Copyright law has become an exclusive system centred around economic exploitation that now serves to discourage creativity – A proposal for reform with a focus on the music industry.

Daniel Davenport

A dissertation submitted to the University of Exeter in accordance with the requirements of the degree of PhD in the School of Law, July 2020.

87,796 words

(University regulations stipulate a 100,000 word limit)

I declare that the work in this dissertation was carried out in accordance with the Regulations of the University of Exeter. The work is original, except where indicated by special reference in the text and no part of the dissertation has been submitted for any other academic award. Any views expressed in the dissertation are those of the author.

SIGNED: ..... DATE:.....

Abstract.

This thesis argues that copyright law, in both the United Kingdom and the United States, has become predominantly focused on creating and maintaining and creating new and pre-existing legal interests for economic exploitation. The early eighteenth century aims of copyright law, as put forward by the legislatures, courts, and academics, were not predicated solely on the protection of owners interests. Instead, upon exploration, copyright has moved away from its original objectives such as the dissemination of information and the improvement of learning, and instead has created an environment of exclusive control to procure increased profits in the digital age. This is considered to be inappropriate in the digital era as content recipients now have an increased capacity to creatively re-use digital content in the production of unique and innovative works.

The result of these developments has been the creation of an environment of panoptic surveillance and digital licencing that is discouraging creativity based on proprietary rights. This has meant that potential creators and recipients obtain needless licenses, clearances, and permissions under an impulse to avoid the litigation process for either copyright infringement or contractual breaches to avoid legal liability. Ultimately, there has been an emphasis on the control of works, as opposed to creativity, where digital technology and the application of copyright thereof is being utilised by copyright owners, who can avoid the due process of law under the current law. Indeed, the protection of right holder interests can reasonably be said to be analogous to encouraging creativity, but it is suggested that in the digital environment this assumption is perpetuating current business models at the expense of user freedom and creativity.

This thesis argues that copyright has been fundamental to creating the current system due to the way it operates in the digital world. To do so, the thesis considers how the internet created new forms of dissemination that were extremely difficult to control with the law and how these same factors represented an economic and ideological challenge to the music industry. To this end, the thesis analyses the role of capitalism and proprietary rights in the development of the current system. This includes how copyright law has influenced the development of the current streaming business model using digital contracts via licencing. The extent to which licenses are now serving to

increase the control that copyright holders can exert over their works and the potential for contract to restrict re-use is also considered.

The thesis, therefore, suggests that these issues would be reduced if there was a more cost-efficient copyright regime that could increase individual access to the material. This also includes using specific legislation to counteract the issue of contracts in the digital marketplace. To achieve this, the thesis outlines reform proposals which embody the foundational underpinnings behind the creation and existence of copyright like the dissemination of information. This could be achieved through driving down prices which are predicted to create a more financially accessible system. The proposals will also recommend the outlawing of agreements which prevent the application, or otherwise obscure the enforcement, of legitimate copyright limitations. This will be done to the effect that the reforms are still applicable under the agreement.

However, this will not affect individual contractual enforceability, except where the terms of the agreement act to otherwise prevent the enforceability of the reforms. As a result, the reforms recognise the underlying principle that copyright is fundamentally a property right. Ultimately, the aim is to lessen the overt focus upon economic exploitation and enhance the transferability of digital assets by freeing up some of the constraints through creating more financially accessible works and limiting the impact of contracts.

In so doing, the thesis proposes a ‘capping’ system that places a ‘cap’ on what can be charged for a work. The basic tenet of this system is:

> (The size of the work) = (The maximum price it can be market for until (x) number of copies/amount are/is sold in accordance with the figure imposed by the capping system).

Under the proposed system, rightsholders and distributors will have to declare the accuracy of their numbers under a formal system of registration. Then, once the qualifying (number/amount/duration) of (works) have been sold/licensed in accordance with the rules imposed by the guidelines provided: the work can be sold/licensed at a rate chosen by the owner. If there is a conflict where, for example, a work is otherwise contended to be outside of the regulation of the proposed framework, for whatever reason, it will be for an administrative body to adjudicate on such issues.

This system aims to reduce costs overall within copyright which could increase the number of works available due to increased financial accessibility, including the prevention of any undermining by contract. The current copyright systems, based around economic exploitation and proprietary-based exclusivity, have become too influenced by these factors. Recognising this, the proposed system adopts elements from all the factors that have contributed to the creation of the current system. The revised system seeks to lessen the focus on the exploitation of copyrighted goods, by regulating the sale, and re-use, of works. Therefore, the proposals aim to provide a framework that could reduce prices overall and will have an effect beyond enforcement. This will be done by working with capitalism to provide a practical basis towards dealing with the issues raised in the thesis to procure more accepted change.

The law is correct as on 10th July 2020.

Contents

ABSTRACT 4

CONTENTS 7

CHAPTER 1 11

1.1 The problem. 11
1.2 Why use the capping approach and not licensing? 20
1.3 How this approach could increase access to information and encourage the re-use of content. 24
1.4 How this temporary approach could increase the 'quality' of works and further encourage creativity under capitalism 27
1.5 Terminology and Perspective. 34
1.6 Methodological explanations. 47
1.6.1 Rationale for the different methods used. 47
1.6.2 Theoretical and Historical Perspectives. 48
1.6.3 Practical Analysis 51
1.7 Context and Sources 56
1.8 Overview 58

CHAPTER 2 62

2.1 Introduction 62
2.2 From real space to cyberspace: How have things changed since the introduction of digital technology? 66
2.2.1 Digitalisation and the internet 67
2.3 Copyright in the digital age 73
2.3.1 A comparative analysis with 'panoptic' theory to explain the effect of copyright law in the digital age. 73
2.3.1.1 The situation in the UK 77
2.3.1.1(a) Implications for information service providers following recent developments. 93
2.3.1.1(b) Article 17 and its associated implications 98
2.3.1.2 The situation in the US 107
2.3.1.2(a) Can the Copyright Misuse Defence in the US help alleviate these issues? 118
2.4 Have these tactics reduced file-sharing? 122
2.4.1 A "microphysics of power": why users adopted self-regulation in the copyright system 123
2.5 An example from patents to demonstrate the effects created by the current system 132
2.6 Tying all this together: the role of the legal process 143
2.7 Where to from here? 152

CHAPTER 3 157

3.1 Introduction. 157
3.2 A Digital enclosure: demarcating the boundaries 166

3.3 CREATING A THIEF: THE JUSTIFICATORY ROLE OF THE PIRATE IN CAPITALIST COPYRIGHT 179
3.4 THE NARROWING OF 'PERMITTED ACTS' AND 'FAIR USE' 188
3.4.1 Why the normal pricing rules of demand and supply do not apply in the digital age: associated implications 194
3.5 HOW THE CURRENT 'STREAMING' BUSINESS MODEL WAS BUILT ON THE COMMUNICATION RIGHT IN THE UK, AND THE US PUBLIC PERFORMANCE RIGHT, UNDER CAPITALISM 203
3.5.1 The UK approach 203
3.5.1.1 The communication right 207
3.5.1.2 To the public 211
3.5.1.3 Who makes a communication? 217
3.5.1.4 Will the passage of Article 17 of the European Union Directive on Copyright in the Digital Single Market affect the current situation? 220
3.5.2 The situation in the US 229
3.5.2.1 Right of public performance under §106. 229
3.5.2.2 The impact of technological advances 231
3.5.2.3 The meaning of 'perform' under the 1976 Act 232
3.5.2.4 'Public' performances under the 1976 act 234
3.5.2.5 The digital performance right in sound recordings and its limitations 239
3.5.2.5.1 The digital transmission public performance right 239
3.5.2.6 CROSSED WIRES OR A CLEAR CONNECTION: WHEN IS A PUBLIC PERFORMANCE (NOT) ALSO A REPRODUCTION (OR) DISTRIBUTION OF COPIES? 243
3.6 BRINING THE ELEMENTS TOGETHER: HOW THE COMMUNICATION AND PUBLIC DISPLAY RIGHTS LAID THE FOUNDATION FOR THE STREAMING MODEL DISCUSSED IN THE NEXT CHAPTER 247
3.7 CONCLUDING COMMENTS 255

CHAPTER 4 261

4.1 INTRODUCTION 261
4.2 CONTRACT AND COPYRIGHT: WHAT IS THE DIFFERENCE? 274
4.3 FROM P2P, DOWNLOADING, TO STREAMING AND LICENCES. 277
4.3.1 The role of contracts in the digital copyright world 279
4.3.2 The decline of contractual freedom in the digital age and the role that this has played in the creation of the present system 287
4.4 THE BEGINNING OF THE END FOR COPYRIGHT LIMITATIONS ON DIGITAL DISTRIBUTION? 293
4.4.1 The US approach 297
4.4.2 The UK approach 302
4.5 THE CREATION OF A TWO-TIER SYSTEM OF PROTECTION IN THE DIGITAL WORLD? 312
4.5.1 Has the scope of the terms of agreements been increased as a result of developments in copyright law? 318
4.6 HOW THE CURRENT APPROACH SAVED THE MUSIC INDUSTRY? 333
4.7 HOW RE-USE HAS BEEN AFFECTED IN THE CURRENT SYSTEM: ARE LICENCES A LIMITATION ON CREATIVITY? . 338
4.7.1 A repeat of the past? 344
4.8 PROPOSAL FOR REFORM. 348

4.9 CONCLUDING COMMENTS 351

CHAPTER 5 358

5.1 INTRODUCTION. 358
5.2 THE IMPORTANCE OF RECOGNISING THE CURRENT ENVIRONMENT IN APPROACHING REFORM. 363
5.3 THE CAPPING SYSTEM: A BASIC OVERVIEW. 369
5.3.1 Why is there an emphasis on the quantity sold as opposed to a specified time limit under the proposed reforms? 373
5.3.2 Impact on associated laws and potential barriers to implementation. 376
5.3.3 A 'temporary' advantage: why the capping system can be used as a 'source of inspiration' for national lawmakers 382
5.4 THE ISSUE OF CONTRACTS. 385
5.4.1(a) How to decide when an agreement is invalid under the proposals, and what about the intention of the parties: are they relevant or not? 386
5.4.1(a)(i) The UK approach 386
5.4.1(a)(ii) The US approach 389
5.4.1(b) The need to deal with re-use 391
5.4.1(c) A legislative solution operating in conjunction with the reforms. 392
5.4.1(c)(i) The situation in the UK 393
5.4.1(c)(ii) The situation in the US 396
5.4.2 How the reforms could work with compulsory licencing and create a more cost-effective system. 399
5.4.2.1 Compulsory licencing in the UK 400
5.4.2.2 Compulsory licencing in the US 402
5.4.2.3 Why the reforms could achieve more than compulsory licenses: a long-term approach 404
5.5 A TEMPORARY APPROACH FOR LASTING RESULTS: THE OVERALL CHANGES ENVISAGED UNDER THESE REFORMS. 407
5.5.1 Why not use taxation? 407
5.5.2 How the reforms could increase the quality of copyright works 409
5.5.3 How the reforms can drive-down overall prices in the copyright industry 410
5.5.3(a) Post-reform: how costs could remain lower in the long-term after the capping-phase expires 417
5.6 WHY ARTISTIC WORKS ARE NOT INCLUDED IN THE REFORMED SYSTEM. 420
5.7 CHANGE FOR THE FUTURE: HOW THE REFORMS ADD TO THE COPYRIGHT LEGAL INFRASTRUCTURE. 423
5.7.1 Enforcement in the UK. 424
5.7.2 Enforcement in the US. 425
5.7.3 How the proposals can work with current US and UK bodies to reduce costs and streamline enforcement 425
5.7.3.1 The UK approach 426
5.7.3.2 The US approach 427
5.7.3.3 The overall operation of the proposed systems and how they will be enforced in both the UK and the US. 428
5.7.3.3(a) Punishing contraventions and how to assess costs 431

5.7.3.3(a)(i) How deliberate contraventions could be assessed in the UK....433
5.7.3.3(a)(ii) How deliberate contraventions could be assessed in the US....436
5.7.3.3(a)(iii) Why use these approaches?....440
5.7.3.3(b) How to calculate the profits made under a contravention: an apportionment approach....441
5.7.3.3(b)(i) The role of the courts in gathering and securing evidence....442
5.7.3.3(c) Practical enforcement by UK and US regulatory bodies....447
5.7.3.3(c)(i) How this could be enforced in the UK....447
5.7.3.3(c)(ii) How this could be enforced in the US....449
5.7.3.3(c)(iii) How enforcement could be enhanced by conducting random surveillance under existing statutory powers....450
5.7.3.3(c)(iv) The proposed effects of deploying this approach....451
5.8 How to fund the current approach: maximising value by minimising the differentiation in the roles of regulatory bodies....452
5.9 Concluding comments....455
BIBLIOGRAPHY....459
Articles....459
Books and Reports....500

Chapter 1.

Introduction.

1.1 The problem.

> "The State is involved in the recording industry by first assigning monopoly rights to recorded content through copyrights. By establishing the ownership of music through copyrighting, constructed as a form of intellectual property, the State creates the means through which value can be produced from the production of music. From sheet music to digital files, copyright is what enables the capitalist production of music...To the extent the State creates and protects property rights, the State is in support of capitalism."[1]

This thesis is study of how UK and US copyright law in the music industry has become so heavily focused upon maintaining a balance between the interests of right holders of content and those of content recipients, and how this has resulted in an a restriction of creativity[2] beyond the confines of copyright law itself in the digital age. The balance has been disturbed significantly by the way copyright law governs digital assets where limitations on the exclusive rights of copyright owners like the exhaustion[3] and first

---

[1] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), at 43-44.

[2] See this chapter at 1.5.

[3] Copyright Designs and Patents Act 1988 s.18(3)(a); C-456/06 *Peek & Cloppenburg SA* v. *Cassina SpA,* Case [2008] ECR I-2731(ECJ); A. Ohly, *Economic Rights*, in E. Derclaye, *Research Handbook on the Future of EU Copyright Law* (ed.) (2009), 237-8; Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039; Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* v *Tom Kabinet Internet BV and Others* 19 December 2019.

sale[4] doctrines are often rendered inapplicable under contract.[5] This has resulted in an increased amount of imperative control[6] that right holders can exert, which is the probability that a command with a given specific content will be obeyed by a given group of persons. This is because many copyright owners, through changes in markets and technologies,[7] have been able to nullify the legal rights that copyright law gives to users, by purporting to bind consumers to overreaching digital licenses.[8]

The implications of this have meant that although an act may be carried out without infringing copyright, there can be a breach of contract, even though there may be no infringement of copyright[9] in both the UK[10] and the US.[11] The usage of contracts has meant the proposition that both parties to an economic transaction benefit from it[12] is being eroded in the sphere of digital licenses in copyright.[13] In the digital copyright sector, the common form of such a legal relationship is now in the form of a 'click wrap' license which typically takes the form of a page of text to which a user must signal

---

[4] 17 USC §109(a); This principle was reaffirmed in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989) (commissioning party owned the sculpture but not copyright; artist permitted access to sculpture in order to access his copyright); *Pope v Curl* (1741) 2 Atk 341, 26 ER 608; *Cooper* v *Stephens* [1895] 1 Ch 567; The principle is often traced back to the US Supreme Court's decision in *Bobbs-Merrill Co. v. Straus* 210 U.S. 339 (1908).

[5] See chapter 4.

[6] Weber, M., *The Theory of Social and Economic Organisation* The Free Press, (1947), pp.152-53.

[7] Lindsay, D., 'The law and economics of copyright, contract and mass market licenses' Research Paper prepared for the Centre for Copyright Studies Ltd, [2002], p.3.

[8] See Perzanowski, A. and Schultz, J., *The End of Ownership* (Cambridge, MA 2016), 15-101; M.J. Radin, *Boilerplate* (Princeton 2013), 33-51, 168-76; see e.g. L. Hyde, *Common as Air: Revolution, Art, and Ownership* (New York 2010), 66-68 – Taken from Litman, J., 'What we don't see when we see copyright as property' Cambridge Law Journal [2018], 77(3), 536-558.

[9] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20; See also, chapter 4 at 4.5

[10] Copyright Design and Patents Act 1988, s.28(1).

[11] 17 U.S.C. 1976 §.109(d).

[12] Friedman, M *The Relation between Economic Freedom and Political Freedom' in Capitalism and Freedom* (University of Chicago Press, Chicago, 1962) at 13.

[13] See chapter 4 at 4.3.2.

agreement in order to use or access the content.[14] Yet, 'private property' and 'freedom of contract' are not to be seen as adequate answers to regulating copyright because their meaning is often ambiguous. Problems begin when we ask what ought to be the contents of property rights, what contracts should be enforceable, and how contracts should be interpreted or, rather, what standard forms of contract should be read into the informal agreements of everyday transactions.[15]

Changes in markets and technologies disrupt existing legal regimes.[16] The emergence of MP3 files caused the major record labels to change their production and distribution methods as their standard business models were altered.[17] File-sharing had the potential to procure mass "disintermediation" (removal of the middle-man) in the copyright system. This altered the normal physical means of distribution for major record labels.[18] The response by the music industry was the establishment of a system panoptic surveillance[19] to procure compliance within the digital music industry using copyright law.[20] The term surveillance can be deconstructed in its etymological parts

---

[14] Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, [2008], chapter 5 at 5.2.3.2; Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); *Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).*

[15] Friedrich, H., *Individualism and Economic Order* (H Regnery & Co, Chicago, 1972) at 113.

[16] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), Part I, IV.

[17] See chapter 2 at 2.2; See also, chapter 3 at 3.6, and chapter 4; To see the historical impact of technological revolutions on the recorded industry, see Peter Tschmuck, *Creativity and innovation in the Music Industry* (Springer Pub, 2012) at 9–196; On the way in which digital technology impacted the music industry and how the record labels reacted to such change, see Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), at 1-70.

[18] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), at 6-20, 107; Nicholas G and Inglis F. *Capitalism and Communication: Global Culture and the Economics of Information.* (Newbury Park, CA: Sage Publications 1990).

[19] See chapter 2 at 2.3 and 2.5.

[20] *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch); *A&M Records v. Napster, 239 F.3d* and *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct 2764 (US Supreme Court, 2005); Arnold, R. 'Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of protection' [2011] 1 QMJIP 272; See also, chapter 4 at 4.3 and 4.7.

'sur' (from above), and 'veillance' (to watch).[21] This was to "staunch the flow from the internet artery"[22] from the "digital revolution"[23] where right holders were equipped by copyright law with "enough weapons" to win a number of "battles" against both file sharing platforms and end-users throughout the 2000s.[24]

This thesis argues that contracts laid the foundation for the 'streaming' model under 'signal' copyrights.[25] Streaming refers to any media content – live or recorded – delivered to computers and mobile devices via the internet and played back in real time. Podcasts, webcasts, movies, TV shows and music videos are common forms of streaming content.[26] The significance of this business model is such that in 2017, it was estimated that 70% of digital music sales globally and 38% of global music sales, were accessed via the streaming model,[27] with streaming predicted to double music industry revenues to $104bn by 2030.[28]

The fundamental basis behind both subscription and download services is that music listeners will no longer own the music; rather, they will rent it.[29] As soon as a user fails

---

[21] Galič, M., Timan, T. & Koops, B. Bentham, 'Deleuze and Beyond: An Overview of Surveillance Theories from the Panopticon to Participation' [2017] *Philos. Technol.* 30, 9–37.

[22] Cornish, W., Intellectual Property: Omnipresent, Distracting, Irrelevant (Oxford University Press 2004) at 51-2.

[23] Menell, P, S. 'The American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age' 61 J. [2014] Copyright Soc'y U.S.A. 235.

[24] Malevanny, N., Online Music Distribution – How much Exclusivity is Needed?: A Study of International, European, German and U.S. Copyright Systems and Their Objectives, (Springer-Verlag, 2019) at 2.

[25] See chapter 3 at 3.5; On 'streaming' see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 26-141.

[26] <https://www.verizon.com/info/definitions/streaming/> accessed: 21/04/2018).

[27] IFPI, Global Music Report 2018 at 11, <https://www.ifpi.org/downloads/GMR2018.pdf> (note that these statistics are based on estimation only and may be subject to change) accessed: 22/12/2019; See also chapter 4 at 4.6.

[28] ,<http://www.goldmansachs.com/our-thinking/pages/music-in-the-air.html> accessed: 19/8/2017.

[29] For the UK, see Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039; Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; In the US, see, *Vernor v Autodesk, Inc., 621 F. 3d 1102 (9th Cir. 2010)*; *UMG Recordings, Inc. v. Augusto* 628 F.3d 1175 (9th Cir. 2011); *Kirtsaeng v John Wiley & Sons, Inc,* 133 S Ct 1351 (2013); *Omega SA v*

to pay the fee (or cancels the subscription), and the computer or device that stores the music is connected to the internet, the files then cease to work because the use of that subscription is contingent on a fee.[30] The imposition of digital agreements has meant that rightsholders can govern beyond the physical context[31] as they are intangible[32] and are sold subject to license.[33] This has enabled copyright owners to minimize any subsequent distributions that may have been carried out by 'users' (by users, this means primarily the individual consumers who wish to utilize copyright-protected material). The result is that now, certain acts now require the consent of copyright owners, with copyright law now acting to increase the influence of these contractual terms.[34] As technology is enabling ever greater communication of content, it is

Costco Wholesale Corp (2015) US App Lexis 830 (9th Cir., Cal., Jan 20, 2015); *Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).*

[30] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing, 2015) at 120-124.

[31] See chapter 4 at 4.4, 4.5, 4.7.

[32] In the UK, see Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039; Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; In the US, see, *Vernor v Autodesk, Inc*., 621 F. 3d 1102 (9th Cir. 2010); *UMG Recordings, Inc. v. Augusto* 628 F.3d 1175 (9th Cir. 2011); *Kirtsaeng v John Wiley & Sons, Inc,* 133 S Ct 1351 (2013); *Omega SA v Costco Wholesale Corp* (2015) US App Lexis 830 (9th Cir., Cal., Jan 20, 2015); *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[33] In the UK see CDPA 1988 s.28(1); In the US, see 17 U.S.C. §109(d); For more information, see chapter 4 at 4.5.

[34] See chapter 4 at 4.5, 4.7.

increasingly difficult to create balance[35] in a copyright system in a society that is increasingly virtualized[36] and where digital contracts have become the norm.[37]

This thesis posits that increasing access to information should be the focus of any reform. The inherent focus on economic exploitation[38] and proprietary rights[39] in the current copyright system has created a legal environment that operates to increase costs to re-use works and this restricts creativity.[40] The 'capping' system the thesis proposes differs from the imposition of any negative rights. Instead, it aims to encourage creativity by creating cheaper works, and processes, overall, across the

---

[35] *FAPL,* Joined Cases C-403/08 and C-429-08 [2011] *ECR* I-9083 (ECJ, Grand Chamber), *Painer,* Case C-145/10 [2012] *ECDR* (6) 89 (ECJ), [132], [134]; *Deckmyn,* Case C 201/13, EU:C:2014:458), [27]; *England & Wales Cricket Board v. Tixdaq* [2016] *EWHC* 575 (Ch), [73]; In the US, when measuring whether an act is fair use, the court looks at four factors in particular to determine whether a usage is 'fair' in order to maintain a balance between authors and users. These are: The nature if the copyrighted work; The amount and substantiality of the portion taken - *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994); The purpose and character of the use (the transformative factor) - *Warner Bros. Entertainment, Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D. N.Y. 2008); The effect upon the potential market - *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

[36] Balkin, J., 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds' 90 Virginia Law Review [2004] 2043; Lastowka, G, & Hunter, D., 'The Laws of the Virtual Worlds' 92 California Law Review [2004] 1; Moringiello, J.M, ''What Virtual Worlds Can Do for Property Law'' 62 Florida Law Review [2010] 159.

[37] See chapter 4 at 4.2.

[38] Copyright is treated as a form of personal property right that can be exploited in a number of ways, most importantly by assignment or license – CDPA 1988 ss.1 and 90(1); Griffin notes that the development of copyright has been predominantly centred around the capitalist principles of economic rights - Griffin, J., A call for a doctrine of 'information justice' [2016] Intellectual Property Quarterly.

[39] See chapter 2 at 3.2

[40] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [14] & [25]; Bryant, C. and Heeley, R., 'The Kraftwerk case - does a two-second sample infringe copyright?' Ent. L.R. [2019], 30(4), 125-128; In the US, see *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 200) *Bridgeport Music, Inc. v. Justin Combs Publishing,* 507 F.3d 470, 486-90 (6th Cir. 2007); *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016); See also, Bartlett, C., 'Bridgeport Music's Two-Second Sample Rule Puts the Big Chill on the Music Industry' 15 DePaul J. Art, Tech. & Intell. Prop. L. [2005] 301.

copyright spectrum[41] as competition is seen as a behavioural process. [42] These measures are not designed or implemented in a way that alienates consumers and undermines work in education and extending the appeal of legitimate markets.[43]

The capping system offered by this thesis operates on the basis that:

> "(The size of the work)[44] = (The maximum price[45] it can be market for until (x) number of copies/amount are/is sold in accordance with the figure imposed by the capping system)"[46]

Rightholders and distributors will have to declare the accuracy of their own numbers under a formal system of registration.[47] Then, once the qualifying (number/amount/duration) of (works) have been sold/licensed in accordance with the rules imposed by the guidelines provided: the work can be sold/licensed at a rate chosen by the owner. For simplicity, the analysis focuses on copyright protection for

---

[41] See chapter 5 at 5.5.3 and 5.5.3(a).

[42] McNulty, P. 'A Note on the History of Perfect Competition' (1967) 75 J Political Economy 395, who mentions the influence of other writers in the seventeenth century; McNulty, P., 'Economic Theory and the Meaning of Competition' (1968) 82 Quarterly J Economics 639.

[43] Hargreaves, I., 'Digital opportunity: A review of Intellectual property and growth' (2011) at 8.45.

[44] 'Size' is not defined explicitly here because it is considered to be a quantitative matter that should be outlined by the statutory proposals which should be considered within the wider context of the culture economy. In addition, such an analysis is deemed to be a matter for governmental consideration based on the fact that to provide a comprehensive analysis of potential prices and sizes is argued to be beyond the scope of this thesis, as this is designed to provide a framework for more detailed reform within the copyright sector to be developed.

[45] For purposes here, no specific number of items (or) duration is provided, neither are specific prices because the framework provided is intended to offer a basic outline without any specific numbers. Instead, it is designed to provide a model in which accurate numbers can be inserted into, and implemented into law by way of a fully-fledged extensive economic analysis. In addition, it is suggested that such an analysis is deemed to be beyond the scope of this thesis and so to provide specifics pertaining to numbers beyond the scope of this piece.

[46] The proposals are applicable, mutatis mutandis, to other forms of expression – Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[47] For more information, see this chapter at 5.7.3.3(a).

(items) and other written works, but it should be noted that the proposals are applicable, "mutatis mutandis, to other forms of expression as well."[48]

The 'capped' aspect of the proposals works by applying what are known as 'price controls' to the current copyright system, which is the ability to set maximum and minimum prices.[49] The reforms would set a 'maximum price' that could be charged in relation to works sold and re-used, and the price of works cannot go above a certain level until a certain amount have been sold/re-used.[50] The aim overall, is to reduce prices below the market equilibrium price, and this could reduce prices overall across the copyright system even after the 'capped' phase.[51]

It will be argued that contracts also present a challenge to the proposed system. Both s.28(1)[52] and §.109(d)[53] can mean that copyright protects works in the case of a copyright violation, can also create further rights under contract that are particular to the terms of that agreement. This creates what can be fairly deemed to be a 'two-tier' system of protection.[54] This thesis suggests that such items can be used to contract out of the proposed system in same way as they are used to invalidate copyright defences.

Professor Ian Hargreaves would seemingly agree, where he proposed a recommendation in his 2011 review, when talking about limits to copyright. He recommended that:

> "the Government should legislate to ensure that...copyright exceptions are protected from override by contract."[55]

---

[48] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[49]<https://www.economicshelp.org/blog/621/economics/price-controls-advantages-and-disadvantages/> accessed: 19/02/2019; On re-use, see chapter 5 at 5.4.1(b).

[50] There is a reason why 'quantity' here is used over a 'time' based approach – for more information, see chapter 5 chapter at 5.3.1.

[51] See also, part 5.5 in this chapter generally, and specifically, 5.5.3(a).

[52] CDPA 1988.

[53] 17 U.S.C.

[54] See chapter 4 at 4.5.

[55] Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011) at p.8; See also, chapter 4 at 4.8, chapter 5 at 5.4.

Contracts need specific consideration in order to ensure that the reforms are not undermined by contract,[56] which includes making sure that they apply to situations where works are re-used.[57] It will be argued that the proposals could be considered a 'special case' in accordance with the Berne Convention[58] and TRIPS,[59] as well as other international provisions.[60] The Berne Convention[61] states, in relation to the reproduction right, under Article 9(2) that:

> "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[62]

The proposed system aims to provide a set of rules which do not significantly limit any of the exclusive rights conferred by copyright. Instead, they seek to provide a system of remuneration for rightsholders that does not conflict with the normal exploitation of a work as the restrictions apply for a limited period. The temporary nature of the system is unlikely to unreasonably prejudice the legitimate interests of the author as

---

[56] See chapter 5 at 5.4; *Jacobsen v Katzer* 535 F.3d 1373 (Court of Appeals, Federal Circuit, 2008); Care has to be taken with this case, since the license is one that provides a condition of use which might otherwise result in copyright infringement. The broader case which extended copyright protection to an area where it was previously denied was in *ProCD, Inc.* v *ZeidenBerg,* 86 F.3d 1447 (7th Circuit, 1996).

[57] See chapter 5 at 5.4.1(b).

[58] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised in Paris on July 24, 1971 and amended in 1979, S, Treaty Doc. No. 99-27 (1986) [The 1979 amended version does not appear on *UNTS* or *ILM*, but the 1971 Paris version is available at 1161 *UNTS* 30 (1971)]; On the Berne Convention generally, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 23-04.

[59]Agreement of Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, 15th December 1993, 33 *ILM* 81 (1994).

[60] Malevanny, N., Online Music Distribution – How much Exclusivity is Needed?: A Study of International, European, German and U.S. Copyright Systems and Their Objectives, (Springer-Verlag 2019) at chapter 3.

[61] Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) 1886 (Berne, September 9, 1886).

[62] Berne Convention for the Protection of Literary and Artistic Works. Article 9(2).

the limitations are not permanent, so there is a chance for them to recoup any perceived lost funds. As there is no reduction in the legal rights of the author other than their ability to exploit their works for a limited time, it is likely that the measures will comply with article 9(2) and could be deemed a 'special case'.

It will be asserted that this will increase in the amount of information that is disseminated. This is because the drive-down in prices pertaining to creation, and re-use, which could also see costs reduced at the point of sale post-reform due to the reduction in production costs for rightsholders. This also includes limiting the effects of Article 17.[63] In some situations a creative re-use may involve several works, such as with a piece of music combining together numerous samples at once. This thesis argues that the reforms would apply in the same manner, but would be adapted in accordance with the current approach in a manner that works alongside the compulsory licensing scheme.[64]

1.2 Why use the capping approach and not licensing?[65]

> "One of the core purposes of copyright law is to remunerate right holders for use of their works... the emergence of sound recordings allowed performances of music without the consent of right holders... Legislators all over the world reacted differently. Some simply prohibited such forms of private use (e.g., USA, UK), while others (Germany or France as front runners), realizing that they could never effectively control private behaviour, legalized it and established at the same time a compensation (levy) system, under which copying devices and blank media were charged with fees, respectively, and collecting societies were involved to distribute the revenues among the right

[63] Directive 2019/790; For more information, see the discussion in chapter 2 at 2.3.1.1(b) and chapter 3 at 3.5.1.4.

[64] See chapter 5 at 5.4.2, 5.4.2.3; Kung-Chung L., and Reto M.H., *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer-Verlag GmbH Germany, 2017) at 71-83, 85-100.

[65] See chapter 5 at 5.4.2.3

holders...and the compensation system had one strong argument on its side: creators (the original right holders) could be compensated."[66]

The rise in direct licencing has lessened the role of copyright exceptions and levies.[67] In the UK, there are few non-voluntary licenses because international standards that the UK has obligated itself to are resistant to such items.[68] This also includes the fact that the exploitation of rights is generally the copyright owners privilege.[69] In the US, the restrained scope of the licenses proves to be a consistent difficulty. For instance, §115 is often regarded as being ill-equipped at dealing with the licencing needs of the 21st Century and places artificial limits on the free marketplace.[70]

Moreover, so-called extended collective license systems (ECL systems) are also considered to be ill-suited here. ECL systems are primarily aimed at including the rights from non-represented right holders (so-called "outsiders"), to procure a complete repertoire for the user. In doing so, ECL systems improve collective rights management (CRM). Yet, being a form of "blanket paying mechanism" the CRM and, in particular, ECL systems have worked quite well in the past.[71]

---

[66] Kung-Chung L., and Reto M.H., *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer-Verlag GmbH Germany, 2017) at v.

[67] Kretschmer, M., 'Private Copying and Fair Compensation: An Empirical Study of Copyright Levies in Europe' [2011] Intellectual Property Office, Newport (22 out of the then 27 Member states had these schemes); For background, see B, Hugenholtz, *The Story of the tape Recorder and the History of Copyright Levies* in B. Sherman and L. Wiseman, *Copyright and the Challenge of the New* (eds., 2012) chapter 7; Karapapa, S., *Private Copying* (Routledge 2012); See also, *Microsoft Mobile Sales International Oy,* Case C-110/15, EU:C:2016:326, [AG23] (AG Wahl) (noting that the increase in direct licensing of consumers and the diminishing importance of the private copying exception and levy); Case C-572/14 *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH v Amazon* [2016].

[68] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 28-06.

[69] Case C-7/97 *Oscar Bronner v. Mediaprint* [1998] *ECR* I-7791, 7811 [AG-56].

[70] Statement on Music Licencing Reform of Marybeth Peters before the Subcommittee on Intellectual property, Committee on the Judiciary, United States Senate 109th Congress, 1st Session, July 12th, (2005).

[71] Kung-Chung L., and Reto M.H., *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer-Verlag GmbH Germany, 2017) at 86 and 4.4.2.

However, whether this could work efficiently under modern technological conditions such as online markets is questionable.[72] This also includes potential issues regarding the ECL compatibility with EU and International Law[73] such as the Berne Convention "three-step test"[74] which applies to all "limitations and exceptions."[75] Thus, licenses are considered to be inappropriate in any copyright reform as they are often viewed with suspicion in copyright law,[76] as well as being difficult on an administrative basis.[77] This also includes being perceived as operating against the free market philosophical underpinnings inherent within copyright[78] amongst other things.[79]

The proposals will manoeuvre around such issues because they are not permanent meaning that any issues of how they are perceived will only be for a limited time.[80] It will be argued that this minimises any potential interruption of the free market as the proposals are temporary, but can also have an effect on the cost of works overall in the copyright sector post-reform.[81] This is posited to present minimal disruption to

---

[72] Ibid.

[73] Kung-Chung L. and Reto, M. H, *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer-Verlag GmbH Germany, 2017) at 5.2.

[74] See the discussion in chapter 5 at 5.3.2.

[75] Article 13, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); Article 8, WIPO Copyright Treaty (WCT); There is debate as to whether the ECL model would be a limitation or an exemption - Trumpke, F., 'The Extended Collective License – A Matter of Exclusivity?' [2012], NIR 2012, 264-294; Article 5 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[76] Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' 90 [1990] Col. Law Review 1865 at 1872.

[77] See further Scrutton, *The Law of Copyright* (1883), at 14.

[78] Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' 90 [1990] Col. Law Review 1865 at 1924.

[79] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 28-08.

[80] To see why a 'quantity-based' approach is used as opposed to a 'time-based' approach, see chapter 5 at 5.3.1.

[81] See chapter 5 at 5.5.3(a).

copyright holders monopolies,[82] but could also create a cheaper, more efficient, and subsequently, more accessible copyright market overall.[83]

The thesis will argue that the greater emphasis on direct licencing amongst consumers that has diminished the importance of things such as the private copying exception,[84] further supports the decision to move away from licencing as a basis of any reform strategy. This conclusion is considered to be more likely in light of *Reprobel*,[85] and Article 16 of the Directive on Copyright in the Digital Single Market.[86] Also, the legal use of copyright works outside of a country on the basis of a national ECL model is not possible due to the principle of territoriality.[87] This is particularly important for this thesis as creative content is increasingly distributed in non-physical formats across national borders through different networks and devices, whereby it is questionable whether the national models of ECL systems may have a future at all.[88] Yet, it is also

---

[82] For more information on how these reforms will comply with the various international conventions and obligations of both the US and the UK, see this chapter at 5.3.2.

[83] For more information on the benefits that the reforms could have on the copyright market, see chapter 5 at 5.5

[84] Case C-110/15, *Microsoft Mobile Sales International Oy,* EU:C:2016:326, [AG23] (AG Wahl) (noting the increase in direct licencing of consumers is diminishing the importance of the private copying exception).

[85] Case C-572/13 *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*, EU:C:2015:750 (ECJ), at [48] (Presumably, publishers and other licensees or assignees can claim such compensation in accordance with any contractual agreement made with the author (or right holder).

[86] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC - Originally, it was listed as Article 12 (now Article 16) which specified that (a member state may specify that a transfer of a license to a publisher confers on the latter a 'sufficient legal basis' to be entitled to a share of compensation); See also the discussion in chapter 2 at 2.3.1.1.

[87] On the issue of 'territoriality' and the associated copyright implications, see Polčák R., 'Territoriality of Copyright Law' (2020) - in: Szczepanik P, Zahrádka P, Macek J., and Stepan P. *Digital Peripheries* (eds. Springer Series in Media Industries. Springer, Cham).

[88] As far as Europe is concerned this development has also been identified by the European Commission, which clearly strives to facilitate cross-border use of works by promoting transnational or pan-European licensing; European Commission (2015), A Digital Single Market Strategy for Europe, COM - Kung-Chung L., and Reto M.H., '*Remuneration of Copyright Owners: Regulatory Challenges of New Business Models*,' (Springer-Verlag GmbH Germany, 2017) at 97-8.

acknowledged that the ECL method could operate within a territorial-based framework in a manner that is combined with reciprocal agreements between national CMOs; or by introducing a country of origin or transmission rule,[89] whereby ECL systems may work on a national basis.[90] Ultimately, however, it is not unfair to suggest that licencing methods, like the ECL approach, will be unsuitable in digital online markets.

1.3 How this approach could increase access to information and encourage the re-use of content.

The thesis argues that the proposals could result in a reduction in production costs which may see a potential increase in the level of information that is disseminated. This is based on the notion that a drive-down in fees relating to creation, and re-use, could see costs reduced overall at the post-reform stage due to the reduced production costs for copyright owners.[91] This also includes limiting the effects of Article 17.[92] Neoclassical economic theory suggests that competition produces the best outcomes for society as competitive markets keep prices lowered, and this results in other qualitative and quantitative benefits flowing to consumers as a result.[93]

Yet, this approach is not free of criticism,[94] as it is primarily driven by empirical observation, the stance is premised on theoretical constructs, often with restrictive

---

[89] Under a "country of transmission rule" a user would only have to obtain a license from the country where the copyrighted work was made available, since the relevant act would be interpreted as taking place in the country of origin resp. transmission. A similar rule was introduced for satellite distribution in Europe (Article 1 Paragraph 2(b) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission) – Taken from M. Hilty, *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer-Verlag GmbH Germany, 2017) at 98; L. Guibault (2015) and (2014); J. Axhamn / L. Guibault (2011), 60.

[90] M. Hilty, *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer-Verlag GmbH Germany, 2017) at 98.

[91] See chapter 5 at 5.5, 5.5.3, and 5.5.3(a).

[92] Directive 2019/790; For more information, see the discussion in chapter 3 at 3.5.1.4.

[93] Jones, A. and Sufrin, B. *EU Competition Law* (6th ed, Oxford University Press, 2016), at 86.

[94] R.J. van den Bergh and P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Antwerp/Oxford: Intersentia/Hart Publishing, 2001), at 16, who emphasize the great divergences among economic schools since classical theory. However, competition economics has been nourished by these interactions between movements, schools, and

methods that are otherwise far removed from reality. However, in copyright, the cost of expression to authors of copyrighted works increases as copyright protection increases. Ultimately, this means that there is less material an author can borrow from other copyright holders without infringing their copyrights, whereby the cost of creating that work will be higher.[95]

Moreover, if a later author is free to borrow material from an earlier one, the later author's cost of expression is reduced; and, from an ex-ante viewpoint, every author is both an earlier author[96] from whom a later author might want to borrow material and the later author himself. In the former position, he desires maximum copyright protection for works he creates; in the latter, he prefers minimum protection for works created previously.[97]

This thesis suggests that a similar result could be achieved by limiting the cost that can be charged for a work (which also applies to re-use) without reducing copyright protection. This is due to the predicted reduction in production costs that could be induced by the proposals because natural prices are determined by the cost of production, and this is often irrespective of demand.[98] This is based on the hypothesis that potential authors and publishers under this system will have lower rates to recoup when considering the price to charge for a work when it gets to market.[99] This can be

---

doctrines so that today it is relatively stable and reliable, at least in those applications with a longer history.

[95] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325.

[96] Jaszi, P. 'On the Author Effect: Contemporary Copyright and Collective Creativity' Cardozo Arts & Entertainment Law Journal 10, no. 2 [1992]: 293-320.

[97] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[98] Smith, A., *His Life, Thought, and Legacy* (Eds. Ryan Patrick Hanley, Princeton University Press, 2016) at 242 - (It should also be noted that this is, of course, not the entire story of economic growth, but nonetheless one essential element according to Smith); See also, this chapter at 5.5).3(a).

[99] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

indirectly achieved by the anticipated direct reduction in both licenses and production costs under the reforms.[100]

It is predicted that this could induce socially efficient incentives to create new works[101] that result from the above self-interested bargaining, and also, the tendency of capitalists to consistently look for new ways to accumulate profit under the notion of self-interest.[102] This also does not rule out the potentiality that the money acquired could also be used to secure compensation for authors indirectly, through the setting up of establishments designed to assist those in need of financial assistance under this approach.[103] However, it is acknowledged that such arguments are quintessentially predictive in this economic system, but there is little alternative to this approach the economy of the entire earth which we can call "world economy" – cannot be absolutely determined, but only relatively so.[104]

The thesis contends that the reforms could make works more financially accessible across the copyright spectrum as competition is regarded as a behavioural process.[105] This means that easier accessibility may lessen the restrictive aspects of the current system as lower prices could mean less unlicensed or infringing activities based on the fact that compliance would be more financially feasible, making works cheaper for creators and consumers.[106] This is important as every author is both an earlier

---

[100] See chapter 5 at 5.5.3(a).

[101] The funds could be used to pay for social and cultural establishments – Case C-521/11 *Amazon.com,* EU:C:2013:515, [49]; See also, chapter 5 at 5.7.3.3(a).

[102] See chapter 3 generally.

[103] Case C-462/09 *Thuiskopie* [2011] *ECR* I-5331, [29], [39]; Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925, at 944.

[104] Steiner, R., 'World Economy: The formation of a science of world economics' Rudolf Steiner Press (1977), at 180.

[105] McNulty, P., 'A Note on the History of Perfect Competition' [1967] 75 J Political Economy 395, who mentions the influence of other writers in the seventeenth century; McNulty, P., 'Economic Theory and the Meaning of Competition' (1968) 82 Quarterly J Economics 639; Gruter, M., 'Law and the Mind', Londone: Sage, (1991), p.62 in De Soto, H., 'The Mystery of Capital: Why capitalism triumphs in the West and failed everywhere else' Black Swan Publishing, (2001), pp.185-6; Litman, J., *Digital Copyright* (Promethus books, 2001).

[106] It is arguable that an increase in affordable legitimate content may reduce piracy: J. Poort and J. Quintais, 'Global Online Piracy Study' Institute for Information Law, University of Amsterdam [2018],

author[107] from whom a later author might want to borrow material and the later author himself, and this means all parties to the copyright system could benefit from this approach in a system where everyone is a necessary co-creator to an extent.[108]

Hargreaves would support this, stipulating that it is important to ensure that "measures are not designed or implemented in a way that alienates consumers and undermines work in education and extending the appeal of legitimate markets."[109] The reduction of costs in copyright is essential because in *Reformation Publishing v Cruiseco*[110] it was held that a general starting point for a reasonable license fee for 1 year for 2 songs is £155,000.[111]

1.4 How this temporary approach could increase the 'quality' of works and further encourage creativity under capitalism[112]

p.27; Taken from Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577 at [577]; See also, chapter 5 at 5.2.

[107] Jaszi, P., 'On the Author Effect: Contemporary Copyright and Collective Creativity' Cardozo Arts & Entertainment Law Journal 10, no. 2 (1992), 293-320.

[108] Bueys, J., 'Not just a few are called, but everyone' [1972], in Charles Harrison and Paul Wood (eds), *Art in Theory,* 1900-1990: An Anthology of Changing Ideas, Oxford: Blackwell, [1999], pp. 889-92 – Taken from: Reckwitz, A., *The Invention of Creativity: Modern Society and the Culture of the New* (Polity press, 2017) at 72.

[109] Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011), at 8.45.

[110] *Reformation Publishing Company Limited v Cruiseco Limited and anor* [2018] EWHC 2761 (Ch) – (a large part of the judgment looked at what type of damages would be appropriate and the recent cases of *One Step (Support) Ltd v Morris - Garnier* [2018] UKSC 20, and the Court of Appeal decision in *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308 and concluded the term "Wrotham Park damages" to cover all the types of remedy should no longer be used.

[111] A large part of the judgment looked at what type of damages would be appropriate and the recent cases of *One Step (Support) Ltd v Morris - Garnier* [2018] UKSC 20, and the Court of Appeal decision in *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308 and concluded the term "Wrotham Park damages" to cover all the types of remedy should no longer be used.

[112] For the purpose of understanding, the term 'quality' refers to 'good-quality' works, which is works of a high/superior standard in comparison to other pieces of a similar nature - he standard of

The temporary nature of the reforms could push quality to the top of rightsholders agendas.[113] This is because economic exploitation is contended to be their main motivation[114] in a society that operates like a "workshop" which is "organised for the production of wealth" under capitalism.[115] For understanding, it is argued that the quality of the work will directly affect an author's ability to charge his rate. This is because under the current system they need to surpass the number of works required to be sold/licensed before they can gain pricing freedom.[116]

Capitalism is an economic system to which there has been no workable alternative offered[117] and the approach of the reforms is designed to provide what is predicted to be an indirect 'incentivising' mechanism that uses the profit-making mentality perpetuated by capitalism to encourage the creation of high-quality works.[118] Theoretically, the longer a work stays within the confines of the caps, the longer it will take for an owner to charge their rates.[119] This fact could create a scenario where

---

something as measured against other things of a similar kind; the degree of excellence of something.

[113] See chapter 5 at 5.5.2.

[114] Griffin, J., 'Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly; See also, chapter 3 at 3.2.

[115] Marx, K., *Selected Writings in Sociology and Social Philosophy* (Trans. By T.B. Bottomore, McGraw-Hill Paperbacks, 1956), p.91; On capitalism, and the way it has affected the copyright system as a whole, see chapter 2 generally.

[116] This refers to the ability of authors to no longer be limited by the pricing limits imposed by the cap

[117] Harari, Y.H., *Homo Deus: A Brief History of Tomorrow Penguin* (Random House, 2015); For an opposing view, see Woolfgang, Streeck, *How will capitalism end?* (Verso Books, 2016) - (Wolfgang Streeck argues that we are witnessing a long and painful period of cumulative decay: of intensifying frictions, of fragility and uncertainty, and of a steady succession of normal accidents); Alternatives to capitalism have also been offered - Mason, P.,, *Post-capitalism: A guide to our future* (Penguin Publishing, 2016); Bregman, R., *Utopia for Realists: And How We Can Get There*, (Bloomsbury Publishing, 2017).

[118] See chapter 3; More specifically, see 3.2; See also, Steiner, R., *The Threefold Social Order* (Anthroposophic Press, 1966), chapter III.

[119] Predictive theoretical approaches are contended to be the only option in a reform system that has not been used before - Steiner, R., *World Economy: The formation of a science of world economics* (Rudolf Steiner Press, 1977) p.180.

rightsholders will attempt to focus on the quality of the works to bypass the pricing limitations.

This is contended to cause creators to focus on the quality of the works produced under the limited prices they can charge to bypass these limits by creating high quality works with a corresponding level of demand that will enable them to do so in the quickest timeframe. Therefore, the temporary nature of these reforms remains a central element to their proposed success because owners could look to bypass the limits imposed and the production of high-quality works is contended to help achieve this. Ultimately, it is hypothesised that these factors will ensure that quality works remain a forefront consideration for those subject to the capping proposals in a capitalist society driven by profit accumulation.[120]

The current evolution has created a copyright system that is discouraging creativity based on exclusive control to procure increased profits in the digital age. This is due to an inherent focus on economic exploitation[121] and optimal exploitability[122] in the music industry[123] that is being further extended by a combination of contract and copyright.[124] It is expected that the current approach will continue in capitalist society[125] if the factors which have influenced the development of the current system[126] are not considered when formulating reform here.

---

[120] See chapter 3 at 3.2.

[121] See chapter 3 at 3.2-3.2.1.

[122] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[123] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [14] and [25]; Bryant, C. and Heeley, R., 'The Kraftwerk case - does a two-second sample infringe copyright?' Ent. L.R. [2019], 30(4), 125-128; In the US, see *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 200 *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007); *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016); Bartlett, C., 'Bridgeport Music's Two-Second Sample Rule Puts the Big Chill on the Music Industry' 15 DePaul J. Art, Tech. & Intell. Prop. L. 301 (2005).

[124] See chapter 4.

[125] See Chapters 3 and 4.

[126] See chapter 4 at 4.3.

This brings us to the central basis and fundamental questions of the thesis:

- How did advancements in digital technology enable the creation of a system of panoptic surveillance and what role did the copyright legal process play in the ability of the music industry to adapt to these changes? (Chapter 2)

- To what extent has capitalism and property influenced the development of the current system and how was the current streaming model for digital music built on the exclusive rights of communication and public performance? (Chapter 3)

- How have digital contractual agreements increased copyright holder control unilaterally and restricted creativity, and if so, to what extent could these agreements be used to undermine the enforceability of the capping proposals? (Chapter 4)

- How would the proposed capping system be implemented? (Chapter 5)

It is argued that the current copyright system has become too focused on economic exploitation to the point where it is now acting to restrict creativity via a combination of copyright and contract[127] under capitalism.[128] To this end, the high costs associated with re-using works,[129] and the costs associated with litigating a copyright claim,[130] are suggested to justify a degree of questioning as to whether reduced prices within copyright could help alleviate the issues associated with the current system as

[127] See chapter 4 *generally.*

[128] See chapter 3 *generally*.

[129] See chapter 4 at 4.7 *generally*;

[130] See chapter 2 at 2.3 and 2.6 *generally*; See also chapter 4 at 4.7 *generally*; See also, Posner, R.A., *Economic Analysis of Law* (Boston: Little, Brown, 1972), p.393; For example, in *Bridgeport Music v. Dimension Films Inc*. 410 F.3d 792 at 801 (6th Cir. 2005) per Guy J it was stated that users should "get a license or do not sample"; *Gowers Review* [2006] p.67; For more information, see the discussion in chapter 4 generally, and in particular, parts 4.5, 4.6, respectively; See also, Case C-476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007); *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016). *Reformation Publishing Company Limited v Cruiseco Limited and anor* [2018] EWHC 2761 (Ch).

opposed to limiting copyright protection.[131] This is because copyright, in providing exclusive rights over acts such as reproduction and dissemination, also provides limits on such rights via doctrines such as exhaustion[132] and first sale[133] under contract.[134]

However, many have argued that an increase in direct licencing has diminished the role of copyright exceptions and levies through contract in the digital age.[135] This is because the fundamental nature of digital technology removes the applicability of these copyright limitations away.[136] This allows copyright owners to exert control over their assets once they are transferred to customers under licence through the terms of these agreements. These agreements receive legislative under items like the E-

---

[131] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325 at 333; See also, chapter 5 at 5.3.1 and 5.5.3(a).

[132] CDPA 1988 s.18(3)(a); Case C-456/06 *Peek & Cloppenburg SA* v. *Cassina SpA,* [2008] ECR I-2731(ECJ); A. Ohly, 'Economic Rights', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright Law* [2009], 237-8; Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039; Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* v *Tom Kabinet Internet BV and Others* 19 December 2019.

[133] 17 USC §109(a); This principle was reaffirmed in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989) (commissioning party owned the sculpture but not copyright; artist permitted access to sculpture in order to access his copyright); *Pope v Curl* (1741) 2 Atk 341, 26 ER 608; *Cooper* v *Stephens* [1895] 1 *Ch 567*; The principle is often traced back to the US Supreme Court's decision in *Bobbs-Merrill Co. v. Straus* 210 U.S. 339 (1908).

[134] See chapter 4 at 4.4 *generally.*

[135] Kretschmer, M., 'Private Copying and Fair Compensation: An Empirical Study of Copyright Levies in Europe' [2011] (22 out of the then 27 Member states had such schemes); Karapapa, S., 'Private Copying' (Routledge 2012); For background, see B, Hugenholtz, 'The Story of the tape Recorder and the History of Copyright Levies', in B. Sherman and L. Wiseman, *Copyright and the Challenge of the New* (eds. 2012, ch.7); See also, Case C-110/15 *Microsoft Mobile Sales International Oy*, EU:C:2016:326, [AG23] (AG Wahl) (noting that the increase in direct licensing of consumers and the diminishing importance of the private copying exception and levy); Case C-572/14 *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH v Amazon* [2016].

[136] For more information, see chapter 4 at 4.4.

Commerce Directive Art.9(1),[137] and also both s.28(1)[138] and §109(d)[139] that assist the enforceability contractual terms[140] in the copyright system.[141] This is because although an activity may fall within one of the permitted acts[142] does not preclude the fact that it does not contravene some other legal right (like contract).[143] The thesis argues that this creates a 'two-tier' system of protection and exploitation for owners[144] that has served to decrease dissemination and increase costs.[145]

Notwithstanding this, it is acknowledged that digital rights management (DRM) is also a method that can assist copyright owners in controlling access to digital works and limiting potential transfers.[146] This includes being used to track and limit uses[147] as did

---

[137] E-Commerce Dir., Art.9(1); There are certain exceptions that cannot be overridden by contract under the following subsections: CDPA 1988, ss.50, 50B, 296A(1)(a), 296A(1)(b), 296A(1)(c); For guidance on how the directive could apply post-Brexit, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770360/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf (Accessed: 4/02/2019).

[138] CDPA 1988; See chapter 4 at 4.5 and 4.5.1 respectively.

[139] 17 U.S.C. §109(d) (1976) as this section specifies that the first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as someone who as obtained it subject to contract, like a licensee; See chapter 4 at 4.5.

[140] For more information, see chapter 4 at 4.7.

[141] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20; See chapter 4 at 4.4 and 4.5.

[142] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), chapter 7, part 3.

[143] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 9-20.

[144] For more information, see chapter 4 at 4.5.

[145] See chapter 3 at See also, chapter 4 at 4.5, 4.7.

[146] McKenzie, E., Note, *A Book by Any Other Name: E-books and the First Sale Doctrine, 12 Chi. Kent. Journal of Intellectual Property, 57, 63 in* Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015).

[147] *See Digital Rights Management (DRM) & Libraries, Am. Libr. Ass'n,* http://www.ala.org/advocacy/copyright/digitalrights [http://perma.cc/D88E-HLHD] accessed: 21/02/2019.

the music industry when selling songs online via iTunes,[148] in an attempt at curbing illegal file-sharing.[149] However, this will not be considered here as the top music companies have predominantly abandoned the use of DRM[150] with the iTunes Store selling all music DRM-free.[151]

Therefore, this thesis suggests that any proposed reform system outside of directly reducing copyright law in either scope or duration,[152] should instead, seek to reduce costs across copyright in relation to sale and re-use for a limited period.[153] It is hypothesised that the capping approach could transcend to reduced production fees and a correlative reduction in the overall cost of works generally.[154] The reforms also consider the ability of digital contracts to otherwise restrict the current system.[155] The only direct change to copyright law is the proposed introduction of a legislative provision that is designed to help solve the issue of rightsholders 'contracting' out of copyright law.[156]

The thesis posits that these items could increase both the amount of information disseminated and the level of creative activity in relation to works by providing considerably greater certainty for the purchasers and re-users of copyright content that can be said to be lacking in the current system.[157] Moreover, this may extend to an additional reduction in both infringements, and threats of, infringement

---

[148] Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015) at 181.

