more sophisticated. An increasing number of users use encryption or similar technologies to hide from internet access providers and copyright owners. Borland, J. [2004], *Covering tracks: new piracy hope for P2P*, CNET News.com (24 February), www.news.com.com/2100-1027-5164413.html. [15/08/2010].

copyrights[1095]. There are significant difficulties in consideration of monitoring the usage of protected works and thereby identifying infringers, and the costs may ultimately 'outweigh the benefits'[1096]. Moreover, it is debatable whether or not liability truly affects users' behaviour[1097]. Notwithstanding the growing number of authorised file-sharing sites[1098]—and regardless court decisions or changes in the law[1099]—copyright owners may still have difficulties in competing with them[1100]. File-sharing networks and Web 2.0 platforms offer vast amounts of content and are currently free of charge. According to some, focusing on control and liability may subsequently turn copyright into an excessive monopoly over access and use of protected works[1101].

In summary, the 'use with control and liability' approach involves enforcement, and consequently litigation, but it also includes online distribution alternatives, education and monitoring[1102]. These are discussed in the following.

5.2.1 - Enforcement

The entertainment industries have to rely upon court rulings and international cooperation when striving to fight piracy. They have to litigate and target directly with enforcement actions the source of pirate operations on a large scale, and may be

[1095] The record industry '*is taking a non-economic, inefficient approach to the P2P problem since they only seem to be concerned with the protection of their copyright rights, with a blatant disregard for the extensive costs involved'*. Lemley, K.M. [2003], *Protecting consumers from themselves: alleviating the market inequalities created by online copyright infringement in the entertainment industry*, 13 Albany L.J. of Science and Technology, 613, 629.

[1096] Randle, P. [2002], *When the chips are down: law and technology can potentially prevent the circumvention of copy protection*, 18(5) C.L.S.R. 314, 315; deBeer, J.F. [2000], *Canadian copyright law in cyberspace: an examination of the Copyright Act in the context of the internet*, 63 Saskatchewan L.Rev. 503, Para. 56.

[1097] Hanbridge, N. [2001], *Protecting rights holders' interests in the information society: anti circumvention, threats post Napster, and DRM*, 12(8) Ent.L.Rev. 223, 224.

[1098] Selby, J. [2000], *The legal and economic implications of the digital distribution of music: Part 2*, 11(2) Ent.L.Rev. 25, 26; Hill, R.J. [2000], *Pirates of the 21st Century: the threat and promise of digital audio technology on the internet*, 16 Santa Clara Computer & High Technology L.J. 311, 315.

[1099] '*In addition a chilling of the fundamental right to freedom of expression may result as users may become reluctant to do or say anything with respect to file-sharing for fear of being sued or facing possible criminal sanctions whether such fears are justified or not*'. Samuelson, P. [2007], *op.cit.* 335. Potter, A. [2003], *Is copyright unconstitutional?* 37(2) This Magazine 22, 25.

[1100] Hill, R.J. [2000], *op.cit.* 315.

[1101] Boynton, R.S. [2004], *The tyranny of copyright?*, The New York Times (25 January), www.nytimes.com. [15/08/2010]. Sykes K. [2003], *op.cit.* 8. Assuming it was possible to distribute a work using a copy-protection technology impossible to be circumvented, and to eliminate any other sources of that work, the result would be a *de facto* monopoly of unlimited duration. Moreover, in the countries where levy and royalties system are already in place, users would be prevented from accessing such work, while continuing to pay private copy levies. Piasentin, R.C. [2006], *op.cit.*

[1102] Gilroy, N. [2009], *The carrot and stick approach*, 193 Copyright World, 23-26, 23; IFPI [2006], *Commercial piracy report*, www.ifpi.org/content/library/piracy-report2006.pdf. BERR [2009], *Government response– Consultation on legislative options to address illicit file-sharing* (29 January). www.berr.gov.uk/files/file51703.pdf. [15/08/2010].

required to use special force to seize equipment and catch infringers[1103]. The last decade has witnessed international bodies in the fields of music, software and film promoting enforcement actions against users, services and software providers. In particular, litigation against users became

'*an integral part of the campaign to eradicate file-sharing*'[1104],

although it appears to be costly and unpopular.

In the past, copyright law expressly exempted a large amount of infringement; small-scale infringements were implicitly accepted, partly because of the impossibility to prevent them, but also because of the potential benefit these may bring[1105]. Networking technologies created a number of enforcement problems, including[1106]:

- the identification of infringers[1107];
- everyone with a computer or a mobile phone is potentially an infringer due to the easiness of accessing unauthorised digital files;
- files can be easily obtained and further disseminated, notwithstanding technological protection measure; and
- cross-border legal problems.

The impact of enforcement over networking technologies is considered to be debateable. Actions made against users did not achieve a noticeable deterrent effect[1108]. Notwithstanding statements declaring the number of users of these technologies have decreased as direct consequence of enforcement against users, it has nevertheless been argued that users simply migrate to more secure and secret sharing networks[1109]. Litigation against software and service providers appears not to have incisive consequences: for instance, Pirate Bay remains online; LimeWire is moving to cloud-computing. The number of infringements reaches beyond the legal system's ability to cope with them; thus, it is arguable whether enforcement alone is enough to solve the

[1103] Whalley Coombes, S. [2004], *Piracy report reveals startling figures*, 15(1) Ent.L.Rev. 28-30.
[1104] O'Flynn, T. [2006], *File-sharing: an holistic approach to the problem*, 17(7) Ent.L.Rev. 218-21.
[1105] Such as the work, or the author, reaching a wider audience, whom will eventually acquire the work or future work of the same author. Nasir, C. [2005], *From scare tactics to surcharges and other ideas: potential solutions to peer to peer copyright infringement: Part 3*, 16(5) Ent.L.Rev. 105-110.
[1106] Nasir, C. [2005], *op.cit.*
[1107] Notwithstanding stealth technologies and encryption, the process of identifying infringers is laborious and certainly not cost-effective. *Ibid.*
[1108] Institute for Research on Private Law [2005], *Peer-to-peer file-sharing and literary and artistic property*, http://privatkopie.net/files/Feasibility-Study-p2p-acs_Nantes.pdf. [15/08/2010].
[1109] '*In total, the effect on the global volume of peer-to-peer exchanges is non existent, and this volume continues to increase regardless*'. Spedidam [2005], *Pour une utilisation légale du peer-to-peer*, www.spedidam.fr. [15/08/2010].

vast amount of issues related to networking technologies[1110].

5.2.1.1 – European Union. - The Enforcement Directive attempts to harmonise the situation amongst Member States; meanwhile, national laws differ in practice. The directive met stiff opposition[1111] since it combines the most extreme of enforcement provisions available throughout Europe[1112]. The original intent of the directive was to take action against industrial, large-scale smuggling perpetrated by criminal organisations; however, networking technology users have become the target of this Directive[1113]. A number of states have yet to implement it[1114]; meanwhile, in 2008, the European Parliament adopted a report advising against criminalising non-profit making users[1115]. Furthermore the EU second Intellectual Property Right Enforcement Directive[1116] has caused debates, in particular the definition of 'commercial scale'[1117], and the crime of 'aiding, abetting and inciting' infringement, because of the concern this directive may force networking technologies providers to block any peer-to-peer service[1118]. However, it is submitted that criminal law is poorly suited for the purpose of regulating copyright[1119], and that such an approach ultimately presents a risk to technological innovation.

[1110] O'Flynn, T. [2006], *op.cit.*
[1111] Daly, M. [2007], *op.cit.* 319-324.
[1112] For instance, the UK's Anton Pillar, the France's *saisie contrefaçion* orders (Article 8); or the UK's Mareva injunctions (Article 11).
[1113] Explanatory Memorandum 3, 11-12. Massa-Strowel [2004], *The scope of the proposed IP Enforcement Directive: torn between the desire to harmonise remedies and the need to combat piracy*, 26(6) E.I.P.R. 244-253. Cornish, W.R. *et al*. [2003], *Procedures and remedies for enforcing IPRs: the European Commission's Proposed Directive*, 24(10) E.I.P.R. 447, 448. Morris, P.S. [2009], *op.cit.* 286.
[1114] The Directive has been implemented in the UK by the Intellectual Property Regulations 2006 (Statutory Instrument 2006 No. 1028); in France (*Décret no 2008-624 du 27 juin 2008 pris pour l'application de la loi no 2007-1544 du 29 octobre 2007 de lutte contre la contrefaçon et portant modification du code de la propriété intellectuelle*, NOR: ECEQ0803248D, 29 June 2008, Journal Officiel de la République Francaise, 5-64); in the Netherlands (Staatsblad 2007, 108); in Sweden in 2009. Nilsson, H. [2009], *File-sharing- Sweden: new legislation to tackle file-sharing*, 11(3) E-Commerce Law & Policy; Phillips, J. [2008], *Months from implementing IP Enforcement Directive, Sweden swamped by fake Abbas*, IPKat blog (21 August). ipkitten.blogspot.com. [15/08/2010].
[1115] Committee on Culture and Education [2008], *Report on cultural industry in Europe*, www.europarl.europa.eu/sides/getdoc.do?type=ta&reference=p6-ta-2008-0123. [15/08/2010].
[1116] Text adopted by European Parliament on April 25, 2007. Amended proposal for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (IPRED2) COM(2006) 0168 final. eur-lex.europa.eu. [15/08/2010].
[1117] Sugden, P. [2009], *How long is a piece of string? The meaning of 'commercial scale' in copyright piracy*, 31(4) E.I.P.R. 202-212.
[1118] www.copycrime.eu/blog; O'Brien, D. [2007], *Ipdred2 after the Committee*, www.eff.org; O'Brien, D. [2007], *Ipred2 pausing for thought*, www.eff.org. [15/08/2010].
[1119] Hughes, G. [1990], *Computers crime and the concept of 'property'*, 1 Intellectual Property J. 154-163; Smith, R. *et al*. [2004], *Cyber criminals on trial*, Cambridge University Press, 88.

5.2.1.2 – US. - Various bills have been proposed in mind of increasing penalties and providing more remedies to copyright owners[1120]. Most of these have so far been abandoned[1121]. However, the 'No Electronic Theft Act'[1122], the 'Family Entertainment and Copyright Act'[1123], and the 'Enforcement of Intellectual Property Rights Act'[1124] empowered this effort by criminalising unauthorised file-sharing[1125]. The latest Bill, containing intellectual property rights enforcement provisions, introduced at the Senate is the 'Cybersecurity Bill 2010'[1126]

5.2.2 – Online Distribution

A successful, alternative, legal business model should accompany a successful 'control with liability' strategy[1127]. As legitimate download services have multiplied[1128], the key questions have become more concerned with how to persuade file-sharers to use legal services[1129]. Therefore, the question of price and desirability has also become of extreme relevance. Essentially, price and quality of the files should be competitive. A number of alternative business models have been suggested: charging per item, per volume of traffic, or per month[1130]. The argument is that, when promoting easy accessibility of legal services, there are no valid reasons for using file-sharing networks and Web 2.0 platforms for the purpose of accessing/downloading unauthorised content. Dissatisfaction with a business model is not a legal defence, but it is submitted that the entertainment industries should give users a reason to pay for content they can already

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[1120] For instance, S.2237, 'Protecting IP Rights Against Theft and Expropriation Act of 2004'. S.1621, 'Consumer, Schools, and Libraries DRM Awareness Act of 2003'. H.R. 2517, 'Piracy Deterrence and Education Act of 2003'. H.R. 2752, 'Author, Consumer and Computer Owner Protection and Security Act of 2002' H.R. 2885, 'Protecting Children from P2P Pornography Act'. H.R. 5211, 'P2P Piracy Prevention Act'.

[1121] Including the proposed S. 2560 Inducing Infringement of Copyrights Act.

[1122] 17 USC §506(a)(2). 'The NET Act'.

[1123] S.167 and H.R.357, 109th Congress, 1st Session, became Public Law, No.109-9, 27 April 2005.

[1124] S.3325. McDermott, E. [2008], *IP Enforcement Bill spark debate*, Managing Intellectual Property, 12.

[1125] Bailey, A. [2000], *A nation of felons? Napster, the Net Act, and the criminal prosecution of file-sharing*, 50 American University L.Rev. 473. Hays, T. [2007], *Secondary liability for infringements of copyright-protected works: Part 2*, 29(1) E.I.P.R. 15-21.

[1126] http://commerce.senate.gov/public/index.cfm?p=pressreleases&contentrecord_id=fc96f55d-79be-4627-8131-ce8906485352. [15/08/2010].

[1127] '*The first line of defence against pirates is a sensible business model that combines pricing, easiness of use, and legal prohibition in a way that minimize the incentives for consumers to deal with pirates*'. Lacy, J. *et al.* [1997], *Music on the internet and the intellectual property protection problem*, Proceedings of the International Symposium on Industrial Electronics, IEEE Computer Society Press, SS77–SS83.

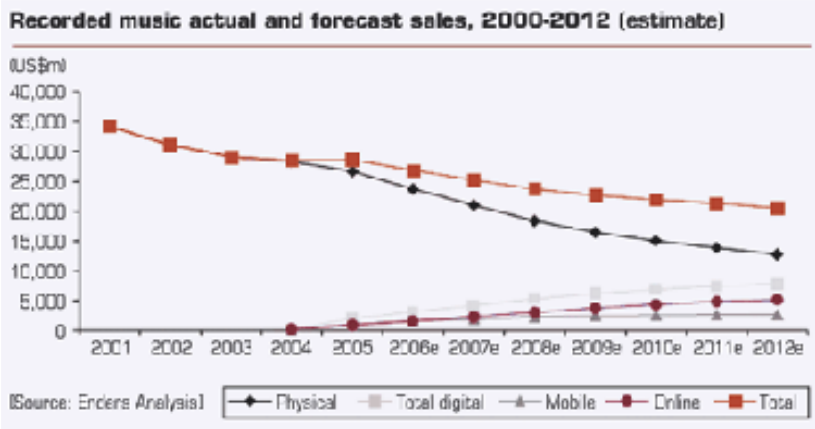
[1128] Calleja Consulting [2007], *European Union: music-pan-European digital music download service*, 18(2) Ent.L.Rev. N19.

[1129] Varian, H.R. [2005], *Copying and copyright*, 19(2) Journal of Economic Perspectives, 121-38.

[1130] Lang-Vragov, [2005], *op.cit.* 121-139.

obtain free of charge[1131]. An approach concerned with regaining the lost consumer base could be to reduce prices and increase the quality of the files offered, and to also increase the penalties for infringements—the so-called 'carrot and stick' approach. For instance, in the music business, total sales are predicted to decrease as shown by Figure 21 below.

Figure 21- Recorded Music Sales[1132]



The reasons are numerous, but are mainly related to price, quality and arguably business models. For instance, in the US, downloading a song from iTunes costs $ 0.99. In the UK, downloading a song costs £ 0.79, but it should cost £ 0.54 at the current exchange rates. Moreover, users in Europe pay a different rate: € 0.99 (£ 0.86) for the same file[1133]. The problem is clear: the same file charged at different prices[1134].

Nevertheless, legal online distribution services create challenges for the traditional copyright system and management, which are not easily solved[1135]. These issues reach beyond the scope of this work; however, they do deserve to be mentioned, some of which include the issues of cross-border distribution, repertoires, and competition law[1136]. Notably, even if successfully addressing these challenges, doubts would

[1131] Jacover, A. [2002], *op.cit.* 2250-1.
[1132] Figure from Castonguay, S. [2008], *The digital market- Educating users*, WIPO Magazine 2. www.wipo.int/wipo_magazine/en/2008/02/article_0005.html. [15/08/2010].
[1133] Admittedly, this is an over-simplification of the situation.
[1134] The issue of pricing has been noticed by regulators. In the US the Department of Justice has launched an investigation into alleged price fixing of music downloads by record labels. www.guardian.co.uk. The European Commission is examining Apple's iTunes pricing policy following a complaint by Which? www.timesonline.co.uk. [15/08/2010]. In the UK, the House of Commons (Culture, Media and Sport Committee) called the BPI executives to justify the high price of music downloads. O'Flynn, T. [2006], *op.cit.*
[1135] Dehin, V. [2010], *The future of legal online music services in the European Union: a review of the EU Commission's recent initiatives in cross-border copyright management*, 32(5) E.I.P.R. 220-237.
[1136] These issues have received particular attention by the EU institutions. Recommendation 2005/737 on collective cross-border management of copyright and related rights for legitimate online music services. Commission Decision 2003/300 (COMP/C2/38.014- relating to a proceeding under Article 81 of the EC

nevertheless remain concerning the influence of legal online distribution over unauthorised dissemination.

An interesting example is that of Allofmp3.com—an unauthorised Russian music service, which has been under threat of litigation by the IFPI and RIAA for almost ten years[1137]. A number of legal decisions have been held against the site in various jurisdictions[1138], and the Russian government publicly agreed to close down the site[1139]. However, despite all this, the site continues to run under the new name 'MP3Sparks.com'. It claims to be in full compliance with Russian Author's Right law and provides a clear warning that:

> '*you are not able to download audio and video if it is in conflict with the laws of your country of residence*'.

However, consumers in the UK and other countries are still able to download files from the site. Notwithstanding the licensing issues and the probable illegality of the site, it offers DRM-free CD-quality files at various prices charging for data downloaded instead of per file. In summary, it offers the best audio quality at the best price. It is a perfect competitor for legal online distribution, but it arguably does not pose any threat to unauthorised file-sharing. Therefore, it is submitted that, even when reducing the price and increasing the quality of online distribution services, unauthorised dissemination of protected content would nevertheless continue as before.

5.2.3 - Education

Enforcement and favourable legal alternatives should also be accompanied by extensive campaigns to persuade users that sharing is wrong and it is not worth risking criminal convictions or damages[1140]. Surveys suggest that users are not 'convinced' of the

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Treaty and Article 53 of the EEA Agreement - IFPI 'Simulcasting') (2003) OJ L107/58 (CEC); COMP/C2/38.014-IFPI 'Simulcast', 8 October [2002] OJ L107/58. COMP/C2/38.126-BUMA, GEMA, PRS, SACEM, 17 May [2001] OJ C145/2. COMP/C2/38.698-CISAC, 26 July 2008. COMP/M.4404-Universal/BMG Music Publishing, 22 May 2007.

[1137] Two separate criminal investigations took place in Russia. IFPI manifested the intention to persecute in the UK. Although doubts about the enforceability in Russia of any subsequent court order invariably arise. www.ifpi.org. The court in Moscow ruled that the website works within the limits of Russian law. *Kvasov*, Cheryomushky District Court, 16 August 2007. http://news.bbc.co.uk. [15/08/2010].

[1138] For instance, a preliminary injunction was granted against the site in Germany; Italian authorities shut down allofmp3.it and began a criminal investigation into it; in Denmark, a court ordered an internet access provider to block its users' access to the website.Tthe credit card company Visa decided to cease handling payments to the site. Bottomley, K. [2007], *Allofmp3.com- The legality of Russia's online black market*, 18(6) Ent.L.Rev. 212-214.

[1139] As a result of bilateral negotiations between the US and Russia on Russia's accession to the WTO in November 2006. *Ibid.*

[1140] Yavorsky, S. [2006], *Copyright-music-piracy and file-sharing*, 17(3) Ent.L.Rev. N-23-25.

wrongdoing of infringing copyright[1141]. Therefore, prevention through education could potentially diminish infringements—in the instance that it could be proven true that users are less likely to share protected content if they know it is 'wrong'[1142]. However, almost 70% of internet users in the UK know that sharing a file without authorisation is considered to be copyright infringement[1143]. Nevertheless, it is arguable whether users facing lawsuits for copyright infringement could reasonably claim that they were unaware their actions were illegal.

Most of the campaigns target parents, as they are considered the first source of information about rules[1144]. The IFPI published '*Young People, Music and the Internet*'[1145], a guide providing parents with a glossary of the relevant terminology, an explanation of the risks of infringing copyright, and the dangers of computer viruses. The IFPI has also produced '*Digital File Check*'[1146], a software which blocks and removes file-sharing software as well as shared folders. The latest tool is 'pro-music.org', a website providing links to educational tools, and '*everything you need to know about online music*'[1147].

All of these efforts are positive signs that a more pragmatic approach is being adopted in relation to file-sharing on both national and international levels[1148]. However, it appears that such methods lack practical results[1149]. There are several assertions that media and the internet in general are to blame for the spread of copyright infringements, in view of the fact that they provide the 'know-how', sponsor the practice, and put 'peer pressure' on users[1150]. It is submitted that 'education' is simply not working: behaviours are not changing[1151]. Notably, this may be owing to the fact that there is no immediately recognisable 'victim' or 'crime' in such a scenario[1152]. It is

[1141] Para. 4.2.3 and 4.5. FAST, for instance, commissioned a survey on online software 'theft': 80% of the respondents declared they would not report it; however, they would report a shoplifter. www.fast.org.uk. [15/08/2010].
[1142] Microsoft [2008], *Survey of teen attitudes on illegal downloading*, www.microsoft.com/presspass/press/2008/feb08/02-13MSIPSurveyResultsPR.mspx. [15/08/2010].
[1143] IFPI [2008], *op.cit.*
[1144] It has been suggested to teach copyright in schools. Soetendorp, R. [2005], *Intellectual property education - in the law school and beyond*, 1 I.P.Q. 82-110.
[1145] www.ifpi.org/content/library/young-people-leaflet.pdf. [15/08/2010].
[1146] www.ifpi.org/content/section_resources/digital-file-check.html. [15/08/2010].
[1147] www.pro-music.org. [15/08/2010].
[1148] O'Flynn, T. [2006], *op.cit*. More on copyright educational efforts at www.riaa.com. [15/08/2010].
[1149] Yavorsky, S. [2006], *op.cit.*
[1150] SABIP [2009], *op.cit.* 10.
[1151] SABIP [2010], *op.cit.*
[1152] *Ibid.* 11-12. The socialogical aspects of the issue have been explored in Macmillan, F. (ed.) [2007], *New directions in copyright law- Volume 1-4*, Edgar Elgar.

submitted that systems considered independent from users' intentions or knowledge of copyright laws should be favoured[1153].

5.2.4 - Technology: 'Is the answer to the machine in the machine?' [1154]

Some commentators argue that, without technological controls, it is impossible to control the dissemination of digital works. Therefore, three types of technological controls have been implemented:

1. control over the file using digital rights management;
2. control over the internet access-monitoring and filtering; and
3. control over the hardware.

There is indeed a certain logic in arguing that technology may help in solving the problem it has caused. However, asking a machine to understand the complexity of a copyright system is simplistic[1155]. Technological solutions must be carefully addressed because there is risk of compromising the users' capacity to exercise legitimate rights by giving copyright owners perpetual protection of their works. Obviously, one could stipulate that technology providers embed in their product or services a mechanism for monitoring and restricting copyright infringement[1156]; however, the problem would always be that of enforcement. Decentralised open-source softwares have already been disseminated. Web 2.0 platforms can be registered in jurisdictions where law considers them not liable, or where enforcement is otherwise difficult. Further, various technological solutions are so simple to circumvent that legal protection anti-circumvention measures had to be introduced. Finally, as discussed in Chapter Two, one of the characteristics of networking technologies is their ability to quickly evolve in order to circumvent technical and legal obstacles[1157]. Thus, notwithstanding the effort in creating and promoting technological answers, the results appear to be constantly limited to a soft deterrent more than an actual solution.

[1153] As it will be discussed in Chapter Six.
[1154] The title is a reference to Clark C. [1996], *The answer to the machine is in the machine*, in Hugenholtz, P.B. [2006], *The future of copyright*, Kluner, 139-145.
[1155] Clark C. [1996], *op.cit*, 145.
[1156] Nasir, C. [2005], *op.cit.*
[1157] Para 2.2.1 and 2.2.2.9.

5.2.4.1 – Digital Right Management (DRM). - DRM[1158] is the name given to technological protection measures designed to secure access—including subsequent copying—to digital material and enforce contractual agreements[1159]. The importance of protecting these measures was recognised by the WIPO Treaties[1160] and also by the Copyright Directive[1161]. Consequently, national legislations[1162] have made the circumvention of such technological protection serious offences.

One positive point of the DRM systems is that they have encouraged the confidence of copyright holders in promoting new business models[1163]. However, it is submitted that they are not a solution to the problems described in this work, for the following reasons:

1. If they were 'effective' protections, they would not need to be legally protected. As a matter of terminology, if they are effective, they cannot be circumvented, and if they can be easily circumvented they are not effective, and are therefore not worth protecting[1164]. It appears that, as opposed to simplifying enforcement-reducing infringement, they multiplied the 'rights' to be enforced;
2. In order to be fully effective, they have to be applied universally. A single unprotected file in a network multiplies exponentially, and the unauthorised files shared over the internet are normally DRM-free. This makes the technological protection measures applied to other versions of the file worthless;
3. DRM can be so easily circumvented that, most of the time, they do not justify the investment in creating them.

Therefore, their benefits are limited by a significant technological weakness[1165]. Moreover from a socio-political prospective, if they were effective, they may ultimately

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[1158] For detail on DRM systems, *see* Rosenblatt-Trippe-Mooney [2002], *Digital rights management: business and technology*, M&T Books; Stefik, M. [1996], *Internet dreams: archetypes, myths, and metaphors*, MIT Press, 219-253. Ganley, P. [2002], *Access to the individual: digital rights management systems and the intersection of informational and decisional privacy interests*, 10 International J. of Law and Information Technology, 241; Ganley, P. [2004], *op.cit.*; Bygrave-Koelman [2000], *privacy, data protection and copyright: their interaction in the context of electronic copyright management systems*, in Hugenholtz P.B. (ed.) [2000], *Copyright And electronic commerce: legal aspects of electronic copyright management*, Kluwer Law International; Piasentin, R.C. [2006], *op.cit.*

[1159] Nasir, C. [2005], *op.cit.*

[1160] Article 11 of the WCT, Article 18 of the WPPT

[1161] Article 6-7. Also Article 2 of the Conditional Access Directive. Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access.

