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Changing Modes of Asset Management: IPR and Copyright in the Digital Age

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Preface

Media and Content Industries (MCI) carry out an array of heterogeneous economic activities, which encompass publishing (including music), sound, motion picture and video/TV production, programming, distribution and broadcasting industries, as well as diverse information services.

The common thread in these activities is that they are all conducted by establishments primarily engaged in the creation and dissemination of information and cultural products. Also, the last decade witnessed a progressive intertwining of these activities amongst themselves and with the ICT sector, which increasingly provides the means for disseminating MCI products. At the same time, there was rapid change in the way these establishments worked and their business models (production and distribution processes, key players, organisation, etc.). Last, but not least, there was a substantial increase in the overall weight of MCI in the EU economy.

While understanding and mastering the descriptive quantitative tools that we have to hand is important, it is even more essential to grasp the current dynamics in the various industries in the Media and Content sector, possibly in relation with those in the ICT sector, in order to adapt our metrics and analysis to the current and emerging transformations of these sectors.

Therefore in 2009, IPTS launched a research project on the "Statistical, ecosystems and competitiveness analysis of the Media and Content Industries". This research initially included the preparation of a statistical report, a historical report and three subsector case studies, each supported by a dataset and technical annex. In 2010, IPTS decided to complement the initial case studies (cinema, music and newspaper) with two additional subsectors (book publishing and broadcasting) in order to provide a comprehensive view of the sector. In 2010, IPTS had already released a case study of the video games industry, a fast growing segment of the sector.

This set of studies has two objectives:

1. To offer a quantitative statistical approach to the Media and Content Industries, including their extension or blurring boundaries due to: offline and online activities; innovative activities deriving from recently developed technological applications (i.e. P2P, WEB 2.0, social computing or other related current or emerging trends and technologies); specific sub-industries, companies or products that would not readily fit existing taxonomies.
2. To offer an industrial and economic analysis of the Media and Content Industries, and their dynamics. The case studies investigate the past and current ecosystems of these industries, looking beyond value chains or major actors to those aspects that are relevant to the understanding of the transformations themselves: emerging challengers, past and new threats and ways of responding, new business models, major investments, major failures or successes and their causes, technological changes affecting the industry, radical innovations if any, etc.

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The six reports¹ are based on a review and synthesis of the available literature and (official and unofficial) data of the MCI sector, desk research, and several workshops.² The results were reviewed by experts and at dedicated workshops. The reports aim to offer a reliable set of data and analysis, and also to contribute significantly to the debate about the economic health and development conditions that will support the future competitiveness of the European Media and Content Industries.

In 2012, the IPTS launched a call on “Media and Content Industries: Changing regulation for changing industries”, with the following aims:

- Describe impacts and lessons from digitalisation,
- Draw synthetic lessons about the impacts of digitalisation and give an integrated view about the resulting transformations in the Media and Content Industries, differentiating these impacts within and outside Europe.”
- Propose an overview of value creation in the media and content industries and identify emerging business models from the various subsectors”.
- Debate main policy-related issues, consequences and ways forward”, with a main focus on copyright.
- Compare/confront the economic, industrial and other observations gathered in those studies with the above mentioned European and other non-European policies and regulations.
- Offer a series of policy options or recommendations.

This report complements the synthesis of the six case studies³ focusing on the protection of creation (copyright as asset management) and innovation. It provides an extension of the shorter section of chapter 5. Chapter 5 of the synthesis report is meant to provide an overview of most the policies within the horizontal framework adopted.

This report is organized in five sections: the main element of the academic debate around IPR, the economic case (weight of copyrighted industries, role in business models, old and new), the legal strategies of the copyrighted industries, the policies attempting to deal with

¹ The following reports are available at: <http://is.jrc.ec.europa.eu/pages/ISG/MCI.html>
Leurdijk, A; de Munck, S; van den Broek, T; van der Plas, A; Manshanden, W; Rietveld, E (2012) Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: A Quantitative Overview”
Leurdijk, A., Nieuwenhuis., O., Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: [The Music Industry](#) (2012).

Leurdijk, A., Nieuwenhuis., O., Slot, M., Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: [The Newspaper Publishing Industry](#) (2012)

De Vinck, S., Lindmark, S., [Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Film Sector](#) (2012).

De Prato, G., Simon, J.P, Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Book Publishing Industry (2012),

Sanz, E., [Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Film Sector](#) European Television in the New Media Landscape (2012).

² First MCI workshop, IPTS Sevilla, 30-31 May, 2011: “The economics of Media and content industry (MCI). Approaches, case study, economic effect of the digital transition”. Second MCI workshop, IPTS Sevilla, 27-28 October, 2011: validation workshop. All the presentations at the two MCI IPTS workshops are available at: <http://is.jrc.ec.europa.eu/pages/ISG/documents/>

³ *The dynamics of the media and contents sector*. The report underlines the specific dynamics at work within the media and content industries after a succession of disruptive technological waves.

the various facets of this complex issue, the changes needed and the balance to be found between major policy goals.

The report is based on desk research, a review of the literature, of the policies and public debates in the EU and the US.

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Introduction

Copyrights are part of a set of intellectual property rights that comprises brands,⁴ patents, know-how, trademark, design and trade secrets. This chapter deals mostly with copyright but incorporates some elements about patents. Copyright belongs to the intangible assets of the media and content industries but new entrants (high tech companies such as Apple) are relying mostly on patents and brands, these other property rights can bring significant streams of revenues.⁵

Copyrights as intellectual property rights are part of the asset management of the creative industries and this is likely to vary in space and time. It did vary already. For instance, the introduction of the printing press as a technological innovation enabled the creation of the book industry putting in place all the elements of its value chain (paper industry, other technical technologies, bookshops and libraries), however cultural changes of that magnitude took quite some time to unfold⁶ (Book report).

The situation is all the more complex as different creative industries have different value networks and ways to manage their assets. To take an extreme example a painter, painting on canvas, may have less reasons to have concerns about digital copies⁷ produced at almost no cost than a video artist developing video game software. The video games industry did have to cope with this issue since its very beginning but strove to react with technological solutions rather than expensive law suits (video game report). It is to be noted that this young industry came up with some innovative ways to manage their assets, introducing new business models ("freemium") to that end.⁸

Content is the main strategic asset of the players from the media sector, it is the very core of the aggregation-centred model⁹ and is based on the marketing of its valuable contents (application software, games, film, music, video...) under its own brand (Sky, BBC, RTL, Hachette...). However in the new ecosystem we described in the synthesis report,¹⁰ five business models are now competing. None of the main players being fully integrated, the companies compete but do not confine to their core business. They have to rely on each other assets to provide their services and they will try to get access to the needed assets under the best possible terms at the same time trying to restrict or to overcharge access to their own core assets. No wonder it appears a thorny area of potential conflicts.

As noted in 2006, by the Screen Digest study '*Interactive Content and Convergence*', some content providers were simply reluctant to licence their content. Content providers and

⁴ 18 million brands registered according to WIPO, out of which 80% are fairly recent. *Source*: C.Venica, presentation of Primavera de Flippi, Creative Commons France at the conference : "Géopolitique des droits de la propriété intellectuelle", Paris MSH Nord, 6 Avril 2012. "*The value of the top ten brands in each EU country amounted to almost an average of 9% of GDP per capita in 2009* » (EC, Com (2011) 287 final : 4).

⁵ Qualcomm derived, in 2010, 36% of its revenue from its patent portfolio (WIPO, 2011: 35).

⁶ See the report on the book publishing industry, produced by IPTS as part of the project on media and content industries.

⁷ Of course analogue copies of physical work can be easily done but they require highly skilled labour which means a high cost. Besides, in the art world/market legal copies are much cheaper than the original work.

⁸ See the report on "*The dynamics of the media and contents sector. A synthesis*". Will be referred to as MCI 1.

⁹ MCI 1.

¹⁰ MCI 1.

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distributors, around that period, found it difficult to agree on distribution terms. At that time the new entrants (Telcos) were asking for improved access to content under “must offer¹¹ conditions” to the TV channels owned by broadcasters.^{12,13} The situation has improved since partly because of tsunami initiated by Apple, making it far more difficult to move back.

The usual way to protect the content has been, so far, copyright. But the system came under attack from various sides. De facto, as claimed by rights holders, through piracy. It opened up what M. Cooper (2008) described as the “*first great battle of the digital age*” on digital intellectual property. Copyrighted content allows rights holders to control the circulation of their goods all along the value chain, in space and time; the digital era is jeopardizing this power. “*The major industry has always controlled the means of distribution up until the digital era, and that control has been lost... all copyright owners have lost that control with the internet*” regrets the CEO of the Irish music industry trade body.¹⁴ They link the process of creation and the use of copyright to stimulate, protect and fund back creation.

As underlined in the synthesis report,¹⁵ with digitization, the balance of power is shifting toward the downstream, away from the upstream, from the “production” side of the media toward the distribution side. In other words two different kinds of economics are colliding: the economics of production of cultural goods and prototypes and the economics of distribution of digital goods and services. The former balance with the management of rights and access is drastically changing in a world dominated by access where now the consumers may move more and more from the ownership of cultural goods toward the management of access to the relevant contents. Legacy players are relying on copyright, new entrants are pushing access as their own strategic assets are protected through other means, like patents, brand or trade secrets.

The debate may be cooling down somewhat, the main entity in charge of managing copyrights; the World Intellectual Property Organization (WIPO) is considering alternative options¹⁶ to licence. In its 2011 Report, the UN entity stressed not only the growing role of IP, the growing global demand for IP rights but emphasizes the shifting nature of innovation and IP (WIPO, 2011).

¹¹ “*Must offer*” is introduced often as a counterpart to balance “*must carry conditions*” imposed upon distributors such as cable networks operators so as to maintain diversity at a time when analogue cable capacity was limited. (Scheuer et al, 2008, Simon, 1999). Must offer conditions are also required in the context of mergers. For instance after the European Commission merger control decision, [NewsCorp/Telepiu of April 2, 2004](#), Sky Italia was (until December 2011) required to all non-satellite operators non-exclusive, non-discriminatory and unbundled access to Sky Italia’s premium content.

¹² They claimed they should be allowed to compete with traditional media on an equal footing, such as where rights clearance was concerned.

¹³ See the answers to the Creative Content Online consultation, 2008. E.C (2006), Consultation on content online in the Single Market, Jul. 28 - Oct. 13.

¹⁴ Quoted by Rogers (2011).

¹⁵ MCI 1.

¹⁶ At the International Institute of Communications (IIC), Annual Conference, 2010, Barcelona, S.Wunsch-Vincent (formerly with the OECD now Senior Economic Officer for the World Intellectual Property Organization) announced that his organisation was now ready to look at alternative ways to licences and talking with different stakeholders.

The issue of copyright has attracted a lot of attention and triggered hot debates mostly around piracy and the policy measures required to enforce adequately the rights, prevent infringements and pursue infringers in a digital age. However this focus on piracy did not contribute to a better understanding of the complexity of the situation. Nevertheless this type of infringement will be dealt with but not the issue of counterfeiting that will remain out of the scope of this review.¹⁷

The main question is how to assess whether copyright is enhancing creation in a digital environment or adding unnecessary constraints, or even preventing other important economic and social activities.

The first chapter of the report quickly sums up the main element of the academic debate around IPR. The second moves to the economic case and analyses its different aspects: weight of copyrighted industries, level of revenues generated for creators, role in business models (old and new) but also its limitation, focusing on the case of patents and innovation. The third chapter follows closely the legal strategies of the copyrighted industries. The fourth chapter presents the policies attempting to deal with the various facets of this complex issue. The fifth section concludes about the changes needed and the balance to be found between major policy goals.

¹⁷ It will be alluded to when dealing with the discussion over the ACTA treaty, see section 4.1.

1. Is there anything wrong with IPR? The academic debate

The body of scholarship on intellectual property and the Internet is vast, in both legal and economic literatures.¹⁸

1.1 A critical academic literature

Advocates of the “free internet” argue that the 19th century copyright regime is outmoded. As early as 1990, Litman, J. (1990) argued that the public domain “*should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use*”. Samuelson, P. (1996), prior to the adoption of the 1998 US Digital Millennium Act (DMCA), held the view that new copyright law may restrict access to information and impede the application of new technologies by authors and their audiences and slow development of more appropriate models for cyberspace. Lessig, L. (2001) claimed that over extensive copyright rules were enclosing the “*commons of the mind*,” resulting in public harm in access to knowledge. He argued that a system of legal protection of copyright with less commercially driven enforcement was needed for artists and creators. He led the Creative Commons movement of which he was a founder in 2001 (see 2.1). Netanel, N.W. (2008) claimed that copyright policy had been distorted to offer too much protection in the early Internet law period, chilling free speech. Copyright was perceived as a barrier to new or old applications.

The academic literature after the revision of the laws is largely critical of the extension of intellectual property protection (Hugenholtz, 1999, Carrier 2011) and has focused on a critique of the law itself (Netanel, 2008), the efficiency of the lobbying by industrial interests to maintain those protections (Hargreaves, 2011), and the technical mechanisms sought by governments and industry to enforce those rights (Lessig, 2001). Recent scholarship has also focused on attempts to reform the law in order to prevent rather absurd outcomes, (Noveck, 2006), as well as new means of negotiating open technology sharing across borders to enable scientific collaboration (Burk 2007). Given that digital products can only be protected by intellectual rather than real property laws the debate over the extent of reuse, the permissions required to grant reuse, and the nature of the legal protection appeared critical (Samuelson 1996), and triggered significant controversy and early revision of both European and US legislation in the period 1996–1998.

1.2 The shortcomings of the economic case of copyright

As Sanz (2012)¹⁹ sums up: “*The empirical shortcomings of the economic case of copyright are pointed out almost invariably by most of the central contemporary authors*”, quoting the seminal paper from Landes and Posner: “*Economic analysis has come up short of providing either theoretical or empirical grounds for assessing the overall effect of intellectual property law on economic welfare*” (Landes and Posner, 2003: 422). The first attempts dates back from the 30ies when A. Plant was exploring the issue asking how the absence of copyright would affect the book industry: “*Would books be written in such circumstances, and would they be published?*” The answer was positive pointing to the lack of strong relationship between the supposed incentive and the output. Cultural goods, information

¹⁸ This section relies mostly on Marsden’s review of academic literature for the legal references (2012).

¹⁹ The Sanz paper offers a section reviewing the classic economic theory of copyright.

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good or knowledge are public goods whose consumption are non-rivalrous and non-excludable (Stiglitz, 2008: 1700). Digitization is further increasing these features.