[149] *See* McKenzie, E., 'A Book by Any Other Name: E-books and the First Sale Doctrine' 12 *Chi. Kent. Journal of Intellectual Property,* at 62 *in* Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015). .

[150] See chapter 4 at 4.1.

[151] Lettice, J., 'Apple iTunes Store Goes '100% DRM-Free' – Allegedly' (2009) *Register.* <http://www.theregister.co.uk/2009/01/06/macworld_itunes/> accessed: 21/02/2018.

[152] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325.

[153] See chapter 5 at 5.4.1(b).

[154] See chapter 5 at 5.5 and 5.5.3(a).

[155] See chapter 5 at 5.4; On contracts specifically, see chapter 5 at 5.4.1(c).

[156] See chapter 4 at 4.8; See also, chapter 5 at 5.4.1(c).

[157] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [26]; For more information, see chapter 4 at 4.5.1.

proceedings, as a whole[158] by working with capitalism[159] to provide incentives to creators.[160]

Ultimately, the reforms could increase the accessibility of information by reducing production costs within copyright, and this may alleviate the issues within the current system by encouraging creativity and compliance with copyright through lowering costs overall in copyright. It is argued that this could help move the law closer to the early eighteenth century aims like the 'improvement of learning' under the Statute of Anne 1709[161] by considering both right holders and recipients.[162] This approach is considered to be particularly important because copyright law, as per the historic judgement handed down by Lord Mansfield, in *Sayre* v *Moore*:

> "must take care to guard against two extremes equally prejudicial;; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded."[163]

1.5 Terminology and Perspective.

---

[158] Danaher and Telang, 'Website Blocking Revisited' (18 April 2016), SSRN, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795> accessed 30 June 2019 (assesses how the aftermath of the November 2014 website blocks, there was a 6% increase in subscriptions to legitimate sources such as Netflix and a 10% increase in videos viewed on legitimate ad-revenue supported sources such as BBC and Channel 5's streaming sites. Furthermore, it is arguable that an increase in affordable legitimate content may reduce piracy: J. Poort and J. Quintais, 'Global Online Piracy Study' Institute for Information Law, University of Amsterdam [2018]*, p.27*; Taken from Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577 at [577].

[159] See chapter 3 at 3.2 and chapter 5 at 5.5.3.

[160] Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011) at p.8; See also, chapter 5 at 5.3 and 5.5.

[161] "An act for the Encouragement of Learning, by Vesting Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein Mentioned"- Statute of Anne 1709. See: <http://www.copyrighthistory.com/anne.html> accessed: 13/10/2014.

[162] See chapter 5 at 5.5.3.

[163] Per Lord Mansfield in *Sayre* v *Moore* [1785] at 362.

Consistent reference is made to property rights throughout this thesis, with a focus on intellectual property. Intellectual property rights are granted by the State and are limited both in term and scope. The thesis focuses on UK and US law, as these are most developed regarding legal argument, and consequently permit a greater level of analysis. EU law has been identified where relevant when discussing UK law. It is important to note that in the US, copyright law is quintessentially Federal. For the sake of clarity, the thesis specifies when cases are from the Supreme Court, Appeals courts and State courts. Yet, decisions may be different between courts of the same level, and this is highlighted at different points.

The fundamental focus of the thesis, copyright law, is usually granted for a period of the life of the author plus 70 years.[164] The rights include the right of reproduction and distribution, and these are exclusive rights which are negative by nature[165] and require the owner's permission.[166] Yet, as a result of digital technology contracts can prevent the application of copyright limitations like those provided for under Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works.[167] For example, in

---

[164] For the UK, CDPA 1988 s.12(2) (as amended by the EC Council Directive 93/98 EC harmonizing the term of protection of copyright and certain related rights); Alternatively, in the US, see Title 17, chapter 3, §302(a).

[165] In the UK, CDPA 1988 ss.16, 17; *VG Wort v. Kyocera Document Solutions Deutschland GmbH,* Joined Cases C-457/11, C-458/11, C-459/11, and 460/11, EU:C:2013:34, [AG33] (AG Sharpston, referring to reproduction as the 'fundamental' right); In the US, see 17 USC §106; Under US law, 'copies' are material objects that are to which a work is foxed – *Paha Pubs., Inc. v. Enmark Gas Corp,,* 22 U.S.P.Q.2d 1076 (N.D.Tex 1992); J. Litman, *Digital Copyright* (2001), 180 *ff* (proposing instead a general right to control commercial exploitation); For digital media, electronic files are considered to be comprehended within this definition despite the lack of physicality – *London-Sire Records v. Does,* 542 F.Supp.2d 153 (D.Mass.2008); Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), chapter 7, part 3; See also, chapter 4.

[166] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [43]; *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[167] This is otherwise known as the "Three-Step Test under the Berne Convention, Article 9, and this is discussed specifically in chapter 5 at 5.3.2; Note, there is a requirement that these limitations do not do not prejudice the legitimate interests of the rightsholders - Info. Soc. Dir., Art. 5(5); Marrakesh Dir, Art. 3(1) ('applied'); Rel. Rights Dir., Art. 10 ('applied'); Proposal for a Directive on Copyright in

the US, this includes the defence 'fair use' in the US which is codified under §.107 of the 1976 Act.[168] In the UK, such limitations are categorized as 'permitted acts' which are listed under Chapter III of Part 1 of the 1988 Act.[169] Moreover, these limits on the exclusive rights enjoyed by copyright owners are somewhat diminished due to their 'extraordinary precision and rigidity'[170] despite two reviews of their implementation.[171] The European Court of Justice has also indicated a preference for a 'narrow' interpretation of copyright exceptions.[172] This illustrates the high level of protection favoured in this area regarding the reproduction and distribution of articles.[173]

---

the Digital Single Market, COM(2016) 593, Art. 6(applying Art 5(5) to proposed new mandatory exceptions).

[168] Copyright Act of 1976, 17 U.S.C. §.107; On Fair Use, see *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F.Supp. 957 (D. N.H., 1978); *Italian Book Corp., v. American Broadcasting Co.*, 458 F.Supp. 65 (S.D. N.Y., 1978); These can be compared with the contrasting cases of *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005); *Capitol Records Inc. v. Alaujan*, (2009) WL 5873136 (D. Mass., 7/27/09).

[169] Copyright Designs and Patents Act 1988; See also, Info. Soc., Dir., Art. 5; The traditional approach of the UK courts: *Newspaper Licensing Agency v Marks & Spencer* [2000] 4 *All ER 239* (CA), 257 (Chadwick LJ); See also, Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20. On defences under European law and the E-Commerce Directive 2000/31/EC and the public interest defence see Chapters' 21 and 24 respectively.

[170] *Pro Sieben Media* v. *Carlton UK Television* [1988] FSR 43, 48; *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605; See also, *Fraser Woodward v BBC* [2005] EWHC 472 (Ch), [2005] EMLR 22.

[171] A. Gowers, 'Gowers Review of Intellectual Property' (2006), ch.4, 39, [3.26]; Ian Hargreaves., 'Digital opportunity: A review of intellectual property and growth' (2011), 3, 8.

[172] Case C-5/08 *Infopaq Int. v. Dansk Dagblades Forening,* [2009] *ECR* I-6569 (ECJ) (*'Infopaq I'*), [57]; Case C-145/10 *Painer,* [2012] *ECDR* (6) 89 (ECJ), [109]; Case C-138/16 *AKM v Zurs.net Betriebs GmbH*, EU:C:2017:218, [27]-[38] (ECJ); *Case C-265/16, VCAST v RTI SpA, EU:C:2017:913, [32].*

[173] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [47], [48], [49]; See also, the judgments in C-306/05, *SGAE*, EU:C:2006:764, paragraph 36; *Peek & Cloppenburg*, EU:C:2008:232, paragraph 37; and *Football Association Premier League and Others*, EU:C:2011:631, paragraph 186); (see, by analogy, judgment in *Football Association Premier League and Others*, EU:C:2011:631, paragraphs 107 to 109).

These agreements are suggested to be the result of an evolution of copyright to ensure that the music industry could remain profitable in the digital age by reorganising the legal framework following the advent of the internet[174] and file-sharing.[175] The significance of the contractual approach is that it minimises the amount that can be distributed (maximising scarcity). In turn, this is contended to serve the purpose of intensifying the avenues of exploitation due to the limitations induced by contract under a relatively new business model.[176] This has led to concerns about whether being copyright is being used as a means of "censorship, a restraint on creativity, and a way of restricting the supply of music, and so on."[177] This has meant that online music has become an expanding market, soon to overtake conventional music sales in physical stores.[178] This is also considered to be a reason why streaming by services such as Spotify and Deezer are overtaking downloaded music formats like iTunes which has seen a decline in the imitation offline shop "download-to-own" model.[179]

These agreements can be said to have received legislative approval under items such as the E-Commerce Directive Art.9(1),[180] (SI 2002 No.2013);[181] and also, both

---

[174] See chapter 2 at 2.2.1 and chapter 3 at 3.4; See also, Castells, M., 'The Rise of the Network Society' (Volume 1 of *The Information Age*, 1996).

[175] See chapter 2.

[176] See chapter 4 at 4.6.

[177] Frith, S. and Marshall, L., *Music and Copyright* (2nd edn. Edinburgh: Edinburgh University Press 2004) at 5.

[178] Andres Wiebe, *Right Clearance for Online Music: Legal and Practical Problems from the Perspective of a Content Provider and Alternative Models* (Medien und Recht Publishing, 2014) at 1.

[179] <https://www.theguardian.com/media/2017/jan/05/film-and-tv-streaming-and-downloads-overtake-dvd-sales-for-first-time-netflix-amazon-uk> accessed: 21/08/2019.

[180] E-Commerce Dir., Art.9(1); There are certain exceptions that cannot be overridden by contract under the following subsections: CDPA 1988, ss50, 50B, 296A(1)(a), 296A(1)(b), 296A(1)(c).

[181] The Directive was originally implemented by the Electronic Commerce (EC Directive) Regulations 2002 ("the 2002 Regulations"), which amongst other things implemented the Country of Origin principle and liability provisions to all UK legislation in the 'coordinated field' made before these Regulations <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770360/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf> accessed: 4/02/2019.

s.28(1)[182] and §109(d)[183] that assist the enforceability of contractual terms[184] in the copyright system.[185] In the UK, the only statutory provision which governs the relationship between contracts and copyright is to be found in the Fair Dealing Chapter.[186] The Fair Dealing provisions are statutory sections which detail various 'permitted acts' of infringement, and according to s.28(1) of the Copyright, Designs, and Patents Act 1988:

> "..[the provisions] relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts."[187]

According to this subsection, owners can assert rights under contract and get their private interests upheld by way of a separate agreement. This means that even though an act can be carried out without infringing copyright, this does not prevent rights being asserted under an agreement stipulating the contrary and create a breach of contract.[188] In the US, 17 U.S.C. §.109(d) is operates similarly to that of s.28(1) in the UK. Specifically, §109(d) enables the direct omission of licenced works statutorily from the regulation of the first sale doctrine, suggesting that the doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as a licensee.[189]

---

[182] CDPA 1988; See also chapter 4 at 4.5.

[183] 17 U.S.C. §109(d) (1976) as this section specifies that the first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as someone who as obtained it subject to contract, like a licensee; See also chapter 4 at 4.5.

[184] See chapter 4 at 4.7.1

[185] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20; See also, chapter 4 at 4.4 and 4.5 respectively.

[186] See CDPA1988, Chapter III.

[187] CDPA 1988, s.28; Griffin, J., 'The interface between copyright and contract: Suggestions for the future' [2011] European Journal of Law and Technology, Vol. 2, No.1.

[188] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20.

[189] 17 U.S.C. 1976 §.109(d); See chapter 4 at 4.5.

The thesis argues that the contractual practices that have developed in the digital music industry are submitted to be a deliberately intensified exploitation of an already existing market monopoly that is restricting creativity.[190] The purpose of this was to create a new investment outlet by retaining control over subsequent distributions via contract. The reason being is because capitalism perpetually strives to create an environment in its image and requisite to its own needs at a particular point in time.[191] This is done by adapting copyright law in the digital age: a product of deterritorialization and reterritorialization in capitalist society.[192] What this means is that what is presented as progress in the music industry, via the new formats it offers up, like iTunes and Spotify, remains a disguise for consistent sameness, simply a different way to secure music sales.[193]

Creativity is referred to in several places within this thesis. Creativity has, however, been subject to many differing interpretations. Creativity is expressed here as the ability of individuals/recipients to use the internet and other copyrighted goods, without fear of legal consequence. The basic tenet of the claim is that even though the majority of recipient's activity may be perfectly legal under copyright, the argument is that the environment created by the current copyright system is preventing people from using

---

[190] See chapter 4 at 4.5, 4.7.

[191] Harvey, D., *The Geopolitics of Capitalism* (1950) at 150 in Gregory. D, and Urry, J. (eds.): *Social Relations and Spatial Structures. London* at 128-163; Taken from Wilmsmeier, G., Monios, J. 'The production of capitalist "smooth" space in global port operations' [2015] Journal of Transport Geography 47: 59-69; Heidegger would suggest that the current system is an attempt to gain 'mastery' over technology - Callister, P. D.,, *Law and Heidegger's Question Concerning Technology: A Prolegomenon to Future Law Librarianship*, [2007] Law Library Journal, Vol. 99, at 285- 305: Available at: https://ssrn.com/abstract=960134 accessed: 21/2/1016; On primitive accumulation generally, see Brewer, A., *A guide to Marx's Capital* (Cambridge University Press, 1984), Part 8; "The so-called primitive accumulation, therefore, is nothing else than the historical process of divorcing the producer from the means of production" – Marx, K., *Selected Writings in Sociology and Social Philosophy* (Trans. By T.B. Bottomore, McGraw-Hill Paperbacks, 1956) at 133.

[192] Reterritorialization is the restructuring of a place or territory that has experienced deterritorialization, and Deleuze and Guattari State that relative deterritorialization always accompanied reterritorialization – G Deleuze and F Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983); For more information, see chapter 3 at 3.4;

[193] See chapter 4 at 4.6.

cultural goods for fear of legal repercussions and increasing costs in the digital age.[194] It is argued that this can prevent the development of new thoughts and ideas under the current system, specifically creativity in the music industry.[195] This was highlighted in the Gowers Review where it was noted:

> "Much of the value from the inventions and creativity protected by IP can only be realised if that knowledge is widely accessible to others. To secure an IP right, the idea must be made public, thereby adding to the common stock of knowledge available for progress."[196]

The thesis highlights that in capitalist society there is a tendency for a few people to own considerable amounts of property in one form or another, even in digital copyright.[197] Yet, restricted access to formal property systems is not necessarily a bad thing[198] as a rising tide lifts all boats[199] and it can be said that economic growth by a relatively small class of people could bring increasing wealth and higher living standards to all sections of society. This is supported under the theory of 'trickle-down' economics, which generally refers to economic policies which favour the wealthy and defend tax cuts for the rich based on the theory that greater wealth at the top ought to permeate all the way down to those with the lowest income.[200] Thus, by deferring to the market, there is less need to rely upon theory for validation of the

---

[194] See Chapters 2 and 4.

[195] See chapter 4 at 4.7.

[196] Gowers Review, HM Treasury, HMSO, London (2006).

[197] Travis, H., 'Copyright Class Struggle: Creative Economies in a Social Media Age' Entertainment Law Review, [2019], 30(4), 133-135.

[198] Samtani A. and Wong K.L., 'Can and should culture be copyrighted? E.I.P.R. [2018], 40(9), 553-556.

[199] Stiglitz, J., 'Joseph Stiglitz Says Standard Economics is Wrong. Inequality and Unearned Income Kills the Economy' (6 September 2016), Economics, <http://evonomics.com/joseph-stiglitz-inequality-unearned-income/> accessed 22 May 2019; Taken from - Colino, S.M., 'The antitrust "F" word: fairness considerations in competition law' J.B.L. [2019], 5, 329-345; Travis, H., 'Copyright Class Struggle: Creative Economies in a Social Media Age' Entertainment Law Review, [2019], 30(4), 133-135.

[200] Sowell, T., *Trickle Down Theory and Tax Cuts for the Rich* (Stanford: Hoover Institution Press, 2012), at 1–2.

current capitalist system, as this allows the law to defer to the free market - leading to the “consumer knows best” validation of copyright advanced by Demsetz.[201]

This is because competitive markets are believed to yield better levels of social welfare outcomes as opposed to monopolies. In a similar vein, the relation between copyright and competition is not a straightforward one. On the one hand, copyright can be seen as an intervention in a free market through the grant of “monopoly rights.”[202] This intervention is considered essential to prevent the market failure of public goods and to avoid a scenario where negative incentives for creation lead to underproduction of intellectual creations and thus leave the society worse off.[203] Some scholars have also suggested that copyright enables trading on the market and thus supports free markets and competition in the same way as the trickle-down notion.[204]

Yet, although these assertions are considered to be relevant, as an ideology, however, trickle-down economics has been described as "non-existent" as “[n]o such theory has been found in even the most voluminous and learned histories of economic histories."[205] From a practical standpoint, rather than trickling down, it is asserted that wealth has remained at the top where the development of copyright law continues to

---

[201] H. Demsetz, *Economic, Legal and Political Dimensions of Competition* (Amsterdam: North-Holland, 1982) *in* Griffin, J., ‘Copyright evolution - creation, regulation and the decline of substantively rational copyright law’ I.P.Q. [2013], 3, 234-252.

[202] See *Palmer*, 12 Hamline L. Rev. 261, 280 (1989); *Reich*, Die ökonomische Analyse des Urheberrechts in der Informationsgesellschaft, pp. 94–98 with further references in Malevanny N, ‘Relevant Rights and Their Applicability to Online Music Uses. In: Online Music Distribution - How Much Exclusivity Is Needed?’ [2019] Munich Studies on Innovation and Competition, vol 12. Springer, Berlin, Heidelberg, at 317.

[203] Malevanny N, ‘Relevant Rights and Their Applicability to Online Music Uses. In: Online Music Distribution - How Much Exclusivity Is Needed?’ [2019] Munich Studies on Innovation and Competition, vol 12. Springer, Berlin, Heidelberg, sect. 8 A.

[204] William Landes and Posner, R., *The Political Economy of Intellectual Property Law* (AEI-Brookings, 2004) at 22; Landes W., and Posner, R., ‘An economic analysis of copyright law’ 18 [1989] Journal of Legal Studies 325 at 332.

[205] Sowell, T., *Trickle Down Theory and Tax Cuts for the Rich* (Stanford: Hoover Institution Press, 2012) at 1–2.

be shaped by effective lobbying rather than expertise.[206] This is because the "rising tide has only lifted the large yachts, with many smaller boats being left dashed on the rocks."[207]

However, these people receive large incomes, generally derived wholly or partly from ownership of that property.[208] The creation of this environment stems from restricted access to formal property under law[209] and is essential in copyright law.[210] Thus, copyright is treated as a form of personal property right that can be exploited in a number of ways, most importantly by assignment or license.[211]

---

[206] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [28]; Scott. B.R., The Political Economy of Capitalism, Division of Research, Harvard Business School. (2006).

[207] Stiglitz, J., 'Joseph Stiglitz Says Standard Economics is Wrong. Inequality and Unearned Income Kills the Economy' (6 September 2016), Economics, <http://evonomics.com/joseph-stiglitz-inequality-unearned-income/> accessed 22 May 2019; Taken from - Colino, S.M., 'The antitrust "F" word: fairness considerations in competition law' J.B.L. [2019], 5, 329-345.

[208] Miliband, R., *The State in Capitalist Society: The Analysis of the Western System of Power* (Quartet Books London, 1973) at 26.

[209] De Soto, H., *The Mystery of Capital: Why capitalism triumphs in the West and failed everywhere else* (Black Swan Publishing, 2001), pp.67-8; To see how property can be used for democratic purposes, and is also viewed as a means in which to allow individuals to participate in society and obtain their own personal sovereignty, see G.W.F. Hegel*, Introductory Lectures on Aesthetics* (1820); Hegel*, Philosophy of Right* (1821), *§§41–71*; A. Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Uni. Chicago Press, 2009), at 39-40.

[210] Copyright is a property right under CDPA 1988 s.1(1), and protects against exploitation of the copyright work by others under CDPA 1988; For a more general discussion of the effect that property has had in this area, including various perspectives, see discussion under, (The Five Cornerstones of Copyright: Democratic Proprietary Entitlement) in Griffin, J., 'Making a new copyright economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly; Locke, J., *The Second Treatise of Government* (Eds. Thomas P. Peardon, Bobbs-Merrill Educational Publishing Indianapolis, 1952), chapter v; Also, in *Millar* v *Taylor* (1768) 98 E.R. 201 at [219-222] and *Donaldson* v *Beckett* (The *Hansard Report of Donaldson v Beckett*, reported as "Proceedings in the Lords on the Question of Literary Property", 14 Geo. III 1st er. 17 950 (1774) ss.999-1000) (both of cases involved judgements which made explicit reference to John Locke's *Second Treatise on Government,* for the purpose of not just justifying the provision of copyright per se, but also the provision of property within copyright.

[211] CDPA 1988 ss.1 and 90(1).

Legal systems have an impetus of their own, as they are deemed to be a professional tradition that can operate for good or bad. However, to change the law is not necessarily the exclusive task of the legislator or law reformers entirely as the task of lawyers and judges is to understand the social foundations of legal rules and develop them for the betterment of society.[212] It is anticipated that the move away from download-to-own towards more flexible business models (such as subscriptions), would suggest that reform of the current system will unlikely be seen as a policy priority, and so the current proposals could help alleviate the need for a fully-fledged legislative overhaul.[213]

As a result, the thesis outlines reforms which recognise the underlying principle that copyright is fundamentally a property right.[214] Proprietary rights have been a foundational aspect of copyright since the inception of this legal area under the Statute of Anne in 1710.[215] The developmental aspects of private property conceptually are the outcome of the social creativeness that is associated with individual human ability that provides for the free and independent use of the means of production.[216]

The goal of the proposals as a result of the issues within the current system is to lessen the focus on economic exploitation. This could be done by how the reforms may enhance the transferability of digital assets by freeing up some of the constraints through creating more financially accessible works[217] and limiting the impact of contracts.[218] The reason for this approach is to push copyright towards more interdependent social, political and economic processes.[219] This is because the

---

[212] E. Ehrlich, *Fundamental Principles of Sociology of Law* [1936]. For a sympathetic critique and detailed discussion of Ehlrich's thought see Littlefield [1967] 19 Maine L. Rev. 1.; R. Pound, 'Philosophy of Law' (revised ed. 1954) at 42-47.

[213] See chapter 5 at 5.5.

[214] See chapter 3 at 3.2.

[215] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned 1710 (8 Ann. C. 19).

[216] Steiner, R., *The Threefold Social Order* (Anthroposophic Press, Inc. New York, 1966), chapter III.

[217] See chapter 5 at 5.5.3.

[218] See chapter 5 at 5.4.

[219] Balganesh. S, 'Debunking Blackstonian Copyright' 118 Yale Law Journal [2009] 1126-1181 at 1181, Available at http://www.jstor.org/stable/40389483?seq=1#page_scan_tab_contents accessed: 21/11/2015; On the benefits of the reforms, see chapter 5 at 5.5.

Statute of Anne limited the term of protection in the public interest. As stated, this thesis posits that increasing access to information should be the focus of any reform.[220] This is because the inherent focus on economic exploitation[221] in the current copyright system has created a legal environment that operates to increase costs to re-use works and this restricts creativity.[222] Notwithstanding this, it is also contended that any adaptation of copyright law in the twenty-first century, the challenge is to respect the fundamentals of that law and to meet the needs of both creators and the public interest alike.[223]

The thesis aims to provide reforms that do not seek to reduce copyright protection or to tax owners[224] in capitalist society[225] as well as ensuring that copyright remains fundamentally recognised as a property right.[226] The thesis will focus on the factors which have influenced the development of the modern copyright system in the music industry. This will be achieved by identifying the developments that will be argued to have created the current system that is inherently focused on economic exploitation,

---

[220] See this chapter at 1.1.

[221] Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016].

[222] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [14] and [25]; Bryant, C. and Heeley, R., 'The Kraftwerk case - does a two-second sample infringe copyright?' Ent. L.R. [2019], 30(4), 125-128; In the US, see *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 200 *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007); *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016); See also, Bartlett, C., 'Bridgeport Music's Two-Second Sample Rule Puts the Big Chill on the Music Industry' 15 [2015] DePaul J. Art, Tech. & Intell. Prop. L. 301.

[223] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20; On the future of copyright, see: E. Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Cheltenham: Edward Elgar Publishing, 2009); B. Fitzgerald, "Copyright 2010: The Future of Copyright", E.I.P.R. [2008], 30(2), 43; C. Geiger, 'The future of copyright in Europe: striking a fair balance between protection and access to information' [2010] I.P.Q. 1; R. Deazley, *Rethinking Copyright—History, Theory, Language* (Cheltenham: Edward Elgar Publishing, 2006); B. Atkinson and B. Fitzgerald (eds), Copyright Law: Vol III: Copyright in the 21st Century (Farnham: Ashgate, 2011); Z. Efoni, *Access-right: the future of digital copyright law* (New York: OUP, 2011).

[224] See chapter 5 at 5.5.1

[225] See chapter 3.

[226] See chapter 3 at 3.2.

particularly the evolution towards the current streaming model.[227] The proposals aim to learn from these developments to encourage access to existing content and facilitate creative re-uses by reducing the cost of producing and accessing that content. This is because an accessible system of culture is not one that denies property, or where musicians do not receive remuneration. A culture without proprietary rights, or in which musicians do not get paid, is anarchy, not freedom. Lawlessness is not what is advocated here, but instead, a balance between freedom and control, capitalism and copyright. [228]

The thesis will suggest that the nature of digital has pushed the boundaries of copyright law and digital works towards the "edge of the reach of the state"[229] in an attempt to "free" itself from the confines of copyright limitations.[230] This can also be suggested in some ways to be a "withering away"[231] or "abolition" (*Aufhebung*)[232] of the state. This is because contractual agreements are given legal credibility through their enforceability via the state apparatus (like the courts).[233] However, it is argued that the inapplicability of statutory limitations in the digital context[234] and the fact that copyright owners set the terms of these agreements,[235] has amounted to an

---

[227] See chapter 4.

[228] Lessig*, Free Culture* (2004), p.xvi

[229] Griffin, J., 'A call for a doctrine of information justice' [2016] Intellectual Property Quarterly.

[230] Heidegger, M., The Question Concerning Technology (Trans. William Lovitt, Harper Torchbooks 1977); Marx and Engels ultimately predicted that the state and law were temporary phenomena - M.D.A. Freeman, 'Lloyds: Introduction to Jurisprudence' (9th ed, 2014), p.1153-55.

[231] M.D.A. Freeman, 'Lloyds: Introduction to Jurisprudence' (9th ed, 2014), p.1189-90; Jessop, B., 'Recent Theories of the Capitalist State' Cambridge Journal of Economics, Volume 1, Issue 4, December [1977], pages 353-373 https://doi.org/10.1093/oxfordjournals.cje.a035370 accessed: 21/03/19.

[232] In Hegelian philosophy: the process by which the conflict between two opposed or contrasting things or ideas is resolved by the emergence of a new idea, which both preserves or transcends them - Avineri, *The Social and Political thought of Karl Marx* [1968], noted the two different terms derive from different intellectual traditions. Engels *Absterben* is a "biological similie", Marx's *Aufhebung* is "a philosophical term with clear dialectical overtones" (p.203).

[233] Deleuze, G. and Guattari, F., *A Thousand Plateaus* (Bloomsbury Academic, 1988), Ch.13.

[234] See chapter 4 at 4.4.

[235] For more information, see this chapter 4 at 4.7.1.

oxymoronic situation that will be demonstrated to both strengthen and wither away the state.[236]

It can be said however, that technology forced the law to adapt,[237] but these contractual methods have prevented the creation of secondary markets by limiting distributions.[238] This reflects the decision in the thesis to specifically deal with contracts[239] when attempting to initiate change within the digital copyright world if the reforms are going to be successful and to prevent confusion.[240] Professor Ian Hargreaves adopted a similar stance in his 2011 review, when talking about limits to copyright. Specifically, he recommended that the Government should legislate to ensure that copyright exceptions are protected from override by contract.[241]

The thesis will assess how to decide when an agreement is invalid under the proposals, and also if an article would have otherwise be bound by the reform system using the *but-for* test.[242] In the UK, this was established in *Barnett v Chelsea and*

---

[236] See chapter 4 at 4.4.

[237] *A&M Records v. Napster, 239 F.3d*; *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct 2764 (US Supreme Court, 2005) – These cases were the landmark decisions which determined that peer-to-peer file-sharing and the distribution/reproduction of another's work unauthorised was considered to be an infringement of copyright even if done without the expectation or receipt of financial gain.

[238] *Vernor v Autodesk, Inc*., 621 F. 3d 1102 (9th Cir. 2010); *UMG Recordings, Inc. v. Augusto* 628 F.3d 1175 (9th Cir. 2011); *Kirtsaeng v John Wiley & Sons, Inc,* 133 S Ct 1351 (2013); *Omega SA v Costco Wholesale Corp* (2015) US App Lexis 830 (9th Cir., Cal., Jan 20, 2015); *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013); In the UK see - Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039*Art & Allposters,* Case C-419/13, EU:C:2015;27 (ECJ); See also, Rosenmeier, Szkalej, and Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights* (Wolters Kluwer, 2019) at §7.02, 03; For more information, see chapter 4 at 4.5.1.

[239] For more information on the effect of contracts on the current system, see chapter 4 *generally.*

[240] Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011), Recommendation 5, and 51, [5.40] (explaining that permitting contractual variation 'replaces clarity...with uncertainty'). For more information, see this same review at chapter 9, p.229.

[241] For more information, see Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011) at p.8; See the discussion in chapters 4 and 5 at 4.8, 5.4.

[242] See chapter 5 at 5.4.

Kensington HMC [1969],[243] and in the US, the case of *Stubbs v. City of Rochester*.[244] Under this, the courts could assess whether or not a contract has been *used* to undermine the enforceability of the reforms and *but for* such items, the reforms would otherwise apply.[245] It will then describe a theoretical framework for more appropriate future regulation.

1.6 Methodological explanations.

1.6.1 Rationale for the different methods used.

The thesis identifies the relationship between copyright law and digital technology and how this has affected the relationship between right holders and content recipients. The initial chapters outline a theory of how the emphasis on control in the music industry led to the creation of a system of panoptic surveillance in response to digital technology as a result of capitalism. They do so from theoretical, philosophical, economic, historical, and sociolegal perspectives. The purpose of this is to build up a conceptual framework to enable understanding of the degree to which capitalism has, or has not, pushed copyright to become centred around economic exploitation.

The later chapters deal with how developments within copyright law have facilitated the role of contracts in the current system and how they have increased the influence that copyright owners have in the current system. This includes the way in which these agreements limit the application of legitimate copyright limitations imposed by statute. The aim is to assess whether these agreements could undermine the enforceability of the reforms and if so, to what extent this can be prevented with reform. The reforms utilise the theoretical aspects discussed in the previous chapters in order to learn from,

---

[243] 1 QB 428.

[244] 124 N.E. 137 (N.Y. 1919).

[245] The test and its surrounding discussion in this chapter is by no means any attempt at providing an exhaustive or otherwise comprehensive account of the law in this area, or legal causation as a whole for that matter, but simply, to show that the mechanics of it can be used to create a viable approach in which to assist in the successful implementation of the current proposals; Note, it can also be said that IP is, in fact, also a tort - Richa, G., Tort in Intellectual Property (September 5, 2010).Available at SSRN: https://ssrn.com/abstract=1672183 or http://dx.doi.org/10.2139/ssrn.1672183 accessed: 3/05/2018.

the ideological aspects of the current legal framework and the factors that have led copyright law to its modern day position.

1.6.2 Theoretical and Historical Perspectives.

To begin, it is important to comment on some of the historical and theoretical analysis in the thesis. Regarding historical analysis, the thesis highlights the interplay between the modern development of copyright, along with historical events. For example, the development of the contractual methods discussed,[246] are suggested to be akin to the effects of the UK Licencing of the Press Act 1662 and in the US, the 'courtesy of the trade' provisions.[247] The purpose of this is to demonstrate the effects of these agreements in the way that the same way as the 1662 legislation did. It gave the stationers the ultimate say in what got printed and what did not and contracts are argued to be doing the same, to the point where copyright holders are now able to control what is distributed, and what is not.[248]

Yet, when exploring historical patterns, there must be a degree of selectiveness by necessity. This thesis is concerned with the development of copyright in the context of digital technology and the internet and how capitalism has influenced these items to the point where creativity is being limited to maximise economic exploitation. The theoretical analysis throughout the thesis differs from existing texts. This is done by moving beyond a strictly rights-based or economic approach to explain the current shape of the copyright legal infrastructure, although the thesis does incorporate such texts. Typical of economic texts include those by Landes and Posner,[249] Demsetz,[250] and Steiner.[251] In terms of rights theories, examples include those that discuss

[246] See chapter 4.

[247] See chapter 4 at 4.7.1

[248] For a brief account of how the stationers register played a vital role in upholding order in London's commerce of print in the mid-seventeenth century, see Johns, A., *Piracy: The intellectual property wars from Guttenberg to Gates* (University of Chicago Press, 2009), chapters 2 and 3.

[249] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325; Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925.

[250] Demsetz, H., 'Toward a Theory of Property Rights' 57 Am. Econ. Rev. Papers & Proc. [1967] 347.

[251] Steiner, R., 'The Threefold Social Order', (Anthroposophic Press, Inc. New York, 1966), chapter III.

Lockean theory, such as Gordon[252] and Blackstone.[253] The importance of Locke's labour theory[254] is demonstrated by the fact that English copyright law is predicated in this theory.[255]

Instead, however, the thesis attempts to introduce more sociological, philosophical, and political texts to explain the evolution of copyright, including how to conceptualise its current functionality in the context of capitalism in order so that reforms can work with these same principles. Typical of sociological texts is Luhmann,[256] and Habermas,[257] which are used to help the reader understand the functionality of copyright in the social sphere and the effects this has on the individual. Regarding the theoretical political texts used, examples include Foucault,[258] and Bentham.[259] The reason for the inclusion of these works is based on their usage of Panoptic theory, which is based on a circular prison with cells arranged around a central wall, creating

---

[252] W.J. Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' 102 [1993] Yale Law Journal 1533.

[253] Blackstone, W., *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769* (Chicago: University of Chicago Press, 1979).

[254] Locke, J., *The Second Treatise of Government* (Edited by Thomas P. Peardon) (Bobbs-Merrill Educational Publishing Indianapolis, 1952).

[255] Sir William Blackstone shows that Locke's labour theory underlines copyright: There is still another species of property, which (if it subsists by the common law) being grounded on labour and invention is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke, and many others, to be founded on the personal labour of the occupant. – See Blackstone, W., *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769* (Chicago: University of Chicago Press, 1979) - Deming Liu, 'Reflections on the idea/expression dichotomy in English copyright law' J.B.L. [2017] 1, 71-96.

[256] Teubner and Febbraio, *State Law, and Economy as Autopoietic Systems* [1992]; Luhmann, *The Autopoiesis of Social Systems* in (Sociocybernetic Paradoxes 1986), pp.172-192; Luhmann, *A Sociological Theory of Law* [1985].

[257] Habermas, J., *Theory of Communicative Action*, vol.2 (Wiley publications, 1992); Habermas, J. *Legitimation Crisis* (London: Heineman 1976).

[258] Foucault, M., *Power: The essential works of Foucault 1954-1984* (Volume 3, edited by James Faubion, 2002).

[259] Bentham, J., *Panopticon, Works,* (vol. 4, ed. Bowering [1838-43] New York: Russel and Russel, 1971).

the potential of total, uninterrupted, and, permanent observation.[260] This is discussed in Chapter two, but for now, it is worth noting that the theory is not without its flaws and has been described as controversial.[261] Nonetheless, the primary reason for incorporating this theoretical approach is because it is suggested to best explain the effect of the approach taken by the music industry and in the regulation of copyright and information[262] in the digital age.[263] Finally, in the context of philosophy, the main works come from writers such as Deleuze and Guattari[264] and were chosen as they conceptualise how the capitalist system functions and the extent to which it permeates into social systems like law. This provides fresh alternatives for thinking about culture and how copyright governs it in capitalist society. Also, there is minimal reference to these works in copyright law when attempting to explain the evolution of this legal area, with the panoptic theory being the most used, but is still nonetheless limited.[265]

One of the assumptions within copyright is the notion that copyright exists primarily for providing monetary reward/incentive in exchange for the exploitation of a copyrighted work.[266] Considering this, the thesis, by drawing on the theoretical and historical perspectives, creates a set of reforms to work with this notion, but in a way that could

---

[260] Foucault, M., *Power: The essential works of Foucault 1954-1984* (Volume 3, edited by James Faubion, 2002), at 58-59.

[261] Schofield, P. *Bentham: a guide for the perplexed* (London: Continuum, 2009).

[262] Zuboff, S. *Big other: surveillance capitalism and the prospects of an information civilization*, Journal
of Information Technology, [2015], 30, 75–89.

[263] Lyon, D. *An electronic panopticon? A sociological critique of surveillance theory*, The Sociological Review, [2008], 41(4), 653–678; Taekke, J, *Digital panopticism and organizational power. Surveillance & Society*, [2011] 8(4), 441–454.

[264] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983); Deleuze, G. and Guattari, F., *A Thousand Plateaus: Capitalism and Schizophrenia* (Bloomsbury Academic 1987).

[265] There is some reference to the panoptic theory and the development of the internet in – Rheingold, H., *The Virtual Community*, (MIT Press 2000); There is also some discussion of panoptic theory in the evolution of copyright law in the era of digital technology in - Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 8; Reckwitz, A., *The Invention of Creativity: Modern Society and the Culture of the New*, (Polity press 2017), 159.

[266] *Millar v Taylor* [1769] 98 E.R. 201 at 220 (explicitly); *Donaldson v Beckett* [1774] 1 E.R. 837 at 845.

see an increase in the dissemination of information and encourage creativity. The framework would also ensure that the reforms are not undermined by contract in the same way that copyright limitations are in the current system.

1.6.3 Practical Analysis

Copyright is made up of several rights. The rights provided by UK copyright law include, amongst others, the right of reproduction,[267] the right to perform, show or play the work in public,[268] the right to issues copies to the public,[269] and the right to communicate the work to the public,[270] and adaptation.[271] In the US, 17 USC §106 provides that there are copyrights over reproduction in copies and phonorecords,[272] the distribution of copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending,[273] display of certain works,[274] and digital audio transmissions of sound recordings.[275]

Building upon the legal analysis discussed in the earlier chapters, the thesis proceeds to consider how the creative re-use of existing works has been affected by copyright law and contract. To assess this, the thesis considers the role that copyright law has played in facilitating the advancement of capitalist interests in the copyright industry.[276] This is achieved by first analysing the exclusive rights of communication in the UK,[277] and the public performance and display right in the US.[278] In doing so, the thesis postulates that these exclusive rights have shaped the law of the present day by

[267] S.17 CDPA 1988.

[268] s.19 CDPA 1988.

[269] s.18 CDPA 1988.

[270] s.20 CDPA 1988.

[271] s.21 CDPA 1988.

[272] 17 USC §106(2).

[273] 17 USC §106(3).

[274] 17 USC §106(5).

[275] 17 USC §106(6).

[276] See this chapter at 3.4

[277] Specifically CDPA 1988 s.20(2).

[278] Specifically, see 17 U.S.C §106(6).

playing a “central” role in the “shaping of the landscape of the digital market.”[279] These rights have provided what is considered to be a ‘cradle’[280] away from file-sharing that enabled the music industry to adopt the current streaming model discussed,[281] performing what is contended to be a ‘bridge-gap’ function.[282]

Following this, the thesis explores how contracts in the digital sphere have increased rightsholder control.[283] The reason for this is to understand how digital technology, due to its relationship with contract law, has procured this situation and what the practical implications are for users regarding the accessibility of works electronically.[284] This includes the fact that ‘electronic contracts’ are to be recognised as valid and enforceable under UK law. This is under the E-Commerce Directive Art.9(1)[285] (as implemented via the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No.2013).[286] Similarly, such agreements are recognised under US law via 17 U.S.C.

---

[279] Foong, C., *The Making Available Right, Realizing the Potential of Copyright’s Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.5; See also, chapter 3 at 3.5, 3.7.

[280] See chapter 3 at 3.5 and 3.6.

[281] See chapter 4.

[282] See chapter 3 at 3.6.

[283] See this chapter at 4.5.1.

[284] For more information, see 4.2.

[285] E-Commerce Dir., Art.9(1); There are certain exceptions that cannot be overridden by contract under the following subsections: CDPA 1988, ss50, 50B, 296A(1)(a), 296A(1)(b), 296A(1)(c); For guidance on how the directive could apply post-Brexit, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770360/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf accessed: 4/02/2019.

[286] The Directive was originally implemented by the Electronic Commerce (EC Directive) Regulations 2002 (“the 2002 Regulations”), which amongst other things implemented the Country of Origin principle and liability provisions to all UK legislation in the 'coordinated field' made before these Regulations - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770360/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf accessed: 4/02/2019.

§109 (1976).[287] The significance of this is that the digital dissemination of information removes the intermediaries from the distribution process.[288] A consumer who would have bought a CD directly from a retailer can now be supplied with an equivalent digital version over the internet directly from the copyright holder. By implication, this means that the rights owner can enforce any rights that they may have under copyright. However, this can now also include additional obligations imposed as part of the agreement.[289]

Notwithstanding this, digital contracts often prevent the practical application of the exhaustion and first sale doctrines.[290] This is because works which are 'licenced' and not 'sold' have the capacity, more so in the digital context,[291] to prevent the limitations on the distribution right in a particular copy from applying. However, it is important to note that the matter of whether an act of electronic transfer has been made by way of a 'sale' is often difficult to investigate.[292] The effect of this is that if the exhaustion

---

[287] More specifically, U.S.C. §109(d) (2012) as this section specifies that the first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as someone who as obtained it subject to contract, like a licensee.

[288] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), at 120-124.

[289] Issues of fitness for use and quality of digital content supplied by traders to consumers is regulated in part by the Consumer Rights Act 2015, Ch.3. The European Commission, as part of the Digital Single Market strategy, has proposed harmonization: Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content, COM (2015) 634 final. The proposal requires the supplier of digital content to have undertaken relevant rights clearances in relation to third party intellectual property rights, but in other respects the proposed legislation leaves intellectual property rights intact.

[290] See this chapter at 1.1; For more information, see chapter 4.

[291] This is primarily facilitated by the fact that both doctrines (first sale & exhaustion) usually only apply to tangible copies of works. For more information, see A. Ohly, 'Economic Rights', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright Law* (2009), 237-8. See also, Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; M Savič, 'The CJEU *Allposters* case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378; (reviewing the benefits of the US concept of exhaustion and pushing the notion that it needs to continue in the digital sphere and not be restricted).

[292] Case C 166/15 *Aleksandrs Ranks* v. *Finansu un ekonmisko noziegumu izmeklesanas prokutura, Microsoft Corp.,* EU:C:2016:762, [43], [44] (ECJ) (in relation to exhaustion of electronic copies,

doctrine applied, any action to curtail any attempted restriction on 'any subsequent distribution' in the UK under s. 18(3)(a)[293] would be prevented. This is because under this section copyright owners cannot control the resale under the exhaustion principle.

For purposes here, it is important to note that this has been widely assumed as only applying to the distribution of tangible copies.[294] This is primarily due to the decision of *Allposters v. Stichting Pictoright*,[295] but now also includes e-books following the recent Court of Justice of the European Union (CJEU) *Tom Kabinet* case.[296] Consent to the download of a work cannot be regarded as consent to the distribution. As a result, the distribution right cannot have been exhausted. Therefore, the *Usedsoft* principle[297] does not apply to works other than software because *Usedsoft* was itself concerned with the distribution of a tangible copy.[298]

The US equivalent is the 'first-sale' doctrine. The doctrine was first constitutionally codified under 17 U.S.C. §41 (1909) following the US Supreme Court decision of *Bobbs-Merrill Co. v. Straus*.[299] The doctrine is now codified under 17 U.S.C §109(a) (1976) and is where the copyright owner's distribution right in a particular copy of the work is 'exhausted' after its first sale under the doctrine.[300] The first sale doctrine regulates the rights of the copyright and chattel owners by establishing that once

---

differentiating between 'back up' copies made by the transferee, in relation to which there is no exhaustion, and copies received directly from the copyright-holder.)

[293] CDPA 1988; Info. Soc. Dir., Art. 4(2), allows for exhaustion in cases of 'first sale or other transfer of ownership in the Community'.

[294] A. Ohly, 'Economic Rights', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright Law* [2009], 237-8; Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015].

[295] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015];]; M Savič, 'The CJEU *Allposters* case: beginning of the end of digital exhaustion?' [2015] E.I.P.R 378.

[296] Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* v *Tom Kabinet Internet BV and Others* 19 December 2019 at [48], [58].

[297] See chapter 4 at 4.4, more specifically at 4.4.2.

[298] Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) *Art & Allposters International BV v Stitching Pictoright'* May [2016], Queen Mary University London.

[299] (Supreme Court, 1908); See chapter 4 at 4.4, more specifically at 4.4.1.

[300] The principle is often traced back to the US Supreme Court's decision in *Bobbs-Merrill Co. v. Straus* 210 U.S. 339 (1908).

authorized copies have been lawfully distributed, the property rights of the chattel owners prevail. In essence, the doctrine prevents the copyright owner from controlling future transfers of a particular copy of a copyrighted work after he has transferred its "material ownership" to another.[301]

The thesis suggests that once the system proposed in Chapter five enters into force, the use of contracts in such a way should be overseen by an administrative body and the courts to prevent owners contracting out of the reforms.[302] This also involves the suggested imposition of a legislative proposal.[303] If the regulatory body decides that the proposals are being used in a manner that restricts their application, including situations concerning re-use of copyright content, then a penalty scheme is introduced,[304] which also involves voiding contracts or their respective terms.[305]

It is important to recognise that the implementation of a capping system that restricts the level of economic exploitation that copyright owners can place on works may introduce problems concerning international obligations,[306] like those under the Berne Convention.[307] The reforms would need to satisfy certain parts of Berne, like Article 9(2),[308] although the thesis argues that these can be overcome,[309] certain aspects like Article 17[310] can be used to aid the practical enforcement of the proposals by UK and US regulatory bodies.

---

[301] *Columbia Pictures Industries v. Redd Horne,* 749 F.2d 154, 158 (3d Cir. (1984) at [159].

[302] See chapter 5 at 5.7.

[303] See chapter 5 at 5.4.1(c).

[304] See chapter 5 at 5.7.3.3.

[305] See chapter 5 at 5.4.

[306] See chapter 5 at 5.3.2 and 5.7.3.3(i).

[307] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886; On the Berne Convention generally, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 23-04.

[308] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886.

[309] See chapter 5 at 5.3.2.

[310] Berne Convention (Paris Act 1971) art.17; Vol.2 F1.

1.7 Context and Sources

There have been many studies on the economics of copyright law that have come to dominate discourse,[311] including general historical accounts of the development of copyright.[312] For example, Professor Cohen suggests that:

> "...within the mainstream of copyright scholarship, it has been taken as self-evident that a grand theory of the field must be grounded either in a theory of rights or in a theory of economic analysis."[313]

Although this thesis does consider economics and property, as they are foundational aspects of copyright, in contrast, the analysis throughout takes into account a broad range of factors that are not necessarily considered within copyright discourse to explain its modern-day position. This is done by considering the relationship between knowledge and power as discussed by Foucault[314] and Bentham,[315] which includes

---

311 Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325; Breyer, S, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' 84 Harvard Law Review281 [1970]; Woodmansee, M., 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author', Eighteenth Century Studies, (1984), 17(4), Summer, 425-28; Stanley M. B. and Sheila N. Kirby and Salop, S.C., 'An Economic Analysis of Copyright Collectives' *Virginia Law Review,* [1992] 78 (1), 383-411; Towse, R. Handke, C, and Stepan, P., 'The Economics of Copyright Law: A Stocktake of the Literature' Review of Economic Research on Copyright Issues, [2008], vol. 5(1), pp.1-22; Hurt, Robert M. and Schuchman, R.M., 'The Economic Rationale of Copyright' *American Economic Review* (Papers and Proceedings), 56; 421-32; Gordon, W.J., 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' 82 Colum. L. Rev. 1600 [1982]; Gordon, W.J., 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory' 41 Stanford Law Review [1989] 1343.

312 Spoo, R., *Without Copyrights: Piracy, Publishing and the Public Domain* (Oxford University Press, 2013); Richard Watt, *Copyright and Economic Theory* (Edward Elgar Publishing 2000); Merges, R.P., *Justifying Intellectual Property* (Harvard University Press, 2011); Sherman, B. and Bently, L., *The Making of Modern Intellectual Property Law* (Cambridge University Press, 1999).

313 Cohen, J., 'Creativity and culture in copyright theory' 40 University of California Davis Law Review 1151 (2007) at 1155.

314 Foucault, M., *Power: The essential works of Foucault 1954-1984* (Volume 3, edited by James Faubion, 2002).

315 Bentham, J., *Panopticon, Works,* vol. 4, ed. Bowering [1838-43] (New York: Russel and Russel, 1971).

the role that capitalism has played in this by assessing the evolution of copyright in the context of the theoretical approaches advocated by Deleuze and Guattari.[316]

The aim of the thesis is to understand why copyright has become inherently focused on control and economic exploitation in capitalist society and how this has been achieved in the digital world.[317] The reason for this approach is because it is argued that only when the development of copyright is understood in the wider socio-political context in which it operates, can lessons for the future then be learned.

In doing so, the thesis aims to contribute to the shaping of the law by identifying the external factors that have contributed to the creation of a copyright system that is predominantly focused on exploitation. The end result is to create a system of change that works with capitalism to procure practical change for the future that increases access to works through lowering costs overall in copyright. The reason for this approach is because of the conceivable failure of things such as the Open Access scheme (OA),[318] the lack of usage of DRM in the music industry,[319] the diminishing role of licensing,[320] and the increasing prevalence of contracts in undermining copyright limitations.[321]

This thesis aims to provide:

- A demonstration of how panoptic surveillance was used by the music industry to maintain their market positions in the digital age (Chapter 2)

- An assessment of the extent that capitalism and property have influenced the development of the current copyright system (Chapter 3)

---

[316] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983); Deleuze, G. and Guattari, F., *A Thousand Plateaus: Capitalism and Schizophrenia* (Bloomsbury Academic 1987).

[317] Slaughter, S. and Rhoades, G., *Academic capitalism and the new economy: Markets, State and Higher Education* (John Hopkins University Press 2010); Vandenberghe, F. 'Deleuzian capitalism' Philosophy & Social Criticism, 34(8) [2008]: 877-903.

[318] See chapter 3 at 3.1.

[319] See chapter at 4 at 4.1.

[320] See chapter at 5.4.

[321] See chapter 4.

- An analysis of how contractual agreements have increased copyright holder control and restricted creativity, and to what extent these agreements could be used to undermine the enforceability of reform (Chapter 4)

- An investigation of how the proposed capping system could be implemented (Chapter 5)

1.8 Overview

The second Chapter considers how digital technology had the potential to undermine the market structure of the music industry. There is a particular focus on how this same technology enabled the creation of a system of panoptic surveillance. The Chapter analyses how this procured an exponential extension of legal liability for copyright infringement online. The chapter assesses whether there is now, in fact, a situation where information service providers have become policers of content in an attempt to avoid potential legal action. There is a consideration of whether certain aspects of copyright have meant that it has become a decentralized system that allows copyright owners to avoid the due process of law and create barriers to market entry.

The third Chapter considers the underlying role of capitalism in the development of copyright in the digital age. This is done by analysing how it has become inherently focused on economic exploitation and restriction under proprietary-based reasoning and legally enforceable rights. The chapter considers how this assessment reveals inadequacies in copyright which have resulted in the formulation of legal doctrines that limit the amount of public knowledge in favour of private interests. This thesis contends that this has created a copyright system which is more about exploitation than creation, where the money is now concentrated into the hands of a few record labels. The chapter will conclude by suggesting that there is now a protectionist proprietary copyright policy that is shaped more by effective lobbying than evidence and expertise, the purpose of which is to preserve the status quo as a result of capitalism under copyright.

The fourth Chapter considers the role of contract law because contracts can be used to both extend copyright protection, and, prevent the application of copyright limitations. It investigates how the music industry used digital licensing to create a more secure method of consuming music online. The thesis argues that this was an attempt to safeguard the unauthorised distribution of music against the seemingly

unlimited capacity to do so as a result of digital technology. It will then scrutinise how licensing has been chosen specifically as a method of exploitation in the digital world due to the way that contracts exploit the copyright legal infrastructure via the diminished applicability of the 'first sale' and 'exhaustion' doctrines. In doing so, it considers how the terms of these agreements have been strengthened to create what is agued as a two-tier system of protection. This means that subsequent transfers can be unlawful under copyright law as they are considered to breach the exclusive right of distribution, but also, failing this, there can be a breach of contract as there is no exhaustion of the exclusive rights. The thesis contends that contracts could impede future transfers of works because there will be no distribution, and this then reinforces the applicability of the e-contract and the control which restricts creativity. The thesis then considers the discussion outlined in the Chapter by analysing how the proposed reforms could be undermined by the functionality of contracts in the digital music age and how this can be counteracted.

In chapter five, it is proposed that there is a need for a system which explicitly takes into account the factors which have led to the creation of the current system, as detailed in the previous chapters. The reforms encapsulate how the concepts of power and knowledge via panopticism (Chapter 2) can be used to create a more efficient system of reform overall regarding enforcement of the proposals;[322] that the advancement of the technology of the internet and the evolution of copyright law in the digital age can be said to be products of capitalism which should be taken into account in the reforms[323] (Chapter 3); and that digital licenses are an intensification of a pre-existing music market which restricts creativity, and that the proposed system may need to deal with these contracts to ensure that enforcement is not subverted by these methods (Chapter 4). The proposed approach could help alleviate the issues discussed throughout this thesis by reducing costs across copyright concerning sale and re-use for a limited period. This may reduce production fees and this could lead to a corresponding decrease in the overall cost of works, as well as dealing with the issues posed by contract. By implementing this proposed strategy, both the amount of

[322] See chapter 5 at 5.7.3.3(c)(iiii).

[323] See chapter 5 at 5.5.3, 5.9; Harari, Y.H., *Homo Deus: A Brief History of Tomorrow* (Penguin Random House, 2015).

information disseminated and creative activity concerning works may increase by providing considerably greater certainty for the purchasers and re-users of copyright content. This would be a result of works being more financially accessible which could increase consumer compliance by the extension of legitimate markets through lower prices.[324] The proposed system would be overseen by an administrative body similar to the UK Copyright Tribunal, or the US Copyright Royalty Board, with assistance from current regulatory bodies in the UK[325] and the US.[326]

[324] See chapter 5 at 5.5.3(a).

[325] See chapter 5 at 5.7.3.3(c)(i).

[326] See chapter 5 at 5.7.3.3(c)(ii).

Chapter 2:

Panoptic surveillance in copyright

2.1 Introduction

> "Striking the correct balance between access and incentives is the central problem in copyright law."[1]

The expansion of digital communications technology has led to the "balance"[2] that copyright law tries to achieve becoming an increasingly difficult task.[3] Although recipients of digital content are in a technological position to readily re-use copyright works,[4] legal sanction has been used to limit such capacities.[5] This includes attempts

---

1 W. M. Landes and R. A. Posner, 'An Economic Analysis of Copyright Law' 18 [1989] *Journal of Legal Studies* 325.

2 "We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded." – Per Lord Mansfield in *Sayre* v *Moore* [1785] at 362.

3 "MGM and many of the amici fault the Court of Appeal's holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement. The more artistic protection is favoured, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off" - Justice Souter, in *MGM* v *Grokster*, 125 S.Ct. 2764 (US Supreme Court, 2005) at 2775.