[1162] Such as the DMCA and the CDPA.

[1163] Koempel, F. [2005], *Digital rights management*, 11(8) CTLR, 239-242. Sobel, L.S. [2003], *op.cit.*

[1164] For instance, it was argued the CSS has lost effectiveness. Helsinki District Court, 25 May 2007. Later reversed by the Court of Appeal.

[1165] An example of DRMs's failure is the 'Secure Digital Music Initiative'. Upon completion, several hackers were encouraged to attempt to crack the code, which they did quickly. The initiative was

create an environment in which all access to creative material is restricted; a 'digital lock-up' world which is not favoured by most[1166]. Other concerns relate to the effects that DRM may have on uses traditionally accepted under copyright law[1167]. These technological measures can be used, for instance, to[1168]:

- prevent access/copy to works not protected by copyright;
- prevent insubstantial copying or reproduction otherwise permitted under copyright law; and
- impose further limitations, such as the times a lawful purchaser can access a work.

DRMs may permit the dissemination of works that, otherwise, the copyright owners might be reluctant to release, but they are arguably ineffective and may have an adverse impact on public access[1169]. The DRM experience is over —at least temporarily—for the music industry[1170], whilst the system is still utilised by the film and videogames industry.

5.2.4.2 – Monitoring. - Monitoring can take on two forms of detection: direct or indirect[1171]. Direct detection involves the copyright owner, or one of her/his agents, manually joining a network and exchanging data with the peers connected. This method is accurate; however, it is extremely costly and time-consuming. Indirect detection relies on WebCrawlers[1172] and the databases of digital fingerprints, which report to the copyright owner or her/his agent when a potential infringement is taking place, and further details the alleged infringer's IP address. This method is cost-effective; however,

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therefore suspended to '*re-assess technological advances at some later date*'. www.sdmi.org. [15/08/2010].

[1166] Lessig, L. [2004], *op.cit*. 13. Some proposed the adoption of a 'reverse notice and takedown' as a counter-measure to safeguard public interest. Under this regime, users would send copyright owners a notice communicating the desire to make a lawful use of a TPM-protected work. Then, the right owner will have to remove the TPM or otherwise enable these lawful uses. Reichman-Dinwoodie-Samuelson [2009], *op.cit*. Also Article 6(4) of the Copyright Directive, §296ZE of the CDPA.

[1167] Samuelson, P. [2007], *op.cit.* 19; Ku, R.S.R. [2002], *op.cit.*, 274; Lessig, L. [1999], *op.cit*. '*Today's digital rights management can easily become tomorrow's political rights management. The same system that we are increasingly putting in place allowing the record industry to survey your hard disk would allow the government to survey your hard disk with a different purpose'*, J.P. Barlow quoted in La Monica, M. [2003] *Debating digital media's future*, CNET News.com, 18 September, http://news.com.com/2100-1025-5079007.html. [15/08/2010].

[1168] As noted, for instance by the Gower's report, Gower [2008], *op.cit.* 73.

[1169] Computer Science and Telecommunications Board, National Research Council [2000], *op.cit.* 8-9.

[1170] IFPI Digital Music Report 2008.

[1171] Piatek-Kohono-Krishnamurthly [2008], *Challenges and Directions for Monitoring Peer-to-Peer File-Sharing Networks –or- Why My Printer Received a DMCA Takedown Notice*. dmca.cs.washington.edu/uwcse_dmca_tr.pdf. [15/08/2010].

[1172] Softwares that browse the internet collecting data.

it may be inaccurate owing to the presence of a large amount of false-positive and false-negative results.

Monitoring produced an extensive literature[1173]. The latest softwares have been successful in detecting illegal transmissions as soon as they commenced, and are also effective against streaming transmission[1174]. Moreover, the latest deep-packet-inspection tools allow the identification of the actual content of every packet transmitted[1175]. Nevertheless, most of the existing monitoring systems remain deficient, since they are inaccurate, arguably privacy-invasive, and cost-ineffective[1176].

5.2.4.3 – Filtering. - Filtering technologies comprise softwares concerned with examining for specified criteria, and subsequently blocking all material transmitted over a network. Filters were originally conceived as a defence against child pornography and their application: for instance, the Internet Watch Foundation has operated such a procedure and has been successful[1177]. Some service providers agree with some copyright owners concerning a set of principles, including the implementation of filters[1178]. Courts, however—such as those in the cases of *Napster*[1179], *Aimster*[1180],

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[1173] Nwogugu, M. [2008], *op.cit.*; Asvanund, A. *et al*. [2003], *An empirical analysis of network externalities in peer-to-peer music-sharing networks*, 15(2) Information Systems Research 155. Clark-Tsiaparas [2002], *Bandwidth-on-demand networks- A solution to peer-to-peer file-sharing*, 20(1) BT Technology Journal 53; Golle, L.B. *et al*. [2001], *Incentives for sharing in peer-to-peer networks*, Working Paper, Stanford University; Pavlov-Saeed [2004], *A resource-based analysis of peer-to-peer technology*, 20(3) System Dynamics Review 237; Androutsellis, S. *et al*. [2004], *A survey of peer-to-peer content distribution technologies*, 36(4) ACM Computing Surveys 335; Castro, M. *et al*. [2003], *SplitStream: high-bandwidth content distribution in cooperative environments*, in *Peer-to-peer systems II*, Lecture Notes In Computer Science, 292; Bhattacharjee, S. *et al*. [2003], *op.cit.* 107.

[1174] Zhang, R. *et al*. [2005], *Topology-aware peer-to-peer on-demand streaming*, in Boutaba, R. *et al*. (eds) [2005], *Networking*, LNCS 3462, 1-14; Krishnan-Uhlmann [2004], *The design of an anonymous file-sharing system based on group anonymity*, 46(4) Information and Software Technology 273; Steinmetz-Wehrle ed. [2005], *op.cit.*; Chun, B.G. *et al*. [2006], *ChunkCast: An Anycast Service for Large Scale Content Distribution*, The 5th international workshop on peer-to-peer systems (IPTPS'06); Juniper & Ellacoya Networks, [2005], *Application traffic management solution*, www.juniper.net/solutions/literature/solutionbriefs/351154.pdf. [15/08/2010].

[1175] Edwards, L. [2009], *The fall and rise of intermediary liability online*, in Waelde-Edwards (ed.) [2009], *Law and the internet*, Hart, 47-88.

[1176] For instance in *Universal Music Australia Pty. Ltd. v. Sharman License Holding Ltd.*, [2005] F.C.A. 1242, although it was shown that in certain circumstances it is possible to monitor usage, the court felt that it was not practical.

[1177] However, it has not been exempted from incidents, such as the 'wikipedia ban'. www.guardian.co.uk/technology/2008/dec/09/wikipedia-iwf-ban-lifted. [15/08/2010].

[1178] 'Principles for User Generated Content Services', www.ugcprinciples.com. DailyMotion uses 'signature'. www.ina.fr/sites/ina/medias/upload/to-know-ina/ina-signature.pdf. YouTube uses 'audible magic'. www.audiblemagic.com. [15/08/2010].

[1179] *A&M Records Inc. v. Napster Inc.*, 114 F Supp 2d 896 (N.D. Cal. 2000); 54 USPQ 2d 1746 (N.D. Cal. 2000); 239 F 3d 1004; 57 USQP 2d 1729 (9th Cir. 2001); WL 227083 (ND Cal. 5 March 2001); 284 F.3d 1091 (9th Cir. 2002).

[1180] *Re Aimster Copyright Litigation* 252 F Supp 2d 634 (ND Ill., 2002); affirmed 334 F 3d 643 (7th Cir. 2003).

Grokster[1181], *Sharman*[1182], *Pirate Bay*[1183], *Scarlet*[1184], *etc*.—have suggested 'filtering tools or other mechanisms' should be implemented by technology and service providers to reduce copyright infringements. In *Grokster*, Metro-Goldwyn-Mayer asked the court to impose a positive obligation to filter[1185], notwithstanding the counter arguments that filtering technologies have '*not been subjected to any significant public testing or scrutiny*'[1186]. It is debateable whether or not they can differentiate effectively between the infringing and non-infringing uses of protected material[1187]; they can be easily circumvented[1188], and their costs are too high for '*benefits that are at best uncertain*'[1189].

In general, whilst it is nevertheless understandable that courts request the imposition of filtering technology in the aforementioned cases, it is ultimately arguable whether filters would actually prevent the infringement and, more importantly, whether they are considered to be justifiable when taking into account the limitations which they may impose on freedom of expression, privacy, and access to knowledge, all of which are acceptable[1190]. Finally, it is submitted that copyright law is based on a degree of human interpretation and understanding, which cannot be obtained by a 'machine'. For instance, it is impossible for an automated system to recognise the fair dealings or fair use defences.

5.2.4.4 – Disabling, Hardware Restrictions & Logic Bombs. - Other technological solutions have been suggested: for instance, internet access providers could block any traffic which is not transmitted through known servers; every computer could be

[1181] *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 259 F Supp 2d 1029, 65 USQP 2d 1545 (C.D. Cal. 9 January 2003); 2003 WL 1989129 (C.D. Cal. 25 April 2003); affirmed 380 F.3d 1154 (9th Cir. 2004); 125 S.Ct. 2764 (2005); on remand 454 F.Supp. 966 (C.D. Cal. 2006).
[1182] *Universal Music Australia Pty. Ltd. v. Sharman License Holding Ltd.*, [2005] F.C.A. 1242.
[1183] '*Pirate Bay*', Verdict B 13301-06, 17 April 2009, Stockholm District Court, Division 5, Unit 52.
[1184] *Societe Belge des Auteurs, Compositeurs at Editeurs v. SA Scarlet (formely known as Tiscali),* Tribunal de Première Instance de Bruxelles, 29 June 2007, [2007] ECDR, 19.
[1185] *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 243 F Supp 2d 1073, 65 USQP 2d 1545 (C.D. Cal. Jan. 9, 2003); 2003 WL 1989129 (C.D. Cal. April 25, 2003). Brief of Motion Picture Studio and Recording Company Petitioners, 32-34.
[1186] Brief of Computer Science Professors Suggesting Affirmance of the Judgment, 15.
[1187] *Ibid.*
[1188] Either by third parties or by users uninstalling or refusing to install the filtering software. *Ibid.* 14-15. For instance, Chinese citizens have defeated the internet filter run by the Chinese Government (Great Firewall of China) many times. When the court ordered Napster to use filtering technology, users responded misspelling the files' names to overcome the filters. Later, Napster used audio fingerprinting techniques to further limit copyright content leakage. None of this, however, met the standard demanded by the court. *A&M Records Inc. v. Napster Inc.*, 284 F.3d 1091 (9th Cir. 2002), 1096-1099.
[1189] *Ibid*.
[1190] Edwards, L. [2009], *op.cit.* 85.

provided with a mechanism concerned with blocking every file that is not legitimately obtained. Finally, one could utilise logic bombs[1191] to infect the computer of the infringing users. However, it is submitted that these solutions, even if technically possible, are too extreme to be considered. A workable solution should consider and respect the users' integrity as well as the rights of the copyright owners[1192].

5.2.5 – Towards a Shared Responsibility

If the goal of copyright owners was controlling copying and distribution and realising royalty payments from networking technologies providers and users, the tactic of aggressive litigation employed

> '*was, to a degree, unnecessary and self-defeating*'[1193].

This simply led to more remote, secure, and de-centralised technologies. Sharman, Grokster, Pirate Bay, and lately Limewire and Newzbin, were still relatively easy targets, much like Napster. However, they provoked a natural and relatively easy strategic response—the moving of technology providers towards different jurisdictions. Moreover, the modern generations of networking technologies are open-source, free of charge, and particularly difficult—if not impossible—to monitor and block[1194]. Traditional theories of secondary liability are becoming insufficient[1195], and the problem self-perpetuating[1196]. Fighting online copyright infringement through standard courts' ruling has so far proved to be inadequate, slow and costly. Thus, some argue that a solution should be established in collaboration with internet access providers.

5.3 – Collaboration with Internet Access Providers

During recent years, different roles have been suggested for internet access providers, including: disclosing the identities of alleged infringers, enacting filters and traffic

[1191] A logic bomb is a software which start a malicious function upon specified conditions. For instance, it could delete the entire hard-drive whenever an unauthorised file is downloaded.
[1192] As suggested in Para. 5.1.1.
[1193] Hays, T. [2007], *op.cit.* 20.
[1194] Those changes were predicted by Winn-Wrathall [2000], *Who owns the customer? The emerging law of commercial transactions in electronic customer data*, 56 Business Law, 213.
[1195] *Ibid.*
[1196] For early analyses: McEvedy, [2002], *op.cit.* 65; Koelman, K. [2000], *Online intermediary liability*, in Hugenholtz, P.B. (ed.) [2000], *op.cit.* Julià-Barceló-Koelman [2000], *Intermediary liability in the E-Commerce Directive: so far so good, but it's not enough*, Computer Law & Security Report, 231.

management, and warning users concerning the illegality of file-sharing[1197]. The French and British 'graduated responses' are recent examples of the attempt to address online copyright infringement with the collaboration of the intermediaries, which is currently under discussion at EU[1198], international[1199] and national[1200] levels. The popularity of this approach and the reason similar modules are becoming popular is generally owing to the combination of a strong political message—copyright must be respected and infringement will be prosecuted—accordingly, splitting the associated costs of enforcement between copyright owners and the internet access providers. This concept is based on the assumption that:

> '*Rather than new copyright rules, an alternative enforcement system is needed*'[1201].

The 'graduated response' can result from a statute, codes of practices, industry agreements, or otherwise ordered by a court. The approach is not without precedent. An example is the ICANN Uniform Dispute Resolution Policy, which many suggest could be a quick and effective dispute resolution system for online copyright infringements[1202]. However, the aim ICANN is to resolve existing disputes, whilst the 'graduated response' intends to reduce copyright infringements focusing on the pre-litigation phase[1203].

5.3.1 –France 'Olivennes', 'Three Strikes' or 'Graduated Response'

The '*Création et Internet*' law established a new government agency called HADOPI[1204] which had the objective to collect the IP address of alleged infringers sent

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[1197] Edwards, L. [2009], *op.cit.* 81.

[1198] For instance, the European Commission's Consultation and the 2008 Communication on '*Creative Content Online in the Single Market*'.

[1199] For instance, the ACTA negotiation. Para. 5.2.6.6.

[1200] Italy, Germany, Sweden and New Zeeland are planning similar proposals, as well as the UK and Ireland which are discussed below. Rudkin-Binks-Malbourne [2009], *The new 'three strikes' regime for copyright enforcement in New Zeeland – requiring ISPs to step up to fight*, 20(4) Ent.L.R. 146-149.

[1201] Strowel, A. [2009], *Internet piracy as a wake-up call for copyright law makers- Is the 'graduated response' a good reply? Thoughts from a law professor 'who grew up in the Gutenberg Age'*, WIPOJ 1, 75-86, 78.

[1202] Lemley-Reese [2004], *op.cit.*; Christie, A. [2002], *The ICANN domain name dispute resolution system as a model for resolving other intellectual property disputes on theiInternet*, 5 Journal of World Intellectual Property 105; Helfer-Dinwoodie [2001], *Designing non-national systems: the case of the uniform domain name dispute resolution policy*, 43 William & Mary L.Rev. 141. Kabat, A.R. [1998], *Proposal for a worldwide internet collecting society: Mark Twain and Samuel Johnson Licenses*, 45 J.C.S.U.S.A. 329, 341.

[1203] Strowel, A. [2009], *op.cit.*

[1204] *Haute autorité pour la diffusion des oeuvres et la protection des droits sur internet* (High Authority for the Diffusion of Works and the Protection of Rights on the Internet). www.laquadrature.net/HADOPI. [15/08/2010].

by copyright owners and to subsequently contact the relevant internet access providers. Upon receipt of this information, the internet access providers would send the alleged infringers an email in the first instance, subsequently followed by a registered letter, warning them about the consequences of their actions. Finally, if the users were found to continue with the infringing activities, the internet access provider would then disconnect their internet access for a period of three to twelve months[1205]. Moreover, special rules are defined in order to circumvent data protection issues, thereby allowing certain private parties to collect personal data and to transmit them to the authority[1206]. The National Assembly later rejected the HADOPI bill, simply because it was against the 'innocent until proven guilty' principle and the users' right to access information[1207]. The latter point is of great interest:

> '*Freedom of expression and communication is so valuable that its exercise is a prerequisite for democracy and one of the guarantees of respect for other rights and freedoms; attacks on the exercise of this freedom must be necessary, appropriate and proportionate to the aim pursued'*[1208].

Notwithstanding these remarks, the government resubmitted the law, HAPODI 2[1209], creating a 'fast-track' procedure before a judge. Under the current and applicable version of the law, the role of HADOPI is limited to prevention, whilst enforcement is left to ordinary courts. The law introduced a new statutory obligation for internet subscribers to control their internet connection, requiring users not to use their connection to reproduce or communicate to the public—including making available—protected works[1210]. This monitoring obligation also requires subscribers to prevent third parties from infringing copyright through their connection. Upon a breach of this obligation, HADOPI would then send an email to internet subscribers through the internet access provider explaining the alleged infringer's legal obligation and the penalties he/she would incur for further breaches—the first strike. Upon a further breach experienced within six months, HADOPI would then send a second email along with a recorded-delivery letter—thereby comprising the second strike. Upon a further breach—and consequent third warning—HAPODI would then report the infringer to a judge,

[1205] Users would still have to pay the subscriptions fees– '*double peine'* provision. A black-list would preclude them from obtaining access from another provider.
[1206] The Law on 'Informatics and the Protection of Freedoms' of 6 January 1978 regulates the collection and processing of the IP addresses. Article 9 allows some legal entities representing the right owners to collect/process the data needed to enforce copyright. Strowel, A. [2009], *op.cit.* 79.
[1207] Phillips, J. [2009], *Three strikes … and then?* 4(8) J.I.P.L.&P. 521.
[1208] Conseil Constitutionnel Decision 2009-580 DC, June 10 2009.
[1209] Law No.2009-669 of 12 June 2009 favouring the diffusion and protection of creation on the internet (Official Journal, 13 June 2009).
[1210] Article L. 336-3 of the Intellectual Property Code.

who would then be in a position to decide on the case following a non-adversarial hearing[1211]. The subscribers appear to have limited possibilities to challenge such an accusation. The sanctions include a fine, imprisonment, and/or suspension of the internet access.

There are serious concerns regarding the consequences for subscribers of Wi-Fi connections—in particular open Wi-Fi connections, such as those commonly offered in public places—when the infringement is committed by third parties who access without authorisation. HADOPI sanctions the subscriber, not the infringer. Moreover, the notice's process is based upon an indirect detection system[1212], which is arguably inaccurate and may consequently lead to litigation against innocent users[1213]. Most importantly, there are concerns regarding the strong limitations of the freedom of expression, which includes freedom to access the internet, and communication[1214].

> '*The freedom of expression does not include a right to access a particular protected work*'[1215]; [excluding exceptional circumstances[1216]. However, it includes a] '*right to receive and impart information and ideas without interference by public authority and regardless of frontiers*'[1217].

In a democratic society, limitations to internet access should be imposed under strict conditions: for instance, they should be prescribed law, necessary, and justifiable[1218]. However, users' 'freedom of expression' is not the only argument to challenge the graduated response approach. For instance, as discussed in Chapter Two, the substantial investment undertaken by governments worldwide shows how the internet today plays a fundamental role in the global economy[1219]. Technologically advanced, widespread, cheaply accessible and reliable network infostructures enhance

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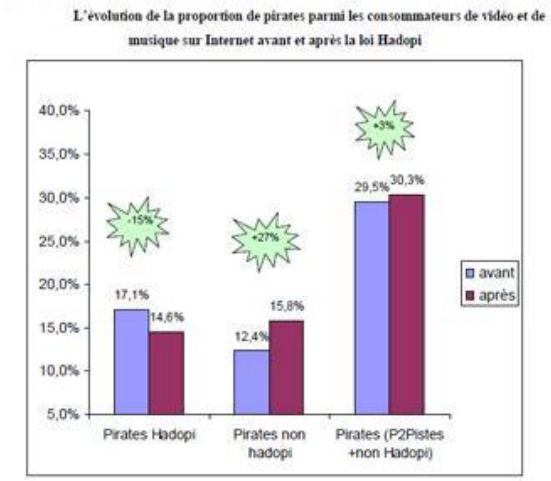
[1211] Decisions are expected to be made within five minutes. Baden-Powell, E. [2009], *Download and out in Paris and London*, 193 Copyright World, 12-14, 13.
[1212] Para 5.2.4.2.
[1213] Patry, W.F. [2009], *op.cit.* 13.
[1214] Strowel, A. [2009], *op.cit.* 81. '*The evolution of the internet proves that it is becoming an indispensable tool for promoting democratic initiatives, a new arena for political debate* […], *a key instrument* […] *for exercising freedom of expression* […], *and a mechanism for promoting digital literacy and the dissemination of knowledge* […]'. European Parliament recommendation of 26 March 2009 to the Council on strengthening security and fundamental freedoms on the internet (2008/2160(INI)), www.europarl.europa.eu. [15/08/2010].
[1215] Strowel-Tulkens [2005], *Freedom of expression and copyright under civil law: of balance, adaptation and access*, in Griffiths-Suthersanen (ed.) [2005], *Copyright and free speech*, Oxford University Press, 287–313.
[1216] *Time Inc v. Bernard Geis Associates*, 293 F.Supp. 130 (SDNY 1968), about the film on the assassination of President Kennedy.
[1217] Art.10(1) European Convention on Human Rights. For instance, *Khurshid Mustafa et Tarzibachi v. Sweden*, 16 December 2008 (23883/06); *Autronic AG v. Switzerland*, 22 May 1990, www.echr.coe.int. [15/08/2010].
[1218] Strowel, A. [2009], *op.cit.* 82.
[1219] Para. 2.4.1.

productivity, but this requires uninterrupted connectivity. Therefore, disconnecting users from the internet may undermine their 'integrity'[1220] not only potentially infringing their freedom of expression, but also their business and financial activity with potential direct economic consequences[1221]. Finally, it should be underlined how the margin of error in the identification of the potential infringers is hardly acceptable[1222], and there is a tendency to overlook the fact that the notice of infringement generated by the copyright owners are simply 'red flags' over potential unauthorised uses of protected materials and not un-appealable infringement sentences.

Nevertheless, a study reveals that file-sharing traffic grew by 3% between September and December 2009—despite HADOPI—and that 30.3% of internet users in France still infringe copyright[1223] (Figure 22).

Figure 22 - Effect of HADOPI on Piracy[1224]



The figure above shows how the 'menace' of HADOPI did not change French downloading habits but rather shifted the sources used to obtain unauthorised copies of protected works. The use of file-sharing software decreased from 17.1% to 14.6% of internet users, but only because they increasingly migrated to streaming services and

[1220] Para 5.1.1.
[1221] Bridy, A. [2010], *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 Oregon L.Rev. 81.
[1222] *See*, for instance, *Media CAT Ltd v Adams & Ors* [2011] EWPCC 6 (08 February 2011). www.bailii.org/ew/cases/EWPCC/2011/6.html. [15/03/2011].
[1223] Dejean, S. [2010], *Une première évaluation des effets de la loi Hadopi sur les pratiques des Internautes français*, University of Rennes. www.marsouin.org/IMG/pdf/NoteHadopix.pdf. [15/08/2010].
[1224] *Ibid.* 12.

file-hosting sites[1225], which are not covered by the HADOPI[1226]. Notably, there are several alternative ways to circumvent HADOPI circulate over the internet[1227].

> '*None of this is of any substance anyway. The feasibility of disconnecting a person from the internet, and any attempt to police and enforce such a ban, smacks of the futile. It does not require much imagination or initiative to conjure up ways of returning and remaining online, and the rate at which telecommunications technology facilitates greater ease of both terrestrial and mobile broadband connection suggests that, even if a ban were feasible today, it would be meaningless tomorrow*'[1228].

Finally, the costs of the system should be noted[1229]: the planned budget was Euro 6.7 million per year; accordingly, internet access providers predict costs amounting to Euro 70 million per year[1230]; the cost of operating the infrastructure is approximately Euro 10-20 million per year[1231]. In addition, it should be considered that there are costs associated with the sending of thousands of warnings on a daily basis[1232], as well as the costs for increasing the justice system's capacities to handle the appeals[1233]. It is submitted that, in all likelihood, such sums could have been better invested into compensating copyright owners.

5.3.2 – Digital Economy Act 2010

In the Digital Britain Report[1234], there was no mention of disconnecting users from the internet. However, it was suggested at least to throttle copyright infringers' connections speed[1235]. Early proposals included an obligation for internet access providers to notify infringers, and to maintain data relating to such, as well as a code of practice to be complied by both internet access providers, and right holders in order to trigger actions[1236]. Notwithstanding the opposition of internet access providers and consumer

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[1225] Such as Rapidshare and Megaupload.
[1226] http://torrentfreak.com/piracy-rises-in-france-despite-three-strikes-law-100609. [15/08/2010].
[1227] For instance, '*6 Ways Savvy Internet Users Will Neutralize Hadopi*'. http://torrentfreak.com/six-ways-file-sharers-will-neutralize-3-strikes-100102. [15/08/2010].
[1228] Phillips, J. [2009], *op.cit.* 521.
[1229] www.laquadrature.net. [15/08/2010].
[1230] Estimation from the France Superior Council for IT of the Ministry for Economics.
[1231] Grassmuck, V. [2009], *op.cit.*
[1232] Estimation from the French Minister of Culture. www.rfi.fr/actude/articles/111/article_1312.asp. [15/08/2010].
[1233] Grassmuck, V. [2009], *op.cit.*
[1234] Department of Culture, Media and Sport [2009], *Digital Britain report*. www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf. [15/08/2010].
[1235] Copyright World News [2009], *Three strike rule for infringers struck down but not out*, 192 Copyright World, 7.
[1236] www.berr.gov.uk/files/file51703.pdf. [15/08/2010]. A parallel proposal was five-step scheme of UK Music, based on warnings and temporary, limited suspensions: warning notice; interactive notification

organisations, such as the Openright Group[1237], on 7 April, the UK Parliament nevertheless passed the Digital Economy Act[1238] to fight

> *'online infringement of copyright* […] *via a two-stage process. First by making legal action more effective and educating consumers about copyright on-line. Second through reserve powers, if needed, to introduce technical measures, such as disconnection'*[1239].