M.Cooper or L.Lessig (2004),²⁰ suggest that copyright may well be the suppressor of '*radical potential*'. These scholars and others like Y.Benkler (2006, 2011) tend to argue that legal regimes and technology are often out of phase, as in the case of many uses of collaborative software. When such incompatibilities are proven to exist they would usually suggest that the copyright regime should be reinterpreted or adapted to Knowledge Society/ Information Society goals. The Electronic Frontier Foundation, a US think tank and activist group, explains that "*IP law sometimes hampers—rather than encourages—communication, creativity, and innovation.*"²¹ Much in the same line, others are wandering about the costs of safeguarding copyright, and predicting that copyright reform will happen sooner or later.²² They underline that technology is a lost battle and that extending the consumers rights or implementing the existing ones may be at odds with the defensive strategies of some rights holders.²³

"Similar to the literature on patents, research on copyright has not produced conclusive empirical evidence whether unauthorized use of copyright works decreases social welfare, or what type of copyright policy would solve such a problem without excessive unintended consequences" (Handke, 2011: 41, quoted by Sanz, 2012). So far the research remains inconclusive and the evidence may be lacking. It is therefore understandable that legal theory and policymakers struggle to evaluate the claims pushed by rights holders especially as they also have to balance these claims against other main policies goals like freedom of expression, or consumer rights (Guilbaut et al, 2012a). However, most of the goals of the copyright regime can remain and still be perceived as legitimate: to enable creation and innovation. The means to achieve these goals can change over time as well as the guidelines to implement them (Coene and Dumortier, 2012).

²⁰ His famous book "*Free culture*" was released on the Internet under the Creative Commons Attribution/Non-commercial license on March 25, 2004.

²¹ <http://www.eff.org/issues/intellectual-property>

²² R. Falkvinge, MEP representative of the Swedish Pirate Party at the IIC Annual Conference, Barcelona, 2010.

²³ J. McNamee (Advocacy Co-ordinator, European Digital Rights), at the IIC Telecoms and Media Forum Brussels, 2010, listed the following: "*suining citizen's, plundering citizen's personal data in peer to peer, opposition to provide copyright exception and "fair use" exceptions, cutting off citizen's from the Internet*"

2. The economic debate: contribution to wealth, new business models, and welfare

From an economic viewpoint it is often claimed that copyright is a form of legal protection designed to correct a market failure linked to the very nature of creative goods as public goods characterized by high fixed production costs but low reproduction costs. In other words once the work has been produced it can be easily duplicated if not legally protected. Therefore intellectual property provides an exception to competition law, affording not only creators but most often owners²⁴ of the exploitation rights (licenses)²⁵ of intellectual innovations and products (publishers) legal protection from copying with a limited monopoly on permission to reuse material (Litman 1990, Boyle 1992). These two different categories of stakeholders may have different or conflicting interests as underlines by Baumel (2009: 15) *“both may have different incentives to produce and distribute cultural goods”*²⁶ (see section 2.4).

Intellectual property provides a strong management tools for this category of asset allowing the holder of the right to strategically use exclusivity, windowing,²⁷ versioning,²⁸ bundling²⁹ and to price discriminate. The downside is that it restricts access accordingly: *“copyright protection (. . .) trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law.”* (Landes and Posner, 1989, p. 326) quoted by Baumel et al, 2009: 15). As noted by Sanz (2012) this granted monopoly is usually seen as a loss of efficiencies and consequently a loss of social welfare in a static setting. In a dynamic one however, the welfare losses are supposedly being compensated by welfare gains (more products, more innovation) (Stiglitz,³⁰ 2008). *“The justification for any restriction is that there is a dynamic benefit, as a spur to innovation”* (Henry and Stiglitz, 2010: 240). Otherwise, creating exclusivity and limiting access will not be justified.

2.1 A positive contribution to the creation of wealth

Precise data on the real economic weight of royalties gathered by industries and the amount redistributed to authors/ creators, with the exception of books, are not easy to find as they are coming from different sources (for instance in music royalties from print rights, mechanical,³¹ performance and synchronization royalties), and collected by numerous

²⁴ This is an important point to stress as the economic interests of group, creators and owners may differ; see section 2.4.

²⁵ From a legal perspective, publishers don't 'own' the copyright, but they have the exploitation rights (licenses). In practice the difference is often minimal, from a legal perspective ownership and exploitation rights are two different concepts. The author would like to thank Nico van Eijk for clarifying this legal nuance.

²⁶ Quoting the seminal 1934 Plant study of books.

²⁷ Staggered sales, for instance the practice of releasing some book formats first (hardcopies) and others (paperbacks), video releases.

²⁸ Discrimination through quality.

²⁹ Combined sales.

³⁰ Dealing mostly with the case of patent, see 2.2.

³¹ The term mechanical has its origins in the "piano rolls" on which music was recorded in the early part of the 20th Century. They cover: tape recordings, music videos, ringtones, MIDI files, downloaded tracks, DVDs, VHS, UMDs, computer games and musical toys etc... *Source* Royalties: Wikipedia. <http://en.wikipedia.org/wiki/Royalties>

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collective organizations. Besides, terms of licenses agreement and contracts (scope of rights) vary from one segment to another.³² However, for the music segment, the International Confederation of Societies of Authors and Composers (CISAC) releases an annual survey³³ of the global authors' rights royalty collections of its members (225 authors' societies³⁴). In 2009, total collections reached € 7.152 billion³⁵ (see figure 2.1), an increase of 1.7% from 2008 to 2009 (but in current €).³⁶ The decline in mechanical rights (relating to recorded works) continued in 2009 (-8.7%). This significant decline reflects the ongoing difficulties of the recorded music market, where the transition to the digital market is slow to bear fruit. Like mechanical rights, revenues from private copying continued to decrease.

The digital sector accounts for 1.6% of total collections for all the repertoires combined, with the following distribution: 53.8% from downloading, 27.7% from mobile telephony (ringtones), 15.6% from streaming and 2.5% from webcasting. The growth in collections from this sector is still too weak to generate substantial revenues for creators. 72% of collections (€5.13bn) were from public performance royalties (growth in value +3.4% and in market share +1.2 pts from 2008). Radio, TV, cable and satellite generate most of the performing rights (56%). Music concerts represent 12% of these performing rights and 8% of authors' rights overall. Television is therefore the medium which contributes the most to creators' revenues (more than €1billion). The musical repertoire accounted for 86% of collections (€6.14bn). Through an 11% growth, the non-musical repertoire achieved €1 billion for the first time. Specialized consultancies such as Carat or ZenithOptimedia were forecasting growth rates between 3.5 - 5% for 2010-2012 and an on-going rise of the Internet share.

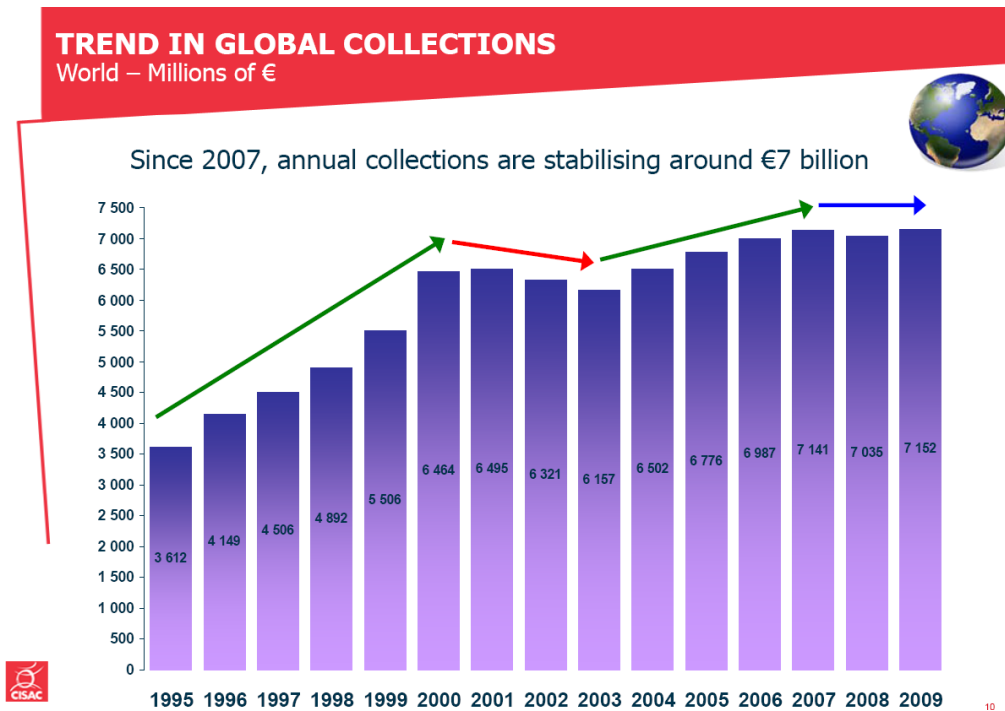
³² The audiovisual sector blends different type of remuneration of creators, fixed and non-fixed, upstream (prepayment) and downstream (proportional).

³³ Survey available at: <http://www.cisac.org/CisacPortal/initConsultDoc.do?idDoc=20585>

³⁴ 100 entities: 44% are located in Europe.

³⁵ Does not include the royalties collected directly by music publishers for songwriters and composers.

³⁶ A decline of 1.5% in constant euros. All data are coming from the presentation of Frederic Patissier, Business Intelligence Senior Consultant, available at the address above, under the reference: COM11-0063. Presentation dated January 2011.

Figure 1: Trend in global collections of royalties, music industry, 1995-2009.

Source: CISAC, 2011.

In line with the trends highlighted in the synthesis report,³⁷ Asia-Pacific is the region where the growth was the strongest, with a double-digit growth rate (+11%), this region not only reached the symbolic billion euro mark, but also now accounts for 14% of global collections, at the expense of Europe whose share declined by an equivalent proportion (-1.4 points). Europe, the leading region in the world for authors' rights with 63% of collections (€4.48bn), is the only region that saw a slight decline in its collections in 2009 (-0.5%). The survey states that the future growth in authors' rights will depend on the BRICs, but adds cautiously and not without reasons (see Section 3.2 on developing countries signing the Berne treaty), that these economies with the strongest growth "are those in which the level of protection of authors' rights is not always the most satisfactory (e.g. China,³⁸ India, etc.)".³⁹

In their review of studies of copyrighted industries in France, Benhamou and Sagot-Duvaurox (2007: 11) gave the following data for the French markets, explaining how they used and combined various sources: 427 million euros in 2004 for books (around 400 million in 2009: Minidata Figures 2011: 9) out of a market of 2.8 billion euros and a stream of 126 million euros for the sales of rights in 2009 (Minidata: 9); 268 million euros for TV in 2002, 460 million euros for music in 2004 out of a market of 2 billion euros (total revenues not only sales of edited music, the latter segment accounting for a little less than

³⁷ MCI 1 see intro.

³⁸ For the commitment of China, see Qian Tao (2012).

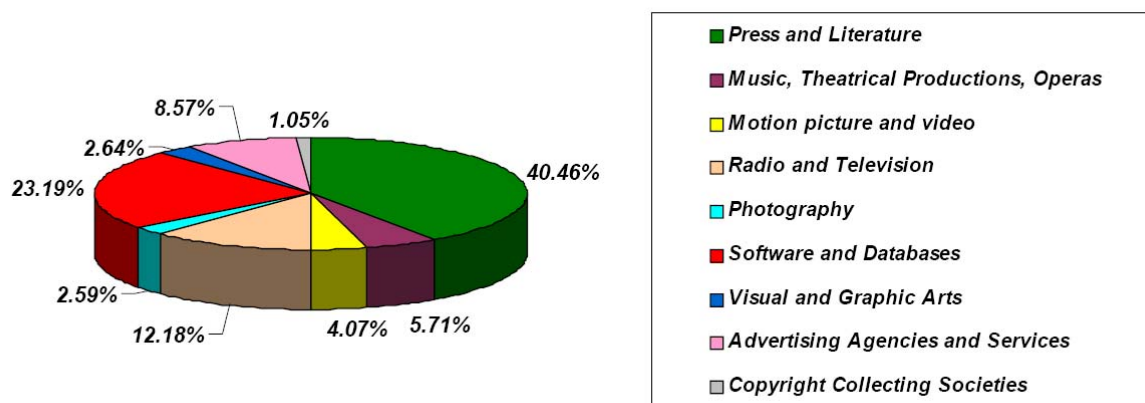
³⁹ CISAC survey.

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1.2 billion in 2005 v. 512 million in 2009), photographers received 75 million of euros of royalties in 2003.

Nevertheless, there are some good reasons for relying on an IPR regime, as noted by WIPO (2011) ownership of IP rights has become central for the strategies of innovating firms worldwide. IP has moved to the forefront of innovation policy. Data are available for the industries involved although not always consistent.⁴⁰ “*Copyright-based creative industries (comprising software and database production, book and newspaper publishing, music and film) contribute 3.3% to the EU GDP (2006)*” (EC, Com (2011) 287 final: 5). Another WIPO study (2012) looked at the contribution of the core copyright industries to GDP. The contribution to GDP varies significantly across countries from over 10% (USA, Australia), to under 2% for Brunei. With an average of 5.4%, three quarters of the countries surveyed (30) in the WIPO sample have a contribution between 4% and 6.5% (WIPO, 2012: 2). Figure 2 shows the average break-down among the industry segments of the core sector. With 40.5%, the press and literature segment is by far the biggest contributor to generating added value. The second largest segment is the software and databases segment with almost 24%.

Figure 2: Contribution of core copyright industries to GDP by industry

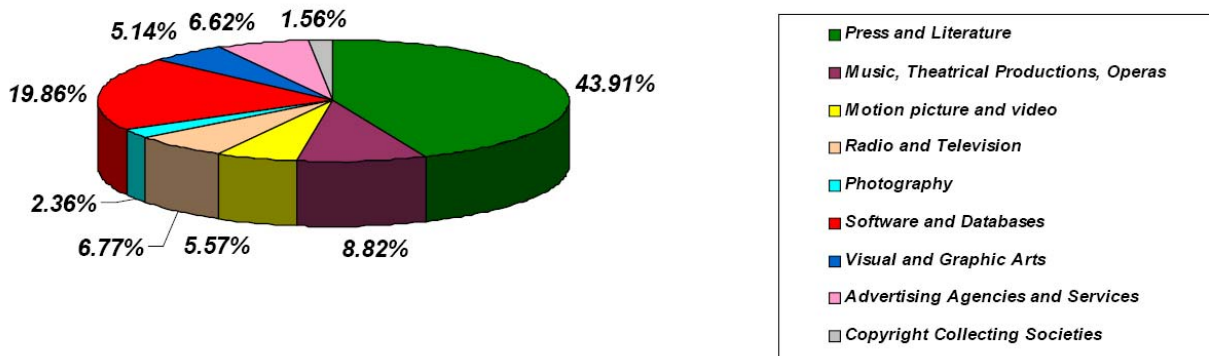


Source: WIPO (2012: 13).

The contribution of copyright industries to national employment also varies significantly across countries and stands at an average of 5, 9% (WIPO, 2012: 3). Looking at the contribution to employment, Figure 3 shows that almost half of the labour force in the core copyright industries is employed in the press and literature segment also followed by the software and databases segment. However comparing with Figure 2, it shows that the software and databases segment and the Radio & TV segment are the most labour intensive sectors, providing higher contribution to GDP compared to their respective labour input.

⁴⁰ For the size of EU industries see the report on the quantitative overview, produced by IPTS as part of the project on media and content industries, listed in the “*IPTS MCI reports*” of the bibliography.