4 See this chapter at 2.2.

5 See this chapter at 2.3; See also, chapter 3 at 3.3; See also, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch) – A computer, connected to the internet, which is running P2P software and where music files containing copies of copyright works are placed in a shared directory, was held to constitute an infringement of the copyright owner's "making available" rights by the person in control of the computer; See also, Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019).

to hold online service providers[6] liable for the activity of their subscribers.[7] This has created an increasingly unregulated system[8] due to a lack of substantive legislative restraints to deter unfounded infringement allegations.[9] In response to file-sharing, the Recording Industry Association of America (RIAA), which is a trade organization that represents the recording industry in the United States, began a highly publicised lawsuit campaign[10] against individual users of file-sharing applications.[11] In the UK, a speculative invoicing program was initiated,[12] which is a practice concerns the sending of letters before action. These are based around alleged copyright infringement online.

This procedure involves an entity acting on behalf of copyright holders (under a profit-sharing arrangement) to pursue small-scale infringers.[13] This is achieved by sending letters-before-action to internet subscribers, claiming a substantial sum in relation to alleged violations of copyright from the subscribers internet address.[14] This drove

---

[6] See this chapter at 2.3.1.1(a) and 2.3.1.1(b).

[7] For more information, see the discussion in this chapter at 2.3.1.1(a), 2.3.1.1(b), 2.3.1.2, and 2.5; See also, *BMG Rights Management v Cox Communications,* 881 F.3d 293 (4th Cir. 2018); *EMI Christian Music v MP3Tunes,* 844 F.3d 79 (2d Cir. 2016). See C. Doctorow, *Information Doesn't Want to Be Free: Laws for the Internet Age* (San Francisco 2014), 80-89; See also this chapter at 2.3 *generally*.

[8] See this chapter at 2.5.

[9] See this chapter at 2.3.1.1, 2.3.1.2(a), and 2.5 *generally*; Law Commission Report, 'Patents, Trade Marks and Designs: Unjustified Threats (No. 360)' [2015] - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/468450/51672_Law_Commission_HC_510_TEXT.pdf accessed: 23/09/2019.

[10] See this chapter at 2.3.1.1 and 2.3.1.2; See also, *Capitol Records v Thomas-Rasset,* 692 F.3d 899 (8th Cir. 2012); *Sony BMG Music Entertainment v Tenenbaum,* 660 F.3d 487 (1st Cir. 2011).

[11] For more information, see this chapter at *A&M Records, Inc. v. Napster, Inc.* (No. C 99-5183 MHP No. C 00-0074 MHP), *United States District Court for the Northern District of California* - in *A&M Records, Inc. v. Napster* 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913 (2005); *Arista Records LLC v Lime Group LLC,* No.06 CV 5936 (KMW) (US S.D.N.Y. May 25, 2010).

[12] For more information, see this chapter at 2.3.1.1.

[13]See http://www.guardian.co.uk/technology/2011/mar/17/acs-law-file-sharing (Accessed: 15/8/2016).

[14] *Media CAT v. Adams* [2011] *FSR* (28) 679, *Golden Eye International Ltd v. Telefonica UK Ltd* [2012] *RPC* (28) 698.

copyright legal proceedings to the edge of the reach of the State,[15] to the point where copyright-based threats are kept away from the objective scrutiny of the courts[16] under a system of panoptic surveillance.[17]

For example, the take-down provisions of the Digital Millennium Copyright Act (DMCA) §.512[18] (in the US)[19] have the potential to hold Internet Service Providers (ISPs) liable for infringing activity commissioned by their users unless it removes or disables access to the information. Thus, while it has emerged as a process capable of producing relatively consistent results, it also has significant problems. It is left open to different kinds of "abuse"[20] which results in the removal of material without the need for judicial scrutiny.[21]

In the UK, a similar procedure, under s.97A,[22] encourages so-called 'notice-and-take-down' relationships,[23] or where such material reappears, a 'notice-and-stay-down' relationship.[24] This means if a rightsholder provides notice, the service provider will

---

[15] See this chapter at 2.5; See also, Griffin, J., 'A call for a doctrine of information justice' [2016] Intellectual Property Quarterly.

[16] See this chapter at 2.3.1.1, 2.3.1.2, and 2.5.

[17] See this chapter at 2.3 and 2.5 *generally*; Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), ch.8.

[18] 17 U.S.C. §512.

[19] For the UK equivalent, see the next section.

[20] Blythe, M.C., 'Freedom of speech and the DMCA: abuse of the notification and takedown process', E.I.P.R. [2019], 41(2), 70-88; J. Urban & L. Quilter, 'Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act' Santa Clara Computer & High Technology Law Journal [2006].

[21] See this chapter at 2.5.

[22] CDPA 1988; *[2010] EWHC 608 (Ch); Twentieth Century Fox Film Corp v Newzbin Ltd [2010] F.S.R. 21*; In that case the service provider was itself infringing and the relief under s.97A added nothing to what the claimant was already entitled to – For more information on the scope of these injunctions, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 21-243.

[23] Case C-324/09 *L'Oreal SA v eBay International AG*, [2011] ECR I-6011, [116] (Grand Chamber).

[24] *Societe de Producteurs en France v. Google, No. 11-13,666* (French Supreme Court, 12 July 2012).

take the material down[25] or otherwise risk losing the immunisation from liability following the ruling of *L'Oreal SA v eBay.*[26]

The thesis argues that such issues would be reduced if there was a more cost-efficient copyright regime that could increase individual accessibility to material.[27] This also includes using specific legislation[28] to counteract the issue of contracts in the digital system discussed in chapter 4.[29] The chapter begins by analysing how digital technology had the potential to undermine the music industry's market structure.[30] It then assesses how this same technology created what is argued as a system of panoptic surveillance.[31] It then considers how this had led to a gradual extension of legal liability for copyright infringement online,[32] to the point where information service providers have become policers of content in an attempt to avoid being sued.[33] The chapter then assesses how copyright has become a decentralized system that enables rightsholders to avoid due process.[34] It concludes by considering how this also enables the removal of commercial competitors from the market and creates

---

[25] e-Commerce Regs, reg. 19 (based on e-Commerce Dir., Art. 14). On the Knowledge standard, see Case C-324/09 *L'Oreal SA v eBay International AG*, [2011] ECR I-6011, [116] (Grand Chamber), [118]-[124] (awareness of facts or circumstances on the basis of which a diligent economic operator should have realized that [the activity was illegal].

[26] Case C-324/09 *L'Oreal SA v eBay International AG*, EU:C:2011:757, [AG155] (AG Jaaskinen); This is discussed in this chapter at 2.5.

[27] For more information, see chapter 5 at 5.4.1(b), and 5.5.3(a) respectively.

[28] For more information, see chapter 4 at 4.8; See also, chapter 5 at 5.4.1(c).

[29] Contracts are discussed more extensively in chapter 4 at 4.8;For a more extensive discussion on how they will be dealt with under the proposals, see chapter 5 at 5.4.

[30] For more information, see this chapter at 2.2 and 2.2.1 respectively; See also, Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing, 2015).

[31] For more information, see this chapter at 2.3.

[32] *A&M Records, Inc. v. Napster, Inc. (No. C 99-5183 MHP No. C 00-0074 MHP), United States District Court for the Northern District of California* - in *A&M Records, Inc. v. Napster* 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913 (2005); See this chapter at 2.6.

[33] See this chapter at 2.3.1.1(b).

[34] For more information, see this chapter at 2.5.

barriers to entry,[35] although the concept of such barriers has been suggested to be more imagined than real.[36]

2.2 From real space to cyberspace: How have things changed since the introduction of digital technology?

> "In rooms around the country, there are posters taped to windows without compensation to the original creator. These *uses* occur without the express permission of the copyright holder. They are unlicensed and uncompensated ways in which copyrighted works get used."[37]

The above extract describes the usage of copyrighted material by individuals outside of the digital sphere. This scenario is unlikely to be the subject of a copyright lawsuit. This is due to the fact that tracking such behaviour in real space is difficult.[38] However, digital technology moved this activity into cyberspace, and this had the quintessential effect of enabling rightsholders to access these dorms. This has allowed them to enforce copyright in ways never seen where online service providers have arguably become "policers" of content.[39]

This has meant that the changes within technology and the amendments that have been made to copyright law to keep up with digitalisation have created a climate of

---

[35] For more information, see this chapter at 2.6; Shane, W., 'I Want My MP3: Legal and Policy Barriers to a Legitimate Digital Music Marketplace' 17 J. Intell. Prop. L. [2009] 95.

[36] Hovenkamp, H., 'Antitrust Policy After Chicago' 84 [1985] Univ Mich *LR* 213, 226–229.

[37] Lessig, L., *The Future of Ideas* (Vintage Books, 2001), at 180-181; For a general overview of the impact of the internet, see Boyle, J., *The Public Domain (*Yale University Press, 2008), chapter 4.

[38] Helberger, Hugenholtz, and Bernt., 'No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law' (February 23, 2012). Berkeley Technology Law Journal, Vol. 22, No. 3, 2007; Amsterdam Law School Research Paper No. 2012-35; Institute for Information Law Research Paper No. 2012-29. Available at SSRN: <https://ssrn.com/abstract=2010007> accessed: 25/06/2017).

[39] Griffin, J. and Nair, A., International Review of Law, Computers and Technology [2013]: Scientia potential est: Making threats of copyright infringement, International Review of Law, Computers and Technology.

"fear"[40] within copyright law.[41] This is because rather than embrace technological change, the music industry opposed it.[42] As a result, a raft of new legal problems needed to be considered. This meant that a system which was originally designed to ensure public benefit began to actively restrict the dissemination of information.[43] I will now consider why this has happened and the results this produced.

2.2.1 Digitalisation and the internet

Due to the advances of the internet in the digital age, music consumers turned to online sources for their music in the 1990's. This meant major record labels lacked a way to profit from selling music to consumers, and consumers turned to legally questionable sources for digital music.[44] This is because the internet makes copying cheaper and on an unparalleled scale, and with this, came the greater danger of illicit copying. This has been counteracted with more expansive rights,[45] harsher

---

[40] 'Fear' for purposes here is defined as "Apprehension of harm. Apprehension of harm or punishment, as exhibited by outward and visible marks of emotion" – http://thelawdictionary.org/fear/ accessed: 22/1/2016; On how fear and paranoia can be used for political ends, see Plato, *Laws* (Translated by A. E. Taylor (1961) in *The Collected Dialogues of Plato*, (Eds. by Edith Hamilton and Huntington Cairns, Bollingen, New York); Glass, J.M., 'Notes on the Paranoid Factor in Political Philosophy: Fear, Anxiety, and Domination' Political Philosophy, Vol 9, No. 2 (Jun. 1988), pp.209-228; Adam, J., *Platonis Apologia Socratis* (Cambridge University press,1910); Furedi, F., *How Fear Works: Culture of fear in the Twenty-First Century*, (Bloomsbury Continium, 2018) at 37-38; Plato, *The Republic,* (trans. Desmond Lee), (Penguin Books Ltd, 2007); Cooper, J.M., 'Plato's Theory of Human Motivation' History of Philosophy Quarterly, Vol. 1, No. 1 (Jan., 1984), at 3-21.

[41] See the discussion in this chapter at 2.3.1.2.

[42] Goldring, F., 'Abandon the 'Shock and Awe' Tactics: An Eight-Step Recovery Program for a Healthier Music Industry' Billboard, Oct. 25, 2003, at 14. Mr. Goldring describes himself as "someone who earns a living working with musicians, record companies and publishing companies." *Id.* In addition to being a columnist for Billboard magazine, Mr. Goldring is also a musician; Taken from Fedock, J.A., 'The RIAA v. The People: The Recording Industry's Misguided Attempt to Use the Legal System to Save Their Business Model' 32 [2005] Pepp. L. Rev. 4; Lessig, *Free Culture* (2004), at 199-207.

[43] Frith, S. and Marshall, L., Music and Copyright (2nd edn. Edinburgh: Edinburgh University Press 2004) , chs., 1, 6.

[44] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 7.

[45] See chapter 3 at 3.4.

penalties,[46] and increasing use of digitalised contracts.[47] This attempt to "staunch the flow from the internet artery"[48] by rightsholders in the digital age resulted in a technology of freedom being turned into a technology of regulatory control and surveillance.[49]

During the internet boom years, legal scholars opined that there were no borders in cyberspace. As the internet was so unique, they claimed it should have its own legal framework.[50] The emancipatory nature of the internet inevitably clashed with the proprietary[51] characteristics of capitalism and copyright law.[52] This is argued to have created an "inescapable dynamic of tension"[53] between abundance and scarcity in copyright markets because it is suggested that electronic communications were not immune from monopolisation in capitalist society.[54]

Castells highlights that "the architecture of this network technology is such that it is very difficult to censor or control it."[55] By its very nature, it revolutionised computers

---

[46] E.g. in the UK, the Digital Economy Act 2017, has granted a significant extension of the term of imprisonment for online infringement (on an industrial scale) from two years to ten for offences committed on or after 20 November 2002 by the Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002 – and/or an unlimited fine. For more information, see this chapter at 2.3.1.1

[47] See chapter 4.

[48] Cornish, W., Intellectual Property: Omnipresent, Distracting, Irrelevant (Oxford University Press 2004) at 51-2

[49] Boyle, J., *The Public Domain (*Yale University Press, 2008), at 60-61; On panoptic surveillance, see this chapter at 2.3; Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 8.

[50] Johnson, D. and Post, D., 'Law and Borders: The Rise of Law in Cyberspace' 48 [1996] Stan. L. Rev. 1367.

[51] For more information on the role of property in capitalism and how it has been used in the development of copyright in the digital age, see chapter 3 at 3.2. 3.3 and 3.4.

[52] Deleuze, G. and F. Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), at 179.

[53] Mansell, R., 'New Media Competition and Access: The Scarcity-Abundance Dialectic' *New Media & Society,* [1999], 1(2), p.155.

[54] See the discussion in chapter 3 at 3.4; Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapters 1 and 2.

[55] Castells, Manuel, 'The Rise of the Network Society' (Vol.1 of *The Information Age*) [1996] at 352 in Hesmondhalgh, D., *The Cultural Industries* (3rd eds. SAGE Publications 2013), pp.327-28.

and communication and has a worldwide broadcasting capability, and a mechanism for information distribution, collaboration and interaction between individuals and their computers regardless of geographic locations.[56] The nature of digital technology is argued to have created an 'instability' where copyright holders turned to litigation[57] in an attempt to gain mastery over something that they could no longer control in the manner they had previously.[58]

This is down to the end-to-end infrastructure of the internet, in that Cyberspace, by its very nature, is hard to control. This is because access cannot be curtailed by a middle man,[59] which saw rightsholders "attempting to thrive by controlling the network that everyone else is forced to pass through."[60] It was an architecture which disabled the power of any middle-man to control how those at the ends interacted: this is the principle of end-to-end. This design choice of end-to-end assures that those with a new idea get to sell that new idea, the views of the network owner notwithstanding.[61]

It is argued that mankind is on a perpetual quest to gain mastery over technology.[62] For example, Heidegger posits that "everything depends on our manipulating of technology in the proper manner as a means. We will, as we say, 'get' technology 'spiritually in hand.' We will master it. The will to mastery becomes all the more urgent

---

[56] Koutras, N., 'History of copyright, growth and conceptual analysis: copyright protection and the emergence of open access' I.P.Q. 2016, 2, 135-150.

[57] For more information, see this chapter at 2.3.

[58] For more information on this, see Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 1.

[59] For more information on the characteristics of the internet, and how it represented something of an unchained beast in the eyes of rightsholders, see Lessig, L., *Code and Other Laws of Cyberspace,* (New York: Basic Books 1999); Lanier, J., *You are not a Gadget* (Penguin Books, 2010).

[60] Lanier, J., *You are not a Gadget* (Penguin Books, 2010) at p.95.

[61] Lessig, L., *The Future of Ideas: The fate of the Commons in a Connected World* (Vintage Books 2001) at 121

[62] Shanahan, M., *The Technological Singularity* (MIT Press Essential Knowledge Series, 2015); Von Neumann, J., The Computer and the Brain, (Yale University Press, 1958); Susskind and Susskind., *The Future of the Professions: How Technology Will Transform the work of Human Experts* (Oxford University Press 2015); Kurzweil, R., *The Singularity is Near: When Humans Transcend Biology* (Duckworth publishing, 2006); Zuboff, S., *In the age of the Smart Machine: the future of work and power* (Basic Books, 1988).

the more technology threatens to slip from human control."63 This is argued to be because digital technology disrupted the scarcity that intellectual assets otherwise enjoyed prior to digital advances. This newfound ability to instantaneously replicate and transfer information had what is contended to be a 'destabilising' effect. This created a considerable interest in getting a handle on technology through legal sanction.[64]

Yet, an opposing stance may be that the internet[65] was a network consciously developed within capitalism. This is because a global privatised network was necessary, along with free-trade policies, to deliver global capitalism efficiently.[66] Conversely, it can be said that the internet actually enhanced the stability of copyright. This is down to the fact that it otherwise enabled the monitoring of copyright in ways that would otherwise go undetected in the "real" world.[67] Nonetheless, it is argued that whatever view is taken, law was still an essential feature in the procurement of this as copyright is about getting something for nothing.[68]

As a result, digital technology represents what is argued as a 'double-edged' sword for rightsholders. This is because although there is an increased capacity to monitor infringers, it also opens up the potential for the instantaneous distribution of

---

[63] Heidegger, M., The Question Concerning Technology (Trans. William Lovitt, Harper Torchbooks 1977), p.2

[64] Callister, P.D., 'Law and Heidegger's Question Concerning Technology: A Prolegomenon to Future Law Librarianship' Law Library Journal, Vol. 99, pp. 285-305, 2007. Available at SSRN: https://ssrn.com/abstract=960134 accessed: 21/2/1016.

[65] For more information now how the internet and copyright developed in accordance with capitalism, see this chapter at 3.4.

[66] Schiller, D., *Digital Capitalism: Networking the Global Market System* (Cambridge, MA: MIT Press, 2000) at 203 and Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), at xx.

[67] Popper, K. & Eccles, J.C., *The Self and Its Brain: An Argument for Interactionism* (Berlin, Heidelberg, New York: Springer-Verlag, 1977); S.Vaidhyanathan, *The anarchist in the library: how the clash between freedom and control is hacking the real world and crashing the system* (Basic books, 2004).

[68] Boyle, J., *The Public Domain (*Yale University Press, 2008), at 75.

information. As such, “mastering”[69] the internet was essential and the expansion of copyright discussed in chapter 3,[70] including the deployment of contracts in chapter 4,[71] are postulated to be a product of this attempted ‘mastery’.[72]

In essence, the internet threatened to ‘slip’ the market away from the control of copyright right holders due to its architecture. The result is that copyright has expanded beyond its originally anticipated remit and failed to guard against two equally prejudicial extremes.[73] It has filtered into homes through the desktops of recipients by implication of the creative and communicative acts that each of us perform daily for consumptive purposes.[74] Yet, it is almost unthinkable that the market could stay forever outside of the internet network, as it is a mode of communication that is fundamental to its own organizational structure.[75] The result is that culture has become ‘openly’, and ‘defiantly’, an industry ‘obeying’ the same rules of production as any other producer of commodities where culture production is “now an integrated component of the capitalist economy as a whole.”[76]

---

[69] Shanahan, M., *The Technological Singularity* (MIT Press Essential Knowledge Series, 2015); Kurzweil, R., *The Singularity is Near: When Humans Transcend Biology* (Duckworth publishing, 2006); Von Neumann, J., *The Computer and the Brain* (Yale University Press, 1958); Zuboff, S., *In the age of the Smart Machine: the future of work and power* (Basic Books, 1988); Susskind and Susskind., *The Future of the Professions: How Technology Will Transform the work of Human Experts* (Oxford University Press 2015);

[70] See chapter 3 at 3.4.

[71] See chapter 4.

[72] Heidegger, M., *The Question Concerning Technology* (Trans. William Lovitt. Harper Torchbooks 1977).

[73] “We must take care to guard against two extremes equally prejudicial;; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour;; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.” – Per Lord Mansfield, *Sayre* v *Moore* [1785] at 362.

[74] Boyle, J., *The Public Domain (*Yale University Press, 2008), p.52; Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ).

[75] Terranova, T, ‘Free Labour: Producing Culture for the Digital Economy’ Social Text, [2000] 63 (18), p.35; Available at: http://web.mit.edu/schock/www/docs/18.2terranova.pdf Accessed: 9/12/2014

[76] Adorno, T.W., *The Culture Industry* (Edited by J. M. Bernstein, Routledge Classics 1991), pp.9-11.

This is argued to provide evidence of the dialectical relationship between scarcity and abundance within capitalism. This is because inequality remains in the digital environment[77] and the consumption of culture has become "fundamentally integrated into capitalism"[78] in an environment of panoptic control. In this environment, users are unsure as to whether their activities are being monitored,[79] or held as a contractual breach.[80] This is argued to be an attempt by the copyright industry to ensure the continued extension of capitalist commodification in the digital age.[81] The items discussed within this chapter and throughout this thesis are argued as an attempt by the culture industry to procure what Terranova described as a new digital economy by "reintroducing commodification"[82] to digital assets that had been de-commodified by the mass infringement induced by these technological advances as a result of capitalism.[83] It is to these matters we now turn.[84]

---

[77] Mansell, R. (1999) New Media Competition and Access: The Scarcity-Abundance Dialectic. *New Media & Society,* 1(2), 155-182; Mansell, R. (2004) 'Political Economy, Power and New Media' *New Media and Society*; See also, chapters 2 and 3 generally.

[78] Leyshon, A., Webb, P., French, S. Thrift, N., & Crewe, L. (2005) On the reproduction of the musical economy after the internet. *Media, Culture and Society,* 27(2), 177-209.

[79] See this chapter at 2.3 *generally*.

[80] See chapter 4 generally, and in particular, 4.5 and 4.5.1 respectively.

[81] Deleuze, G. and Guattari, F., *A Thousand Plateaus* (Bloomsbury Academic, 1988), pp.532-33; (Deleuze and Guattari note that the term "subjection", of course, should not be confined to the national aspect, with enslavement seen as international or even worldwide. For information technology is also the property of the States that set themselves up as humans-machines systems – at p.533); For more information, see chapter 3 at 3.4, and chapter 4 at 4.3.1 respectively.

[82] Terranova, T, 'Free Labour: Producing Culture for the Digital Economy' Social Text, [2000] 63 (18), p.35; Available at: http://web.mit.edu/schock/www/docs/18.2terranova.pdf (Accessed: 9/12/2017).

[83] Writers like Dan Schiller and David Arditi postulate the view that items like digital technology are a result of capitalism as well, by stating that the internet was a network consciously developed by reorganizing "telecommunications policy along neoliberal lines" and this global privatised network was necessary, along with free-trade policies, to deliver global capitalism efficiently – (For more information, see Schiller, D., *Digital Capitalism: Networking the Global Market System* (Cambridge, MA: MIT Press, 2000) at 203 and Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), P.xx at n.11).

[84] For a general discussion of the legal and commercial approaches of the US and the UK to file-sharing, see Aditi Mene, 'Piracy and illegal file-sharing: UK and US legal and commercial responses' PLC Cross-border - <https://uk.practicallaw.thomsonreuters.com/1-502-

2.3 Copyright in the digital age

2.3.1 A comparative analysis with 'panoptic' theory to explain the effect of copyright law in the digital age.

The work of Jeremy Bentham,[85] as discussed by Foucault,[86] will be used in this chapter.[87] This is to increase understanding of the way copyright regulates user behaviour in order to see how these observations could be used to facilitate the enforcement of the proposals[88] discussed in chapter 5.[89] Specifically, the reason for using this theoretical approach in this section is because it is suggested to best explain the effect of the approach taken by the music industry in the regulation of copyright in the digital age.[90] However, Foucault's interpretation of Bentham under his concept of *panopticism* has led to criticisms suggesting that Bentham is viewed through the reading of Foucault whereby Bentham's thought should be re-examined.[91] However, although such items have been extensively discussed,[92] it is argued that a copyright thesis is not the basis for conceptual differences relating to different analysis of

---

7956?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a746983> accessed: 21/04/2019

[85] Bentham, J., *Panopticon, Works,* vol. 4, ed. Bowering [1838-43] (New York: Russel and Russel, 1971).

[86] Foucault, M., *Power: The essential works of Foucault 1954-1984* (Volume 3, edited by James Faubion, 2002).

[87] See this chapter at 2.3, 2.4 and 2.6.

[88] See chapter 5 at 5.1, 5.7.3.3(c)(iii).

[89] See chapter 5 at 5.3.

[90] See this chapter at 2.3.

[91] Brunon-Ernst, A., & Tusseau, G. Epilogue: the panopticon as a contemporary icon? (2013) in A. Brunon- Ernst (Ed.), Beyond Foucault: New perspectives on Bentham's panopticon (pp. 185–200), Ashgate Publishing.

[92] Lyon, D. Surveillance society: monitoring everyday life. Buckingham: Open University Press (2003); Galič, M., Timan, T. & Koops, B. Bentham, 'Deleuze and Beyond: An Overview of Surveillance Theories from the Panopticon to Participation'. Philos. Technol. 30, [2017] 9–37. at 2.2; Lyon, D. (Ed.) Lyon, D. Surveillance studies: an overview. Cambridge: Polity (2007); Surveillance as social sorting: privacy, risk, and digital discrimination. London: Routledge (2003); Taekke, J. Digital panopticism and organizational power. Surveillance & Society, (2011) 8(4), 441–454.

panoptic theory.[93] Therefore, for this section, the work of Bentham in this section concerns a comparative analysis of the functionality of the copyright court process against the surveillance architecture of panopticon theory. This theory is based on a circular prison with cells arranged around a central wall, creating the potential of total, uninterrupted, and, permanent observation.[94]

The purpose of this comparative approach is to enable the reader to understand the rationale behind rightsholders employing the tactics discussed and the effect of the current copyright regulation in the digital world. This also includes analysing how this has removed such items away from the scrutiny of the courts. It will be demonstrated that the formidable power produced by these tactics has meant that users now present themselves as counterpart[s] of a power that endeavor[s] to administer, optimise, and multiply it[self], [under the] precise controls and comprehensive regulations [in copyright law].[95] This will show why users simply engage in "self-censorship" rather than face the expense and risk of litigation.[96] Yet, this is not always the case, and

---

[93] For a general account of the development of the concept of surveillance theories and concepts, see Galič, M., Timan, T. & Koops, B. Bentham, 'Deleuze and Beyond: An Overview of Surveillance Theories from the Panopticon to Participation'. Philos. Technol. 30, [2017] 9–37. at 2.2.

[94] Foucault, M., *Power: The essential works of Foucault 1954-1984* (Volume 3, edited by James Faubion, 2002), pp.58-59; See also, the discussion in this chapter at 2.3.1.1(b).

[95] Foucault, M., "The History of Sexuality" Volume I: An Introduction by Michael Foucault (Translated from French by Robert Hurley) Pantheon Books, New York, (1978), p.137; See also, this chapter at 2.5.

[96] For more information, see chapter 4 *generally,* and more specifically at 4.8; See also, Netanel, N.W., *Copyrights Paradox* (Oxford University Press, 2008), p.112; Heins. M, & Beckles, T., "Will Fair Use Survive? Free Expression in the Age of Copyright Control" ii (New York University Brendan Centre for Justice (2005) ("Threatening 'cease and desist' letters cause many people to give up their fair use rights"); Lanjuow, O.J. & Lerner, J., *"The Enforcement of Intellectual Property Rights: A Survey of the Empirical Literature"* (National Bureau of Econ. Research Working Paper No. 6296, 1997) (stating litigation costs fall most heavily on small firms, which may settle because they cannot afford long-term litigation); Balganesh, S., 'Copyright Infringement Markets' (February 13, 2013). Columbia Law Review, Vol. 113, 2013; University of Pennsylvania, Institute for Law & Economics Research Paper No. 13-7. Available at SSRN: http://ssrn.com/abstract=2233065; (Accessed: 12/5/2015) (Outlined that companies are now reluctant to contest claims against them because of the excessive financial implications of doing so, highlighting that going to court is no longer a viable or desirable option commercially); See also the discussion in this chapter at 2.3 *generally.*

copyright can be said to encourage expressive diversity in some instances through things like the Open Access scheme (OA).[97]

Foucault discusses how the State encourages individual societal cooperation with the rules laid down by it through a system of surveillance. In this system, citizens never know when, or if, they are being watched by the State. This is what makes this method so effective, due to the fact that this surveillance is so far-reaching in its effects, that it gives rise to "infinitesimal surveillances, permanent controls, and extremely meticulous orderings of space."[98]

It is recognised that this analysis does not relate specifically to copyright context per se. However, panopticism is argued to have direct applicability to the discussion in this chapter.[99] This is because the panopticon is a generalisable model of functioning, a way of defining power relations in terms of everyday life.[100] The panopticon, is a form of architecture that makes possible a mind-over-mind-type of power. It is a ring-shaped building in the middle of which there is a yard with a tower at the centre. In the central tower there is an observer who's gaze can traverse the whole cell. Modern society is where panopticism reigns.[101]

---

[97] For more information, see the discussion on (open-access) in chapter 3 at 3.1.

[98] Foucault, M., "The History of Sexuality" Volume I: An Introduction by Michael Foucault (Translated from French by Robert Hurley) Pantheon Books, New York, (1978), p.145.

[99] See the discussion in his chapter at 2.3.1.1, 2.3.1.2 respectively.

[100] Foucault, M., 'Discipline and Punish: The Birth of the Prison' (Trans. Alan Sheridan, Penguin Books 1977), p.205; For a general account of how this theory can be applied to copyright, see Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 8.

[101] Foucault, M., *Power: The essential works of Foucault 1954-1984* (Volume 3, edited by James Faubion, 2002), p.58; Foucault also describes the law, being framed by mechanism of surveillance and correction, as a "disciplinary mechanism" – (See Foucault, M., *Surveiller et Punir. Naissance de la prison* (Paris: Gallimard, 1975); English Translation by A. Sheridan, *Discipline and Punish. Birth of the Prison* (London: Allen Lane and New York: Pantheon, 1977)); See also, Shoshana Zuboff, The age of surveillance capitalism' Public affairs, (2019).

The surveillance approach represents a form of control that stems from what Leyshon et al., described as a "significant defensive strategy" which has "slowly yielded results for record companies, by successfully shutting down infringing networks."[102] It is asserted that this approach has led to what is posited to be a change in consumer attitudes[103] where litigation has been viewed as "deserving of avoidance."[104] Yet, it would seem that the results produced by this approach are mixed,[105] but there has been an overall reduction in the numbers of files shared.[106] Nonetheless, the discouragement of individuals from using digital networks[107] is contended to be designed to limit the amount of infringing material circulating within the capitalist market. This is because file sharing networks were subject to the laws of network economics. In short, they only work well if many people use them[108] and it is economic efficiency, not some other normative conception, is what determines legal prohibition.[109]

---

[102] Leyshon, A., Webb, P., French, S. Thrift, N., & Crewe, L. 'On the reproduction of the musical economy after the Internet' Media, Culture & Society, [2005] 27(2), 177-209.

[103] Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. 'Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions' [2006] Journal of Law and Economics, 49, 91-114.

[104] Balganesh, S., 'Copyright Infringement Markets' (February 13, 2013). Columbia Law Review, Vol. 113, 2013; University of Pennsylvania, Institute for Law & Economics Research Paper No. 13-7. Available at SSRN: http://ssrn.com/abstract=2233065; Accessed: 12/5/2015.

[105] For a general analysis of the effects caused by the litigation here, see this chapter at 2.4.1.

[106] Giletti, T., 'Why Pay if it's Free? Streaming, Downloading, and Digital Music Consumption in the iTunes era' Media@LSE Electronic MSc Dissertation Series [2012], compiled by Dr. Bart Cammaerts and Dr. Nick Anstead.

[107] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch).

[108] Boyle, J., *The Public Domain (*Yale University Press, 2008), p.78.

[109] Posner R. *Economic Analysis of Law (*4th edn, 1992) in J.W. Harris, "Legal Philosophies," second edition, Oxford University Press, pp.48-50.

2.3.1.1 The situation in the UK

In the UK, usually it is the rights holder, as defined in the relevant legislation, who is able to bring an action for infringement.[110] This can also be brought by other parties such as equitable owners whose rights have been breached (but they must join the legal owner before the final judgement can be given).[111] This can also include co-owners of intellectual property,[112] and exclusive licensees.[113] In some cases, courts have allowed representative actions to be brought, mainly by trade associations such as the British Phonographic Industry (BPI).[114]

However, as a result of online piracy in the digital age,[115] rightsholders and their representatives decided to use new methods, namely the practice of speculative invoicing in the copyright industry.[116] The practice concerns the sending of letters before action, which will often be based around alleged copyright infringement online. This procedure involves an entity acting on behalf of copyright holders (under a profit-sharing arrangement) to pursue small-scale infringers. This is achieved by sending letters-before-action to internet subscribers, claiming a substantial sum in relation to alleged violations of copyright from the subscribers internet address.[117] Such information (or evidence) is obtained via the fact that intellectual property right holders are able to obtain a court order requiring a person to reveal information relevant to the

---

[110] This is not the same as the *registered* right holder: see *Xtralite (Rooflights) v. Harrington Conway Ltd.* [2004] *RPC 7,* [25].

[111] *Columbia Pictures Industries v Robinson v. Robinson* [1988] *FSR* 531, 547; *Batjac Productions v. Simitar Entertainment* [1996] *FSR* 139, 149-52.

[112] CDPA 1988, ss. 173(2), 259; *Cescinsky v. Routledge* [1916] 2 *KB* 325.

[113] CDPA 1988, ss. 101, 191L. (if the exclusive license specifically grants the right to bring proceedings); The situation of a bare licensee is somewhat precarious – CDPA 1988, s.101A; *Douglas v. Hello!* [2008] 1 AC 1.

[114] *CBS Songs v. Amstrad* [1988] *RPC 567.*

[115] On 'piracy' see chapter 3 at 3.3 *generally.*

[116] Lobato, R. and Thomas, J., 'The Business of Anti-Piracy: New Zones of Enterprise in the Copyright Wars' [2012] 6 Int J Comm 606.

[117] *Media CAT v. Adams* [2011] *FSR* (28) 679, *Golden Eye International Ltd v. Telefonica UK Ltd* [2012] *RPC* (28) 698.

action[118] under a *'Norwich Pharmacal Order'*.[119] This order remains one of most powerful tools available to rights holders in the fight against online infringement.[120]

Article 8(1) of the EU Enforcement Directive,[121] headed 'Right of information' requires Member States to ensure that judicial authorities may order information on the origin and distribution networks of infringing goods or services to be provided by the infringer and/or any other person, subject to certain factors.[122] This can also include the source of goods and materials.[123] This is in spite of the fact that the CJEU in *Promusicae,*[124]

---

[118] Civil Procedure Rules, r.31. J. Riordan, 'The Liability of Internet Intermediaries' (2016), ch.6, offers a concise account.

[119] *Norwich Pharmacal Company & Ors v Customs And Excise* [1973] UKHL 6, [1974] AC 133 (26 June 1973); These orders were not available in Scottish law. Accordingly, provision was made by the Intellectual Property (Enforcement, etc) Regulation 2006 (SI 2006/1028), reg. 4; See also, Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), Part VI, chapter 21, part 7, section B (v); On *Norwich Pharmacal Orders* see chapter 5 at 5.7.3.3(b)(i).

[120] Sachdeva, A. and McDonald, J., 'The use of Norwich Pharmacal orders to identify online infringers - an old remedy updated for modern times' Entertainment Law Review (2013).

[121] (SI 2006 No. 1028); Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights is a European Union directive in the field of intellectual property law, made under the internal market provisions of the Treaty of Rome; For background, see the Green Paper on combating counterfeiting and piracy in the single market, COM(98) 569 final; the follow-up to the Green Paper, COM (2000) 789 final; and the proposal for the Directive, COM(2003) 46 final.

[122] Namely, under Article 8(1), they would have to be: (a) found in possession of the infringing goods on a commercial scale; (b) was found using the infringing services on a commercial scale; (c) was found to be providing on a commercial scale services used in infringing activities; or (d) was indicated by a person within (a) to (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services. Article 8(2) provides that the information so ordered shall, as appropriate, comprise (a) the names and addresses of the producers, manufacturers, distributers, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers and (b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained.

[123] This is provided for by the Enforcement Dir, Art. 8; it has been made clear that Art. 8 also entitles a person to an order for disclosure after a finding of infringement: *New Wave v. Alltoys,* Case C-427/15, EU:C:2017:18.

[124] Case C-275/06 *Productores de Musica de Espana (Promusicae) v. Telefonica de Espana,* [2008] ECR I-271.

ruled that there was no requirement for these orders in the Information Society Directive, the E-Commerce Directive, or the Enforcement Directive.[125]

There is a need to strike 'a fair balance' between the various fundamental rights protected by the European legal order[126] in a "proportionate" way.[127] In *Media CAT Ltd v Adams & Ors*[128] when asked to grant Norwich Pharmacal relief, the UK Patents County Court had carefully to consider the terms of the draft letter of claim and its impact upon ordinary "innocent"[129] consumers who may not have access to specialised legal advice and who may be embarrassed or distressed at the allegations.[130] This also includes where there was "a good indication" of wrongdoing.[131] Moreover, as discussed below, such orders in this context may prove to be more difficult for applicants following *Mircom International v. Virgin Media* [2019].[132] The fundamental basis of this approach is to "scare" people into paying.[133]

---

[125] Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España* SAU [2008] 2 C.M.L.R. 17 at [57]-[60].

[126] Ibid, at [71].

[127] Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España* SAU [2008] 2 C.M.L.R. 17 at [70].

[128] EWPCC 6 (08 February 2011).

[129] E.g. Just as the noble Lord, Lord Lucas, has said, ("some of these firms are using some extremely unjustified and unpleasant ways against perfectly innocent people. I hesitate to use the word "innocent", but in a sense they are because they have not breached copyright.") – https://publications.parliament.uk/pa/ld200910/ldhansrd/text/100126-0003.htm - at column 1305 accessed: 21/09/2018.

[130] *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch); *Media CAT v. Adams* [2011] *FSR* (28) 679; *Golden Eye International Ltd v. Telefonica UK Ltd* [2012] *RPC* (28) 698.

[131] *Carlton Film Distributors Ltd v VCI Plc* [2003] F.S.R. 47. See to the same effect *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch); at [21] "a wrong must have been carried out, or arguably carried out" and *Eli Lilly and Company Ltd v Neopharma Ltd* [2008] EWHC 415 (Ch); [2008] F.S.R. 25 at [28] (names of customers who were arguably wrongdoers); Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 21-213.

[132] *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch); [2020] F.S.R. 5.

[133] *Media CAT v. Adams* [2011] *FSR* (28) 679, [112].

There have also been explicit judicial recommendation in the UK that this procedure should be the subject of further regulation to prevent these abuses.[134] However, there have been no moves to do so as of yet, but Lord Lucas expressed that the orders should not be given too easily.[135]

Attempts to threaten infringement proceedings in the digital age became a particularly public concern following a number of people receiving letters from solicitors such as ACS Law, and Davenport Lyons. These firms began speculative invoicing campaigns where compensation was demanded for alleged copyright infringements discovered through the monitoring of Internet IP addresses in 2012.[136] These campaigns targeted groups who were legally and technologically 'unaware'.

For example, sixty-year-old 'Mary' from Bedfordshire received a letter threatening legal action. She stated that, "I'm a pensioner, so it was such a shock. I didn't even know what file-sharing was before this," and "I didn't sleep for a week" she stressed.[137] Lord Lucas, commenting on the issue, stated in the House of Lords that the "process

---

[134] Judge Birss QC suggested that safeguards might be needed to prevent abuse of *Norwich Pharmacal* orders in this way. He suggested that a group under CPR, Pt 19, might be a potential safeguard - *Media CAT v. Adams* [2011] *FSR* (28) 679, [112]; However, in *Golden Eye International Ltd v. Telefonica UK Ltd* [2012] *RPC* (28) 698, [142], Arnold J offers several reasons why such orders are unlikely to work along the lines of them being "disproportionate" - *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012) at [36].

[135] <https://publications.parliament.uk/pa/ld200910/ldhansrd/text/100126-0003.htm> ("we must have something to make sure that Norwich Pharmacal orders are not given, willy-nilly, to people who have not gone through this procedure. We have produced some comfort for the citizen in the Bill; we must at least make sure that judges consider whether or not this procedure should be used before Norwich Pharmacal orders are granted") -Lord Lucas at column 1309 accessed: 21/09/2018.

[136] Griffin, J. and Nair, A., 'Making threats of copyright infringement' [2013] International Review of Law, Computers and Technology; Fiveash, K. 'Judge mulls "wasted costs" as ACS: Law cases close,' The Register, available at <http://www.theregister.co.uk/2011/03/17acs_law_cases_closed_judge_considers_costs/> accessed: 22/8/2014; Williams, C., 'Anti-piracy lawyers 'knowingly targeted the innocent', says law body,' The Register, available at http://www.theregister.co.uk/2010/11/19/davenport_lyons_sra/ (last accessed: 24/8/2014); See also, http://www.guardian.co.uk/technology/2011/mar/17/acs-law-file-sharing accessed: 15/8/2016.

[137] <http://news.bbc.co.uk/newsbeat/hi/technology/newsid_7766000/7766448.stm> accessed: 19/05/2017.

produced a great deal of stress and indignation amongst many of our citizens...for redress of copyright-related issues."[138]

The effect of this meant that consumers were operating in an environment of "widespread uncertainty"[139] when faced with the prospect of legal action. To explain further, recipients carrying out their daily activities online[140] now become the new panopticon inmate, the observed individual who tries to keep his activity secret. [141] This is because copyright law has arguably enabled legal owners to exert more control over the activity of recipients, which might be legally borderline. On the other hand individual recipients may feel free to copy unaware they are infringing certain copyrights. This may increase the issues resulting from uncertainty – a rightsholder could use the system to bring actions against content recipients who are more likely to have less knowledge of the legal system.[142]

The extent of these figures whereby settlement was demanded totalled up to £500 using its speculative invoicing procedure.[143] Guy Trittion, a barrister acting on behalf of alleged file-sharers, argued that two companies who instructed ACS to act for them, wasted court time. He highlighted that they had "no intention of following through with the trial and had merely used the threat of legal action as a means to squeeze money from those targeted in the letter-writing campaign."[144] The solicitors representing those engaging in the speculative model had their independence compromised because of

---

[138] <https://youtu.be/dwKbQVzRHEg Per Lord Lucas at 4:40-4:56> accessed: 09/07/2018.

[139] Griffin, J. and Nair, A., 'Making threats of copyright infringement' [2013] International Review of Law, Computers and Technology.

[140] *Media CAT v. Adams* [2011] *FSR* (28) 679, *Golden Eye International Ltd v. Telefonica UK Ltd* [2012] *RPC* (28) 698.

[141] Adorno, T.W., *The Culture Industry* (Edited by J. M. Bernstein, Routledge Classics 1991), at 94-96.

[142] Griffin, J. and Nair, A., 'Making threats of copyright infringement' [2013] International Review of Law, Computers and Technology; See also, IPO press release, at http://www.ipo.gov.uk/about/press/press-release/press-release-2012/press-release-20121001.htm accessed 30/4/2013.

[143] <http://www.guardian.co.uk/technology/2011/mar/17/acs-law-file-sharing> accessed: 15/8/2016.

[144] Ibid; It is also worth noting that the individual who brought the infringement cases from ACS law was severely disciplined for his actions, being suspended from practice for 2 years, – https://torrentfreak.com/acslaw-anti-piracy-lawyer-suspended-for-2-years-120116/ accessed: 12/06/15.

the “financial interest” they had in the process,[145] as well as “expecting to earn as much as £3 Million from [their] work.”[146]

Murray notes that ACS law became a “beacon for consumer anger”[147] as it developed a business model based on speculative invoicing, acting for a small number of clients such as Media CAT Ltd. These are businesses that were given contractual permission by copyright holders to “inquire, claim, demand, and prosecute, through the civil courts where necessary any person or persons identified as having made available for download [material] that has expressly licensed [by agreement].”[148]

In *Media CAT Ltd v Adams*[149] there was mention of 10,000 letters being sent out after a *Norwich Pharmacal* application that were served to Internet Service Providers (ISPs) where the identity of subscribers was obtained. The letters would be sent out, threatening litigation if the subscriber did not pay up. It took nearly three years to get some cases to full hearing, and HH judge Birss QC was outraged by the process. He stated that the letter writing campaign was:

> “founded on the threat of legal proceedings such as the claims before this court...simple arithmetic shows that the sums involved in the Media CAT exercise are considerable. 10,000 letters for Media CAT claiming £495 each would still generate about £1 Million if 80% of the recipients refused to pay and only the 20% remainder did so...I cannot imagine a system better designed to

---

[145] ACS law were set to receive 65% of the revenues from the letter writing exercise, much greater than the Media CAT client - *Media CAT Ltd v. Adams* EWPC 006, [41], [98]-[102]; Also, HH Judge Birss QC remarked, in a later hearing, that “It also seems to me as separate matter that there is a good arguable case that Mr Crossley's admitted revenue share from the letter writing campaign meant that he stood personally to benefit from success in the proceedings. The causes of action were all the same and victory for Media CAT in one of the court actions would obviously have boosted the revenues from the letter writing campaign” – *Media CAT Ltd v. Adams* [2011] EWPCC 010 at - [99]; *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch), Note 1; Flaux J in Ramilos v Buyanovsky [2016] EWHC 3175 (Comm) at [23].

[146] *Media CAT Ltd v. Adams* [2011] EWPCC 010 (18/04/2011) at - [93].

[147] Murray, A., *Information Technology law: The Law and Society* (2nd edition, Oxford University Press, 2013), at 288.

[148] *Media CAT Ltd v Adams* [2011] EWPCC 006, [5].

[149] EWPCC 6 (08 February 2011).

create disincentives to test the issues in court. Why take cases to court and test the assertions when one can just write more letters and collect payments from a proportion of the recipients?"[150]

The operationality of the procedure is as follows. An owner of copyright employs a device to highlight IP addresses that are perceived to be connected to apparent infringements. When they are identified, a legal letter is then issued with three key points. These are that: 1) a transgression of copyright has been committed; and 2) if the matter proceeds to court the defendant will be pursued for a significantly large sum of money; (or) 3) the defendant can simply settle and the matter will be stopped."[151]

These matters came to a head in the UK regarding speculative invoicing in the case of *Golden Eye international Ltd v. Telefonica UK Ltd*,[152] presided over by Mr. Justice Arnold. The claimant was involved in making pornographic films and sought a *Norwich Pharmacal* order against a large ISP. This was to obtain disclosure of the names and addresses of more than 9,000 customers who were alleged to have committed infringements of copyright through file-sharing using the Bit Torrent protocol.[153] The ISP did not oppose the application, but the court benefitted from an intervention from the Consumer Rights Group (Consumer Focus) who represented 'real defendants' – namely those whose names would be revealed. Justice Arnold observed the key factor in making a judgement was its 'proportionality'.[154] This involves balancing the need to

---

[150] *Media Cat Ltd v Adams* [2011] EWPCC 006, [98]-[102].

[151] <https://youtu.be/dwKbQVzRHEg Per Lord Lucas at 1:17-2:53> accessed: 09/07/2018.

[152] *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012); EWCA Civ 1740; [2013] Bus. L.R. 414 (CA (Civ Div)); *Totalise plc v Motley Fool Ltd* [2001] EWCA Civ 1897, [2002] 1 WLR 1233; *Rugby Football Union v Viagogo Ltd* [2011] EWCA Civ 1585. Applied *in Santander UK Plc v National Westminster Bank Plc* [2014] EWHC 2626 (Ch); [2014] 7 WLUK 1124; CHD; 31 July 2014.

[153] For a comprehensive account of the workings of the BitTorrent P2P protocol see *Dramatico Entertainment Limited v British Sky Broadcasting Limited* [2012] EWHC 268 (Ch) [19] - [20]; See also, Hyland, M., 'The seductive interface between adult entertainment and Norwich Pharmacal relief' Communications Law, Bangor University law School, [2013].

[154] A number of factors must be weighed up. For more information, see – *Rugby Football Union v. Viagogo Ltd* [2012] 1 WLR 3333, [45] (Lord Kerr of Tonaghmore JSC); On '*proportionality*' in this context, see chapter 5 at 5.7.3.3(b)(i).

protect property rights,[155] and the need to preserve privacy under Article 8 of the European Convention on Human Rights (ECHR).[156]

In his judgement, Justice Arnold described the practice as involving the sending of letters before action to thousands of internet subscribers whose internet connection is alleged to have been used for small-scale copyright infringement. This also included those whose names and addresses had been obtained by means of Norwich Pharmacal Orders[157] against their ISPs. He dissented that:

> "The tactic is to scare people into paying the sums by threatening to issue court proceedings. If this does not work, proceedings are not normally issued. This is because the economic model for speculative invoicing means that it is more profitable to collect monies from those who pay rather than incur substantial costs in pursuing those who do not pay in court."[158]

The economic realities of the tactics used meant that "Golden Eye was chasing a Golden Egg*"*[159] since the company stood to collect between 25% and 37.5% of the money (which was a handsome £700 by way of compensation or potentially face court) that it collected for the other claimants if *Consumer Focus* did not intervene in the issue.[160] However, despite such factors, it was ruled in *Golden Eye*[161] that it was necessary and proportionate to reveal the identities of those whose IP addresses appeared to be implicated in illegal file-sharing as without such data, the copyright

---

[155] ECHR, First Protocol, Art. 1; Charter, Art.17(2).

[156] ECHR. Art.8(1); Charter, Art. 7; See also, Case C-275/06 *Productores de Musica de Espana (Promusicae) v. Telefonica de Espana,* [2008] ECR I-271.

[157] *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] AC 133, HL and Civil Procedure Rules, Part 31 rule 31.18. (A Norwich Pharamacal Order is to find out the identity of an allaged wrongdoer, regardless of whether it was carried out unwittingly). These orders are not restricted to claims in tort – *Ashworth Hospital Authority v MGN Ltd*, [2002] 1 WLR 2033.

[158] *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012) at [36].

[159] <http://ipkitten.blogspot.com/2012/04/700-demand-letters-no-golden-egg-for.html> accessed: 22/07/2018.

[160] Ibid.

[161] *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012).

owner would find it seemingly impossible to enforce his rights in an otherwise uncertain environment. Yet, it is important to note that Norwich pharmacal orders in this context may now prove more difficult for applicants following *Mircom International v. Virgin Media* [2019][162] (discussed below). Despite this, it is contended that the Norwich Pharmacal order is still available, implying that the courts provide "predictable legal consequences in capitalist society"[163] where judges are often "professionalistically unconcerned in the results of these legal disputes."[164]

However, the courts still provide a necessary check on the power of copyright holders and it is submitted that without such an intervention, the power held by the claimants in *Golden Eye* would have been devoid of judicial scrutiny and the letters would have, in fact, acted to scare individuals into financial settlement in a copyright-based "money-making exercise."[165] This process is asserted to enhance the ability of rightsholders to enforce and administer copyright legal regulation outside of judicial scrutiny. This is because the potentiality of high costs in matters going to court has meant that the "threat or potentiality of an action may influence the individual more than if the action itself were to actually happen."[166]

---

[162] *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch); [2020] F.S.R. 5.

[163] Trubek, D.M., 'Max Weber on Law and the Rise of Capitalism' Faculty Scholarship Series [1972] Paper 4001, Available at: <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4993&context=fss_papers> accessed: 12/9/2014.

[164] Gilmore, 'From Tort to Contract: Industrialization and the Law' Book Review, 86 Yale L. J. (1977) at 789 in Morton Horwitz, 'Transformation of American Legal History', Vol. 23, Issue 4 23 William & Mary Law Review 663 (1982).

[165] Katharine Stephens, Zoe Fuller and Hilary Atherton, 'Copyright: Norwich Pharmacal orders against ISPs' C.I.P.A.J. [2013], 42(1), 45.

[166] Frank, J. *Law and the Modern Mind* (New York: Tudor Publishing, 1949) chapter 1; Griffin, J. and Nair, A., 'Making Threats of Copyright Infringement' [2013] International Review of Law, Computers and Technology; Mazzone, J., 'Copyfraud' Brooklyn Law School, Legal Studies Paper No. 40; New York University Law Review, Vol. 81, [2006] at 1026 - available at SSRN: <http://ssrn.com/abstract=787244> accessed: 22/5/2015.

Therefore, in cases like *Media CAT v Adams*, "both the claimant and the various copyright owners that it was representing received considerable income from the business model without any cost to them."[167] This was made possible by the threat of potential proceedings in the event of non-payment because there no intention to initiate such a course of action despite the letters being "founded on the threat of legal proceedings."[168] Also, the sums demanded in the letters included damages and "ISP administration costs (and legal costs where applicable) with no breakdown."[169]

However, when challenged at court, Media CAT and ACS Law attempted to issue notices of discontinuance. The notices are to designed to bring a case to an end where a claimant decides that they want to terminate proceedings after starting a claim in order to end the legal process, under Rule 38.2(1).[170] This was in order to avoid judicial scrutiny of the sums procured by using copyright law in which to base the claims, and then the process of the court, in an attempt to mask the nature of their activity.

In a damning verdict, HH Judge Birss, whilst throwing the case out, gave the following commentary:

> "The question in my judgement is whether the effect the notices of discontinuance undoubtedly have bringing these cases to an end and thereby terminating any scrutiny by the court of the claims is an unwarranted advantage to Media CAT amounting to an abuse of the courts process...Media CAT and ACS:Law have a very real interest in avoiding public scrutiny of the cause of action because parallel to the 26 court cases, a wholesale letter writing

---

[167] *Media CAT Ltd v. Adams* [2011] EWPCC 010 (18/04/2011) at - [99].

[168] *Media CAT Ltd v Adams* [2011] EWPCC 006, - [98].

[169] *Media Cat Ltd v Adams* [2011] EWPCC 006, [19].

[170] Civil Procedure Rules, Part 38 – Notice of Discontinuance; *Advantage Insurance Co Ltd v Stoodley & Anor* [2018] EWHC 2135 (QB) (09 August 2018) - Under the UK Civil Procedure Rule 38.2(1), where the claimant discontinues the defendant may apply to have the notice of discontinuation set aside; On the tactical reasons for doing so, see *Brian Kite -v- The Phoenix Pub Group* [2015]; *Renwick and Mitchell v Markerstudy Insurance Co Ltd* [2015]; *Edwards v Bristol City Council* [2017]; *Issa -v- Bristol City Council* [2017]; <https://www.hilldickinson.com/insights/articles/beware-tactical-use-notice-discontinuance> accessed: 20/09/2018.

campaign is being conducted from which proceedings such as the claims before this court."[171]

It is asserted that items such as those discussed in this section will not be the last to surface in the UK legal system, but such occurrences may be limited following the recent Court of Appeal decision in *Mircom International v. Virgin Media* [2019][172] where there now appears to be a requirement, by applicants, to prove they have a "*genuine intention*"[173] of obtaining legal redress.[174] This is considered to be of vital importance, because the existence of companies like Mircom and Golden Eye, were submitted, by Virgin Media, in the case, to be entirely based on "obtaining disclosure orders of this kind, making threats of infringement and offering to settle for a fixed fee…"[175]

Therefore, it can be said that in any future application for such an order, the court will expect to see credible evidence by those making an application that they have a genuine intention to obtain redress for the infringement as opposed to simply trying to "*shakedown*" defendants in a "*money-making scheme*" (in Virgin Media's words) embarrassed individuals.[176] In spite of this, it is nonetheless argued that the initial point remains, simply that the issues brought about in cases like *Media CAT* will not be the last to surface in the UK. The reason for this is because there is no specific provision to deal with threats of legal action under copyright law. Specifically, this relates to when a copyright work is being re-used. Interestingly, the UK does not actually have a specific system to deal with copyright threats – instead, an action needs to be brought for a declaration of non- infringement, abuse of process (which is limited)[177]

---

[171] *Media CAT Ltd v. Adams* [2011] EWPCC 006, at [98]-[101].

[172] *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch); [2020] F.S.R. 5.

[173] Ibid at [54]-[60].

[174] Fiona Clark, Cases on Intellectual Property Law, Fleet Street Reports, [2020] 93-186 at 110-128.

[175] *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch) at [6] – (This was not specifically disputed by the Applicants, eg by identifying any other business activities conducted by Mircom or Golden Eye).

[176] *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch) at [54].