Clauses 4 to 16 introduced sections 124A to 124N to the Communication Act 2003. The system imposed is different that of France, and is commonly referred to as the 'two-stage' or 'three-step' rather than 'three strikes'[1240]. The first stage requires two initial obligations for the internet access providers[1241], which will be required to send letters to alleged infringing subscribers after a notification from the copyright owners[1242], and to accordingly collect information about 'serious' infringers[1243]. Upon receipt of a court order, the provider must then disclose this information to the copyright holder who, after issuing a 'final warning', can then proceed with legal action against the alleged infringer. The practical details will be agreed upon by the relevant entities in a Code of Practice approved by Ofcom[1244]. The second stage will start in April 2011 following the assessment of the Secretary of State and Ofcom[1245]. The Secretary could oblige internet access providers to impose limits to the speed of the alleged infringers' internet connection, suspend the service or limit it in other ways[1246].

It is debateable whether or not such a system will fulfil the Government's objective to reduce online infringing activity by 70%. Already, in 2005, the BPI has sent hundreds of thousands of instant messages, such as the one shown in Figure 23 below, to users uploading files in the UK with arguably scarce results.

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and web redirection; 72 hours suspension; one month suspension; two plus two suspension. www.ukmusic.org. [10/01/2010-No Longer Available].

[1237] www.openrightsgroup.org. [15/08/2010].

[1238] www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1. [15/08/2010].

[1239] Queen Speech–Digital Economy Bill. www.number10.gov.uk/other/2009/11/queens-speech-digital-economy-bill-21348. [15/08/2010].

[1240] Baden-Powell, E. [2009], *op.cit.* 13.

[1241] Koempel, F. [2010], *Digital Economy Bill*, 16(2) C.T.L.R. 29-43.

[1242] §124A Communications Act. This is the same as the HADOPI first-strike.

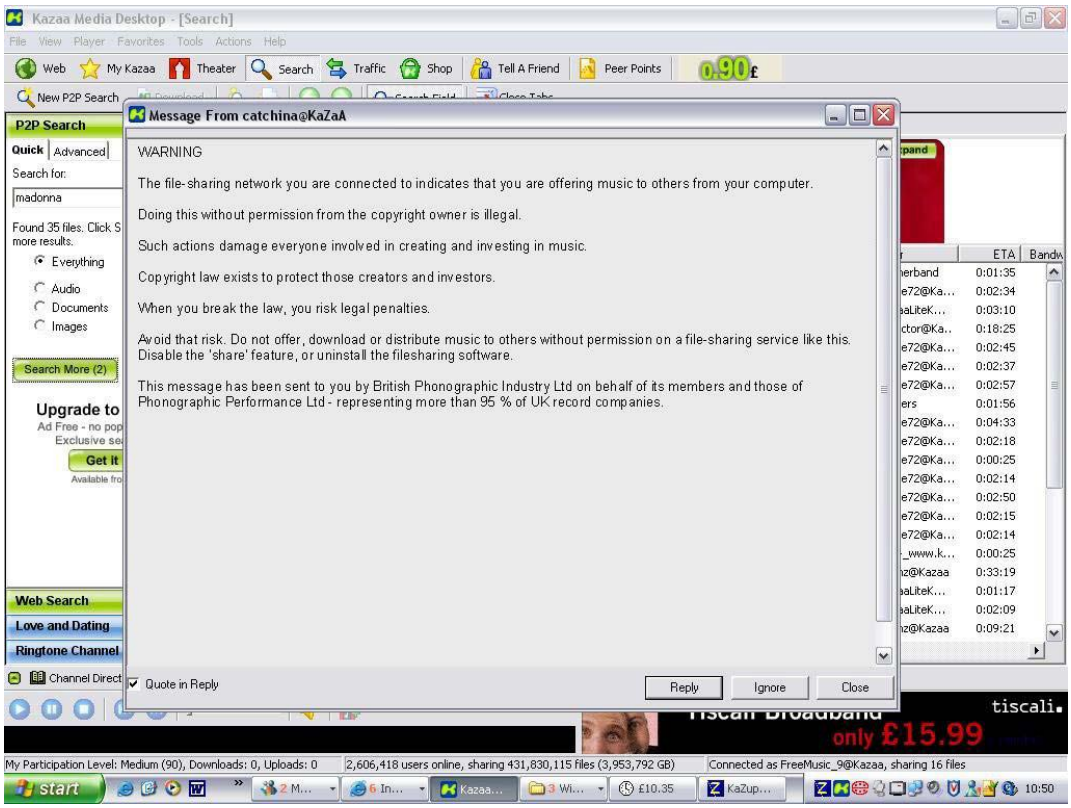
[1243] §124B.

[1244] §124C. In case such agreement is not reached, Ofcom will impose a code of practice after the approval of the Secretary of State. §124D-E. Ofcom is also required to prepare reports on the progress of the notification scheme. §124F.

[1245] §124H.

[1246] §124G-H-I. In addition, Clause 17: '*The Secretary of State may by regulations make provision about the granting by a court of a blocking injunction in respect of a location on the internet which the court is satisfied has been, is being or is likely to be used for or in connection with an activity that infringes copyright*'.

Figure 23 - Instant Messages



5.3.3 – Ireland

Eircom, the main internet access provider, agreed to the three-strikes-approach as part of a settlement agreement[1247]. The other Irish internet access providers, however, did not follow this example. The association of internet service providers of Ireland made it clear that they would take such action only if imposed by legislation[1248] and lately this was confirmed by the High Court[1249]

This formula, known as 'private ordering' is not unprecedented in copyright law. In a sense it is understandable that copyright owners failing to succeed in the enforcement of their right through the law making process search for a solution elsewhere[1250]. The private ordering approach may strongly expand, or limit, the scope of protection beyond the carefully balanced boundaries of copyright protection. The use of private ordering may be costless in situations where the copyright owners want to limit

[1247] *EMI (Ireland) Ltd v. Eircom Ltd.* [2010] IEHC 108 (HC (Irl)). Nagle, E. [2010], *To every cow its calf, to every book its copy - copyright and illegal downloading after EMI (Ireland) Ltd. and Others v. Eircom Ltd*, 21(6) Ent.L.Rev. 209-214.
[1248] Statement of 13 March 2009. www.ispai.ie/docs/20090313copyright.pdf. 17/6/09.
[1249] *EMI Records (Ireland) Ltd. et Al. v. UPC Communiactions Ltd* , Charleton J. 11 October 2010.
[1250] Dussollier, S. [2007], *Sharing access to intellectual property through provate ordering*, 82(3) Chicago-Kent L.Rev. 1391-1435, 1392.

their own rights. However the situation is different when through private ordering the parties involved want to expand the scope, application and enforcement of copyright protection. In the graduated response scenario private ordering may have a cost for society as a whole that might be detrimental. This approach potentially jeopardises the rights and interests of third parties, undermining the balance of interests which is at the heart of the copyright regime. Users, for instance, do not take part in the drafting of this agreement, nor they are involved in the negotiation between the internet access providers and the copyright owners. Their interests cannot be taken into full account[1251].

5.3.4 – EU Telecom Package

The key objective of the Telecom Package was to create a new telecommunication system throughout Europe which would increase the speed and access to communication technology for EU citizens[1252]. It caused heated debate, in particular concerning the issue of the right of access to the internet, which was eventually compromised[1253]. The amended Universal Service Directive[1254] states:

> '*This Directive neither mandates nor prohibits conditions, imposed by providers of publicly available electronic communications and services, limiting end-users' access to, and/or use of, services and applications, where allowed under national law and in conformity with Community law, but lays down an obligation to provide information regarding such conditions. National measures regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, including in relation to privacy and due process, as defined in*

[1251] Dinwoodie, G.B. [2007] The *International Intellectual Property System: Treaties, Norms, National Courts and Private Ordering*, in Gervais, D. [2007], *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era*, Oxford University Press. Bridy, A. [2010], *op.cit*. Also Strowel, A. [2009], *Internet Piracy as a Wake-up Call for Copyright Law Makers--Is the 'Graduated Response' a Good Reply?* 1 W.I.P.O.J. 75; and Yu, P.K. [2010], *The Graduated Response*, 62 Fla. L.Rev. 1373.

[1252] It includes the following. Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office. Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

[1253] 'Telecoms Reform Package', COM (2007) 697, COD/2007/0247. Amendment No. 138/46. www.ip-watch.org/weblog/2009/05/06/eu-parliament-signals-against-three-strikes. [15/08/2010]. Grassmuck, V. [2009], *op.cit.*

[1254] Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services.

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms'[1255].

This should be read in conjunction with Recitals 29—limitations of user access—and 30—no requirement to monitor. Notwithstanding the on-going arguments concerning internet freedom, net neutrality and the compatibility of proposed and enacted legislations regarding internet disconnection[1256], it can be argued that:

'*Three-strikes-laws', which could cut off Internet access without a prior fair and impartial procedure or without effective and timely judicial review, will certainly not become part of European law*[1257].

The principle appears clear. Nevertheless, it is submitted that it will be a matter of interpretation determining at a national level what is 'fair and impartial'.

5.3.5 – ACTA

During the 'stealth'[1258] phase of the Anti-Counterfeit Trade Agreement negotiations, it was suggested that the draft internet Chapter include provisions regarding internet access providers' policy for 'terminating subscriptions and accounts' and 'procedures governing the removal or disabling of access to information'[1259]. In April, 2010, a 'Public Predecisional-Deliberative Draft' was published[1260], followed by the EU Trade Commissioner declaration that:

'[…] *the negotiation draft shows that specific concerns, raised in particular by the civil society, are unfounded. No party in the ACTA negotiation is proposing that governments should introduce a compulsory '3 strikes' or 'gradual response' rule to fight copyright infringements and internet piracy*'[1261]

However, Article 2.18, 3(a) Option 2, still includes the 'possibility of establishing procedures' for 'the removal/disabling of access to information'. It has also been pointed out by the Digital Civil Rights in Europe that the proposal to limit the liability of internet access providers' immunities upon the adoption of policies to control their

[1255] Article 1(3) as amended by Directive 2009/136/EC.
[1256] Domhnall, D. *et al*. [2010], *Reform of European electronic communications law: a special briefing on the radical changes of 2009*, 16(4) C.T.L.R. 102-112.
[1257] European Commission MEMO/09/513, 20 November 2009.
[1258] Blakeney, M-L [2010], *Stealth legislation? Negotiating the Anti-Counterfeiting Trade Agreement (ACTA)*, 16(4) International Trade Law & Regulation, 87-95.
[1259] www.laquadrature.net/wiki/acta_20100118_version_consolidated_text#page_25. www.ip-watch.org /weblog/2010/03/29/leaked-acta-text-shows-possible-contradictions-with-national-laws. [15/08/2010].
[1260] europa.eu/rapid/pressReleasesAction.do?reference=IP/10/437&format=htmlaged=0&language=EN&guiLanguage=en. http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf. [15/08/2010].
[1261] http://trade.ec.europa.eu/doclib/press/index.cfm?id=552. [15/08/2010].

networks is still in the text[1262]. At this point in time, no consolidated text is available.

5.3.6 – Towards a Use without Liability

> '*George Orwell's vision of the loss of privacy assumed both a powerful technology and a powerful state. Indeed the State was powerful because it was able to control and exploit the technology. As symbolised by Big Brother, the state was able not only to collect information but to restrict the flow of information. Big Brother represented a model of powerful government with total control over a mass medium'*[1263].

The aforementioned proposals appear to be disproportioned[1264]; they increase the difficulties in terms of maintaining the delicate balance of interest within copyright law[1265] and between copyright law, human rights[1266], competition law, and e-commerce law[1267]. They will ultimately affect legitimate e-commerce[1268], as well as the potentially-illegal market[1269] for both legitimate and dubious goods and services[1270], without taking into consideration the social and political contexts.

File-sharing has undoubtedly normalised over time. What becomes normal becomes tolerable and, for a large portion of users, acceptable[1271]. Low-level illegality became part of life online[1272]. There is no published data concerning internet access provider knowledge regarding the behaviour of their customers[1273]. Thus, the impacts of

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[1262] www.edri.org/edrigram/number8.8/acta-transparency-european-comission. [15/08/2010].
[1263] Katsh, M.E. [1995], *Law in a digital world*, Oxford University Press, 227.
[1264] Patry, W.F. [2009], *op.cit.* 14.
[1265] In particular, '*access to digital content and information is not only an economic problem, but also a cultural, social and political issue*'. Helberger, N. [2005], *Digital rights management from a consumer's perspective*, 8 IRIS PLUS, www.obs.coe.int/oea_publ/iris/iris_plus/iplus8_ 2005.pdf. [15/08/2010].
[1266] Art.10 (freedom of expression) of the European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended, CETS n.005; or the US constitutional free speech provisions applied in the context of a defamation complaint, but otherwise applicable to contributory infringement, in *New York Times* v. *Sullivan* 376 U.S. 254 (1964).
[1267] Benkler, Y. [2001], *A political economy of the public domain: markets in information goods versus the marketplace of ideas*, in Dreyfuss-Zimmerman-First (ed) [2001], *Expanding the boundaries of intellectual property law*, Oxford University Press, 267-294. Lichtman-Landes [2003], *Indirect Liability for copyright Infringement: an economic perspective*, 16 Harvard Law &Technology, 395.
[1268] The growth of legal online file-sharing may make copyright ownership of music recordings irrelevant as a commercial commodity. Some artists have bypassed the record industry and gone straight to online distribution, free of charge, to gain popularity. Alleyne-Perry, [2005], *Pop band goes to no. 1 by clicking with fans online*, Daily Telegraph (24 October).
[1269] Downloading had become so commonplace it now features in measurements of contemporary culture. Shannon, V. [2004], *New digital top 20 list: song downloads stand up to be counted*, International Herald Tribune, 2 September, 13.
[1270] Drier notes these 'psychologic features' and relates them to the 'incentive to create'. Drier, T. [2001], *Balancing proprietary and public domain interests: inside or outside of proprietary rights?* in Dreyfuss-Zimmerman-First [2001], *Expanding the boundaries of intellectual property law*, Oxford University Press, 295, 316.
[1271] Bailey, A. [2000], *op.cit.*
[1272] Hays, T. [2007], *op.cit.* 15-21.
[1273] Edwards, L. [2009], *Should ISPs be compelled to become copyright cops?* 6 Computer and Law, 29.

these proposals cannot be properly estimated.

On the one side, the idea of monitoring every transmission, although possible in certain circumstances, is not a favourable solution. Internet access providers rely upon file-sharing. They are 'copyright dependent' in the sense that the volume of their traffics, and therefore their income, would be considerably smaller without copyright infringement; this does not mean it is acceptable for them to flourish on illegality, but rather suggests that a total collaboration of internet service providers is improbable. On the other hand, users have grown accustomed to a certain degree of control and methods concerned with avoiding what is already common practice. Much of the information concerning the internet is empirical or anecdotal; however, studies show how the internet is the main information source for most of its users[1274]. Expanding across the population regardless of income, education, age, ethnicity or gender the internet is also a powerful democratic tool. The internet appears to be 'indispensable', and banning someone from the internet for copyright infringement could be an extreme punishment. Courts, agencies and human rights' watchdog organisations have already expressed their concerns: a member of modern society cannot afford to be without internet access[1275]. As indicated by the European Parliament:

> '*Internet is a vast platform for cultural expression, access to knowledge, and democratic participation in European creativity, bringing generations together through the information society…* [The Member States shall] *avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of Internet Access*'[1276].

Finally, the methods used to indentify infringers are debateable, as well as the liability for third party infringements. For instance, in the common scenario of a family- or flat-sharers subscribing to a single internet connection, copyright infringements will cause the subscriber to be banned, even when he/she is not the infringer, with consequences for every family member or flat-mate accessing the internet from the same connection.

Notwithstanding the above arguments against this approach, a 'use with control

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[1274] Horrigan-Raine [2002], *Pew internet & American life project, counting on the internet*, 5 www.pewinternet.org/~/media//Files/Reports/2002/PIP_Expectations.pdf. [15/08/2010].

[1275] In the US, for instance: *US v. Peterson*, 248 F.3d 79, 83-84 (2nd Cir. 2001), *US v. Freeman*, 316 F.3d 386, 391-392 (3rd Cir. 2003), *US v. White*, 244 F.3d 1199, 1206-1208 (10th Cir. 2001). Habib, J. [2004] *Cybercrime and Punishment: Filtering Out Internet felons*, Fordham Intellectual Property Media & Entertainment L.J., 1051-1092.

[1276] European Parliament resolution of 10 April 2008 on cultural industries in Europe (2007/2153-INI), www.europarl.europa.eu/sides/getdoc.do?pubref=-//ep//text+ta+p6-tA-2008-0123+0+doc+xml+v0//en. [15/08/2010].

and liability' solution would nevertheless still leave the following issues open[1277]: international harmonisation; exclusive rights[1278]; user rights or limitations[1279]; intermediary liability[1280]; secondary or indirect liabilities[1281]; and licensing models[1282].

5.4 – Use with Control without Liability

The benefits of a use with control without liability are numerous. Notwithstanding the reports of sales decreasing since the advent of networking technologies, users' demand for copyright works has increased[1283]. A viable solution aimed towards satisfying this demand could be licensing: it was deemed suitable for the radio and television broadcasting, and would probably be suitable for networking technologies, as proven by the late cooperation between service providers and some copyright owners[1284]. Legal

[1277] List based on Fitzgerald's 11 points for 2010. Fitzgerald, B. [2008], *op.cit.*

[1278] Boyle, J. [1997], *op.cit*. Reuveni, E. [2007], *Authorship in the age of conducer*, 54 J.C.S.U.S.A. 286. Samuelson, P. [2007], *op.cit*.

[1279] *CCH Canadian Ltd v. Law Society of Upper Canada* 2004 S.C.C. 13 [2004] 1 S.C.R. 339; (2004), 236 D.L.R. (4th) 395; Cohen, J.E. [2005], *The place of the user in copyright law*, 74 Fordham L.Rev. 347. *Authors Guild v. Google Print Library Project*, Case Number: 1:2005cv08136, filed on 20th September 2005, SDNY. *Perfect 10 Inc v. Amazon Com Inc* 487 F.3d 701 (9th Cir, 2007). Fitzgerald, B. *et al*. [2007], *op.cit.* Ch.4; Fitzgerald, B. *et al*. [2006], *Creating a legal framework for copyright management of open access within the Australia academic and research Sector*, OAK Law Report No.1, August. www.oaklaw.qut.edu.au. [15/08/2010].

[1280] Lemley, M.A. [2007], *Rationalising internet safe harbors*, Stanford Public Law Working Paper 979836, www.law.stanford.edu/publications/details/3657/rationalizinginternetsafeharbors. [15/08/2010]. Fitzgerald B. *et al*. [2008], *Search engine liability for copyright infringement*, in Spink-Zimmer (ed.) [2008], *Web searching: interdisciplinary perspectives*, Springer.

[1281] *Metro-Goldwyn-Mayer Studio Inc. v. Grokster Ltd.*, 125 S.Ct. 2764 (2005) Schumpeter, J. [1942], *op.cit*.

[1282] Lessig, L. [2004], *op.cit.* Fitzgerald, B. *et al*. [2007], *Open content licensing: cultivating the creative commons*, Sydney University Press, eprints.qut.edu.au/archive/00006677. [15/08/2010]. Fisher, W.W. [2004], *op.cit.*; Netanel, N.W. [2003], *op.cit.* European Commission [2006], *Statement of objections to the International Confederation of Societies of Authors and Composers (CISAC) and its EEA members*, MEMO/06/63 (7 February); European Commission [2007], *Commission market tests commitments from CISAC and 18 EEA collecting societies concerning reciprocal representation contracts*, IP/07/829 (14 June).

[1283] Some critics argue that the entertainment industries losses are not directly attributable to networking technologies. Stokes-Rudkin-Binks [2003], *Online music: P2P aftershocks*, 14(6) Ent.L.Rev. 127, 127; Hervey, S. [2002], *The future of online music: labels and artists*, 15 Transnational Law, 279, 283; Mousley, M.C. [2003], *Peer-to-peer combat: the entertainment industry's arsenal in its war on digital piracy*, 48 Villanova L.Rev. 667, 671-4; Lemley, K.M. [2003], *op.cit.* 613. Bate, C. [2000], *What a tangled world wide web we weave: an analysis of linking under Canadian copyright law*, 60(1) University of Toronto L.Rev. 21, Para. 15; Racicot, M. *et al*. [1997], *The cyberspace is not a 'no law land': a study of the issues of liability for content circulating on the internet*, Industry Canada, strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/vwapj/1603118e.pdf/$FILE/1603118e.pdf. [15/08/2010]. MacMillan, F. [2007], *op.cit.* 491; Schulman, B.M. [1999], *The song heard round the world: the copyright implications of MP3s and the future of digital music*, 12 J.O.L.T. 589, 629.

[1284] In the US, Google has agreed licences with a number of copyright owners, including CBS, BBC, Universal Music Group, Sony Music Group, Warner Music Group, NBA and The Sundance Channel. www.youtube.com/t/about. In Germany Google has agreed a licence with GEMA. www.gema.de/presse/pressemitteilungen/pressemitteilung/?tx_ttnews%5Btt_news%5D=68&tx_ttnews%5BbackPid%5D=73&cHash=d91e3a4737. In France, DailyMotion has agreed a licence with SPPF. www.vod-fr.com/133-dailymotion-partenariat-pour-rmunrer-les-producteurs-decontenus.html. [15/08/2010].

access to protected works online would facilitate access to culture and thereby provide the legal certainty deemed necessary to take full advantage of networking technologies, thereby benefitting society as a whole[1285]. Authors and performers would reach a global audience at virtually no costs[1286]; copyright owners would receive royalties whilst keeping some mechanisms for controlling and blocking infringing content with the collaboration of the online service providers. They would also save the significant costs in consideration of monitoring and enforcement. The service providers could offer—or at least continue to offer—a wide range of content increasing the number of their users, and consequently increasing the revenues. Furthermore, users could access content legally. Several business models have been suggested, and these are discussed in the following.

5.4.1 – Open Access Licences

A number of different schemes belong to this category, including copyleft, creative common, general public licence, and open source. The analysis of these models ultimately reaches beyond the scope of this work, but are nevertheless important. Their principal feature is that the copyright owner states in advance the uses he/she would like to authorise without further consent or licence fee[1287]. This form of licensing and the phenomenon itself of

> '*volunteer produced and freely disseminated information is a significant feature of the digitally networked environment*'[1288].

However, the majority of copyright owners—and in particular the entertainment industries—tend to reject such models.

5.4.2 – Voluntary Licence Schemes

Copyright owners could join and offer 'voluntary collective licences'[1289]. They could form a new collecting society—or use existing ones—invite authors, performers, and

[1285] Piasentin, R.C. [2006], *op.cit.*
[1286] '*Many new artists are willing to allow their works to be freely shared among users provided the artist receives credit as the creator of the work, but under the current industry regime, the entertainment industries refuse to allow such sharing of their works*'. Kretschmer, M. [2003], *op.cit.* 339-40. Also Schulman, B.M. [1999], *op.cit.* 629.
[1287] MacQueen, H.L. [2009], *op.cit.* 221.
[1288] Cahir, J. [2004], *The withering away of property: the rise of the internet information* commons, 24(4) O.J.L.S. 619-641.
[1289] This is how the 'problem' with radio was 'solved'.

publishers to join it, giving blanket licenses on non-discriminatory terms to everyone—service and software providers, or users directly—in exchange for a fee. Licences could be offered through collecting societies, internet access and/or online service providers or the file-sharing software providers, or a combination of such entities[1290]. The collecting society would then divide the fees amongst its members. No changes to copyright law are required, but it would be compulsory that all copyright owners join.

5.4.2.1 – EFF 'A Better Way Forward'. - Since 2003, the Electronic Frontier Foundation has proposed a blanket voluntary collective licence. Their proposal is straightforward[1291]: the music industry should form a number of collecting societies and offer the user a 'licence to share' in exchange of a regular fee[1292]. The sum collected would be divided between the copyright owners depending on their works' popularity. Users could acquire a licence through a website, or it could be included in the services offered by internet access and software providers. The advantages of such a system are underlined by EFF itself: copyright holders are remunerated, and the system does not involve new legislation. The proposal is limited to music file-sharing. It leaves many issues uncovered, but this could be solved by generalising the proposed licensing system[1293]. However, a major lacuna is that users could simply decide not to pay, which would force copyright owners to continue to search for, and accordingly enforce, their rights against the remaining 'free-loaders'.

5.4.2.2 – GILA System. - Professor Sterling's global internet licensing has a more general and direct approach to such issues. It covers every digital work and is global[1294]. A global internet licensing agency (GILA) should be establishment by existing collecting societies to administer the licensing of protected material on the internet without territorial restriction. GILA would receive mandate to administer the making available right from the copyright owners directly or otherwise from the existing collecting societies. All this material would ultimately form the GILA repertoire. Every

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[1290] Gervais, D.J. [2005], *The price of social norms: towards a licensing regime for file-sharing*, 12 J.I.P.L. 39.
[1291] Lohmann, von F. [2008], *A better way forward- Voluntary collective licensing of music file-sharing*, www.eff.org. [15/08/2010].
[1292] The system apparently would generate $3 billion per year to the music industry only in the US. *Ibid.*
[1293] *'If other industries want to form voluntary collecting societies and offer blanket licenses to file sharers, there is nothing to stop them from doing so. Individuals would then be free to purchase the license if they were interested in downloading these materials from the file-sharing networks*', *ibid.*
[1294] www.qmipri.org/documents/Sterling_JALSGILASystem.pdf. [15/08/2010].

item would be provided with a 'GILA Identification Number' (GIN), thereby permitting the administration of rights and the tracing of online use of such item. The GILA website would then contain the details of every item and of various available licences. Users and technology providers could then apply to GILA to obtain a global licence. The royalties collected would then be distributed amongst the concerned right owners.