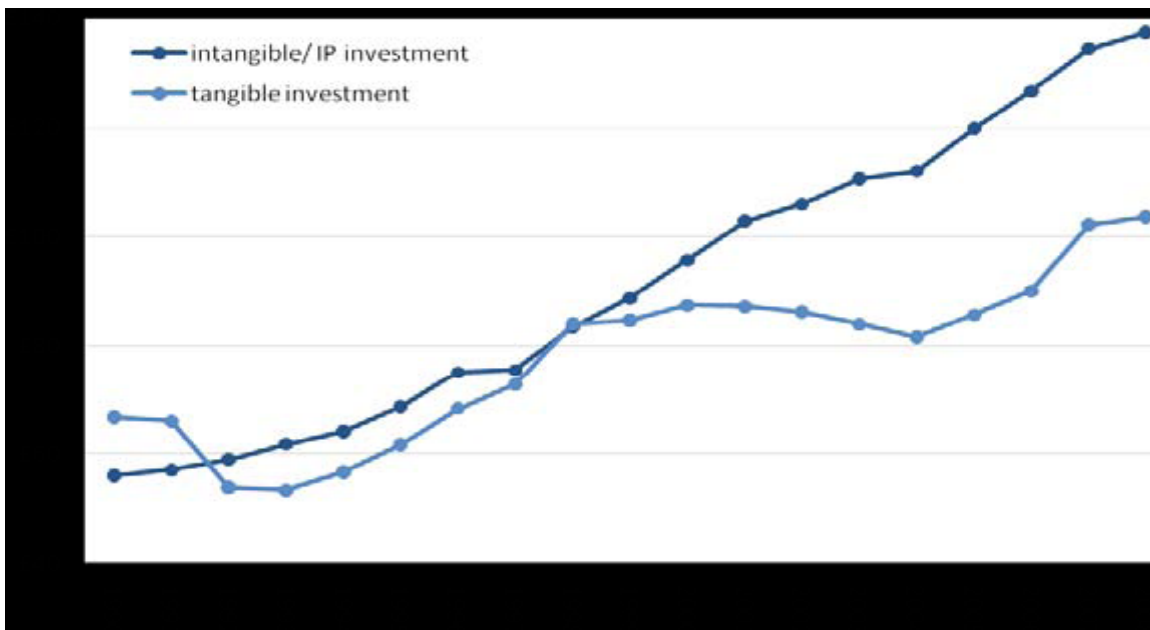
Figure 3: Contribution of the core copyright industries to employment by industry



Source: WIPO (2012: 14)

Intangible assets now account for a significant fraction of labour productivity growth in countries such as Austria, Finland, Sweden, the United Kingdom (UK) and the United States of America (US) (WIPO, 2011: 25). The Hargreaves report on the review of “Intellectual Property and Growth” (Hargreaves, 2012: 12) notes: “As advanced economies become ever more knowledge intensive, the stakes involved in IP are rising”. The report stresses: “Every year in the last decade, investment by UK business in intangible assets has outstripped investment in tangible assets: by £137 billion to £104 billion in 2008”. Figure 4 illustrates the growth of the investment in intangible asset in the UK. In Sweden and the UK investments in intangibles reached 9.1% of the GDP (WIPO 2011).

Figure 4: UK business investment, 1990- 2008 (million £)



Source: Nesta, 2011 (quoted by Hargreaves)

Changing Modes of Asset Management:

In the US, a report commissioned by the International Intellectual Property Alliance (IIPA) claimed that *"the US copyright industries:*

- *continues to outpace the rest of the economy in real growth,*
- *employ over five million workers, who are on average paid significantly more than other U.S. employees; and*
- *contribute significantly to U.S. foreign sales and exports, exceeding those for many U.S. industry sectors" (Siwek, 2011).*

2.2 Beyond IPR: innovation systems and creative activities

Besides, there are some positive indirect economic impacts beyond copyright industries. The Computer & Communications Industry Association (2010) holds the view that *"We are only beginning to fully understand in the 21st century that what copyright leaves unregulated—the 'fair use economy'⁴¹—is as economically significant as what it regulates."* They report that companies benefiting from fair use generate substantial revenue, employ millions of workers, and represent one-sixth of total U.S. GDP. This underlines the complexity of the issue as well as the necessity to have the broader view possible taking into account the various facets and not concentrating solely on a few metrics like industry revenues as welfare gains are to be expected in other areas and could be overlooked by too restrictive approaches of copyright.

Demand aspect and other social factors are important as well. M. Cooper (2008) argued that *"since technologies are frequently seen as empowering the consumer and "democratizing" innovation" the demand side deserves a better treatment⁴² of "the impact of digital technology on content industries. Indeed, network effects that play such an important part in the analysis of digital technologies are known as "demand side economies of scale."* He also insists on the new muscle it gives to customers, *"to exit from commercial relationships and to enter into political relationships, including a new found ability to self-supply or engage in collaborative production"*, on an unprecedented scale. Y. Benkler (2011) also stresses the new dimension of collaboration.

P. Aigrain (2012) lays the stress on the same dimension but focuses on sharing: *"Sharing starts from a radically different viewpoint, namely that the non-market sharing of digital works is both legitimate and useful".* He claims *"that non-market sharing leads to more diversity in the attention given to various works"*. According to P. Aigrain if one takes a broader look at the economics of the creative sector which includes not only commercial ones but non-commercial, one finds that the sector is *"dominated by the support of non-market activities"*.⁴³ The artistic and cultural economy is split in two halves: one arises from non-commercial activities, the other from commercial activities. However, two thirds of these commercial activities consist of various services and B-to-B; leaving only 1/3 of the

⁴¹ Under *"fair use economy"* they classify: manufacturers of consumer devices that allow individual copying of copyrighted programming; educational institutions; software developers; and Internet search and web hosting providers.

⁴² Quoting Hirschman's framework (*Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States*) as well suited to provide insights.

⁴³ Quoting UNU-MERIT 2006.

pie for the regular sales of cultural goods⁴⁴ which basically means that the last segment (sales to consumers) accounts for just 1/6 of the total.

The EC 2011 communication on IPR notes: “*There is a growing realisation that solutions are needed to make it easier and affordable for end-users to use third-party copyright protected content in their own works*” (Com(2011) 287 Final:12). The founders of “creative commons”,⁴⁵ in 2001,⁴⁶ thought that copyright designed for a physical world was less and less appropriate in a digital one, a world of new forms of interpersonal communications and collaboration, a world of routine copying. They deemed that the exclusive reproduction right lost most of its “raison d’être”, that it was time to move away from this reproduction right to a right or re-use more suited to the new environment and practices, stressing that each technological innovation (printing press, photography) brought some changes to the previous regime. In fact, this new regime complements the existing regime,⁴⁷ dealing more with the social part, non commercial aspect mentioned earlier. The choice is left to the author to opt for the appropriate regime he wished to be applied to the work thereby providing a flexible range of protection for re-using and sharing works. In December 2002, Creative Commons released its first set of copyright licenses for free to the public. Creative Commons developed its licenses — inspired in part by the Free Software Foundation’s GNU General Public License (GNU GPL) — alongside a Web application platform. As of 2009 there was estimated 350 million CC licensed works.⁴⁸

These are clearly important dimensions not to be forgotten even without sharing the optimism of these authors about “*the wealth of networks*”. However, proponents of the copyright appear to overlook or disregard most all the other social and economic effects of network up to the point to claim (Baumel et al, 2009) that access to copyrighted contents for free (through piracy) amounted to a subsidy for the deployment of the broadband infrastructure. The paper fails to provide any robust evidence of such a subsidisation mechanism. On the opposite, just taking a look at the way social networks grew clearly indicates that new form of interpersonal communications were key for their growth. The success of YouTube was built on the posting of User Generated Contents (UGC), not of edited contents, even if they appeared later. The argument would need to be substantiated with an historical distribution of the kind of contents accessed.

The social benefits accruing to the adoption of broadband network go much beyond access to content as rightly noted by the above mentioned authors. The deployment of broadband networks as well as increased connectivity are clear cases of an increase of welfare, and

⁴⁴ P. Aigrain presentation at the « Géopolitique des droits de la propriété intellectuelle », conference, MSH Paris Nord, 6 Avril 2012.

⁴⁵ This section is following the presentation of Primavera de Flippi, Creative Commons France at the conference : “Géopolitique des droits de la propriété intellectuelle”, Paris MSH Nord, 6 Avril 2012.

⁴⁶ Creative Commons (CC) is a non-profit organization headquartered in Mountain View, California, United States devoted to expanding the range of creative works available for others to build upon legally and to share. *Source*: Creative commons, Wikipedia: http://en.wikipedia.org/wiki/Creative_Commons

⁴⁷ From a legal viewpoint, according to P.Lanteri, Assistant Legal Officer, Copyright Law Division, WIPO, these non-normative initiatives are not « real » alternatives as they operate under the current normative copyright system. Presentation at the IPTS conference “Dynamics of the Media and Content Industries” Brussels, 25-26 October 2012, available on the IPTS website.

⁴⁸ *Source*: <http://creativecommons.org/about/history>

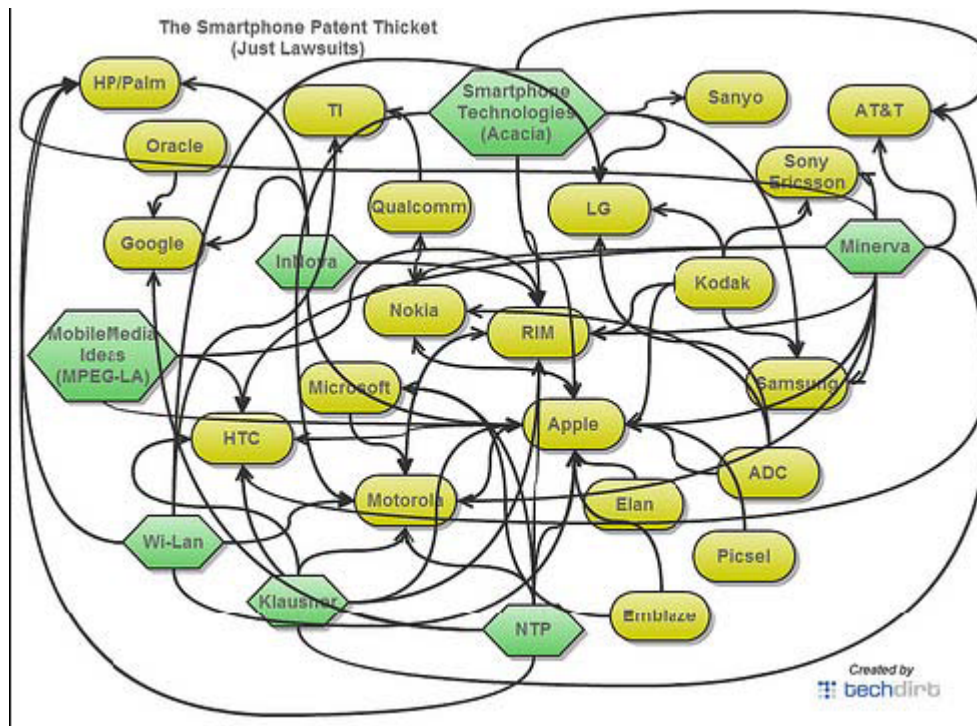
this has been documented by numerous studies (Crandall & Jackson, 2001)⁴⁹ triggering positive effect on GDP. Baumel et al acknowledged that *“during the roll-out phase, politicians are more sensitive to the positive externalities of the Internet”*. They may indeed have good reasons for that, the promotion of technological innovation being one. It provides the basis of broadband policies on both sides of the Atlantic and elsewhere (see report 1, Chapter 4). The courts, the US Supreme Court for instance, (see Box 2 on Grokster), the ECJ (see Box 3 and Chapter 3) are trying to strike a balance between technological innovation and the protection of existing rights.

2.3 Some limitations of IPR: the case of innovation and patenting⁵⁰

These positive elements do not necessarily contradict the more critical points stemming from the quick review of academic literature, as the global picture is not totally rosy either. The 2011 WIPO report clearly identifies the growing concerns triggered by *“increasingly dense webs of overlapping patent rights”* and its potential negative impact on innovation. The Hargreaves report illustrates such a drift by taking a closer look at the well-know case of the current generation of smartphones. *“Such a device will be covered by hundreds of patents owned by tens of rights holders. And these patents are often relevant to multiple phones, particularly if they cover, for example, the communications standards used. The resulting smartphone patent thicket (illustrated below) leads to an environment where litigation is commonplace in a market crowded with patents of overlapping scope.”* (Hargreaves, 2011: 56). This dense web of overlapping IPR is used to defend against competitors and to obstruct entry to market, thereby impeding innovation (Forge, 2012).

⁴⁹ The research is one of most influential and frequently quoted: *“We conclude that the universal adoption of broadband Internet connections by U.S. households could eventually provide consumers with benefits in the range of \$200 billion to \$400 billion per year”* at 2.

⁵⁰ For a broader view of patent as a proxy of innovation see De Prato, Nepelski (2010, 2011) and the Predict report, 2011.

Figure 5: The smartphone patent thicket

Source: www.techdirt.com (quoted by Hargreaves, 2011)

Furthermore, the Hargreaves report underlines the so called patent “hold up” phenomenon whereby a patent holder will leverage its strong position in negotiations or disputes to extract further monopoly rents. As an illustration of “hold up” the report highlights the “*patent infringement case between NTP, Inc. and Research in Motion (RIM) who came under enormous pressure to settle the case to avoid a shutdown of their BlackBerry service, eventually paying NTP \$612.5 million to settle the case*” (p.64). Besides, (Forge 2012) an increasing number of firms that only hold and licence patents but are not involved in manufacture themselves, the non practicing entities (NPEs), sometimes termed ‘*patent trolls*’ are now interfering. Their business model is the following: they build large patent portfolio, to extract rents and litigate as required. As J. Bessen (2008, 2012) puts it a NPE “*licenses “freedom from suit”, not technology “, buying up old patents*” (average 8 years old), clearly an issue with software patents.

2.4 Creators v. managers of the exploitation rights

The continental notion of “*droit d’auteur*” is much more protective of the creators, than the common law notion of copyright.⁵¹ The latter links the role of authors and publishers but rather under the umbrella of the intermediary dealing with the market, therefore it is more a tool to monetize and manage assets (Edelman, 2008, Benhamou & Farchy, 2009). The former, created under the influence of the French enlightenment philosophers

⁵¹ The 1710 British [Statute of Anne](#) was the first real copyright act, and gave the publishers rights for a fixed period, the US copyright clause was introduced later in the US constitution (1787) and later with US [Copyright Act of 1790](#). Source: copyright, <http://en.wikipedia.org/wiki/Copyright>.