[177] *Grainger v. Hill* [1838] 4 *Bing* NC 212. (132 *ER* 769). On the limits of the limits of the action, see *Pitman Training v. Nominet* [1997] *FSR* 797; *Essex Electric v. IPC Computer* [1991] *FSR* 690. On

or malicious falsehood (which is also limited).[178] Moreover, the 'malice' required is often difficult to define and seems to require that the threat must be issued with a view to injuring the claimant rather than defending the defendant's rights. However, an honest belief in an unfounded claim is otherwise considered to lack the necessary maliciousness.[179]

Despite the conceptual difficulties this represents, these are considered to be further exacerbated by the European Commission Report, *Communication: Towards a modern, more European, copyright framework* (2015).[180] In this, the Commission stated that it intended to engage with all parties to set up and apply "follow-the-money" enforcement mechanisms.[181] However, given the apparent judicial distaste for such actions,[182] it can be said that the potential of similar campaigns happening again is unlikely.

In spite of this, it is asserted that the only reason why such items received such scrutiny is because they were challenged by an intervention that caused the matter to get to

---

the distinction between the tort of abuse of process and malicious prosecution, see *Speed Seal Products v. Paddington* [1986] 1 *All ER* 91 (Fox LJ).

[178] *Greers v. Pearman and Corder* [1922] 39 *RPC* 406, 417; Davies, G., Garnett, K., Harbottle (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), ibid., at 13-179; Laddie, J., Prescott, P., Vitoria, M., and Lane, L., *The modern law of copyright and designs* (Lexis Nexis Butterworths, 2018) at 39.94.

[179] *Greers v. Pearman and Corder* [1922] 39 *RPC* 406, 417; *Polydor v. Harlequin* [1980] *FSR* 26, 31.

[180] COM (2015) 626 final, December 9, 2015, p. 11, following on from its Communication A Digital Single Market Strategy for Europe (COM(2015) 192 final) para. 2.4; See also, <https://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud accessed> January 12, 2018.

[181] Examples of the "follow-the-money" approach are persuading advertisers not to advertise on websites which sell counterfeit goods and persuading payment providers to block financial transactions between the operators of such sites and advertisers and consumers. See "'Follow The Money': Financial Options To Assist In The Battle Against Online IP Piracy A Discussion Paper by Mike Weatherly
MP" <http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf> accessed January 27, 2018.

[182] *Media CAT Ltd v. Adams* [2011] EWPCC 006; *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012).

court.[183] As such, if this was not the case, it is argued that the issues associated with the system remain the same. This is because claimants rely on "scaring people into paying the sums by threatening to issue court proceedings."[184] Therefore, it is the 'threat' aspect where these letters carry their weight. Thus, it is submitted that speculative invoicing still represents a potential problem for users in the current UK copyright system. This is because when faced with allegations of infringement, and the fact that the UK does not actually have a specific system to deal with copyright threats, the accused would "rather pay than incur substantial costs...in court."[185]

Yet, there does seem to be improvement regarding taking the litigation element out of infringement allegations in light of the UK Government report titled *Copyright Education and Awareness*.[186] In this report, it announced that it would contribute £3.5 million to a three-year public education campaign called Creative Content UK (CCUK) (previously known as VCAP) in 2016.[187] This scheme was negotiated between the

---

[183] The court benefitted from an intervention from the Consumer Rights Group (Consumer Focus) who represented 'real defendants' – namely those whose names would be revealed - *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012).

[184] *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012) at [36].

[185] *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012) at [36]. This approach may also be considered as "disproportionate" – See (*Rugby Football Union* v *Consolidated Information Service* [2012] UKSC 55; *Twentieth Century Fox Film Corp. v. British Telecommunications Plc* [2011] *EWHC* 1981 (Ch), [2011] *RPC* 855; *Paramount Home Entertainment International v. British Sky Broadcasting Ltd* [2013] *EWHC* 3479 (Ch), [2014] *ECDR* (7) 101; *Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd* [2012] *EWHC* 268 (Ch), [2012] 3 *CMLR* (14) 328; *Twentieth Century Fox Film Corp. v. British Telecommunications Plc* (No.2) [2011] *EWHC* 2174 (Ch); *Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd (No.2)* [2012] *EWHC* 1152 (Ch), [2012] 3 *CMLR* (15) 360; M. Husovec, 'Injunctions against Innocent Third Parties: The case of Website Blocking' [2013] JIPITEC (arguing that these remedies signify a transformation in the nature of remedies from tortious to *in rem*).

[186] Weatherly, M., 'Copyright Education and Awareness: A Discussion Paper' [2014].

[187] There has been significant investment in raising awareness of the value of copyright to a variety of audiences: The Office for Harmonization in the Internal Market (*OHIM) has a list of 147 IP awareness and education projects across the EU listed on the Observatory website: <https://oami.europa.eu/ohimportal/en/web/observatory/public-awareness*-campaigns>; VCAP

music and film industry and four ISPs (BT Virgin, Sky, and TalkTalk) and is modelled upon the 'copyright alert system' that was voluntarily adopted in the United States.[188]

However, it should be noted that the CCUK scheme aimed to "*send millions of educational notices*" and "*subscriber alerts*" to those detected by copyright owners as infringing their content. Specifically, this concerned "*unlawful*" [189] the operation of BitTorrent networks (which will often reveal an individual's IP address to the public and this can be visible to copyright owners.[190] Under the scheme, there is a twenty day period of grace between letters. Thus, if you are a repeat infringer then you will not see another message until twenty days after the initial first letter.[191] Yet, there are concerns that this could be spun into a threat of legal proceedings or something similar thereof.[192]

Under the current copyright system, it is argued that the current CCUK scheme could be used to issue threatening letters in order to use the CCUK scheme as a assistive mechanism. In order to do so, it is reasonable to assert that the alerts under the scheme could be reworded in a way that attempts to induce payment, but in a less obvious manner than the method adopted by ACS law under the umbrella of the scheme. The concern is that this would have the effect of potentially avoiding judicial scrutiny or any liability (on part of those issuing the letters). Also, it is unlikely that any further claims can be brought for an abuse of process (as it is not a court claim). Thus,

---

(Voluntary Copyright Alert Programme); Weatherly, M., 'Copyright Education and Awareness: A Discussion Paper' [2014], at 12-15.

[188] Similar schemes have been adopted or are being considered elsewhere, often facing substantial opposition: see, e.g., S. McVicar and C. Roche, 'Proposed Amendments to Australian Copyright Act to Tackle Online Piracy will Increase Obligations on ISPs' [2015] *EIPR* 120.

[189]<http://www.ispreview.co.uk/index.php/2017/01/big-uk-isps-send-first-internet-piracy-warning-letters-month.html> accessed: 22/1/2017)

[190] Ibid.

[191]<http://www.ispreview.co.uk/index.php/2017/01/big-uk-isps-send-first-internet-piracy-warning-letters-month.html> accessed: 22/1/2017)

[192] <https://www.ispreview.co.uk/index.php/2018/04/nobody-wants-to-talk-about-uk-isp-internet-piracy-alert-emails.html> accessed: 06/05/2019.

it remains likely that under the current system that rightsholders can "continue to ride the 'gravy train' of letter-writing in the absence of court supervision."[194]

In turn, this could also be an instance where the lack of specific systems to deal with copyright threats in the UK again proves to demonstrate that matters (like the *ACS Law Saga*) will not be the last to surface in the UK legal system. This is significant as there are no provisions in copyright for persons subject to unjustified threats of litigation. They have to seek alternative remedies to combat such items.[195] There are, however, special provisions that offer remedies against unjustified threats to litigate elsewhere in intellectual property law.[196] For example, in the case of patents, trademarks, registered designs, the unregistered right, and community designs, whether registered or registered[197] and this has caused writers to question whether the current system of threats in copyright is still justified.[198]

It is also suggested that the lack of specific threats provisions to deal with claims could lead to further copyright infringement claims being monetized. For example, despite a general prohibition on trading litigation (otherwise known as 'champerty')[199] the UK courts have permitted copyright holders to delegate to third parties decisions about whether to bring litigation, in exchange for a percentage of returns.[200] Moreover, in March 2017, Broadband customers in the UK from both Sky, and Virgin Media, were

---

[194] *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch) at [54]

[195] This also applies to passing off and breach of confidence; For a general discussion, see *Reckitt Benkiser UK v. Home Pairfum* [2004] *FSR* (37) 774.

[196] See I. Davies and T. Scourfield, 'Threats: Is the Current Regime Still Unjustified?' [2007] *EIPR* 259; Schwartz, G., and Gardner, M., 'Groundless Threats of Proceedings for IP Infringement' [2006] Communications Law 85; For copyright, one potential avenue for those who have suffered damage from an unjustified threat can seek a declaration of non-infringement: see *Leco Instruments v. Land Pyrometers* [1982] *RPC* 133, 136.

[197] Community Design Regulations 2005 (SI 2005/2339), [2].

[198] See I. Davies and T. Scourfield, 'Threats: Is the Current Regime Still Unjustified?' [2007] *EIPR* 259

[199] A contract is void as contrary to public policy where it is for maintenance and champerty. They are no longer independent torts or crimes: see Criminal Law Act 1967, ss.13, 14.

[200] *Golden Eye International Ltd v. Telefonica UK Ltd* [2012] *RPC 28;* [2013] *RPC* (14) 452. On the emergence of anti-piracy businesses, see Lobato, R. and Thomas, J., 'The Business of Anti-Piracy: New Zones of Enterprise in the Copyright Wars' [2012] 6 Int J Comm 606.

the subject of a wave of almost identical letters of a similar nature, and which also demanded cash to make these supposed lawsuits 'go away'.[201]

Solicitor, Michael Coyle, who represented defendants in the 2012 ACS legal action, stated that the proceedings were an abuse of process[203] and the "serious money" involved[205] meant that the "whole process [was] indiscriminate and cause[d] immense worry and suffering."[206] It is suggested that such items are likely to be exacerbated by the fact that in the UK, the Digital Economy Act 2017,[207] has granted a significant extension of the term of imprisonment for online infringement from two years to ten under the CDPA.[208] Considering this, it is contended that such a measure could assist copyright trolls in obtaining settlements due to the fact that settlements could be obtained under the guise of the criminal law in the same way that law can be said to "coerce"[209] the thief to use the market.[210]

In the words of Cornish, this is because "the industry faces a problem that has always vexed it. The State is willing to treat copyright-taking as a civil wrong on generous terms, but it is prepared to fund the policing of naked commercial piracy through

---

[201]<https://torrentfreak.com/received-a-piracy-letter-uk-solicitor-will-defend-you-for-free-150320/>(March 20, 2015) (Accessed: 27/4/2016)

[203]<https://www.ispreview.co.uk/index.php/2015/03/solicitor-offers-free-defence-for-victims-of-uk-internet-piracy-letters.html> (Accessed/27/4/2016).

[205]<https://torrentfreak.com/received-a-piracy-letter-uk-solicitor-will-defend-you-for-free-150320/> (March 20, 2015) (Accessed: 27/4/2016); *Media Cat Ltd v Adams* [2011] EWPCC 006, [98]-[102].

[206] Ibid.

[207] <http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0087/17087.pdf> (Last accessed: 21/11/2016); Felipe Romero-Moreno and James G.H. Griffin, 'The UK's criminal copyright proposals in an era of technological precision' E.J.L.T. 2016, 7(2), Internet.

[208] CDPA 1988 s.107(1)(a)+(b)+(d),(e), (2)(a),(2A), (4)(b), (4A)(b); It is not yet confirmed what would be considered to be an industrial scale.

[209] Posner, R., *Economic Analysis of Law* (4th ed) at 251-52.

[210] Wisniewski, J.B., *The Economics of Law, Order, and Action: The Logic of Public Goods* **(**Routledge 2018); (e.g. capitalist transactions are unjust, then, in so far as they are *coerced*) – Carling, A.H., *Social Division* (Verso Books 1991) at 145.

criminal law."[211] Therefore, it is argued that legislation like the Digital Economy Act 2017 is another example of the State responding to the needs of rightsholders via criminal law.[212] Similarly, the current passage of the European Union Directive on Copyright in the Digital Single Market (hereinafter ECDM)[213] has been described as a policy tool for the copyright industry[214] that protects the interests of incumbent right holders in the digital age.[215] Thus, it can be said that the group which owns and controls the means of production in the copyright system (which here are rightsholders)[216] are able, by virtue of their economic power, to use the State as an instrument in which to achieve their commercial aims.[217]

2.3.1.1(a) Implications for information service providers following recent developments.

On September 24 2015 the European Commission also launched a consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy. Significantly, the consultation includes questions relating to whether online intermediaries should be subject to a duty of care

---

[211] Cornish, W., Intellectual Property: Omnipresent, Distracting, Irrelevant (Oxford University Press 2004), p.59; See also, Felipe Romero-Moreno and James G.H. Griffin, The UK's criminal copyright proposals in an era of technological precision, E.J.L.T. 2016, 7(2).

[212] *Murphy* v *Media Protection Services Ltd* [2012] EWHC 529 (Admin); [2012] 3 WLUK 262; Copyright, Design and Patents Act 1998 s.297(1); ("Europol wipes out 30,000+ piracy sites, three suspects cuffed to walk the legal plank using website take-downs") - https://www.theregister.co.uk/2019/12/02/europol_30000_piracy_sites/ (Accessed: 21/02/2020).

[213] COM/2016/0593 final - 2016/0280 (COD).

[214] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [28].

[215] *Kretschmer, "European Copyright Reform: is it possible?" (7 May 2019), re:publica19*, https://www.youtube.com/watch?v=ZyujNlpxu9k[Accessed 30 October 2019] - Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [40].

[216] Travis, H., Copyright Class Struggle: Creative Economies in a Social Media Age, Entertainment Law Review, (2019), 30(4), 133-135.

[217] Miliband, R., The state in Capitalist Society: The analysis of the Western system of Power, Quartet books London, (1973), p.22; See also, Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [28].

in relation to illegal content.[218] It is postulated that such items will only serve to enhance the power of letter campaigns, which in accordance with the lack of specific defences, can only serve to compound such factors.

In the UK, platforms such as YouTube are not responsible for copyright violations (although internet service providers can be),[219] as long as the platform has no 'actual knowledge'[220] of unlawful activity or information. However, when such knowledge or awareness is obtained, it must act expeditiously to remove or disable access to the information.[221] This encourages the so-called 'notice-and-take-down' relationships,[222] or where such material reappears, a notice-and-stay-down relationship.[223]

Under this, if a rightsholder provides notice, the service provider will take the material down or otherwise risk losing the immunisation from liability following the ruling of the CJEU *L'Oreal SA v eBay.*[224] However, the service of a notice is not, a precondition to a finding that the ISP had actual knowledge of another person using its service to

---

[218] https://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud [Accessed March 21, 2017]; See also, Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 21-08.

[219] C. Angelopoulos, European Intermediary Liability in Copyright (Wolters Kluwer, 2017); J. Riordan, The Liability of Internet Intermediaries (Oxford, 2016); G. B. Dinwoodie (ed.), *Secondary Liability of Online Service providers* (Springer 2017); See also, the laws on accessory liability in the UK and störerhaftung in Germany under s 1004 of the German Civil Code.

[220] The phrase 'actual knowledge' is, under CDPA 1988 s.97A(2), a question of fact to be determined by the court by taking into account all of the matters which appear to the court to be relevant, although the court is required to have regard to the question of whether the ISP has received notice of the infringement, the notice specifying the full name and address of the sender of the notice and details of the infringement in question.

[221] e-Commerce Regs, reg. 19 (based on e-Commerce Dir., Art. 14). On the Knowledge standard, see Case C-324/09 *L'Oreal SA v eBay International AG*, [2011] ECR I-6011, [116] (Grand Chamber), [118]-[124] (awareness of facts or circumstances on the basis of which a diligent economic operator should have realized that [the activity was illegal].

[222] Case C-324/09 *L'Oreal SA v eBay International AG*, [2011] ECR I-6011, [116] (Grand Chamber).

[223] *Societe de Producteurs en France v. Google, No. 11-13,666* (French Supreme Court, 12 July 2012).

[224] *L'Oreal SA v eBay International AG,* Case C-324/09, EU:C:2011:757, [AG155] (AG Jaaskinen).

infringe copyright. It is simply a matter to which the court must have regard.[225] In deciding what constitutes 'actual knowledge' is not to be considered too strictly. For example, in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* (No.2)[226] the defendant website in question facilitated the copying of sound recordings and indeed the vast majority of uses amounted to infringement.

The significance of this procedure in accordance with the current environment is that there is little protest from the website-holders who inevitably lose out, despite a procedure available for objecting. What is seen here is a "combination of legal process and technology that begins to offer rightsholders an immediate weapon of mass action."[227] Adding to this, Recital 64[228] states that Online Content Sharing Service Providers (OCSSPs) carry out acts of communication to the public when they give access to works/subject matter uploaded by their users, meaning they become directly liable for their users uploads.[229]

Yet, despite there being a prohibition on 'general monitoring' i.e. rightsholders placing an obligation on service providers under the e-Commerce Directive,[230] Article 15(1),[231] can help to counteract any overzealous operationality of these provisions. The section

---

[225] *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch).

[226] *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 1152 (Ch). See also, *EMI Records Ltd v Briitsh Sky Broadcasting Ltd* [2013] EWHC 379 (Ch).

[227] Cornish, W., Intellectual Property: Omnipresent, Distracting, Irrelevant (Oxford University Press 2004), p.59.

[228] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.) (Text with EEA relevance).

[229] DSM Directive art.17(1). On the complex CJEU case law on communication to the public, see Quintais, J.P., "Untangling the hyperlinking web: In search of the online right of communication to the public",= (2018) 21 J. World Intell. Prop. 385 – in Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [38].

[230] 2000/31/EC.

[231] For discussion, see C. Angelopoulos, European Intermediary Liability in Copyright (Wolters Kluwer, 2017) 100-5; Art. 15. Recital 47 States: 'Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.'

states that Member States shall not impose a general obligation on providers when providing the services covered by Articles 12, 13, and 14, to monitor the information which they transmit of store, nor a general obligation to actively seek facts or circumstances indicating unlawful activity.[232]

In *Scarlet v. SABAM,*[233] the Court of Justice of the European Union (CJEU) had to decide whether the prohibition in Article 15 was breached. This concerned an order requiring an internet service provider (whose system had been used as a vehicle to facilitate file sharing) to screen all content uploaded to filter and thus identify musical works in which the claimant held copyright.[234] The court also considered the roles of Article 3 of the Enforcement Directive 2004 and Article 16 of the Charter of Fundamental Rights.[235] The key question was whether the system would "require an intermediary provider, (such as an ISP), actively monitor *all the data* of each of its customers in order to prevent a future infringement of intellectual property rights."[236]

Ultimately, the CJEU confirmed its ruling in *L'Oreal*, namely that national courts have jurisdiction to order injunctions against online service providers to prevent future infringements of copyright. In doing so, it dismissed the blocking order in the *SABAM* case because it would have been 'disproportionate' to require ISP's to actively engage in obligatory monitoring of its customers for an indefinite period.[237]

---

[232] A derogation in Art. 15(2) allows member States to require information society service providers promptly to inform 'competent public authorities' of alleged unlawful activities; Also, what happens when a platform has been required to take down specific material, can it be required to ensre that no user uploads the same material again? – see *Societe de Producteurs en France v. Google, No. 11-13,666* (French Supreme Court, 12 July 2012).

[233] Case C-70/10 [2011] *ECR* I-11959 (ECJ).

[234] Case C-70/10 *Scarlet Extended v. SABAM,* Case C-70/10 [2011] *ECR* I-11959 (ECJ), [29] (describing 'the contested filtering system').

[235] Charter of Fundamental Rights of the European Union (2012); See also, O'Sullivan, K.T., 'Copyright and internet service provider "liability": the emerging realpolitik of intermediary obligations' IIC [2019], 50(5), 527-558.

[236] Case C-70/10 [2011] *ECR* I-11959 (ECJ) at [40]; On 'intermediaries' see Arnold R (2018) Essential reading on intermediary accountability: injunctions against intermediaries in the european union: accountable but not liable? J Intell Prop Law Pract 13(3):247-249.

[237] *Scarlet Extended v SABAM* [2011] paras 46–53 – The CJEU held that allowing the blocking order would not respect the requirement of striking a fair balance between the competing interests.

However, in the case of *UPC Telekabel,*[238] the CJEU upheld an injunction granted by a domestic court where it permitted the defendant to choose the means to restrict its customers' access to the infringing websites. Thus, while UK procedural law may establish the conditions and procedural requirements, EU law can be said to place significant limits on the scope of the measures that may be ordered against online service providers.[239] Thus, it can be argued that online service providers cannot be required to actively monitor all communications transmitted through their services, unless such monitoring was ordered as part of a criminal investigation as provided for by EU law.[240]

Yet, this is not as simple as it may seem due Article 17 of the ECDM.[241] This requires the social media platforms like YouTube, Facebook and Twitter to take more responsibility for copyrighted material being shared illegally on their platforms.[242] This is unsurprising as a key concern for rightsholders has been the position of those who provide services and facilities that facilitate infringement on the internet.

Specifically, this relates to those who provide the means and infrastructural aspects for the information society to function with things such as streaming, browser and

---

Striking a fair balance would necessarily include a proportionate outcome; To see the potential benefits of such orders, see Loc Xuan Le and Duc Anh Tran, 'Vietnam: is site blocking the solution to online piracy?' M.I.P. 2019, 284, 78.

[238] *UPC Telekabel* [2014] paras 51–53 and 64.

[239] Rizzuto, F., '*Injunctions against intermediate online service providers',* Computer and Telecommunications Law Review (2012), 18(3), 69-73, at 73.

[240] The Court of Justice confirmed the principles regarding the permissible scope of injunctions in Case C-360/10 *SABAM **v** Netlog NV,* judgment of the Court of Justice, February 16, 2012. The case involved a preliminary reference from the first instance Belgian court whose ruling had led to the preliminary reference from the Brussels Court of Appeal in the *Scarlet Extended* case and regarded the compatibility of an injunction being contemplated by the first instance national court with EU law that would place an obligation on Netlog NV, the owner of an online social network platform, to introduce a system for filtering information stored on its platform in order to prevent files being made available which infringe copyright.

[241] COM/2016/0593 final - 2016/0280 (COD).

[242] For more information, see the discussion in this chapter at 2.3.1.1(b).

search-related activity.[243] This also includes those which procure, induce, or have part of a common design[244] the commissioning of acts such as downloading or the unauthorized streaming of protected works accessorily.[245] It is to these matters I now turn.

2.3.1.1(b) Article 17 and its associated implications[246]

> "This is the technology of policing: [where] crawlers and bots will spider around the Internet in order to locate versions of copyright material that ought not to be there at all, or in breach of contract...[and] over time this could be a major technique of control."[247]

---

[243] C. Angelopoulos, European Intermediary Liability in Copyright (Wolters Kluwer, 2017); J. Riordan, The Liability of Internet Intermediaries (Oxford, 2016); G. B. Dinwoodie (ed.), *Secondary liability of Online Service Providers* (2017).

[244] On 'accessorial liability' in the UK, and how accessory liability is found, they must have procured or induced an act, or it must have been the result of their common design. Such an act could also be both an act of primary liability and give rise to accessory liability – *Twentieth Century Fox Film v. Newzbin* [2010] *EWHC* 608 (Ch) (Kitchin J).

[245] On the distinction between a 'communication to the public' and 'accessory liability' when considering the operator of a website, see *Twentieth Century Fox v. Sky UK* [2015] *EWHC 1082* (Ch); See also, G. B. Dinwoodie, 'A Comparative Analysis of Secondary Liability of Online Service Providers', in Dinwodie (ed.) *Secondary Libaility of Online Service Providers* (2017); An act, depending on the facts of each case, could be both an act of primary liability and give rise to accessory liability for the acts of others by way of 'inducement': *Twentieth Century Fox Film v Newzbin* [2010] EWHC 608 (Ch) (Kitchin J); (a defendant may procure an infringement by inducement, incitement or persuasion) – *CBS Songs Ltd v Amstrad Consumer Electronics plc & Another* [1988] 2 A11 ER 484 at [496].

[246] It is important to note that it is yet to be seen the true implications of Brexit for Copyright law in the UK. As a result, it is important to note that the discussion here is premised on the implementation of Article 17 as the law currently stands. However, it may be that it remains of part of the UK legal system by the adoption of a similar framework – R. Arnold, 'The Need for a New Copyright Act: A case Study in Law Reform' (2015) *QMJIP* 110-31.

[247] Cornish, W., Intellectual Property: Omnipresent, Distracting, Irrelevant (Oxford University Press 2004), p.55.

There is now a requirement, under Article 17, (discussed more in chapter 3),[248] for information society service providers that store and provide access to large amounts of works or other subject-matter uploaded by their users, to prevent the availability of these items identified by rightsholders.[249]

The cumulative conditions, set out in art.17(4),[250] are supported inter alia by an "ambiguous" Recital 66.[251] The conditions specify that OCSSPs must demonstrate that they have:

> "(1) made best efforts to obtain an authorisation;
>
> (2) made best efforts to ensure the unavailability of specific works for which the right holders have provided them with the relevant and necessary information; and
>
> (3) acted expeditiously, subsequent to notice from right holders, to take down infringing content and made best efforts to prevent its future upload."

The second condition imposes what critics have described as an upload filtering obligation.[252] Condition (3) introduces both a notice-and-takedown mechanism (similar to that of Article art.14 E-Commerce Directive) and a notice-and-stay-down (or re-

---

[248] For more information, see chapter 3 at 3.5.1.4.

[249] Article 17(1), COM/2016/0593 final - 2016/0280 (COD); For example, this can include things such as parodies and quotations. Moreover, the problems may be greater in some fields, such as photography, than others, such as perhaps recorded sounds. It is still nonetheless unclear as to what the true extent may be as case law will develop such items in due course.

[250] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.)

[251] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.)

[252] On the use of the term, see Julia Reda, 'Article 13 in conjunction with Recitals 38 and 39 of the proposed EU copyright' reform/expansion https://juliareda.eu/eu-copyright-reform/censorship-machines/ [Accessed 30 October 2019] – in Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [39].

upload filtering) obligation.[253] As such, to avoid liability, it is likely that platforms would have to deploy automatic recognition technologies to examine all uploaded content,[254] despite this being explicitly rejected by art.17(8).[255] Thus, it remains difficult to see how the ECDM will not ultimately result in general monitoring.[256] Quintais also notes that OCSSPs are expressly excluded in para.3 from the hosting safe harbour for *copyright relevant acts*,[257] previously available to many of them under art.14(1) E-

[253] For an analysis of these preventive obligations see Husovec, M., "How Europe Wants to Redefine Global Online Copyright Enforcement" in Synodinou. T.E., (ed.), Pluralism or Universalism in International Copyright Law (Kluwer Law, forthcoming), http://dx.doi.org/10.2139/ssrn.3372230 [Accessed 30 October 2019] – in Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [39].

[254] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [39].

[255] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.)

[256] That the provision will lead to filters has in fact been conceded by some EU officials and national governments: see Masnick, M., 'EU Commissioner Gunther Oettinger Admits: Sites Need Filters To Comply With Article 13" (3 April 2019), *Techdirt*, https://www.techdirt.com/articles/20190329/15501341902/eu-commissioner-gunther-oettinger-admits-sites-need-filters-to-comply-with-article-13.shtml; Masnick. M, 'After Insisting That EU Copyright Directive Didn't Require Filters, France Immediately Starts Promoting Filters' (28 March 2019), Techdirt, https://www.techdirt.com/articles/20190327/17141241885/after-insisting-that-eu-copyright-directive-didnt-require-filters-france-immediately-starts-promoting in Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [39].

[257] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [38].

Commerce Directive.[258] This makes legislation like art.17[259] *lex specialis*[260] to the E-Commerce Directive.[261] The significance of this is that it is likely that this will exacerbate the issues associated with so-called 'notice-and-take-down' relationships,[262] especially since it is difficult for platforms to avoid liability.[263]

Nonetheless, it can be said that the current law in the UK would prohibit orders requiring filtering or content-recognition systems to be installed on user-generated content platforms such as YouTube, or social media, such as Instagram.[264] Also, to enforce such orders would be conceivably incompatible with the Charter of Fundamental Rights of the EU, as interpreted by the CJEU.[265] Yet, such filtering

---

[258] DSM Directive art.17(3). On the intersection between the DSM and E-Commerce Directives, see Peguera, M., *"The New Copyright Directive: Online Content-Sharing Service Providers lose eCommerce Directive immunity and are forced to monitor content uploaded by users (Article 17)" (26 September 2019), Kluwer Copyright Blog*, http://copyrightblog.kluweriplaw.com/2019/09/26/the-new-copyright-directive-online-content-sharing-service-providers-lose-ecommerce-directive-immunity-and-are-forced-to-monitor-content-uploaded-by-users-article-17/ [Accessed 14 October 2019] - in Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [38].

[259] COM/2016/0593 final - 2016/0280 (COD).

[260] *Lex specialis*, in legal theory and practice, is a doctrine relating to the interpretation of laws and can apply in both domestic and international law contexts. The doctrine States that if two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) overrides a law governing only general matters (*lex generalis*) - https://www.trans-lex.org/910000/_/lex-specialis-principle/ (Accessed: 19/02/2019).

[261] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [38].

[262] Case C-324/09 *L'Oreal SA v eBay International AG*, [2011] ECR I-6011, [116] (Grand Chamber).

[263] See the discussion in Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [39]; *Warner Music UK Ltd v Tunein Inc* [2019] EWHC 2923 (Ch) [2019] 11 WLUK 6 at [205]-[213].

[264] For more information, see the above section – 2.3.1.1(a).

[265] Stalla-Bourdillon, S and Rosati, E, Turk, K. et al., 'A Brief Exegesis of the Proposed Copyright Directive' (24 November 2016), SSRN, https://ssrn.com/abstract=2875296[Accessed 30 October 2019]; Senftleben et al., 'The Recommendation on Measures to Safeguard Fundamental Rights' [2018] 40 E.I.P.R. 149; Angelopoulos, and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market (2017), SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800 [Accessed 30 October 2019]

technology would arguably apply whenever a user uploaded content. Thus, although it may be aimed, in theory, at particular acts, the objective result on a practical level in terms of how it would operate would nevertheless involve the direct or indirect screening of all uploaded content. However, recent EU reform proposals may change this.

There are also potential complications pursuant to the utilisation of such mechanisms due to its potential to interfere with the capacity of hosts to conduct their business (procuring possible contraventions of Article 16 of the Charter).[266] For purposes here, this can reinforce the dominance of existing operators like YouTube by creating indirect barriers of entry for host services due to the costs associated with developing sufficient adequate technologies in which to carry out the monitoring function.[267]

Yet, under the proposals in chapter 5,[268] it is argued that the reduction in the cost of works,[269] which includes re-use,[270] could lessen these barriers. This is due to the potential decrease in the amount of infringing works uploaded due to the increased financial accessibility of works under the proposed system. This could mean that host services may have less instances infringing material being uploaded and this may lessen the need to monitor over time.[271]

- Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [39].

[266] *Scarlet Extended SA v. SABAM,* Case C-70/10 [2011] *ECR* I-11959, [46]-[49], [53] (ECJ); Case C-360/10 *SABAM v. Netlog NV*, EU:C:2012:85, [44]-[46], [52] ECJ.

[267] ECS, *General Opinion on the EU Copyright Reform Package* (2017), 7. Quite how big a problem this is would depend on the expense of such technologies. Apart from Google's famous 'Content-ID' system, which is said to have cost many millions of dollars to develop, other commercial offerings, such as 'Audible Magic', appear to be much less costly.

[268] For more information on the proposals, see chapter 5 at 5.3, on their proposed benefits, see 5.5.

[269] For more information on the proposals, see chapter 5 at 5.5.3(a).

[270] For more information on the proposals, see chapter 5 at 5.4 *generally.* Specifically, see 5.4.1(b).

[271] Note that there is no empirical evidence to support this directly. However, Danaher Smith and Telang 'Website Blocking Revisited' (18 April 2016), SSRN, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795> [Accessed 30 June 2019] did find that in the aftermath of the November 2014 website blocks, there was a 6% increase in subscriptions to legitimate sources such as Netflix and a 10% increase in videos viewed on legitimate ad-revenue supported sources such as BBC and Channel 5's streaming sites.

Article 17[272] reflects potential illegalities pertaining to Article 15 of the e-Commerce Directive.[273] This includes a potential disregard for fundamental rights,[274] as well as censorship technology posing a possible intrusion on personal data.[275] Other situations where interference with the rights of personal data has been found unjustifiable was in the conjoined cases of *Tele2 Sverige AB v. Post-och Telestyreben*.[276] These concerned retention of traffic data, but they seem rather far-removed from filtering copyright-protected content to offer any real precedent-based guidance. This is due to a lack of quintessential contextual applicability regarding the subject matter concerned.

According to Angelopoulos, the conclusion may be that Article 15 is never compatible with the Charter for a host to be obliged to install content recognition technologies.[277] This is because the Charter and the e-Commerce Directive being (assumed to be) irrelevant to agreements between private actors as per *UPC Telekabel v. Constantin*

Furthermore, it is arguable that an increase in affordable legitimate content may reduce piracy: J. Poort and J. Quintais, 'Global Online Piracy Study' Institute for Information Law, University of Amsterdam [2018]*, p.27*; Taken from Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577 at [577].

[272] Directive (EU) 2019/790.

[273] *Scarlet,* Case C-70/10, [2011] *ECR* I-11959, [34]-[40] (ECJ); *Netlog NV,* Case C-360/10, EU:C:2012:85, [33]-[38] (ECJ);

[274] C. Angelopoulos, 'Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence' (6 October 2016).

[275] EDRI, 'Deconstructing Article 13', Available online at https://edri.org/files/copyright/copyright_proposal_article13.pdf; *Scarlet,* Case C-70/10, [2011] *ECR* I-11959, [50], [53] (ECJ); *Netlog NV,* Case C-360/10, EU:C:2012:85, [48]-[52] (ECJ) (Note that at the time of writing, the Article was 13, but has now been changed to Article 17).

[276] Joined Cases 203/15 and C-698/15, EU:C:2016:970.

[277] C. Angelopoulos, On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market (January 2017). The installations of such systems seems to be obligatory, at least in relation to some other wrongs, under the European Convention on Human Rights: *Delfi v. Estonia,* Application No. 64569/09 ([2015] *EMLR* (26) 563, ECHR, Grand Chamber).

GmbH.[278] Also, in the case of *Bonnier Audio,*[279] the CJEU upheld a domestically issued order requiring an ISP to provide the names and addresses of copyright infringers.

This new tool[280] in the arsenal of copyright owners is likely to encourage letters threatening legal action which remains an unregulated aspect of copyright law in the UK. This could mean that the cost and burden of intellectual property litigation may make the mere threat of court proceedings become a viable method in which to procure financial settlements,[281] with little scope to deter such claims in the copyright context.[282] As such, it is argued that letters can be written against the backdrop of the threat of court action and then furthered via legislation such as CPR, r.31[284] and Directive 2004/48/EC (the "Enforcement Directive") (SI 2006/1028).[285]

---

[278] C-314/12 *Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, EU:C:2014:192, [52]-[54] - in this respect, it is notable that the Court of Justice, in *UPC,* required the ISP to 'ensure compliance with the fundamental right of internet users to freedom of information' when formulating the manner in which it implemented a 'blocking order.' It might be that this implies that all ISP behaviour that is designed to protect third party rights, but as a result affects users, must comply with fundamental rights; See also, *Twentieth Century Fox v. Newzbin* [2010] *EWHC* 608 (Ch); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster,* 545 *US* 913, 125 *S. Ct.* 2764 [2005].

[279] Case C-461/10 *Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgrupp AB, Piratförlaget AB, Storyside AB v Perfect Communication Sweden AB* [2012], ECLI:EU:C:2012:219.

[280] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [28].

[281] See chapter 5 at 5.7.3.3(b)(i); *Ashworth Hospital* [2002] 1 *WLR* 2033; *Norwich Pharmacal v. CCE* [1974] *AC* 133; *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012); EWCA Civ 1740; [2013] Bus. L.R. 414 (CA (Civ Div)); *Wilko Retail v. Buyology* [2015] *FSR* (17) 432; *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch); [2020] F.S.R. 5.; *Media CAT Ltd v. Adams* [2011] EWPCC 006; *Jade Engineering* [1996] *FSR* 461.

[282] (e.g. an alternative course to combat unjustified threats to sue to avoid unnecessary litigation is the issuing of certificates of contested validity. As well as presenting itself as a potential victory article, it can also deter subsequent threats of litigation): RDA 1949, s.25; PA 1977, s.65; TMA 1994, s.73.

[284] This provision enables intellectual property right holders to obtain a court order requiring a person to reveal information relevant to that particular action; See also, J. Riordan, 'The Liability of internet Intermediaries' (Oxford Uni. Press 2016) at chapter 6.

[285] Article 8 – This enables the disclosure of the names and addresses of relevant parties, the dates and quantities imported, and the source of goods or materials otherwise connected to infringement;

Moreover, this is also likely to increase the censorship of content because art.17[286] could enable copyright holders to recognise potential infringements immediately. Article 17(1) ECDM requires that service providers issue rightsholders with adequate information on the functioning and deployment of monitoring measures and content recognition technologies, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter found on their platforms.[287] Thus, it is asserted that matters like the ACS Law Saga could "come alive again with greater intensity"[288] under the legislative obligations provided for by Article 17. Therefore, it is likely that art.17 will not just have an influence on the copyright-based claims issued in relation to infringement proceedings or threats thereof in the UK, but it is also likely continue to generate judicial and academic debate for the foreseeable future.[289]

Finally, there may be hope for smaller UK firms and individuals who are subjected to infringement claims, coming from the Intellectual Property Enterprise Court (IPEC). This court is designed to provide a streamlined and more cost-effective forum to hear lower value and less complex intellectual property claims than the Patents Court.[290]

It has been made clear that Art. 8 also entitles a person to an order for disclosure after a finding of infringement: *New Wave v. Alloys,* Case C-427/15, EU:C:2017:18; In Scotland, under the Intellectual Property Enforcement, etc) Regulation 4.

[286] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.)

[287] Article 17(1), COM/2016/0593 final - 2016/0280 (COD).

[288] <https://acsbore.wordpress.com/2016/06/18/view-from-the-lords-copyright-trolls-are-villains-and-scammers/> accessed: 18/06/2018.

[289] For an exploration of different interpretation options for art.17 DSM Directive, see *The European Copyright Roundtable, 'How to Implement Article 17 DSMD?'*, <https://www.youtube.com/channel/UCl1OA6-H9MTCJJBPvTn4LLw> Accessed 30 October 2019.

[290] For more information on IPEC, see HM Courts and Tribunals Service, 'Guide to the Intellectual Property Enterprise Court Small Claims Track' Issued July (2014). Available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426129/patents-court- small-claims.pdf> (Accessed: 19/8/2016).

IPEC offers both a small claims track (up to £10,000) and a multi-track procedure (between £10,000- £500,000), with anything above this going to the Patents Court.

There is no need for parties to be legally represented (although they can choose to be, with costs recoverable from the other party only in exceptional circumstances).[291] As the procedure is designed for this, and if the parties agree, the court (IPEC) will deal with the written arguments of the parties instead of a hearing. Yet, there are concerns about the nature of IPEC regarding the access to justice for parties with less financial backing. For example, interim remedies (which are remedies ordered before the final hearing of the claim) such as injunctions,[292] asset freezing orders,[293] and

---

[291] Civil Procedure Rules at part (27.10) – For more information, see <http://www.justice.gov.uk/courts/procedure-rules/civil/rules> (Accessed: 31/07/2017).

[292] *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch); [2012] E.C.D.R. 14, citing *Twentieth Century Fox Corp v Newzbin* [2010] EWHC 608 (Ch); [2010] F.S.R. 21; [2010] E.C.D.R. 8; [2010] E.M.L.R. 17, para.89. ("In a case which involves an allegation of authorisation by supply, these circumstances may include the nature of the relationship between the alleged authoriser and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable it will be used to infringe, the degree of control which the supplier retains and whether he has taken any steps to prevent infringement."); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd [2012] EWHC 1152 (Ch)*.
On blocking injunctions see *K. O'Sullivan 'Enforcing Copyright Online: Internet Service Provider Obligations and the European Charter of Fundamental Rights'* [2014] E.I.P.R. pp.577–583; R. Arnold 'Website-blocking Injunctions: The Question of Legislative Basis' [2015] E.I.P.R. at 623–630, which contains a detailed review of the corpus of existing case law and discusses the impact of art.10(2) of the European Convention of Human Rights and the ECHR cases of *Yildirim v Turkey* (App. No.3111/10, 18 December 2012) and *Delfi v Estonia* (App. No.64569/09, 16 June 2015). On September 24, 2015 the Commission launched a consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy. The consultation includes questions relating to whether online intermediaries should be subject to a duty of care in relation to illegal content: <https://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud> [Accessed 9 January 2015] – in Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 21-253, 26-137.

[293] On 'freezing orders' see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), Part VI, chapter 21, Part 7, Section B; See also, chapter 5 at 5.7.3.3(b)(i).

search and seizure orders,[294] are not available on the small claims track, but are available on the multi-track. The consequence is that those with claims below £10,000 will be left with no real opportunity to prevent something like the disposal of assets prior to a final judgement which may cause concerns regarding access to justice and the recovery of assets.

2.3.1.2 The situation in the US

The rapid advancement of technology saw copyright infringement through online file-sharing become a serious problem for the recording industry. Evidence at trials relating to this showed that revenues across the music industry decreased by fifty percent between 1999 and 2006.[295] This was a decline that the record companies attributed to piracy.[296] As a result, the response by the music industry was to dramatically change the surveillance of music consumers online in the US.[297]

Statutory damages under §504[298] have the greatest deterrent and remedial bite when the defendant infringes large quantities of works. The basic level of damages under this section is between $750 and $30,000 per work, and this is at the discretion of the court. Also, the US Congress further amended §504(c) to increase the minimum per-work from $500 to $750. It further increased the maximum per-work award from $20,000 to $30,000, which also included the maximum per-work award for wilful infringement from $100,000 to $150,000, with no need for commercial motive.[299] This

---

[294] *Anton Pillar KG v Manufacturing Processes Ltd* [1976] Ch. 55; For more information, see chapter 5 at 5.7.3.3(c)(i).

[295] Cohen, E.J. Loren, L.P. Okediji, R.L, O'Rourke, M.A., *Copyright in a Global Information Economy*, (Wolters Kluwer Law & Business, 2019), at 838; RIAA (Recording Industry Association of America). 2003a. 'Recording Industry to Begin Collecting Evidence and Preparing Lawsuits against File `Sharers' Who Illegally Offer Music Online.' June 25. http://www.riaa.com/news/newsletter/062503.asp. (Last accessed: 15/11/2014).

[296] *Sony BMG Music Entertainment v. Tenebaum,* 660 F.3d 487, 492 (1st Cir. 2011).

[297] Arditi, D., 'Disciplining the Consumer: File-Sharers under the Watchful Eye of the Music Industry' (2011); Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 8.

[298] 17 U.S.C.

[299] See H.R. Rep. 106-216 at 3 [1999], whereby it seems that Congress was well aware of the threat of non-commercial copyright infringement when it established the lower end of the range, in that it

meant that individual end-users engaged in large-scale "file-sharing" faced the prospect of millions of dollars of personal liability.

However, the few adjudicated cases have awarded substantially less than these sums. For example, in the 2012 case of *Capitol Record Inc. v. Thomas-Rasset,*[300] the damages award reached §1,920,000, but was eventually settled at $222,000.[301] Rasset was sued by record company copyright owners for infringing copyright in 24 sound recordings by exchanging them over digital networks. After several appeals, the case arrived at the Eighth Circuit which evaluated the previous award and concluded that the sum of $220,000 was constitutionally permitted. This was because the US Supreme Court in *St. Louis Co. v. Williams*[302] historically decided that damages awarded pursuant to a statute violates due process only if they are "so severe and oppressive as to be wholly disproportionate to the offence and obviously unreasonable."[303] Thus, under this standard, Congress arguably possessed a "wide latitude of discretion" in setting statutory damages.[304]

---

noted, amongst other things, "By the turn of the century the Internet is projected to have more than 200 million users, and the development of new technology will create additional incentive for copyright thieves to steal protected works...Many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their conduct...even after copyright owners put them on notice that their actions constitute infringement and that they should stop the activity or face legal action...".

[300] 692 F.3d 899 (8th Cir. 2012).

[301] The case was originally named *Virgin Records America, Inc v. Thomas-Rasset.*

[302] *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919).

[303] *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919).

[304] *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 66 (1919); On the "guideposts" of statutory damages, there are three factors in determining whether an award is excessive or unconstitutional: "(1) the degree of reprehensibility of the defendants misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed by comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 418 (2003); *see also BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 574-75 (1996). (Note that the punitive damages have never been held to be applicable in the context of statutory damages).

It is argued that the music industry created this online surveillance through a combination of monitoring file-sharing programs,[305] filing lawsuits,[306] and requesting Internet Service Providers (ISPs) to block users' internet access.[307] Thus, although the judicial trend favoured the exoneration from direct liability of "mere conduit" service providers, the prospect of liability on the grounds of contributory infringement[308] pushed service providers to lobby Congress for reductions and exemptions in their liability to copyright owners.

The Recording Industry Association of America (RIAA) were the leading advocates of the legal campaign,[309] along with several more similar business and interest groups.[310] One of the first significant instances of the lawsuits from the RIAA came on June 26 2003, whereby legal threats were redirected toward individual subscribers of these networks[311] who, in the past, were never subject to legal action in online environments. Such actions are enabled by Rule 20 of the Federal Rules of Civil Procedure for the permissive joinder of parties[312] which enables the filing of a single lawsuit against multiple defendants. This was in response to what the copyright industry perceived as an "epidemic of illegal file sharing."[313] This was because prior to this move, such users

---

[305] Strowell, A., *Peer-to-peer File Sharing and Secondary Liability in Copyright Law,* (Edward Elgar Publishing 2009), at 151-58, 166-171; Latta, S.L., *Cybercrime: Data Trails DO Tell Tales*, (Enslow Publishers 2012), p.64.

[306] *Sony BMG Music Entertainment v. Tenenbaum,* 719 F.3d 67 (2013); *Capitol Records Inc. v. Thomas-Rasset,* No. 06-1497 (D. Minn. Jan. 22, 2010).

[307] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster,* 545 *US* 913, 125 *S. Ct.* 2764 (2005).

[308] *A&M Records, Inc. v. Napster, Inc. (No. C 99-5183 MHP No. C 00-0074 MHP), United States District Court for the Northern District of California* - in *A&M Records, Inc. v. Napster* 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913 (2005).

[309] <https://www.riaa.com/what-we-do/> (Accessed: 21/03/2019).

[310] Reyman, J., 'The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture' 115 (Routledge 2010) at 61.

[311] On P2P networks and the challenges they pose to the copyright system, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), Part VIII, chapter 26, Part 3, section F(i)(b).

[312] Fed. R. Civ. P. 20(a)(2).

[313] RIAA 2003a. 'Recording Industry to Begin Collecting Evidence and Preparing Lawsuits against File `Sharers' Who Illegally Offer Music Online.' June 25. http://www.riaa.com/news/newsletter/062503.asp. (Last accessed: 15/11/2014).

were perceived to be immune to legal repercussion[314] and these lawsuits against small-scale infringers changed this notion dramatically.[315] This approach was chosen because of the difficulty of filing lawsuits against every individual file sharer. Consequently, the RIAA chose to focus on a limited number of individuals and maximise the publicity[316] surrounding its legal action to discourage the overall production of file-sharing networks.[317]

In the process, the RIAA successfully threatened thousands of other people, where the option was either to settle out of court (and stop sharing music); or risk paying up to $2,500 per shared song if they were to lose in court. This also included thousands more in legal fees even if one wins.[318] The RIAA also admitted that in 2007, more than

[314] Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. 'Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions' [2006] Journal of Law and Economics, 49, 91-114.

[315] Graham, J., *RIAA Lawsuits Bring Consternation, Chaos,* USA Today, Sept. 10, 2003, at 4D, Available at: <http://usatoday30.usatoday.com/tech/news/techpolicy/2003-09-10-riaa-suit-reax_x.htm> Accessed: 11/4/2015; Lichtman, D.G., 'Kazaa and punishment' Wall Street Journal, September 9, (2009) *in* Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. (2006) Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions. *Journal of Law and Economics*, 49, 91-114.

[316] Two cases that went to court and received extensive publicity were - *Sony BMG Music Entertainment v. Tenenbaum,* 719 F.3d 67 (2013); *Capitol Records Inc. v. Thomas-Rasset,* No. 06-1497 (D. Minn. Jan. 22, 2010).

[317] Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. 'Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions' [2006] Journal of Law and Economics, 49, 91-114.

[318] Park, D.J., *Conglomerate Rock: The Music Industry's Quest to Divide Music and Conquer Wallets* (Lanham, MD: Lexington Books 2007); Knopper Steve, Reinventing Record Deals: Rolling Stone, November 29, 2009. *Appetite for self-destruction: The Spectacular Crash of the Record Industry in the Digital Age* (New York: Free Press 2007) *in* Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing, 2015).

18,000 individuals had been sued by its companies, with new reports showing the number to be around 30,000 in the US,[319] most of whom settled out of court.[320]

A useful example showing the effect of this approach comes from PhD student, Joel Tenenbaum. He was being sued by the RIAA "for alleged piracy"[321] that involved the sharing of music online in July 2009. The case, *Sony BMG Music Entertainment v. Tenenbaum*,[322] concerned infringements alleged to have taken place between 1999-2007. This case was only one of two file-sharing cases to go to verdict in the RIAA's anti-downloading litigation campaign. The majority were settled out of court,[323] with the other case being *Capitol Records Inc. v. Thomas-Rasset*.[324]

Commenting on the case, Tenenbaum wrote that:

> "Even now, I am scared to write this. Though they have already seized my computer and copied my hard drive, I have no guarantee they won't do it again. I face up to $4.5m in fines and the last case like mine that went to trial had a jury verdict of $1.92million. No matter how many people I explain this to, the reaction is always the same: dumbfounded surprise and visceral indigence, both of which are a result of the amazing secrecy the RIAA has operated under. "How did they get you?" I'm asked. I explain that there are 40,000 people like

---

[319] Electronic Frontier Foundation, 'RIAA v. The People: Five Years Later' Accessed:13/8/2014 https://www.eff.org/files/eff-riaa-whitepaper.pdf; Engel, J., 'Music Industry Targets CMU' The Saginaw News, Apr. 16, 2007 (quoting the RIAA as filing 18,000 lawsuits); Jeff Leeds, 'Labels Win Suit Against Song Sharer' *New York Times* (2007), Available at: <http://www.nytimes.com/2007/10/05/business/media/05music.html?_r=0> Accessed: 19/6/2016.

[320] Kravets, D., 'Dec. 7, 1999: RIAA Sues Napster' (December 12, 2009) <https://www.wired.com/2009/12/1207riaa-sues-napster/> accessed: 22/5/2015.

[321] <http://www.digitaltrends.com/music/appeals-court-denies-piracy-penalty-plea/> Last accessed: 22/23/4/2016.

[322] *Sony BMG v Tenenbaum* No. 07cv11446-NG (D. Mass. Dec. 7, 2009).

[323] Weiner, S., 'Sony BMG Music Entertainment v. Tenenbaum' Harvard Journal of Law and Technology (August 12, 2009) Available at: http://jolt.law.harvard.edu/digest/copyright/sony-bmg-music-entertainment-v-tenenbaum (Accessed: 23/5/2016); *Sony BMG v Tenenbaum* No. 07cv11446-NG (D. Mass. Dec. 7, 2009); See, Ben Jones, 'Court Upholds $675k Verdict in RIAA Piracy Case' (August 24, 2012) https://torrentfreak.com/court-upholds-650k-verdict-in-riaa-piracy-case-120823/ (Accessed:6/7/2016).

[324] 692 F.3d 899 (8th Cir. 2012).

me, being sued for the same thing, and we were picked from a pool of millions who shared music. And that's when a look appears on the face of whoever I'm talking to, the horrified "it could have been me!" look."[325]

The RIAA won the case,[326] but damages were reduced from $675,000 to $67,500,[327] because the fee was deemed "constitutionally excessive" rather than on the grounds of the US "remittitur" procedure. This is a ruling by a Judge where damages are reduced in civil cases because they are deemed to exceed the amount in question.[328] However, both parties appealed.[329] The First Circuit Appeal Court reinstated the initial $675,000 and ruled that the case be sent back to the District Court for consideration of the remittitur issue.

However, Harvard Law Professor, Robert Neeson, representing Tenenbaum, immediately opposed this, stating that such a procedure would do nothing more than to allow the plaintiffs to appeal any reduced fee and send his client on a financially draining retrial. He said that, "the First Circuit's misuse of remittitur threatens to push the defendant down an endless litigation rathole…the prospect of which forces defendants onto a retrial 'merry-go-round' that forces them to settle, avoiding

---

[325] Tenenbaum, J., 'How it feels to be sued for $4.5million' The Guardian Music Blog (July 2009) (last accessed: 11/7/2015) (Available at <https://www.theguardian.com/music/musicblog/2009/jul/27/filesharing-music-industry>

[326] Weiner, S., 'Sony BMG Music Entertainment v. Tenenbaum' Harvard Journal of Law and Technology (August 12, 2009) Available at: <http://jolt.law.harvard.edu/digest/copyright/sony-bmg-music-entertainment-v-tenenbaum> (Accessed: 23/5/2016); *Sony BMG v Tenenbaum* No. 07cv11446-NG (D. Mass. Dec. 7, 2009).

[327] <https://www.theguardian.com/music/musicblog/2010/nov/09/joel-tenenbaum-a-year-on> (Accessed 12/9/2016)

[328]<http://www.abajournal.com/news/article/supreme_court_turns_down_file_sharing_appeal_challenging_remittitur_procedu/> (Accessed: 12/9/2016); A high profile file-sharing case where this was used was in *Capitol Records Inc. v. Thomas-Rasset*, No. 06-1497 (D. Minn. Jan. 22, 2010)

[329]<http://copyrightsandcampaigns.blogspot.co.uk/2010/07/labels-file-notice-of-appeal-in.html> (Accessed: 17/9/2016)

constitutional issues."[330] Yet, the US Supreme Court refused to hear the matter,[331] and all subsequent appeals by Tenenbaum were refused. This meant that the outstanding fee of $675,000 that was issued by District Court Judge Rya Zobel upheld.[332]

Significantly, the attention such awards have drawn has enhanced prior criticisms of heavy-handed copyright enforcement and excessive damages awards.[333] Prior to digitalisation, major record labels maintained their market positions because of their control of distribution networks – specifically the access of major record label artists to brick-and-mortar stores.[334] Yet, as music became digital, the major record labels began to look for new ways to profit from selling music under a new digital system.[335] This was because digitalisation created a "disintermediation"[336] (i.e.

---

[330] Weiss, D., 'Supreme Court Turns Down File-Sharing Appeal Challenging Remittitur Procedure' (May 21, 2012) Available at: <http://www.abajournal.com/news/article/supreme_court_turns_down_file_sharing_appeal_challenging_remittitur_procedu/> (Accessed: 3/10/2016)

[331]<https://scholar.google.com/scholar_case?case=17968294347924737000&q=Sony+BMG+Music+Entertainment+v.+Tenenbaum&hl=en&as_sdt=2,5&as_vis=1> (Accessed: 17/10/2016)

[332] *Sony BMG Music Entertainment v. Tenenbaum,* 719 F.3d 67 (2013); The award was upheld because $22,500 per infringement was not only held to be on the low end of the spectrum – only 15% of the statutory maximum – for wilful infringement, and the Jurys verdict was not so excessive as to warrant remittitur – See, Ben Jones, 'Court Upholds $675k Verdict in RIAA Piracy Case' (August 24, 2012) (Available at: https://torrentfreak.com/court-upholds-650k-verdict-in-riaa-piracy-case-120823/) (Accessed:6/7/2016); The details of the appeal are available at: https://cases.justia.com/federal/appellate-courts/ca1/12-2146/12-2146-2013-06-25.pdf (Accessed: 20/10/2016) - *Sony BMG Music Entertainment v. Tenenbaum* (June 25, 2013).

[333] See Samuelson, P. & Wheatland, T., *Statutory Damages in Copyright Law: A Remedy in Need of Reform* 51 Wm & Mary L. Rev. 439, 454-55 [2009]; See also, *Capitol Records Inc. v. Thomas-Rasset,* 692 F.3d 899 (8th Cir. 2012) (upholding Jury's award of $220,000).