In principle the system enables per-use payments to be made to the right owners. However, this proposal relies on global acceptance and a successful identification system (GIN). One of the main characteristics of unauthorised file-sharing is the cost-free act of sharing. Thus, one could argue that a number of users would not apply for the licence but would instead continue sharing, regardless the potential liabilities for copyright infringement, non-GIN files[1295], which would multiply exponentially and consequently nullify the efforts.

5.4.3 - Digital Retailer Models

> *'Since P2P computing takes place on the Internet and all P2P users use ISPs to get access to the Internet, ISPs could play an important role in a possible solution'*[1296].

Sobel suggests a digital retailer model. The internet access providers would have an obligation to monitor users' protected file downloads requiring payment, and bill them for the received content periodically[1297]. This would be achieved by digital watermark or fingerprint embedded within the content itself. The weakness of such an approach is that watermark detection at user level is likely to be ineffective[1298]; the filtering system operated by the internet access provider will increase the associated costs[1299]. In addition, there are privacy concerns, as the internet access provider would keep detailed records of received content for billing purposes; and that this system could create artificially high pricing structures[1300]. However, an important innovation to be noted is the suggested pay-per-redistribution model[1301].

[1295] A file of a GIILA work from which the GIN has been removed or was not present in the first place.
[1296] Sobel, [2003], *op.cit.* 679.
[1297] Sobel adopts an expansive definition of internet service providers. *Ibid.* 682-683.
[1298] Para. 5.2.4.1. Also, Biddle P. *et al*. [2004], *The darknet and the future of content distribution*, http://crypto.stanford.edu/DRM2002/darknet5.doc, 12-14. [15/08/2010].
[1299] Brugidou-Kahn [2005], *Etude des solutions de filtrage des échanges de musique sur internet dans le domaine du Peer-to-peer*, Report submitted to the France Ministry of Culture, 10 March.
[1300] Ganley, P. [2004], *op.cit.*
[1301] Sobel, [2003], *op.cit.* 691.

5.4.4 – Towards a Use without Control

Voluntary collective licensing depends on the participation of all copyright owners, users and facilitators. This is difficult to achieve; therefore, a voluntary solution is improbable. The main critique to this approach is that the national licensing structures do not work well with networking technologies: for instance there is no international or regional licensing system[1302]. There are alternatives; however, it is suggested that they would nevertheless still require the abandonment of the pre-networking technologies concept of 'control', as will be discussed in the following Chapter. Preliminarily, it should be underlined how desiring 'use without control' is different from arguing towards a 'free from copyright internet'.

Some commentators assert copyright law does not fit into the internet[1303]. This being a consequence of a true information society[1304]: '*information wants to be free*'[1305]. They argue that the law is incapable of keeping pace with technological developments. Therefore, technology—not the law—should govern the internet. Some consider copyright law to be inappropriate in the context of digital distribution, and accordingly suggest maintaining copyright law for analogue distribution whilst replacing it with a privilege allowing users to engage in non-commercial activities in the internet context[1306]. Some argue that, in the past, copyright over the internet was superfluous simply because users have their own etiquette. They are responsible and qualified to settle everything without the need of an external intervention of the law[1307]. They argue that

> '*the internet began as and should remain a medium for the free exchange of information, ideas and content*'[1308].

This no-copyright approach forms the basis of 'the Pirate Party'—a political movement started in Sweden and present in the UK[1309] and other European Countries[1310].

[1302] Maxwell, W. *et al*. [2010], *Towards borderless business?* 196 Copyright World, 12-14, 13.
[1303] Barlow, J.P [1994], *op.cit.*
[1304] Phan, D.T.T. [1998], *op.cit*.
[1305] *Ibid.* 206. Interestingly, a similar notion is expressed in *Donaldson v. Beckett* [1774] 4 Burr. 2408, when Lord Camden questioned what happened to thoughts '*if he speaks, and lets them fly out in private or public discourse? Will he claim the breath, the air, the words in which his thoughts are clothed? Where does this fanciful property begin, or end, or continue?*' Wiese, H. [2002], *op.cit*. 390.
[1306] Ku, R.S.R [2002], *op.cit.* 311-24.
[1307] Working Group on Intellectual Property Right [1995], *Intellectual property and the National Information Structure*, Washington D.C. 15.
[1308] Wu, T. [2003], *When code isn't law*, 889 Virginia L.Rev. 679, 722.
[1309] www.pirateparty.org.uk. [15/08/2010].
[1310] They have three core policies: reform copyright and patent law; limit surveillance; defend freedom of speech and freedom to enjoy and participate in the shared culture. www.pirateparty.org.uk. [15/08/2010].

Notwithstanding the arguments pro and against the concern of copyright, it is submitted that networking technologies should be 'free' in the sense that everyone should have access to the medium, and should be able to access such without civil liberties being compromised. Moreover, networking technologies should be neutral in the sense of being free from restrictions on content or modes of communication allowed[1311]. However, they should not be 'free' from copyright. In fact:

> '*It is intellectual property that provides the key to the distribution of wealth, power and access in the information society. The intellectual property regime could make--or break--the educational, political, scientific, and cultural promise of the net … Intellectual Property is the legal form of the information age*'[1312].

Today, a consistent part of the content shared on the internet is protected by copyright and is not authorised. Copyright owners have significant difficulties in convincing users that they should pay for the works they download and access[1313]. Nevertheless, '*Copyright has adapted in the past; it will again*'[1314]

5.5 – Conclusion

Networking technologies undermine copyright owners' control over reproduction and distribution. It is submitted that any attempt to reinstate old rules in relation to enforcement or otherwise concerned with increasing copyright control with alternative methods is an 'exercise in futility'[1315]. The real problem is that the entertainment industries and the collective societies seem to be trapped in business models where content has to be paid for directly. Legal alternatives and civil and criminal enforcement actions have so far failed to decrease traffic over networks, but it appears not to put pressure on copyright owners[1316]. The only consequence is that the unauthorised dissemination of copyright work continues without generating revenues for anyone,

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[1311] The analysis of the concept of network neutrality is beyond the scope of this work, and therefore simply mentioned. Generally, Sidak, J.G. [2006], *A consumer-welfare approach to network neutrality regulation of the internet*, 2(3) Journal of Competition Law & Economics, 349-474; Stromdale, C. [2007], *Regulating online content: a global view*, 13(6) C.T.L.R. 173-178.

[1312] Boyle, J. [2007], *op.cit*.

[1313] Ficsor, M. [1996], *Towards a global solution: the digital agenda of the Berne Protocol and the new instruments*, in Hugenholtz, P.B. (ed) [1996], *The future of copyright in a digital environment*, Kluner. Walker-Sharpe [2002], *Digital rights management*, 18(4) C.L.S.R. 259, 261. OECD [2005], *Working party on the information economy- Digital broadband content: music*. www.oecd.org/dataoecd/13/2/ 34995041.pdf. [15/08/2010]. Strahilevitz, L.J. [2003], *Charismatic code, social norms, and the emergence of cooperation on the file-swapping networks*, 89 Virginia L. Rev. 505, 581-2.

[1314] de Zwart, M. [1996] *Copyright in cyberspace*, Alternative Law Journal 266, 270.

[1315] Ginsburg, J.C. [2001], *op.cit.* 1642.

[1316] Peukert, A. [2009], *A bipolar copyright system for the digital network environment*, in Strowel, A. [2009] *Peer-to-peer file sharing and secondary liability in copyright law*, Edward Elgar, 148-176, 153.

perpetuating and extending the already difficult problems of today's copyright environment[1317]. In January, 2008, the 'Attali Commission'[1318] issued a report on policies to overcome economic growth's restrictions[1319], and subsequently collected hundreds of proposals including a levy on internet use, presented '*as a reconciliation of economic development and free legal downloading*'[1320].

The report suggests that filtering and monitoring conflict with constitutional rights and fundamentally undermine economic growth, and subsequently concluded that a levy on internet access providers would ensure a fair compensation for authors and other copyright owners without penalising internet development[1321]. We continue the investigative journey analysing this approach in the following Chapter.

[1317] Litman, J.D. [2004], *op.cit.*, 33-34
[1318] The Commission for freeing French development.
[1319] Attali, J. [2008], *Rapport de la Commission pour la libération de la croissance française*, www.liberationdelacroissance.fr/files/rapports/RapportCLCF.pdf. [15/08/2010].
[1320] *Ibid.* Objective leading to Action 57.
[1321] *Ibid.* Decision on Action 57.

CHAPTER 6

A Way Forward

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'*You'd better start swimmin' or you'll sink like a stone, for the times, they are a-changing*'[1322]

6.1 - Introduction

As the previous Chapters have shown, a number of scholars have proposed alternatives to the problems described in this work, thereby urging the need for a new system which allows the online dissemination of protected works whilst charging users to compensate authors and other copyright owners[1323]. Arguably copyright, as it is today, does not meet the needs of a functioning information society. A voluntary alternative is not emerging. Therefore, solutions involving a legislative intervention-such as compulsory licenses, mandatory collective administration and remuneration systems-become relevant[1324]. The spectrum of possibilities is reduced, although remains wide and appropriate[1325] to preserve the

> *'balance between the right of authors and the larger public interest, particularly education, research and access to information*'[1326].

It is submitted that 'control over dissemination' is, in all likelihood, an out-dated concept, highly costly, and potentially dangerous for technological innovation and users' rights. Nevertheless, unless considering copyright an illegitimate form of property, one is unable to argue a public interest to use copyright works without compensating the owners. A 'copyright-free internet' is not a workable hypothesis[1327]. Thus, the following approaches analysed in this Chapter

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[1322] Bob Dylan, *The times they are a changing*, 1964, Columbia Records.
[1323] Fisher, W.W. [2004], *op.cit.* Gervais, D.J. [2005], *op.cit.* Litman, J.D. [2004], *op.cit.*. Ku, R.S:R. [2002], *op.cit.* Netanel, N.W. [2003], *op.cit.* Lunney, G.S. [2001], *The death of copyright: digital technology, private copying, and the Digital Millennium Copyright act*, 87 Virginia L.Rev. 813.
[1324] Lemley-Reese [2004], *op.cit.* 1354-56. These have been historically an important instrument to balance the interests of the copyright owners with the ones of the user. Netanel, N.W. [2003], *op.cit.* 32.
[1325] Geiger, C. [2005], *Right to copy v. three-step-test*, 1 C.R.I. 7, 10; Corwin-Hadley [2004], *P2P: the path to prosperity*, 24 Loyola of Los Angeles Entertainment L.J. 649, 669; Eckersley, P. [2004], *op.cit.* 92; Griffin, J. [2001], *At impasse: technology, popular demand, and today's copyright regime*, www62chevy.com/ at_impasse.htm, www.evolab.com/at_impasse.html. [04/07/2005-No longer available]. Lincoff, B. [2002], *Full, fair and feasible solution to the dilemma of online music licensing*, www.bennettlincoff. com/music.pdf. [12/08/2010].
[1326] WCT, Preamble.
[1327] Reichman-Dinwoodie-Samuelson [2009], *op.cit.* 258.

'*are mainly based on the very same idea: authorise the exchange of works and allow for payment to the rightful owners*'[1328].

The author's proposal concludes this analysis.

6.2 - The Precedents

6.2.1 - Private Copy Levy System

'*Early laws on copyright were not concerned with the kind of small-scale hand-made reproduction that occurred in homes or at the work place. Private copying exemptions, in one form or the other, have existed in many copyright laws since the earliest of times*'[1329].

The reasoning for this can be traced back to 1880, when Kohler suggested that the right of reproduction should be infringed only when the copying of the work

'*is intended to serve as a means of communicating* [the work] *to others*'[1330].

The justifications of private copying exceptions can be found in the necessity to protect users' privacy, to restore the copyright 'balance' when licensing and enforcement are impractical, and to promote the creativity of prospective authors facilitating the access to existing works. In other words,

'*a form of compensation for right holders based on the premise that an act of private copying cannot be licensed for practical purposes and thus causes economic harm to the relevant right-holders*'[1331].

Private copy exceptions are provided generally on the condition that copyright owners are fairly compensated for the acts of private copying[1332]. This reflects the 'remuneration principle', but this should not be confused with the term 'equitable remuneration'[1333].

'*While the notion of 'equitable remuneration' is based on the assumption that authors are entitled to remuneration for every act of usage of their protected works, fair compensation is linked to the possible harm that derives from acts of private copying. Fair compensation is for the harm that could result from the act*

[1328] Bernault-Lebois [2005], *op.cit.* Para. 23.
[1329] Helberger-Hugenholtz [2007], *No place like home for making a copy: private copying in European copyright law and consumer law*, 22 B.T.L.J. 1060-1098, 1065. For instance, UrhG 1876 and the Dutch Copyright Act 1912.
[1330] Kohler, J. [1880], *Das Autorrecht*, 230; quoted in Helberger-Hugenholtz [2007], *op.cit.* 1065.
[1331] European Commission [2008], *Fair compensation for acts of private copying*, ec.europa.eu/internal_market/copyright/docs/levy_reform/background_en.pdf. [10/08/2010].
[1332] Article 5(2)(b) and Recital 35, Copyright Directive. Not always, for instance: §29 CDPA.
[1333] Articles 4(4) and 8(2), Rental and Lending Directive.

of private copying itself"[1334].

The Copyright Directive does not specify a particular form of fair compensation[1335], but many Member States impose levies upon recording equipment and/or blank media, which are ultimately paid for by the users[1336]. The media and equipments on which the levies are applied constantly expanded over time. Today, they include, depending on the jurisdiction, memory sticks, flash drives, blank CD/DVD, computer hard drives, scanners, printers, CD/DVD writers, MP3 players, and mobile phone with internal memory[1337]. These levies are gathered by collecting societies and accordingly used to compensate the copyright owners. However, there are other means to providing fair compensation[1338].

Notwithstanding the legal nature of the private copy has not been fully clarified yet -limitation, right or privilege- the system proved to be valuable in the past. Therefore, it has been argued that levies are likely to be the best available solution to redressing the 'harm' caused by private digital copying[1339], and it has been suggested that a levy system could readdress the 'harm' caused by networking technologies. The private copy exception could be simply extended, adapting the existing remuneration systems to the new medium. Internet access providers, in a sense, provide the 'equipment', and could pass the payment of the levies to the users:

> '*This solution seems compatible with the international treaties given that conditions of the three step test are satisfied. The private copy made by the Internet user constitutes a 'special case' which 'does not conflict with the normal*

[1334] European Commission [2008], *op.cit.* The ECJ interpreted the notion of 'equitable remuneration in *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)*, C-245/00 ECJ, 6 February 2003, 1251, §36. The ECJ stressed that the equitable character of remuneration must consider '*the value of that use in trade*' (§37), which '*brings the notion of equitable remuneration closer to that of compensation'*. Dussolier-Ker [2009], *op.cit.* 354.

[1335] Some authors argue that the Copyright Directive rejected the levy-style remuneration schemes. They believe that using the word 'permit' instead of 'require' in Article 5.2(b) was a missed opportunity of harmonisation. Commentators have criticised the Copyright Directive, and even suggested it could be invalidated, for failing to achieve harmonisation by leaving the implementation of 20 out of the 21 exceptions contained in Article 5 to the discretion of Member States. Hugenholtz, B. *et al.* [2003], *The future of levies in a digital environment*, Institute for Information Law, Faculty of Law, University of Amsterdam, www.ivir.nl/publications/other/DRM&levies-report.pdf. [10/08/2010].

[1336] As mentioned in Para 1.4, the levy system was firstly introduced in 1965 in Germany and quickly exported in Europe and beyond. Hugenholtz, B. [2003], *op.cit.* 501-502. With the exception of the UK and Ireland. Malta and Luxembourg have a private copying exception, but not a levy system. European Commission [2008], *op.cit.* Copyright Levy Reform Alliance [2006], *Analysis of National Levy Schemes and the EU Copyright Directive*, www.bitkom.org/files/documents/LegalStudy-100413A1.pdf. [15/08/2010].

[1337] For details, European Commission [2008], *op.cit.*

[1338] For instance, Norway provides 'fair compensation' by means of a state-run fund. European Commission [2008], *op.cit.*

[1339] A levy or limited tax on copying technology and storage media for private copying is 'inescapable'. Lunney, G.S. [2001], *op.cit.* 911-20.

exploitation of the work or other protected subject matter' and which does not cause 'any unreasonable prejudice to the legitimate interests of the author'[1340].

This would compensate the copyright owners for the 'harm' caused by the infringements[1341]. The adaptability and flexibility of the private copying exception to new social and technical scenarios could guarantee a number of practical benefits[1342]. Thus, various scholars and commentators suggest a levy on broadband or, perhaps more generally, internet connections[1343].

6.2.2 - Compulsory Licence

'*A compulsory licensing scheme is one where the government requires that copyright owners make their work available to users at a fixed price*'[1344].

Compulsory licences[1345] have been often used in the past in order to resolve copyright issues created by new technologies when copyright owners could not agree on licensing terms—in particular in the US[1346]. The first compulsory licence was adopted

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[1340] Bernault-Lebois [2005], *op.cit.*

[1341] *Ibid.* The downloader/accessor is undoubtedly the one taking the initiative to reproduce and could benefit from a private copy exception under certain circumstances. In France, for instance, Article L 122-5 CPI. This does not mean all downloads and accesses constitute private copy acts. However, it is submitted that a solution to the problem of reproduction would be relatively simple if the unlawfulness of the sources was not relevant or, at least, not relevant when the source is not determinable. For instance, in Germany the source should not be 'manifestly illegal'.

[1342] Geiger, C. [2010], *The future of copyright in Europe: striking the balance between protection and access to information*', 1 I.P.Q. 1-14; Geiger, C. [2009], *Implementing an international instrument for interpreting copyright limitations and exceptions*, I.I.C. 627; Geiger, C. [2008], *op.cit.*; Geiger, C. [2008], *Flexibilising copyright*, I.I.C. 178.

[1343] In 2009, it was reported that the Isle of Man was considering the introduction of a broadband levy, but no further details are available. www.nytimes.com/2009/01/19/business/worldbusiness/19digital.html?_r=1. In August 2010 a similar proposal has been put forward in Brazil. www.compartilhamentolegal.org/compartilhamento. English translation: pedroparanagua.net/2010/09/02/brazils-proposal-on-monetizing-p2p. [14/09/2010]. It should be noticed that a tax on broadband was considered in the UK. Lord Carter proposed an internet levy of £20 a year to pay the cost of the graduated response. technology.timesonline.co.uk/tol/news/tech_and_web/article5607744.ece. The proposal disappeared from the Digital Economy Act. [15/08/2010].

[1344] Liebowitz, S.J. [2003], *Alternative copyright systems: the problem with a compulsory license*, www.utdallas.edu/~liebowit/intprop/complpff.pdf. [15/08/2010].

[1345] The UrhG describes statutory remuneration rights (*gesetzliche Vergütungsansprüche*) or statutory licences regarding private copying as opposed to compulsory licenses-where the right holder is obliged to grant a licence according to a specific procedure. For instance, *see* the terminology used in Article 15 Rome Convention. Guibault, L.M.C.R. [2003], *Copyright limitations and contracts. An analysis of the contractual overridability of limitation on copyright*, Information Law Series Vol. 9, The Hague, 20-27. A different view is expressed in Ricketson, S. [2003], *op.cit.* 4. In contrast, US copyright law and literature use the terms compulsory license and statutory license synonymously. Goldstein, P. [2002], *Copyright*, 2nd ed. Aspen Law and Business, §5.8.6.2.

[1346] *'Some compulsory licenses have been moderately successful, but their general track record is disappointing. At best, these licenses should be viewed as interim arrangements to preserve a balance between the extremes of full and no liability during periods of technological or other change'*. Botein-Samuels [2005], '*Compulsory licenses in peer-to-peer files sharing: a workable solution?*' 30 Southern Illinois University L.J. 69-83.

in 1909 for the player piano[1347], followed by the compulsory licences for the jukebox[1348], digital audio home-recording[1349], digital performance right in sound recordings[1350], cable[1351], public broadcasting[1352], satellite retransmission[1353], and local-to-local retransmission[1354]. Compulsory licences oblige copyright owners to license their works, generally in exchange of a fair compensation[1355]. This led various commentators to consider whether or not such an adoption of another compulsory licensing system could be a workable solution to the problems discussed in this work[1356].

6.2.3 - Mandatory & Extended Collective Managements

When technology evolution makes the exercise of exclusive rights increasingly difficult for the single copyright owner, the logical solution appear to establish organisations to manage collectively the rights of groups of copyright owners. In the traditional system, copyright owners authorise these organisations so as to exercise some, or all, of their rights and to accordingly collect remunerations[1357]. This collective administration is not limited to exclusive rights; it may also involve remuneration rights. In some scenarios, this collective administration might be compulsory.

Mandatory collective management systems impose the exercise of rights through a single interlocutor: a collective society[1358]. A number of Directives in Europe impose this system for cable retransmission[1359], rental rights[1360] and resale rights[1361]. In France,

[1347] The compulsory licence for mechanical reproduction of phonorecords. USC §1(e) (1909); now preserved in USC §115 (2000).
[1348] Former USC §116; repealed and replaced in 2003.
[1349] USC §1003–07 (2000).
[1350] USC §114(d)–(h) (2000).
[1351] USC §111 (1976).
[1352] USC §118 (2000).
[1353] USC §119 (2000).
[1354] USC §122 (2000).
[1355] The compensation methods vary, for instance, subscriptions or levies. Netanel, N.W. [2003], *op.cit.* Gordon [2003], '*How compulsory license for internet might help music industry woes,* Entertainment Law & Finance (May). http://stevegordonlaw.com/compulsory_license.html. [15/08/10]. However, alternative methods could be used, including as advertisement revenue sharing, micro-refunds. No one of the above is exclusive. For details about alternative compensation systems, *see* www.iuma.com, www.emusic.com, www.artistdirect.com, and www.templetons.com/brad/dontpay.html. [12/08/2010].
[1356] Netanel, N.W. [2003], *op.cit.*
[1357] Ficsor, M. [2003], *Collective management of copyright and related rights at triple crossroads: should it remain voluntary or may be 'extended' or made mandatory?* Copyright Bulletin, October.
[1358] Gervais, D.J. [2006], *Collective management of copyright and related rights*, Kluwer Law International. von Lewinski, S. [2004], *Mandatory collective administration of exclusive rights-a case study on its compatibility with international and EC copyright law*, e-Copyright Bulletin. portal.unesco. org/culture/en/ev.php-url_id=19552&url_do=do_topic&url_section=201.html. [12/08/2010].
[1359] Article 9.1, Satellite & Cable Directive.
[1360] Article 4, Rental & Lending Directive.

for example, this system is also in use for the reprography right. Extended collective licensing is a mechanism which permits collective societies to negotiate licensing agreements without authorisation when the copyright owner is unknown or non-locatable[1362]. The system has also been in use in Nordic countries[1363] for licensing the broadcasting right since the 1960s, and more recently has been extended to the right of reproduction[1364]. Notwithstanding the risks concerning the increasing of negotiating power of collective societies, these systems have been suggested as possible ways to 'legalise file-sharing'[1365].

6.3 - Early Proposals

6.3.1 - Synthesis of Broadband Levies Schemes

Netanel suggests allowing users to share files and compensating copyright owners with a levy on products and services benefitting from file-sharing[1366]. The Levy would be divided by organisations representing copyright owners[1367]. The value of the levy should be determined via industry agreements, the absence of which would activate mandatory arbitration proceedings designed to ensure authors are provided with a fair return and users pay a fair levy[1368]. The levy would be shared between copyright owners in proportion to how many times their works are downloaded. However, it is open to doubt whether current watermarking and sampling technologies are capable of such monitoring, and therefore helpful in compiling the aggregate usage statistics[1369]. Ku also suggests introducing a levy on internet service subscriptions, and thereby measuring the extent of downloads and other uses of digital works with heavy tracking and

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[1361] Article 6.2, Resale Directive.
[1362] EU High Level Expert Group [2008], *Final report on digital preservation, orphan works, and out-of-print works*, ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_ subgroup_final_report_26508-clean171.pdf. [12/08/2010].
[1363] Denmark, Finland, Iceland, Norway and Sweden.
[1364] www.kopinor.org/layout/set/print/content/view/full/2090. [12/08/2010].
[1365] Bernault-Lebois [2005], *op.cit.*
[1366] Examples include software providers, internet access providers, computer and consumer electronics manufacturers, storage media and wireless communications equipment.
[1367] In order to share the sums provided by the levy, Netanel suggests the use of sampling and tracking technologies. Netanel, N.W. [2003], *op.cit.* 35-39
[1368] This assessment '*should also reflect the relative roles of the copyright holders and levy payers in making the copyrighted works available to the public, taking into account their respective creative contribution, technical contribution, capital investment, cost, and risk*'. *Ibid.* 28.
[1369] *Ibid.* 37-38.

monitoring[1370].

These examples show that a levy solution forms a compromise between ever-expanding exclusivity and abandonment of copyright. They are attempts to achieve an acceptable degree of remuneration whilst minimising restrictions imposed on users[1371].

6.3.1.1 - Critique. The levy approach satisfies the proposed requirement of compensation and technology innovation, but ultimately still raises concerns regarding user integrity owing to the fact that they rely on the extensive monitoring of user activities so as to afford a distribution of levy funds concomitant to actual consumption[1372]. The system appears workable, but not without problems: for instance, it might penalise those users who do not infringe copyright. However, the main obstacle to this approach appears to be what has been defined as the 'phasing-out' principle[1373]:

> '*DRM makes it possible to compensate right holders directly for the particular uses made of a work. Where such individual rights management is available there would appear to remain no need, and no justification, for mandatory levy systems*'[1374].