(Beaumarchais,⁵² Montesquieu but also more indirectly Rousseau, see Edelman, 2008) stresses the link between the author and its creation, the latter stresses the link with the market, the protection of the investments. Therefore, copyright yields a less powerful notion of “moral right”; a right that is both imprescriptible and inalienable. Historically, the notion of copyright was influenced by the utilitarian theory of J. Bentham, rather than by the approach of J. Locke whose notion of natural property was closer to that of the French philosophers (Benhamou & Farchy: 5). As underlined by Edelman (1989: 97) the approach of “droit d’auteur” is much more ambitious than the “humble” approach of copyright: just prevent copying without authorisation from the right holder. Both, “droits d’auteur” and “copyright” are harmonised and enshrined in the Berne convention of 1886 (see chapter 4, section 4.1).⁵³

Nevertheless, if copyright is a central element to generate revenues for managers of rights, it does not appear to play the same role for creators or artists. Benhamou & Sagot-Duvaurox (2007) in their synthesis of a series of reports⁵⁴ commissioned by the French Ministry of Culture in 2005-2006, stressed the tension between copyright as a way to protect the work and the rights of creators and copyright as a mean to remunerate authors. They note that artists draw only a relatively minor and rapidly decreasing portion of their income from copyright. Music is a typical case⁵⁵ (Coleman and Bazelon, 2011) of an historical upturn where revenues are coming from performances⁵⁶ and related rights rather than from royalties redistributed by music companies.

Besides, with the notable exception of books,⁵⁷ the sales of cultural goods generate only a very small fraction of revenues for the creators. Often creative workers are getting revenues from other financial resources, from other professional occupations (teaching, journalism...) or even in some case out of some public subsidies as with performers⁵⁸ (musicians and players) in France. Copyright revenues and associated royalties do not appear to be a panacea and even less so as there is a growing tendency to use flat-rate fees⁵⁹ instead of the proportionate royalties that were stemming from the logic of copyright, thereby according to Benhamou et al (2007) questioning the very principle of copyright. Benhamou et al (2007: 16) describe “*a sort of wild chase among models that are changing incessantly, accompanied by inevitable adjustments in rules and practice*”. They

⁵² Beaumarchais was the founder in 1777 of the first French authors society.

⁵³ The USA did not sign the Berne Convention until 1989.

⁵⁴ Book, cinema, photography and TV. See list of references.

<http://www.culturecommunication.gouv.fr/Politiques-ministerielles/Etudes-et-statistiques/Publications/Culture-etudes/V.-Economies-des-droits-d-auteur-Synthese-CE-2007-8-decembre-2007>

⁵⁵ See the report on the music industry, produced by IPTS as part of the project on media and content industries, listed in the “*IPTS MCI reports*” of the bibliography.

⁵⁶ In 2007, Madonna left Warner Music to sign a so-called “360 degree” deal with the live entertainment company Live Nation, sharing revenues from music sales, performances, merchandise and the right to her name. Coleman and Bazelon, 2011:13).

⁵⁷ In France, as of 2003, the 8 700 « affiliated authors » received Euros 300 million of royalties, p. 11. The amount peaked in 2006 at nearly 500 million (Minidata 2011: 9). C. Robin (2007:5) notes that the real amount for the sole authors are probably lower as this amount covers other contributors (editors for instance). See the report on the book publishing industry, produced by IPTS as part of the project on media and content industries, listed in the “*IPTS MCI reports*” of the bibliography.

⁵⁸ The highly controversial statute of temporary workers/ performers (“*intermittents du spectacle*”).

⁵⁹ Advances on royalties generally practised in film and television, copyright-free photographs, once-and-for-all payments in the publishing industry, especially for collective works. Benhamou et al, p.16.

also note that, due to this increased complexity, the growing number of (often global) players from other sectors, with different business cultures,⁶⁰ the players may favour a contractual, collective approach to ease out the processes and reduce the transaction costs. As a result, copyright, at least for the creator may not be the core source of revenues.

The audiovisual sector (film⁶¹ and TV⁶²) is probably one of the most complex sub-sector due both to a proliferation⁶³ of contributors, from authors (scriptwriters, directors, composers or performing artists⁶⁴ and others (book adapters, dialogue writers) and an array of modes of remuneration (prevalence of salaries for cast, guaranteed minima for authors, but percentage for composers...). Besides, other distribution media (television, video, etc.) add further contractual arrangements for complementary streams of revenues (Farchy, J., 2007: 20). In the television sector the complexity is such that it leads Benhamou & Peltier (2007: 24) to a rather blunt assessment of the efficiency of the all not very transparent system, highlighting they were *“led to wonder about the efficacy of a system supposed to protect writers and favour open dealing, but which still falls a long way short of these goals”*. The television sector is also characterised by a highly uneven distribution of revenues between the different categories of authors involved, a system strongly tilted in favour of directors (Benhamou & Peltier, 2007: 17, 18). In these fields, the “author” appears to have several faces as emphasized by P. Chantepie.⁶⁵

Even in the apparently positive case of the books, C. Robin (2007: 5) stresses a paradox: although the amount appears to be significant, at the same time authors tend to be more pressured by the publisher as the amount of royalty is one of the few parameters a publisher can manage (not the case of most fixed costs) in a sector where margins are thin. Somehow, the financing burden is shifted toward the author and new technologies are enabling this process to take place with the author providing a file instead of a manuscript. As stressed by C. Robin this additional work required from the author is not compensated by additional revenues, the level of royalties remain the same.

In such an uncertain context the ways to pay the authors/ creators are moving targets (neither the level nor the bases are to be taken for granted). Hence the issue of the remuneration is still pending. For instance, in the book industry, there are uncertainties on royalties (percentage and final amount⁶⁶) and slipping contracts (duration of cessions of rights, “meeting” clause). Solutions are being explored, such as some kind of general licence, for an extended use of the works. This may require some harmonization at the EU

⁶⁰ See MCI 1.

⁶¹ See the report on the film sector, produced by IPTS as part of the project on media and content industries, listed in the “IPTS MCI reports” of the bibliography.

⁶² See the report on the broadcasting industry, produced by IPTS as part of the project on media and content industries, listed in the “IPTS MCI reports” of the bibliography.

⁶³ This proliferation of authors and their respective legal status and right to remuneration was already illustrated over 60 years ago by a legal action initiated by Bertold Brecht for the 1932 film « *Kühle Wampe. Wem gehört die Welt?*” around the notion of collective work. In 1930, B. Brecht had already sued the German producer Nero Film for its use of “*Three Penny Opera*”.

⁶⁴ Tunstall, J. & Walker, D., (*Media Made in California*, Oxford University Press) reported that in 1979 around 90% of the 23000 members of the US Screen Actors Guild (Hollywood) were not making a living, 70% of the UK Equity members were on the dole. Quoted by Heinich, N. (2012: 184).

⁶⁵ “*Figure multiple*”. Introduction to the Benhamou & Peltier report (2007).

⁶⁶ According to Jesus Badenes, CEO of Grupo Planeta, authors are likely to get a larger share in a digital world with declining cost. Presentation at the IPTS conference “Dynamics of the Media and Content Industries” Brussels, 25-26 October 2012. available on the IPTS website.

level as well as in the case of the exemptions for private copies (see 3.2). The French government passed a law on March 1, 2012 to offer a new mode of collective management of the rights that is trying to balance copyright protection, to preserve its principle, while taking seriously the “access argument” pushed forward by Google for its Google book project.⁶⁷ By the same token, reviewing copyright law may offer an opportunity to strengthen the position of authors but at the same time it may render the exploitation more complex.

2.5 The role of copyright in business models

Legacy industries link the process of creation with the use of copyright to protect and fund back creation, to recoup their investments in creation. For right owners, the view may differ from the view of creators, as copyright tend to appear being more and more, according to Edelman (2008: 94), a way to better protect their investments. Besides for Edelman, the introduction of related rights⁶⁸ further weakened the author side of the equation, strengthening the right holders’ (producers) side.

The way the rights are used way from one sub-sector to another, the role of copyright within the business model of each industry does vary from some rather simple cases like with books or even newspaper, to complex intermingling of rights like in audiovisual sector, or combined with other means of managing assets, like in the video game industry (see Box 1). Each industry will blend different kind of revenues and the role of copyrighted contents then differ from an industry relying more on advertising revenues that on direct sales (retailing), like for instance with broadcasting, but even in that case copyright is important to ensure other streams of revenues and from a marketing or symbolic strategies (exclusivity) viewpoint as well so as to boost the legitimacy of the product. In the case of cinema, the pre-negotiation of rights may contribute to the funding of a film (up to 65%⁶⁹), such pre-sales will usually come with some territorial rights attached.

Box 1: Some examples of business models

Newspaper and magazines: Lagardère active business models with main revenues coming from advertising (75%, different kind of ads including click-to-call and to store), branding (brand experience: 15%) and paid content (10%: paid app).

Scientific, technical and medical publishing: as the subsector is already digitalized, the publishers charge an annual access fees to their main customers, mostly institutional. At the same time they tend to increase the fees, while the customers has reduced rights in terms of property as customers are now paying for access not for the ownership of the physical object.

Pay as you go: an example of temporary pay-per-download is Apple’s iTunes Store.

⁶⁷ Rémi Gimazane, chef du département de l’économie du livre, French Ministry of Culture and Communication at the Jornadas sobre el libro digital, May 18 2012. See the report on the book publishing industry, produced by IPTS as part of the project on media and content industries, listed in the “*IPTS MCI reports*” of the bibliography.

⁶⁸ Or neighbouring rights of performers, phonogram producers and broadcasting organisations are covered, and are internationally protected by the 1961 [Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations](#) but not by the Berne convention. *Source:* Wikipedia Related Rights. http://en.wikipedia.org/wiki/Related_rights

⁶⁹ According to Ted Shapiro, SVP, General Counsel and Deputy Managing Director at the Motion Picture Association in Brussels. Presentation at the IPTS conference “Dynamics of the Media and Content Industries” Brussels, 25-26 October 2012. Available on the IPTS website.

Subscription model: users pay a periodic flat fee and receive the right to download or listen to/watch content (un)limitedly for a certain period of time. This is the standard model for cable and satellite TV, often marketed through bundles (tiered offers) also for VOD (S-VOD). Other examples are Spotify, an EU firm, and Last.fm., streaming platforms in the music sector.

Advertising supported service model: streaming can now take the place of over-the-air distribution. On Pandora, customers specify what artists or songs they enjoy listening to, and similar music is then streamed to them. In the book sector, Leroutard.com is advertisement based or the Spanish 24 Symbols. InLibro Veritas offers a free digital copy of e-books, but paid hard copies to be ordered.

Freemium: the content is made available for free on line. Some customers may be willing to buy items, the example of the video game industry is the best example of that trend with firms like Bigpoint, Rovio (Angry Birds), Zynga. The model is built on economies of scale. The "New York Times" introduced a metered system where access to the first article is free but the customer will have to pay to access to the next one. Pandora (music on line) and Flickr (on line storage of photos are other examples.

Source: J.P.Simon, The dynamics of the media and content industries, MCI 1.

Not only it will differ among the segments but it differs in space and time to match the different markets and their evolution. Besides the way to combine the streams of revenues may be jeopardized by technological changes as it happens with the digitization of news. In that case of the newspaper industry,⁷⁰ Internet contributed to collapse the legacy subsidy model of the newspapers,⁷¹ the willingness to pay of customers of edited copyrighted news (the most expensive to produce) declined significantly, so did the revenues coming from advertising (the subsidy side). However, the attractiveness of news brand did not as "*the traditional players remain the most popular sources for digital news*" (Pew, 2012). The question remains how to monetize the content produced under some copyright regime together with other sources of revenues.

Besides, copyright is not just a protecting tool; it is a powerful marketing device through windowing. Some economists may argue that such a profit maximising tool is monopoly rent extraction which may or may not be the case. In any case it is deeply grounded in the business models of these industries and accordingly should be carefully looked at. D. Waterman showed how the US movie industry made the most of it with a successful market segmentation (Waterman, 2005: 118), "*maintaining pecking order and timing in sequence*". It is then understandable that this industry would display caution before leaving a well established and functioning business model for an unproven one. Adding a new business line is a complex operation especially within the existing tight release windows.⁷² The fear is about the new product cannibalizing⁷³ the existing segments, especially as stressed by D. Waterman (2005) as the video window is "*by far the most important in economic terms*".⁷⁴ In the 80ies the introduction of videotape (to be replaced later by DVD)

⁷⁰ See the report on the newspaper industry, produced by IPTS as part of the project on media and content industries, listed in the "IPTS MCI reports" of the bibliography.

⁷¹ MCI 1.

⁷² The usual chronology after the showing in theatres is video/DVD sale, video/DVD rental, VOD, pay-TV, and free-to-air television.

⁷³ A fear that seems to be unfounded according to some management studies: "*So the benefits for the global sales of a company seem to outweigh the cannibalization effects of a new channel*. (Lang, 2012: 31-32).

⁷⁴ In 2008, North American revenues the distribution was the following: theatrical box-office distribution US \$9.6 billion, home video US \$25.8 billion, while online distribution accounted for only US \$227 million (Coleman, Bazelon: 22).

gave birth to an internal debate about the right marketing strategy: rental, sales, combination of the two. It took some time to stabilize and for the video window to become the main source of revenues.

If, as mentioned, some right holders are reluctant to grant their rights, there is no reason to assume a permanent unwillingness to clear these rights as soon as the benefits will show up and the trials and errors would have been made. The case of the US movie industry clearly showed how it benefitted from the introduction of any new technology over the last fifty years and how windowing maximized its revenues. The pending questions are how and when; this may take some time to be sorted out.

The complementary side of time sequencing (windowing) is spatial sequencing with the territoriality of rights which raises similar issues. There seems to be a consensus, at least for instance in France (M. Tessier, CSA 2011) but not only,⁷⁵ about the role and control of territorial rights. As R. Biggam⁷⁶ explains: "*the rights are sold to follow the consumer's demand and this demand is territorial*" for broadcasting. However, some media groups hold the view that clearing territorial rights, country by country, raised the transaction costs artificially in a digital age. The "Television without Frontiers" (TSF)⁷⁷ directive and the following Satellite-Cable (Satcab) Directive⁷⁸ were trying to deal with these issues of updating the legislative framework for new technologies and a potential more unified EU market. "Satcab" introduced one-stop shopping allowing the satellite industry to negotiate on behalf of the cable industry, imposing a contractual relationship between broadcasters and collecting societies.

For instance, the RTL group considered⁷⁹ the impossibility to offer multi-territorial licences for on-line services as a market failure. National collecting societies have a licence exclusivity on their territory. An option, suggested by the media group would be direct licensing leaving right holders free to make choices, an option implemented in Australia and the US for over 10 years.

2.6 Territoriality and the single market: an issue?

However territorial restrictions though territorial licensing in copyright law may be at odds not only with competition law (see chapter 3) but also with the goals of the single market. From an EC viewpoint copyright carries two "evils", as stressed by KEA (2006). First, it is territorial or national thus hindering the progress of the internal market concept by sustaining frontiers. Second as noted earlier, it grants a monopoly right to the right holder.⁸⁰ From a legal viewpoint the pressure is increasing. As could be expected, territorial restrictions already are on the future consumer protection agenda.⁸¹

⁷⁵ The contribution of the MPA to the EC consultation on on line distribution of audiovisual contents shares this views and explains that the EU market is a mosaic of different cultural markets.

⁷⁶ IPTS MCI workshop, October 28, 2011.

⁷⁷ Directive 89/552/EC "Television without Frontiers" of 3rd October 1989. See MCI 1 for a commented list of legal references covering the main directives. The directive was designed to take into account new developments such as cable and Pay TV, program sponsorship and teleshopping.

⁷⁸ Directive 93/83 of 27th September 1993 "SatCab".