[334] Arditi, D., 'Disciplining the Consumer: File-Sharers under the Watchful Eye of the Music Industry' (2011).

[335] Arditi, D., 'Music Everywhere: Setting a Digital Music Trap', SAGE Journals, Vol.45, [2017] 617-630.

[336] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), at 105.

removal of the middle man) that changed the brick-and-mortar-based market-model that the music industry operated under prior to digital technology.[337]

Gillespie suggests that file sharing "threatened to change the balance of power of who did the distributing"[340] and it is argued that Tenenbaum, by sharing files online for free, was engaging in the exact kind behaviour that "challenged the recording industry's exclusive control over the distribution of sound recordings."[341] By implication, it is suggested that this is the reason why the case against Tenenbaum was absent of the usual justifications for, and economic checks that otherwise prevent large-scale copyright litigation.[342] As a result, Tenenbaum was labelled 'thief' and a 'pirate' and was identified as such on his very first appearance[345] in a case that was placed in the national spotlight.[347] This is hypothesised to have been an attempt to gain what is posited to be a degree of 'justification'[348] for the case, whereby the plaintiffs depicted

---

[337] Garnham, N. and Fred Ingilis, 'Capitalism and Communication: Global Culture and the Economics and Information' Newbury Park, [1990] CA Sage Publications; Arditi, D., 'Disciplining the Consumer: File-Sharers under the Watchful Eye of the Music Industry' (2011).

[340] Gillespie. T, *Wired Shut: Copyright and the Shape of Digital Culture,* (Cambridge, MA: MIT Press 2007), at 43.

[341] Burkart, P., and McCourt, T. *Digital Music Wars: Ownership and Control of the Celestial Jukebox,* (Lanham, MD: Rowman & Littlefield 2006) at 49.

[342] Karol, P., 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06 at 893.

[345] Karol, P., 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06.

[347] Moya, J., Harvard Prof Fighting RIAA Back in Court Tomorrow, zeropaid.com (Jan. 5, 2009), http://www.zeropaid.com/news/9942/harvard_prof_fighting_riaa_back_in_court_tomorrow/; Jon Newton, 'RIAA Faces Power Team in Tenenbaum Case' (Nov.20,2008, 9:26 AM), <http://www.p2pnet.net/story/17640>; 'Sue Walsh, Harvard vs. the RIAA' (Dec. 15, 2008, 11:21 AM), <http://www.technologytell.com/gadgets/42833/harvard-vs-the-riaa/> At trial, Tenenbaum was also represented by a small Boston criminal defence firm, Feinberg & Kamholtz. See Ben Sheffner, 'Tenenbaum Seeks Reduction in Jury's Award Against Him; Argues $675,000 Verdict Violates Constitution, copyrights and campaigns' (Jan. 4, 2010, 12:15 PM), <http://copyrightsandcampaigns.blogspot.com/2010/01/tenenbaum-seeks-reduction-in-jury s.html.> – Taken from Karol, P., 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06.

[348] See chapter 3 at 3.2 .

file-sharing as “sophisticated criminal-theft ring.”[349] This is further postulated to be the reason why, according to Professor Karol, that the plaintiffs developed and emphasized consistently in the trial, an overarching theme of downloading as “theft”[350] as Tenenbaum “embodie[d] the industry’s decade-long attempt to shape the narrative of online downloading through the rhetoric of theft.”[351]

Kleiman and Kilmer demonstrate how the dynamic of this litigation tactic works under this approach.[352] They posit that the intensity is held constant under this method. The more credible the commitment to punish rule-breaking is, the more likely it is to succeed in discouraging the targeted behaviour, and therefore the less likely it is that the threatened punishment will actually take place. This recalls the chess maxim that ‘the threat is stronger than its execution’.[353] Yet, under this analysis, if this maxim was entirely true, then it would suggest that these dynamics would reduce the number of files shared due to the potential of legal repercussion. As will be seen below,[354] these tactics have generated mixed results, with 36.5% of users suggesting that the threat of legal repercussion had failed to curb their behaviour online, and in contrast, 38%

---

[349] Transcript of Jury Trial Day 2 at 68-70, *Sony BMG Music Entm’t v. Tenenbaum,* 721 F. Supp. 2d 85 (D. Mass. 2010) (No. 1:07-cv-11446), at 17-20 (describing how P2P file- sharing enterprises are able to share copyrighted files on a massive scale for free) - Taken from Karol, P., ‘Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case’ 47 [2013] New England Law Review, Boston Research Paper No. 13-06 at 894.

[350] Green, P.S., ‘13 Ways to Steal a Bicycle: Theft Law in the Information Age’, [2012] 270-76; *Sony BMG Music Entm’t v. Tenenbaum,* 719 F.3d 67, 71 (1stCir. 2013) (emphasis added) – (“new technologies that would allow Internet users to steal copyrighted works.”); See also the discussion on ‘theft’ and the role this has played in the current system in chapter 3 at 3.3.

[351] Karol, P., ‘Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case’ 47 [2013] New England Law Review, Boston Research Paper No. 13-06.

[352] Kleiman, M. and Kilmer, B., ‘The dynamics of deterrence’, Department of Public Policy, University of California, 3250 Public Affairs Building, Los Angeles, CA 90095-1656; Drug Policy Research Rand, 1776 Main Street, Santa Monica, CA 90407-2138. Communicated by Thomas C. Schelling, University of Maryland, College Park, MD, June 15, 2009 (received for review September 7, 2007) <http://www.pnas.org/content/106/34/14230.full.pdf> accessed: 23/5/2017.

[353] Ibid.

[354] See this chapter at 2.4.

agreed it did.[355] However, it is submitted that the success or failure of the legal approach used by the RIAA in the file-sharing saga does not detract from the intention of the campaign itself. Although the success or failure of the campaign may undermine the credibility of the above maxim in certain instances, it is nonetheless postulated that the legal methods used were aimed at inducing a psychological[356] impact on the mind of the individual users online. The purpose of doing so is contended to have been to attempt to procure widespread compliance[357] via copyright law[358] to the point where the potentiality of a threat being carried out can have greater influential effects than if the act were to be carried out itself.[359]

Alternatively, Bhattacharjee et al., provide a further reason for the general approach used by the RIAA where they note that it was simply due to the "impracticality" of filing lawsuits against every individual file sharer.[360] They posit that the RIAA chose to focus on a "relatively small group of individuals and maximise the publicity surrounding its

---

[355] Giletti, T., 'Why Pay if it's Free? Streaming, Downloading, and Digital Music Consumption in the iTunes era' Media@LSE Electronic MSc Dissertation Series [2012], compiled by Dr. Bart Cammaerts and Dr. Nick Anstead.

[356] How Fear Works: Culture of fear in the Twenty-First Century, Bloomsbury Continium, (2018), pp37-38; Bellemare, M. F. & Holmberg, A. M. "The Determinants of Music Piracy in a Sample of College Students," (2010), *Duke University – Sanford School of Public Policy; Duke University – Department of Economics.*

[357] On how fear and paranoia can be used for political ends, see Plato. Laws, Translated by A. E. Taylor (1961). In The Collected Dialogues of Plato, Edited by Edith Hamilton and Huntington Cairns, Bollingen, New York in Glass, J.M., Notes on the Paranoid Factor in Political Philosophy: Fear, Anxiety, and Domination, *Political Philosophy,* Vol 9, No. 2 (Jun. 1988), pp.209-228.

[358] For more information, see this chapter at 2.4.1; Griffin, J., and Nair, A., International Review of Law, Computers and Technology [2013]: Scientia potential est: Making threats of copyright infringement, International Review of Law, Computers and Technology.

[359] Frank, J., *Law and the Modern Mind,* (New York: Tudor Publishing 1949), Ch.1. (*Law and the Modern Mind* is a 1930 book by Jerome Frank which argued that judicial decisions were more influenced by psychological factors than by objective legal premises); The book has also been the subject of criticism, see Lon Luvois Fuller, Thomas W. Bechtler, *Law in a Social Context: Liber Amicorum Honouring Professor Lon L. Fuller* (1978), p. 17.

[360] Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. (2006) Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions. *Journal of Law and Economics*, 49, 91-114.

legal action to discourage the overall production of file-sharing networks."[361] Nevertheless, it is contended the RIAA approach, due to the publicity involved, was designed to create a panopticon-style system in its functionality and enforcement that was centred upon the aforementioned psychological impact in order to influence public opinion. Yet, the RIAA could also be said to be conducting the litigation simply as a means of enforcing their client's intellectual property rights to enable their effective economic exploitation in the same way third parties finance copyright litigation for the associated profits.[362]

However, it is suggested that although this is a valid consideration, the reason why the RIAA are suggested to have pursued the case[363] for the former psychological reasoning is because of the lack of economic sense to the litigation. Simply put, any collectable judgements would be almost certainly "dwarfed" by their litigation costs because the recording industry had spent $17 million in legal fees and collected just $391,000 in settlements.[365] This also led to claims that the only reason the recording industry stopped the litigation was because it simply run out of money to file such uneconomical lawsuits.[366] Therefore, the panoptic approach is argued to have enabled

---

[361] Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. 'Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions' [2006] Journal of Law and Economics, 49, 91-114.

[362] *See, e.g.,* Steinitz, M., *Whose Claim is this Anyway? Third Party Litigation Funding,* 95 Minnesota Law Review, 1268, 1275-86 (2011); Lyon, M., Comment, *Revolution in Progress: Third-Party Funding of American Litigation,* 58 UCLA Law Review 571, 577 (2010); Molot, J.T., *Litigation Finance: A Market Solution to a Procedural Problem,* 99 Georgetown Law Journal 65, 90 (2010).

[363] *Sony BMG Music Entm't v. Tenenbaum,* 719 F.3d 67, 71 (1stCir. 2013).

[365] (The record companies' indifference to the negative anticipated value of the Tenenbaum litigation is consistent with their attitude throughout the broader campaign against file sharing) – Jeff Stone, Critics Say the MPAA and RIAA Should Stop Lying About Piracy Loss Before Shutting Down Demonoid, The Pirate Bay , INT'L BUS.TIMES (Oct.20, 2012), <http://www.ibtimes.com/critics-say-mpaa-riaa-should-stop-lying- about-piracy- loss-shutting-down-demonoid-pirate-bay-850179> – Taken from Karol, P., 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06; https://www.techdirt.com/articles/20100713/17400810200.shtml (Accessed: 21/04/2018).

[366] <https://hbr.org/2008/12/why-the-riaa-stopped-suing> accessed: 08/03/2015; In the UK, costs should be borne out by those rightsholders initiating proceedings – *Twentieth Century Fox Film*

the RIAA to extend its vision into the homes of consumers, placing them, by analogy, in a peripheric ring. In this ring, rightsholders sit in the central panoptic tower. This is because [t]he panopticon "disassociates the see/being seen dyad: in the peripheric ring, one is totally seen, without ever seeing; in the central tower, one sees everything without ever being seen."[367]

However, there is the potential for improvement. In January 28, 2016, the Internet Policy Task Force of the Department of Commerce published a White Paper on Remixes, First Sale, and Statutory Damages.[368] The Task Force supports the streamlining of the procedure for adjudicating small claims of copyright infringement [in which statutory damages award would be capped]. This would also give further consideration to the proposal of the Copyright Office to establish the risk of disproportionate levels of damages against individual file-sharers.[369] The US Copyright office in 2013 also expressed such an intention in *Copyright Small Claims, a Report of the Register of Copyrights* (September 2013),[370] but none of these items have been initiated as of yet.

2.3.1.2(a) Can the Copyright Misuse Defence in the US help alleviate these issues?[371]

It is argued that the Copyright Misuse defence can offer a potential mechanism to which claims without credibility or abuses of procedure can be dealt with in order to help alleviate some of the current issues. However, it is not without its faults, as Copyright Misuse can also be said to suffer from the fact it is a defence. What is

---

Corp. v. British Telecommunications Plc [2011] *EWHC* 2714 (Ch), [53]-[55] (differentiating between various stages in proceedings).

[367] Foucault, M., 'Discipline and Punish: The Birth of the Prison' (Trans. Alan Sheridan, Penguin Books 1977), pp.201-202

[368] https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf

[369] https://www.uspto.gov/learning-and-resources/ip-policy/copyright/white-paper-remixes-first-sale-and-statutory-damages (Accessed: 18/02/2019).

[370] http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf. (Accessed: 27/06/2018).

[371] There is a similar doctrine in the UK known as 'restraint of trade' - *Macaulay* v *Schroeder* [1974] 1 WLR 1308 at 1314; See also, Joined cases *Silvertone Records* v *Mountfield*, *Zomba Music* v *Mountfield* [1993] EMLR 152.

significant about the Copyright Misuse doctrine is that it operates as a defence – and it not a cause of action in itself. This was discussed in *Online Policy Group v Diebold*.[372] Ultimately, the application of this defence varies between different courts,[373] whereby it suffers a degree of uncertainty.

The defence is relevant because it restricts the ways in which a right holder may invoke copyright infringement proceedings. Yet, it may problematic to use it for the purposes discussed as it does not seem to deal with the matter of threats issued by way of a letter writing campaign or threats issues in absence of official court proceedings. This means that formal proceedings need to be initiated by the individual issuing the threats in order to employ this mechanism.

Consequently, it is dependent on the threat being acted on, and so this is where the potential of the defence being successfully invoked can become problematic. This is posited to be a significantly limiting feature considering that in most instances, letter writing campaigns are often started with little or no intention of going to court in order to avoid judicial scrutiny.[374] Moreover, the defence also suffers from inconsistent application because it is a defence,[375] with some US courts such as the Eleventh Circuit in Bell South[376] going so far as to introduce an additional requirement that any application of misuse must also entail a violation of anti-trust laws. Yet, because the endorsement of the doctrine is an extension of the 'misuse doctrine from patents to copyright, this in effect embraces the 'unclean hands' principle. This is because the

---

[372] Online Policy Group v Diebold 337 F.Supp.2d 1195 (ND Cal. 2004), and 17 USC §512(h); See also, Lasercomb v Reynolds 911 F2.d. 970 (4th Circuit, 1990).

[373] For more information, see Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, Ph.D. (2010) at 5.5.3.

[374] Only two file-sharing cases have ever been fully adjudicated - *Sony BMG Music Entertainment v. Tenenbaum,* 719 F.3d 67 (2013); *Capitol Records Inc. v. Thomas-Rasset,* No. 06-1497 (D. Minn. Jan. 22, 2010); In the UK see also, *Media CAT Ltd v. Adams* [2011] EWPCC 006, at [98]-[101].

[375] *ProCD, Inc. v Zeidenberg*, 86 F.3d 1447 (7th Circuit, 1996) – the doctrine could have reasonably been referred to in this case but it did not so.

[376] *BellSouth Advert. & Pub. Corp. v Donnelley Information. Pub.*, 999 F.2d 1436 (11th Cir. 1993). For a comprehensive list of each circuits case law with synopsis, see Gervaise-Davis III, G., The affirmative defence of copyright misuse', 867 Practising Law Institute/Patents, Copyrights, Trademarks and Literary Property Course Handbook 103 (2006) at 134-138.

doctrine extends from the equitable principle that the courts "may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest."[377] This is contended to be the case since it is altogether outside of the sphere of the copyright fair use doctrine as per Alcatel v. DGI Techs.378

However, this can be considered to have been reversed in some respects, although it is important to note that the case may be specific to its facts. In *PMI Corp v. AMA*[379] the US Court of Appeals set forth the strongest statement of what had been developing as a doctrine of copyright misuse. It outlined the way in which an infringer may assert it as a complete defence on the basis that copyright owner is using his copyright in an unfairly anticompetitive manner.[380] The court also concluded that it was not necessary, in order to invoke the copyright misuse doctrine, that there be proof that the copyright owner had technically committed a violation of antitrust laws.[381]

Nevertheless, despite this apparent widening of the scope in which to bring a 'misuse' defence against infringement, it still seems that the potential future issues associated with things like letter-writing campaigns remain for the foreseeable future. This is because its application has been seemingly limited to situations such as when a licensor attempted to extend copyright protection by contract.[382] Thus, in *Lasercomb v. Reynolds*[383] (of the Fourth Circuit), Circuit Judge Sprouse considered the history of copyright law and focused particularly on those bodies involved, such as Parliament and the Stationers' Company.

---

[377] *Morton Salt Co. v. G.S. Suppiger,* 314 U.S. 488 (1942) at 492.

[378] *Alcatel USA, Inc. v. DGI Techs., Inc.,* 166 F.3d 772 (5th Cir. 1999).

[379] *Practice Management Information Corp. v. American Medical Association* 121 F.3d 516 (9th Cir. 1997).

[380] *Practice Management Information Corp. v. American Medical Association* 121 F.3d 516 (9th Cir. 1997).

[381] *Ibid.*

[382] *ProCD, Inc. v Zeidenberg*, 86 F.3d 1447 (7th Circuit, 1996).

[383] *Lasercomb v Reynolds* 911 F2.d. 970 (4th Circuit, 1990).

In doing so, he stated, amongst other things, that "...the granted monopoly power does not extend to property not covered by the patent or copyright."[384] With this, the misuse defence can also be said to be very much unpredictable with regards to its application in copyright following the later decision of *Video Pipeline v. Vista Home*[385] (of the Third Circuit). In this case, it was ruled that 'neither the Supreme Court nor this Court, has affirmatively recognized the copyright misuse doctrine.[386] This is based on the notion that misuse is not a cause to invalidate the copyright or patent, but instead "precludes its enforcement during the period of misuse"[387] as the "ultimate aim [of copyright law] is to stimulate creativity for the general public good."[388]

Comparatively, in the UK, the common law doctrine of restraint of trade[389] could potentially be used. Under the doctrine, covenants which are in restraint of trade are prima facie unenforceable at common law and are enforceable only if they are reasonable as between the parties and so far as the public interest is concerned.[390] The reason for applying this doctrine is because it can be "applied to factual situations with a broad and flexible rule of reason."[391] Thus, Lord Reid in *Macaulay* v *Schroeder*[392] asserted that if contractual restrictions are capable of oppressive enforcement, they must be justified prior to enforcement by the courts,[393] although

---

[384] Ibid., *Lasercomb v. Reynolds* at 974; This principle was recognised half a century before the Supreme Court in *Morton Salt Co. v. G.S. Suppiger,* 314 U.S. 488 (1942).

[385] *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.* 342 F.3d 191 (3d Cir. 2003).

[386] *Ibid.* See *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.,* 307 F.3d 197, 221 (3d Cir. 2002). There is however, a well-established patent misuse doctrine, *see, e.g., Morton Salt Co. v. G.S. Suppiger Co.,* 314 U.S. 488 (1942); *W.L. Gore & Assocs., Inc. v. Carlisle Corp.,* 529 F.2d 614 (3d Cir. 1975).

[387] *Practice Management Information Corp. v. American Medical Association* 121 F.3d 516, 520 n.9 (9th Cir. 1997) (citing *Lasercomb v Reynolds* 911 F2.d. 970, 979 n.22 (4th Circuit, 1990).

[388] *Sony Corp. of America v Universal City Studios,* Inc (Supreme Court, 1984) 464 U.S. at 432; *see also Eldred v. Ashcroft,* 537 U.S. 186, 123 S. Ct. 769, 787 (2003).

[389] For more information, see *Copinger and Skone James on Copyright*, 17th edition, Sweet and Maxwell, London, (2016), chapter 28, part 6.

[390] See in particular *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269.*

[391] Per Lord Reid in *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269* at 331.

[392] *Macaulay* v *Schroeder* [1974] 1 WLR 1308; See also *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 W.L.R. 61, CA.

[393] *Macaulay* v *Schroeder* [1974] 1 WLR 1308 at 1314.

parties choosing to enforce such agreements are not acting illegally if they choose to do so.[394]

However, it is argued that although restraint of trade could be used in the context of contracts discussed in chapter 4, it is suggested to lack the contextual enforceability of the US equivalent copyright misuse defence for purposes here. To expand, it is suggested that the UK doctrine lacks the 'defence' element in threats of proceedings situations in that it is often applied to instances where parties have chosen to engage in contractual relations.[395] As such, it is suggested that restraint of trade is a limited public policy tool, but one that would be ill-suited to operate as a defence in the context of threats to sue in copyright. This is opposed to the US misuse doctrine, which is more akin to a formed defence though it is still also limited.[396]

2.4 Have these tactics reduced file-sharing?

The effect of the surveillance tactics is argued to have encouraged consumers to self-regulate.[397] This was due to the potentiality of being monitored by rightsholders and their representatives. This is submitted to be further evidenced by the element of variety regarding those targeted in the US and UK, including those targeted by the letter writing campaigns like ACS law. This was suggested to be aimed at manifesting a degree of uncertainty among all age groups operating online.

The reason for this is because the more anonymous and temporary the observation is, the greater the risk for the user being surprised and the greater his anxious

---

[394] *Boddington v Lawton [1994] I.C.R. 478.*

[395] On further instances where restraint of trade has been raised in contractual situations see *Sunshine Records (Pty) Ltd v Frohling [1990] (4) S.A.782*; *John v James [1991] F.S.R. 397*; *Silvertone Records Ltd v Mountfield [1993] E.M.L.R. 152*; *Panayiotou v Sony Music Entertainment (UK) Ltd [1994] E.M.L.R. 229,* Jonathan Parker J; For a general discussion of the principles of the doctrine see Chitty on Contracts 31st edn (London: Sweet & Maxwell, 2012) at paras 16–076.

[396] *See Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.* 342 F.3d 191 (3d Cir. 2003); See also, *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.,* 307 F.3d 197, 221 (3d Cir. 2002). There is however, a well-established patent misuse doctrine, *see, e.g., Morton Salt Co. v. G.S. Suppiger Co.,* 314 U.S. 488 (1942); *W.L. Gore & Assocs., Inc. v. Carlisle Corp.,* 529 F.2d 614 (3d Cir. 1975).

[397] See the discussion in this chapter at 2.4.1.

awareness of being observed.[398] As such, the methods used are postulated to have created a dual system of enforcement that worked synergistically to create a scenario where users began to self-regulate due to the mechanics of the approach taken. It is to these matters we now turn.

2.4.1 A "microphysics of power": why users adopted self-regulation in the copyright system[399]

The current environment is argued to be a product of "the overall effect or result of a series of interacting structures which are located at a completely different levels of the copyright system to where they are enforced, constituting a 'microphysics of power'."[400] Put simply, it is submitted that the nature of copyright threats provisions and the expense associated with the court process, have served to create a "bottom-up" transfer of power back to rightsholders, where copyright litigation is now seen, in the words of Balganesh, as "deserving of avoidance."[401] This also meant that downloading music via file-sharing networks become synonymous with music piracy.[402]

It is hypothesised that this was influenced by the large number of early settlements, due to the threats of increased costs even if one wins, or the threat of tying defendants

---

[398] Foucault, M., 'Discipline and Punish: The Birth of the Prison' (Trans. Alan Sheridan, Penguin Books 1977), p.202

[399] Deleuze, G., "*Foucault", Translated and edited by Sean Hand,* Bloomsbury Academic Publishing, (2006), p.23.

[400] Deleuze, G., "*Foucault", Translated and edited by Sean Hand,* Bloomsbury Academic Publishing, (2006), p.23; Also, there is a predominant categorization within copyright-based legal discourse to argue that the rightsholder is all powerful (See, for example: Vaidhyanathan, S. 2001. *Copyrights and Copywrongs: The Rise of Intellectual Property and how it Threatens Creativity,"* 2nd ed, chapter 1, New York: New York University Press.

[401] Balganesh, S., 'Copyright Infringement Markets' (February 13, 2013). Columbia Law Review, Vol. 113, 2013; University of Pennsylvania, Institute for Law & Economics Research Paper No. 13-7. Available at SSRN: http://ssrn.com/abstract=2233065; Accessed: 12/5/2015.

[402] For more information, see chapter 3 at 3.3; See also, Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 8.

up in court with more money than they can afford to pay.[403] This was to avoid the due process of law[404] and shape the behaviours of those operating online.[405] In this process the RIAA also made mass media announcements outlining their intention to spend the next month identifying users who offer songs for others to copy. These campaigns changed consumer attitudes toward online file-sharing. This was done by suing hundreds of individual computer users, representing a marked shift in RIAA policy that increased a user's "perceived risk of getting caught illegitimately sharing unauthorised music files and [this caused] a change in consumer behaviours."[406]

With surveillance, even if it is discontinuous or not necessarily everywhere at the same time, the user never truly knows if he or she is being observed, and this resulted in a decrease in user activity on targeted illegitimate sites.[407] In a similar vein, Bhattacharjee et al., (in a study which assessed the impact of legal threats on online music sharing activity) showed that legal threats appear quite effective against individuals whose initial file-sharing levels were low. An overwhelming majority of these individuals also further reduced the average number of files they shared by more than a third.[408]

---

[403] Park, D.J., 2007. *Conglomerate Rock: The Music Industry's Quest to Divide Music and Conquer Wallets.* Lanham, MD: Lexington Books; Knopper Steve, 2007. "Reinventing Record Deals." Rolling Stone, November 29, 2009. *Appetite for self-destruction: The Spectacular Crash of the Record Industry in the Digital Age.* New York: Free Press *in* Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing, 2015).

[404] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.126.

[405] Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. (2006) Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions. *Journal of Law and Economics*, 49, 91-114.

[406] Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. 'Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions' [2006] Journal of Law and Economics, 49, 91-114.

[407] Groennings, K., Costs and Benefits of the Recording Industry's Litigation against Individuals, 20 Berkeley Technology Law Jorunal. 571 (2005). Available at: http://scholarship.law.berkeley.edu/btlj/vol20/iss1/51 (Accessed: 17/10/2016) at n.38

[408] Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. (2006) Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions. *Journal of Law and Economics*, 49, 91-114, Tables 10, 11

The further consequences of this change are outlined in a study by Giletti,[409] (when examining the motive behind the intention of consumers to purchase music). He posits that 38% of participants who had previous experience using file-sharing networks agreed that the threat of legal repercussions had curbed their usage.[410] However, in the same study, it should also be noted that 36.5% of people felt that the threat of legal repercussions did not curb their usage. Yet, other studies also show that the file-sharing litigation has made users respond to the threat of going to court[411] and since the RIAA began to initiate legal proceedings against illegal file-sharers, Madden and Lenhart found that usage of illegal downloading site (Kazaa) had experienced a 25% reduction in usage between November 2002-2003.[412]

Although this analysis can indicate mixed success in the US for the RIAA's strategy, the majority of substantial sharers decreased the number of files shared, typically by more than 90 percent.[413] The majority of non-substantial sharers actively reduced sharing activity, typically to a third of their original levels, and a substantial number of

[409] Giletti, T., 'Why Pay if it's Free? Streaming, Downloading, and Digital Music Consumption in the iTunes era' Media@LSE Electronic MSc Dissertation Series [2012], compiled by Dr. Bart Cammaerts and Dr. Nick Anstead.

[410] Ibid; Sarah McBride & Ethan Smith, 'Music Industry to Abandon Mass Suits' The Wall Street Journal (Dec. 19, 2008).

[411] Rainie, L. & Madden, M., 'Pew Internet Project and comScore Media Metrix Data Memo' 6 (Apr. 2004), *available at* <http://www.pewintemet.org/pdfs/PIPFilesharing-April-04.pdf> accessed: 9/9/2016.

[412] Madden, M. and Lenhart, A., 'Music Downloading, File Sharing, and Copyright' Pew Internet and American Life Project, (July 2003) available at: <http://www.pewinternet.org/2003/07/31/music-downloading-file-sharing-and-copyright/> accessed: 17/8/2015; By the end of 2002 Kazaa estimated that it had 140 million users - Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 26-135.

[413] Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. (2006) Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions. *Journal of Law and Economics*, 49, 91-114.

sharers exhibited some risk mitigation behaviour.[414] Also, in a study conducted by Rainie and Madden, it was demonstrated that, in response to these tactics:

> "the total number of individuals sharing files online dropped from twenty-eight percent in June 2003 to twenty-three percent in February 2004. Only eighteen percent of total Internet users downloaded music files according to an April 2004 survey, compared to twenty-nine percent in the spring of 2003. Thirty-eight percent of those in the April survey also claimed that the reason why they were downloading fewer files was because of the RIAA suits, up from 27 percent before the end of 2003."[415]

Nonetheless, it is acknowledged that although these results suggest there may be a drop in the percentage of traffic, this may be due to the rise of Netflix and video streaming generally. As a result, this could mean that there is not a drop in the actual usage of illegal file-sharing sites – it is just less as a percentage of Internet traffic generally. This could be a likely consequence as video streaming doesn't always needs such a high degree of compression, thereby reducing the flow[416] of data over the internet.[417] It could have also been the case that users are not downloading less but are sharing less (that is, making fewer of their music files shared or accessible for

---

[414] Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. (2006) Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions. *Journal of Law and Economics*, 49, 91-114.

[415] Rainie, L. & Madden, M., 'Pew Internet Project and comScore Media Metrix Data Memo' 6 (Apr. 2004) at 4. Available at <http://www. pewintemet.org/pdfs/PIPFilesharing-April-04.pdf> (Accessed: 9/9/2016).

[416] Waldfogel, J., *Digitization, Copyright, and the Flow of New Music Products,* in Ginsburgh, Victor/Throsby, C.D. (eds.), *Handbook of the Economics of Art and Culture*, Vol. 2, Amsterdam 2014, 277.

[417]<https://www.researchgate.net/publication/2835762_Distributed_Video_Streaming_Over_Internet> (Accessed: 20/05/2017).

downloading).[418] However, it is argued that the threat of legal repercussions helped to pave the way for these new forms of media.[419]

This was done by the way in which legal proceedings impacted on the choices made by consumers who are now opting for legal methods of consumption. For example, 60% of users who have not tried downloading said that the impact of the suits would prevent them from partaking in such activity in the future.[420] This is argued to have increased popularity of legitimate distribution channels like Spotify, Netflix, and Apple Music by channelling consumers to these methods of distribution.[421] This is because the biggest reason for culture companies conducting litigation and threats thereof is to ensure that "the company maintains its dominance within the networks of distribution by shutting down file-sharing networks, [and then] replacing them with their own subscription and downloading services."[422] Groenning supports this, suggesting that

---

[418] Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. 'Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions' [2006] Journal of Law and Economics, 49, 91-114.

[419] Other legal factors are also argued to be associated with this – Specifically, see the rights of 'communication' and 'public display' in chapter 3 at 3.6; Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019); Jane C, Ginsburg, 'The (New?) Right of Making Available to the Public' in Vaver, D. and Bently, L., (eds), *Property in the New Millennium: Essays in Honour of William R. Cornish* (Cambridge University Press, 2004) 234-37.

[420] Rainie, Lee, et al. 'The Impact of Recording Industry Suits Against File Swappers' Pew Internet and American Life Project, (January 2004) (Available at: <http://www.pewinternet.org/files/old-media/Files/Reports/2004/PIP_File_Swapping_Memo_0104.pdf.pdf> accessed: 15/9/2016; See also, Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 8.

[421] Richwine, L., and Aishwarya, V., 'Netflix records new sky-high share price and subscribers' The Independent, <http://www.independent.co.uk/news/business/news/netflix-latest-news-share-price-subscribers-numbers-streaming-tv-june-us-a7846316.html> accessed: Tuesday 18 July 2017; Wlomert, Nils/Papies, Dominik, 'On-Demand Streaming Services and Music Industry Revenues – Insights from Spotify's Market Entry' 33 IJRM 314 [2016]; This is also discussed in chapter 4 at 4.6 and 4.7 respectively.

[422] Leyshon, A., Webb, P., French, S. Thrift, N., & Crewe, L. 'On the reproduction of the musical economy after the Internet' Media, Culture & Society, [2005] 27(2), 177-209.

there has been an increased level of popularity among legal sites like iTunes since the initiation of litigation from the RIAA.[423]

The music industry wanted to make the public aware that illegal downloading was "the equivalent to shoplifting, but online."[424] This was an attempt to add disincentive much like the legal prohibitions to the laws on theft, which are designed to encourage the thief to use the market.[425] For Posner, the reason why theft is punished is because it is inefficient to permit the thief to bypass the market.[426] As such, universities have adopted internal policing mechanisms and joint initiatives with legitimate online music providers.[427] Also, a report by the International Federation of the Phonographic Industry (IFPI), showed that these waves of well publicised legal actions had a very significant impact in raising awareness of the law on unauthorised file-sharing in both the US and UK. In Europe, a study found that after legal actions awareness of illegality levels reached 70%, and this was similar in the US.[428]

However, since 2009, file-sharing cases have seen a decrease in the amount brought to court. Yet, settlement rates from 2009-2015 for file-sharing cases stand at 90.6%, which is much higher than the 64.1% settle rate seen over that time period for every other copyright infringement suit outside of the file-sharing arena. This can be used to suggest there is a greater tendency to settle under the conditions of the current

---

[423] Groennings, K., 'Costs and Benefits of the Recording Industry's Litigation against Individuals' 20 Berkeley Technology Law Journal [2005] 571.

[424] Denegri-Knott, J., & Taylor, J., 'The Labelling Game: A Conceptual Exploration of Deviance on the Internet' [2005] Social Science Computer Review, 23(1), 93-107.

[425] Posner R. *Economic Analysis of Law* (4th edn, 1992).

[426] Posner R. *Economic Analysis of Law* 77 (1973), at 68.

[427] Groennings, K., 'Costs and Benefits of the Recording Industry's Litigation against Individuals' 20 Berkeley Technology Law Journal [2005] 571.

[428] IFPI, Digital Music Report 2010 - Litigation against individual users does not seem to be actively pursued in the UK at the time of writing. In its response to the Government's Digital Britain report, UK Music remarked, ('[W]e do not believe that the form of intervention proposed by today's report—suing consumers is the best way forward') <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/4387285/Digital-Britain-Report-reaction.html> [Accessed December 5, 2015] - Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 26-138.

system. With this, it is important to note that the majority of cases that were filed during this time period were by Malibu Media LLC, who are an adult entertainment company (however, this is only speculative with regards to why individuals may want to settle), but this can also be a factor in these settlements.[429]

Yet, despite all of these suits, illegal file-sharing continued to grow even after several global lawsuits by the RIAA. However, the joint strategy of pursuing individual users[430] and software distributors deterred large quantities of these illegitimate sharers.[431] Bakker highlights that this eliminated many illegal file-sharing sites, with the few left being the "preserve of the committed niche of users."[432] This is argued to demonstrate that the litigation-based tactics have been met with some success, but this can be said to have been somewhat limited.[433]

Nonetheless, Bellemare and Holmberg found that the subjective probability of legal threats was a significant determinant of illegal downloading.[434] This shows that for some users a formal exercise of power is arguably no longer needed. This is because in light of the findings discussed, it can be said that some users were anticipating the potentiality of legal repercussions. Therefore, despite the suits predominantly stopping

---

[429] Howard, B., 'Lex Machina Publishes Copyright Litigation Report' (August 11, 2015) Available at: https://lexmachina.com/lex-machina-2015-end-of-year-trends/ (Accessed: 2/10/2016).

[430] *Sony BMG Music Entertainment v. Tenebaum,* 660 F.3d 487, 492 (1st Cir. 2011); *Capitol Record Inc. v. Thomas-Rasset* 692 F.3d 899 (8th Cir. 2012).

[431] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch).

[432] Piet, B., 'File-sharing – fight, ignore or compete: paid download services vs. P2P networks' Telematics and Informatics, 22 (1-2): 41-55:d_Services_vs_P2P-Networks (Accessed: 19/5/2015); For a general overview of how litigation has deterred file-sharing as a whole, see Groennings, K., 'Costs and Benefits of the Recording Industry's Litigation against Individuals' 20 Berkeley Technology Law Journal [2005] 571., Part II. Available at: http://scholarship.law.berkeley.edu/btlj/vol20/iss1/51 (Accessed: 17/10/2016).

[433] Bridy A.M., 'Why pirates (still) won't behave: regulating P2P in the decade after Napster' Rutgers Law J [2009], 40(3): 565-611.

[434] Bellemare, M. F. & Holmberg, A. M. 'The Determinants of Music Piracy in a Sample of College Students' (2010), Duke University – Sanford School of Public Policy; Duke University – Department of Economics in Giletti, T., 'Why Pay if it's Free?: Streaming, Downloading, and Digital Music Consumption in the iTunes era' Media@LSE Electronic MSc Dissertation Series, Compiled by Dr. Bart Cammaerts and Dr. Nick Anstead, [2012].

in 2009, there is now argued to be more wholescale monitoring of activity online under Article 17[435] in a 'decentralized'[436] system.[437] This means ISPs are now required to act expeditiously to remove or disable access to infringing material when they have knowledge of it.[438] This is the result of a copyright system that states that Online Content Sharing Service Providers (OCSSPs) carry out acts of communication to the public when they give access to works/subject matter uploaded by their users, meaning they become directly liable for their users uploads[439] under Recital 64.[440] This also includes the use of blocking injunctions,[441] alongside lawsuits and settlements, as well as the internet access restrictions.

---

[435] Directive (EU) 2019/790.

[436] Decentralisation is the process by which the activities of an organization, particularly those regarding planning and decision making, are distributed or delegated away from a central, authoritative location or group.

[437] See the discussion in this chapter at 2.5.

[438] e-Commerce Regs, reg. 19 (based on e-Commerce Dir., Art. 14). On the Knowledge standard, see Case C-324/09 *L'Oreal SA v eBay International AG*, [2011] ECR I-6011, [116] (Grand Chamber), [118]-[124] (awareness of facts or circumstances on the basis of which a diligent economic operator should have realized that [the activity was illegal).

[439] DSM Directive art.17(1). On the complex CJEU case law on communication to the public, see Quintais, J.P., 'Untangling the hyperlinking web: In search of the online right of communication to the public' [2018] 21 J. World Intell. Prop. 385 – in Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [38].

[440] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.) (Text with EEA relevance).

[441] Blocking injunctions can also be used against ISP's whereby they can be ordered to block customer access to websites, such as Newzbin and the Pirate Bay, containing or giving access to copyright material without the permission of the relevant rights holder – *Twentieth Century Fox Film Corp. v. British Telecommunications Plc* [2011] *EWHC* 1981 (Ch), [2011] *RPC* 855; *Twentieth Century Fox Film Corp. v. British Telecommunications Plc* (No.2) [2011] *EWHC* 2174 (Ch); *Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd* [2012] *EWHC* 268 (Ch), [2012] 3 *CMLR* (14) 328; *Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd (No.2)* [2012] *EWHC* 1152 (Ch), [2012] 3 *CMLR* (15) 360; *Paramount Home Entertainment International v. British Sky Broadcasting Ltd* [2013] *EWHC* 3479 (Ch), [2014] *ECDR* (7) 101. See also, M. Husovec, 'Injunctions against Innocent Third Parties: The case of Website Blocking' [2013] JIPITEC (arguing that these remedies signify a transformation in the nature of remedies from tortious to *in rem*).

These are submitted to be designed to eliminate the due process of law in the interests of capitalism and this is made possible by judging how the lawsuits were received.[442]

This is because knowledge and power, as Foucault would argue, are interrelated factors that form part of a unified whole, and by this, it is meant that there can be no power without knowledge and vice-versa.[443] Therefore, in the current copyright system, it is asserted that the power being exercised comes from the knowledge [recipients] themselves form. This is then extracted, re-transcribed, and accumulated according to new norms, or else objects of knowledge that will also make possible new forms of control in the copyright system.[444]

As a result, the change in human behaviours is contended to be the result of the knowledge that users themselves form under the panoptic system, whereby they create the subjective probability of legal threats themselves and govern their own behaviours accordingly due to their own perceptions of what could happen[445] within a decentralized system.[446] It is hypothesized that this is the consequence of the panoptic approach discussed in this chapter,[447] which is designed to induce in the [user] a state of conscious and permanent visibility that assures the automatic functioning of power.[448] The result is that things are arranged so that the surveillance is permanent in its effects, even if it is discontinuous in its action.[449] This renders its actual exercise

---

[442] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 8; See this chapter at 2.5.

[443] Foucault, M., *Power: The essential works of Foucault 1954-1984* (Volume 3, edited by James Faubion, 2002), at 37-83.

[444] Foucault, M., *Power: The essential works of Foucault 1954-1984* (Volume 3, edited by James Faubion, 2002), at 84.

[445] See this chapter at 2.3.

[446] See the discussion below at 2.5.

[447] See this chapter at 2.3, 2.4, and 2.5.

[448] Foucault, M., 'Discipline and Punish: The Birth of the Prison' (Trans. Alan Sheridan, Penguin Books 1977), at 201; Foucault, M., *Power: The essential works of Foucault 1954-1984* (Volume 3, edited by James Faubion, 2002); Adorno, T.W., *The Culture Industry* (Edited by J. M. Bernstein, Routledge Classics 1991), at 12.

[449] See this section at 2.3.1.1 and 2.3.1.2 *generally.*

unnecessary in a system of observation.[450] In short, users are caught up in a power situation where they are themselves the bearers in copyright law[451] because panoptic structures function as architectures of power, not only directly but also through (self-disciplining) of the watched subjects.[452]

2.5 An example from patents to demonstrate the effects created by the current system

Online service providers are increasingly the focus of renewed efforts to enforce copyright online. Traditionally, these providers enjoyed safe-harbour immunity to the extent that their role in assisting online enforcement was relatively minimal.[453] Yet, in light of recent reforms,[454] and the spread of the "blocking injunction"[455] in the EU, this traditional position is coming under pressure.[456]

This section will briefly discuss the recent activity in the context of patents in the UK to help understand the issues copyright is likely to face, as the take-down procedure

---

[450] Frank, J. *Law and the Modern Mind* (New York: Tudor Publishing, 1949) chapter 1; Griffin, J. and Nair, A., 'Making Threats of Copyright Infringement' [2013] International Review of Law, Computers and Technology; Mazzone, J., 'Copyfraud' Brooklyn Law School, Legal Studies Paper No. 40; New York University Law Review, Vol. 81, [2006] at 1026.

[451] Foucault, M., 'Discipline and Punish: The Birth of the Prison' (Trans. Alan Sheridan, Penguin Books 1977) p. 201; Mark Huggard, *Power: a Reader* (Manchester University Press, 2002), at 196.

[452] Galič, M., Timan, T. & Koops, B. Bentham, 'Deleuze and Beyond: An Overview of Surveillance Theories from the Panopticon to Participation'. Philos. Technol. 30, [2017] 9–37.; Lyon, D. *The search for surveillance theories* (2006) in D. Lyon (Ed.), *Theorising surveillance: The panopticon and beyond* (Portland: Willan Publishing 2006) at 3-20.

[453] O'Sullivan, K.T., 'Copyright and internet service provider "liability": the emerging realpolitik of intermediary obligations' IIC [2019], 50(5), 527-558.

[454] Article 17 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.); For more information, chapter 3 at 3.5.1.4.

[455] For example, in the UK, this type of relief is known as a "Norwich Pharmacal" order; *Norwich Pharmacal Co v. Customs and Excise Commissioners*[1974] A.C. 133; See also, chapter 5 at 5.7.3.3(b)(i).

[456] O'Sullivan, K.T., 'Copyright and internet service provider "liability": the emerging realpolitik of intermediary obligations' IIC [2019], 50(5), 527-558.

is equally applicable in the UK under s.97A[457] and in the US via 17 U.S.C §512.[458] Specifically, this concerns the fact that manufacturing giant Epson continues to shut down UK businesses by requiring eBay and Amazon to take down compatible product listings under the previously discussed 'take-down' procedure.[459] The purpose of doing so is to illustrate the effects of high costs surrounding liability and litigation and how this applies to copyright law.

This is to show how this decentralized system can be used to discourage commercial competition in a manner that is almost (in the UK at least) entirely devoid of judicial scrutiny. This is asserted to be due to the desire of service providers to escape any potential damages for breach of statutory duty.[460] It will be shown how there are parallels within the copyright system that can be said to go further than matters here and this is considered to warrant such discussion. The US, however, does have a slightly different system which prevents behaviours like those carried out by Epson and will be discussed later in this section.

Online sellers have the disadvantage of being visible, and eBay and Amazon's automatic and inflexible takedown policies make them by far the easiest target. Epson's ruthless patent-trolling is steadily shutting down small UK businesses, forcing them to lay off employees or close entirely. Takedown notices are damaging UK entrepreneurship, competition and independent business activity.[461] Alternatively, it could also be argued that this same process could also be used as a method in which

---

[457] CDPA 1988; [2010] EWHC 608 (Ch); *Twentieth Century Fox Film Corp v Newzbin* Ltd [2010] F.S.R. 21; In that case the service provider was itself infringing and the relief under s.97A added nothing to what the claimant was already entitled to – For more information on the scope of these injunctions, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 21-243.

[458] 17 U.S.C.

[459] See the discussion in this chapter at 2.3.1.1(a).

[460] Electronic Commerce (EC Directive) Regulations 2002.

[461] Case C-324/09 *L'Oreal SA v eBay International AG*, [2011] ECR I-6011, [116] (Grand Chamber), [118]-[124]; Similar criticisms have been given in the US - Lemley, Chris Sprigman and Mark. 'Why notice-and-takedown is a bit of copyright law worth saving' *Los Angeles Times*. Retrieved [2018]-06-23; Elliot, H., 'Notice-and-Stay-Down' is really filter-everything' *Electronic Frontier Foundation* <https://www.eff.org/deeplinks/2016/01/notice-and-stay-down-really-filter-everything> accessed: 19/05/20.

to prevent or disrupt piracy on the internet.[462] Nonetheless, it is argued that CJEU cases such as the *L'Oreal SA v eBay International*[463] are exacerbating matters here due to the inherent requirement for platforms such as Amazon and eBay to act 'expeditiously' to remove information in order to escape liability.

The UK Open Rights Group (hereinafter ORG) in February 2019 condemned the actions of Epson, calling the take-down procedure a "personal patent guard-dog"[464] with similar concerns about the procedure expressed in the US.[465] This led to discussions in the American House of Representatives, before a subcommittee of the

[462] E.g., ("Europol wipes out 30,000+ piracy sites, three suspects cuffed to walk the legal plank using website take-downs") - The operation was part of an 18-country joint effort involving the European police agency and local cops targeting sites that trafficked in both pirated digital content (streaming video, media files, and cracked software downloads) and sale of counterfeit real-world goods and pharmaceuticals. In total, Europol says it was able to shut down 30,506 domains - https://www.theregister.co.uk/2019/12/02/europol_30000_piracy_sites/ accessed: 21/02/2020).

[463] e-Commerce Regs, reg. 19 (based on e-Commerce Dir., Art. 14). On the Knowledge standard, see Case C-324/09 *L'Oreal SA v eBay International AG*, [2011] ECR I-6011, [116] (Grand Chamber), [118]-[124] (awareness of facts or circumstances on the basis of which a diligent economic operator should have realized that [the activity was illegal].

[464] Shapherd, A., 'Patently unfair – Epson takedowns continue' (February 14th 2019) <https://www.openrightsgroup.org/blog/2019/patently-unfair-epson-takedowns-continue> accessed: 12/04/2019.

[465] Online service providers have expressed concern at the levels of takedown notifications they receive that abuse the DMCA provisions which also require a significant and disproportionate amount of resources to deal with effectively as opposed to the time spent on legitimate notices - (*Urban et al.,* 'Notice and Takedown in Everyday Practice' (2017), paras 2 and 3);

Committee on the Judiciary in March 2014.[466] This has been made possible, as is the same with copyright in the UK, by the Electronic Commerce Directive.[467]

The *Electronic Commerce Directive* (*e-Commerce Directive*; *Online Services Directive*) 2000/31/EC allows an online intermediary to immunize themselves from liability if they are not responsible for content transmitted via their services because they are a "mere conduit"[468] for the content. This also applies to instances where they are merely "caching"[469] or "hosting"[470] it.[471] This is because, amongst other items, the information alleged to be infringing is likely to fall under e-Commerce Directive regulation 2(1) as a "commercial communication"[472] "relating to goods [or] services."[473] Specifically, the take-down procedure is given substance by the fact that under Reg.13 of the e-Commerce Directive,[474] the duties imposed by regulations 6, 7, 8, 9(1) and

---

[466] Masnick, M., 'If We're Going to Change DMCA's 'Notice and Takedown', Let's Focus on How Widely It's Abused' (14 March 2014), *TechDirt*, <https://www.techdirt.com/articles/20140314/11350426579/if-were-going-to-change-dmcas-notice-takedown-lets-focus-how-widely-its-abused.shtml> accessed 14 December 2018]; As notice-and-takedown is still the basis of today's trade mark enforcement - *Alibaba Group, 2018 Global Intellectual Property Rights Protection Annual Report (May 2019)*, https://www.alizila.com/wp-content/uploads/2019/05/Final_Alibaba_2018_IPR_Report.pdf[Accessed 24 October 2019] in Sylvia Polydor, 'The interplay between technology and trademark protection: a study of infringement, intermediary responsibility and protection measures in the digital age' E.I.P.R. [2020], 42(1), 4-12.

[467] 2000/31/EC.

[468] e-Commerce Directive, Article 12

[469] e-Commerce Directive, Article 17

[470] e-Commerce Directive, Article 14

[471] For more information on the defences applicable here, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), chapter 21.

[472] 'commercial communication" means a communication, in any form, designed to promote, directly or indirectly, the goods, services or image of any person pursuing a commercial, industrial or craft activity or exercising a regulated profession, other than a communication' - e-Commerce Directive, Reg. 2(1).

[473] e-Commerce Directive, Reg. 2(1)(c).

[474] The Electronic Commerce (EC Directive) Regulations 2002.

11(1)(a) shall be enforceable, at the suit of any recipient of a service, by an action against the service provider for damages for breach of statutory duty.[475]

Any means in which to improve the matter for a seller by challenging listings removal is considered to highlight an all but too common theme throughout this chapter. This is that those subject to infringement claims often lack the funds or expertise to force (those like Epson) to defend strategies in an open judicial forum.[476] Instead, Shapherd posits that eBay and Amazon's automatic takedown notice procedures provide the multi-million-dollar corporation with "a blunt tool it can brazenly use to circumvent fair judicial process."[477] As a result, it is argued that these disputes are an increasingly private affair that seems to be dictated by the assumption of liability against service providers. This is suggested to be a product of the fact that capitalism unintentionally produces a large number of new and unpredictable social and cultural phenomena. This includes new social and commercial inequalities.[478]

The reason for this is posited to be due to the fact that in capitalist society there is a growing tendency to establish a legal order that protects established interests against competitors through formal monopolies, whereby certain persons become protectors of the monopolistic practices.[479] This is because the lack of regulation for threats of proceedings and the effects which follow are asserted to be based on the rationale that this "monopolization is directed against competitors and users who share some positive or negative characteristics: and its purpose is always the closure of social and economic opportunities to outsiders."[480]

---

[475] The Electronic Commerce (EC Directive) Regulations 2002.

[476] *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012); EWCA Civ 1740; [2013] Bus. L.R. 414 (CA (Civ Div)); See also the discussion in this chapter at 2.3.1.1.

[477] Shapherd, A., 'Patently unfair – Epson takedowns continue' (February 14th 2019) https://www.openrightsgroup.org/blog/2019/patently-unfair-epson-takedowns-continue (Accessed: 12/04/2019).

[478] Reckwitz, A., *The Invention of Creativity: Modern Society and the Culture of the New* (Polity press, 2017), 87; Karl Marx and Friedrich Engels, *The communist manifesto* in Robert C. Tucker (ed.), *The Marx-Engels Reader*, (New York and London: W. W. Norton, 1978), at 469-500.

[479] Weber, M., *Economy and Society* (University of California Press Version, 1978), at 341-343.

[480] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.342.

Therefore, it is contended that such actions by rightsholders have been to ensure the successful orchestration of an environment designed to save their traditional market paradigm.[481] This has occurred to the point where it appears again that copyright has served to create a situation where "wealth is only being redistributed in the direction of the already well-to-do."[482] In comparison, however, the US seems to more effectively safeguard against such items under §512(g).[483] This provides that any material taken down will be replaced within 10 business days unless the copyright owner, within that time, files an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network under §512(g)(2)(C).[484] Failing the prerequisite initiation of proceedings by the copyright owner in order to comply with the legislation, the service provider must put the material back no more than 14 days after the initial take-down.

This is significant as it ensures, unlike the UK, that the take-down process must be substantiated with court proceedings as a matter of law. Also, the procedure goes one step further by seemingly excluding any attempts by individuals who try and use falsified information in a manner to induce any false use of the procedure. This is done by ensuring that a person, who knowingly misrepresents that material or activity is infringing will be the subject of damages incurred any person injured as a result of the service providers' removal of the material under §512(f).[485]

---

[481] P. Drahos, *Information Feudalism* (London: Earthscan, 2002) 19-38, 74-107 and 169-86*; Taken from* Savirimuthu, Joseph*, 'P2P@ software(e).com: Or the art of cyberspace 3.0', in* Macmillan, *New Directions in Copyright Law,* Vol 6, p.250.

[482] Coleman, J.L., 'Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law' *Ethics,* Vol. 94, No. 4. (Jul., 1984), pp. 649-679. Available at: <http://www.ppge.ufrgs.br/giacomo/arquivos/econ-crime-old/coleman-1994.pdf> Accessed: 27/6/2015.

[483] 17 U.S.C. §512(g)(1)-(3).

[484] 17 U.S.C.

[485] "Any person who knowingly materially misrepresents … that material or activity is infringing, or that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred." – DMCA §512(f); See also, *Online Policy Group v Diebold* 337 F. Supp. 2d 1195 (N.D. Cal. 2004); *Automatic Inc v Steiner* 82 F. Supp. 3d 1011, 1030, 1032 (N.D. Cal. 2015).

However, the more recent decision of by the United States Court of Appeals Ninth Circuit in *Lenz v Universal Music*[486] ruled that copyright holders must consider fair use in good faith before issuing a takedown notice for content posted on the internet.[487] Yet, this also involves a requirement by the plaintiff to show bad faith by a rights holder,[488] as well as a consideration of whether the use of the material was allowed by the copyright owner or the law under §512(c)(3)(A)(v).[489]

A key issue here is that there are few examples available of successful claims brought under §512(f) for abuse of the takedown process. Ultimately, this means that it is "exceedingly difficult for an end-user to succeed in a claim for misrepresentation against a copyright holder."[490] Consequently, such provisions, which could be used to prevent the scenario in the UK happening in the US seem to be of little use. This is particularly relevant since there are very little "real"[491] consequences for misuse of the DMCA argues Cobia.[492] Thus, it is fair to suggest that the process can represent a procedure that is devoid of any substantive deterrents regarding the discouragement of misuse due to the lack of legal repercussions.[493] In turn, this could give rise to the view that its operationality is theoretical with regards to limiting any malpractice on part of those who use the system. This is because even where such actions are victorious,

---

[486] *Lenz v Universal Music Corp.* 801 F.3d 1126 (2015), (9th Cir. 2015).

[487] *Ibid.*

[488] *Lenz v. Universal Music Corp* 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

[489] 17 U.S.C.

[490] O'Donnell, 'Lenz v. Universal Music Corp. and the Potential Effect of Fair Use Analysis Under the Takedown Procedures of §512 of the DMCA' (2009) 10 Duke Law & Technology Review, available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1194&context=dltr [Accessed 3 January 2019].

[491] Popper, K. & Eccles, J.C., *The Self and Its Brain: An Argument for Interactionism* (Berlin, Heidelberg, New York: Springer-Verlag, 1977); S.Vaidhyanathan, *The anarchist in the library: how the clash between freedom and control is hacking the real world and crashing the system* (Basic books, 2004).

[492] Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure' (2009) 10 Minn. Journal of Law, Science, and Technology 387, 394, para.2.

[493] M. Masnick, 'If We're Going to Change DMCA's 'Notice and Takedown', Let's Focus on How Widely It's Abused' *(14 March 2014).*

there can be difficulties with collecting the damages awarded.[494] Also, anyone can submit a DMCA takedown notification, and where the complainant is located outside America, it can prove extremely difficult to enforce against them any judgments made under §512(f).[495]

The current take-down procedure could lead to a scenario where rightsholders effectively avoid due process in copyright due to the convergence of law and technology in the digital age under this system.[496] This is because capitalism will ultimately annihilate itself with the ultimate exchange without sufficient State regulation.[497] Information exchange could lead to the self-annihilation of due-process under the take-down procedures where matters remain uncontested as such items in the UK system remain devoid of judicial scrutiny.[498]

As a result, Griffin and Nair note that it is reasonable to infer that the current system favours threats that maintain a more divisive system, favouring knowledge that arises through conflict in a legal environment that is geared towards creating barriers to both the market, and the sharing of content and reproduction.[499] Yet, this notion remains questionable because evidence of monopolization by creating barriers-to-market-

---

[494] Blythe, M.C., 'Freedom of speech and the DMCA: abuse of the notification and takedown process', E.I.P.R. 2019, 41(2), 70-88 at 78.