As previously discussed, DRMs are not the universal remedy that some promote[1375]. It is submitted that technological protection measures cannot the guarantee the economic return private copy levies provide. Thus,

> '*the phasing out rule would only be a cure administered to the wrong illness*'[1376].

Levies systems are still a valuable form of remuneration; in particular, when the process of dissemination is horizontal and 'remuneration' needs to be created, collected and re-

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[1370] Ku, R.S.R. [2002], *op.cit.* 311-315; Ku, R.S.R. [2003], *Consumers and creative destruction: fair use beyond market failure*, 18 B.T.L.J. 539, 566.
[1371] Ganley, P. [2004], *op.cit.*
[1372] Netanel suggests the monitoring of all subsequent uses of works would be preferable. Netanel, N.W. [2003], *op.cit.* 37-38. For a discussion on DRM and privacy, *see* Ganley, P. [2004], *op.cit.* 268-272.
[1373] Reinbothe, J. [2002], *The legal framework for digital rights management*, Digital Rights Management Workshop, Brussell, 28 February. Samnadda, J. [2002], *Technical measures, private copying and levies: prospective in implementation*, 10th Annual Conference on International Intellectual Property Law & Policy, 4-5 April.
[1374] Hugenholtz, B. *et al* [2003], *op.cit.* For instance, Article 5.2(b) Copyright Directive states that '*fair* [must] *take account of the application or non-application of technical measures*'. Apparently alternative forms of remuneration are unnecessary since DRM allows rightholders to protect their own interests. *'The European Commission has indicated that it considers proper use of DRMs would lead to [the] phasing down or out levies for private copying in the context of proper application of the framework laid down by the Directive'*. Garnett, K. *et al*. [2005], *op.cit.* §12-009, note 53. Vinje has gone further and suggested that the phase out of levies should occur in tandem with the *availability* of technical measures and not with the unilateral decision by rightholders to apply them. Vinje, T.J. [2000], *Should we begin digging copyright's grave?* 22(12) E.I.P.R. 551-562, 555.
[1375] Para. 5.2.4.1.
[1376] Dusollier-Ker [2009], *op.cit.* 371.

distributed[1377].

6.3.2 - Synthesis of Mandatory & Extended Collective Administration

Gervais suggested modifying the existing collective licensing to extend it to file-sharing[1378], subjecting the making available right to mandatory collective management[1379]. This would force collective societies to license certain uses on a fair, non-discriminating basis[1380]. Von Lewinski analysed the feasibility of a making available right mandatory collective management provision in Hungarian copyright law[1381], affirming its conformity with international and European copyright law. The model was further analysed by Bernault & Lebois under the supervision of Lucas[1382], who conclude it was feasible. The study concludes that, adapting the existing system of remuneration, downloading could be covered by the private copying exception, and further suggests a mandatory collective management for the 'making available' right. The study also emphasises the efficiency of the precedent collective managements for reprography, and cable broadcast[1383].

> *'Compulsory collective management is not perceived as reversing the fundamental principles of copyright, but instead 'reinforcing and (...) organising the protection granted to authors against infringements of their fundamental rights'*[1384].

It appears to be a workable solution, but has the risk of increasing the power and control of the collective societies[1385]. The proposal was named 'Global Licence' in France in 2005[1386], and was supported by politicians from very different backgrounds. The Alliance Public Artistes commissioned two studies on the feasibility of the model from a technical[1387] and economic[1388] perspective. The proposal implementing the

[1377] Ghosh, S. [2002], *The merits of ownership; or, how I learned to stop worrying and love intellectual property*, 15 J.O.L.T. 453, 492-494. Kretschmer, M. [2003], *op.cit.* 334. Hugenholtz, B. *et al* [2003], *op.cit.* 99-100.
[1378] Gervais, D.J. [2005], *op.cit.*
[1379] This solution would keep the exclusive author's right in place and only limit the exercise of this right. Grassmuck, V. [2009], *op.cit.* Guibault, L.M.C.R. [2003], *op.cit.* 26-27.
[1380] Geiger, C. [2005], *op.cit.* Para. 381-384, 441-489. Guibault, L.M.C.R. [2003], *op.cit.* 26-27. On mandatory collective administration of exclusive rights without the obligation of the collecting society to license certain uses, von Lewinski, S. [2004], *op.cit.*
[1381] Von Lewinski, S. [2004], *op.cit.*
[1382] Bernault-Lebois [2005], *op.cit.*
[1383] *Ibid.* 48
[1384] *Ibid.* 48.
[1385] This problem would be solved if collective societies were 'supervised' by other entitites, as it will be suggested in Para 6.6.
[1386] It was promoted by the alliance public-artistes. www.lalliance.org/pages/1_1.html. [12/8/2010].
[1387] alliance.bugiweb.com/usr/documents/etudespedidambigchampagne-en-janv2006.pdf. [12/08/2010].
[1388] alliance.bugiweb.com/usr/Documents/PressKit-June2005.pdf. [12/08/2010].

Global Licence was subsequently discussed[1389], but ultimately was not included in the final version of the DAVDSI law. It was contended that the Global Licence was a 'communist measure'; that the method for apportioning the money raised was unreliable and would have failed to provide enough revenue; and, finally, that it would have not been three-step-test compliant. These arguments are not convincing, as will be explained in the following[1390].

Finally, Aigrain includes the application of extended collective licence schemes in the different possible legal solutions to unauthorised file-sharing[1391], and NEXA shares this position[1392].

6.3.3 - Bipolar Copyright Systems

Fisher, in his administrative compensation system, suggests replacing copyright law with an licence and a 'tax'[1393]. The system would be voluntary. Copyright owners, desiring remuneration for the use of their work online, would register their works to a government agency. The agency would then subsequently monitor the use of such works online, and share between the registered copyright owners the remuneration collected by a 'taxing' internet access providers[1394]. Lessig proposes the temporary introduction of a similar system until licensed streaming replaces file-sharing[1395].

Litman suggests that copyright owners should choose between authorising the 'sharing' of their works and being compensated by blanket fee or levy/tax; and 'hoarding' their works in exclusively exploited online ventures, DRM-secured[1396]. The default rule would be 'sharing', but copyright owners could 'opt out' of the system[1397]. Copyright owners could choose between the two systems according to the particular

[1389] www.theregister.co.uk/2005/12/22/france_legal_p2p_flat_fee. [12/08/2010].
[1390] Para. 6.4.1. For instance, '9 Telecom', an internet access provider which belongs to Universal Music, did implement a similar idea by providing unlimited downloadable music.
[1391] Aigrain, P. [2008], '*Internet & création-Comment reconnaître des echanges sur l'internet en finançant la creation?* Inlibroveritas.
[1392] centre for Internet & Society at the Polytechnic of Torino. NEXA [2009], '*Position paper on file-sharing and extended collective licensing*. nexa.polito.it/licenzecollettive. [12/08/2010].
[1393] Fisher, W.W. [2004], *op.cit.*
[1394] '*Once this alternative regime were in place, copyright law would be reformed to eliminate most of the current prohibitions on unauthorized reproduction and use of published recorded music and films*'. *Ibid*. 9-10, 199-258.
[1395] Lessing agrees with Fisher's proposal, but he anticipate the system would only serve for the interim. Lessig, L. [2004], *op.cit.* 300-04. He argued that file-sharing should be should be addressed with a system of compulsory licenses similar to the one for cable retransmission, the fee being set by the governments striking the right balance. *Ibid.* 254-55.
[1396] Litman, J. [2004], *op.cit.*
[1397] *Ibid*.

circumstances of each case. Governmental agencies are not involved. It is a market-based, decentralised solution, which recognises self-determination as a core value of copyright in general[1398].

6.3.3.1 - Critique. - The system is of an extreme complexity. The efforts in establishing and organising the system in practice may outbalance the benefits of leaving the copyright owner the freedom to choose[1399]. Notwithstanding this, Paukert argues that such an approach would not be three-step-test compliant[1400], and thereby suggests an opt-in approach whereby, in order to enjoy the remuneration from a levy/tax, the right holders would have to register the works with the competent authority; if not, the use will be unauthorised and thus infringing[1401]. This solution does not raise doubts as to whether it is in accordance with treaty obligations under Berne, TRIPS, Copyright Directive or the WIPO Treaties, nor does it limit the enjoyment or exercise of exclusive rights by law. However, it could be argued that the model would only give copyright owners an incentive to accept lawful non-commercial file-sharing, but the situation would remain unchanged for the copyright owners who do not want this alternative distribution channel. The questions concerning this model are therefore practical, mainly concerned with how to persuade copyright owners to accept it, and whether or not they are any different from a voluntary licence.

6.3.3.2 - The System in Practice. - Interestingly, however, a number of projects have been realised under this bipolar approach. Fisher created a software which tracks how many times a file is played, and periodically submits such data to the service providers—Noank Media Inc.[1402]. In July 2008, he launched a beta-trial together with Cyberport[1403] and some copyright owners registered their works in the system. Users can gain access to the catalogue in exchange of fees, which are, in the large part, passed to the copyright owners. Griffin[1404] set up Choruss[1405], an experiment based on audio

[1398] Peukert, A. [2009], *op.cit.* 176-177.
[1399] On a necessary 'new simplicity' in dealing with copyright, *see* Bechtold, S. [2004] '*Das Urheberrecht und die Informationsgesellschaft*', in Hilty-Peukert (ed) [2004], '*Interessenausgleich im Urheberrecht*', 67, 84-86.
[1400] Peukert, A. [2009], *op.cit.* 189-190.
[1401] Fisher alternatively proposed that if the work is not registered, then it would be deemed to be in the public domain. Fisher, W.W. [2004], *op.cit.* 204.
[1402] www.noankmedia.com. [12/08/2010].
[1403] An Hong Kong internet access provider. www.cyberport.com.hk. [12/08/2010].
[1404] '*Market forces will not resolve the problem*', Griffin [2001], *op.cit.* The system was supported by EFF and three of the majors. www.eff.org/deeplinks/2009/03/more-choruss-pro-and-con. www.wired.com/

fingerprint[1406]. An interesting project that came close to launch was PlayLouder[1407] but was abandoned, probably because of the entertainment industries' plans for a 'graduated response' approach[1408]. Another example is Qtrax[1409].

The Swedish music-collecting society allows Swedish internet access providers to offer 'legal file-sharing subscriptions' to their customers[1410]. In France, Neuf Cegetel[1411], an internet access provider, offers its subscribers the possibility of un-limited downloading from the Universal Music's catalogue for a monthly fee[1412]. Similarly, the Danish Play[1413], mobile and wire-based broadband providers, such as Omnifone[1414], Orange[1415], TeliaSonera[1416], and Nokia, have a 'come with music' service[1417]. Although they are downloading rather than file-sharing services and are limited to music, such experiments show a tendency to accept flat-rate approaches.

6.3.4 - Synthesis of New Rights

Lincoff proposed the creation of an '*online transmission right for musical works and*

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epicenter/2008/12/warner-music-gr. www.ip-watch.org/weblog/2009/03/17/chorussscovenant-the-promised-land-maybe-for-record-labels-a-lesser-destinationfor-everyone-else. 12/08/2010].

[1405] www.theregister.co.uk/2008/12/11/griffin_choruss. [12/08/2010].

[1406] www.thelicensingplate.com/jim-griffin-discusses-chorussin-digital-music-forum. [12/08/2010].

[1407] playlouder.com. [12/08/2010].

[1408] www.theregister.co.uk/2009/01/23/virgin_puts_legal_p2p_on_ice. www.paidcontent.co.uk/entry/419-fourmore-isps-join-music-piracy-letter-scheme-extended-to-film. playlouder.com now welcome the users with this message: '*Thank you for using the old Playlouder.com. We are sorry to say goodbye to it, but we have been working on something much better. We are not ready to tell you what it is yet, but check back here from time to time so you are the first to know'*. playlouder.com. [12/08/2010].

[1409] music.qtrax.com. www.wired.com/listening_post/2008/01/major-labels-al. www.afterdawn.com/news/archive/14544.cfm. www.afterdawn.com/news/archive/17586.cfm. [12/08/2010].

[1410] STIM licences the necessary rights, collects the fees from the providers and distributes them to its members based on measured use of their works. www.stim.se/stim/prod/stimv4eng.nsf/alldocuments/1d66451cbe1b0f81c12573f4002e1ccc. www.stim.se/stim/prod/stimv4eng.nsf/productions/b5ca55f631b0f152c125759e0030bd74/$file/pirates_filesharers_music_users.pdf. [12/08/2010].

[1411] Neuf Music. www.neufmusic.fr/home.php. www.groupeneufcegetel.fr/html/en/Press/cps/Neuf_Cegetel_adds_unlimited_legal_music_downloads_to_its_100_Neuf_Box_service.html. [12/08/2010].

[1412] This was simple to achieve given the fact that Vivendi owns both Universal Music and 40% of Neuf Cegetel. www.marketwatch.com/news/story/french-broadband-providerneuf-cegetel/story.aspx?guid=%7be17f6781-aa1e-4269-81c5-32cf7a84aae8%7d. [12/08/2010].

[1413] musik.tdconline.dk. tdc.com/publish.php?id=16268, www.themusicvoid.com/?p=355#more-355, designit.com/latest/news/tdc-play-wins-international-acclaim. [12/08/2010].

[1414] www.omnifone.com, www.paidcontent.co.uk/entry/419-vodafone-offers-flat-rate-all-you-can-eat-music-downloads-omnifones-fir, www.nytimes.com/2009/02/17/technology, www.guardian.co.uk/business/2009/feb/16/bskyb-digital-musicservice. [12/08/2010].

[1415] arstechnica.com/gadgets/news/2008/06/orange-takes-on-nokiascomes-with-music-with-musique-max. [12/08/2010].

[1416] www.moconews.net/entry/419-swedish-carrier-teliasonera-startsunlimited-music-subscription-offerin. [12/08/2010].

[1417] www.theregister.co.uk/2009/02/09/totally_titsup. www.nokia.com/a4136001?newsid=256586. www.gulli.com/news/nokia-comes-with-musicbald-2009-03-02, www.heise.de/newsticker/nokia-will-comeswith-music-in-anderen-europaeischen-laendern-starten--/meldung/121889. [12/08/2010].

sound recordings'[1418], which would combine the rights of reproduction, performance and distribution[1419]. It would be limited to the online environment and subject compulsory administered by a single collecting society. He proposed registering and digitally marking protected works for monitoring purposes and accordingly charging service providers and users a licence fee for file-sharing[1420].

The Songwriters Association of Canada suggested[1421] introducing a right covering the sharing of music using any technology: the right to share '*a copy of a copyrighted musical work without motive of financial gain'*[1422]. Canadian internet access providers would collect fees from their users and subsequently remit them to collecting societies, which would share the sums between the copyright owners. The collecting society would be responsible for monitoring the usage and distributing royalties. Users could opt-out from the payment agreeing to a predetermined amount of damages if they share protected works. These two proposals are local, limited to musical works, subject to registration, and not compulsory for the users. However, they inspired the proposal, which will be later discussed in this Chapter[1423].

6.4 - *Kultur Flat-rate*

6.4.1 - Synthesis of the *Kultur Flat-rate*

The German Green political party proposed the introduction of a levy-based file-sharing permission in their campaign for the 2009 European Parliament Elections[1424].

> *'Compensation for artistic contributions on the internet. We want to develop a fair process to compensate artists for the dissemination on the internet or elsewhere of their works. In the digital era, we need to strengthen the rights of consumers. We are committed to a differentiated solution that may include an all-inclusive fee for music, movies and other media and content. The introduction of a*

[1418] Lincoff, B. [2002], *op.cit*. Point III.
[1419] The making available right is not included in Lincoff's proposal. For a possible reasoning, *see* Para. 3.2.3 and 3.2.6.2.
[1420] Lincoff, B. [2002], *op.cit*.
[1421] Songwriters Association of Canada [2009], '*Proposal for the monetization of the file-sharing of music*'. www.songwriters.ca/studio/proposal.php. [01/12/2009-No longer available].
[1422] Point 4. '*The right is limited to activities that take place without motive of financial gain*'. '*Parties who receive compensation for file-sharing would not be covered by this right*'. www.songwriters.ca/studio/proposal.php#details. [01/12/2009-No longer available].
[1423] Para. 6.5.
[1424] *Europawahlprogramm* (*vorläufig, Stand*: 31.01.09), *Point VIII: Kultur, Bildung und Forschung–Der GRÜNE Weg in die Wissenschaftsgesellschaft, 29 Ordentliche Bundesdelegiertenkonferenz*, Dortmund, 23-25 January 2009. www.gruene-partei.de/cms/default/dokbin/267/267132.kapitel_viii_kultur_bildung_und_forschun.pdf. [12/08/2010].

culture-flat-rate, which allows the use of digital cultural assets for non-commercial use, can be a solution for this. The revenue must come transparently and equitably in the first place to the authors' own benefit. We clearly reject the current massive wave of legal action, interference with privacy, the use of DRM or data traffic filters. They are a disproportionate interference with the users' rights[1425].

The German Social Democrats Political Party (SPD) followed the Green lead, introducing a similar proposal in their draft for the national election[1426]:

'*Fair remuneration for creative work. As part of the social democratic creative-package, we wants to ensure that cultural and media professionals, artists can live from their creative work. It depends on the intellectual property to protect and compensate them adequately. It is important to protect intellectual property and to remunerate it appropriately. Copyright and copyright contract law should allow a decent income from the exploitation of intellectual property in the digital environment. The future of digitization brings new challenges in the protection of intangible products and goods. We need a reasonable balance between usability and the rights of the creators. In the framework of the creative-package, we will involve network operators and internet service providers in a dialogue with rights holders and collecting societies. We are committed to the examination of a culture flat-rate'*[1427].

The minimal requirement for a flat-rate solution should be[1428]:

1. a licence permitting users to share protected works for non-commercial purposes;
2. a flat-rate levy, possibly collected by the internet access provider; and
3. a collective management system.

[1425] '*Künstlerische Beiträge im Internet vergüten Wir wollen faire Verfahren entwickeln, um Künstlerinnen und Künstler für die Bereitstellung ihrer Werke im Internet oder anderswo zu entschädigen. Im digitalen Zeitalter brauchen wir eine Stärkung der Rechte von VerbraucherInnen. Wir setzen uns für differenzierte Lösungen ein, die Pauschalvergütungen für Musik, Filme und andere Medien und Inhalte beinhalten können. Die Einführung einer Kulturflatrate, die die Nutzung von digitalen Kulturgütern für den nicht-kommerziellen Gebrauch ermöglichen soll, kann ein richtiger Weg dahin sein. Die Einnahmen müssen transparent und gleichberechtigt in erster Linie den Urhebern selbst zugute kommen. Die aktuell massenhaften Klagewellen, Eingriffe in die Privatsphäre, der Einsatz von DRM oder die Filterung des Datenverkehrs lehnen wir klar ab. Sie sind ein unverhältnismäßiger Eingriff in die Rechte der Nutzerinnen und Nutzer'*. Translation by J.L.A. Himmrich, reproduced with consent.

[1426] *Entwurf des regierungsprogramms der SPD. Antrag des SPD-Parteivorstandes an den Bundersparteitag der SPDD am* 14 June 2009, 48. www.frankwaltersteinmeier.de/_media/pdf/ Entwurf_Regierungsprogramm.pdf. [12/08/2010].

[1427] '*Gerechte Vergütung kreativer Arbeit. Wir wollen im Rahmen des sozialdemokratischen Kreativpaktes erreichen, dass Kultur- und Medienschaffende, Künstlerinnen und Künstler und Kreative von ihrer Arbeit leben können. Es kommt darauf an, das geistige Eigentum zu schützen und angemessen zu vergüten. Das Urheberrecht und das Urhebervertragsrecht sollen in der digitalen Welt ein angemessenes Einkommen aus der Verwertung geistigen Eigentums ermöglichen. Die Zukunft der Digitalisierung stellt uns vor neue Herausforderungen beim Schutz immaterieller Produkte und Güter. Wir brauchen einen vernünftigen Ausgleich zwischen Nutzerfreundlichkeit und den Rechten der Kreativen. Dabei werden wir in Rahmen des Kreativpaktes die Netzbetreiber und Internet-Service-Provider in den Dialog mit Rechteinhabern und Verwertungsgesellschaften einbeziehen. Wir setzen uns für die Prüfung einer Kultur-Flatrate ein'*. Translation by J. Himmrich, reproduced with consent.

[1428] A. Roßnagel, director of the '*Institut für Europäisches Medienrecht in Zusammenarbeit mit der Projektgruppe verfassungsverträgliche Technikgestaltung an der Universität Kassel*' (hereinafter EML), cited in Grassmuck, V. [2009], *op.cit.* 2.

This approach would limit the possibility to enforce copyrights against users[1429], but the copyright owners would be compensated in the form of an equitable remuneration. From an economic perspective, this could be argued to be an improvement over the current situation where copyright owners are not compensated for the unauthorised dissemination of their works over networking technologies[1430]. Copyright, as discussed in Chapter Four:

> *'does not imply that a specific exploitation model is irreversibly predetermined* […] *When a business model has become dated due to changed technological or social circumstances it would even be inadmissible to protect and artificially keep it alive through massive law-making intervention*'[1431].

The German Green have commissioned a study on the legal feasibility of such an approach[1432]. The conclusion was positive, and a number of scholars[1433], representatives from the music industry[1434], collecting societies' advisors[1435], and activists[1436] support the culture flat-rate, considering it the only meaningful solution.

6.4.2 - Critique

The main critique to the flat-rate approach is the accusation of being an expropriation of the copyright owners' exclusive 'property' rights[1437]. However,

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[1429] Despite the significant attempts to enforce copyright, positive results are rare. *Ibid.* 19.
[1430] Grassmuck, V. [2009], *op.cit.*
[1431] *Ibid.* 12, 13.
[1432] EML [2009], '*Die Zulässigkeit einer Kulturflatrate nach nationalem und europäischem Recht*', www.boersenblatt.net/sixcms/media.php/747/ kulturflatrate.pdf. [12/08/2010]
[1433] For instance, Hoeren (www.webseiten-infos.de/youtube-und-das-urheberrecht); Flechsig (blog.beck.de/2008/08/12/flechsig-und-die-flatrate); Wandtke (waste.informatik.hu-berlin.de/grassmuck/Texts/08-03_state-of-flatrate.html); and Peukert (www.heise.de/newsticker/digital-rights-management-welche-alternativen-sind-rechtlich-moeglich/meldung/55150). [12/08/2010].
[1434] For instance, Renner (www.merkur.de/2008_40__eine_loesung_is.30479.0.html?&no_cache=1). [12/08/2010].
[1435] For instance, Leonhard (www.mediafuturist.com/music_like_water). [12/08/2010].
[1436] For instance, http://privatkopie.net and www.fairsharing.de. [12/08/2010].
[1437] The Association of German Music Industry recently published its '*Ten arguments against the kultur flat-rate'*:'*1) the culture flat-rate is unfair as consumers pay for something they are not using; 2) the culture flat-rate undermines the economic base especially for the new digital business models; 3) the culture flat-rate is a disproportionally high burden for all consumers and disadvantages the socially deprived; 4) the culture flat-rate requires the set-up of a gigantic bureaucracy; 5) he culture flat-rate flattens culture; 6) the culture flat-rate takes away from creators and artists the right to control the usage of their works; 7) the culture flat-rate is inconsistent with the economic principles of our society; 8) the culture flat-rate is inconsistent with international law; 9) the culture flat-rate devalues intellectual property; 10) the culture flat-rate raises more questions than it answers*'. Bundesverband Musikindustrie [2010], *Bundesverband Musikindustrie veröffentlicht Positionspapier zur Kulturflatrate*, 25 January, www.musikindustrie.de/fileadmin/news/presse/100125_Kulturflatrate_10_Argumente_FINAL.pdf. Translated in Dobusch, L. [2010], *Extending private copying levies: approaching a culture flat-rate?*, http://governancexborders.wordpress.com/2010/01/30/extending-private-copying-levies-approaching-a-culture-flat-rate. [15/08/2010].

'the protection of property does not mean an absolute guarantee of preservation of the status quo, in the sense that all achieved legal positions are sacrosanct'[1438].

Promoters of this approach argue it is rather a limitation of rights in conformity to the principle of proportionality, not an expropriation: it serves legitimate purposes; it is adequate, necessary and appropriate[1439]. It resolves the collision of rights between copyright owners and users, ensuring remuneration and respecting the privacy of users. Therefore, it is argued that this approach is not only legitimate but also necessary given the large numbers of infringements - and infringers - preventing copyright owners from enforcing their rights[1440]. This approach appears also adequate and proportionate[1441].

Another criticism of this approach is the argument that those users who do not infringe copyright would be required to pay a levy anyway[1442], but this could be mitigated as calculating the sums users are required to pay in proportion to their the bandwidth consumption[1443]. Sharing a protected work over a network consumes substantial bandwidth and if, as it has been claimed[1444], there is a direct connection between high-speed broadband and widespread copyright infringement, then

'*a graduated levy would be a fair solution*'[1445].