⁷⁹ C. Hauptman (Deputy General Counsel RTL) at the IIC Annual Conference, Barcelona, 2010.

⁸⁰ Most economists would share this view, see Stiglitz, 2008.

⁸¹ See the intervention of N. Kroes, "Ending fragmentation of the Digital Single Market", at the Business For New Europe event, London, 7 February 2011.

In 2011, an opinion of the Advocate General Kokott of the European Court of Justice (ECJ, see Box 3 for the ECJ cases) holds the view that territorial exclusivity arrangements are contrary to European Union Law.⁸² On October 4, 2011 the ECJ adopted a ruling⁸³ endorsing this opinion, in a case involving the use in the UK of decoder cards intended to gain access in other member states to satellite retransmissions of live English football matches circumventing this territorial exclusivity of the football rights. The UK Football Association Premier League (FAPL) grants exclusive rights to broadcast football matches in the licensees' respective broadcasting area. Under the exclusive agreement signals are encrypted and must be decrypted with a decoder using a decoder card. Agreements also foresee that licensees cannot circulate authorised decoder cards outside their territory. Some companies import satellite decoder cards from abroad (Greece) into the UK and offer them at more affordable prices than the licensed broadcasters (Sky and ESPN) to pubs that want to show live matches. Therefore, FAPL tried to stop pub owners from showing UK football matches purchased "*legitimately*" from Greek satellite television operators.

While recognising that transmission in public houses requires authorisation as a communication to the public in the meaning of the Copyright Directive, the ECJ made it very clear that prohibiting foreign decoder cards was against the freedom to provide services, and that lawfully manufactured foreign decoder cards were not '*illicit devices*'. But above all, the ruling states that territorial clauses are contrary to competition law (article 101 of TFEU). The ruling uses strong language: territorial exclusivity is "*irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market.*"⁸⁴ In the 1984 Coditel II case,⁸⁵ the ECJ appeared recognising some of the territorial specificity of audiovisual content exploitation (KEA, 2010: 7) linked to contractual freedom of the author and exclusivity. However, the decision left to national court to decide whether the right was disproportionate and distorting "*competition within the common market*",⁸⁶ so it was not a "*blank check*".

The ruling will impact the way broadcasters buy for sports and other content rights (such as films and TV shows) in the future. This decision will likely benefit consumers, as they would have the opportunity to watch football matches at cheaper prices with decoder cards from

⁸² Opinion of Advocate General Kokott, delivered on 3 February 2011 (1), Cases C-403/08 and C-429/08 (Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd.), paragraph 171ff.

⁸³ Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08). Available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d596eb90a308a9471f8e81840a6ae8a1b4.e34KaxiLc3eQc40LaxqMbN40a3aTe0?text=&docid=110361&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=1618536>

⁸⁴ At para. 115.

⁸⁵ Judgment of the Court of 6 October 1982. - Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others. - Reference for a preliminary ruling: Cour de cassation - Belgium. - Copyright and right of distribution: Cable diffusion of television. - Case 262/81.

⁸⁶ At 20: "*Accordingly, the answer to be given to the question referred to the Court must be that a contract whereby the owner of the copyright in a film grants an exclusive right to exhibit that film for a specific period in the territory of a Member State is not, as such, subject to the prohibitions contained in article 85 of the treaty. It is however, where appropriate, for the national court to ascertain whether, in a given case, the manner in which the exclusive right conferred by that contract is exercised is subject to a situation in the economic or legal sphere the object or effect of which is to prevent or restrict the distribution of films or to distort competition within the cinematographic market, regard being had to the specific characteristics of that market*"

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foreign broadcasters. Following the decision, Commissioner M. Barnier stressed the importance of a ruling that was strengthening the single market.⁸⁷

⁸⁷ Intervention at the 4th ACT Annual conference, November 9, 2011.

3. Legal strategies: obtaining extensions and compensations, limiting exemptions, mandating liabilities

The strategies of right holders to protect their legal rights have been manifold. One of the current strategies of right holders has been to try to extend the scope of the intellectual property protection. Several examples illustrate these strategic attempts; this chapter reviews the main strategies adopted to such an end but also to obtain further compensations for any kind of infringements, virtual (levies) or real (piracy), and conversely to limit the exemptions to the legal rights ("safe harbours", private copy) and to lobby for a mandatory liability of any implied third parties (ISPs). The chapter reviews the empirical evidence about piracy and its impact.

3.1 Extensions

Some strategies are well accounted for (see next section: Sonny Bono case) but others are not that well known, especially the case of the protection (against piracy) of the broadcast signal, and its integrity. For the latter broadcasters being legally liable for the content they broadcast, they have concerns about the way third party will behave and comply. Under current European law, the broadcaster is legally responsible for editorial and commercial content. The question is about the compliance with the EU directive and the compliance with the contractual obligations for third parties. On signal integrity, the issue is, for instance in the connected TV environment about platform operators adding advertising or other contents in and around the broadcaster's signal.

This is the reason why the US government was initially backing, in 2006, a draft treaty of the World Intellectual Property Organisation⁸⁸ to update on the Protection of Broadcasting Organisations on a signal-based approach.⁸⁹ Certain U.S. Internet portals (Yahoo, AOL, Digital Media Association) successfully petitioned the U.S. Government to push to include "webcasting". This went unnoticed until consumer organisations (such as CPtech) flagged the issue and counter-lobbied early 2006. They were supported by US and non US telecom carriers expressing concerns on three main points:

- Broadcast-type services are not explicitly covered when delivered across "closed" telecoms networks.
- Extension of the treaty to webcasting/simulcasting will create serious liability problems for internet intermediaries.
- Provisions on technological protection measures risk reinforcing the market power of certain content providers.

The EC (DG Markt) also disagreed about the extension, and favoured a text characterised by complete technological neutrality. The Commission admitted that some legal language could be necessary to deal with the liability problems for internet intermediaries but suggested rather copying such language from the 1996 treaty meant to solve similar problems.

⁸⁸ The main objective of the treaty *"is to serve as a stable legal framework for the activities of broadcasting organizations against piracy, but it also provides protection against competitors and against unfair exploitation, and against free-riding,"* Jukka Liedes, Chair of the Standing Committee on Copyright and Related Rights.

⁸⁹ USTA, interview 2005: *"treaty is life support for broadcasters"*.

The powerful lobby efforts of US broadcasters nevertheless led to the adoption, in 2006, of the Audio Broadcast Flag⁹⁰ Licensing Act after a FCC decision of 2003 was struck down by a court,⁹¹ to increase the protection in a digital world. Consumers association opposed the bill but as opposed to the other issue of the WIPO treaty, did not manage to derail the bill. They claim the act was simply reducing the scope of the rights for users without dealing adequately with the issue of piracy. The measures were not consistent with other legal measures governing the use of for instance «*Digital Audio Recording Devices*» and «*Digital Music Recordings*». This was contradicting the well established US "fair use"⁹² of copyrighted material which as stated above bring some other social benefits.

The US Sonny Bono Copyright Term Extension Act of 1998⁹³ (CTEA) is a more well known case of extension of the time. Part of its notoriousness⁹⁴ stems from the fact that it was challenged as unconstitutional and brought to the US Supreme Court⁹⁵ by a motley group of leading US economists spanning a wide ideological spectrum (among them five Nobel laureates) (Liebowitz & Margolis, 2003). The economists claim that the first major provision of the CTEA, the extension of the term of copyright protection from fifty years to seventy after the death of the author, was imposing costs on the creation of new copyrighted works. They also deemed that the second major provision, a retroactive application of the act to works produced prior to the act, did not make much economic sense. Liebowitz & Margolis criticised their approach for ignoring several important aspect of the economics of copyright, stressing their lack of empirical evidence but acknowledged nevertheless they could not "argue that the extensions of the CTEA are clearly efficient" (Liebowitz & Margolis: 3). In the EU, the recording industry argued that the term of protection for sound recordings should be extended within Europe from 50 to 95 years to match the term in the U.S (E.C, 2007: 33).⁹⁶

3.2 Exemptions

Bringing Grokster in 2003 (see Box 2) to the court was not only an important moment of the fight against piracy for the entertainment industry but was perceived as an opportunity to reduce the protection of liability granted under the "Sony Safe Harbour"⁹⁷ after the 1984 US Supreme Court decision. Although having held Grokster guilty of infringement may have appeared as some kind of victory, some US scholars questioned the extent of the

⁹⁰ A *broadcast flag* is a set of status bits sent in the data stream of a digital television program that indicates whether or not it can be recorded, or if there are any restrictions on recorded content.

⁹¹ The FCC decision was challenged by the Electronic Frontier Foundation in 2006. The United States Court of Appeals for the District of Columbia Circuit ruled that the FCC had exceeded its authority in creating this rule. <http://www.eff.org/issues/intellectual-property>

⁹² Fair use is an important restriction to the rights conferred on original works by the U.S. Copyright Act of 1976. Source: Computer & Communications Industry Association (2010). The TSF and now AVMS directive offers similar exemptions.

⁹³ The DMCA was adopted that same year.

⁹⁴ « *Cause celebre* » as Liebowitz & Margolis phrase it.

⁹⁵ *Eldred v. Ashcroft*. CTEA was held constitutional by the Supreme Court.

⁹⁶ Quoted by the documents accompanying the communication on "Creative Content Online in the Single Market", COM(2007) 836 final.

⁹⁷ The Sony safe harbour "shelters VCRs, typewriters, tape recorders, photocopiers, computers, cassette players, compact disc burners, digital video recorders, MP3 players, Internet search engines, and peer-to-peer software," but not cable descramblers. "The safe harbour protects technology developers who know, or have reason to know, that their products are being widely used for infringing purposes, as long as the technologies have, or are capable of, substantial non-infringing uses (SNIUs" P. Samuelson.; p.1).

« victory »: P. Samuelson⁹⁸ claims that the Court not having revisited the Sony safe harbour was indeed “a considerable defeat for MGM and the entertainment industry which believed the “bad” facts of the Grokster case would be compelling enough to induce the Court to reinterpret Sony”(p.7). In his concurring opinion Justice Breyer concluded that modifications of the Sony safe harbour “would significantly weaken the law’s ability to protect new technology.”⁹⁹

Box 2: The Grokster case and the fight against piracy

On June 27, 2005, the US Supreme¹⁰⁰ court held that the software service company Grokster was liable for infringing copyrights and could not benefit from the 'Sony safe-harbour' principle that was set by the Supreme Court¹⁰¹ in 1984, this applied as well to another two other firms StreamCast distributing the software, Morpheus and Sharman networks (Kazaa software). The Sony safe-harbor ruling stated that, "...the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes"¹⁰².

This brought to a close the legal action initiated, in 2003, when the Recording Industry Association of America and the Motion Picture Association of America took the PtoP (using the FastTrack protocol) company, created in 2001, to a court in California (Los Angeles). The court decided that file sharing was not illegal, therefore the decision was appealed by the plaintiffs but the United States Court of Appeals for the Ninth Circuit issued a partial ruling supporting Grokster. The case ended up at the Supreme Court. On November 2005, the site was closed and showed the following warning:

"The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture and music files using unauthorized peer-to-peer services is illegal and is prosecuted by copyright owners. There are legal services for downloading music and movies. This service is not one of them.

YOUR IP ADDRESS IS XX.XX.XXX.XX AND HAS BEEN LOGGED. Don't think you can't get caught. You are not anonymous."¹⁰³

Although the decision was hailed as a "victory" for right owners, the judgment is a balanced and limited decision that does not question the Sony Betamax jurisprudence. The court had to decide whether Grokster was liable of a contributory copyright infringement and did find such an infringement, but not because of the use of the software but because the company was using piracy as a commercial tool to attract customers, thereby clearly incentivising the users to behave illegally. However, without such an explicit strategy, a PtoP company or a carrier cannot be held liable of such an infringement. The Court made clear that direct evidence of intent to induce infringing conduct was needed. The Court advised software companies to act more carefully and confirmed the legal use of PtoP software for universities, libraries...

Moreover, the decision does not jeopardize the Sony-Betamax case which clearly stated that using a technology is not blameable per se (VCR in that earlier case). The Supreme Court is trying to keep a balance between technological innovation and the protection of existing rights. In other words, the decision indicates that the guilty company should be punished but not the technology. Technology developers who induce copyright infringement should not expect to be treated any differently than those who induce patent infringement notes P. Samuelson (p.6)¹⁰⁴. A Dutch court judging a similar case of PtoP (Kazaa) took the same position in 2005.

⁹⁸ Legally Speaking: Did MGM Really Win the Grokster Case? , <http://people.ischool.berkeley.edu/~pam/papers/CACM%20SCT%20decides%20MGM.pdf>

⁹⁹ Quoted by P. Samuelson at 6.

¹⁰⁰ Metro-Goldwyn-Mayer Studios Inc., et al, petitioners v. Grokster, Ltd, et al. 545 U.S (2005).

¹⁰¹ Sony Corp. of America v Universal City Studios, Inc., 464 US. 417 (1984).

¹⁰² Quoted by Wikipedia.

¹⁰³ Still to be found under: www.grokster.com/

¹⁰⁴ Legally the court was using the jurisdiction on contributory patent infringement: “courts would borrow an inducement liability standard from patent law, “P. Samuelson p.3.

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The decision was welcome by consumer organisation as illustrated by the reaction of the president of the Think Tank, Center for Democracy and Technology, Jerry Berman: *"The court has worked to craft careful balance that allows copyright owners to pursue bad actors, but still protect the rights of technology makers. We hope this decision will preserve the climate of innovation that fostered the development of everything from the iPod to the Internet itself."*

During the discussions prior to the adoption of the EU copyright directive right holders, mostly led by US companies, were trying to achieve what they did not manage to achieve during the adoption of the US DCMA. Although, the DMCA contains provisions about "notice and take down", the Online Copyright Infringement Liability Limitation Act (OCILLA: or "safe harbour provision")¹⁰⁵ was passed as part of DCMA with provision exempting Internet intermediaries from copyright infringement liability under defined conditions. They were lobbying for limiting the scope of exemptions, for instance for not allowing caching¹⁰⁶ to be included in the proposed list of exemptions as a compulsory exception for technical copies but to be classified as an act of reproduction.

The companies were also attempting to find measures to reduce or to mitigate the exemption from liability for intermediaries in their activity of "*mere conduit*" of information from third parties, a major provision of the Information Society directive. They suggested introducing a three strikes approach to make the ISP cooperate more closely with the content providers to stop users infringing copyright. ISP objected to acting as an Internet special police without any legal mandate. They also considered it was a mean to pass the cost of enforcement to them through mandated technical solutions.

Eventually, France passed in 2009 the so-called Hadopi law¹⁰⁷ creating an independent authority to require ISPs to suspend the service to the infringer after receiving three warnings (three strikes) from their ISP acting on behalf of the owner of the infringed content. It may be still too early to assess the real output of this law, but experts are often sceptical about the end results.¹⁰⁸ For instance, I.Hargraves considers that the results¹⁰⁹ do not provide clear evidence either way. According to W.Maxwell¹¹⁰ (2012) such measures tightly tailored to a specific technology are likely to be ineffective, as illustrated with the case of Hadopi: PtoP became less of an issue as streaming is increasing.