[495] Blythe, M.C., 'Freedom of speech and the DMCA: abuse of the notification and takedown process', E.I.P.R. 2019, 41(2), 70-88.

[496] Similar to the notion of self-destructive capitalism: see *Deleuze and Guattari, Anti-Oedipus (1977), pp.240-262*; cf. Habermas, J., Theory of Communicative Action, vol.2 (1992), pp.332-373 on colonization in Griffin, J., 'A call for a doctrine of information justice' [2016] Intellectual Property Quarterly 44.

[497] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983).

[498] Griffin, J., 'A call for a doctrine of information justice' [2016] Intellectual Property Quarterly.

[499] Griffin, J. and Nair, A., 'Making threats of copyright infringement' [2013] International Review of Law, Computers and Technology; See also, Stefan Michel, Digitisation of art in the public domain - museum urges Wikimedia to take down reproductions of out-of-protection artworks, J.I.P.L.P. 2019, 14(6), 427-429 – (Notes the German Federal Supreme Court decision in Bundesgerichtshof (1 ZR 104/17) (Museumfotos) on whether Wikimedia's uploading of digitised versions of paintings owned by a museum, but in the public domain and appearing in an exhibition catalogue, infringed copyright.); See also, Bundesgerichtshof (1 ZR 104/17) (Museumfotos) unreported 20 December 2018 (BGH (Ger)).

entry is scant or non-existent,[500] as the cost of the monopolist of integrating is prima facie the same as the cost to the new entrant of having to integrate.[501] Yet, barriers to entry, as a cost that differentially affects new entrants compared to firms already in the market, is now generally accepted[502] on the basis that they are forced to pay higher fees.[503] Despite this, the clearance of rights in the current copyright system prevents the widespread establishment of new online music services[504] and this may stifle the creation of new works.[505] Thus, the reforms[507] discussed in chapter 5[508] aim to help counteract these issues by creating the possibility of producing cheaper works to lessen the severity of such items which could decrease costs throughout copyright.[509]

Yet, the reason for this problem is posited to be because in capitalist societies "power has always invoked the existing power relationships when seeking the approval of those subjected to power."[511] However, the proposals could counteract this in that they provide a framework designed to encourage creative re-uses under a legislative scheme.[512] This is done by reducing the cost of production through placing a temporary limit on the price that can be charged for a copyrighted item, pertaining to both sale and re-use.[513]

Consequently, it is argued that the current system could push information regulation towards the edge of the State,[514] to the point where rightsholders would develop a

---

[500] Peltzman, Issues in Vertical Integration Policy, in Public Policy Toward Mergers 167 (1969).

[501] Williamson, Book Review, 83 Yale L.J. 647, 656-7 (1974).

[502] G. Stigler, The Organisation of Industry, (1968), at 67-70.

[503] Williamson, Book Review, 83 Yale L.J. 647, (1974) at 656-59.

[504] Rights Clearance for Online Music (A. Wiebe ed.), Vienna: Medien und Recht 2014, ISBN 978-3-900741-66-2 (with G Spindler, M Schaefer, L Reis, S Soubelet-Caroit, E Traple).

[505] See chapter 4 at 4.7; Vernon & Graham, Profitability of Monopolization by Vertical Integration, 79 J. Political Econ. 924 (1971).

[507] For a brief overview, see chapter 5 at 5.3.

[508] See chapter 5 at 5.5 generally.

[509] For more information, see chapter 5 at 5.5.3(a).

[511] Horkheimer, M., and T.W., Adorno., *Dialectic of Enlightenment* (Eds, G.S., Noerr and E., Jephcott, Stanford University Press 2002), p.125.

[512] For more information, see chapter 4 at 4.8 and chapter 5 at 5.4.1(c).

[513] On re-use, see chapter 5 at 5.4.1(b) and 5.4.1(c).

[514] Griffin, J., 'A call for a doctrine of information justice' [2016] Intellectual Property Quarterly.

self-serving system of information regulation to which they themselves are the regulators under the current system due to the lack of opposition to the usage of the take-down procedure.[515] This is due to a lack of judicial criticism in what is argued to be a customary private law system.[516] However, this appears to only be in the context of the current provisions and the issues surrounding threats to sue specifically in relation to copyright.

As such, without enacting specific provisions to deal with unjustified threats claims, it is suggested that the proposals can go some way to solving these issues. They would do so by making material more accessible[517] which could increase compliance and thereby reduce the matters discussed as a result. This is based on the notion that more uses could be compliant under the proposed system.[518] This may lessen the

---

[515] Case comment, Internet hosting provider liability for copyright infringement: Reti Televisive Italiane SpA (RTI) v Yahoo! Italia SrL, IIC 2020, 51(3), 389-402; See also, Blythe, M.C., 'Freedom of speech and the DMCA: abuse of the notification and takedown process', E.I.P.R. 2019, 41(2), 70-88; CJEU 12 July C-324/09 *L'Oréal v. eBay International,* paras. 127 and 131); M. Masnick, 'If We're Going to Change DMCA's 'Notice and Takedown', Let's Focus on How Widely It's Abused' (14 March 2014); Sylvia Polydor, 'The interplay between technology and trademark protection: a study of infringement, intermediary responsibility and protection measures in the digital age' E.I.P.R. [2020], 42(1), 4-12.

[516] Customary legal systems generally exhibit the following features: (1) a predominant concern for individual rights and private property; (2) laws enforced by the victims backed by reciprocal agreements; (3) standard adjudicative procedures established to avoid violence; (4) offences treated as torts punishable by economic restitution; (5) strong incentives for the guilty to yield to prescribed punishment due to threat of social ostracism; and (6) legal change via an evolutionary process of developing customs and norms - Lon L. Fuller, *The Morality of Law* (New Haven and London: Yale University Press 1969); Benjamin Zipursky, *The Inner Morality of Private Law*, 58 Am. J. Juris. 27 (2013); Ludwig von Mises, *The Free and Prosperous Commonwealth,* at 85-86; cited by Baumgarth, *Ludwig von Mises and the Justification of the Liberal Order* at 96-97. See also, the economic arguments supporting this proposition in F. A. Hayek, 'The Use of Knowledge in Society' Menlo Park, California: Institute for Human Studies, 1977; [revised and reprinted from *The American Economic Review,* vol. 35, No. 4, Sept 1945]. Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/601 (Accessed: 22/5/2015)

[517] See chapter 5 at 5.5.3(a).

[518] See chapter 5 at 5.2 and 5.9 respectively.

amount of infringing uses due to access being more economically viable which could encourage legitimate uses generally.[519]

This approach is posited to be the most viable in the current environment as opposed to attempting to introduce a specific provision to deal with unjustified threats. This is because a 2015 report by the UK Law Commission[520] specifically excluded copyright from the protection from threats provisions under the Intellectual Property (Unjustified Threats) Bill 2016.[521] This resulted in the passing of Intellectual Property (Unjustified Threats) Act 2017[522] which also excluded threats relating to copyright infringement. This means copyright is not within the scope of the new law as there are no existing threats provisions for copyright. The current approach has also enabled copyright owners to effectively eliminate competitors by avoiding the due process of law.

However, rather than using an external process like the take-down orders, rightsholders use the deleterious financial consequences created by the court process to eliminate commercial competitors.[523] This is achieved by the fact that those subjected to an infringement allegation are forced to settle or face potential bankruptcy.[524] This has meant that cases never actually get to trial because of limited

[519] E.g. it is tenable that an increase in affordable legitimate content may increase overall compliance with copyright and correlatively reduce piracy or non-compliance: J. Poort and J. Quintais, 'Global Online Piracy Study' Institute for Information Law, University of Amsterdam [2018], p.27.

[520] Law Commission Report, 'Patents, Trade Marks and Designs: Unjustified Threats' (No. 360) 2015 - <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/468450/51672_Law_Commission_HC_510_TEXT.pdf> accessed: 23/09/2019.

[521] Law Commission Report, 'Patents, Trade Marks and Designs: Unjustified Threats' (No. 360) 2015, Appendix C.

[522] For more information on the changes brought in by the Act, see Audrey Horton, 'Intellectual Property (Unjustified Threats) Act 2017' - https://www.twobirds.com/en/news/articles/2017/uk/it-and-ip-law-bytes-june-2017/intellectual-property-unjustified-threats-act-2017 (Accessed: 21/05/2018).

[523] See the discussion in this chapter at 2.6.

[524] See the discussion in this chapter at 2.6.

funds in a judicial system that “changed the distribution system” in the digital age.[525] It is to these matters we now turn.

2.6 Tying all this together: the role of the legal process

Davies et al., argue that file-sharing networks were targeted because they were “perceived by many in the entertainment industries to be a much greater threat than standalone devices capable of making or storing digital copies of content.”[526] Michael Robertson, of MP3.com, argues that the objective of copyright litigation:

> “is as much about straddling the competition as anything else and its had its effect by successfully drying up the capital markets for any digital music company.”[527]

Robertson’s company that was sued, in the case of In *UMG Recordings, Inc. v. MP3.com*.[528] This was a landmark case which considered MP3.com's unauthorized duplication of music on Compact Discs (CDs). This was for the purposes of launching a service entitled My.MP3.com or "Beam-it"[529] which allowed users to access their private music collections online from anywhere in the world. The court held that defendant's, My.MP3.com, service infringed the plaintiffs’ copyrights.

This was due to the act of converting the plaintiffs' CDs into MP3 files. This provided access to these files to users which infringed the plaintiffs' copyrights in the sound recordings. The court rejected the defendant's argument that this was a fair use of plaintiffs' sound recordings. In reaching this conclusion, the court held that defendant's

---

[525] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 8.

[526] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 26-135.

[527] Lessig, L., *The Future of Ideas: The fate of the Commons in a Connected World* (Vintage Books, 2001), p.201; See also, Wlomert, Nils/Papies, Dominik, On-Demand Streaming Services and Music Industry Revenues – Insights from Spotify’s Market Entry, 33 IJRM 314 [2016].

[528] 92 F. Supp. 2d 349 (S.D.N.Y., May 4, 2000).

[529] (The mechanism used for the verification is a program called Beam-it which reads a random subset of an audio CD and interacts with the My.MP3.com servers using a proprietary protocol. This paper presents a reverse-engineering of the protocol and the client-side code which implements it) - https://www.cs.rice.edu/~dwallach/pub/beam-it.html (Accessed: 19/04/2019).

use was commercial (as the defendant intended to sell advertising on its site once it had adequate user traffic) and not transformative. The protected work was close to the core of those intended to receive copyright protection, and the defendant had copied virtually all of plaintiffs' works and by its actions, which adversely impacted the plaintiffs' ability to license their works in this fashion.[530] In doing so, relying on *Infinity Broadcasting Corp. v. Kirkwood*,[531] (rejecting the fair use defence by an operator of a service that retransmitted copyrighted radio broadcasts over telephone lines), the court ruled that:

> "[A]lthough the defendant recites that My.MP3.com provides a transformative "space shift" by which subscribers can enjoy the sound recordings contained on their CDs without lugging around the physical discs themselves, this is simply another way of saying that the unauthorized copies are being retransmitted in another medium - an insufficient basis for any legitimate claim of transformation."[532]

What was significant about this case for purposes here, is that, although MP3.com settled for $54 million. This was due to a fine imposed by the US courts of $118 million, as the defendant company simply could not pay. The result was that the plaintiff subsequently purchased the company MP3.com around a year later for a discounted fee.[533]

A similar scenario happened in February 2001, in the US Court of Appeals Ninth Circuit decision in *A&M Records* v. *Napster*.[534] This was the first service that provided a simplistic method users to exchange files of copyright-protected sound recordings and

---

[530] *UMG Recordings, Inc. v. MP3.com* 92 F. Supp. 2d 349, 356 (S.D.N.Y., May 4, 2000).

[531] 150 F3d 104, 108 (2d Cir. 1998).

[532] 92 F. Supp. 2d 349, 356 (S.D.N.Y., May 4, 2000); This can also be compared with the ruling of Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [49]; See also, Murray, A., 'Information Technology law: The Law and Society' (2nd edition), (Oxford University Press, 2013), pp.263-291.

[533] For more information on this case, see *Lessig, Free Culture (2004),* pp.188-99; *UMG Recordings, Inc. v. MP3.com*, 92 F.Supp.2d 349 (S.D.N.Y. 2000).

[534] *A&M Records v. Napster*, Inc., 284 F.3d 1091 (9th Cir. 2001).

was estimated to have had 70 million users at its peak.[535] It enabled users to identify and transfer music from other users. Essentially, it enabled *peers,* that is, to get music from other *peers.* It did this not through a completely peer-to-peer architecture – there was a centralised database of who had what, and who, at any particular moment, was online. But the effect was file-sharing and sites which provided the basis for which users could facilitate access to copyrighted material. This enabled users to 'steal' copyrighted work,[536] making them 'pirates'.[537]

In response to this, the recording industry, headed by the RIAA, filed a suit against Napster on the grounds that the system provided the means in which to procure and facilitate the theft of copyrighted material.[538] The system was shut down accordingly due to its effect on the present and future digital download market.[539] Amongst other

---

[535] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 26-135.

[536] Patry, W., *Moral Panics and the Copyright Wars* (New York: Oxford University Press 2009) at 44; See also, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch); For more information on how this concept has been used in the current system, see chapter 3 at 3.2 and 3.3 respectively; See also, Karol, P., 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06.

[537] For more information on how this concept has been used in the current system, see chapter 3 at 3.3; Also, in the UK, this approach was adopted by Templeman LJ who stated that "a defendant may procure an infringement by inducement, incitement or persuasion" – *CBS Songs Ltd v Amstrad Consumer Electronics plc & Another* [1988] 2 A11 ER 484 at [496].

[538] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001); The essence of the Napster systems functionality is explained by Lessig in Lessig, L., *The Future of Ideas: The fate of the Commons in a Connected World* (Vintage Books, 2001), Ch.8.

[539] The original Napster was effectively shut down following a series of legal challenges in the USA, in which the court found that Napster had engaged in "contributory copyright infringement" - These culminated in two successful applications by the recording industry in *A&M Records Inc v Napster Inc 114 F.Supp.2d 896 (US N.D. Cal 2000)* and *A&M Records Inc v Napster Inc 239 F.3d 1004 (US 9th Cir 2001)* – On contributory copyright infringement, see chapter 5 at 5.7.3.3(a)(ii); See also, Lessig, L., *The Future of Ideas: The fate of the Commons in a Connected World* (Vintage Books, 2001), pp.130-32, 194-96; Also, in contravention of precedent, in *A&M Records, Inc vs. Napster,* the Ninth Circuit of Appeals ruled that Napster had to shut down because it was designed with the intent of circumventing copyright law – (Langenderfer, Jeff, and Don Lloyd Cook. 'Copyright Policies and Issues Raised by A&M Records v. Napster: 'The Shot Heard "Round the World" or "Not with a Bang

things, it was also ruled that lack of harm to an established market did not prevent such harm being accrued to the potential for new markets in different forms.[540] This included things like the digital download market that was very much in its commercial infancy at the time.[541] This is because capitalism has to capture the externalities in an information-heavy economy. This is to the point where capital has extended its ownership rights to new areas and has to own our selfies and our playlists.[542] It is argued that it does so through using copyright law[543] to capture the technology[544] that allows any sort of resistance to it.[545]

---

but a Whimper?' [2001] Journal of Public Policy and Marketing 20 (2): 280-88.); McCourt, T. and P. Burkart, 'When Creators, Corporations and Consumers Collide: Napster and the Development of On-line Music Distribution' [2003] Media Culture & Society 25(3): 333-50; Waldfogel, J., 'Bye, Bye, Miss American Pie? The Supply of New Recorded Music Since Napster' NBER Working Paper No. 16882, March 2011, available at http://www.nber.org/papers/w16882) (accessed: 21/02/2018).

[540] *A&M Records v. Napster*, Inc., 284 F.3d 1091 (9th Cir. 2001) at 915; See also, *L.A. Times v. Free Republic,* 54 U.S.P.Q.2d 1453, 1469-71 (C.D. Cal. 2000) (stating that online markets for plaintiff newspapers' articles was harmed because plaintiffs demonstrated that "[defendants] are attempting to exploit the market for viewing their articles online"); ("any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works.") - See also *UMG Recordings,* 92 F.Suppd.2d at 352; This can be compared with Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] - (an alteration of the copy of the protected work, which provides a result closer to the original, is actually sufficient to constitute a new reproduction of that work, within the meaning of Article 2(a) of Directive 2001/29, which is covered by the exclusive right of the author and requires his permission) - at [43].

[541] *A&M Records v. Napster*, Inc., 284 F.3d 1091 (9th Cir. 2001) at 915 (The essence of the reasoning adopted was that having digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads.")

[542] Mason, P.,, *Post-capitalism: A guide to our future* (Penguin Publishing 2016), p.175.

[543] Wiebe, A., *Right Clearance for Online Music: Legal and Practical Problems from the Perspective of a Content Provider and Alternative Models* (Medien und Recht Publishing, 2014), p.4.

[544] Waldfogel, J., 'Bye, Bye, Miss American Pie? The Supply of New Recorded Music Since Napster' NBER Working Paper No. 16882, March 2011, available at http://www.nber.org/papers/w16882) (accessed: 21/02/2018).

[545] Mason, P.,, *Post-capitalism: A guide to our future* (Penguin Publishing 2016), p.175.

Significantly, in the case,[546] the US Court of Appeals Ninth Circuit did conclude that the defendant had raised defences which were not frivolous, and the company should have been granted permission to try to prove them at a full trial. The court granted an injunction whilst the case was pending, based on the rationale that it was appropriate to prevent any damage to copyright owners against the issue of online file-sharing (the exchange of digital music files online), to block any such action whilst the case was ongoing. The trial never commenced. This was due to the fact that Napster's legal fees had eaten up all of its capital, forcing it to declare bankruptcy in June 2002. It was then sold following its liquidation in autumn, for $5,300,000 by Software company Roxio, who then paid $39,500,000 to buy another unsuccessful company, and rebranded it with the Napster label because of its commercial popularity.[547]

However, Napster did, in fact, attempt to obtain a license from the labels suing them. It alleged that repeated attempts to obtain the aforementioned were refused, suggesting that the record labels had colluded to refuse to deal with the upstart new media.[548] According to Napster, the major labels established and exclusively licensed their own online joint ventures, not just to corner the market in online distribution of music, but to slow online distribution altogether. The purpose of this was to stave off competition to their less than optimal core business of CDs, whilst at the same time securing secured methods of distribution for the digital future.[549]

Significantly, in the case,[550] the trial court found that "even on the underdeveloped record before the court, the joint ventures look[ed] bad, sound[ed] bad, and smell[ed] bad."[551] Yet, despite the "stench of anticompetitive collusion"[552] the court in the case

---

[546] *A&M Records v. Napster*, Inc., 284 F.3d 1091 (9th Cir. 2001).

[547] See Litman, *Digital Copyright* [2001], p.197.

[548] *Re* Napster, Inc. Copyright Litig., 191 F. Supp. 2d 1087, 1109 (N.D. Cal. 2002).

[549] Netanel, N.W., *Copyrights Paradox* (Oxford University Press, 2008), p.77

[550] *A&M Records, Inc. v. Napster, Inc.,* 114 F.Supp.2d 896 (N.D.Cal. 2000).

[551] *In re Napster,* Inc. Copyright Litig., 191 F. Supp. 2d 1087, 1109 (N.D. Cal. 2002).

[552] Netanel, N.W., *Copyrights Paradox* (Oxford University Press, 2008), p.77.

refused to issue a compulsory license by limiting the record label plaintiff's relief for Napster's contributory copyright liability to an award of reasonable damages.[553]

In doing so, the court reasoned that:

> "the [p]laintiffs would [otherwise] lose [the] power to control their intellectual property; they could not make a business decision not to license their property to Napster."[554]

Following Napster, new file-sharing networks[555] evolved with less technical control over users activities. The US Supreme Court ruling in *MGM Studios Inc v Grokster*[556] overturned a previous decision by the US Court of Appeals for the Ninth Circuit.[557] In doing so, it found that liability could not be escaped if the infringement was promoted by the defendant and was given a broad interpretation.[558] Pursuant to this, Grokster was held to be "inducing infringement"[559] and this approach has been used to find defendants liable in subsequent litigation, notably the 2010 LimeWire case involving a file-sharing service in the District Court.[560] Grokster was shut down abruptly as part of

---

[553] These culminated in two successful applications by the recording industry in *A&M Records Inc v Napster Inc 114 F.Supp.2d 896 (US N.D. Cal 2000)* and *A&M Records Inc v Napster Inc 239 F.3d 1004 (US 9th Cir 2001)*.

[554] *A&M Records v. Napster*, 239 F.3d at 1029

[555] E.g., Aimster, Blubster, Morpheus and Grokster – (Those variants avoided centrally based directories of users in favour of decentralised networks that largely resided and operated on users' own computers).

[556] *Ltd, 545 U.S. 913 (US S.Ct. 2005)*.

[557] 380 F.3d 1154 (9th Cir. 2004).

[558] Promotion need not be subjective or overt to result in liability—it could be proven by the presence of more than one objective activity evidencing such promotion, including communications (e.g. soliciting infringing users), failure to prevent or curtail infringement (i.e. to filter), or profiting from the infringement. In such circumstances, actual or potentially lawful uses, even if substantial, would be no defence - Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright*, 17th edition, Sweet and Maxwell, London, (2016), at 26-136; See also, *Arista Records LLC v Lime Group LLC,* No.06 CV 5936 (KMW) (US S.D.N.Y. May 25, 2010*)*.

[559] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster,* 545 *US* 913, 125 *S. Ct.* 2764 (2005); Gregorian, Jamie, Grokster, Bittorrent, Copyright Infringement, and Inducement: How Modus Operandi Can Provide a Functional Standard for Future File-Sharing Cases (May 1, (2007).

[560] *Arista Records LLC v Lime Group LLC, No.06 CV 5936 (KMW) (US S.D.N.Y. May 25, 2010)*.

a settlement with the recording industry.[561] Similar approaches have been taken in the UK under the notion of 'authorization'[562] in cases like *Twentieth Century Fox v. Newzbin,*[563] and others,[564] which is discussed in chapter 5.[565]

Ultimately, the conclusion of these deliberations resulted in Napster being driven out of business before it could pursue discovery on the label's anti-competitive collusion, and Grokster being shut down. However, the fundamental difference between Napster and Grokster for purposes here is that there is evidence that Grokster was deliberately set up to take customers from Napster by offering what it did, but for free[566] and referring to itself "the next Napster."[567] This meant it can be reasonably said to be a get rich scheme that was fully expected to close down. Yet, on the other hand, Napster attempted to become a legally compliant service.[568]

---

[561]<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=12&cad=rja&uact=8&ved=2ahUKEwj2sezKpuroAhWRQUEAHeOrAkwQFjALegQIARAB&url=https%3A%2F%2Fwww.nytimes.com%2F2005%2F11%2F07%2Fbusiness%2Fgrokster-filesharing-service-shuts-down-in-settlement.html&usg=AOvVaw2cfekyk9aw4G3aOuVO29Rm> (Accessed: 03/11/2017).

[562] This is discussed in chapter 5 at 5.7.3.3(a)(i).

[563] [2010] *EWHC* 608 (Ch) - (a defendant may procure an infringement by inducement, incitement or persuasion) – *CBS Songs Ltd v Amstrad Consumer Electronics plc & Another* [1988] 2 A11 ER 484 at [496]; In the US, this is known as "inducing infringement", and has been used to find similar defendants liable in subsequent litigation, notably in the 2010 District Court decision involving P2P service LimeWire - *Arista Records LLC v Lime Group LLC, No.06 CV 5936 (KMW) (US S.D.N.Y. May 25, 2010)* - B. Sisario, 'Major Record Labels Settle Suit With LimeWire', New York Times, May 12, 2011).

[564] *Roadshow Films Pty Ltd v iiNet Ltd [2010] F.C.A. 24 (Australia February 4, 2010)* (finding internet service provider not engaged in authorising infringement with respect to users that infringed copyright via the BitTorrent P2P system); *L'Oreal SA v Ebay International* AG [2009] EWHC 1094 (Ch); [2009] R.P.C. 21 (finding no "procurement" of users' infringements, whether by inducement, incitement or persuasion, by online auction site eBay for counterfeits sold through its service) -), *Copinger and Skone James on Copyright*, 17th edition, Sweet and Maxwell, London, (2016), at 26-137.

[565] For more information, see chapter 5 at 5 at 5.7.3.3(a)(i),(ii).

[566] Levine, R., *Free Ride: How the internet is destroying the culture business and how it can fight back* (Vintage Books 2011), p.37.

[567] (Plaintiffs' Joint Excerpts of Record, 2003) *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) in Sandler. R.L., *Ethics and Emerging Technologies*, (Palgrave Macmillan 2014), p.310.

[568] *Re* Napster, Inc. Copyright Litig., 191 F. Supp. 2d 1087, 1109 (N.D. Cal. 2002).

The problems experienced by Napster are summed up by the journey of Spotify co-founder and CEO, Daniel Ek, regarding the formation of the streaming business model discussed in chapter 4. In essence, he claims the business model was built as a result of his positive consumer experience using the Napster model in his childhood and wanted to replicate it.[569] However, the key thing for purposes here is that Ek recognised that he needed to avoid the issue experienced by Napster of having to obtain permission from the music labels[570] to enable his company to have their songs on the Spotify platform. This is because, without it, he risked being sued.[571]

---

[569] <https://www.newyorker.com/magazine/2014/11/24/revenue-streams> (Accessed: 8/11/2019).

[570] *Re* Napster, Inc. Copyright Litig., 191 F. Supp. 2d 1087, 1109 (N.D. Cal. 2002).

[571] <https://qz.com/1683609/how-the-music-industry-shifted-from-napster-to-spotify/> (Accessed: 25/07/2019); In the US - *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013); *A&M Records, Inc. v. Napster* 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913 (2005); In the UK – *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch); Download from peer-to-peer systems - Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] [43]-[46]; and when they access an Internet stream – *FAPL v. British Communications* [2017] EWHC 480 (Ch) [31] (Arnold J); this also includes the image created on a television screen being regarded as a copy for the purposes of what constitutes a reproduction here – *FAPL,* Joined Cases C-403/08 and C-429/08 [2011] *ECR* I-9083, [159], see also, *Football Association Premier League Limited and ors v. QC Leisure and ors and Karen Murphy v. Media Protection Services Ltd ('FAPL'),* Joined Cases C-403/08 and C429/08 [2011] *ECR* I-9083 (ECJ, Grand Chamber); *ITV Broadcasting Ltd v. TV Catchup Ltd* [2011] EWHC 1874 *(Pat)*; Often the most passive/incidental acts are caught by the reproduction right, such as upload onto a USB – *Technische Universitat Darnstadt* v. *Eugen Ulmer KG,* Case C-117/13, EU:C:2014:2196, [52] (ECJ).

Therefore, it is posited that this creates a process of rational exchange[572] in the copyright system.[573] To explain, this form of exchange that is only possible when one [party] is under compulsion because of his own need for the others economic power, with exchange serving the purposes of consumption or acquisition.[574] This is because Napster tried to become legal but was closed down via the court process due to their lack of funds, it is contended that rightsholders can use the courts to induce a legal process of elimination in absence of judicial scrutiny as matters can remain untried.

The court process is where culture industries can shut down and/or purchase defendant organisations by exploiting the functionality of the copyright legal process and technology itself. As a result, is it asserted that the nature of the court process enables applicants to remove competition by causing them to either settle or go bankrupt. Yet, this is not necessarily a bad thing as civil procedure is designed to maximise the efficiency of trial and encourage settlement, thereby reducing the costs associated with the judicial system[575] by using factors such as risk, relative costs of settlement, and the relative costs of litigation.[576]

However, the current system is suggested to be inefficient under the analysis of Posner because cases remain unconsidered on the basis that the accused has no money to continue their claim or simply does not want to litigate matters due to the potential financial consequences.[577] Consequently, it is submitted that by creating a

---

[572] Posner, R., *Economic Analysis of Law*, 77 (1973) at 104-13, 393-94; Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925; Weber, M., *Economy and Society* (G. Roth and C. Witrich, eds, University of California Press, 1978), p.1394; Posner, R.A., "Rational Choice, Behavioural Economics, and the Law," 50 Stanford Law Review 1551 (1997); Becker, G.S., The Economic Approach to Human behaviour, 153, 158 (1976); Thomas J. Miceli, The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts, Oxford University Press, (2017), 15.2.

[573] Griffin, J., Copyright evolution - creation, regulation and the decline of substantively rational copyright law, I.P.Q. 2013, 3, 234-252.

[574] Weber and Parsons, "The Theory of Social and Economic Organisation" The Free Press New York, (1947), p.171.

[575] Posner, R., *Economic Analysis of Law*, 77 (1973) at 337-339.

[576] Ibid.

[577] (E.g. even a £2,000 claim for copyright infringement...can run up costs of £20-£30k) - Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011), p.83; Lanjuow, O.J. &

more financially accessible under the reforms discussed in chapter 5 could help to limit such issues.[578] Thus, lower access fees may mean that works are, in fact, more financially accessible. This could result in fewer disputes as compliance may increase by extending the appeal of legitimate markets[579] within copyright.[580]

2.7 Where to from here?

This chapter has focused on how digitisation was turned into an opportunity for the music industry under copyright law. This was to the point where the economic power conferred upon rightsholders and their representatives, made them able to use the State as an instrument in which to re-establish their market positions.[618] This resulted in a copyright system of threats which created an environment of panoptic control.[619]

In this system, the litigation approach was arranged in such a way to ensure that multiple levels of the public were targeted,[620] including considerable media attention for two trials[621] that were of little economic significance,[622] but were designed to shape

---

Lerner, J., 'The Enforcement of Intellectual Property Rights: A Survey of the Empirical Literature' (National Bureau of Econ. Research Working Paper No. 6296, 1997) (stating litigation costs fall most heavily on small firms, which may settle because they cannot afford long-term litigation); Balganesh, S., 'Copyright Infringement Markets' (February 13, 2013). Columbia Law Review, Vol. 113, 2013; University of Pennsylvania, Institute for Law & Economics Research Paper No. 13-7. Available at SSRN: http://ssrn.com/abstract=2233065; (Accessed: 12/5/2015) (Outlines that companies are reluctant to contest claims against them because of the financial implications of doing so, highlighting that going to court is no longer a viable or desirable option commercially); See also, this chapter at 2.3, 2.5, and 2.6.

[578] For a brief introduction of the reforms see chapter 5 at 5.3; For their proposed benefits see 5.5.

[579] Extending the appeal of legitimate markets was an aim suggested by Professor Hargreaves in - Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* [2011], at 8.45; See also, chapter 5 at 5.5.3(a).

[580] See chapter 5 at 5.5.

[618] For more information, see chapter 3 at 3.3, 3.4 and 3.5; See also, chapter 4 at 4.6.

[619] See this chapter at 2.3.

[620] See this chapter at 2.3.1.1 and 2.3.1.2 respectively.

[621] *Sony BMG Music Entertainment v. Tenenbaum,* 719 F.3d 67 (2013); *Capitol Records Inc. v. Thomas-Rasset,* No. 06-1497 (D. Minn. Jan. 22, 2010).

[622] Karol, P., 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06 at 893; See also, this chapter at 2.3.1.2.

consumer attitudes[623] surrounding the file-sharing so that it was viewed as "stealing" and "theft."[624] This had the effect of arranging the copyright system in such a way that the exercise of power is not added from the outside, like a rigid, heavy constraint, to the functions it invests. Instead, it is so subtly present to increase its efficiency by itself increasing its points of contact,[625] where consumers began to self-regulate.[626] The result is argued to be that the copyright system is not simply a hinge, a point of exchange between a mechanism of power and a legal function. It is a way of deterring opposition to infringement claims and maximising compliance in an environment controlled by permanent and omnipresent surveillance that is capable of making all visible but remains invisible.[627]

This transformed digital music online into a "field of perception: thousands of eyes posted everywhere."[628] The consequences of this, was that the ability of rightsholders to enforce and administer copyright legal regulation over the internet had been strengthened, whereby the mere threat or potentiality of action may influence the individual more than if the action itself were to happen.[629] Thus, litigation performs

---

[623] See this chapter at 2.4.1.

[624] Green, P.S., '13 Ways to Steal a Bicycle: Theft Law in the Information Age', [2012] 270-76, ; *Sony BMG Music Entm't v. Tenenbaum,* 719 F.3d 67, 71 (1stCir. 2013) (emphasis added) – ("new technologies that would allow Internet users to steal copyrighted works."); For more information, see chapter 3 at 3.3.

[625] The copyright system sued various levels of the user spectrum in an attempt to ensure that small-time users at home, to those in the commercial sector were not immune from this multi-faceted approach – See this chapter at 2.3 and 2.6; On the way that contracts have been used to extend the control that rightsholders are able to exert over intangibles in the digital context, see chapter 4 *generally*.

[626] See this chapter at 2.4.1.

[627] Foucault, M., 'Discipline and Punish: The Birth of the Prison' (Trans. Alan Sheridan, Penguin Books 1977), pp.206-214; See this chapter at 2.3 and 2.5 *generally*; See also, Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 8.

[628] Foucault, M., 'Discipline and Punish: The Birth of the Prison' (Trans. Alan Sheridan, Penguin Books 1977), p.214.

[629] Frank, J. *Law and the Modern Mind* (New York: Tudor Publishing 1949), chapter 1; Griffin, J. and Nair, A., 'Making Threats of Copyright Infringement' [2013] International Review of Law, Computers and Technology; Mazzone, J., 'Copyfraud' Brooklyn Law School, Legal Studies Paper No. 40; New York University Law Review, Vol. 81, [2006] at 1026.

more than just a remedial function in copyright law (i.e., merely correcting harm) and instead, provides a constitutive function that enables proceedings to be brought in the first place.[630] What remains is to flesh out how the impact of capitalism on copyright law has caused the law in this area to evolve to accommodate the emergent technologies for the benefit of rightsholders in the music industry at the expense of the user.[631]

To this end, the next chapter looks at how copyright law developed as a result of capitalism.[632] It will also discuss how such developments provided the basis for the success of the 'streaming' business model[633] (which is discussed in chapter four).[634] This includes the influences[635] of the UK (communication right)[636] and the US (public performance right).[637]

---

[630] Balganesh, S., 'Copyright Infringement Markets' (February 13, 2013). Columbia Law Review, Vol. 113, 2013; University of Pennsylvania, Institute for Law & Economics Research Paper No. 13-7. Available at SSRN: http://ssrn.com/abstract=2233065; Accessed: 12/5/2015; See also, Waldron, J., 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' 68 Chicago-Kent Law Review [1993] 841, 844.

[631] See chapter 3 at 3.3; See also, chapter 4 at 4.3.2, 4.5 and 4.7 respectively.

[632] E.g., see chapter 3 at 3.1 and 3.4; See also, chapter 4 at 4.5.1; Smith, A., *The Wealth of Nations* (Book IV, 1776) in Griffin, J., 'A call for a doctrine of information justice' Intellectual Law Quarterly, [2016].

[633] For more information, see chapter 3 at 3.5; Paying subscribers to subscription services grew from eight million in 2011 to 28 million in 2013 (source: IFPI, Digital Music Report 2014, http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf [Accessed December 5, 2015] - Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 26-141.

[634] See also, chapter 4 *generally* and also at 4.6.

[635] The way they have done this is by providing a 'cradle' away from p2p file-sharing and into the current streaming model discussed in the fourth chapter, for the benefit of rightsholders, essentially performing what is described as a 'bridge-gap' function; For more information, see chapter 3 at 3.5.

[636] In the UK, under section 20 CDPA 1988, a right to communicate a work to the public arises with respect to literary, dramatic, musical and artistic works, sound recordings, films, and broadcasts, in order to secure the successful implementation of the Information Society Directive Info. Soc. Dir., Art. 3, itself implementing WCT, Art. 8; Rel. Rights. Dir., Art. 8(3), Recital 16.

[637] A "public performance" of music is defined in the U.S. copyright law to include any music played outside a normal circle of friends and family. Songwriters, composers, and music publishers have the exclusive right to play their music publicly and to authorize others to do so under the copyright

Chapter four then looks at the role of contracts and how the streaming model has led to the proliferation of digital licencing that maximises the imperative control[638] over consumers.[639] This is because digital licenses enable the terms of the relationship to be dictated to a greater extent as the agreements give rise to obligations which are enabled[640] and subsequently recognised by law.[641] This will be demonstrated to dramatically restrict the freedom associated with contracts.[642] This includes the transferability[643] and individual usage[644] of copyrighted material in the interests of capitalism. It then looks at why this is an issue,[645] including how a proposed system could counteract this.[646] chapter five will then outline how this system could be implemented.[647]

---

law. This is known as the "Performing Right". This right was designed to enable and encourage music creators to continue to create music - §106(6) 17 U.S.C.

[638] The example given by Weber here refers to a corporate group, by virtue of the fact that the members are subjected to the legitimate exercise of imperative control, that is to 'authority', and so are labelled as an 'imperatively coordinated' group. He also notes that in this case, 'imperative control' is confined to the legitimate type, but it is not possible in English to speak here of an 'authoritarian' group. The citizens of any State, no matter how 'democratic,' are 'imperatively controlled' because they are subject to law – (Weber, M., *The Theory of Social and Economic Organisation* (The Free Press, 1947), pp.152-53.

[639] For more information, see the discussion in this chapter generally, and in particular, parts 4.5, , 4.6, respectively; See also, Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007); *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016); Savic, M., 'The Legality of Resale of Digital Content after UsedSoft in Subsequent German and CJEU Case Law' [2015] EIPR 414-29.

[640] See the discussion in this chapter at 4.5; See also, CDPA 1988 s.28(1), and 17 U.S.C. §109(d) (1976).

[641] Edwin Peel, The Law of Contract (14th eds. Sweet and Maxwell 2015), p.1; See also, chapter 4 at 4.5 & 4.6.

[642] For more information, see chapter 4 at 4.3.2.

[643] For more information, see chapter 4 at 4.4.

[644] For more information, see chapter 4 at 4.5.1.

[645] For more information, see chapter 4 at 4.7 *generally*.

[646] For more information, see chapter 4 at 4.8.

[647] For more information, see chapter 5 *generally*; On the reforms, see 5.3.

Chapter 3

Property and the role of the communication and public performance rights in the digital music industry

3.1 Introduction.

> "The capitalist ideology infiltrates into the lives and minds of those who operate within this economic system. It changes the way individuals view the world – his or her emotions, perceptions, speech, and thought – the entire existence of individuals operating with the capitalist sphere are influenced and formed by the material relations that operate within it; it is the way he or she understands the world at large."[1]

The thesis creates an understanding of how and why the copyright legal system has become predominantly focused upon protecting and creating new and pre-existing business interests in the economy, but this is not always the case.[2] To this end, the

---

[1] Lasch, C., *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* [1978]; Capitalism is described by Maurice Dobb as a "system of economic activity that is dominated by a certain type of motive, the profit-motive" – (Dobb, M., *Studies in the development of capitalism* (London Routledge, 1963) p.5; Popper, K., and Eccles, J.C., *The Self and its Brain* (Routledge Publishing 1977); However, views on capitalism are beginning to change, with suggestions that the current system needs to rethink how it redistributes wealth by its own billionaires, otherwise suggesting that the degree it affects the way individuals view the world may not be so extensive - https://www.forbes.com/sites/randalllane/2019/3/4/reimagining-capitalism-how-the-greatest-system-ever-conceivedand-its-billionairesneed-to-change/#33a1a27b64c8 (Accessed: 27/08/2019); Some also suggest capitalism isn't working – <https://economicprinciples.org/Why-and-How-Capitalism-Needs-To-Be-Reformed/> (Accessed: 05/11/2019); Marx saw capitalism as the harbinger of "misery, agony of toil, slavery, ignorance, brutality, and mental degradation" for working men, it is less clear whether this was meant to rule out real wage growth – Marx, K., *Capital*, (Vol. 1, 1867) Ch.25, Section 3.

[2] Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925, at 944 who establishes the issue of economic concentration and deconcentration policies as the fundamental difference between the Chicago School and the Harvard School; See also, See R.J. van den Bergh and P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective*(Antwerp/Oxford: Intersentia/Hart Publishing, 2001), at 16, who emphasize the great

chapter analyses the operation of copyright in the economic and political realms. This is to explain why copyright has evolved as a result of the market. The chapter will assess how capitalism has influenced the development of the copyright legal area using proprietary rights.[3] This has been done by maximising the proprietary control that rightsholders have over their copyrighted assets, which is also a focal point of debate.[4] In doing so, this chapter will explain why there has been a gradual

divergences among economic schools since classical theory. However, competition economics has been nourished by these interactions between movements, schools, and doctrines so that today it is relatively stable and reliable, at least in those applications with a longer history; See also, Richard. A. Posner, *The Economics of Justice* (Harvard University press, 1983); G. Calabresi and A. D. Melamed [1972] 85 Harvard L.R. 1089 and [1997] 106 Yale L.J. 2081; A prominent critic of Posner's work is Ronald Dworkin, see his work – *A Matter of Principle,* (Clarendon Press, Oxford) chapter 13; Williamson, Dominant Firms and the Monopoly Problem: Market Failure Considerations, 85 Harv. L. Rev. 1512, 1518-19 [1972].

[3] James Griffin notes that "copyright is a property right, which also protects the intangible property within the copyright work. The notion of property has been central to the development of copyright law" – (See 'The Five Cornerstones of Copyright: Democratic Proprietary Entitlement' in Griffin, J., 'Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly.

[4] See e.g. *Phillips v. Mulcaire* [2012] UKSC 28; [2013] 1 *AC* 1; J. Griffiths and R. Howe (eds), Concepts of Property in Intellectual Property Law (Cambridge Uni. Press. 2013), ch.3; Patry, *Moral Panics and the Copyright Wars* ,pp.109-32; M. Grynberg, 'Property Is a Two-Way Street: Personal Copyright Use and Implied Authorization' [2010] 79 Fordham L. Rev. 435; A. Mossoff, 'Is Copyright Property?' [2005] 42 San Diego L.Rev. 29; F. MacMillan (ed.), *New Direections in Copyright Law* (2008), 1, 11-15; R.P. Merges, 'The Concept of Property in the Digital Era' [2008] 45 Hous.L.R. 1239; S. Aistars, D. Hartline and M. Schultz, *Copyright Principles and Priorities to Foster a Creative Digital Marketplace* [2016] 23 Geo. Mason L. Rev. 769; Litman, J., 'What we don't see when we see copyright as property' Cambridge Law Journal [2018], 77(3), 536-558; L. Bently, 'What is Intellectual Property?' (2012) 71 CLJ 501; L. Lessig, *Free Culture* (New York 2004), 83-173; Griffin, J., 'Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly; R. Burrell and A. Coleman., *Copyright Exceptions: The Digital Impact* (2005), 180-239; Y. Benkler, 'Free to the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (1999) 74 NYU L. Rev. 354.

strengthening of the position of rightsholders and a withering away[5] of the copyright limitations[6] that member states are able to use in their laws.[7]

The second chapter outlined how the internet created new forms of dissemination that were extremely difficult to control with law[8] and this has made copyright "one of the defining issues of contemporary times."[9] In turn, the internet has been held to r[u]n counter to capitalism's process of commodification in the culture industry, as this is a process that relies on the existence of copyrighted material.[10] Moreover, other theorists have suggested that the internet was devoid of capitalist intent and was a network designed to encourage freedom.[11] Yet, the internet has also been regarded as being consciously developed within a global privatised network, along with free-trade policies, in order to deliver global capitalism more efficiently.[12] However,

---

[5] Engels referred to the State "withering away" - Jessop, B., 'Recent theories of the capitalist state' Cambridge Journal of Economics, Volume 1, Issue 4, 1 December [1977], at 353–373; See also, Avineri, *The Social and Political Thought of Marx, K.,* [1968].

[6] For more information, see this chapter at 3.4

[7] Rel. Rights Dir., Art. 10(1).

[8] See chapter 2 at 2.2 and 2.2.1, 2.3 and 2.4.1 respectively.

[9] Fenwick, T. and Locks, I., 'Copyright in the Digital Age: Industry Issues and Impacts' (Wildy, Simmonds and Hill Publishing, 2010), pp.2-3; The pressure that the rise of the internet and digital technology have placed upon copyright law have been comprehensively documented – (Lessig, *Free Culture* [2004]; Vaidhyanathan, *The Anarchist* [2004]; Vaidhyanathan, *Copyright and Copywrongs* [2003]; Boyle, *Software and Spleens* [1996]; Boyle, *The Public Domain* [2008].

[10] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.116; See also, Lessig, L., *The Future of Ideas: The fate of the Commons in a Connected World* (Vintage Books, 2001), p.223; For more information on how copyright is essential to the capitalist process of 'commodification' see Hesmondhalgh, D., *The Cultural Industries* (3rd eds. SAGE Publications 2013), pp.68-71; Rheingold, H., *The Virtual Community: Homesteading on the Electronic Frontier* (Revised edition, Cam. MA: MIT Press 2000)ence that capitalism has had on this process, see this chapter at 3.4 *generally*.

[11] Rheingold, H., *The Virtual Community: Homesteading on the Electronic Frontier* (Revised edition, Cam. MA: MIT Press 2000); John, Foster, and McChesney, Robert Waterman, 'The Internet's Unholy Marriage to Capitalism' *Monthly Review,* March (2011) *in* Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.136.

[12] Schiller, D., Digital Capitalism: Networking the Global Market System (Cambridge, MA: MIT Press, 2000) at 203 and Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), at xx.

globalisation or boundary erosion due to the internet's explosive growth has also been much overstated.[13]

This chapter builds on the previous chapter by focusing on why the copyright legal system has expanded in both scope and duration.[14] This includes analysing how it has become inherently focused on economic exploitation[15] and restriction under proprietary-based reasoning,[16] and legally enforceable rights.[18] The previous chapter also considered the ways in which digital technology represented an ideological challenge to the very legal and economic principles on which copyright holders depended.[19] This chapter goes further by assessing what has happened within the copyright legal framework as a result of this.[21]

---

[13] A growing number of scholars and writers have countered that globalisation is not necessarily a uniform, irreversible and inexorable trend creating social, economic and cultural convergence throughout the world. See, for example: Benjamin R. Barber, *Jihad v McWorld: How Globalism and Tribalism are Shaping the World* [1996]; Friedman, T.L., *The Lexus and the Olive Tree: Understanding Globalisation* [2000] (finding a balance between American free-market capitalism and powerful local forces, including religion, race and cultural identity); and Shanthi Kalathil and Taylor C. Boas, *Open Networks Closed Regimes: The Impact of the Internet on Authoritarian Rule* (2003).

[14] Litman., *Digital Copyright* (New York: Prometheus Books, 2001), p.25.

[15] Plant, A, 'The Economics of Copyright' (1934) *Economica* 167.

[16] See this chapter at 3.2

[18] See this chapter at 3.2

[19] For more information, see chapter 2 at 2.2, 2.2.1 respectively; Gillespie, Tarleton, *Wired Shut: Copyright and the Shape of Digital Culture* (Cambridge, MA: MIT Press 2007) at 43 in Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.116; Lanier, J., *You are not a Gadget* (Penguin Books, 2010); Susskind and Susskind, *The Future of the Professions: How Technology Will Transform the work of Human Experts* (Oxford University Press 2015) – (This book argues that technological advances will bring transformation to professional work that will resemble the impact of industrialization on traditional craftsmanship – due to the fact that expertise is more accessible and affordable than ever before). On the effect of technology as a whole, see pp.289-95.

[21] For more information, see this chapter at 3.4.

Yet, although this same technology has increased the costs associated with accessing electronic publications,[24] it also gave rise to things like the Open Access scheme (OA). This refers to free, unrestricted online access to research outputs such as journal articles and books. OA content is open to all, with no access fees.[25] For example, a renowned author in the open access area, Michael Carroll, has argued that the concept of open access was born out of the frustrations caused by the increasing diffusion of scholarly research on the internet and the ever-rising price of journal subscriptions.[26]

However, such items are not the focal point of discussion here, but it is pertinent to highlight that progress in OA has arguably stalled. This is because only 20% of new papers are 'born-free', and half of all versions of records are pay-walled.[27] This is to the point where scholarship is typically locked up in journals that are so expensive that even university libraries may be priced out of the market.[28]

To this end, the chapter begins by looking at how capitalism creates an attitude of accumulation among individuals that is perpetuated by the notion of property.[29] This is because copyright is a property right,[30] but copyright law is concerned, in essence,

---

[24] Turner, F., *From Counterculture to Cyberculture: Stewart Brand, the Whole Earth Network, and the Rise of Digital Utopianism* (Chicago: University of Chicago Press, 2010); David Lyon, *The Electronic Eye: The Rise of Surveillance Society—Computers and Social Control in Context* (John Wiley and Sons, 2013).

[25] It is regularly argued that open standards will allow for increasing interaction at both the personal and technological level - R. Stallman*, Free Software Free Society: Selected Essays of Richard M. Stallman* (Free Software Foundation, 2002); M. O'Sullivan, 'Making Copyright Ambidextrous: An Expose of Copyleft' [2002] 2 Journal of Law and Information Technology, <https://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2002_3/osullivan/> [Accessed 19 December 2015].

[26] Carroll, M.W., 'The Movement for Open Access Law - Symposium.' Lewis & Clark Law Review 10, no.4 (Winter 2006): 741-760.

[27] Green, T., 'Is open access affordable? Why current models do not work and why we need internet-era transformation of scholarly communications', Wiley online Library, (24 Jan 2019) Available at: <https://onlinelibrary.wiley.com/doi/full/10.1002/leap.1219> (Accessed: 16/05/2019).

[28] <https://www.chronicle.com/article/The-Fallacy-of-Open-Access/241786> Accessed: 04/11/2019.

[29] See this chapter at 3.2.

[30] CDPA 1988 ss.1(1), 90(1) and 96(2); cf. Copyright Act 1956 s.36(1) and Copyright Act 1842 s.25

with the negative right of preventing the copying of material.[31] It then evaluates the role that the property rhetoric played in the commodification of culture[32] under the digital copyright regime.[33] It then takes these ideas forward and assesses them within the market context,[34] arguing that individuals are acting together to facilitate the development of capitalism.[38]

The chapter then considers the role that copyright law has played online[39] in facilitating the advancement of capitalist interests in the culture industry and the effect this has

---

[31] *British Leyland Motor Corp v Armstrong Patents Co Ltd [1986] A.C. 577;* [1986] R.P.C. 279 at 302; *Fraser v Thames Televison* Ltd [1984] Q.B. 44 at 60; *George Hensher v Restawhile Upholstery (Lancs.) Ltd* [1976] A.C. 64; [1974] F.S.R. 173 at 98; *Performing Rights Society Ltd v Rangers FC Supporters* Club [1975] R.P.C. 626 at 633.

[32] E.g. ("Tenenbaum "embodie[d] the industry's decade-long attempt to shape the narrative of P2P downloading through the rhetoric of theft.") - Karol, P., 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06.

[33] See this chapter at 3.3; See also, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch); Green, P.S., '13 Ways to Steal a Bicycle: Theft Law in the Information Age', [2012] 270-76, ; *Sony BMG Music Entm't v. Tenenbaum,* 719 F.3d 67, 71 (1stCir. 2013) (emphasis added) – ("new technologies that would allow Internet users to steal copyrighted works."); Karol, P., 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06.

[34] For more information, see this chapter at 3.4 *generally.*

[38] See the discussion in this chapter at 3.4; Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016]; This idea has been discussed extensively - Adorno, T.W., *The Culture Industry* (Edited by J. M. Bernstein) Routledge Classics, (1991); Adorno, M., and T. W., Horkheimer., *Dialectic of Entitlement*, (trans. J. Cumming, New York: Herder and Herder, 1972); Ciaffa, J.A., *Max Weber and the problems of value-free social science: A critical examination of the Werturteilsstreit* (Associated University Presses, Inc. 1998); Similar points are also made in Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016]; Marx, K., *Das Capital* (London: Penguin version, 1990); Miliband, R., *The State in Capitalist Society: The Analysis of the Western System of Power*, (Quartet Books London, 1973); Marx, K., Capital: *A Critique of Political Economy*, (Int'l Pub. Ed. New York 1967) (1st ed. 1867); Marx, K., *Capital*, (Wordsworth Editions Ltd, 2013).

[39] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ); Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December

had on digital music.[40] This involves analysing the exclusive rights of communication[41] in the UK (s.20 CDPA),[42] and the public display right in the US (17 U.S.C. §106).[43] Specifically, in the UK, streaming is protected under s.20(2)(b) because in *FAPL v British Communications*,[44] it was held that a 'communication' is an electronic transmission of a work, coming in the form of internet 'streaming' according to Arnold J.[45] In the US, streaming is protected under §.106(6)[46] which governs the digital performance right in the context of sound recordings. This has been interpreted broadly[47] due to the effects of the landmark US Supreme Court decision of *Herbert v Shanley*[48] discussed in this chapter.[49]

It is contended that these rights have shaped the law of the present day and thus play a central role in the shaping of the digital music market.[50] They have provided what is argued as a 'cradle'[51] away from file-sharing and into the current streaming model discussed in the fourth chapter, essentially performing what is described as a 'bridge-

---

(2018); *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013); *Football Association Premier League and Others, EU:C:2011:631,* Paras 107-109; Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019).

[40] See this chapter at 3.4

[41] CDPA 1988 – the 'communication' right was introduced in this form to implement the Information Society Directive; Info. Soc. Dir., Art. 3, itself implementing WCT, Art. 8; Rel. Rights. Dir., Art. 8(3), Recital 16.

[42] CDPA 1988 s.20(2) CDPA 1988.

[43] 17 U.S.C §106(6).

[44] EWHC 480 (Ch).

[45] Ibid at [33] (per Arnold J).

[46] US Copyright Act 1976.

[47] See this chapter at 3.5.2.1;

[48] 242 U.S. 591 (1917).

[49] See this chapter at 3.5.2.

[50] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.5.

[51] See this chapter at 3.5 and 3.6 respectively.

gap' function.[52] This analysis reveals inadequacies within the current system which have resulted in the formulation of legal doctrines that limit the amount of public knowledge in favour of private interests.[53] For instance, in the UK, certain permitted acts[54] in relation to the usage of copyright works are allowed under Chapter III of the CDPA 1988.[55] Yet, these are often defined with in a high degree of rigidity[56] whereby they can be said to be otherwise confined to activity that is fundamentally non-commercial.[57] The result is that such provisions are not to be understood as "mere examples of a general wide discretion vested in the courts to refuse to enforce copyright where they believe such a refusal to be fair and reasonable."[58] Alternatively, in the US, under (17 U.S.C. §107)[59] there is a system of fair use.[60] However, this is

---

[52] See this chapter at 3.6.

[53] What this means is that the amount of information now available to be freely accessed or used by the public is now limited under the current system by the existence and potential enforceability of private interests, with private interests being specifically those granted by copyright law over intangible assets; For more information, see this chapter at 3.5 *generally*, see also chapter 4, particularly at 4.7.

[54] The Information Society Directive (2001/29/EC) also provides for exceptions to the rights of reproduction, communication, and distribution, and the circumstances to which such exceptions may be recognised – under Art.5; See also, the requirements of the Related Rights Directive, Art.10; Software Directive, Art.5 and 6; See also the Database Directive Art.6.

[55] The majority of these are found in Chapter III of Part I of the Copyright, Designs and Patents Act 1988 and are referred to as 'permitted acts'.

[56] *Pro Sieben Media v. Carlton UK Television* [1998] *FSR* 43, 48 (Laddie J); See also, the more liberal interpretation of CDPA 1988, s.30(1) in *Pro Sieben Media v. Carlton Television* [1999] *FSR* 610, 614 (Walker LJ).

[57] *Navitaire Inc. v. Easy Jet Airline Co. & Bulletproof Technologies Inc.* [2006] *RPC* (3) 111, [77].