6.5 - Conformity with International Obligations

Every proposal has to conform to the obligation under Berne, TRIPs, WCT and WPPT Treaties. In particular, it has to be three-steps-test compliant[1446]. Most of the

[1438] EML [2009], *op.cit.* 14.
[1439] Grassmuck, V. [2009], *op.cit.*
[1440] EML [2009], *op.cit.* Conclusions. '*Copyrights in contradistinction to material property are in the final instance not intended to exclude others from the use of works but to enable authors to generate earnings from their exploitation*'. *Ibid.*
[1441] *Ibid*.
[1442] This is not unprecedented: the introduction of private coping levies and the public broadcast fee caused similar critiques. Moreover, in a sense, notwithstanding the differences between remunerations systems, levies and taxes, citizens often pays for services they do not use. For instance, taxes paid by healthy people without children are often used to finance health care and schools.
[1443] In University campuses, for instance, they have been calculated to consume 75% of the total capacity. Wade, J. [2004], *The music industry war on piracy*, 51(2) Risk Management, 10-15.
[1444] Para. 2.4.2.
[1445] Aigraain, P. [2008], *op.cit.*
[1446] Gervais, D.J. [2005], '*Towards a new core international copyright norm: the reverse three-step-test*', 9 Marquette Intellectual Property L.Rev. 1, 33. Available at ssrn.com/abstract=499924. Ginsburg, J.C. [2001], '*Toward supranational copyright law? The WTO panel decision and the 'three-step-test' for copyright exceptions*', 187 R.I.D.A 3. '*The three-step-test is far from providing harmonization*'. Sirinelli, P. [1999], '*Exceptions and limits to copyright and neighbouring rights*', Workshop on Implementation Issues of the WCT and the WPPT, WIPO Document WCT-WPPT/IMP/1 of 3 December 1999, 42. www.wipo.int. [13/08/2010]. Peukert, A. [2009], *op.cit.*

aforementioned proposals rarely deal with this aspect[1447]. Lessig acknowledges that 'some of the changes' he proposes would require amendments to, 'or the abrogation of some treaties'[1448]. Fisher admits that his proposed limitation to exclusive rights necessitate amendment to Berne and TRIPs[1449]. Litman herself doubts her proposal is three-step-test compliant[1450]. Furthermore, Netanel states his levy is TRIPs-compliant[1451]. The issue is not only theoretical[1452]. The German Ministry of Justice already declined to introduce a new limitation for non-commercial file-sharing, explicitly referring to the three-step test[1453]. This does not mean that such treaties are not perfectible; however, the complexity of the procedure and the required consensus of all contracting parties for amendments makes any sort of modification to international treaties appear unrealistic[1454].

Therefore, a proposal drawing a limitation/exception to one of the exclusive rights—which are 'mandatory minimum rights in international copyright law[1455]—have to be subject to the three-step test[1456]. This test, in its TRIPs version, states:

> '*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder*'[1457].

These steps are considered cumulatively[1458] and successively[1459].

[1447] Lunney, G.S. [2001], *op.cit.* 910-918; Sobel, L.S. [2003], *op.cit.* 673; Ku, R.S.R. [2002], *op.cit.* 311-315; and [2003], *op.cit.* 566. Lemley-Reese, [2004], *op.cit.* 1414-31. The exception is Eckersley, who discussed in details Article 13 of TRIPS. Eckersley, P. [2004], *op.cit.* 152-158.

[1448] Lessig, L. [2004], *op.cit.*, 251.

[1449] Fisher proposed a new 17 U.S.C. §107A. Fisher, W.W. [2004], *op.cit.* 247.

[1450] Litman, J.C. [2004], *op.cit.* 39.

[1451] Netanel, N.W. [2003], *op.cit.* 60.

[1452] Peukert, A. [2009], *op.cit.*

[1453] Bill for a '2nd Act on Copyright in the Information Society', 27 September 2004, 33-34. www.bmj.bund.de/files/630f712008607f2bf49cde66e5a84046/760/referentenentwurf_urheberr.pdf. [14/08/2010].

[1454] On the difficulties to amend the TRIPS Agreement, *see* Gervais, D.J. [2005], *op.cit.* 30 ('*Far from simple politically*'); Gervais, D.J. [2005], *op.cit.* ('*Any proposal to license P2P should take account of applicable international treaties*'). Eckersley, P. [2004], *op.cit.* 157.

[1455] Article 9 Berne, Article 9(1) TRIPS, agreed statement concerning Article 1(4) WCT; Articles 11, 11bis(1), 11ter(1), 14(1), 14bis(1) Berne, Article 8 WCT, Articles 10, 14 WPPT.

[1456] Article 9(2) Berne and later in Article 13 TRIPS, Article 10 WCT and Article 16(2) WPPT. Ricketson, S. [2003], '*WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*', WIPO publication SCCR/9/7.

[1457] Article 13.

[1458] Failure to comply with any one of the three conditions results in the limitation/exception being disallowed. WTO Panel, Dispute DS160, §110(5) US Copyright Act, 7 January 2002, Para. 6.74, 6.97; Reinbothe-Lewinski [2002], *op.cit.* Article 10 WCT no. 14. Ricketson, S. [2003], *op.cit.*

[1459] Records of the WCT negotiations, reproduced in Ficsor, M. [2002], *op.cit.* 71; and in Ginsburg, J.C. [2001], *op.cit*. 40. Moreover, the interpretation of the test must take into consideration the aim of the instruments which include it. This aim was to harmonise national laws in order to provide for adequate, balanced copyright protection.With regard to Berne, Ficsor, M. [2002], *op.cit*. 5.06-8; regarding Article 7-8 TRIPS, WTO Panel, DS114 Canada-Patent Protection of Pharmaceutical Products, 18 August 2000,

6.5.1 - 'Certain Special Cases'

Divergent opinions exist as to what this requirement means in detail. A restriction must be '*clearly defined and narrow in its scope*'[1460]. The scope has to be '*known and particularised*' so that it becomes foreseeable whether or not a given use will be subject to the limitation/exception[1461]. Moreover, the scope has to be 'narrow', both in a qualitative and in a quantitative sense[1462]. However this can be read in a number of alternative ways. For instance, it has been suggested that "certain special cases" should relate to the legitimacy of the policy rationale rather than to the extent of the coverage of the exception[1463]. On the other hand, it seems clear that this condition does not rule-out various other concepts, such as fair dealing or fair use, 'an incalculable, shapeless provision exempting a wide variety of different uses' is deemed impermissible[1464]. Concerning the 'specialness' of the limitation or exception, various commentators question whether some clear reason of public policy, a rational basis for justification exists for the restriction[1465], or whether users' interests need to be reconciled the copyright owners interests[1466]. The WTO Panel considers the public policy issue of subsidiary relevance in applying the first step[1467]. It could be argued, however, that a limitation/exception for private non-commercial uses is clearly defined and narrow in scope and can easily be distinguished from non-permitted uses[1468]. Consequently, it

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Para. 7.26; regarding the WCT, Ricketson, S. [2003], *op.cit.* Reinbothe-von Lewinski [2002], *op.cit.* Article 10 WCT.

[1460] Ricketson, S. [2003], *op.cit.* WTO Panel, Dispute DS160, §110(5) US Copyright Act, 7 January 2002, Para. 6.112; Ficsor, M. [2002], *op.cit.* 129, 227; Reinbothe-von Lewinski, [2002], *op.cit.* Article 10 WCT, 15. With regard to Article 30 TRIPS ('limited exceptions'), WTO Panel, DS114 Canada-Patent Protection of Pharmaceutical Products, 18 August 2000, Para. 7.30. Ficsor, M. [2002], *op.cit.* 151 (extensive use of compulsory licensing not in line with Article 13 TRIPS).

[1461] WTO Panel, Dispute DS160, §110(5) US Copyright Act, 7 January 2002, Para. 6.108; Senftleben, M. [2004], *op.cit.*137.

[1462] *Ibid.*

[1463] *See*, for instance, Griffiths, J. [2010], *Rhetoric & the 'three-step-test': copyright reforms in the United Kingdom*, 32(7) E.I.P.R. 309-312. Ficsor, M. [2002], *How Much of What?* R.I.D.A. 111, Senftleben, [2004], *op.cit*. 144-152; He, H. [2009], *Seeking a Balanced Interpretation of the Three-Step Test: an Adjusted Structure in View of Divergent Approaches* I.I.C. 274.

[1464] Senftleben, M. [2004], *op.cit.* 133-137. Ricketson, S. [2003], *op.cit.* Gervais argues that only the second and third step really embody a restriction to future limitations and exceptions, because few countries would act in a purely arbitrary way introducing exceptions that imply a complete repeal of copyright law. Gervais, D.J. [2005], *op.cit.* 17.

[1465] Ricketson, S. [2003], *op.cit.* Ficsor, M. [2002], *op.cit*. 129-32. Reinbothe-von Lewinski, [2002], *op.cit.* Article 10 WCT no. 15.

[1466] Senftleben, M. [2004], *op.cit.* 144-152. Ricketson, S. [2003], *op.cit.*

[1467] WTO Panel, Dispute DS160, §110(5) US Copyright Act, 7 January 2002, Para. 6.102-13; Ginsburg, J.C. [2001], *op.cit.* 39-43.

[1468] Peukert, A. [2009], *op.cit.* 163-4; Lessig, L. [2004], *op.cit.* 296-7. Senftleben, M. [2004], 140-4, 162.

could theoretically constitute a 'certain special case'[1469].

6.5.2 - 'Conflict with a normal exploitation'

'Normal exploitation' refers to what a copyright owner may expect from present or future and potential markets. However, this is open to contrasting interpretations. For instance, with the increasing availability of ways to exercise economic rights, the range of 'normal' exploitations increases with the consequent decrease of the margins for the introduction, or even maintenance, of limitations and exceptions. Therefore, when defining the second step, it should be accepted that a 'conflict' should arise only when the exception

> "*substantially impair[s] ... the overall commercialisation of that work by divesting the authors of a major source of income*"[1470];

and that 'normal' exploitation is not the full use of an exclusive right; otherwise, every restriction would be impermissible, and thus the provision itself superfluous. 'Normal' implies an empirical and a normative element[1471].

Regarding the degree of market displacement following from the restriction, different standards have been articulated. It has been maintained that a limitation/exception conflicts with normal exploitation[1472]:

- if it causes a serious loss of profit;
- if it covers uses for which the author would ordinarily expect to receive a fee;
- if it applies to those forms of exploitation that currently generate significant or tangible revenue or which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance as opposed to uses that do not compete with non-exempted uses (actual and potential effects).

A passage from *Grokster* is interesting. The 9th Circuit Court, mentioned

> '*one striking example provided by the software distributors is the popular band Wilco, whose record company had declined to release one of its albums on the basis that it had no commercial potential. Wilco repurchased the work from the record company and made the album available for free downloading, both from its own website and through the software user networks. The result sparked*

[1469] EML [2009], *op.cit.* 27.
[1470] Senftleben, M. [2004], *op.cit.* 193.
[1471] Peukert, A. [2009], *op.cit.* 165.
[1472] *Ibid*.

widespread interest and, as a result, Wilco received another recording contract'[1473].

Thus, experience shows that 'normal exploitation' is not eliminated if the work had already been available on networks. As has been highlighted, the second-step analysis would be better if complemented by '*market research to draw concrete conclusions'*[1474]. Nevertheless, it is submitted that 'normal exploitation' should not refer to a particular business model. Thus, if a new alternative method of exploitation differently compensated became 'normal', the limitation that allows it might then be argued to comply with the second step[1475].

Lately the question was raised of whether non-economic considerations should be taken into account, in particular, the public interest. In fact a pure economic approach would paralyse too often any application of limitation and exception in the digital environment[1476]. This reading appears to break radically with the traditional interpretation of the second step, and would practically diminish the importance of the third step[1477]. However this author is of the view that user initiated dissemination of information is a democratic necessity that needs to be balanced with the rights of the authors and other copyright owners[1478].

6.5.3 - 'Unreasonable prejudice'

The third step requires limitations to be 'justifiable' and 'reasonably' supported by public policies or other social needs[1479]. The crucial questions are therefore concerned with whether or not the interests at stake are legitimate, and at which point the level of 'prejudice' may become 'unreasonable'[1480]. Nevertheless, the introduction of a levy-based compensation system appears to respond to this requirement[1481]. In a sense, a

[1473] *MGM Studios, Inc. v. Grokster Ltd*., 380 F.3d 1154, 1161 (9th Cir. 2004). The Supreme Court did not refer to this example expressly but stated that '*some musical performers* […] *have gained new audiences by distributing their copyrighted works for free across peer-to-peer networks* […]'. *MGM Studios, Inc. v. Grokster Ltd*. 125 S.Ct. 2764, 2772 (2005).
[1474] Grassmuck, V. [2009] *op.cit.*
[1475] EML [2009], *op.cit.*
[1476] Ginsburg, J.C. [2001], *op.cit.* 48-52; Senftleben, M. [2004], *op.cit.* fn.9, 181
[1477] Lucas, A. [2010], *For a reasonable interpretation of the three-step test*, 32(6) E.I.P.R., 277-282.
[1478] *See*, in this sense, Netanel, N.W. [1996], *op.cit.*; Senftleben, [2004], *op.cit.* 33-34.
[1479] WTO Panel, Dispute DS160, §110(5) US Copyright Act, 7 January 2002, Para. 7.69; Gervais, D.J. [2005], *op.cit.* 19-20.
[1480] Senftleben, M. [2004], *op.cit.* 226-241. Ricketson, S. [2003], *op.cit.* Reinbothe-von Lewinski, [2002], *op.cit.* Article 10 WCT no. 23. Ginsburg, J.C. [2001], *op.cit.* 53. Peukert, A. [2009], *op.cit.* 172. German Federal Supreme Court, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 963, 967 (2002).
[1481] Senftleben, M. [2004], *op.cit.* 237.

remuneration system rebalances the prejudice making 'reasonable' what it would otherwise be 'unreasonable', if left uncompensated[1482].

> '*The interests of authors and exploiters of the third step have to be weighed against the interests of the general public and against possible alternatives. Assuming an appropriate remuneration* […] *the prejudice would not be unreasonable'*[1483].

6.5.4 - Critique

The above analysis is controversial, and some of the commentators disagree with such statements and conclusions[1484]. The reason for this negative assessment is that all international conventions rest upon the perception that copyright is a private, exclusive right. Accordingly, non-voluntary licences are the exception to this rule, and they have to be of a limited nature[1485]. Moreover there is a tendency to overlook the fact that the three step test was introduced as a diplomatic agreement with relatively loose constraint, permitting parties of the Berne Convention to retain their existing limitation and exceptions and to avoid a disharmonised evolution of national limitations and exceptions. The interpretation of the test should therefore be flexible and balanced. Restrictive interpretations appear to be unjustified when they contrast with the test's original *ratio*.

Nevertheless, the test itself produces a number of problems in an era in which legislative freedom and broad harmonisation are needed. In particular, it has been noted that

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[1482] Dusollier-Ker [2009], *op.cit.* 353.
[1483] EML [2009], *op.cit.* 28.
[1484] Rietjens, B. [2006], '*Copyright and the three-step-test: are broadband levies too good to be true?*' 20(3) International Review of Law Computer & Technology 323-336. '*Indeed, an exception for large-scale 'private' copying of the 'sharing' type might well conflict with a normal exploitation*'. Ginsburg, J.C. [2001], *op.cit.*55-6. '*Placing of an entire protected work on the digital networks for free access may unreasonably prejudice the author's interests in a considerable degree*' Reinbothe-von Lewinski [2002], *op.cit.* Article 10 WCT no. 22. '*It is difficult to see any justification that can be made for these uses under the three-step-test*'. Ricketson, S. [2003], *op.cit.* 80. '[the three-step-test] *might just prove itself flexible enough to allow some limited experimentation with virtual markets* [although it] *was devised as a mechanism to reinforce a model of copyright based in exclusive rights*. Eckersley, P. [2004] 158.
[1485] A broad levy system has not generally been accepted as a true alternative to exclusive rights in the history of international copyright law. A general compulsory licence for the dissemination of knowledge was rejected in 1967, during the Stockholm Conference. Report in Ricketson, S. [2003], *op.cit.* 481. Germany suggested that exceptions to the reproduction should not conflict with the author's right to obtain equitable remuneration. *Ibid.* 196. Remuneration schemes for private copying were discussed prior to the WIPO conference in 1996, but they were not included in the conference's agenda. This holds true also for the WIPO Treaties of 1996. Various statements at the WIPO Symposiums in 1993, 1994, and 1995 stressed the notion of copyright as an exclusive right in cyberspace. Ficsor, M [2002], *op.cit.* 5.125-7, 5.113-120, C10.33. '*It would be preferable to admit private copying as an enforceable right against technical devices and to solve the problem by a working system of equitable remuneration*'. Geiger, C. [2005], *op.cit.* Para. 371-380.

'*Organisations representing right-holders now frequently suggest that expansions to the scope of exceptions in copyright law would, or might, be incompatible with the 'three-step test' and would therefore contravene international and European law.* […] *Given the fundamentally uncertain requirements of the 'three-step test' and taking into account the role it was originally designed to fulfil, these claims are usually little more than misleading wishful-thinking*'[1486].

Thus, the test has come under pressure owing to its rigidness and restrictive approach, as well as its inability to allocate the balance between the interests involved. An international consensus regarding the scope of the test is still missing, and it has been suggested how the test may block the limitations adjustments needed, in particular, for networking technologies[1487]. The serious risk is that:

'the three-step test will further constrain the existing architecture of copyright, will limit both judicial and legislative freedom, and incrementally suppress and subdue balances that exist in national systems'[1488].

Considering the above, the author favours a different approach in order to solve the issues described in this work: a 'positive' remuneration right for authors and copyright owners, centrally and collectively administered. As it will be later discussed this new right will not limit the pre-existent exclusive ones, but will rather specify the condition under which the communication to the public and the reproduction rights might be exercised.

6.6 - A New Regime

The proposals discussed, however, have the limit to be linked to the current technologies available or directly to file-sharing. Whilst considering the speed of technology innovation, it would be advisable to adopt a more general approach. At this point,

'*the enigma is* [still] *this: If our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do with our minds? And, if we can't get paid, what will assure the continued creation and distribution of such work?'*[1489]

A new regime is necessary in order to guarantee copyright holder remuneration for the

[1486] Griffiths, J. [2010], *op.cit.* 309.
[1487] Westkamp, G. [2008], '*The three-step-test and copyright limitations in Europe: European copyright law between approximation and national decision making*', J.C.S.U.S.A. 2-3, 11, 31-32. Max Planck-Queen Mary [2009], '*Declaration: a balanced interpretation of the three-step-test*', www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf. [13/08/2010]. Geiger, C. [2009] *op.cit.* 627-37.
[1488] Westkamp, G. [2008], *op.cit.* 63.
[1489] Barlow, J.P. [1994], *op.cit.*

use of their works[1490]. This regime has to be internationally harmonised, and must also consider the interests of every group involved, including creators, performers, users, technologists, states and relevant industries. This legal framework should regulate the issues described in this work, but should be drafted in neutral terms so as to anticipate future challenges. This regime would apply whenever exclusive rights are difficult to implement or could have negative effects on society. This regime should not restrict fundamental rights, such as freedom of expression and communication, privacy and data protection[1491], and should consider copyright in its complexity, taking into account its legal aspects, but also its philosophical, economic, social aspects[1492]. In line with the *Kultur* Flat-rate and Open-Access/Content approaches, the following proposal is submitted.

6.6.1 - The Global Dissemination Treaty

Unauthorised dissemination of protected works over networking technologies is a global phenomenon; therefore, it is fundamental for a solution to be global. It is submitted that the best procedure to introduce a global instrument in order to address the issues described in this work is the adoption of an international treaty. Owing to the borderless nature of the environment, a national or regional approach would leave the problem unsolved 'elsewhere', thus rendering the proposal futile. Moreover, a globally disharmonised system is likely to be a dysfunctional system[1493].

The task of developing a global system to address the issues discussed in this work is one of the major challenges the copyright system is currently facing:

[1490] '*Under conditions of the digital age a new social contract between creatives and audiences has to be negotiated, a new arrangement for the reciprocal creative contribution" by authors and by society*', Grassmuck, V. [2009], *Sustainable production of and fair trade in creative expressions*, Research Workshop on Free Culture, Berkman Center for Internet & Society at Harvard University Cambridge, MA, 23 October, cyber.law.harvard.edu/fcrw/sites/fcrw/images/Grassmuck_09-10-23_Free-Culture_ Berkman_txt.pdf. [15/08/2010]. Also, Aigrain, P. (2008), *op.cit.*

[1491] On the importance of fundamental rights in the European legal framework, *see* Geiger, C. [2006], *Constitutionalizing intellectual property law? The influence of fundamental rights on intellectual property in Europe*, I.I.C. 371.

[1492] This paragraph includes most of the suggestions from Geiger, C. [2010], *op.cit.*

[1493] Clear examples are current disharmonised levy systems, even within Europe. Anderson N. [2010], *Europes dysfunctional private copying levy to remain*, Ars Technical (8 January). arstechnica.com/tech-policy/news/2010/01/europes-dysfunctional-private-copying-levy-will-stay-dysfunc tional.ars. Niemann, F. [2008], *Copyright levies in Europe*, Bird&Bird, www.twobirds.com/english/news/articles/pages/ copyright_levies_europe.aspx. GESAC [2010], *GESAC regrets Digital Europe's unilateral decision to abandon talks on Private Copying Levies*, www.gesac.org/eng/news/communiquesdepresse/download/ communiquesen_20 100107_private%20copying%20levies.pdf. Digital Europe [2010], *Digital Europe calls for the European Commission to take regulatory measures* (7 January), www.digitaleurope.org/ index.php?id =32&id_article =404#. [15/08/2010].

As new technologies challenge copyright's internal balance, and as the costs of globalization heighten the vital need for innovation and knowledge dissemination, a multilateral instrument that can effectively harness various national practices with regard to L&E's, and that can provide a framework for dynamic evaluation of how global copyright norms can be most effectively translated into a credible system that appropriately values author and user rights, is a necessity[1494].

The introduction of an international instrument is a unique opportunity to coordinate, harmonise and balance the global copyright regime on the path set by the Berne Convention Revisions, the TRIPS Agreement and WIPO Treaties. As discussed by Hugenholtz and Okedji in their proposal for an international instrument on limitations and exceptions, the goal of an international approach is to[1495]:

1) eliminate trade barriers, in particularly in regard to internet and access service providers;
2) facilitate users' access to protected works;
3) promote technological innovation;
4) promote/reinforce fundamental freedoms;
5) explicitly promote the normative balance necessary to support diffusion of knowledge.

The Global Dissemination Treaty shares these goals, but suggests a different approach to achieve them: a positive global centrally administered collectively managed remuneration right to compensate authors and copyright owners, which respects user integrity and promotes technological innovation. It is suggested that the treaty should be drafted and applied under the WIPO umbrella. Notably, WIPO has experience in administering and co-ordination the management of rights internationally[1496]. This proposal is in line with WIPO's 'Medium Term Strategic Plan':

'*The impact* [*of digital technology and the internet on the production, distribution and consumption of cultural works*] *is profound and signals a fundamental challenge for the institution of copyright. The objective* […] *is clear: to provide a market-based mechanism that extracts some value from cultural transactions so*

[1494] Hugenholtz-Okediji [2008], *Conceiving an international instrument on limitation and exception to copyright*, 3. www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf. [15/03/2011].
[1495] Hugenholtz-Okediji [2008], *op.cit.* 41.
[1496] For example, since its establishment in 1967, its 'service industry' has grown to include the digital administration of registrations and payments under the Patent Cooperation Treaty, the Madrid System for the International Registration of Marks, the Hague System for the International Registration of Industrial Designs, and the Lisbon System for the International Registration of Appellations of Origin. Moreover, WIPO has also entered the global dispute arena with the establishment of its WIPO Arbitration and Mediation Center in 1994 in relation to another network related phenomenon, i.e. domain names. It now offers alternative dispute resolution in respect of cross-border dispute settlement. Finally, they have the required experience and technology in the creation and management of large database; for example, they currently administer 1.7 million international patent applications. For further details of all these services, *see* www.wipo.int/services/en. [15/08/2010].

as to enable creators to lead a dignified economic existence while, at the same time, ensuring the widest possible availability of affordable creative content. The question is not so much the objective of the system, but the means of achieving that objective amid the convergence of the digital environment. Many experiments in better achieving the objective are going on around the world, both in terms of legislative solutions and in terms of new business models'[1497].

Moreover, WIPO could also guarantee the presence at the negotiation of all the relevant interest groups from both developed and developing countries. Finally, this proposal could be presented under the WIPO Development Agenda, which has opened its remit to consider collective management of copyright in the online environment[1498]. The involvement and participation of other forums is not excluded.

As Dinwoodie and Dreyfuss declare:

'[…] *WIPO brings to the table an intellectual property sensibility* […] *WIPO's Development Agenda also suggests that its approach to intellectual property rights is changing in a manner conducive to a more sophisticated analysis of the role intellectual property plays in the economy*'[1499].

The Global Dissemination Treaty will:

1. introduce a new remuneration right for the dissemination of protected works for authors, performers and other right owners-the Global Dissemination Right (GDR);
2. create a new agency, within WIPO, for the purpose of administering the system—the Global Dissemination Agency (GDA); and
3. implement a new global remuneration system-the Global Dissemination Remuneration System (GDRS).

The treaty will be flexible and will leave room for cultural autonomy of the member states allowing diverse local solutions[1500]. The treaty will include six articles, which will be drafted in technologically neutral terms, under the headings below (Figure 24).

[1497] WIPO [2010], *A medium term strategic plan for WIPO, 2010-2015*, 5, www.wipo.int/export/sites/www/about-wipo/en/pdf/mtsp_rev_en.pdf. [15/08/2010].

[1498] For example, it has currently opened an avenue of investigation into the interaction between territorially-limited licensing practices in the field of collective management of copyright, on the one hand, and global distribution of content in the digital environment, on the other hand. *See* WIPO Committee on Development and Intellectual Property [2009], *Project on Intellectual Property and Competition Policy (Recommendations 7, 23 and 32)*, Fourth Session Geneva, 16-20 November, CDIP/4/4 Rev, www.wipo.int/copyright/en/activities/copyright_licensing_modalities.html. [15/08/2010].

[1499] Dinwoodie-Dreyfuss [2009], *Designing a global intellectual property system responsive to change: the WTO, WIPO and beyond*, 46(4) Huston L.Rev. 1187-1234, 1234.

[1500] These two aspects are fundamental for an international treaty to be 'ideal', together with judicial manageability. Hugenholtz-Okediji [2008], *op.cit.* 42.