On December 2011, the Spanish government adopted the royal decree that regulates the Intellectual Property Commission (IP Commission). The IP commission is responsible for requesting ISPs to suspend services or to withdraw content from websites when IPRs are infringed. However, ironically, as noted by Hugenholtz and Senftleben (2011: 9), these national laws may undermined not guaranteed the legal security: *"...the introduction into the fabric of EU law of the 'three-step test', and its literal implementation in several laws of the Member States, has considerably reduced legal security, since courts are now invited to*

¹⁰⁵ 17 USC § 512 - Limitations on liability relating to material online.
<http://www.law.cornell.edu/uscode/text/17/512>

¹⁰⁶ A caching proxy server accelerates service requests by retrieving content saved from a previous request made by the same client or even other clients. Caching proxies were the first kind of proxy server. The irony of this position was that as that time most of the ISPs dropped the use of caching. "System caching" was not liable under 512.b.

¹⁰⁷ Haute autorité pour la diffusion des oeuvres et la protection des droits sur Internet.

¹⁰⁸ A critical assessment of Hadopi was pushed forward by the new French president elected in 2012.

¹⁰⁹ Of the survey released in 2010.

¹¹⁰ Presentation at the 40th TPRC, Washington, September 21-23, 2012.

examine and (re)interpret statutory exceptions in the light of this entirely open-ended norm”.

In the UK, the Digital Economy Act of 2010 (DEA) has created a highly controversial system of law which aims to first increase the ease of tracking down and suing persistent infringers of copyrighted material (N. Helberger et al, 2012b:93). The law did not take into account the recommendation from Consumer Focus (a UK wide consumer interest statutory body): *“There is also an unfair balance between protection of the end of user’s rights and protection of copyright holders. Intellectual Property Rights (IPRs) allow technological (Digital Rights Management) and territorial restrictions placed on products to protect copyrights holders. Whereas consumers are granted limited rights which result in uncertainties over legal use of the digital content they buy and interoperability of equipment used”* (N. Helberger et al, 2012b:92). The Act was challenged in court.¹¹¹ As underlined by Maxwell (2012:12): *“The DEA and the French graduated response regime, both of which were adopted by parliaments in their respective countries after full debate, nevertheless suffer from a perceived lack of legitimacy by the public at large”.*

In the United States, the Center for Copyright Information was created along lines parallel to the French Hadopi, but based on a Memorandum of Agreement, signed in July 2011, between the ISPs in the US and the right holder organizations (Maxwell, 2012: 5). In Ireland, in 2008, ISPs and right holders entered into a settlement agreement to implement a voluntary graduated response regime (Maxwell, 2012: 11). The US Congress considered in 2011 the introduction of specific legislation: “Stop Online Piracy Act” (SOPA) and “Protect IP Act” (Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, or PIPA).¹¹² Both generated petitions against the legislation.¹¹³ The two proposals were withdrawn, SOPA after a service blackout coordinated in 2012 by the [English Wikipedia](#), [Reddit](#), and an estimated 7,000 other smaller websites. South Korea and Taiwan have passed laws to terminate service to customers who engage in piracy (Coleman, Bazelon: 16).

Technical restrictions of usage often presented as technical protection measures (TPM) of the copyrighted work are covered by the Copyright Directive. However as noted by Helberger et al -2012b: 22): *“TPMs generally are designed to impede access or copying, while DRM systems do not impede access or copying per se, ... DRM systems are typically able to offer broader functionality than simply protect content against unauthorised access or copying”.* These measures can be twisted opportunistically. Filtering as technical measures is considered in the directive with other measures, but not mandated.

However, in 2004, the Belgian collecting society (Sabam) took Scarlet, a Belgian ISP, to the courts claiming that some of Scarlet’s customers had infringed the copyright of some of the musical works in the catalogue of works administered by Sabam through peer-to-peer (P2P) software. Sabam was also trying to get an order requiring the ISP to prevent such infringements in the future by blocking or making impossible the sending or receiving of files. A Belgian court’s judgment of November 2004 found that such copyright

¹¹¹ BT, TalkTalk v. Secretary of State, [2011] EWHC 1021, 20 April 2011. See Maxwell at 20.

¹¹² The Act was already a re-write of the [Combating Online Infringement and Counterfeits Act](#) (COICA) which failed to pass in 2010.

¹¹³ Source: Wikipedia, Stop Online Piracy Act, available at: http://en.wikipedia.org/wiki/Stop_Online_Piracy_Act . Wikipedia: Protect IP Act, available at: http://en.wikipedia.org/wiki/PROTECT_IP_Act. [Google](#) stated it collected over 7 million signatures

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infringements had occurred. In June 2007, another judgment ordered Scarlet to bring them to an end by installing a filtering and blocking system making it impossible for its subscribers to send or receive music files from Sabam's repertoire by means of peer-to-peer software. Scarlet appealed the judgment before the Court of Appeals of Brussels, and the Belgian court filed a reference¹¹⁴ for a preliminary ruling before the Court of Justice on February 5, 2010 on the compatibility of the national law with EU legislation.

The Court of Justice of the EU has ruled (SABAM/Netlog case)¹¹⁵ that an injunction by a national court which requires an internet service provider (ISP) to actively monitor all electronic communications on its network to prevent copyright infringements does not strike the right balance between the need to fight online piracy and the fundamental freedom of ISPs to conduct their business. It may also infringe the fundamental rights of the individuals, in particular the right to protection of personal data and the right to freedom of information. Finally, the court ruled that, such an injunction leads to a general monitoring obligation, contrary to the Electronic Commerce Directive. This landmark decision from the ECJ on copyright clarified the existing regulatory regime (art. 8.3), explaining what ISPs can or cannot do, making explicit that ISPs cannot be required to carry a general control duty at their own expense. The ECJ balanced freedom of innovation and the protection of copyrights.

Box 3: The interpretation by the ECJ of key copyright law concepts: the main cases.

- Relationship between copyright and competition law: from the ECJ judgments *Coditel II* (C-262/81) and *Magill* (C-418/01) to the European Commission's *CISAC* decision
- Exceptions and limitations in the Information Society Directive (Directive 2001/29), including fair compensation for reproductions (C-467/08 *Padawan*), copying for private use (C-462/09 *Stichting de ThuisKopie*) and remuneration of authors for public lending (C-271/10 *VEWA v Belgium*)
- The concept of communication to the public (C-306/05 *SGAE v Rafael Hoteles*)
- The notion of originality and the scope of exception for the purpose of public security: ECJ case *Maria-Ewa Painer* (C-145/10)
- The future of exclusive licence agreements and the accessibility of broadcasting services (C 403/08 and C 429/08 *Football Association Premier League Ltd and Media Protection Services Ltd*)
- Copyright versus the protection of privacy in electronic communications: the responsibility of internet service providers (C-70/10 *SABAM*)

¹¹⁴ The reference for a preliminary ruling asked the court to decide about the interpretation of the following directives: the Electronic Commerce Directive, the Copyright Directive, the Enforcement Directive, the General Data Protection Directive, the Directive on Privacy and Electronic Communications.

¹¹⁵ *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*. C-360/10 – SABAM. Available at: <http://curia.europa.eu/juris/liste.jsf?pro=&nat=&ogp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=ALL&pcs=O&avg=&page=1&mat=or&parties=sabam&jge=&for=&cid=4254154>

3.3 Compensations

Beyond the economic impact of fair use or of exemption, there is a lot of controversy about whether or not consumers are allowed to make one or more copies of the digital content for private use. In a world of routine copying enabled by digital technologies this is not likely to go away easily as consumers will try to reap the benefits of digitization, to create better quality copies or to transfer a digital format from one form to another, e.g. digital music into MP3 files. Article 5(2)(b) Information Society Directive does not provide consumers with such a right. It is left to Member States to decide to authorise consumers to make a copy for private use, provided that the rights holders receive a fair compensation. Therefore there is a great deal of uncertainty about the extent to which user rights under intellectual property law are mandatory or merely default rules both in the EU and the US.

Whatever the extent of the right, mechanisms for compensation like levies have been created. Levies are a form of indirect remuneration to ensure that rights holders receive fair compensation for certain acts of private copying which they cannot, for practical reasons, monitor and therefore to which they cannot consent directly. Levies are covered by the Copyright directive. *“The private copying levy systems were introduced at a Member State level on the basis that there were no effective means to monitor and therefore authorise acts of home copying of, e.g. music, films or books. There is no uniform Community-wide levy system”*¹¹⁶ (E.C., 2008: 3). The introduction of private copying levies is rooted in a finding, in a series of cases decided by the German Supreme Court in the 1950’s and 1960’s, of contributory liability¹¹⁷ on the part of the manufacturers and distributors of recording equipment (Hugenholz et al, 2003), and extended since to several kind of devices.

Levies gradually proliferated from analogue equipment to digital media and equipment (CD writers and hard disks), making users more and more worried about competing mechanisms for protection with the growing use of DRMs. However, they are not intended, as sometimes mistakenly believed, to compensate right holders for acts of illegal copying (piracy) a point often made by consumers organisation (BEUC quoted by EC. 2008: 18). ‘Fair compensation’ is due only in cases of legitimate private copying (Hugenholz et al, 2003). Consumer organisation claim that current levy systems are based on assumptions and not on empirical studies on the actual effects of private copying (E.C., 2008: 18). In such a context, the generalisation of the levies raises concerns about having more and more users paying a ‘copyright tax’ without actually using copyrighted content which would mean that a large numbers of consumers would be cross-subsidising a relatively limited group of ‘private copiers’. Levies raise other issues in term of cost as hardware levies systems entail large administrative/compliance costs for payers but also of efficiency of the collection. The latter has been pinpointed by the French authority (“Cour des Comptes”)¹¹⁸ showing that the collection was being “evaporated” because of the intervention of as many as six collective

¹¹⁶ E.C., (2008), Background document. “Fair compensation for acts of private copying”.

¹¹⁷ To commit a contributory copyright infringement a defendant must, (1) with knowledge of the infringing activity, (2) induce, cause or materially contribute to the infringing conduct of another. (Hugenholz et al, 2003: 72).

¹¹⁸ France's 2010 report of the CPCSPRD (Cour des Comptes).

intermediaries. Besides, according to Digital Europe (2012),¹¹⁹ manufacturers cannot pass on levies to end users/consumers due to competitive pressures.

To find solutions, the EC launched several consultations. A first consultation took place in 2006 about how to adapt the tax to a converged digital environment but no decision were taken as the consensus between Member States was lacking. Another consultation was launched in 2008 followed by a hearing. It resurfaced in the May 2011 communication on IPR strategy. The Commission announced that it would like to broker an agreement on private copying levies with the objective of harmonising the methodology used to impose levies, the type of equipment covered, the tariffs, the administration of levies and the interoperability of national systems. It announced as well the appointment of a high-level independent mediator by the end of 2011 to explore possible approaches with stakeholders. In December 2011, former European Commissioner António Vitorino was appointed as mediator. He opened in April 2012 the mediation process.¹²⁰ The main issues for discussion are: the methodology for setting levy tariffs, cross-border sales; the determination of the person or entity liable to pay the levy, the visibility of the levy, private copying and reprography in the context of the new digital forms of distribution.

3.4 Fighting against piracy

Lack of empirical evidence seems to be the regular answer to most of the questions about the efficiency of the legal protection offered by copyright, it appears to be also the case for piracy. Besides, the debate on piracy did not contribute to a better understanding of the complexity of the situation. On the opposite, it did confuse the debate,¹²¹ the defensive strategy most likely acted as a blinder, preventing the music industry, for instance, to adapt promptly to the new environment and to experiment with new business models. Assessing the impact of piracy is not an easy task and experts disagree on data and methodologies. Defining for instance the relevant market is not obvious, the market may vary from very broad ones like the leisure market with substitution effects to more narrowed down market definition (e.g. recorded music and not the entire music industry). The adoption of different relevant markets may yield different conclusions about the impact of infringements.

The Hargreaves report stressed that *“reliable data about scale and trends is surprisingly scarce. Estimates of the scale of illegal digital downloads in the UK range between 13 per cent and 65 per cent in two studies published last year.¹²² A detailed survey of UK and international data finds that very little of it is supported by transparent research criteria. Meanwhile sales and profitability levels in most creative business sectors appear to be holding up reasonably well. We conclude that many creative businesses are experiencing turbulence from digital copyright infringement, but that at the level of the whole economy, measurable impacts are not as stark as is sometimes suggested”*. According to the report, to assess properly requires to take into account other elements such as: not all illegal downloads are lost sales, therefore it is not appropriate to measure economic losses due to piracy at a one-to-one ratio, the willingness to pay a higher price for a legal copy should not be overestimated, money not spent on legal copies is not lost to the economy¹²³ and

¹¹⁹ Presentation. Meeting with Mr Antonio Vitorino European Commission Copyright Levies Mediator. Monday 16 April 2012.

¹²⁰ Stakeholders were invited to send contribution by May 31, 2012.

¹²¹ As illustrated by the overstatement to be found in TERA (2010).

¹²² I.E. 2010.

¹²³ Noting not without humour: *“This is of no comfort to the sector suffering losses”*.

may not be problematic from a dynamic viewpoint; *“purchases prompted by experience from an illegal copy (for example, concert tickets or other merchandise) can offset losses”* (Hargreaves: 72), as other intermediaries and creative can also reap benefits. Substitution and elasticity effects not only are difficult to quantify but vary from country to country with consuming patterns. The IVIR/TNO study on file sharing (2009) on the Dutch media shared the same views,¹²⁴ the authors stressed some positive aspect of file sharing: *“...we see that many people download tracks to get to know new music (sampling) and eventually buy the CD if they like it”*.¹²⁵

In the case of music, for instance, some experts are reluctant¹²⁶ to accept the data coming from the industry (IFPI, 2011, TERA 2010), some may even claim that the music industry is counting revenues that most likely they would not have been able to receive because of the declining trends of that form of music consumption. In his opinion in the Grokster case, Justice Breyer, acknowledged that unauthorized p2p copying probably had diminished copyright industry revenues, but noted nevertheless that studies of the effects of p2p file sharing were unclear on the extent of harm and on whether creative output had diminished.¹²⁷ Grokster was a clear case of infringement, for greyer zones it may be even more difficult to assess properly. Still in the case of music, analyzing the impact of piracy for creation, Bacache et al (2012) came to a rather nuanced statement: *“artists seem rational in their attitudes towards piracy. The heterogeneity that we observe in their opinions stems from the heterogeneity of the impact of piracy on their revenues, according to their contractual situation, the intensity of their live activity, and their entrepreneurial behavior (self-releasing)”*, they note that *“self-releasers”* have behaviours similar to the record labels as they need to recoup their investments.

Looking at only the (missed) revenues may not be the most appropriate metrics to understand the logic and dynamic of infringements even if obviously painful for the hit industry. For instance, the question, in the case of book for instance (see Box 4, then becomes: is piracy filling an unmet demand? In any case, mature and declining industries are under strong pressure, notwithstanding the impact of technology, to restructure themselves. A pressure summarized by I. Hargreaves: *“There is every chance that digital technology will continue to disrupt business models of makers of films and TV programmes, books, newspapers and music”*.