[58] *Pro Sieben Media AG v Carlton UK Television* Ltd [1998] F.S.R. 43 at 49 (reversed by the Court of Appeal, [1999] 1 W.L.R. 605 per Laddie J; [1999] F.S.R. 610, but not with any disapproval of this statement).

[59] Copyright Act 1976 (US).

[60] Copyright Act 1976, 17 U.S.C. s.107; *Sony Corporation of America v. Universal City Studios* (1984) 464 US 417; Comparatively, see *Herbert v Stanley* 242 U.S. 591 (1917) (here it was held that a music performance by a small orchestra in a restaurant was 'for profit' despite the fact that no

also interpreted narrowly,[61] to the point where even where there is no direct economic benefit to demonstrate commercial use, an act can still be infringing.[62]

It will be argued that this has created a copyright system which is more about exploitation than creation,[63] concentrating money in the hands of the few in an economic system that rewards the absolute commitment to profit.[64] Yet, it is important to note that the concentration of wealth into the hands of the few is not always detrimental[65] as capitalism can promote wealth that benefits society,[66] but such views have a "strong conservative bias."[67] The chapter will conclude by suggesting that there is now a protectionist proprietary copyright policy that is shaped more by effective

---

separate admission charge was made to her the music); See also, this chapter at 3.4 and 3.5 respectively.

[61] *Harper & Row, Publishers, Inc, Inc. v. Nation Enterprise* 471 U.S. 539 (1985).

[62] *Worldwide Church of God v. Philadelphia Church of God,* 227 F.3d 1110, 1118 (9th Cir. 2000).

[63] Griffin notes that the development of copyright has been predominantly centred around the capitalist principles of economic rights - Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016].

[64] <https://www.theguardian.com/commentisfree/2019/jun/12/capitalism-isnt-broken-its-working-all-too-well-and-were-the-worse-for-it> (Accessed: 22/11/2019).

[65] See this chapter at 3.2; On the economic analysis of law generally, in the US – see A. M. Polinsky, *An Introduction to law and Economics* (1989) (and) Posner, R., *Economic Analysis of Law* (5th ed., 1998); Landes, W.M. and Posner, R.A., *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003); In the UK – see A. Ogus and C. Veljanovski, *Readings in The Economics of Law and Regulation* (1984); W. Landes and Posner, R., 'An economic analysis of Copyright Law' 18 Journal of Legal Studies [1989] 325.

[66] Raghuram G. and Zingales, L., *Saving Capitalism from the Capitalists: Unleashing the Power of Financial Markets to Create Wealth and Spread Opportunity* (Princeton University Press, 2004); Smith, A., *The Wealth of Nations* (Book IV, 1776); Mises, L.W. *Human Action: A Treatise on Economics*, (Liberty Fund Inc., 2007); F. A. Hayek, *The Road to Serfdom*, (Routledge Classics, 2001).

[67] Posner states that "perhaps this is less accurately described as a "criticism" than as a reason for the distaste with which the subject is regarded in some quarters" – Posner, R.A., 'The Economic Approach to Law' 53 Texas Law Review 757 (1975), p.775, Part III; See also, the discussion in this chapter at 3.2.

lobbying than evidence and expertise[68] to preserve the status quo (rightsholders) as a result of capitalism under copyright.[69]

3.2 A Digital enclosure: demarcating the boundaries

> "All this chaos and uncertainty, all these feuds and enmities, have one and the same cause; the existence in the world of a kind of property, which is at once the most precious, the easiest stolen, and the worst protected."[106]

It is postulated that there has been what has been called a "digital enclosure"[107] under copyright law, where intangible assets in the digital world have been commodified by rightsholders who are using law to ring-fence their assets,[108] that is, prevent others from gaining access to them under the property-based monopoly granted by copyright.[109] However, because society has become "increasingly virtualized"[110] as a

---

[68] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [28]; See also, the discussion in this chapter at 3.5.1.4, 3.6 and 3.6 generally.

[69] See the discussion in this chapter at 3.5.1.4, 3.6 and 3.6.

[106] Parton, 'International Copyright' AM 20 (10/1867): 430-451; Seville, C., *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge University Press, 2009), chapter 2; Lanier, J., *You are not a Gadget* (Penguin Books, 2010), p.29.

[107] Boyle, J., *Public Domain* [2008].

[108] See the discussion in chapter 4 at 4.5; Case C-666/18 *IT Development v Free Mobile SAS* [2020] E.C.D.R. 7 at [49]; Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019) at [48]; (see, to that effect, judgment of 19 November 2015, *SBS Belgium*, C-325/14, EU:C:2015:764, paragraph 14 and the case-law cited); In the US, see *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013); *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007); *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016).

[109] '...the law by bestowing a right of copyright on an unpublished work bestows a right to prevent its being published at all...' – *Beloff v Pressdram* [1973] 1 A11 ER 241; David Arditi compares this process to the property enclosures enacted in Britain from the fifteenth to early nineteenth centuries as described in Marx, K., *Capital,* Volume 1 (1992) – (Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.45); See also, Cheung, 'The Structure of a Contract and the Theory of a Non-exclusive Resource', 13 J.Law & Econ. 49 (1970); Demsetz, 'Toward a Theory of Property Rights' 57 Am. Econ. Rev. Papers & Proceedings 347 [1967].

[110] Balkin, J.M., 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds', 90

result of the ever-expanding role of digital technology in the life of the individual[111] the following can be argued. It can be said that the digital enclosure is an example of the dualities inherent in a type of mind-brain-dualism that is associated with the “Three Worlds” doctrine advocated by Popper and Eccles in their philosophical and neuropsychological book called *The Self and the Brain*.[112] Popper's theory rests on the notion of a three-tiered world, comprising not only of material objects and states of mind (which he calls "World 1" and "World 2," respectively) but also a domain of intelligibles, virtual objects or abstract entities (which he calls "World 3").[113]

However, a criticism of the approach by Popper is that he proceeds by excluding numerous things from the mental and physical arenas, only to then assert their discovery in the Third World. This approach is then demonstrated as a methodological principle, stipulating that we must pragmatically resort to Occam's razor only after we have decided which entities are irreducible.[114] Despite the weaknesses highlighted in relation to these arguments philosophically[115] it is hypothesized that despite the fact it

---

Virginia Law Review 2043 (2004); Lastowka, G, & Hunter, D., ‘The Laws of the Virtual Worlds’ 92 California Law Review 1 [2004]; Moringiello, J.M, ‘What Virtual Worlds Can Do for Property Law’, 62 Florida Law Review 159 [2010].

[111] For example, statistical evidence suggests that this type of format encompasses around 21% of adults - Rainie, L., ‘The Rise of e-reading’ Pew Internet and American Life project, [2014], Available at- <http://libraries.pewinternet.org/2012/04/04/the-rise-of-e-reading/> Accessed- 9/10/2014; In addition, another study by the national literary trust analysed the reading habits of almost thirty five-thousand 8-16-year-olds, whereby a seemingly similar pattern was visible regarding the readership of printed newspapers, suggesting that the control exerted by these digitalised contractual methods will exponentially increase in the future. The results were that this form of reading has tumbled from 46% in 2005 to 31% in this latest study in 2013, which is in contrast to the 41% of these young people who now read news stories online - Sean Coughlan, 'Young People Prefer to Read on Screen” BBC News Education, 16/5/2013. Accessed: 12/12/2014. Available at: (http://www.bbc.co.uk/news/education-22540408).

[112] See Popper, K. & Eccles, J.C., *The Self and Its Brain: An Argument for Interactionism* (Berlin, Heidelberg, New York: Springer-Verlag, 1977).

[113] https://reasonpapers.com/pdf/07/rp_7_10.pdf (Accessed: 21/06/2019).

[114] https://reasonpapers.com/pdf/07/rp_7_10.pdf Accessed: 21/06/2019.

[115] Some of the weaknesses of Popper's argument for World Three have been identified by Paul Feyerabend in his masterly review of Popper's Objective Knowledge (Inquiry 17 [1974]: 475-507).

may be said that people can simply avoid using online facilities, it is asserted that this is not a realistic option as life has moved increasingly online[116] and offers numerous benefits.[117]

This is significant because it is posited that there is an interaction between all three of the worlds in the copyright context within the digital world, creating "downward causation"[118] which is an interaction involving the influence of one or more of each world. Thus, in the digital world, copyright, although it covers objects which may also be classified as material (such as a book) (world 1); it nonetheless also covers intelligables (world 3) that subsequently has the effect of changing the way these items are perceived by individuals, thereby altering their state of mind in relation to intangibles (world 2).[119] This is based on the notion that the fencing off of the intangible subject-matter fulfils the economic function equivalent to that of ownership of physical property.[120] Significantly, this is made possible by the property rhetoric which has been

---

Feyerabend notes correctly that none of Popper's arguments for the autonomy of abstract objects establishes their irreducibility in terms of mental or physical states and processes. Pointing out, as Popper does, that such things as numbers, arguments, and theories exert a causal influence in the mental and physical realms cannot by itself show that such things do not themselves belong to those realms: to show a causal connection is not to mark an ontological distinction. - <https://reasonpapers.com/pdf/07/rp_7_10.pdf> Accessed: 21/06/2019.

[116] <https://www.wired.com/insights/2014/04/future-digital-will-change-world/> (Accessed: 22/02/2020); <https://www.nytimes.com/2020/03/27/technology/virus-older-generation-digital-divide.html> (Accessed: 22/02/2020); <https://www.nytimes.com/live/2020/coronavirus-covid-19-03-17> (Accessed: 22/02/2020).

[117] <https://www.pewresearch.org/internet/2018/07/03/the-positives-of-digital-life/> (Accessed: 20/02/2020).

[118] Andersen, P.B., Emmeche, C., Niels O. Finnemann, and Christiansen, P.V., *Downward causation: Minds, bodies and matter* (Aarhus: Aarhus Univ. Press, 2000); Ayala, Francisco J. and Theodosius Dobzhansky, *Studies in the philosophy of biology: Reduction and related problems* (London: Macmillan, 1974); Campbell, D.T., *Downward Causation in Hierarchically Organised Biological Systems* in Ayala; Dobzhansky, *Studies in the philosophy of biology*, 179–86.

[119] Popper, K. and Eccles, J., *The Self and its Brain* (Routledge Publishing 1977).

[120] Cornish and Llewelyn, Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights (6th edn, Sweet and Maxwell 2007), p.37.

central to the development of areas like copyright and capitalist society itself regarding the ability of individuals to generate profit autonomously.[121]

By implication, this has resulted in a digital enclosure that has been extended by the advances in digital technology across people's lives, meaning that the digital enclosure, has, in fact, began to enter the "real world" of Popper and Eccles.[122]

Consequently, at least two of the worlds are submitted to have merged on a conceptual level creating an information society that has to be "exploited to the full"[123] according to the UK government. This is because the state supports and protects property rights in support of capitalism.[127] The inevitable result is a merging of the 'worlds' in copyright law, particularly worlds 2 and 3 in the digital context due to the expansion of copyright law.[128] This has led to the degree of diversity of the fields of activity to which copyright is relevant to expand to the extent that there was a need for us all to become specialists.[129] Thus, in the copyright system our education and our expertise is the microscope through which we contemplate, identify and analyse the

---

[121] For an explanation see under: The Five Cornerstones of Copyright: Democratic Proprietary Entitlement"- This is found in Griffin, "Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright", [2013], Intellectual Property Quarterly; On the usage of the legal system and proprietary rights regarding an individuals to preserve wealth in Western capitalist societies, see De Soto, H., *The Mystery of Capital: Why capitalism triumphs in the West and failed everywhere else*, (Black Swan Publishing, 2001); On the role of property in copyright, see Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 3.

[122] Popper, K. & Eccles, J.C., *The Self and Its Brain: An Argument for Interactionism* (Berlin, Heidelberg, New York: Springer-Verlag, 1977).

[123] House of Lords – Agenda for Action in the UK – Chapter 5 opinion of the committee - <https://publications.parliament.uk/pa/ld199596/ldselect/inforsoc/ch5.htm> (Accessed: 05/07/2018).

[127] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.44.

[128] See Popper, K. & Eccles, J.C., *The Self and Its Brain: An Argument for Interactionism* (Berlin, Heidelberg, New York: Springer-Verlag, 1977).

[129] Derclaye, E., *Research Handbook on the Future of EU Copyright* Research Handbooks in Intellectual Property (Edward Elgar, Cheltenham, UK, Northampton, MA, USA 2009), p.194.

teeming life-forms that interact in an unending cycle of thesis, antithesis and synthesis[130] within a proprietary base.[131]

Despite the uneasy analogy of intellectual property to real property, intellectual property rightsholders have widely used the rhetoric of private property rights to push for stronger protection[132] in a copyright system where individuals are generally unwilling to share their property.[133] This can be due to the fact that those who exploit assets in return for capital owe their wealth to their ability to use this implicit legal infrastructure hidden deep within property systems.[134] In turn, this proprietary reasoning has simply become so dominant that it has clouded the analysis of the underlying basis for copyright. In turn, the rise of digital technology has meant that there is less uncertainty over the proprietary boundaries owing to digital technology allowing clear demarcation of those boundaries.[135]

---

[130] For a rationale for a flexible, multi-layered systematic analysis of copyright see Westkamp, G., *Changing mechanisms on copyright's ontology – structure, reasoning and the fate of the public domain* in Guido Westkamp (ed.) *Emerging issues in Intellectual Property* (Edward Elgar, Cheltenham, UK and Northampton, MA, USA, 2007); See also, *Ehrlich, Fundamental Principles of the Sociology of Law* [1936], *throughout*.

[131] For a rationale for a flexible, multi-layered systematic analysis of copyright see Westkamp, G., *Changing mechanisms on copyright's ontology – structure, reasoning and the fate of the public domain* in Guido Westkamp (ed.) *Emerging issues in Intellectual Property* (Edward Elgar, Cheltenham, UK and Northampton, MA, USA, 2007); See also, *Emerging Issues in Intellectual Property: Trade, Technology and Market Freedom Essays in Honour of Herchel Smith,* ed. Westkamp, G., 78-103 (Cheltenham: Edward Elgar); For a contrasting account in the context of Trademarks, see Dinwoodie, G.B., 'The Death of Ontology: A Teleological Approach to Trademark Law' 84 [1999] *Iowa L. Rev.* 611.

[132] Robert C. Bird and Subhash C. Jain, *The Global Challenge of Intellectual Property Rights* (Edward Elgar Publishing Ltd, 2008) p.162.

[133] A. Birrell, *The Law and History of Copyright in Book*s [1899] p.17

[134] De Soto, H., *Why Capitalism Works in the West but Not Elsewhere* found in the 'International Herald Tribune' *January 5th, 2001. Available at: <http://www.cato.org/publications/commentary/why-capitalism-works-west-not0elsewhere>* – (Last Accessed: 29/10/2014).

[135] For instance, the use of digital rights management over the right to read aloud, or the right to make any reproduction: see, e.g., *Lessig, Free Culture* (2004), pp.147-155 *in* Griffin, J., 'Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly.

Therefore, the attachment of proprietary rights[137] to copyrights by the State "solidifies a genial relationship between capitalism and the state for the culture industry...[because] by creating copyright as a *property* right, the state codified the selling, buying, and hoarding of copyrighted material...where the [rightsholder] thinks that they own the song."[138] Here, it is copyright that provides the proprietary element (that gives the owner the right to do and to authorise other persons to do the acts restricted by copyright law).[139] This is opposed to the underlying work which has the physical element, and so again, what is seen is an interaction with worlds 1 (material objects), 2 (state of mind), and, 3 (intelligibles). For example, in this scenario, the state uses copyright law to give a world 1 status to world 3 articles due to the way in which proprietary status can be said to effect their world 2 aspects. Thus, it argued that this creates a synergistic effect whereby state legal codification gives material status to

[137] Demsetz, 'Toward a Theory of Property Rights' 57 Am. Econ. Rev. Papers & Proceedings 347 [1967]; Demsetz, The Exchange and Enforcement of Property Rights, 7 J.Law & Econ. 11 [1964]; Posner, R.A., 'The Economic Approach to Law' 53 Texas Law Review 757 [1975].

[138] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), pp.44-5; An alternative view is given by Patry, who argues that copyright has never been regarded as a property right, and is simply a regulatory granted by the grace of congress – (Patry, W., *Moral Panics and the Copyright* Wars (New York: Oxford University Press, p.110); See also, Westkamp, G., *Changing mechanisms on copyright's ontology – structure, reasoning and the fate of the public domain* in Guido Westkamp (ed.) *Emerging issues in Intellectual Property* (Edward Elgar, Cheltenham, UK and Northampton, MA, USA, 2007).

[139] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 1-04.

intellectual assets under copyright, which changes the way that they are viewed[140] to the point that they are 'owned' creating the notion of "thine and mine."[141]

As a result, the current copyright system does not adequately consider the wider issue of creativity,[142] whereby access to works is being discouraged by a combination of legal threats,[143] controlling access points,[144] contractual methods,[145] and high costs (to the point where infringement is being 'monetized').[146] It is asserted that this is made

[140] For example, music was viewed as a public good because it was both nonrivalrous and part of the public domain before copyrights. This meant that anyone could perform or listen to music without affecting the ability of others to perform or listen to that same music. Copyright law stipulates a defined period for which something can be copyrighted, and after that period it is released into the public domain and ownership is technically held by the public, meaning that everyone can perform and reproduce music that is in the public domain; For more information on the rivalrous/non-rivalrous debate, see E.E. Johnson, 'Intellectual Property and the Incentive Fallacy' (2011) 39 Florida State Law Review 623.

[141] J. Boyle, *The Public Domain,* (2008), p.45 *in* Griffin, J., 'Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly.

[142] For more information, see chapter 4 at 4.7; Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 3-229 - "While creative works will by definition be 'original' and covered by copyright, creativity is not required to make a work 'original'" - *CCH Canadian Ltd v Law Society of Upper Canada* [2004] SCC 13 (Sup Ct of Can). Note, however, that the court decided that, under the Canadian statute, originality required more than mere labour, and thus a higher test of originality than that laid down in *University of London Press Ltd v University Tutorial Press* Ltd [1916] 2 Ch. 601 (and lower than the test laid down by the US court in *Feist Publications Inc v Rural Telephone Service Co* 499 U.S. 340 (1991). In this, Canadian law is thus different from UK law.

[143] See chapter 2, more specifically, see 2.3 and 2.5 respectively.

[144] See chapter 3 at 3.5 generally.

[145] See chapter 4 generally.

[146] See chapter 2 at 2.3, and 2.3.1.2(a) respectively.

possible by the proprietary laws[147] that support a "foundational entitlement"[148] in relation to protected works. This is due to the fact that once copyright is characterized as a form of property, the noninstrumentalism of ownership is considered an end in itself. This allows for the scope of its exclusive privileges and exclusionary right to be extended with little regard for its underlying purpose.[149]

Yet, the reforms[150] discussed in chapter 5[151] aim to help alleviate such issues. They could do so by creating the possibility of producing cheaper works to lessen the severity of such items which could decrease costs throughout copyright.[152] In turn, the proposals aim to counteract the effects of the current system, in that they provide a framework designed to encourage creative re-uses.[153] This is done by reducing the cost of production through placing a temporary limit on the price that can be charged for a copyrighted item, pertaining to both sale and re-use.[154] This is important as being culturally involved and challenged is an important part of development.[155] Thus, by

---

[147] On the role of 'property' generally to describe items like copyright, patents and trademarks to convey the impression that they are fundamentally "like" interests in land or tangible personal property, see W., Fisher, 'The growth of intellectual property: A history of ownership of ideas in the United States' (1997) in D. Vaver, *Intellectual Property Rights: Critical Concepts in Law* (Vol 1, Routledge Publishing 2006), chapter 3.

[148] Netanel, N.W., *Copyrights Paradox* (Oxford University Press, 2008), p.7.

[149] Balganesh, S, 'Debunking Blackstonian Copyright' 118 Yale Law Journal [2009] 1126-1181, available at <http://www.jstor.org/stable/40389483?seq=1#page_scan_tab_contents> accessed: 21/11/2015.

[150] For a brief overview, see chapter 5 at 5.3.

[151] See chapter 5 at 5.5.

[152] For more information, see chapter 5 at 5.5.3(a).

[153] On re-use, see chapter 5 at 5.4.1(b) and 5.4.1(c).

[154] In terms of what items would be covered by the law, this is covered by the existing scheme of legal protection i.e. whatever items are capable of being protected by copyright are also capable of being protected under the current scheme. However, 'Artistic' works are not included under the reforms, for more information, see this chapter at 5.6

[155] Griffin, J., 'Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly; R.S. Albert and M.A. Runco, *A History of Research on Creativity* in R.J. Sternberg, *Handbook of Creativity* [1999]; See also, M. Csikzentmihalyi, *Creativity: Flow and psychology of discovery and invention* (Harper Collins Publishers 1996) at 77-83; R. Weisberg, *Creativity: Beyond the Myth of Genius* (1993).

changing the prices (lowering them), it is argued that this would help alleviate the operationality of the current system through maximising the economic efficiency of copyright.[156]

From a social perspective, this limitation may be viewed under two aspects, (a) the assignment or allocation of the available productive forces and materials among the various lines of industry, and (b) the effective *co-ordination* of the various means of production in the copyright industry into such groupings as will produce the greatest result.'[157]

The reason being is that it would indirectly enable access to works due to the possible reduction in costs overall across the copyright spectrum. This could also incidentally increase compliance with copyright due to the reduced prices[158] and thereby potentially reduce piracy[159] through procuring cost-effective options.[160] Yet, empirical

---

[156] Hovenkamp, H., 'Antitrust Policy After Chicago' [1985] 84 Univ Mich *LR* 213, 226–229; N. Mercuro and S.G. Medema, *Economics and the Law—From Posner to Post-Modernism* (Princeton, NJ: Princeton University Press, 1997), at 53; R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978, reprinted with a new Introduction and Epilogue, 1993), at 90–91.

[157] R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978, reprinted with a new Introduction and Epilogue, 1993), at 90–91.

[158] W. Landes and Posner, R., 'An economic analysis of Copyright Law' 18 Journal of Legal Studies [1989] 325.

[159] Devos, K., *Tax Compliance Theory and the Literature* (Springer Publishing 2014); See also, part 5.5 in this chapter generally, and specifically, 5.5.3(a).

[160] "Although it is impossible to eradicate piracy, in the absence of more affordable and accessible options, there will always be a high level of pirate streams for example, and the reforms will help to facilitate cheaper, and subsequently, more accessible options" – Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577 at [576]; See also, *BBC, "Premier League: Third of fans say they watch illegal streams of matches – survey", (4 July 2017)*, <https://www.bbc.com/sport/football/40483486>; *The Guardian, "Premier League launches major fightback against illegal streaming" (29 March 2017)*, <<https://www.theguardian.com/football/2017/mar/29/premier-league-illegal-streaming-tv-audiences>> [both accessed 30 June 2019].

evidence to support this assertion lacking[161] as the demand curve is negatively sloped because there are good but not perfect substitutes.[162]

Nonetheless, it is important to recognise that near 'perfect' substitutes can be made in the digital age where works are no longer of "inferior quality [and] a pirate doesn't have to compensate for the risk of failure."[163] Consequently, this creates a bigger profit overall for copies sold outside the legitimate market.[164] To counteract this, it is suggested that such items could be overcome by creating cheaper works under the proposals discussed in chapter 5.[165] This could achieve the same result as when large firms, which tend to have greater efficiency than smaller ones, because they are able to sell products that are less costly and better quality.[166] For example, under the proposed approach, the overall reduction in costs could create a situation where quality[167] remains a forefront consideration for those subject to the capping proposals. This is important as consumers will not pay a higher price for another brand unless it

---

[161] Note that there is no empirical evidence to support this directly. However, Danaher Smith and Telang 'Website Blocking Revisited' (18 April 2016), SSRN, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795> [Accessed 30 June 2019] did find that in the aftermath of the November 2014 website blocks, there was a 6% increase in subscriptions to legitimate sources such as Netflix and a 10% increase in videos viewed on legitimate ad-revenue supported sources such as BBC and Channel 5's streaming sites. Furthermore, it is arguable that an increase in affordable legitimate content may reduce piracy: J. Poort and J. Quintais, 'Global Online Piracy Study' Institute for Information Law, University of Amsterdam [2018], *p.27*; Taken from Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577 at [577].

[162] W. Landes and Posner, R., 'An economic analysis of Copyright Law' 18 [1989] Journal of Legal Studies at 326.

[163] W. Landes and Posner, R., 'An economic analysis of Copyright Law' 18 [1989] Journal of Legal Studies at 329.

[164] W. Landes and Posner, R., 'An economic analysis of Copyright Law' 18 [1989] Journal of Legal Studies at 328.

[165] See chapter 5 at 5.5.

[166] H. Demsetz, 'Industry Structure, Market Rivalry and Public Policy' [1973] 16 J Law and Economics, 1-9; J. S. Bain, *Industrial Organization* (London: Wiley, 1959) at 424; R. Coase *The Nature of the Firm* (1937) 4 Economica 386; O. Williamson, *Market and Hierarchies: Analysis and Antitrust Implications* (New York: The Free Press, 1975).

[167] See chapter 5 at 5.5.2.

can demonstrate that is either cheaper or better.[168] Thus, the cost of producing works and the ultimate sale price could be less costly and better quality under the capping system.[169]

This could also mean that the production of works is increased overall because the product, and its distribution, are complements, and an increase in the price of distribution will reduce the demand for the product.[170] Thus, the reforms could combat this by increasing demand for the product through ensuring that the price of distribution remains low, which may lead to the product being cheaper overall and this could create more efficiency and lessen monopolistic practice.[171] However, this may create price competition among dealers, but it is contended that this will happen regardless of the system in place as price discrimination is a product of the market[172] and this could lead to smaller, rather than larger, output than a single-price monopoly.[173] Yet, larger output can also reduce the welfare gains from a higher output, but only where the output is in fact higher.[174]

Notwithstanding this, the proposed approach could also help solve issues of predatory pricing[175] that is sometimes used to drive out competitors and is often difficult to detect.[176] The effect of predatory pricing is that it is designed to undercut competitors due to the substantial gains made by the market seller during the timeframe where the

---

[168] Nelson, 'Advertising as Information' 82 J. Political Econ. [1974] 729.

[169] See chapter 5 at 5.3 and 5.5.

[170] Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925, at 927.

[171] However, the costs of creating and maintaining monopolies may exceed the misallocative costs resulting from the smaller output of monopolized compared to competitive markets – Posner 'Exclusionary Practices and the Antitrust laws' 41 U. Chi. L. Rev. 508, 510-13 (1974).

[172] Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925, at 927.

[173] J. Robinson, The Economics of Imperfect Competition, The Econ. Journal. [1933] vol.43, issue 172 at 190-94.

[174] O. Williamson, *Market and Hierarchies: Analysis and Antitrust Implications* (New York: The Free Press, 1975) at 11-13.

[175] Isaac, R. Mark, and Vernon L. Smith. 'In Search of Predatory Pricing' Journal of Political Economy, 93.2 [1985] 320-345.

[176] McGee J, 'Predatory price cutting: The Standard Oil (N.J.) case' Journal of Law and Economics [1985] 1 at 137–169; McGee J. 'Predatory pricing revisited' Journal of Law and Economics 23 [1980] at 289–330.

goods are sold below cost for an extended period of time.[177] Essentially, the actions of the predator are designed to establish the reputation that it will not in any way accommodate the entry of new firms into the market.[178]

This is done by setting a price that makes its competitors' business unprofitable at minimum cost to itself[179] and is an issue within digital copyright.[180] The reforms could help alleviate such issues because it is suggested that the reduction in costs overall could mean that copyright is less susceptible to such tactics during, and, post-reform.[181] This is based on the idea that the reforms, by setting a maximum price, could mean that any strategic price reductions from those engaging in practices like predatory pricing, will have less of an impact.

The rationale behind this hypothesis is based on the notion that if prices are already reduced, then any lower pricing will have less of an impact on the intended targets of the predation, which could mean that they will have better chances of outlasting such behaviours. This is because the predator will attempt to induce the target to a position where he simply thinks it is not worthwhile to outlast the practice he is being subjected to.[182] In accordance with this, it is asserted that the reductions imposed by the reforms could mean that predatory pricing practices will have less impact, and thus, less appeal, based on the notion that the targets will be seemingly less sensitive to the behaviour as prices will already be reduced.[183]

However, the extent to which this is needed is questionable as selling below cost in order to drive out a competitor is unprofitable long-term. This is because the predator loses money during the predation phase, and any attempt to recoup any lost funds will

[177] Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925, at 940.

[178] Dalton, J., and Esposito, L., 'Standard Oil and Predatory Pricing: Myth Paralleling Fact' **(**Springer Review of Industrial Organization, 2011), 38: 245–266.

[179] Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925, at 942.

[180] Stokes, S., *Digital Copyright: Law and Practice, art Publishing* (5th Revised edition 2019) at 5.5.4.

[181] See chapter 5 at 5.5.3(a).

[182] Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925, at 940.

[183] W. Landes and Posner, R., 'An economic analysis of Copyright Law' 18 [1989] Journal of Legal Studies.

be potentially counteracted by new entrants who will bid down to a competitive level.[184] Also, EU law could help deal with items like potentially anti-competitive agreements which involve the distribution of digital content, including the related grant of intellectual property (IP) rights which may be open to challenge under Article 101 of the Treaty on the Functioning of the European Union (TFEU).[185] Under this provision, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

> "(a) directly or indirectly fix purchase or selling prices or any other trading conditions..."[186]

Yet, the reforms aim not to make such items unlawful, as it is reasonable to suggest that the law already deals with such items.[187] Instead, the proposals aim to create conditions where, by setting a maximum price or reducing the price that can be charged for a copyright work in the short-term, this could 'disincentivise' the act of predatory pricing and thereby 'discourage' it. This is because the impact of such activity may be minimal as the proposed approach would put all competitors at the same level of price on market entry. Thus, predatory pricing may be discouraged on the basis that prices would already be lower and because consumers will not pay more unless a brand is cheaper or better,[188] it is submitted that the focus may be on producing better works rather than predatory pricing due to this potentially 'disincentivising' effect.

Moreover, the reduction in prices could also deal with the issue of free riding. A 'free rider' in this context would be a dealer who undersold competing dealers by selling the product itself at a lower price while relying on them to provide the necessary presale

---

[184] Posner notes that rather than suffer financial loss as a result of a price war, the rational would-be monopolist would buy the competing company - Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925, at 927.

[185] Treaty on the Functioning of the European Union *OJ C 326, 26.10.2012* ('TFEU').

[186] TFEU Art.101.

[187] Case T-198/98 *Micro Leader Business v Commission ("Micro Leader")* [1999] ECR II-3989.

[188] Nelson, 'Advertising as Information' 82 J. [1974] Political Econ. 729.

services and tests to ensure that the product is profitable.[189] For example, when a copier can defer making copies until he knows whether the work is a success, the potential gains from free riding on expression will be even greater. This is because the difference between the price and marginal cost of the original work will rise to compensate for the uncertainty of demand, and create bigger profit for copies.[190]

It is suggested that producing cheaper works in the digital age could provide a potentially effective solution to the current situation as a corollary of the proposals under these predicted effects.[191] This is because, at present, there is no need for such economic deference by pirates as the costs of reproduction are minimal due to the capacity for instantaneous and near-perfect replication.[192]

Therefore, if the settings in which the cost of voluntary transactions is low, the effect of the reforms[193] can be said to create incentives for people to channel their transactions through the market. This is because when the allocation of resources by voluntary transactions is prohibitively high, the market becomes an infeasible method of allocating resources[194] and this could encourage things like piracy.[195]

3.3 Creating a thief: the justificatory role of the pirate in capitalist copyright

> "The turbulence accidentally caused by a bird in flight is taken advantage of by the bird flying immediately after to propel itself forward. Yet, the restricted

[189] Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925, at 927.

[190] W. Landes and Posner, R., 'An economic analysis of Copyright Law' 18 [1989] Journal of Legal Studies at 328-29.

[191] Taleb, N., *The Black Swan: The Impact of the Highly Improbably* (New York, Random House, 2007).

[192] Gladwell, M. *The Tipping Point: How Little Things Can Make a Big Difference* (London: Abacus 2000).

[193] See chapter 5 at 5.3, 5.5.

[194] Posner. R, *Economic Analysis of Law*, (4th edn, 1992), pp.251-2.

[195] Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577.

> economy of capitalism shows up as a mirror of anti-production, where the first bird would sue the second bird for piracy."[199]

Digital technology meant that information became "real" and "alive"[200] in that it enabled the collaboration and interaction between individuals and their computers regardless of geographic locations[201] where they could participate in the creation of works rather than be passive consumers.[202] This meant that it was important for rightsholders in capitalist society to redesign culture, the economy, and the law, so as to reinforce the perception that information is real and can be "stolen."[203] Proprietary rights are contended to be a central element, not just in the discourse of the previous chapter,[204] but also, in the construction of the modern system under what Arditi calls the "piracy panic narrative."[205]

---

[199] Soderberg, J., *Hacking Capitalism: The Free and Open Source Software Movement* (Routledge Publishing, 2008), at 148.

[200] Popper, K. & Eccles, J.C., *The Self and Its Brain: An Argument for Interactionism* (Berlin, Heidelberg, New York: Springer-Verlag, 1977); S.Vaidhyanathan, *The anarchist in the library: how the clash between freedom and control is hacking the real world and crashing the system* (Basic books, 2004).

[201] Koutras, N., 'History of copyright, growth and conceptual analysis: copyright protection and the emergence of open access' I.P.Q. 2016, 2, 135-150.

[202] Lessig, L., *Free Culture* (The Penguin Press, 2004); Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing, 2015); Balkin, J.M., 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds', 90 Virginia Law Review 2043 [2004].

[203] Lanier, J., *You are not a Gadget* (Penguin Books, 2010) at 26-29.

[204] See the discussion in sections 2.3 and 2.6 generally.

[205] For more information, see Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), pp.xxii-xxv.

The narratives structure is as follows: file sharing is piracy, piracy is 'stealing',[206] and stealing hurts [rightsholders][207] although this is debatable.[208] The rhetoric became that music fans who share files were not listening to free music but rather "stealing."[209] For example, in the trial of Joel Tenenbaum, discussed in the second chapter, the theme of theft was so strong that the court highlighted that the claimants put such "...a criminal gloss over [the matter], [that it would] deal with at the end of the case should the damages be substantial..."[210]

---

[206] In the UK, the notion of 'stealing' approach was adopted by Templeman LJ who stated that "a defendant may procure an infringement by inducement, incitement or persuasion" – *CBS Songs Ltd v Amstrad Consumer Electronics plc & Another* [1988] 2 A11 ER 484 at [496]; In the US, congress commented on the issue of 'stealing'- "*By the turn of the century the Internet is projected to have more than 200 million users, and the development of new technology will create additional incentive for copyright thieves to steal protected works...Many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their conduct...even after copyright owners put them on notice that their actions constitute infringement and that they should stop the activity or face legal action..."* - See H.R. Rep. 106-216 at 3 (1999).

[207] The fact that the right of a phonogram producer is aimed at protecting his legitimate financial investment (i.e. protection of property against piracy) did not mean that the right did not also cover other exploitation, such as authorising or prohibiting sampling. Somewhat unsurprisingly, it was deemed incorrect to limit the legitimate financial interests of producers of phonograms to protection against the distribution or the communication of their phonograms as such to the public - Case C-476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [30], [31], [32], [33].

[208] Expert Report of Stanley J. Liebowitzat App. A, *Sony BMG Music Entm't v. Tenenbaum,* 672 F. Supp. 2d 217 (D. Mass. 2009) (No. 1:07-cv-11446), available at http://cyber.law.harvard.edu/~nesson/Liebowitz%20Expert%20Report.pdf – (Accessed: 21/03/2020).

[209] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.xxii

[210] See Transcript of Jury Trial Day 4 at 6 – *Sony BMG Music Entm't v. Tenenbaum,* 721 F.Supp.2d 85 (D.Mass.2010) (No.1:07-cv-11446).

This narrative labels file-sharers and those who access intellectual property without consulting the rightsholder as property thieves[211] where file-sharers were repeatedly labelled as "criminals engaged in an act of stealing."[212] This approach was in order for the music industry to construct a victim (the rightsholder) and property was essential to this due to the exclusory elements it is often associated with the term[213] even historically.[214]

Correspondingly, this allowed the copyright industry to go after the pirate with the long yardstick of the law.[215] In turn, this enabled the industry to pursue all those who failed to comply with the regime as 'pirates'[216] allowing copyright to facilitate[217] the "capitalist

---

[211] Green, P.S., '13 Ways to Steal a Bicycle: Theft Law in the Information Age', [2012] 270-76, ; *Sony BMG Music Entm't v. Tenenbaum,* 719 F.3d 67, 71 (1stCir. 2013) (emphasis added) – ("new technologies that would allow Internet users to steal copyrighted works.").

[212] The industry's rhetoric of theft is explored throughout Reyman. See, e.g., Reyman, J., 'The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture' 115 [2010] at 67 (describing announcement on RIAA website comparing downloading to theft); at 116 (describing RIAA ad campaign showing an eye exam chart and noting, "[i]f you can'tsee that illegal downloading is stealing then keep reading"); at 124 (describing the Recording Academy website, which compares downloading to "stealing" and the Music United website, which refers to downloading as "stealing music") in Karol, P., 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06 at 890.

[213] Griffin, J., 'Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly.

[214] Gray and Gray, *Elements of land law* (Oxford University Press, 5th ed, 2009), p. 87; (In archaic English, the word 'proper' served to indicate relationships of proprietary significance. Thus the poor were described as not 'hauyng ony thynge proper'; and a very early 15th century reference describes someone as having been slain 'with his own propre swerd' (*Oxford English Dictionary* (Clarendon 1933) Vol VIII at 1469 ('proper', I, 1)).

[215] For more information on how "piracy" developed out of a combination of political and economic convergences see: Johns, A., *Piracy: The intellectual property wars from Guttenberg to Gates* (University of Chicago Press, 2009), pp.17-40.

[216] See chapter 3 generally.

[217] McCourt, T. and P. Burkart, 'When Creators, Corporations and Consumers Collide: Napster and the Development of On-line Music Distribution' [2003] Media Culture & Society 25(3): 333-50. – (Here it is argued that major record companies have successfully used the emergence of Internet Piracy as a foil to defer anti-trust law suits being filed against them in the US courts and facilitate the music industry growth).

production of music."[218] As was seen in the previous chapter[219] this resulted in a "calculated political strategy to demonize opponents to make them appear to be bad people"[220] who must be punished by being sued[221] following bitter complaints about online consumer piracy.[222] This resulted in cases going to court that were absent of the usual justifications for, or the economic checks that prevent, such large-scale copyright litigation.[223]

Rightsholders have lobbied for laws that have allowed them to term the majority of unauthorised acts in relation to intangibles as piratical acts,[231] and because of this, it can be said that a literary[232] pirate is not only an outlaw; he is protected by the law. He is a product of the law.[233] Therefore, the typical and uncritical use of the term *piracy* – detached from the legal conditions that permitted and even encouraged it – gave a

---

[218] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.44.

[219] See chapter 2 at 2.3.

[220] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.xxii; See also, chapter 2 at 2.3.1.1, 2.3.1.2 and 2.5; See also, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch); See also, R. Arnold, 'Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of Protection' (2011) 1 *QMJIP* 272.

[221] Patry, W., *Moral Panics and the Copyright Wars* (New York: Oxford University Press 2009) at 44.

[222] See e.g. 'Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry' (Hearing Before the Permanent Subcommittee on Investigations of the Senate Committee on Government Affairs) 108th Congress (30 September 2003), 19-20 (testimony of L.L. Cool, recording artist); Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Para-sites, Hearing Before the Subcommittee On Intellectual Property of the House Judiciary Committee, 112th Congress (14 March 2011), 61-62 (testimony of Frederick Huntsberry, Paramount Pictures).

[223] Karol, P., 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06 at 893.

[231] See Litman, J., *Digital Copyright* (Amhurtst, NY: Prometheus Books 2006); See also, Lessig, *Free Culture* (2004).

[232] R. Hauhart, 'The Origin and Development of the British and American Patent and Copyright Laws' (1983) 5 Whittier Law Review 539, 558.

[233] 'The Authors Best Friend' NYEP (9/1/1882); reprinted in PW, no. 558 (9/23/1882): 430.

false aura of illegality to a practice that was then called the courtesy of the trade, which was a lawful form of cultural diffusion well into the twentieth century.[234]

However, the uncritical use of the piracy term now means that any novel use of a protected work, even within an unforeseeable market devised by the follow-on creator, is likely to be infringement if it finds commercial demand.[236] This has been done by creating a sense of illegality to maintain the "economic interests of the author and publisher."[237] The problem is that in the digital world this has created a situation where users feel that every unauthorised use will be the subject of infringement proceedings[238] and this has been exacerbated[239] due to contracts.[240]

---

[234] Spoo, R., *Without Copyrights: Piracy, Publishing and the Public Domain* (Oxford University Press, 2013), pp.3-4; On courtesy, see Spoo's book at pp.30-64.

[236] Sharkova, K., 'The author, the fan and the in-between: in search of a copyright regime for the everyday creative' [2018] E.I.P.R. , 40(12), 784-796 – Sharkova also notes that (it is interesting to note that copyright has refused to protect business plans, and therefore the originality and ingenuity, involved in devising a market and subsequent demand, are incapable of being protected. However, the secondary creative's unprotected labour is subsequently free to be utilised by the right holder of the original work).

[237] Newman, S., 'Intellectual Property Law – Rights, Freedoms and Phonograms: Moral Rights and Adaptation Rights in Music and Other Copyright Works' Computer Law & Security Report 13(1), (1997), at p.22 *in* Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.xxiv

[238] Griffin, J. and Nair, A., 'Making Threats of Copyright Infringement' [2013] International Review of Law, Computers and Technology; Mazzone, J., 'Copyfraud' Brooklyn Law School, Legal Studies Paper No. 40; New York University Law Review, Vol. 81, [2006] at 1026.

[239] (This is due to the fact that items are no longer subject to the otherwise limiting rules on exhaustion or distribution) - *Case C-456/06 Peek & Cloppenburg SA v. Cassina SpA,* [2008] ECR I-2731(ECJ); Also, due to the lack of 'permission' it is likely that this could be treated as an unauthorised reproduction and distribution, but then the initial distribution in the physical world would suggest no, but licensed transfers in the digital area are likely to be judged/treated differently - *Art & Allposters,* Case C-419/13, EU:C:2015;27 (ECJ); In the US, see *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013); For more information, see chapter 4 at 4.5.1.

[240] Hargreaves Review, Recommendation 5, and 51, [5.40] (explaining that permitting contractual variation 'replaces clarity...with uncertainty'); For more information, see this same review at chapter 9, p.229; On the issue of uncertainty within copyright, see chapter 4 of this thesis at 4.7.

The result of this is that as inhabitants of the digital age, the word *pirate* exemplifies the violator of a formal, legally enforceable right – a copyright.[245] This is because the word often concerns proprietary interests that are always concerned with relationships between persons as to the use or exploitation of things (objects, resources, items of wealth).[246] However, what is seen now is a "slippage in discourse [that has occurred] during the digital transformation"[247] that has seen the 'piracy' term become so common that it seems to describe "any unlicensed activity."[248] Interestingly, however, the criminal prosecution of company directors under s.110[249] is not necessarily limited to 'pirates'.[250] However, the Court of Justice of the European Union (CJEU) decision of *Martin Hass* v *Ralf Hutter,*[251] (referred from the German Federal Court of Justice)[252] correctly demonstrates that the term piracy does have genuine economic purposes, such as "protecting legitimate financial investment[s] (i.e. the protection of property

[245] Spoo, R., *Without Copyrights: Piracy, Publishing and the Public Domain* (Oxford University Press, 2013), p.19.

[246] See, e.g. Ackerman, B.A., 'Private Property and the Constitution' (Yale University press 1977), 26-7; Thomas C. Grey, *The Disintegration of Property* in J. Rowland Pennock and Munzer, *A theory of Property* (Cambridge University Press, (990), 15-17.

[247] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.xxv.

[248] Litman, J., *Digital Copyright* (Amhurtst, NY: Prometheus Books 2006) p.85.

[249] Copyright Designs and Patents Act 1988.

[250] *Thames & Hudson Ltd* v *Design and Artists Copyright Society Ltd* [1994] 7 WLUK 49.

[251] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* (2018).

[252] This is discussed in chapter 4 at 4.5.1.

against piracy)."[253] Nonetheless, this still does not detract from the current stance and the issues associated with the term in the digital age.[254]

Therefore, the current approach was fundamental as political power must always seek at least the appearance of moral power if it is to be secured and maintained because authorities routinely impose considerable costs on their citizens.[261] This is due to the fact that not only do they forbid countless actions, but they create a whole set of affirmative obligations that citizens owe to the state itself.[262] This is because the greater the number of people who accept the law's authority to impose such duties, the fewer the resources that the state must devote to the enforcement of its laws. Once the state has won its people's hearts and minds, their bodies will follow.[265]

This is due to the fact that rightsholders, in areas like the recording industry, profit from the sale of music. Thus, to encourage users to purchase music in a way that facilitates the capitalist goal of profit, the music industry constructed an argument claiming that bypassing the explicit authorisation of the rightsholder is the equivalent of stealing.[270]

---

[253] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [30], [31], [32], [33]; *Capitol Records Inc. v. Thomas-Rasset*, No. 06-1497 (D. Minn. Jan. 22, 2010); *Sony BMG Music Entertainment v. Tenebaum,* 660 F.3d 487, 492 (1st Cir. 2011); See also, chapter 4 at 4.5.1; The Advocate General acknowledged that the main purpose of the Rental Directive art.9(1)(b) is to protect against what is commonly referred to as "piracy", being the production and distribution of counterfeit copies of phonograms intended to replace lawful copies - Bryant, C. and Heeley, R., 'The Kraftwerk case - does a two-second sample infringe copyright?' Ent. L.R. [2019] 30(4), 125-128; Hopton, P.,'Advantage Kraftwerk in long running copyright dispute: Pelham (C-476/17) (also known as the Metall auf Metall case)' Ent. L.R. [2019], 30(8), 279-281.

[254] See this thesis generally, and specifically, chapters 2 and 4; See also, Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 8.

[261] For more information, see Shapiro, J.S., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004), p.397.

[262] *Ibid* at 397.

[265] Shapiro, J.S., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004), p.397; On how similar reasons are used for the approach to the enforcement of the reforms, see chapter 5 at 5.7.3.3(c)(iiii).

[270] Green, P.S., '13 Ways to Steal a Bicycle: Theft Law in the Information Age', [2012] 270-76, ; *Sony BMG Music Entm't v. Tenenbaum,* 719 F.3d 67, 71 (1stCir. 2013) (emphasis added) – ("new technologies that would allow Internet users to steal copyrighted works."); Karol, P., 'Hey, He Stole

This was an attempt by rightsholders to gain public attention for the argument that any circumvention of paying for music is an act of property theft.[273] The purpose of this was to create an association with the societal conceptions relating to tangible theft where downloading became "a shoplifting case only in the digital world."[274]

As a result, there is now a "war" [280] against piracy to defend property against acts that "rob" [285] the author of his profit, or "financial investment."[286] This is because piracy is as much a function of the boundaries of the law as it is of the actual behaviours

---

My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06 at 893.

[273] For example, see the highly publicised legal and press campaigns against file sharer Joel Tenenbaum: (Joel Tenenbaum, 'How it feels to be sued for $4.5million' The Guardian Music Blog (July 2009) Last accessed: 11/7/2015, Available at <https://www.theguardian.com/music/musicblog/2009/jul/27/filesharing-music-industry>); This is discussed in chapter 2 at 3.52.3.1.2.

[274] See *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487,493 n.5, 494 (1st Cir. 2011); Transcript of Jury Trial Day 2 at 82, *Sony BMG Music Entm't v. Tenenbaum,* 721 F. Supp. 2d 85 (D. Mass. 2010) (No. 1:07-cv-11446) in Karol, P., 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06 at 893; Green, P.S., '13 Ways to Steal a Bicycle: Theft Law in the Information Age', [2012] 270-76, ; *Sony BMG Music Entm't v. Tenenbaum,* 719 F.3d 67, 71 (1stCir. 2013) (emphasis added) – ("new technologies that would allow Internet users to steal copyrighted works.").

[280] Lessig, L., *Free Culture* (The Penguin Press, 2004) at 17-18.

[285] *Bach* v. *Longman,* 98 Eng. Rep. 1274 (1777); See also, Macmillan, F., *New Directions in Copyright Law* (Edward Elgar Publishing, Vol 2, 2006), p.83, where it states that: (*A study by the Market Research Organisation IDC for the Business Software Alliance, for example, reported that in 2003, 36 percent of the software used around the world was pirated, amounting to a loss of $29 billion*).

[286] The fact that the right of a phonogram producer is aimed at protecting his legitimate financial investment (i.e. protection of property against piracy) did not mean that the right did not also cover other exploitation, such as authorising or prohibiting sampling. Somewhat unsurprisingly, it was deemed incorrect to limit the legitimate financial interests of producers of phonograms to protection against the distribution or the communication of their phonograms as such to the public - Case C-476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [30], [31], [32], [33]; Recital 62 DSM Directive provides further guidance on how to interpret the definition. The same Recital mentions "piracy" websites in ambiguous language, which appears allow Member States to exclude these not from the scope of the OCSSP definition but rather from the special liability regime in art.17(4).

committed. This is because underlying the industry's response to piracy was an implied right to re-assert commercial copyright in a set of relations that were deregulated[287] and at the same time this process enabled capitalism to offer the appearance of "choice"[288] in copyright.

3.4 The narrowing of 'permitted acts'[399] and 'fair use'[400]

The copyright system of the present day is argued to be inseparable from the primitive territorial coding process while classes are relative to the process of commodity production decoded under the conditions of capitalism.[401] Under these conditions, rightsholders are at the top, controlling the legal changes that affect this system and recipients are at the bottom, mere "subordinates" [402] left to fight over what is left in the UK via a small list of permitted acts.[403] These are often defined with extraordinary precision and rigidity[404] under what is considered to be an objective approach.[405]

---

[287] Rojek, C., 'P2P Leisure Exchange: Net Banditry and the Policing of Intellectual Property', *Leisure Studies,* 24 (4), 357-369 in Giletti, T., 'Why Pay if it's Free? Streaming, Downloading, and Digital Music Consumption in the iTunes era' Media@LSE Electronic MSc Dissertation Series [2012], compiled by Dr. Bart Cammaerts and Dr. Nick Anstead.

[288] Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016].

[399] CDPA 1988, chapter III, the concept of 'fair dealing'.

[400] Copyright Act 1976, 17 U.S.C. s.107.

[401] Deleuze, G. and F. Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.179; See also, chapter 3 generally.

[402] Deleuze, G. and F. Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.179.

[403] CDPA 1988, chapter III, the concept of 'fair dealing'; The various permitted acts are sometimes referred to as defences, but strictly speaking this is not the case, cf. CDPA 1988 s.97; A. Sims, 'Strangling Their Creation: The Courts' Treatment of Fair Dealing in Copyright Law Since 1911' [2010] *IPQ* 192; It is impossible to define ;fair dealing' and is a question of 'degree' – *Hubbard v Vosper* [1972] 2 Q.B. 84; [1972] 1 A11 ER 1023 per (Lord Denning MR); *Hyde Park Residence v Yelland* [2000] RPC 604, CA.

[404] *Pro Sieben Media v. Carlton UK Television* [1998] *FSR* 43, 48 (Laddie J); See also, the more liberal interpretation of CDPA 1988, s.30(1) in *Pro Sieben Media v. Carlton Television* [1999] *FSR* 610, 614 (Walker LJ); See also, R.A. Posner, 'When is parody fair use?' (1992) *Journal of Legal Studies* 67.

[405] *Pro Sieben Media v. Carlton TV* [1999] *FSR* 610 (CA), 620; *England & Wales Cricket Board v Tixdaq* [2016] *EWHC* 575 (Ch), [75]; Motive of an infringer can also be relevant – *Hyde Park*

Consequently, all other acts outside are not permitted no matter how "fair"[406] they may be and are confined to activity that is predominantly non-commercial.[407] However, this is in contrast to the US system, which has a fair use system.[408] This system provides guidelines as to what amounts to fair use.[409] Yet, this is often interpreted narrowly after *Harper & Row v. Nation Enterprises*.[410] The result is that US courts are reluctant to find fair use when an original work is merely retransmitted in a different medium[411] with no requirement for users to have direct economic benefit to demonstrate commercial

---

Residence v. Yelland [2000] *EMLR* 363 (CA), [36]; *Pro Sieben Media v. Carlton Television* [1999] *FSR* 610, 614 (Walker LJ); Fraser-Woodward Ltd v British Broadcasting Corporation Brighter Pictures Ltd [2005] EWHC 472.

[406] "It is fair dealing directed to and consequently limited to and to be judged in relation to the approved purposes. It is dealing which is fair for the approved purposes and not dealing which might be fair for some other purpose or fair in general", per Ungoed-Thomas J. in *Beloff v Pressdram* [1973] F.S.R. 33; For further discussion, see J. Griffiths 'Preserving Judicial Freedom of Movement—Interpreting Fair Dealing in Copyright Law' [2000] I.P.Q. 164. See also,

[407] *Navitaire Inc. v. Easy Jet Airline Co. & Bulletproof Technologies Inc.* [2006] *RPC* (3) 111, [77].

[408] Copyright Act 1976, 17 U.S.C. s.107; *M. de Zwart,* 'A historical analysis of the birth of fair dealing and fair use: lessons for the digital age' [2007] I.P.Q. 1, 60.

[409] *Sony Corporation of America v Universal City Studios* (1984) 464 U. s.417. This approach has been criticised for ignoring the principle of statutory construction noscitur a sociis (i.e. that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it). See P. Goldstein, Copyright (Boston: Little, Brown & Co, 1989) para.10.2.1.

[410] *Harper & Row, Publishers, Inc. v. Nation Enterprise* 471 U.S. 539 (1985); Fair use is defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright." H. Ball, The law of copyright and literary property § 125, at 260 (1944). The Supreme Court partially quoted this definition in *Harper& Row.* 471 U.S. at 549; Robin Feingold, 'When Fair Is Foul A Narrow Reading of the Fair Use Doctrine in Harper& Row Publishers Inc. v. Nation Enterprises' 72 Cornell L. Rev. 218 [1986]; Aufderheide, P., Milosevic, T., and Bello, B., 'The impact of copyright permissions on the US visual arts community: The consequences of fear of fair use' SAGE Publications, [2015].

[411] e.g. *Infinity Broadcast Corp. v. Kirkwood,* 150 F.3d 104, 108 (2d Cir. 1998) (concluding that a retransmission of a radio broadcast over telephone lines is not transformative; *UMG Recordings, Inc. v. MP3.com, Inc.,* 92 F.Supp.2d 349, 351 (S.D.N.Y. June 1, 2000) (finding that the reproduction of audio CD to MP3 format does not "transform" the work); For a comparison, see Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [49]; See also the discussion in chapter 4 at 4.4.2

use.[412] This also includes the effect on the potential market for the original (and the market derivative works) which is "undoubtedly the single most important element of fair use."[413] Exceptions to this often depending on the use being 'non-commercial',[414] their economic impact,[415] with non-commerciality under Recital 42 referring to the 'activity as such'[416] and can include indirectly commercial acts.[417]

It is asserted that this is made possible by virtue of the fact that the "capitalist machine"[419] is a primitive machine that focuses on, and is not ignorant of exchange, commerce, and so it exorcises them, localizes them, cordons them off, and maintains the users in a subordinate position. This is so that the flows of exchange and the flows of production do not manage to break the codes of the copyright system and fall

---

[412] See *Worldwide Church of God v. Philadelphia Church of God,* 227 F.3d 1110, 1118 (9th Cir. 2000) (stating that church that copied religious text for its members "unquestionably profited" from the unauthorized "distribution and [use of] text without having account to the copyright holder"); *American Geophysical Union v. Texaco, Inc.,* 60 F.3d 913, 922 (rd. Cir. 1994) (finding researchers at for profit laboratory gained indirect economic advantage by photocopying copyrighted scholarly articles); This can be compared to Case C-306-05*Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hotels SL,* [2006] *ECR* I-11519.

[413] *Harper & Row, Publishers, Inc. v. Nation Enterprise* 471 U.S. 539, 566 (1985) – the Court of Appeals faulted the District Court for "refus[ing] to indulge the presumption" that "harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses." *Campbell v. Acuff-Rose Music, Inc.* 972 F.2d, 1429, 1439 (6th Cir. 08/17/1992).