Figure 24 - The Global Dissemination Treaty

Whereas:

Desiring to develop and maintain the protection of the rights of authors and owners of related rights in a manner as effective and uniform as possible[1501]

Desiring to establish a supportive legal framework which requires various economic, social, cultural and technological implications of the networked society to be taken into account[1502]

Realising national and regional approaches would leave the situation unresolved and lead to a dysfunctional legal framework[1503]

Recognising that there are situations where right owners fail to receive remuneration due to lack of control, failure of national licensing schemes, and impracticality of enforcement[1504]

Recognising that there are situations where enforcement might jeopardise technology innovation and access to culture[1505]

Recognizing the need to introduce a new global instrument to provide a solution to the questions raised by unauthorised dissemination of protected materials over networking technologies[1506]

Recognising the need to describe the minimum standards of the global dissemination right and[1507]

Recognising that the global dissemination right will co-exist with existing obligations[1508]

Emphasising that the obligations of Contracting Parties as provided herein in relation to moral rights and technological protection measures will not be replaced but shall exist alongside such obligations[1509]

Emphasising that the global dissemination right shall not replace existing exclusive rights but instead will protect users, as it will allow them to disseminate protected works legitimately, and for right owners, as it will allow them to be remunerated[1510]

Article 1 – Relationship with Berne, TRIPs, WIPO Treaties and EU Directives

This article will specify that the Treaty is a special agreement within the meaning of Article 20 of the Berne Convention, and that nothing in this Treaty shall derogate from existing obligations of Member States[1511].

[1501] Para. 6.6.2.
[1502] Para. 6.6.1, 6.6.2 and 6.6.2.1.
[1503] Para. 6.6.2.
[1504] *Ibid.*
[1505] Para. 6.6.1, 6.6.2 and 6.6.2.1.
[1506] *Ibid.*
[1507] Para. 6.6.2, 6.6.3 and 6.6.4.
[1508] Para. 6.6.1.
[1509] Para. 6.6.2.
[1510] *Ibid.*
[1511] The so-called 'Grandfather Clause'. For instance, *see* Article 1 WCT, Article 2(2) and 4 TRIPs, and Article 1(2) Copyright Directive. The Global Dissemination Treaty is a 'special arrangement' between members of Berne under Article 20 of the convention. It is submitted that the Global Dissemination Right and consequent remuneration systems are not contrary to the Berne Convention. The Treaty specifies the conditions under which the right of communication to the public have to be exercised when the communication is non-commercial and user-initiated, within the freedom for member states to determine, under Article 11bis(2) Berne Convention, the condition under which the right is to be exercised. Moreover, it is further submitted that the Treaty is not contrary to the WIPO treaties. Article 8 WCT specifies that the right of communication to the public includes the right of making available, and the agreed statement concerning Article 8 further clarifies that nothing in this Article precludes member states from applying Article 11(bis)(2) Berne Convention. The WPPT introduced the making available right for performers (Article 10) and phonogram producers (Article 14), but this is not arguably part of the communication to the public. The right to remuneration for broadcasting and communication to the public under Article 15 WPPT is not dissimilar to the right proposed in the Global Dissemination Treaty. Finally, the suggestion of a right which can be only exercised collectively is not unprecedented, e.g Article 9 of the Directive 93/83/EEC on satellite communication and cable retransmission.

Article 2 - Global Dissemination Remuneration Right (a) This article will define the right. The right shall be a remuneration right[1512] enjoyed by authors, performers and other right owners (including related rights) to 'compensate' them for the non-commercial user-initiated disseminations of their works, including reproduction and transmission by any means. The right shall apply only to non-commercial disseminations of protected materials[1513]. (b) The right shall be based on a remuneration system collectively administered at international level[1514].
Article 3 - Global Dissemination Agency This article will define the power and obligations of the Central and National Branches of the Global Dissemination Agency[1515].
Article 4 - Remuneration System This article will describe the minimum standards of the remuneration system to be complaint to the Treaty. Details will be left to the National Agencies to be determined nationally under the supervision and control of the Central Agency[1516].
Article 5 - Relation with Other Rights This Treaty shall not replace existing rights, and shall leave intact and shall in no way affect existing provisions under international agreements relating to[1517]: a) moral rights; b) digital rights management.
Article 6 – Exceptions and Limitations This article will define the exceptions and limitations that can be accorded to States, Organisations and groups of individuals.
Agreed statements concerning the current available technologies and other matters will follow the Treaty

6.6.2 - The Global Dissemination Right (Article 2 and 5)

Historically, copyright has expanded in line with technology increasing its capability to create, record and disseminate a work, and notably, every time technology stretched the perception of the definition of 'public'[1518]. Networking technologies are, in a sense, the first user-initiated worldwide dissemination technology. Today, everyone is a 'broadcaster'. The dissemination of protected works over networking technologies involves most of the rights which copyright grants, but mainly two economic rights[1519]: the reproduction right and communication to the public (including making available and

[1512] Para. 6.6.2.
[1513] Non-commercial should be intended as a use of the work not in course of a business. Para. 6.6.2.2
[1514] Para. 6.6.4.
[1515] Para. 6.6.3.
[1516] Para. 6.6.4.
[1517] Para. 6.6.2.
[1518] Firstly with the right of performance to the public, then with communication to the public-the public included whoever had a radio and television device-, and finally with making available to the public-public is everyone with an internet connection or a mobile phone.
[1519] The issues concerning moral rights go beyond the scope of this work.

distribution)[1520]. However, as described in Chapter Three,

> *Technology may render certain traditional rights unenforceable and blur the distinction between others*[1521].

Internationally, the scenario complicates at a greater level when considering that a single copyright work may involve multiple rights-and related rights-of multiple owners in multiple jurisdiction. Nevertheless, according to classical law and economic arguments[1522], when the same type of problem constantly repeats, a clarification through legislation is more efficient than a case-based examination[1523]. It is submitted that a new right could simplify the scenario[1524]. In a sense, what is needed is:

'*One* [Right] *to rule them all*'[1525]

The right should be a remuneration right. It should be the only right covering user-initiated non-commercial dissemination of protected work. In a sense, this will be closer to the resale right of Article 1 of the Resale Directive and Article 12 of the Rome Convention

> '*Resale Directive. Article 1 - Subject matter of the resale right. 1: Member States shall provide, for the benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author*'.
>
> *'Rome Convention. Article 12 - Secondary Uses of Phonograms. If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration*'.

It will be a remuneration right from the start and will be 'residual' in the sense that, even if the other rights are assigned, this will not. It will be similar to the right of equitable remuneration described in Article 4 of the Rental and Lending Directive:

> '*Article 4 - Unwaivable right to equitable remuneration. 1: Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or*

[1520] For the ambiguities regarding the definition of these rights in the different jurisdictions, *see* Chapter Three.
[1521] Lincoff, B. [2002], Iop.cit
[1522] Kaplow, L. [1992], *Rules versus standards: an economic analysis*, 42 D.L.J. 557; Posner, R.A. [2007], *Economic analysis of law*, 7th ed. Aspen Publishers, 586-590; Cooter-Ulen [2007], *Law & Economics*, 5th ed. Pearson Education, 358-359.
[1523] Tamura, T. [2009], *op.cit.* 69.
[1524] For an overview of proposals suggesting the introduction of new rights, *see* Para. 6.3.4.
[1525] Adapted from J.R.R. Tolkien, *The Fellowship of the Ring*, 1954, Chapter 2.

performer shall retain the right to obtain an equitable remuneration for the rental. 2: The right to obtain an equitable remuneration for rental cannot be waived by authors or performers. 3: The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers. 4: Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected'.

Copyright owners enjoying the remuneration right shall not be entitled to enforce their economic rights against users for the non-commercial dissemination of their work, provided remuneration is paid and the Treaty conditions are observed[1526]. Importantly, moral rights shall not be affected. The right does not prevent copyright owners from applying technological protection measures so as to prevent access or copy to their works. Copyright owners wishing to apply DRM to their works will still potentially enjoy the remuneration. Notably, if the DRM is 'effective', their work will not be disseminated and no remuneration will be paid. On the other hand, in case of circumvention of DRM, the remuneration will be paid, but users disseminating the 'circumvented' works will be immune from paying damages for the infringement of copyright. The circumvention of the DRM itself is a separate matter, which would be enforced by the owner him/herself. The right does not modify pre-existent remuneration systems, since the compensation by them provided is for different acts/harms.

6.6.2.1—Exclusive Rights versus Remuneration Rights. -

'*By characterising intellectual property rights as exclusive rights, it is submitted by definition that they confer on their proprietor the entitlement to exclude others from making unauthorized use of the protected subject matter. As it is also widely recognized that IPR enjoy protection under the title of property in the meaning of constitutional laws and even human rights instruments, any encroachment of that entitlement may appear as a form of expropriation.* […] *Furthermore, in spite of their canonisation as a special type of human rights, and irrespective of the strong flavour of personal rights permeating copyright law, IPR in the first place have been created to 'do a job'—namely to foster creativity and innovation. This means that exclusivity should be the dominant regulatory model only where and to the extent that other, non-exclusive schemes cannot achieve the same or even better results, and/or generate more beneficial effects for society as a whole. This does not necessarily mean that access or use must be free whenever exclusivity entails*

[1526] Para. 6.6.4.

suboptimal effects. Instead, the proprietary element may persist in the sense that the user is obliged to pay for the privilege of unrestricted access'.[1527]

Historically, exclusivity has been an 'essential feature' of copyright[1528]. Exclusive rights, however, need to be constantly balanced and recalibrated over time[1529] with the introduction of limitations, exceptions and defences[1530]. These, however, rarely involve remuneration for the use[1531]. The Copyright Directive, for instance, refers to a right to remuneration only with regard to private copying[1532]. Notwithstanding, the terminology and classification of limitations/exceptions, and the accompanying rights to remuneration, differ substantially in terms of national copyright laws[1533]; they all reduce the right holder's control to a remuneration right[1534]. On the other hand, a remunerations system appears to be preferable to a licensing system, despite the fact that national and international legislation would need to implement it—notwithstanding, it would not be necessary in the case of comprehensive licensing by the right owners or their representatives.

This comprehensive licence is not emerging due to the complexity of dealing with multiple copyright owners of multiple rights in multiple jurisdictions. A 'levy' is a better approach when licensing is impractical[1535]. One remuneration right centrally administered appears a more efficient approach[1536]. Figure 25 below addresses the

[1527] Kur-Schovsbo [2007], *Expropriation or fair game for all? The gradual dismantling of the IP exclusivity paradigm*, Max Planck Institute for Intellectual Property, Competition and Tax Law, Research Paper Series 09-14.
[1528] Para. 4.3.
[1529] Ricketson, S. [1987], *The Berne Convention for the protection for the literary and artistic works: 1886-1986*, Kluwer, 477.
[1530] Article 13 TRIPs, Article 10 WCT, and Article 5 Copyright Directive name both alternatives.
[1531] For instance, fair dealing in the UK.
[1532] Art. 5(2)(a)-(b) Copyright Directive. In some European jurisdictions, notably Germany, other limitations addressing the public interest in free speech and the dissemination of knowledge, are combined with a right to remuneration. Guibault, L.M.C.R. [2003], *op.cit.* 28-34, 69-75; Senftleben, M. [2004], *op.cit*, 22-34.; Geiger, C. [2004], *Droit D'Auteur et Droit Du Public À L'Information. Approche De Droit Compare*, Litec, Para. 213-305. For instance, §45a German Act (limitation for disabled people) is combined with an obligation to pay an equitable remuneration that is obligatorily administered by a collecting society, whereas §51 (quotation right) is not subject to a remuneration right.
[1533] Sirinelli, P. [1999], *op.cit.* 2.
[1534] Reinbothe-von Lewinski [2002], *op.cit.*
[1535] The Chief Economist of PRS has also recommended this approach: '*We suggest that all stakeholders seriously consider the recognition of and compensation for the value creative content adds to the 'venues' that are Next Generation Broadcasters. Different stakeholders will see this problem (and therefore the solution) quite differently. However, we hope the title offers a unifying theme, which is that it is time to move Digital Britain forward without leaving Creative Britain behind*'. Page-Touve [2010], *Moving Digital Britain*, 19 Economic Insight 12.07.10 www.prsformusic.com/economics. [15/08/2010].
[1536] For an overview of the proposals involving collective management approaches, *see* Para 6.3.2. None of them, however, suggested the introduction of a supra-national body to administer, monitor and control national collective societies, such as the Central Agency described below at Para. 6.6.4.

differences between licence and levy. However, it should be noted that they both lead to the same effect: a transfer of sums from the users to the right owners[1537].

Figure 25 - Licence versus Levy[1538]

Licence	Levy
Payment per use	No payment per use
Known identifiable licence	Unknown users
Exercise of rights	Compensation in lieu of licence and control
Private negotiation	Government imposed
Terms and conditions	Statutory scope
Exchange of data on media usage	Unidentified uses
Limited to use copyright works	Media is potentially used for non-infringing purposes
Control or limit any further uses through terms/conditions of sale or technology	No insight or control of infringing uses

Nevertheless, as discussed[1539], the copyright system itself provides alternative ways to modify this exclusivity when deemed necessary. The idea not to grant exclusive rights but rather to limit them to a right to indirect remuneration is nothing new to copyright law[1540]. Accordingly in relation to the German Supreme Court, the right of remuneration is a natural right that

> '*merely find recognition and form through legislation*. [It arises from the] *debt of gratitude* [...] *grounded in the fulfilment of the individual appetite for art*. [Therefore,] *it is precisely the individual enjoyment of the work - irrespective of whether this enjoyment of the work occurs in the public or in the domestic domain - that constitutes the internal justification for the copyright owner to reasonable remuneration*' [1541].

Some commentators have previously argued that copyright in the digital network environment will at least partially have to be replaced or supplemented by levies owing to the fact that exclusive right are increasingly difficult to enforce and can

[1537] From an economic perspective the introduction of a remuneration right may be explained by the 'liability rule' of Calabresi and Melaned. Calabresi-Melaned [1972], *Property rules, liability riles, and inalienability: on view from the cathedral*, Harvard L.Rev. 1089-1128. '*Copyright law's remuneration can be regarded as liability rule entitlements that are introduced where high transaction costs exist*'. Koelman, K.J. [2004], *Copyright law and economics in the EU Copyright Directive: is the droit d'auteur passé*, 35(6) I.I.C. 603-758, 611. '*Intellectual property is a term of convenience rather than enunciating a truth cast in stone, and the practical relevance of liability rules is likely to increase in view of challenges by novel forms mass uses of protected content, and by growing sophistication of technology*', Kur-Schovsbo [2007], *op.cit.* Abstract

[1538] Figure from Page-Touve [2010], *op.cit.*

[1539] Para. 6.3.

[1540] Litman, J. [2004], *op.cit.*

[1541] '*Grundig*', *Bundesgerichtshof* (German Federal Supreme Court), ZR 8/54; 17 BGHZ 266; [1955] GRUR 492, 18 May 1955. For a complete analysis of the right of remuneration in Germany, *see* Gaita-Christie [2004], *op.cit*.

fundamentally limit the 'free flow of information[1542]. The aim of this proposal is to recalibrate the equilibrium. This new remuneration shall not be limited to private copy, but shall cover all non-commercial uses[1543] in which the enforcement of copyright is considered to be too complex or impossible to achieve without undermining user integrity or technology innovation[1544]. If technological innovation would not constantly decrease the ability to control the dissemination of protected works, exclusive rights should then remain the cornerstone of the system[1545]; otherwise, it is submitted, the shifting towards a remuneration right is the necessary step[1546]. The congeniality of this solution rests upon the fact that it preserves the benefits of technology innovation, whilst at the same time guaranteeing copyright owners' compensation. In other words: '*compensation without control*'[1547].

As discussed in relation to the *Kultur* flat-rate[1548], this remuneration right does not constitute expropriation of constitutional rights, nor is it a form of 'sovietisation' of copyright, as argued in relationship to the 'Global License' in 2005[1549]. It could be interpreted as a limitation/compression of rights and, if that is the case, it is submitted that it serves legitimate purposes and is adequate, necessary and appropriate[1550]. The purpose is to remunerate copyright owners without stifling technology innovation or otherwise undermining user integrity[1551]. It is necessary simply because the 'limitless' number of infringements and infringers prevent copyright owners from enforcing their right. It is adequate and appropriate because the copyright owners quantify the remuneration in collaboration with the national collecting societies, the state, the

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[1542] '*Copyright on the internet should be transformed from an exclusive right to a mere remuneration right*'. Wittgenstein, P. [2000], *Die Digitale Agenda der WIPO-Werträge*, 162, Stämpfli. '*The future protection of authors will probably amount to mere remuneration rights*', Wandtke, A.&A. [2002], *Copyright und virtueller Markt in der Informationsgesellschaft, Gewerblicher Rechtsschutz und Urheberreht* (GRUR) 1, 7. Both quoted in Paukert, A. [2009], *op.cit.*

[1543] Para. 6.6.2.2.

[1544] For an overview of the proposals suggesting a levy system, *see* Para. 6.3.1 and 6.3.1.1. The Global Dissemination Right however is broader in scope, global and differs in the justifications.

[1545] As suggested by some authors including Dogan S. [2003], *Code versus common law*, 2 Journal of Telecommunication & High Technology Law 73; and Ginsburg, J.C. [2001], *op.cit.* 1613. After *Grokster* and *Kazaa*, some have suggested that is was superfluous for copyright to evolve towards a remuneration right, but simply the new methods of dissemination should be brought within the exclusive rights. Ginsurg, J.C. [2009], *Copyright control v. compensation: the prospect for exclusive right after Grokster and Kazaa*, in Strowel, A. [2009], *op.cit.* 110-123, 123.

[1546] As argued by some authors including Lessig, L. [2004], *op.cit.* or Judges, including Breyer, J. in *Grokster*, 125 S.Ct. 2764 (2005), 2793.

[1547] Lessing, L. [2001], *op.cit.* Ku, R.S.R. [2002], *op.cit.* 263.

[1548] Para. 6.4.1. The *Kultur* flat-rate approach, notwithstanding the similarities with the Global Dissemination Right approach, does not suggest the introduction of a new right, nor a global and centralised system.

[1549] *Ibid.*

[1550] Similar conclusions were expressed for the Flat-rate approach. EMR [2009], *op.cit.* conclusions.

[1551] Para. 5.1.1.

relevant industries and users' association. More precisely, it is a right that covers a form of non-commercial exploitations which are only 'theoretically' covered by pre-existent rights. In practice, however, such rights are so difficult to enforce to question whether their owners 'effectively' enjoy them. In a sense, the global dissemination right will grant remuneration instead of a bundle of non-enforceable rights.

6.6.2.2 - Commercial Use versus Non-Commercial Use. - It is difficult to define what a 'commercial use' constitutes. In a number of jurisdictions, a compromise has been reached with wording such as 'for profit' or 'for monetary gain'. Thus, 'saving money' because of not paying for content could arguably be considered commercial use. Moreover, it appears that uses accepted as non-commercial in the analogue world can become commercial in the online digital environment[1552]. The reason behind this could be the presence of a detrimental effect; however, there is no empirical evidence, and any arguments on economic basis can mislead[1553]. The solution of this issue is beyond the scope of this work. Nevertheless, it is submitted that what constitute a 'commercial use' should be clearly defined at international level and should not be left to personal perspectives.

6.6.3 - The Global Dissemination Agency (Article 3)

The Global Dissemination Agency will be set up in Geneva at WIPO. Its primary role would be to monitor the system and supervise/control the National Agencies. Moreover, it will be required to collect information gathered from the National Agencies, and to accordingly calculate the international flow of works and to share such data with the National Agencies for them to calculate the sharing of the sum collected. It will finally be required to assess and approve the calculation of the remuneration methods suggested by the National Agencies.

The National Agencies will include the state (ministry of culture and ministry of telecommunication), relevant industries (network providers), collecting societies,

[1552] This difference in the treatment of similar activities in analogue and digital environment is not unprecedented, for instance: Article 53a UrhG allows the transmission of a journal's article as a graphic file since the technology is closer to analogue than to digital. Westkamp, G. [2008], *op.cit.* 41. OLG München, 29 U 1638/06 (10 May 2007). Article 70(1-bis) LdA allows the posting of 'degraded' literary and music works on the internet for limited purpose. Spinelli, L. [2008], *Italia, al via le immagini degradate*, Punto Informatico, punto-informatico.it/2183742/pi/commenti/italia-alvia-immagini-degradate .aspx. [15/08/2010].
[1553] Westkamp, G. [2008], *op.cit.* 42.

copyright owners' representatives, consumer organisation, *etc*. They will administer the system on behalf of the Central Agency and collect and redistribute the sum. They will determine in consultation with the entities named above the method utilised in order to calculate the amount, who should pay for it, and how to distribute to the national right owners. They will also collect the information on the dissemination of works on behalf of the Central Agency. The method of collection of the remuneration and information will be left open to be determined on national grounds. It may be a 'levy' on the network providers, could be 'state-funded' or any other method the Central Agency will deem to be appropriate. Information could be collected through non-intrusive traffic analysis, anonymous monitoring, recruiting volunteers (Nielsen families[1554]), or any other method deemed appropriate by the Central Agency.

6.6.4 - The Global Dissemination Remuneration System (Article 5)

Contracting parties shall impose a remuneration system, as set out in Figure 30, which will incorporate the following features:

(a) This remuneration system can be imposed on products and services, which directly or indirectly benefit from unauthorised uses of protected work (i.e. internet access providers and mobile networks providers)[1555].

(b) The remuneration shall be determined, as well as the modality to calculate the subsequent distribution of sums to the copyright owners, by the state in agreement with the representative of copyright owners, consumer associations and the relevant industries.

(c) The remuneration shall be calculated on national bases, taking into account the purchasing power of its citizens, the market for product and services, which directly or indirectly benefit from unauthorised uses of protected works, the usage, and the estimated amount of unauthorised uses.

(d) Products- and services-providers may pass the remuneration on their users.

(e) The remuneration will then subsequently be collected by the National Agency, which will also calculate in the most accurate way possible (determined by the national agreements) the nature and volume of the works disseminated (Figure 31).

(f) For a fair distribution of the sums collected, the user identity is irrelevant.

[1554] Para. 6.6.4.3.
[1555] As suggested already by a number of commentators, *see* Para 6.3.1 and 6.3.1.1.

(g) The information will be transmitted to the Central Agency, which will calculate the international flow and will accordingly advise the National Agency how much of the sum has to be nationally retained, transferred aboard, or otherwise received from abroad (Figures 31, 32 and 33).

(h) The National Agency will then transfer the sums to the relevant national organisation/representative of copyright owners (authors, performers, film producers, phonogram producers, *etc*.), and such individuals/parties will then receive the sum on behalf of their members.

(i) Unclaimed sums (orphan works, works licensed under creative commons, works in the public domain, creators refusing to collect the remuneration, *etc*.) will be retained by the relevant member state, to be re-invested into supporting heritage, culture and the communication infrastructure. Governmental and non-governmental organisations may be entitled not to pay the remuneration on the basis of adopting measure to prevent access to protected works via their communication systems.

(j) Member States may exempt particular entities or groups of people, whether the imposition of the remuneration would undermine their right to access to information.

(k) Developing countries may apply under the Global Dissemination Treaty to the Central Agency for an exemption from the remuneration system, which will be determined by the Central Agency.

6.6.4.1 - Compensation Systems versus Levies and Taxes. -

'*The term 'levies', although used frequently in the English language, should be avoided, because it draws attention to the less important issue of how the remuneration is calculated. Yet, attention should be drawn to the essence of this phenomenon, namely the fact that it is a statutory right of remuneration for the use of works, the law having permitted the use without authorisation of the author or other right holders. In other words, it is a compensation for use and thereby an essential element of an adequate protection of authors' rights in their works, and this independent of any 'harm'. Conversely, the term 'levies' is all too often associated with 'taxes' and thereby tends to be misleading. Therefore, it is strongly recommended in the future to speak of (statutory) remuneration rights for private reproduction (or other specified uses). This would, in addition, be consistent with the terminology used in the national laws of Member States within their legal systems*'[1556].

[1556] von Lewinski, S. [2007], *Stakeholder consultation on copyright levies in a converging world—response of the Max Planck Institute for Intellectual Property, Munich*, 38(1) I.I.C. 65-93, 65-66.

It has also been clarified that the concept of remuneration is unrelated to the identification of an 'economic harm', simply because it is not a justification of the existence of copyright. Copyright is granted to guarantee that copyright owners are able to benefit from the use of their work[1557].

> '*Remuneration is a compensation for the value that is reflected in the use of the work. The 'economic harm' is in no way a condition for the recognition of the rights of authors or neighbouring right holders*'[1558].

6.6.4.2 - Methods for the Calculation of a Fair Remuneration. - Private copy levies are generally calculated upon a percentage of the selling costs of related copy-machine and blank support. Different countries use different systems[1559]. The Global Dissemination Remuneration System will leave the National Agencies to determine how to calculate the remuneration level, and who should be responsible for the payment. An important point is that the remuneration will have to be paid at the point of origin and at the point of destination[1560]. Alternatives could be a creation of a state fund, a 'levy' on providers of 'networks' and/or 'networks equipment'. The levy could be 'flat' on the equipment or on the 'connection' provided—such as, for instance, TV and radio licenses, in the sense that users pay notwithstanding actual usage—or on the bandwidth used, which is generally considered more appropriate.