¹²⁴ At 3: *“Determining the impact of unlicensed downloading on the purchase of paid content is a tricky exercise. In the music industry, one track downloaded does not imply one less track sold. Many music sharers would not buy as many CDs at today’s prices if downloading were no longer possible, either because they cannot afford it or because they have other budgetary priorities: they lack purchasing power.”* For a summarized version of the report see Van Eyk, N., Poort, J. Rutten, P., (2010).

¹²⁵ Id at 3.

¹²⁶ See the report on the music industry, produced by IPTS as part of the project on media and content industries, listed in the *“IPTS MCI reports”* of the bibliography.

¹²⁷ Quoted by P. Samuelson at 6

Box 4: Gauging the impact of piracy: the case of book publishing

In the case of books as emphasized, by a 2009 study from the French observatory “*Le MOTif*”,¹²⁸ there are few studies available to document the phenomenon of digital piracy of books.¹²⁹ It is therefore worth summing up their main findings under the assumption that these findings may be valid, to some extent, for other EU markets. In 2009, it appeared as a highly marginal market compared to the music, film or video games markets. The volume of illegal downloadings of books is very difficult to gauge making its financial impact even more difficult to assess. This is why the study opted for concentrating on the illegal offer of the pirates networks.

Finding the appropriate data for the number of titles available is also complex, however according to their estimation (for the summer of 2009) the amount was lower than 1% of the number of titles available under the physical format: between 4000 and 6000, the majority (between 3000 and 4500) being comics books,¹³⁰ followed by scientific, technical or medical titles (1000-1500) and some 200-300 audiobooks half of the title being in the public domain.

As can be expected, authors of best sellers on the French market¹³¹ are prominent in the list of downloaded authors. However, some results are much more counterintuitive. First, 25% of the top 20 are philosophers a percentage that does not compare with the top 20 for books, neither of sales. The number one is the French philosopher, Gilles Deleuze. Another 25% comes from science fiction and heroic fantasy. Lastly writers within the category “religion and esoterism” are overrepresented.

The second round of the study, released 18 months after in March 2011¹³² yielded a similar pattern (science fiction and comics). Piracy still did not appear massive but tended to speed up nevertheless, new titles being pirated more quickly. Direct downloading prevails now upon Peer to Peer. The study concludes by raising the questions of what makes this illegal offer attractive, of its ability to meet the demand of the consumers. In other words, are these pirated books filling an unmet demand?¹³³ Indeed, the study reveals that out of the 50 best-selling comics, 58% of these are not available as e-books. The pirated comics appear to be provided by well organized entities which drives the study do conclude that without an improved legal offer, the risk is high to see an increase in piracy.

Source: de Prato et al, 2012¹³⁴.

¹²⁸ EbookZ1. Observatoire du livre et de l'écrit en Ile-de-France <http://lemotif.fr/fr/e-motif/elabz-/ebookz/>

¹²⁹ The International Intellectual Property Alliance released a short report in 2008: available at http://www.iipa.com/2008_SPEC301_TOC.htm. It concentrates mostly on what they call “priority watch list” of infringing countries such as China, Mexico or Egypt, most of the time there are no data available for books. For China the estimated level of piracy for the period 52 millions US \$ for books but of nearly 2.5 billions for software. <http://www.iipa.com/pdf/2008SPEC301LOSSLEVEL.pdf>. There are no data available on the IPA website either.

¹³⁰ France is well known for the importance of this market, this may not be transferable to other markets.

¹³¹ For instance: Bernard Werber, Amélie Nothomb, Frédéric Beigbeder, J.K. Rowling, Michael Connelly, Daniel Pennac, Marc Levy, Paulo Coelho, Stephenie Meyer.

¹³² EbookZ 2 (march 2011)

¹³³ Following the argument of Edward Nawotka commenting the 2011 survey: “*SURVEY: Are Book Pirates Fulfilling Unmet Demand?*”, January 24, 2012. <http://publishingperspectives.com/2012/01/survey-are-book-pirates-fulfilling-unmet-demand/>,

¹³⁴ See the report on the book publishing industry, produced by IPTS as part of the project on media and content industries, listed in the “*IPTS MCI reports*” of the bibliography.

3.5 Tensions between rights

From a customer viewpoint, as underlined by Hargreaves among others, awareness seems to be a major issue in the case of piracy. Besides, customers' expectations may be at odds with those of the industry, while at the same time the industry will push its extension/limitation strategies. A survey published by Consumer Focus in February 2010 found that 73 per cent of consumers do not know what they are allowed to copy or record.¹³⁵ Besides, the property rights differ between physical objects and access. Physical objects (e.g. books) as goods are sold and become the property of their buyers and can even be resold,¹³⁶ but digital contents are "licensed" and remained managed by the right owner under various layers if intellectual property rights (N. Helberger et al, 2012b: 15). As illustrated with the case of the scientific, technical and medical publishing subsector for instance, it allows publishers to leverage the management of access on an annual basis.

Therefore, customers can expect some comprehensive consumer protection; the EU offers a rather strong protection framework.¹³⁷ Clearly there are some tensions between competing rights as acknowledged, for instance, by the Spanish trade association (Asimelec: Asociación multisectorial de empresas de tecnología de la información, comunicaciones y electrónica, 2010):¹³⁸ private property rights,¹³⁹ privacy rights,¹⁴⁰ freedom of expression and communication, right to the secrecy of private communications, right to access to the Internet, and private copies or fair used already reviewed.

Some are based on principles of high legal status and very often the balance between these conflicting principles will be left to courts. For instance, with the principle of freedom of expression,¹⁴¹ courts will carefully weigh under a proportionality test the risk of overblocking brought by some measures and are likely not to tolerate an impairment of the right,¹⁴² as illustrated by the ECJ decision *Sabam v. Scarlet* in the EU and the Comcast case in the US.¹⁴³ As noted with the ECJ decisions they are some tensions as well with economic rights (right to conduct business).

¹³⁵ Quoted by Hargreaves (2011: 73).

¹³⁶ Under the "First sale doctrine" of the Copyright Act in the US. The "First sale doctrine" "says that when the owner of a copyright (first party) assigns it to a second party (for example, when a DVD is sold to a retail store by a studio or a book is sold to a retail store by a book publisher), the first party cannot control the disposition of the product by the second party". So in practice, a movie studio cannot legally specify whether a DVD can only be rented or only be sold by the retailer, such as Netflix. As Netflix can always just go to Walmart and buy as many DVDs as it wants, it allows the firm to bargain down wholesale prices. Source: Waterman (2005: 105). The EU Rental Rights Directive allows studios to separate the rental and sales markets thereby preventing such resales.

¹³⁷ MCI 1, Chapter 8, Section 2.

¹³⁸ See: "12.2.2 Los límites a la protección de la propiedad intelectual: la posible concurrencia con otros derechos", p.168.

¹³⁹ See MCI 1: 5.1 p.68.

¹⁴⁰ See MCI 1: 8.3 p.100.

¹⁴¹ Guaranteed in the US by the First Amendment of the United States Constitution and in the EU by Article 10 of the ECHR.

¹⁴² W. Maxwell: presentation at the TPRC, 2012.

¹⁴³ *Comcast Corp. v. FCC*, 600 F.3d 642, United States Court of Appeals for the District of Columbia, 2010. The Court vacated a 2008 order issued by the FCC that asserted jurisdiction over Comcast's network management policies and censured Comcast from interfering with its subscribers' use of peer-to-peer software. Source: Wikipedia, Comcast Corp v.FCC, available at: http://en.wikipedia.org/wiki/Comcast_Corp._v._FCC

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Besides, Hugenholtz and Senftleben (2011: 10) argued that the current lack of flexibility of the EU copyright law “undermines the very fundamental freedoms, societal interests and economic goals that copyright law traditionally aims to protect and advance”. They note that “courts have resorted to the application of a variety of – sometimes rather implausible¹⁴⁴ – legal doctrines to create ad hoc legroom in the law of copyright” (at 10). Therefore they suggest introducing some flexibility under some kind of EU “fair use” approach while keeping the EU “acquis”.

¹⁴⁴ Giving the example of the Dutch Supreme Court with the Dior v. Evora decision. The Dutch court decided “to draw the borderlines of copyright outside the existing system of exemptions”.

4. Reviewing the policies

There are many ways to organize the digital economy, between markets and governments. Privately negotiated contracts can anticipate and enhance market goals, while negotiated settlements address unexpected issues and changes in facets of the market environment that alter economic returns. What types of institutions and organizations enhance the incentives for innovation and creativity while also enhancing its diffusion and impact? Forward looking ex ante regulation can try to shape incentives in advance, while ex post regulatory intervention can seek to correct behaviour that departs from ideal norms. To quote S.Greenstein (2010): “*In that sense copyright law does not operate in an institutional vacuum*”. It is one of several mechanisms for protecting intellectual property and regulating market behaviour. Alternative modes of licensing have emerged as noted, Creative Commons being the most well-known¹⁴⁵ linked in science and art with the open source movement and open content principles.¹⁴⁶ This chapter deals with the policies, starting with international treaties and law.

4.1 International law

The Berne convention was signed in 1866 and regularly updated and extended since.¹⁴⁷ The World Intellectual Property Organisation (WIPO) adopted in Geneva on 20 December 1996 the WIPO Performances and Phonograms Treaty (‘the Performances and Phonograms Treaty’) and the WIPO Copyright Treaty (‘the Copyright Treaty’). This adoption of the treaties triggered the passing of legislation on both sides of the Atlantic.¹⁴⁸ Those two treaties were approved on behalf of the Community by Council Decision 2000/278/EC of 16 March 2000.¹⁴⁹

Most of the countries especially developing countries¹⁵⁰ were not signatories of the Berne convention. In the 90ies, to ensure enforcement mechanism against piracy, US lobbyists, mostly from the entertainment industries, tried to link intellectual property with the trade agenda: “*Intellectual property thus became an item on the broad agenda of the Uruguay Round under the General Agreement on Tariffs and Trade (GATT)*” (Henry et al, 2010: 243). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹⁵¹ was

¹⁴⁵ See <http://creativecommons.org>.

¹⁴⁶ Open Society Institute, Open Access Publishing and Scholarly Societies – A Guide, New York, OSI, 2005, p. 6.

¹⁴⁷ 1896, 1908, 1914, 1928, 1948, 1967, 1971, 1979 see : http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P85_10661

The treaties are reviewed in Lindner & al (2011): see Part I.

¹⁴⁸ The main international obligations arising from the two treaties on copyright and related rights needed to be transposed.

¹⁴⁹ OJ 2000 L 89, p. 6.

¹⁵⁰ In 2006, the State Council of China the “Regulations on Protection of the Right of Communication through Information Network” (Copyright Regulations) half year before China joined in the WIPO Copyright Treaty(WCT) and WIPO Performances and Phonograms Treaty (WPPT) of the WIPO transplanting mostly the provisions from the DMCA. The law is currently being amended. Qian Tao (2012). Besides as explained by Paolo Lanteri, WIPO, 2/3 of the countries are without copyright industries making the process of changing the treaties very difficult and long. Presentation at the IPTS conference “Dynamics of the Media and Content Industries” Brussels, 25-26 October 2012. Available on the IPTS website.

¹⁵¹ Which constitutes Annex 1 C to the Agreement establishing the World Trade Organisation.

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signed in Marrakech on 15 April 1994.¹⁵² TRIPS requires member states to provide strong protection for intellectual property rights. Article 9 refers to the Berne convention.¹⁵³ *“The characteristics of the system of intellectual property prevalent in the developed world (and especially the US) have thus to a large extent been globalized”*, underline Henry et al (2010: 244).¹⁵⁴

We already reviewed the draft WIPO treaty on the extension of the protection of TV signals (chapter 3.1). We will close this review of international treaties with an overview of the last one being discussed: the anti-counterfeiting trade agreement (ACTA), an enforcement agreement, but a matter of heated debates as well, for instance at the European Parliament.¹⁵⁵ On May 31, 2012 three EP committees adopted opinions against the proposed agreement. ACTA aims to establish an international legal framework for enforcing intellectual property rights through civil and criminal measures in order to fight counterfeiting and piracy. It has been negotiated by the European Commission, the Council of the EU and ten countries¹⁵⁶ between 2008 and 2010. The agreement signed by the Commission on January 26, 2012 was referred in May 2012, to the ECJ to assess its compatibility with EU fundamental rights. On July 4, 2012 the European Parliament rejected the agreement by an overwhelming majority.¹⁵⁷

The main contended issue during the negotiations has been the alleged impact of the agreement on the liability of intermediaries and on the civil liberties of citizens. The European Data Protection Supervisor (EDPS) sent a first warning about the risk in 2009 and in April 2012, adopted an opinion on ACTA stressing the privacy dangers of the measures foreseen in the digital chapter.¹⁵⁸ According to observers,¹⁵⁹ it is another attempt¹⁶⁰ to promote voluntary action by internet service providers (ISPs) to monitor the internet and restrict the fundamental rights of individuals.

¹⁵² Approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

¹⁵³ Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights provides: *‘Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.’*

¹⁵⁴ In his 2008 paper, J. Stiglitz reminds the reader that he opposed the agreement when he was at the Council of Economic Advisors of the White House: *“Interestingly, so did the Office of Science and Technology Policy. We were not alone in our opposition; indeed, it was a view held by many, if not most, of the people who understood the issues. These views stood in contrast to the views of most of the people who had some special interest on this issue, particularly from the pharmaceutical and entertainment industries, who argued that the stronger the intellectual property rights the better”* (Stiglitz, 2008:1694).

¹⁵⁵ A workshop was held by the civil liberties (LIBE) committee of the European Parliament on May 16, 2012.

¹⁵⁶ Australia, Canada, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the US.

¹⁵⁷ The EP’s resolution stated: *“Parliament declines to consent to conclusion of the agreement and calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text”*. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0287+0+DOC+XML+VO//EN&language=EN>

¹⁵⁸ According to the EDPS, article 27 does not contain the necessary safeguards to protect fundamental rights in the online environment, such as the principles of presumption of innocence, effective judicial protection, due process and the confidentiality of communications.

¹⁵⁹ Joe McNamee, from European Digital Rights at the EP workshop.

¹⁶⁰ ACTA foresees that its parties “shall endeavour” to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringements (art. 27§3).

4.2 The EU policies

The EC has been very active in that field, trying to come up with solutions to streamline the process of copyright licensing. The Information Society Directive (E.C. 2000) was adopted after several years of enquiry and discussions at the European Commission on the challenges brought about for the information society by the emergence of the digital networked environment (see EC, 1995). By the same token, the major goal of the 2001 Directive, “on the harmonisation of certain aspects of copyright and related rights in the Information Society” was to foster growth and innovation of digital content services in the European Union.¹⁶¹

The EC displayed a strong willingness to intervene to correct what was considered as major inefficiencies for the internal market. As Charlie McCreevy, former European Commissioner for Internal Market and Services once explained: “*The current unsatisfactory arrangement of having to clear online rights in musical works on a territory-by territory basis is too costly and complex and needs to be remedied*”, adding “*Europe’s model of copyright clearance belongs more to the nineteenth century than to the 21s*”. The focus of DG MARKT shifted from harmonisation (copyright directive) toward the management of rights with a view to facilitating the acquisition of multi-territorial licenses, more suited to the Internet age.