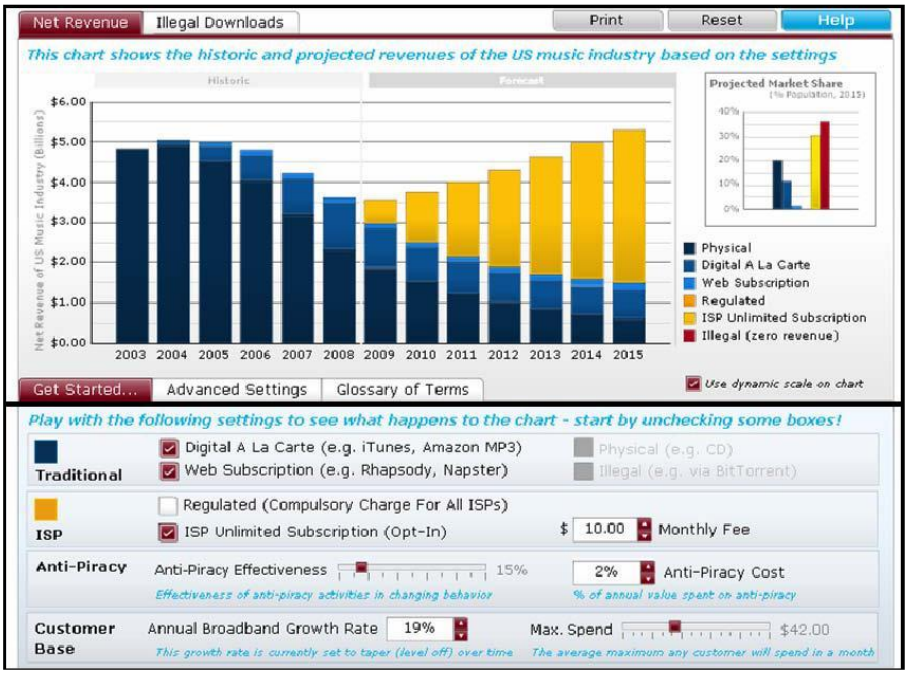
The remuneration should take into account the state of the internal economy, the level of the infrastructure provided, the attitude of users towards copyright works, and the level of education of the population. It should not take into account the estimated 'harm' to copyright owners, as mentioned, but rather should determine what, considering all the above, would be a 'fair remuneration'.

Recently an interesting project was launched, which could help in determining the correct remuneration: 'A Price for Music'[1561]. The aim of the project is to prove that there are ways to make profitable the unauthorised dissemination of music through networking technologies. The model allows users to modify a number of settings to replicate multiple scenarios so as to estimate the financial impact that different approaches may have on copyright owners' incomes. It bases the analysis of music consumption patterns. Figure 26 below shows the default graph of the model, based on

[1557] von Lewinski, S. [2007], *op.cit.* 66.
[1558] *Ibid.*
[1559] European Commission [2008], *op.cit.*
[1560] If these points are under different National Agencies, the rate might be different.
[1561] www.apriceformusic.com. [15/08/2010].

data collected from music industry reports. All the variables are modifiable. The model could be adapted to calculate a fair compensation for the Global Dissemination Right.

Figure 26 - A Price for Music[1562]



6.6.4.3 - Methods for the Measurement of a Fair Distribution. - In order to 'quantify' the user-initiated dissemination of protected works, and consequently share the sum collected fairly, National Agencies should develop a method to measure the volume of the disseminations, and accordingly develop an estimate of the works disseminated[1563]. The issue is known, in fact, under the UK Digital Economy Act 2010, Ofcom duties include:

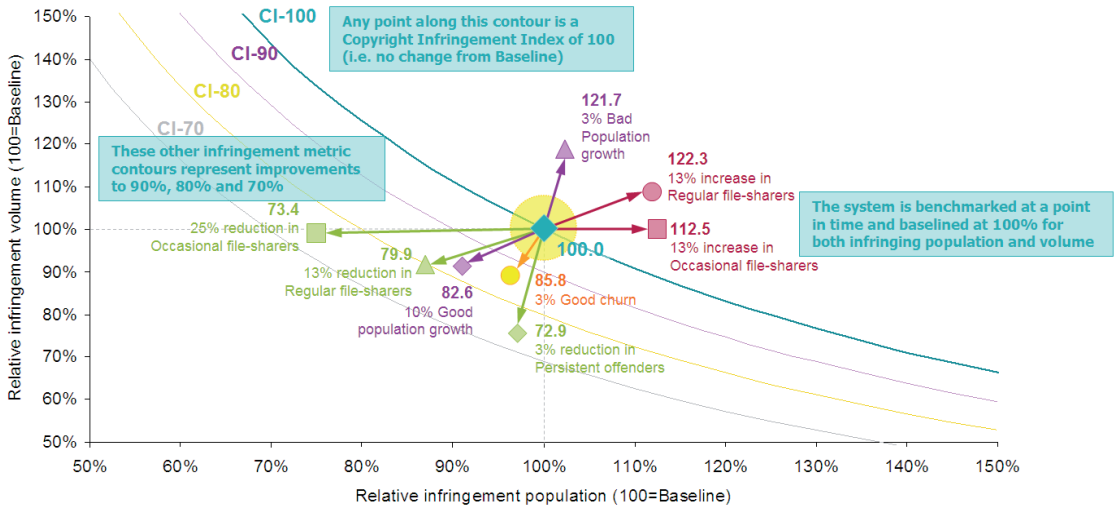
> '*an assessment of the current level of subscribers' use of internet access services to infringe copyright*'[1564].

There are various methods available, some of which have been already tested. For instance, Detica[1565], a traffic analyst company studying users' behaviours on the behalf of a number of internet access providers, created the CView. The system provides an index which can measure and track the nature of the plausibly unauthorised work disseminated over a network (Figure 27). The index is based on anonymous sampling. It

[1562] Figure from www.apriceformusic.com/pdf/apriceformusic_datasheet.pdf. [15/08/2010].
[1563] Page-Touve [2010], *op.cit.*
[1564] §8 Digital Economy Act 2010, inserting §124F(5)(a) to the Communication Act 2003.
[1565] www.detica.com. [15/08/2010]

provides an estimate of the volume of users disseminating works without authorisation and of the works disseminated[1566].

Figure 27 - Detica CView System [1567]



Less technologically advanced systems may be preferred, such as recruiting volunteers to provide feedbacks regarding their online activities, as equivalent of Nielsen families—a system already in use to divide Television advertising revenues, which could be adapted[1568]. The imperfections of the model could be mitigated automating the process through softwares or browsers plug-ins[1569]. No one of these methods is considered exclusive. It would be a matter for the National Agency to decide on the cost/benefit of an accurate or less accurate determination of the nature of the works shared.

Once the nature of the works is estimated, the following issues are to be considered: how to determine which of the often multiple copyright owners of the same work should be remunerated, and in which proportion—and, consequently, to which collective society—the sum should be transmitted. Such issues are normally addressed by different collective society in different jurisdictions in a number of ways. However, there is an extreme lack of transparency in this area. A common method is to assign a given percentage of the remuneration to different copyright owners depending on the equipment used to copy. SIAE in Italy use the following (Figure 28):

[1566] Page-Touve [2010], *op.cit.* Big Champagne uses a similar system: BCDash. bcdash.bigchampagne. com/what. More intrusive tracking systems may be adapted, such as the one offered by BayTSP. www.baytsp.com/services/tracking.html. [15/08/2010]
[1567] Figure from Page-Touve [2010], *op.cit.*
[1568] von Lohmann, F. [2008], *op.cit.*
[1569] *Ibid*. 'Plug-ins' are softwares that increase the capabilities of a web browser.

Figure 28 - SIAE Levies' Allocation Scheme[1570]

Audio Equipment and Blank-Tapes	Video Equipment and Blank-Tapes
50% Authors	30% Authors
25% Performers	70% to be divided equally between producers of 'original' film, producers of 'videograms', and performers.
25% Producers	

Any work that can be disseminated by users should be considered. Thus, the allocation of the remuneration should be between who creates, who performs, and who produces, as shown in Figure 29. In case no one performs (literary works for instance), this share should go to the author.

Figure 29 - Suggested Allocation of the Remuneration

40% - Authors	Authors of literary, dramatic and musical works, of films (list depending on jurisdiction), of softwares and databases
30% - Performers	Performers of dramatic and musical works, and films.
30% - Producers	Publisher, producers, broadcasters, and database's makers

If a work disseminated includes multiple works, the remuneration will be shared between all the right owners entitled. Finally, authors and other right owners are free to refuse the remuneration.

6.6.4.4 - Willingness to Pay. - Whichever method the National Agencies will deem appropriate, it is important to keep users' participation to the system minimum. Ideally, it would be preferable not to have users involved at all. One way or another, the users will eventually pay for the system in any circumstance. Moreover, it is submitted that users do pay for culture[1571]: they pay broadcast fees, mobile phones, internet and games subscriptions. Several researches show users are willing to pay remuneration for disseminating protected works[1572].

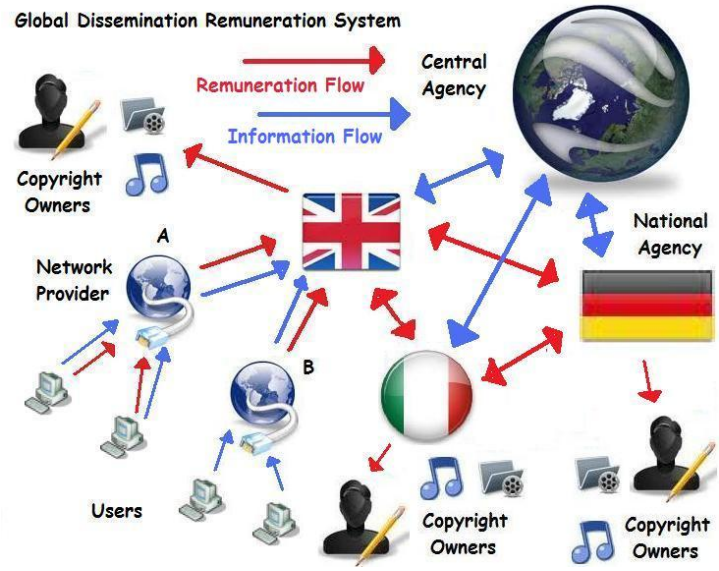
[1570] www.siae.it. [15/08/2010]
[1571] German Federal Ministry of Economics and Technology [2009], *Culture and creative industries*, www.kulturwirtschaft.de/wp-content/uploads/2009/03/german_cci_en_summary_0903231.pdf. [25/08/2010].
[1572] STIM conducted a survey in 2009 finding that 86.2% of respondents would pay an optional subscription to download music legally. PlayLouder found users were willing to pay of £10 per month to

Everyone will pay, in proportion to the use, or for the 'potential' to use. This may be deemed 'unfair'. However, as mentioned, each National Agency will have to estimate the user-initiate dissemination of works. It is predicted that the estimate will determine that only a percentage of the network transmission relate to copyright work. This percentage of the remuneration collected will be reallocated to copyright owners, the rest will be retained by the relevant National Agency and, for instance, could be re-invested into supporting heritage and culture or in the infrastructure returning to the users in form of improved services and modernised communication system.

6.6.5 - The System in Practice

The system will be administered via a Central Agency (for example, as suggested, WIPO) through its National Branches. The National Agencies will be responsible of the collection and distribution of both the remuneration and information. Network providers will be responsible for the collection of the information on behalf of their National Agencies. As previously explained, users may be asked to pay the remuneration and to accordingly provide information on the works they disseminate, if the network operator they subscribed to requires it. The system is described in Figure 30, which shows both the remuneration and information flow described separately below.

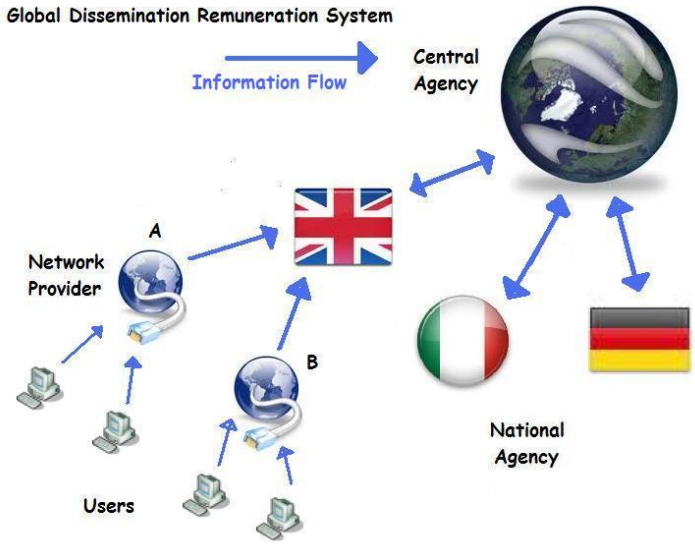
Figure 30 - The System in Practice



file-share. Spedidam conducted a survey in 2005 finding that 75.5% of internet users are 'ready and fully prepared' to pay a levy to be allowed to file-share. Thoumyre L [2007], *Livre Blanc sur le peer-to-peer*, 54. www.legalis.net/pdf/p2p%20livre%20blanc.pdf. Nokia suggested an 'acceptance value' of $90 per year. latimesblogs.latimes.com/technology/2008/10/nokiacomes-wit.html. [15/08/2010]. Richter found that the amount users would to pay is '*roughly equivalent to the local price of a movie ticket*'. Richter, W. [2007], *First findings on students' behaviour and attitudes on illegal file-sharing in China*, HPAIR conference 2007, Beijing, August 2007. As quoted in Grassmuck, V. [2009], *op.cit.*

6.6.5.1 - The Information Flow. - Network providers are responsible for the collection of the information regarding the protected works disseminated through their systems and for the transmission of such information to their National Agency. The National Agencies subsequently transmit the information to the Central Agency, which calculates the global dissemination flow. The nature and amount of works disseminated by users catalogued by nationality of the copyright owner and nationality of the users are shown in Figure 31 below.

Figure 31 – The Information Flow



A percentage of the transmission will be intra-national; the rest will involve two countries' National Agencies. The Central Agency, upon receiving all the required information, will then subsequently provide a report to the relevant National Agencies. Figure 32 offers an example of such a report where the numbers shown are examples which are not necessarily accurate or realistic. Notably, the term 'bandwidth' would be interpreted generally as the network basic unit to calculate usage.

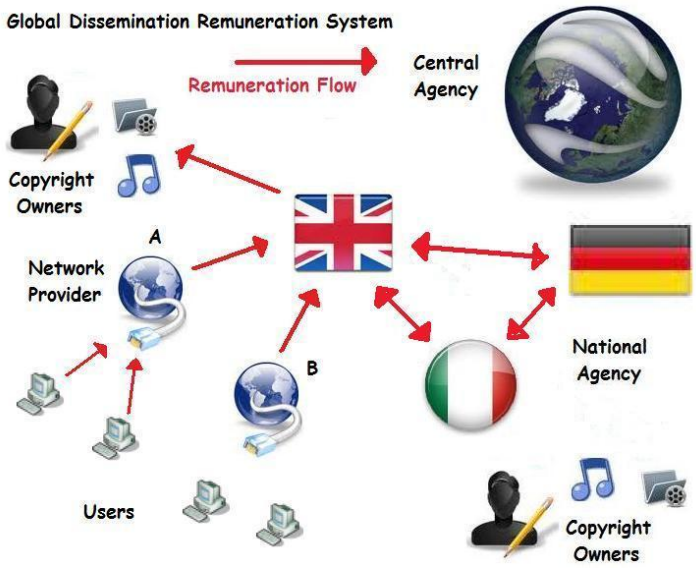
Figure 32 - Example of a Central Agency Report

	UK	**Italy**	**Germany**
Bandwidth used	100	100	200
Bandwidth used for disseminating protected works	60	80	140
UK works	**45**	30	60
Italian works	5	**45**	30
German works	10	5	**50**

Thus, in the above example, remuneration would be based on the bandwidth used. As only 60% of the bandwidth is utilised in the UK for the dissemination of copyright protected works, the UK National Agency would allocate that 60% in the following manner: 45% to go to UK rights holders; 5% to go to Italian rights holders; and the remaining 10% to German rights holders. In the UK itself, the amount collected (i.e. 45%) will be transferred to the relevant national organisation/representative of copyright owners (authors, performers, film producers, phonogram producers, *etc*.).

6.6.5.2 - The Remuneration Flow. - National Agencies are responsible for the collection of remuneration. They are free to determine who should pay the remuneration. The UK, as seen in Figure 33 below, decided to charge the network providers, whilst Germany decided to provide the remuneration with a dedicated state fund. Network providers in the UK may ask the users to contribute to it (even entirely) or otherwise to provide for it themselves. Network Provider A charges its users, whilst B does not[1573]. Both providers pay the National Agency. All the National Agencies worldwide share the sums collected and redistribute them to their national copyright owner in accordance with the information provided by the Central Agency. The Central Agency receives a sum for the administration cost, divided between all the National Agencies proportionally to the sum by them collected. As shown in Figure 33 below.

Figure 33 - The Remuneration Flow



[1573] Internet access providers could decide not transfer the remuneration payment to the users. Broadband is a full market. It could be expected that at least some small providers would not to charge directly users.

6.7—Conclusion

As mentioned[1574], all the proposals included in this Chapter have in common the aim to permit the dissemination of protected works thought networking technologies, designing a system to compensate the copyright owner. The approach is not unprecedented. Private copy levy systems, compulsory licences and mandatory collective managements are a part of the copyright systems, and have been used in the past to approach similar situations. Control through enforcement is arguably not achieving the expected result. An alternative is required, simply because the 'uncertainty' surrounding networking technologies harms not only the copyright owners, but also the users and technology providers. Therefore:

> '*The legal introduction of the culture flat-rate … is nothing less than the logical consequence of the technical revolution introduced by the internet*.'[1575]

The analysis showed the viability of the approach. Summing up, a remuneration system is submitted as being a viable and just method for maximising the potential of networking technologies for copyright owners, technology providers and users.

[1574] Para. 6.1.
[1575] EML [2009], *op.cit.* 63

Conclusion

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'Once you have eliminated the impossible, whatever remains, however improbable, must be the truth'[1576].

Historically, as described in Chapter One, copyright law has been forced to adapt to a number of technological developments with two consequences. On the one hand, the system expanded with new rights, new methods of management, and new limitations and exceptions; on the other hand, copyright owners experienced a constant decrease of the power to control the dissemination of their works. The latest developments to undermine this control are what have been defined in this work as 'networking technologies'. In Chapter Two, these technologies have been analysed with particular attention towards their innovative aspects, the possible future synergies, and their challenge to copyright. In Chapter Three, these challenges were identified, and the reason for the current legal uncertainty analysed. This uncertainty subsequently led to the questioning of the entire system.

In Chapter Four, it was emphasised that: (a) philosophical justifications for a 'strong copyright system' are often limited; (b) the entertainment industries—more than authors, performers and users—are the main actors in the copyright discourse, consequently leading to unbalances in the system; (c) networking technologies are more a challenge to the old business model than to copyright in general, they increase exposure and hold significant potential for authors, industries and users; and (d) sharing activities are perhaps the next stage in societal development. In other words, networking technologies are more a 'blessing' than a 'curse' for society as a whole[1577], as shown in Figure 34:

Figure 34 - Pro and Contra of Networking Technologies

PRO	CONTRA
Lower costs of dissemination	Perfect unauthorised copies
Wider dissemination	Lack of control over dissemination
User-initiated dissemination	No remuneration for copyright owners
Knowledge accessibility	
Cultural diversity and preservation	

[1576] Spock in Star Trek (2009), directed by J.J. Abrams. Original quote from Sherlock Holmes in Sir Arthur Conan Doyle's '*The Sign of the Four*' (1890).
[1577] The following table is based on Dutfield-Suthersanen [2008], *Global Intellectual Property Law*, Edward Elgar, 235-236; and Fisher, W.W. [2004], *op.cit.* 18-37.

Networking technologies are here to stay, at least until they are substituted by next technology. Thus, the legal uncertainty surrounding them has to end.

> '*Ten years after the emergence of Napster, the illegal download of music via peer-to-peer file-sharing networks is at least as widespread now as it has ever been (...) The growth of Europe's online population has driven the growth of the number of European music P-to-P users. Between 2004 and 2009, the Internet population across the UK, Germany, France, Spain, and Italy grew by more than 45 million. Thus, even though regular music P-to-P rates are relatively flat over the period, the total number of regular music P-to-P users grew from 18.9 million in 2004 to 29.8 million in 2009*'[1578].

Networking technology exacerbated the so-called 'digital dilemma'[1579], facilitating global dissemination of content at very low cost. The technology is extremely efficient and economically feasible, but fundamentally diminishes the control of rights owners over their works. Once a work is available over a network, it multiplies in an indefinite number of identical, unauthorised copies without the author being compensated. This inevitability creates a tension between the phenomenon of 'sharing' and the copyright owners interests in remuneration[1580]. Networking technologies became the communication standard whilst the proposed solutions cover almost everything from abolishing copyright to abolishing networking technologies.

Chapter Five explained the limits of enforcement, the flaw in the DRMs and in the 'Graduated Response' approaches and the improbability of solutions involving 'control' over the dissemination of protected works. An efficient control of network technologies is not possible without banning the technology altogether, or without otherwise experiencing severe drawbacks with regards to monitoring and privacy[1581]. The situation is that either exclusive rights are practically not enforceable, or their exercise would have too many negative side effects. In order to avoid such disadvantages, non-commercial unauthorised dissemination of protected works must be legalised[1582]. It has been argued that there are two ways available: licensing and levies. In all likelihood, however, there is probably

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[1578] Jupiter-Research [2009], *Analysis of the European Online Music Market Development & Assessment of Future Opportunities*. Data made available by Gabriela Lopes upon consultation with Shira Perlmutter (Executive Vice-President Global Legal Policy, IFPI) and quoted in Akester, P. [2010], *op.cit.* 374.
[1579] Committee on Intellectual Property Rights and the emerging Information Infrastructure [2000], *Cited*.
[1580] Lessing, L. [2004], *op.cit*, 296; OECD [2004], *Peer-to-peer networks in OECD Countries*, www.oecd.org/dataoecd/55/57/32927686.pdf, 2 [15/08/2010]; Einhorn-Rosenblatt [2005], *Peer-to-peer networking and digital rights management: how market tools can solve copyright problems*, 52 J.C.S.U.S.A. 239, 255. Netanel, N.W. [2003], *op.cit.* 19-22.
[1581] EML [2009], *op.cit.* 19.
[1582] Litman, J. [2004], *op.cit.*

'… the need to explore further, in close co-operation with relevant stakeholders, issues deriving from the use of copyrighted material or the exploitation of user-generated content by media-like services to protect and promote the freedom of expression and information'[1583].

In Chapter Six, non-voluntary approaches have been analysed, including the *Kultur* Flat-rate and the proposed 'Global Dissemination Remuneration Right', which appear to represent comprehensive solutions.

Copyright is at a critical stage of its history, and the near future will reveal whether or not it is possible to maintain the established protection and sources of remuneration of right owners[1584]. It must be acknowledge that the difficulties posed by networking technologies are formidable, and that the implementation of out-dated rules to regulate new phenomena has the obvious disadvantage that they will not necessarily fit the current situation very well. A way by which to regulate technologies which allows user-initiated dissemination of protected work is needed. Once a way to regulate them is established, society will then benefit as a whole and will enjoy a new 'era'.

Copyright aims to protect the '*most sacred* […] *property of the human mind*'[1585], rewarding creators for their contribution to society. However,

'*the current model is not working*'. […and…] '*This is unacceptable*'[1586].

The impact of networking technology has not been clearly quantified, whilst the balance between rights and exceptions and defences has been slowly but steadily shifted towards the first. It would be favourable for copyright to re-focus on achieving a new balance between the rights of the owners and those of users. Notably, there are advantages in permitting a use without control of protected works, as identified in this work.

This analysis addresses only a small element of a much larger debate over networking technologies; the proposed solution should be read in this sense. The consequences of the approach suggested are difficult to predict; however, notwithstanding the uncertainty of the long-term effectiveness, a solution needs to be sought and subsequently implemented. Models are designed for the future and it is important for copyright policies to be technology-neutral in order to last longer, thereby

[1583] First Council of Europe Conference of Ministers responsible for Media and New Communication Services (Reykjavik, Iceland, 29 May 2009), MCM (2009)011, Resolutions. Quoted in Geiger, C. [2010], *op.cit.* 13.
[1584] Sterling, J.A.L. [2008], *cited*, 6-7.
[1585] Le Chapelier's report (1791), Primary Sources on Copyright (1450-1900), Bently-Kretschmer eds, www.copyrighthistory.org. [15/08/2010].
[1586] Department of Culture, Media and Sport [2009], *op.cit.* 109, points 17-18.

maximising the opportunities and limiting the risks. Any attempts to regulate networking technologies if limited to the current file-sharing technologies, will soon be out-dated. It is desiderable, therefore, to find a technology-neutral solution to the impossibility of controlling the dissemination of works in a networked environment. Copyright law has proven able to adapt, but copyright law is inherently conservative. The author realises that

> '*if the suggested divergence from the existing norms and regulations is too radical, the likelihood of such legislation being passed is decreasing*'[1587].

However, promoting alternatives to the exclusive right over dissemination is not an 'expropriation' of copyright:

> '*innovation and creative destruction are essential elements of a free market*'[1588] and '*in a free market there can be no legal entitlement by businesses to a preservation of the status quo*'[1589]

The market has failed to integrate networking technologies in such a manner as to generate revenue for authors and other rights owners, whilst allowing sharing activities to continue. In such a scenario, an alternative modus operandi to the current legislative framework becomes relevant. The proposal sets out one such remuneration system, which it is submitted, is a practical and promising approach in relation to the securing of compensation for authors and other rights owners for the non-commercial dissemination of protected materials, without undermining users' integrity and technology innovation.

'*Thence we came forth to rebehold the stars*'[1590]

[1587] Grassmuck, V. [2009], *op.cit.*.
[1588] Schumpeter, J. [1942], *Capitalism, Socialism and Democracy*, 5th ed. Harper & Brothers.
[1589] Grassmuck, V. [2009], *op.cit.*
[1590] '*E quindi uscimmo a riveder le stelle*'. Dante Alighieri, the Divine Comedy, Inferno, Canto XXXIV, 139. Translation by H.W. Longfellow.

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