The EC took a careful approach acknowledging that options like direct licensing may take time as existing structures are based on bilateral agreements. In its July 2005 staff working document on the cross-border collective management of copyright, the Commission backed the option to give right holders the choice to authorise one single collecting society to license and monitor all the different uses made of their works across the entire EU. It was seen as the most effective long-term model for cross-border licensing of copyright-protected content in the online environment and cross-border distribution of online royalties. Meanwhile, it opted for a soft law approach (recommendation) (E.C., 2005)¹⁶² but nevertheless has been grappling with existing settlements: Barcelona, Santiago agreements.¹⁶³

The latest 2011 document on the strategy for IPR, calls again for the creation of a comprehensive framework for a digital single market as “*Europe remains a patchwork of national online markets*” (COM(2011) 287 final: 9). It is stressed: “*European IPR legislation must provide the appropriate “enabling framework” that incentivises investment by rewarding creation, stimulates innovation in an environment of undistorted competition and facilitates the distribution of knowledge*” (COM(2011) 287 final:4). “One stop-shops” are still seen as way to facilitate rights acquisition. The creation of European “right brokers” are being considered for instance the musical repertoire (COM(2011) 287 final: 11). At the

¹⁶¹ See Lindner & al (2011) for a presentation of the directive (Part II) and its implementation in the 27 Member States (Part III).

¹⁶² The recommendation's objective was to facilitate the pan-European licensing of copyright for online music services. It proposed measures to enhance legal certainty for commercial users, to increase the revenue stream for right holders and to ensure more transparency and rationalisation in the way collective management of copyright operates. The Commission identified restrictions in the reciprocal representation agreements concluded between collecting societies which were presented as likely to hamper the development of an online music services market.

¹⁶³ Settlement adopted by for on line exploitation: the 2000 Santiago agreement for the performing right and the 2001 Barcelona agreement for the reproduction right. It was preceded by the 1987 Sydney agreement for satellite and broadcasting extending the mandate to the territory of the footprint of the satellite. In both cases it enabled multi-territorial and multi-repertoires licences.

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same time the Commission is trying to improve the licensing processes perceived as lengthy and costly¹⁶⁴ and paying attention to the governing structure of collective societies.

In July 2012, the E.C adopted a proposal for a directive to facilitate the pan-European licensing of music on the internet and to promote greater transparency and governance of collecting right management companies. As explained in the proposal: *“This proposal therefore aims to: (a) improve the standards of governance and transparency of collecting societies so that rightholders can exercise more effective control over them and help improve their management efficiency, and (b) facilitate the multi-territorial licensing by collecting societies of authors’ rights in musical works for the provision of online services.”*¹⁶⁵ Two sets of rules are considered, one only applying to authors’ collecting societies to grant multi-territorial licences for online use of musical works. The second is meant to improve and harmonise the standards of governance and transparency and will apply to all collecting societies, regardless of the sector in which they operate (music, films, books...).

The Digital Agenda lists actions to address the barriers to the development of Europe's online markets. Besides, the accessibility of digital content is also a prime target on the EU Lisbon Agenda: “Businesses and citizens must have access to an inexpensive, world-class communications infrastructure and a wide range of services. Content industries create added value by exploiting and networking European cultural diversity.”

However, from a competition angle, the DG Comp took a harsher approach. On April 29, 2004, the Commission issued a statement of objections to collecting societies because of the anti-competitive effects of the territorial exclusivity clauses of the agreements. On February 7, 2006 the Commission opened formal proceedings against [the International Confederation of Societies of Authors and Composers](#) (CISAC) and its members for breach of EC competition law rules¹⁶⁶ after receiving complaints filed by RTL and Music Choice, a UK online music provider. According to the Commission, two types of practices could potentially breach EC competition rules and in particular Article 81 of the EC Treaty. The first, the membership clause of collecting societies, requires an author to transfer his rights only to the collecting society of the Member State in which he is established. According to the second, the territoriality clause, a licence to exploit a copyrighted work can only be obtained from the domestic collecting societies of the territories in which the work would be exploited and is limited to this territory.

The substance of the competition case was about allowing music authors (composers and lyricists) to select the collecting society for the management of their copyright, a choice based on their criteria,¹⁶⁷ but a choice that was blocked by the “membership clause”.¹⁶⁸

¹⁶⁴ See Commissioner Barnier speech at the LetsGoConnected conference, Brussels, May 10, 2012: 2. “L’Europe au diapason des attentes des utilisateurs et des créateurs: pour un pacte numérique”. Available at : http://letsgoconnected.eu/files/SPEECH-12-354_FR_Michel_Barnier.pdf.

¹⁶⁵ Proposal of a directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, at 3. See also: http://ec.europa.eu/internal_market/copyright/management/index_en.htm#maincontentSec5

¹⁶⁶ [The International Confederation of Societies of Authors and Composers](#) (CISAC) and 18 collecting societies (including GEMA, PRS, SABAM, SACEM, and SGAE) reacted offering commitments to avoid anti-competitive effects. The 18 societies offered to remove the membership and exclusivity clauses from the reciprocal representation agreements concluded with each others, an offer that was held likely to be effective to re-introduce competition.

¹⁶⁷ E.g. on the basis of quality of service, efficiency of collection and level of management fees deducted...

Symmetrically, it was also about opening the market for the consumers, helping cross-border music broadcasting over the internet, by cable and by satellite by making it easier for users to obtain licences from a single collecting society of their choice, a choice barred by the "exclusivity clause."¹⁶⁹

Collecting societies argued that the provisions were meant to avoid "forum shopping", and that a trade off was needed between allowing users to continue to benefit from "one stop shops" and the willingness of right holders to control the conditions in which their works are administered. Besides they claimed that their deletion would allow international publishers to administer directly their Anglo-US repertoire, outside the traditional administration of collecting societies¹⁷⁰ (creation of CELAS).¹⁷¹ Indeed, in the wake of the 2005 EC recommendation, all the major music publishers (at that time: Universal Music Publishing, EMI Music Publishing, Warner/Chappell Music Publishing and Sony/ATV Music Publishing), and some independents (e.g., Peer Music), have withdrawn the digital rights to their Anglo-American repertoires from the traditional system of reciprocal representation agreements between the different collecting societies in order to establish separate central licensing bodies for the pan-European administration of their respective online rights (Heyde, J., 2009). According to collecting societies it was likely to weaken small and medium collecting societies and repertoires.¹⁷²

After 2 years of consultations, the DG Competition issued a decision in July 2008 alleging that the 24 EEA societies involved had violated European competition laws (CISAC was not included in the list).¹⁷³ These two practices were found to infringe the rules on restrictive business practices.¹⁷⁴ Therefore, the collecting societies were required to end these infringements. There is indeed a tension between multi-territory rights and multi-license ones as it seems that multi-territorial rights are valid for a single license and multi-license for a single territory.¹⁷⁵

¹⁶⁸ Source: "Antitrust: Commission prohibits practices which prevent European collecting societies offering choice to music authors and users – frequently asked questions". Memo/08/511, 16th July 2008. <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/511&format=HTML&aged=1&language=en&guiLanguage=en>

¹⁶⁹ "Forum shopping" is most likely seen positively from a competition law perspective, as just plain competition.

¹⁷⁰ Sacem, presentation at IIC Annual Conference London, 2007: "A long storyand a huge confusion".

¹⁷¹ Central European Licensing and Administration Services (CELAS) is a company set up to represent a certain set of EMI Music Publishing's repertoire for online and mobile exploitation in Europe. It is jointly owned by two of Europe's leading music Collective Rights Managers – PRS for Music in the U.K. (Mechanical Copyright Protection Society - Performing Right Society) and GEMA in Germany (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte). Source: <http://www.celas.eu/CelasTabs/About.aspx>. It offers licences for cross border music services for online and mobile applications in one place. CELAS was the first, followed by Pan European Digital Licensing (Warner/Chappell), DEAL (Universal), and PAECOL (Sony/ATV).

¹⁷² BUMA/STEMRA (two Dutch collecting entities) lodged a complaint against CELAS with DGComp. In 2001, Buma/Stemra sued the firm Consumer Empowerment, then the owners of Kazaa in the Netherlands. A Munich court in 2009 also question the feasibility of the Celas model for Germany.

¹⁷³ "Antitrust: Commission prohibits practices which prevent European collecting societies offering choice to music authors and users", press release 16th July 2008. <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1165&format=HTML&aged=1&language=EN&guiLanguage=fr>

¹⁷⁴ Article 81 of the EC Treaty and Article 53 of the EEA Agreement.

¹⁷⁵ Sacem, id.

Conclusions: The waning of copyright in a digital world?

The answer to the brief received by Professor I. Hargreaves from the UK government was rather straightforward. The question was: “*Could it be true that laws designed more than three centuries ago with the express purpose of creating economic incentives for innovation by protecting creators’ rights are today obstructing innovation and economic growth?*” To what the report answers: “*The short answer is: yes. We have found that the UK’s intellectual property framework, especially with regard to copyright, is falling behind what is needed*”. Adding shortly after: “*This does not mean, however, that we must put our hugely important creative industries at risk*”. The report is a vibrant plea for a change of a system that looks broken: “*Copyright illustrates this inability to adapt at its most serious. Licensing markets are congested and opaque. Millions of orphan works cannot be licensed at all. There is widespread unauthorised consumption of content. Countless people are in breach of copyright in performing every day acts such as transferring music from computer to MP3 player. ...New technologies such as text mining are regulated in unforeseen ways by copyright*”.¹⁷⁶ In 2012, building on the Hargreaves report, Richard Hooper published his diagnostic report stating again that “*Copyright licensing is not yet fully fit for purpose for the digital age - the UK could do better still*”.¹⁷⁷

Benhamou et al are as critical emphasizing similar issues of a copyright system originating from the book industry but turning out to be less and less adapted to new collective or collaborative works as well as ways to monetize these works. They note a growing number of asymmetries of information between the authors and downstream players.¹⁷⁸ There is an economic logic of “command” where works are ordered by the main customer and not the other way around (proposed to the main customer) especially in the TV sector. Thus, the room left to the author is shrinking and copyright is less and less appropriate. Besides, they note that most of the research underline than even under the present regime, the very notions of work, of author are ill-defined and at least partially ill-adapted to the evolutions of the different segments of the media and content industries. The borders between categories of authors are vague, all authors are not creators, and the wording creator is not the more precise.

Copyright management is as we have seen an important business practice for most of the creative industries although its role varies. It does not follow that it should prevail upon other considerations, other policies. The economic and legal case is after all not that clear as we noted that most of the time evidence was lacking to assess properly the impact of some aspects, like extension of the rights or piracy. Decisions seem to be taken more out of powerful lobbying than on the base of sound economic analysis. No wonder, the academic literature is rather critical. Robust independent empirical research is still needed.

Clearly not only there are issues to solve, evolutions to enable, but also limits to copyright. Copyright should not act as a barrier to innovation and economic opportunity, there is a

¹⁷⁶ Hugenholtz and Senftleben (2011) hold similar views.

¹⁷⁷ Richard Hooper was appointed by UK Business Secretary Vince Cable to lead an independent feasibility study into a Digital Copyright Exchange (DCE) on 22 November 2011. The released report is based evidence collected over a period of three months from December 2011 to March 2012. <http://www.medialaws.eu/copyright-licensing-is-not-yet-fully-fit-for-purpose-for-the-digital-age-the-uk-could-do-better-still/>

¹⁷⁸ See the conclusion of MCI 1.

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need to better understand the different aspects and to find the appropriate balance. Looking for such a balance, I. Hargreaves (2010:8) is advocating that “*Government should firmly resist over regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators*”. Digital content markets can become more effective and enforcement as well but it requires more transparency and as Commissioner N. Kroes suggests: “*...we need a different mindset.. To be creative experimenting with new models, to be courageous investing in new opportunities*”.¹⁷⁹ This requires “*...a new balance between enforcement, and making access to legal content easier*”.¹⁸⁰

As Henry and Stiglitz conclude: “*More generally, we need to think of intellectual property as only one aspect of a country’s (and the world’s) innovation system. Part of the problem today is that this one aspect has come to dominate the other aspects. We need to rebalance, giving more weight to other instruments that further innovation. But that does not dispense with the necessity of facing the fact that the intellectual property system is presently not well designed*”. (Henry & Stiglitz: 248).

Dominance per se is not an issue according to standard competition law, but abuse of dominance is an issue. To paraphrase competition law, copyright per se is not an issue but abuse of copyright is.¹⁸¹ Curbing abuses can be left to courts that are already active in the field but not covering the failure of legislators. Policies can clear the way, ease out and try to find the appropriate balance between often conflicting policy goals. M. Barnier in a recent speech (May 2012) delineated the enabling policy advocated by the EC as “*a facilitator and not a brake*”.¹⁸² He concluded as well: “*Les titulaires de droit doivent pouvoir efficacement les faire respecter sans en abuser*”. A matter of finding the right balance.

¹⁷⁹ Speech at the LetsGoConnected conference, Brussels, May 10, 2012. “Connecting the creative sector”: 3. Available at: http://letsgoconnected.eu/files/SPEECH-12-334_EN_Neelie_Kroes.pdf

¹⁸⁰ Id, N. Kroes at 2.

¹⁸¹ The IPR communication states: “*...to prevent the abuse of IPR which can hamper innovation or exclude new entrants, and especially SMEs, from markets*”. P.6.

¹⁸² At the LetsGoConnected conference. Available at: http://letsgoconnected.eu/files/SPEECH-12-354_FR_Michel_Barnier.pdf. In French: “*un cadre facilitateur, et non un frein*”, p.4

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February 16, 2012 an injunction by a national court requiring a social networking website (SNS) to filter out the unlawful use of musical and audiovisual works between its members is contrary to EU law.

Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08). Available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d596eb90a308a9471f8e81840a6ae8a1b4.e34KaxiLc3eQc40LaxqMbN40a3aTe0?text=&docid=110361&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=1618536>

24 November 2011, Judgment in Case C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)

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3. IPTS MCI reports:

All the reports below are available at: <http://is.jrc.ec.europa.eu/pages/ISG/MCI.html>

3.1 Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries

De Prato, G., Feijóo, C., Nepelski, D., Bogdanowicz, M., Simon, J.P (2010) "*Born digital/ Grown digital. Assessing the future competitiveness of the EU video games software industry*", JRC Scientific and Technical Report, 24555 EN

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3.2 Media and Content Industries: Changing regulation for changing industries

Simon, J.P (2012), *The dynamics of the media and contents sector*. A synthesis report. MCI Report 1.

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European Commission

EUR 25587 – Joint Research Centre – Institute for Prospective Technological Studies

Title: **Changing Modes of Asset Management: IPR and Copyright in the Digital Age**

Author: Jean Paul Simon

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Abstract

The first chapter of the report briefly sums up the main elements of the academic debate around IPR. The second moves to the economic case and analyses its different aspects: weight of copyrighted industries, level of revenues generated for creators, role in business models (old and new) but also its limitations, focusing on the case of patents. The third chapter looks closely the legal strategies of the copyrighted industries. The fourth chapter presents the policies which attempt to deal with the various facets of this complex issue. The fifth section offers conclusion on the changes needed and the balance that must be found between major policy goals

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