[414] CDPA 1988 s29(1) (research for a non-commercial purpose); The limitation to non-commercial research is required under a number of EU law provisions: Info. Soc. Dir., Art. 5(2)(b), (c), (e), 5(3)(a), (b).

[415] (The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter) - *Football Association Premier League Limited v. QC Leisure* [2012] EWCA civ 1708, 2012 WL 6151864 at [35], [44].

[416] Directive 2001/29/EC.

[417] For example, a public house that shows copyrighted material to customers without directly charging them for it, in the hope that it results in them buying drinks or food – *The Controller of Her Majesty's Stationary Office, Ordenance Survey v. Green Amps* [2007] *EWHC* 2755 (ch), [23].

[419] Deleuze, G. and Guattari, F., *A Thousand Plateaus: Capitalism and Schizophrenia* (Bloomsbury Academic 1987), chapter 12.

outside of legal regulation.[420] The reason for this is because such breakage could otherwise deprive rightsholders of the possibility of financial reward for the commercial exploitation of their works.[421] Yet, financial reward for authors is considered to be necessary for copyright law.[422] Accordingly, this thesis does not advocate against this notion.[423]

However, it is argued that the existing regulation focuses too much on the form, the 'stock' of information rather than the use or 'flow' of that information in order to maintain the monopolistic status of right holders.[424] This has led to a copyright system where "every commercial use is presumptively unfair"[425] not just those uses which are "blatantly"[426] commercial. As such, the provisions [of permitted acts] are not to be regarded as a general wide discretion vested in the courts to refuse to enforce copyright where they believe such refusal to be warranted.[427] It is argued that copyright law has been used as the means in which to suppress the release of such decoded flows (digitalised decommodification)[428] incapable of control by the capitalist, whereby copyright expanded.[429] This invariably was a response to technological change,

---

[420] Deleuze, G. and F. Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.178; Griffin also talks usefully about the effects of capitalism on the flow and exchange of information in his article – (Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016]).

[421] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [48].

[422] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[423] For more information, see chapter 5 at 5.5 *generally.*

[424] The Phrase "information flow" was introduced by Elkin-Koren: see Elkin-Koren, 'Cyberlaw and social Change: A democratic approach to copyright law in cyberspace' [1996] 14 Cardozo Arts and Entertainment Law Journal 215.

[425] *Sony Corporation of America v Universal City Studios* (1984) 464 U.S. 417, 451 (1984).

[426] *Campbell v. Acuff-Rose Music, Inc.* 972 F.2d, 1429, 1439 (6th Cir. 08/17/1992) at 1439.

[427] Per Laddie J. in *Pro Sieben Media AG v Carlton UK Television Ltd* [1998] F.S.R. 43 at 49 (reversed by the Court of Appeal, [1999] 1 W.L.R. 605; [1999] F.S.R. 610, but not with any disapproval of this statement).

[428] Frow, J., *Time and Commodity Culture* Oxford University Press, (1997) pp.143-4 in Hesmondhalgh, D., *The Cultural Industries* (3rd eds. SAGE Publications 2013), p.69.

[429] The pressure that the rise of the internet and digital technology has placed upon copyright law has been comprehensively documented - See, inter alia, L. Lessig*, Free Culture* (2004); S.

expanding in terms of scope, breadth and duration at the behest of rightsholders.[430] This then led to the notion of the information state,[431] information society[432] or the information age[433] and more works being protected now than ever before.[434]

It is postulated that this is the result of capitalism, as the now established diagnosis is that we are living in a post-industrial society, where the late modern economy is an economy of knowledge and work with information and ideas – promoted by digital information technologies – and this takes up increasingly more space for more workers.[435] This is known as a reflexive economy of knowledge or, a 'cognitive capitalism'.[436] The result is that in capitalist society, knowledge has become *the*

Vaidhyanathan, *Copyrights and Copywrongs: The rise of Intellectual Property and how it threatens creativity,* 2nd edn (2003); J. Boyle, *Shamans, Software and* Spleens (1996); BPI, "Reducing online copyright infringement", http://www.bpi.co.uk/our-work/policy-and-lobbying/article/second-article.aspx - in Taken from Griffin, J., 'Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly Also, in Griffin (2013) see (The expansion of copyright and the development of technology—the diverging interests of authors and right holders, and a solution) at 70-74; S. Vaidhyanathan, *The anarchist in the library* (2004).

[430] Justice Laddie, 'Copyright: Over-strength, over-regulated, over-rated?' [1996] E.I.P.R. 253.

[431] Hesmondhalgh, D., *The Cultural Industries* (3rd eds. SAGE Publications 2013), pp.327-28.

[432] House of Lords – Agenda for Action in the UK – Chapter 5 opinion of the committee - <https://publications.parliament.uk/pa/ld199596/ldselect/inforsoc/ch5.htm> (Accessed: 05/07/2018).

[433] Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016]; See also, Castells, Manuel, The Rise of the Network Society (Volume 1 of *The Information Age*) (1996) at 352; *Nederlands Uitgeversverbond v Tom Kabinet Internet BV* (C-263/18) EU:C:2019:697, [2019] 9 WLUK 59, [2019] E.C.D.R. 27; See also, Crown copyright in the information age, Comps. & Law 1998, 8(6), 5-6; Hilary E. Pearson, Information in a digital age - the challenge to copyright, C.L.S.R. (1996), 12(2), 90-94.

[434] Laddie, 'Copyright' [1996] E.I.P.R. 253, 253–256.

[435] Reckwitz, A., *The Invention of Creativity: Modern Society and the Culture of the New* (Polity press, 2017), p.89; On digitization, Castells, M., *The Information Age: Economy, Society, and Culture,* vol. 1: *The Rise of the Network Society,* Oxford: Blackwell, 1996.

[436] This interpretation is derived from Daniel Bell. See Bell, *The Coming of the Post-Industrial Society: A Venture in Social Forecasting.* New York: Basic Books, 1999; see also Stehr, *Wissen and Wirtschafter*. On the concept of cognitive capitalism, see Vercellone, C., (ed.), *Capitalismo cognitive: conoscenza e finanza nell'epoca post-fordista,* (Rome: Manifestolibri, 2006) *in* Reckwitz, A., *The Invention of Creativity: Modern Society and the Culture of the New*, (Polity press, 2017), 123-4.

resource, rather than *a* resource. It fundamentally changes the structure of society and creates new economic dynamics – and that land, labour, and capital have become secondary to information – in an information revolution, based on 'the application of knowledge to knowledge.'[437]

The end result will be that th[is] new economic reality of information regulation will be such that it will reveal the "shadow law" [438] of the capitalist state.[439] This is because the state was the first abstract unity that integrated sub-aggregates functioning separately. Now, the copyright system is postulated to have become subordinated to a field of forces whose flows it co-ordinates and whose autonomous relations of domination and subordination it expresses in the culture system through the copyright legal infrastructure.[440] It is argued that these moves were to prevent the destruction of its market, a direct subordination to the dominant forces, the rightsholders, who pushed for expanded laws.[441] These laws then created what are considered to be legal

---

[437] Ducker, P., *Post-capitalist Society* (Oxford, 1993), p.140 *in* Mason, P., *Post-capitalism: A guide to our future* (Penguin Publishing 2016), pp.112-14.

[438] Bibas, S., 'Plea bargaining outside the Shadow of trial' (2004) 117 Harvard Law Review2464. (The essence of this article is that Plea-bargaining literature predicts that parties strike plea bargains in the shadows of expected trial outcomes. In other words, parties forecast the expected sentence after trial, discount it by the probability of acquittal, and offer some proportional discount. This oversimplified model ignores how structural distortions skew bargaining outcomes, causing them to diverge from trial outcomes). Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=464880> (Last accessed: 14/3/2015).

[439] Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016]; Griffin notes that "shadow law" is meant in the broadest sense of norms: e.e. H. Kelsen, *The Pure Theory of Law,* (trans. M. Knight Berkely, CA: University of California, 1970).

[440] Deleuze, G. and F. Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.179; See also, chapter 3 generally.

[441] For example, right holders previously considered that the copyright system insufficiently protects their economic interests - see, inter alia, L. Lessig*, Free Culture* (2004); S. Vaidhyanathan, *Copyrights and Copywrongs: The rise of Intellectual Property and how it threatens creativity,* 2nd edn (2003); J. Boyle, *Shamans, Software and* Spleens (1996); BPI, "Reducing online copyright infringement", http://www.bpi.co.uk/our-work/policy-and-lobbying/article/second-article.aspx - in Taken from Griffin, J., 'Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly Also, in Griffin (2013) see (The expansion of copyright and the development of technology—the diverging interests of authors

codes in the form of new legislation for the decoded flows of commodities and private property that were deterritorialized by digitalisation.[442] Thus, the predominant focus of copyright has been on the traditional economic exploitation of proprietary rights[443] because it was property that enabled the commodification required for copyright to flourish in the digital world[444] under the "regulatory capture"[445] of the copyright system.[446]

3.4.1 Why the normal pricing rules of demand and supply do not apply in the digital age: associated implications

The equilibrium state of an info-tech economy is one where monopolies dominate and people have unequal access to the information they need to make rational buying

and right holders, and a solution) at 70-74; S. Vaidhyanathan, *The anarchist in the library* (2004); It seems that this may still be the case when looking at the discussion of the recent passage of the Digital Single Market Directive – see Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [28]; Recipients argue the contrary, namely protection is 'overbroad' and limits their cultural freedom – A. Gowers*, Gowers Review of Intellectual Property* [2006]; I. Hargreaves, *Digital Opportunity: A review of Intellectual Property and Growth* (2011); Analysys Mason, 'Final Report for the Department of Media, Culture and Sport, Fostering Creative Ambition in the UK Digital Economy' (2009)*,* pp.27–28.

[442] Deleuze, G. and F. Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.255.

[443] Griffin, J., 'Making a new copyright economy: A new system parallel to the notion of proprietary exploitation in copyright', Intellectual Property Quarterly (2013); See also, Griffin, J., Copyright evolution - creation, regulation and the decline of substantively rational copyright law, I.P.Q. [2013], 3, 234-252.

[444] See this chapter at 3.2 and 3.3 respectively.

[445] This refers to situations where regulations end up being "gamed" by an agent, often in divergence from the original intent of the regulation. Some bureaucrats and businesspersons may owe part of their income to protective regulations like copyright law. Note that regulations are easier to put in than to correct and remove.

[446] Taleb, N., *Skin in the Game: Hidden Asymmetries in Daily Life*, (2018), chapter 7.

decisions,[447] but this isn't always the case where the law makes allowances.[448] However, profit does not always arise by monopolistic behaviour because although it may play some role, it can be said to be the result of a combination of often objectively unquantifiable factors.[449] Yet, info-tech destroys the normal price mechanism, whereby competition drives prices down towards the cost of production. For example, a track on iTunes costs next to zero to store on Apple's server, and next to zero to transmit to my computer. Whatever it cost the record company to produce (in terms of artists fees and marketing costs) it costs me 99p simply because it is unlawful to copy it for free.

This is somewhat paradoxical to the normal pricing mechanism of supply and demand in copyright law,[450] as there is normally a 'downward-slumping demand curve' in

---

[447] *Bridgeport Music Inc. v. Dimension Films*, 230 F. Supp.2d 830, 841 (M.D. Tenn. 2002); *Bridgeport Music Inc. v. Dimension Films*, 410 F.3d 792, (2005) (a three-note sample was not considered to be fair use and users were told to "get a licence or do not sample"); Bartlett, C., 'Bridgeport Music's Two-Second Sample Rule Puts the Big Chill on the Music Industry', 15 DePaul J. Art, Tech. & Intell. Prop. L. 301 (2005); Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018) at [14] and [25] – (*"even approximately two seconds"* of unlicensed sampling, from a phonogram (i.e. a sound recording) is regarded as copyright infringement in absence of express authorization); Clips lasting only a few seconds taken from films of football matches lasting 90 minutes were held to be substantial parts of the films: they reproduced incidents of particular interest to the viewers, such as goals, near misses, demonstrations of particular skill and the like, and sufficient footage was shown to enable the viewers to appreciate the incidents Football Association Premier League Ltdv QC Leisure [2008] EWHC 1411 (Ch); [2008] F.S.R. 32; [2008] 3 C.M.L.R. 12 at [209].

[448] In *Napster,* the court in the case refused to issue a compulsory license by limiting the record label plaintiff's relief for Napster's contributory copyright liability to an award of reasonable damages. In doing so, the court reasoned that the "[p]laintiffs would [otherwise] lose power to control their intellectual property; they could not make a business decision not to license their property to Napster." - *A&M Records v. Napster*, 239 F.3d at 1029; *Pro Sieben Media v. Carlton Television* [1999] *FSR* 610, 614 (per Walker LJ).

[449] Demsetz notes that profit is often a product of superior performance by firms, and not monopoly alone. This often is a combination of great uncertainty plus luck or atypical insight by the management of a firm – H. Demsetz, 'Industry Structure, Market Rivalry and Public Policy' [1973] 16 J. Law. and Economics, 1-9 at 3.

[450] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325..

relation to copyrighted works.[451] That is, "for a new work to be created, the expected return – typically, and…exclusively, from the sale of copies – must exceed the expected cost."[452] The demand curve for copies of a given book is assumed, to be negatively sloped because there are good but not perfect substitutes for a given book.[453]

However, it is postulated that because digital items are unlike physical records (or books), for example, the price doesn't change as demand fluctuates. This means that there is no such curve in this instance because supply will arguably never have to correlate with demand. This is because the interplay of these factors does not come into the price of an iTunes track as the supply is infinite. As such, it can be said that "natural prices are determined by the cost of production, independent of demand."[454] This is because until we had sharable information goods, the basic law of economics was that everything was scarce.[455] Supply and demand assumes scarcity.[456] Now that certain goods are not scarce, like digital music, they are technically abundant – as they do not perish etc, and so supply and demand is removed from the equation.[457] Thus, Apple's absolute legal right to charge 99p is what sets the price. Therefore, what

---

[451] See the discussion in chapter 5 at 5.2, 5.3, 5.3.1, and 5.5.3(a) respectively.

[452] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[453] This view is maintained through their analysis, namely the assumption of a downward-sloping demand curve for copies of a given work - Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325..

[454] Smith, A., His Life, Thought, and Legacy (Eds. Ryan Patrick Hanley, Princeton University Press 2016), p.242. (It should also be noted that this is, of course, not the entire story of economic growth, but nonetheless one essential element according to Smith).

[455] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325.

[456] The lack of 'scarcity' in relation to intellectual property is now a key reason why some writers suggest that such rights are no longer justified in their current form – e.g. A. Plant, 'The Economics of Copyright' (1934) *Economica* 167; D. Boldrin and M. Levine, *Against Intellectual Property Monopoly* (2005); J. Silbey, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (2015).

[457] Also, there is a similar argument, but in the context of tangible and intangible goods in what is known as the "rivalrous/non-rivalrous" debate - in E.E. Johnson, 'Intellectual Property and the Incentive Fallacy' (2011) 39 Florida State Law Review 623.

info-capitalism does, which is the idea that capitalism is now profiting from information, is create a monopoly as it is the only way that an industry of this nature can run. Yet, Landes and Posner argue that copyrights rarely confer monopoly power, but posit that there are two types of tracing problem.[458]

In short, information technology in the digital age is corroding the normal operationality of the price mechanism. This has had revolutionary implications for copyright and anyone associated with it. This is because fundamental categories of economic analysis and law[459] ceased to be, as they have been, for two hundred years. The catagories of economic analysis had been based around land, labour, and capital. This most elementary classification was supplanted by people, ideas and things. Central to this was the principle of scarcity which had been augmented by the important principle of abundance.[460] As a result, the copyright legal framework is argued to have been adopted by capitalism accordingly to ensure that the music industry could adapt in the digital age and has "emerged stronger and smarter"[461] as a result.

The operationality of the current copyright system in the digital world means that private property no longer expresses the bond of personal dependence. Instead, it expresses the independence of a subject that now constitutes the bond. This makes for an important difference in the evolution of private property: private property in itself

---

[458] First, it is hard to keep track of heirs over many generations. This is a potential problem with real estate as well, but is solved by having a registry of land titles. A similar system could be instituted for copyrights. Second, books may go out of print and older works in general may not be easily available. - W. Landes and Posner, R., 'An economic analysis of Copyright Law' 18 Journal of Legal Studies [1989] 325, 361-363.

[459] On the economic analysis of law generally, in the US – see A. M. Polinsky, *An Introduction to law and Economics* (1989) (and) Posner, R., *Economic Analysis of Law* (5th ed., 1998); Landes, W.M. and Posner, R.A., *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003); In the UK – see A. Ogus and C. Veljanovski, *Readings in The Economics of Law and Regulation* (1984); W. Landes and Posner, R., 'An economic analysis of Copyright Law' 18 Journal of Legal Studies [1989] 325.

[460] D. Warsh, *Knowledge and the Wealth of Nations: A Story of Economic Discovery* (New York, 2007) *in* Mason, P.,, *Post-capitalism: A guide to our future* (Penguin Publishing 2016), pp.119-20.

[461] <https://www.theguardian.com/music/2016/apr/12/streaming-revenues-bring-big-boost-to-global-music-industry> accessed: 25/3/2018).

relates to rights, instead of the law relating it to intangibles.[463] This resulted in the view that intellectual property needed to be more rigorously policed and laws changed so that the music industry could make more money out of their copyrights.[469] This is done by creating opportunities for exchange[470] in a capitalist economy where the law operates beneath the surface and profits and rents are deductions from the value produced by labour.[471]

Primarily, this rests on the notion that intangibles generally have no monetary value until they are considered property. Thus, the law generally defines the taking of someone else's property without permission as stealing to facilitate opportunities for exchange within the capitalist economic system.[473] Thus, the evolution of copyright has been considered as a "second enclosure"[474] movement. This is the idea of converting unregulated articles into private property that had perhaps been outside

---

[463] Deleuze, G. and F. Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.527

[469] For more information, see Hesmondhalgh, D., *The Cultural Industries* (3rd eds. SAGE Publications 2013), chapters 5, 6, 9, 10; (Frith and Marshall argues that copyright is the vehicle that drives the music business, essentially the value of the copyright industry can be measured in copyright terms) – Frith, S. and Marshall, L., *Music and Copyright* (2nd edn. Edinburgh: Edinburgh University Press 2004) , chapter 6; Greenfield, S. and Osborn, G, *Contract and Control in the Entertainment Industry* (Aldershot: Dartmouth 1998); Greenfield, S. and Osborn, G, *Spirits in the Material World. Musicians, Lawyers, and the Scope and legal enforceability of Music Contracts* in E.M. Barendt and A. Firth (eds), *The Yearbook of Copyright and Media Law* (Oxford: Oxford University Press, 1999) at 149-61. The importance of copyright law in adding value to the music industry is also seen in the central role it has played in the restriction of peer-to-peer file-sharing - Carey, M. and Wall, D, 'MP3: more beat to the byte' International Review of Law, Computers and Technology 15 (1): 35-55.

[470] Weber, M., *The Protestant ethic and Spirit of Capitalism* (London: Unwin University Books, 1971 11th impression) p.17.

[471] Mason, P.,, *Post-capitalism: A guide to our future* (Penguin Publishing 2016), p.148; See also, Smith, A., *The Wealth of Nations* (Book IV, 1776); Berry, Paganelli, & Smith, *The Oxford Handbook of Adam Smith* (Oxford University Press, 2013).

[473] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.46; See also the discussion in this chapter at 3.2; See also, Posner R. *Economic Analysis of Law (*4th edn, 1992).

[474] Boyle, J., *Public Domain* (2008)*,* at *42-53.*

the property system altogether.[476] This is because under the capitalist axiomatic, profit accumulation in the digital age has been unleashed from any external limitations.[477] This has created a cycle of manipulation and "retroactive need"[478] that is unifying the copyright system ever more tightly in the digital world. In this system, digital works are now controlled[479] in the name of profit[480] where the value of works now means their "macro-economic"[481] value.

This is contended to be the result of what Boyle described as the "new vision for intellectual property, where property should be extended everywhere using digital barbed wire."[483] This is because the commodity form is a central element for the

---

[476] Boyle, J., *Public Domain* (2008), at 45.

[477] Nail, T., *Returning to Revolution: Deleuze, Guattari and Zapatismo* (Edinburgh University Press, 2012), p.64.

[478] Horkheimer, M., and T.W., Adorno., *Dialectic of Enlightenment* (eds, G.S., Noerr and E., Jephcott, Stanford University Press 2002), p.95.

[479] For more information, see chapter 4.3; (In the UK) - see Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039; Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; (In the US) - see *Vernor v Autodesk*, Inc., 621 F. 3d 1102 (9th Cir. 2010); UMG Recordings, Inc. v. Augusto 628 F.3d 1175 (9th Cir. 2011); *Kirtsaeng v John Wiley & Sons, Inc,* 133 S Ct 1351 (2013); Omega SA v Costco Wholesale Corp (2015) US App Lexis 830 (9th Cir., Cal., Jan 20, 2015); *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[480] For more information, see chapter 4 at 4.4, 4.5, and 4.7 respectively; Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007); *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016).

[481] See the discussion in chapter 4 at 4.7; ("More accurately, the law turned its attention away from the value of the labour embodied in the protected subject matter, to the value of the object itself...meaning that value now tend[s] to mean the macro-economic value of the property rather than, as had been the case previously, the quantity of the mental labour embodied in the property in question.") - Bently, L. and Sherman, B., *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge University Press, 1999), pp.174-195; See also, *Bamgboye and Another v Reed and Others* [2002] EWHC 2922 (QB) 2002 WL 31961976.

[483] Boyle, J., *The Public Domain* (Yale University Press, 2008), p.50; For more information on how otherwise legitimate defences like "fair-use" (In the UK it is known as "fair-dealing") are not being relied upon for financial reasons, see chapter 2 at 2.3 and 2.3.1 respectively; Balganesh, S., 'Copyright Infringement Markets' (February 13, 2013). Columbia Law Review, Vol. 113, 2013; University of Pennsylvania, Institute for Law & Economics Research Paper No. 13-7. Available at

development of capitalist society[484] where the central role of the state is to ensure that "the veins of commerce in every part will be replenished."[485] Thus, it is asserted that the items discussed within this chapter, are, in fact, a reactionary response to the effects produced by the capitalist ideology on society as a whole, with copyright and its associated parties a part of it. What is meant by this, is that, the commodification of digital assets, as well as the role of both property and the pirate, is argued to provide evidence which points to the fact that the elusive tentacles of capitalism have made their way into the copyright legal area.[486]

In essence, individuals are postulated to be acting together in the development of a capitalist society without necessarily being aware, or knowing of the larger picture. This is argued to have created a form of regulation that becomes self-defining and it is this that can lead to law becoming the self-defining autopoietic prophecy discussed in the previous chapter.[505] This is due to the fact that modern capitalist enterprise rests

---

SSRN: http://ssrn.com/abstract=2233065; Accessed: 12/5/2015. See also: *See* Aufderheide, P. and Jaszi, P., *Reclaiming fair use* (University of Chicago Press, 2011); Gibson, J., 'Risk Aversion and Rights Accretion in Intellectual Property Law' 116 Yale Law Journal 882, 887-906 [2007]; Balganesh, S., 'The Uneasy Case Against Copyright Trolls' 86 South California Law Review [2013].

[484] Marx, K., 1867 [1976], *Capital: A Critique of Political Economy: Volume One*, (London, Penguin), Ch.7 – More specifically, the discussion concerned the notion that a discussion in which the quantitative value of the commodity is 'exchange-value', or the 'labour-time socially necessary for its production' at p.129.

[485] H. W. Brands, *The Money Men: Capitalism, Democracy, and the Hundred Years' of War over the American Dollar* (Atlas Books, 2006), p.37.

[486] See the discussion in chapter 2 at 2.2.1; See also, the discussion in this chapter at 3.4; Schiller, Schiller, D., *Digital Capitalism: Networking the Global Market System* (Cambridge, MA: MIT Press, 2000) at 203 and Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), P.xx at n.11).

[505] For more information, see chapter 2 at 2.4.2 and 2.5 respectively, and this chapter at 3.4; See also, Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016]; See also, Luhmann, *The Autopoiesis of Social Systems* in (Sociocybernetic Paradoxes 1986), pp.172-192; Teubner and Febbraio, *State Law, and Economy as Autopoietic Systems* [1992]; Luhmann, *A Sociological Theory of Law* [1985].

primarily on calculation and presupposes a legal and administrative system, whose functioning can be rationally predicted.[506]

Therefore, all societal relations, including the legal system, are argued to be inadvertently geared towards the procurement and generation of capital. This is contended to be the result of individualistic subjections to the ideological aspects of capitalism. Copyright is postulated to be no different[515] because law and economic forces are "crucially related."[516] This is due to the fact that as a system, capitalism arises as a worldwide enterprise of subjectification by constituting an axiomatic of decoded flows.[517] This subjectification sees individuals in the culture system insist unwaveringly on the ideology by which they are enslaved and the industry bows to the vote it has itself rigged which is argued to be reinforced by the survival of the music market in the industry.[518] The outcome of this is that the copyright system operates on the basis of maximising[519] proprietary-based economic exploitation.[520] Thus,

---

[506] Weber, M., *Economy and Society* (G. Roth and C. Witrich, eds, University of California Press, 1978), p.1394.

[515] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), pp.19-20.

[516] Per A. Hunt, *The Sociological Movement in Law* (1978), p.120 in M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, 9th edition 2014), p.706.

[517] Deleuze, G. and Guattari, F., *A Thousand Plateaus* (Bloomsbury Academic, 1988), p.532.

[518] Horkheimer, M., and T.W., Adorno., *Dialectic of Enlightenment* (Eds, G.S., Noerr and E., Jephcott, Stanford University Press 2002), pp.106-108; Nicolaou, A., 'How streaming saved the music industry' The Financial Times: January 16 2017. Available at: https://www.ft.com/content/cd99b95e-d8ba-11e6-944b-e7eb37a6aa8e (Accessed: 10/05/2017).

[519] For example, in *Bridgeport Music v. Dimension Films Inc*. 410 F.3d 792 at 801 (6th Cir. 2005) per Guy J it was stated that users should "get a licence or do not sample"; Also, "two seconds" in duration of an unlicenced work can be potentially infringing, see Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [14] and [25]; Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004); See also, the discussion in chapter 4 at 4.5, 4.6, respectively.

[520] Griffin, J., 'Making a new copyright economy: A new system parallel to the notion of proprietary exploitation in copyright', Intellectual Property Quarterly (2013); See also, Griffin, J., Copyright evolution - creation, regulation and the decline of substantively rational copyright law, I.P.Q. [2013], 3, 234-252.

rightsholders are also “slaves”[521] in this system who are contended to be acting in concert,[522] to facilitate the development of capitalism[523] in copyright.[524]

Yet, it is argued that to truly be able to see what has happened in the development of the current copyright system, it is important to consider the relationship between the current streaming business model and the communication right in the UK, and the US public performance right. This is because these rights are contended to have been “central”[531] to the way that the current system operates.[532]

[521] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983) p.292.

[522] Griffin, J., ‘A call for a doctrine of ‘information justice’ Intellectual Property Quarterly [2016].

[523] This idea has been discussed extensively - Adorno, T.W., *The Culture Industry* (Edited by J. M. Bernstein) Routledge Classics, (1991); Horkheimer, M., and T.W., Adorno., *Dialectic of Enlightenment* Verso Books, (1997).

[524] Quintais, J.P., ‘The new copyright in the Digital Single Market Directive: a critical look’ E.I.P.R. [2020], 42(1), 28-41.

[531] Koo, J., ‘The Right of Communication to the Public in EU Copyright Law’ Hart Publishing, (2019).

[532] For example, See also the discussion in chapter 4 generally.

3.5 How the current 'streaming'[552] business model was built on the communication right in the UK, and the US public performance right,[553] under capitalism[554]

3.5.1 The UK approach

Central to the digital licensing infrastructure of the 'streaming' model discussed in the next chapter[555] is the communication right. This has played what is considered to be a fundamental role in the functioning of the music industry.[556] As stated,[557] the communication right,[558] specifically under section 20(2)(b)[559] enables material that is placed on the internet for download or stream by a recipient at a time chosen by themselves to be protected by copyright. This is because a 'communication' is an electronic transmission of a work, coming in the form of Internet 'streaming' as per the

[552] On 'streaming' see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 26-141.

[553] It is acknowledged that there is a public performance right in the UK, but the communication right is considered to be most applicable contextually for purposes here when comparing it with the US system as it is also more developed in terms of case law; The right to perform a work in public in the UK is known as the 'performing right' and is located at section 19 of the CDPA 1988; See also, M.F. Makeen, 'Rationalising Performance "in public" under U.K. Copyright Law [2016] IPQ 117.

[554] The streaming model is discussed in chapter 4 generally; Streaming in both TV and Music platforms is beginning to outstrip traditional pay TV for the first time - https://www.smh.com.au/business/companies/netflix-and-video-streaming-platforms-to-outstrip-traditional-pay-tv-20190607-p51vf2.html; <https://www.theguardian.com/technology/2018/apr/24/music-streaming-revenues-overtake-cds-to-hit-66bn>

[555] See chapter 4 generally, and more specifically at 4.3.

[556] Nicolaou, A., 'How streaming saved the music industry' The Financial Times: January 16 2017. Available at: <https://www.ft.com/content/cd99b95e-d8ba-11e6-944b-e7eb37a6aa8e> (Accessed: 10/05/2017); See chapter 4 at 4.6.

[557] See this chapter at 3.1.

[558] CDPA 1988 s.20 – the right was introduced in this form to implement the Information Society Directive; Info. Soc. Dir., Art. 3, itself implementing WCT, Art. 8; Rel. Rights. Dir., Art. 8(3), Recital 16.

[559] CDPA 1988.

comments of Arnold J in *FAPL v. British Communications* [2017].[560] If it is at a time chosen by the person making it available, then it will become a broadcast under s.20(2)(a).[561] However, the latter is not going to be discussed as the primary concern here is those items which cover streaming as this is central to the music industry and the discussion in the next chapter.

The extension[562] of the communication right is argued to be part of a wider and seemingly unforeseen process procured by capitalism itself because the decoding and the deterritorialization of flows define the very process of capitalism.[563] As such, the interpretation of the communication right has had a predominant focus on the copyright owners' economic and proprietary perspectives.[564] This is contended to be because copyright was charged with repressing whatever escapes the axiomatics and the applications of reterritorialization in other flows. This was in order to keep the flows from escaping the system, and maintaining the axiomatic framework of intellectual property in the digital age.[565]

It is posited that capital and intangibles have become intertwined with the industrial essence of capitalism, meaning that rightsholders and the courts have become the servants of the capitalist machine. In this system, the bureaucratic apparatus of the state finds itself grounded in the economy itself.[566] Consequently, Samuelson notes that no matter how economically trivial, acts will be deemed illegal unless they can be

---

[560] *EWHC* 480 (Ch), [33] (per Arnold J); For a detailed legal, historical, and, theoretical analysis, of the 'making available' right, see Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019).

[561] CDPA 1988.

[562] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), pp.12-50.

[563] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.365.

[564] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), chapter 5.

[565] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.365; See also, Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), pp.18-28.

[566] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), pp.422-3.

"shoe-horned"[567] into some other exception. This has meant that the evolution of the copyright system, in particular, is now expressing the two-fold nature of capitalism under the conditions of rights holders and capital,[568] within what is argued in the next chapter as a 'two-tier' system of protection.[569]

It is submitted that the copyright system has displaced the harshest forms of exploitation away from those with legal rights and pushed it outwards to those without legal rights. This displacement is argued to have tolerated opposition to it from doctrines like 'freedom of expression';[570] 'permitted acts' (which are defined with extraordinary precision and rigidity);[571] (including the Court of Justice of the European Union preference for a 'narrow' interpretation of any derogations from the general rules);[572] and 'fair use' (which has become presumptively unfair as a result in the US).[573]

This is contended to be because the legal apparatus of the copyright system in capitalist society is part of the economic mechanism of selection, which is the idea that the common determination of the executive powers serves to produce or let pass nothing which does not conform to the copyright industry's way of doing things, to their

---

[567] Samuelson, P., 'Preliminary Thoughts on Copyright reform' (2007) 3 *Utah Law Review* 551, 565.

[568] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.423.

[569] See the discussion in chapter 4 at 4.5.

[570] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.424; On the freedom of expression limitations imposed by copyright, see generally, Netanel, N.W., *Copyright's Paradox* (2008) Oxford University Press, in particular chapter 6.

[571] *Pro Sieben Media v. Carlton UK Television* [1998] *FSR* 43, 48 (Laddie J).

[572] See e.g., *Painer,* Case C-145/10 [2012] *ECDR* (6) 89 (ECJ), [109]; *VCAST v RTI SpA,* Case C-265/16, EU:C:2017:913, [32]; *Infopaq Int. v. Danske Dagblades Forening,* Case C-5/08 [2009] *ECR* I-6569 (ECJ) (i*Infopaq I*), [57]; *AKM v Zurs.net Betriebs GmbH,* case C-138/16, EU:C:2017:218, [37]-[38] (ECJ).

[573] Sony Corp. of America v Universal City Studios, Inc. ibid., at 451; See also, Aufderheide, P. and Jaszi, P., *Reclaiming fair use* (University of Chicago Press, 2011), ch.1; Gibson, J., *Risk Aversion and Rights Accretion in Intellectual Property Law,* 116 Yale Law Journal (2007) at 888-906; On 'fair use' see, Aufderheide, P., Milosevic, T., and Bello, B., 'The impact of copyright permissions on the US visual arts community: The consequences of fear of fair use' SAGE Publications, [2015].

concept of the consumer, or, above all, to themselves.[574] Consequently, copyright law had to exponentially develop to ensure a high level of protection[575] to ensure that their sphere of mass society and the specific product is not subjected to a series of digital purges.[576] Thus, the law was adapted via the respective laws on communication (in the UK), and, the right of public performance (in the US) accordingly.

It is argued that there has also been a gradual erosion in the independence of the state in capitalist society pertaining to copyright law, where law often reflects the commercial interests of copyright industries.[577] This is to the point where capitalist reflections of the individual spirit can be reflected *contra legem* upon the individual; a state that has come to govern that individual's own aspiration, future and will.[578] Due to this, Griffin notes that copyright law, because of the effect of capitalism upon the state, has gained an Oedipal standing over information regulation.[579] This is argued to be enabled by virtue of the fact that those with the most economic power in the music industry are able to wield legal discourses with the facility and authority to pay others (lawyers, legislators) to act on their behalf and this is a large part of what it means to

---

[574] Horkheimer, M., and T.W., Adorno., *Dialectic of Enlightenment* (Eds, G.S., Noerr and E., Jephcott, Stanford University Press 2002) p.96; See also, Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), pp.103-54.

[575] *SGAE v Rafael Hotels* [2006] para 36; *Stitching Brein v. Ziggo BV and XS4All Internet BV,* Case C-610/15, EU:C:2017:456, [22] (ECJ) (high level); Case C-117/15 *Reha Training Gesellschaft fur Sport-und Unfallrehabilitation mbH v Gesellschaft fur musikaliche Auffurhungs-und mechanische Vervielfaltigungrechte eV (GEMA)*, EU:C:2016:379, [36] (ECJ, Grand Chamber) (this was the subject of a broad interpretation); *Verwertungsgesselenschaft Rundfunk GmbH v. Hettegger Hotel Edelweiss GmbH,* Case C-641/15, EU:C:2016:795, [AG14] (Ag Spunzar) (a very 'broad' right, but less discussion in this case was given).

[576] Horkheimer, M., and T.W., Adorno., *Dialectic of Enlightenment* (Eds, G.S., Noerr and E., Jephcott, Stanford University Press 2002) p.96.

[577] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [28]; *Kretschmer,* 'European Copyright Reform: is it possible?' (7 May 2019), *re:publica19*, https://www.youtube.com/watch?v=ZyujNlpxu9k[Accessed 30 October 2019]; See also the discussion in this chapter at 3.5.1.4.

[578] Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016].

[579] Deleuze, G. and Guattari, F., *Anti-Oedipus* (New York: Viking Press, 1977) in Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016]).

possess power in society.[580] As such, legal discourses therefore tend to reflect the interests and the perspectives of the powerful people who make most use of them[581] and copyright is contended to be no different.[582]

3.5.1.1 The communication right

In the UK, under section 20 CDPA 1988, a right to communicate a work to the public arises with respect to literary, dramatic, musical and artistic works, sound recordings, films, and broadcasts, in order to secure the successful implementation of the Information Society Directive.[583] However, in EU jurisprudence, the European Court of Justice has aimed at securing a 'high level of protection' that has resulted in subsequently 'broad' interpretations of what constitutes a communication across Europe,[584] and this has resulted in a wide range of activities falling under the concept.[585]

This is primarily due to Recital 23 of the Information Society Directive, that states that the right of communication should be understood in the broad sense.[586] Yet, some writers argue that the interpretation of the communication to the public right should be

---

[580] (e.g. Weber would describe this as evidencing the dispensability of legal coercion, which is actually dispensed only with the coercive legal power of the state) - Weber, M., *Economy and Society* (University of California Press Version, 1978), p.756.

[581] Gordon, R.W., *Law and Theology* from Tikkun (1988) Vol.13(1) from Tikkun (1988) Vol. 3 (No. 1).

[582] See the discussion in this chapter at 3.5.1 and 3.5.2 *generally*.

[583] Info. Soc. Dir., Art. 3, itself implementing WCT, Art. 8; Rel. Rights. Dir., Art. 8(3), Recital 16.

[584] Referring to info. Soc. Dir, Recitals 9, 10, 23: *Reha Training Gesellschaft fur Sport-und Unfallrehabilitation mbH v Gesellschaft fur musikaliche Auffurhungs-und mechanische Vervielfaltigungrechte eV (GEMA),* Case C-117/15, EU:C:2016:379, [36] (ECJ, Grand Chamber) (this was the subject of a broad interpretation); *Verwertungsgesselenschaft Rundfunk GmbH v. Hettegger Hotel Edelweiss GmbH,* Case C-641/15, EU:C:2016:795, [AG14] (Ag Spunzar) (a very 'broad' right, but less discussion in this case was given).

[585] C. Angelopoulos, *European intermediary liability in Copyright: A Tort-Based Analysis* (Information Law Series Volume 39 Kluwer Law Intnl [2016], at 54-64. See also, J. Groom, I. Silverman, and B. Clark, 'Still Lost in the Labyrinth?' [2017] *EIPR* 591; Koo, J., The Right of Communication to the Public in EU Copyright Law (Hart Publishing, 2019)at 117.

[586] This was reiterated in the case of *SGAE v. Rafael Hotels SL, Case C-306/05* [2006] *ECR* I-11519, [36].

abandoned in lieu of a more clearly defined right that that is more 'coherent' and places less of 'burden' on the communication to the public right.[587]

Nonetheless, currently, to be an act of 'communication' requires five specific elements:

(1) an intervention to give access to or experience works or other subject matter. The case law of the CJEU has tended to identify 'communication' with 'transmission'[588] which is also reiterated in Recital 23.[589] Thus, *communication to the public* was also expressed to cover *any means or process other than the distribution of physical copies* in the memorandum accompanying the Commission Proposal for what became the Information Society Directive.[590] Therefore, the user must *intervene in a manner that gives access to a work that recipients would otherwise not enjoy,* in order to be classified as a communication.[591] This includes hyperlinking to material[592] (potentially even where it is otherwise freely available) on the internet,[593] but this is not necessarily

[587] Koo, J., The Right of Communication to the Public in EU Copyright Law (Hart Publishing, 2019)p.118.

[588] The Grand Chamber of the CJEU in *FAPL,* Joined Cases C-403/08 and C-429/08 [2011] *ECR* I-9083 [193], stated, amongst other things, that 'the concept of communication must be constructed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used'. See also, *Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hotels SL,* Case C- 306/05 [2006] *ECR* I-11519 [AG37]; *ITV Broadcasting v TV CatchUp* Case C-607/11 [[2013] 3 *CMLR* (1) 1 (ECJ), [23].

[589] Recital 23 says that the right 'should cover any such transmission or retransmission of a work to the public by wire or wireless means, including 'broadcasting', but should not cover any other acts.

[590] COM(97) 628 final 25; See also, P. B. Hugenholtz and S. C. van Velze, 'Communication to a New Public? Three Reasons why EU Copyright Law Can Do Without a "New Public"' (2016) 47 *IIC* 796, 813.

[591] Case C- 162/10 *Phonographic Performance (Ireland) v Ireland,* [2012] 2 CMLR (29) 859, [31] (ECJ).

[592] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ),- [24].

[593] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ), [18]-[20]; *Mackie v Maxi Construction* [2017] SC LIV 11.

the case,[594] and it must be to a 'new public'.[595] Also, other factors which *intervene in a manner that gives access to a work that recipients would otherwise not enjoy,* also includes the selling of a multimedia device loaded with links to streaming services,[596] as well as creating platforms with indexes to facilitate unauthorised peer-to-peer file sharing.[597]

(2) going beyond the mere provision of physical facilities. The person 'communicating' must provide more than a 'mere facility' to procure the communication. This limitation stems from Recital 27.[598] It seems, somewhat paradoxically, that any act that involves the content being made accessible (as opposed to the mere technical infrastructure that can supply content) is sufficient to take an intervention beyond the 'mere provision

---

[594] Article 3(1) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public', as referred to in that provision (AND) article 3(1) of Directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision - Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ), at [42.(1),(2)].

[595] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ), at [24]-[30] - None the less, according to settled case-law, in order to be covered by the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, a communication, such as that at issue in the main proceedings, concerning the same works as those covered by the initial communication and made, as in the case of the initial communication, on the Internet, and therefore by the same technical means, must also be directed at a new public, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public (see, by analogy, *SGAE*, paragraphs 40 and 42; order of 18 March 2010 in Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, paragraph 38; and *ITV Broadcasting and Others*, paragraph 39) – at [24].

[596] Case C- 527/15 *Stichting Brein v Jack Frederik Wullems*, EU:C:2017:300 (ECJ), [39]-[42].

[597] Case C- 610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV*, EU:C:2017:456 (ECJ), [35]; *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] *EWHC* 379 (Ch), [45]-[46]; This may also procure accessorial liability, for more information see – *Twentieth Century Fox Film v Newzbin* [2010] *EWHC* 608 (Ch) (Kitchin J); On considering how those operating websites help to facilitate the aforementioned, see *Twentieth Century Fox v Sky UK* [2015] *EWHC* 1082 (Ch), [17]-[24].

[598] Directive 2001/29/EC.

of facilities, as the cases of *Ziggo,*[599] *Wullems,*[600] and *SGAE,*[601] have arguably demonstrated.

(3) to a public that is not present at the place where the work or subject matter originate. Under this notion, 'the public' should not be present at the place of the communication, and so converting electronic signals and 'streaming' them is a communication (rather than a public performance). However, the CJEU does not define the place where the communication 'originates' as being the location, and instead, it is deemed to be the location to which the broadcast was issued.[602]

(4) when it would not otherwise have had such access. This is based on the idea that the action of the user must be 'indispensable' to enable the public to access the work,[603] in that the public would have been 'unable' to see or hear the work.[604] Significantly, for purposes here, in *Ziggo*[605] the Court found that The Pirate Bay communicated works made accessible by its users to the public. Significantly, it did not require that the intervention render 'possible' access to the work that is otherwise 'impossible', but simply that the intervention makes access to the work 'less difficult'.[606]

---

[599] C- 610/15 *Ziggo BV,* Case, EU:C:2017:456, at [38] (ECJ) - The Pirate Bay could not claim to have been engaged in 'mere provision' because the various acts of indexing and classifying of the torrent files made them readily accessible to users.

[600] Case C- 527/15 *Stichting Brein v Wullems*, EU:C:2017:300 (ECJ) – (pre-instillation of structured menu of hyperlinks onto a multimedia player which enabled users to have direct access to 'unauthorized' was deemed to go beyond 'mere provision' of physical facilities.

[601] Case C- 306/05 *SGAE,* [2006] ECR I-11519 EU:C:2006:764, [45] (ECJ) – The distribution signals collected from an antenna to such televisions is enough to constitute communication; *Warner Music UK Ltd v Tunein Inc* [2019] EWHC 2923 (Ch), 2019 WL 05684849.

[602] (e.g. 'the place where the communication originates...is...the place where the original performance or representation was recorded on the phonograms') – (AG Trstenjak). *Societa Consortile Fonografici (SCF) v. Marco Del Corso,* Case C-135/10, EU:C:2011:431, [AG125].

[603] *Ziggo BV,* Case C-610/15, EU:C:2017:456, [26] (ECJ); *SCF,* Case C-135/10, EU:C:2012:140, [82] (ECJ).

[604] Case C-117/15 *Reha Training,* EU:C:2016:379, [46] ('otherwise would not be able to enjoy'); *Football Association Premier League,* Joined Cases C-403/08 and C-429/08 [2011] *ECR* I-9083, [195] ('Without his intervention the customers cannot enjoy the works broadcast').

[605] Case C-610/15 *Ziggo BV,* EU:C:2017:456.

[606] Case C-160/15 *GS Media NV v. Sanoma Media Netherlands BV et al.*, EU:C:2016:644 (ECJ); C-610/15 *Ziggo BV,* EU:C:2017:456, [26]-[36], (ECJ) ('less efficient') (AG Szpunar).

(5) which is a deliberate act, carried out by a person with full knowledge of 'the consequences'. For the act to constitute a communication, there must be a requirement of deliberateness or intentionality pertaining to the understanding of the consequences of their acts.[607] This is similar to the UK stance in assessing 'secondary infringements' (as discussed in chapter 5).[608] However, this requirement was expressly highlighted in *SGAE v Rafael Hotels*[609] whereby the court referred to the fact that the defendant hotel proprietor communicated signals that it received and relayed to hotel rooms 'to the public'.[610] This was because it was ruled that it is the organisation which intervenes, *in full knowledge of the consequences* of its action, to give access to the protected work to its customers.[611]

3.5.1.2 To the public

The Court of Justice has treated the definition of the public as a matter of European Union law and has attempted to define the terminological and conceptual boundaries of what 'the public' actually entails.[612] The criteria for assessment comes from the

[607] *Stichting Brein v. Ziggo BV and XS4All Internet BV,* Case C-610/15, EU:C:2017:456, [34], (ECJ) ('full knowledge of the relevant facts'). Illegality is discussed later on by the court at [46] but this would appears to be a somewhat distinct requirement.

[608] For more information, see chapter 5 at 7.7.3.3(a)(i); 'Mere suspicion' is not enough to constitute sufficient belief under UK law for secondary liability - *Pensher Security Doors* v *Sunderland City Council* [2000] RPC 249; See also, CDPA 1988 s.22. (The entirety of secondary infringement in relation to the specific acts is contained in ss.23-26, as well as ss296-299 which deals with unlawful decryption of decrypted signals and subverting copyright-protection measures); Secondary liability differs by Member State – See C Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Kluwer Law International BV, 2017).

[609] Case C-306-05*Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hotels SL,* [2006] *ECR* I-11519.

[610] J. Koo, 'Walking Forward with Backward facing Feet: The CJEU Decision in Reha Training and the Development of the Communication to the Public Right' [2016] 11 *JIPLP* 732.

[611] Case C-306-05*Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hotels SL,* [2006] *ECR* I-11519, [42] (emphasis added).

[612] *SGAE,* Case C- 306/05 [2006] ECR I-11519.

Information Society Directive[613] and the Related Rights Directive.[614] Yet, the developmental aspects of the jurisprudence of the CJEU led to the creation of two similar, but somewhat distinct categories of criteria when assessing whether a communication has been to 'the public'.

These relate primarily to the notions of 'public' and whether it is a 'new public'; with the CJEU referring to three inter-related criteria for the assessment thereof, namely: (i) the size of the group which normally needs to be fairly large[615] to comprise the public;[616] (ii) the character of the group which is interpreted broadly so as to cover an 'indeterminate number of potential listeners or viewers';[617] (iii) the character of the communication must be that the relevant communication is made with a view to making profit, and whether customers were targeted deliberately or by chance.[618]

For example, in applying the criteria, the CJEU has held that communicating films and sound recordings to hotel patrons (notwithstanding the fact that it was in the privacy

---

[613] Directive 2001/29/EC.

[614] Case C-117/15 *Reha Training Gesellschaft fur Sport-und Unfallrehabilitation mbH v Gesellschaft fur musikaliche Auffurhungs-und mechanische Vervielfaltigungrechte eV (GEMA)*, EU:C:2016:379, [31]-[34].

[615] *ITV Broadcasting Ltd v TV Catchup Ltd* (C-607/11) EU:C:2013:147 – at [32]; *Societa Consortile Fonografici (SCF) v Del Corso* (C-135/10) EU:C:2012:140 at [84]; *Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SL* (C-306/05) [2007] E.C.D.R. 2 at [37]-[38]; *Phonographic Performance (Ireland) Ltd v Ireland* (C-162/10) EU:C:2012:141 at [33].

[616] *Warner Music UK Ltd v Tunein Inc* [2019] EWHC 2923 (Ch), 2019 WL 05684849 – [48]; *VCAST v RTI SpA,* Case C-265/16, EU:C:2017:913, [47] (ECJ); *Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SL* (C-306/05) [2007] E.C.D.R. 2 at [36], [54]; *Football Association Premier League Ltd v British Sky Broadcasting Ltd* [2013] E.C.D.R. 14 at [186]; *ITV Broadcasting Ltd v TV Catchup Ltd* (C-607/11) [2013] E.C.D.R. 9 at [20].

[617] For example, in *ITV Broadcasting v TV CatchUp,* Case C-607/11 [2013] 3 *CMLR* (1) 1 (ECJ), [33]-[36], the Court indicated that a large number of individual transmissions to individuals could be to an indeterminate number and therefore was to a public); Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), pp.115-6.

[618] *Societa Consortile Fonografica v Marco Del Corso,* Case C-135/10 [2012] *ECDR* (16) 276, [88], [90]-[91]. The 'profit-making' quality of a transmission is relevant, but not an essential requirement when assessing whether it is 'to the public': in *ITV Broadcasting v TV CatchUp,* Case C-607/11 [2013] 3 *CMLR* (1) 1 (ECJ), [42].

of their own rooms),[619] and individual subscribers to a recording system,[620] was a communication. However, a dentist surgery playing sound recording broadcasts does not[621] (but this was considered to turn on its own facts according to Advocate-General Bot).[622]

Regarding the concept of a 'new public', this was primarily put in place to deal with instances where a work is retransmitted in a manner that would otherwise not have been within the authors contemplation when the work was communicated with the right holder's consent. Thus, in instances where there has already been a communication, retransmission, or initial communication, if it falls in accordance with the aforementioned factors, then there will be a communication to a 'new public'. However, this has been subjected to much discussion[623] and has been labelled as 'unnecessarily complex'. This has indicated that the 'extremely broad' scope[624] of communication right is 'unworkable and counterproductive'[625] especially in light of the *Svensson*[626] and *Sanoma*[627] decisions.[628]

---

[619] Case C-306-05*Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hotels SL,* [2006] *ECR* I-11519.

[620] *VCAST v RTI SpA,* Case C-265/16, EU:C:2017:913, [47] (ECJ).

[621] *Phonographic Performance (Ireland) Ltd v Ireland and another* (Court of Justice of the European union, Case C-162/10, 15 March 2012) [31]; *Societa Consortile,* Case C-135/10 [2012] *ECDR* (16) 276 (ECJ).

[622] *Reha Training,* Case C-117/15, EU:C:2016:109, [AG55] (AG Bot).

[623] P. B. Hugenholtz and S. C. van Velze, 'Communication to a New Public? Three reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 IIC 797; See also, Koo, J., The Right of Communication to the Public in EU Copyright Law (Hart Publishing, 2019)Part III; J. Koo, 'Walking Forward with Backward facing Feet: The CJEU Decision in Reha Training and the Development of the Communication to the Public Right' [2016] 11 *JIPLP* 732.

[624] Case C-610/15 *Stitching Brein v. Ziggo BV and XS4All Internet BV*, EU:C:2017:456; *Stichting Brein v Wullems,* Case C- 527/15, EU:C:2017:300 (ECJ).

[625] Karapapa, S., 'The Requirement for a "New Public" in EU Copyright Law' [2017] *ELR* 63.

[626] Case C-466/12 *Svensson and ors v. Retriever Sverige AB*, EU:C:2014:76 (ECJ; This case is also discussed in this chapter at 3.5 and 3.6.

[627] Case C-160/15 *GS Media NV v. Sanoma Media Netherlands BV et al.*, EU:C:2016:644 (ECJ).

[628] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), at 131-43.

The concept of a 'new public' was first deployed in *SGAE*[629] where it was ruled that the rationale for the defendants obtaining the licence to broadcast was used in a way that was otherwise to considered to be outside the contemplation of the right holder at the inception of the agreement. By implication, the retransmission of the work to separate hotel rooms was considered an 'additional service' supplied by the hotel and was 'profit-making' by nature.[630] This is because capitalism 'decodes' and 'deterritorializes' everything by means of capital, and it is suggested that the retransmission of the work to separate rooms was an example of the communication potentially escaping' the rightsholder.

However, such activity in the capitalist system is violently 'reterritorialized' by means of ancillary apparatuses like the courts and the legal system. Thus, the court's interpretation in *SGAE*[631] is regarded as being for the purpose of ensuring that surplus value can be extracted from the new reterritorialized territory as it was the first case to deploy the 'new public' idea and has been described as a confusing concept.[632] This meant that the case was essential for instances where a communication had already occurred, but where there was also a subsequent retransmission of that initial communication.[633] Moreover, the retransmission was considered to be an additional

---

[629] Case C-306-05 *Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hotels SL,* [2006] *ECR* I-11519.

[630] Case C-306-05 *Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hotels SL,* [2006] *ECR* I-11519 at [41], [44]; This can be compared to the US approach of 'market harm' which replaced the "for profit" criterion under the 1976 Copyright Act – HR Rep No 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 62-63; See *Herbert v Stanley; John Church Company v Hilliard Hotel Company* 242 US 591 (1917); This is discussed below at 3.5.2.1.; By similar comparison, see the discussion in chapter 4 at 4.4.2; See also, Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [48]; Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright' May [2016], Queen Mary University London; For an opposite conclusion to the CJEU, the Canadian Supreme Court suggested that in similar circumstances there was no reproduction of a work under copyright law when an image is transferred to an alternative medium, see – *Galerie a'Art du Petit Champlain Inc v Theberge* [2002] SC 34 (Supreme Court, Canada).

[631] Case C-306/05 [2006] ECR I-11519.

[632] G. B. Dinwoodie, 'A Comparative Analysis of Secondary Liability of Online Service Providers', in Dinwoodie (ed.) *Secondary Liability of Online Service Providers* (2017), 14.

[633] *SGAE* Case C-306/05 [2006] ECR I-11519 at [40]-[44].

service offered by the defendants, making it profit-making.[634] However, although this is relevant, the profit-making quality of the transmission is not essential to whether the transmission is 'to the public'.[635] The end result of this was that such activity, despite being initially 'licenced' was a communication to the public and this decision has been confirmed in numerous cases.[636]

In *ITV Broadcasting v TV CatchUp*[637] it was ruled that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question.[638] This also includes situations where there is a different technical means to that in which the initial communication was procured.[639] By implication, this means that it does not matter if the public was the public targeted by the initial communication. This is because there is a new communication by using 'new technical means'.[640] Yet, it is important to note that this was ignored in a 2017 case.[641] However, in *Svensson* v *Retriever Sverige*[642] the Court ruled that communications by the same technical means, using hyperlinks, in order to be infringing, must be directed at a new public. Essentially, this means a

---

[634] *SGAE* Case C-306/05 [2006] ECR I-11519 at [44].

[635] Case C-135/10*Societa Consortile Fonografici (SCF) v. Marco Del Corso,* [2012] *ECDR* (16) 276, [88], [90]-[91]; The 'profit-making' quality of a transmission is relevant, but not essential to whether is it 'to the public': *ITV Broadcasting v TV CatchUp,* Case C-607/11 [2013] 3 *CMLR* (1) 1 (ECJ), [42].

[636] *FAPL,* Joined Cases, C-403/08 and C-429/09 [2011] *ECR* I-9083 (ECJ, Grand Chamber), [197], [198]; *ITV Broadcasting v TV CatchUp,* Case C-607/11 [2013] 3 *CMLR* (1) 1 (ECJ), [39]; *Reha Training,* Case C-117/15, EU:C:2016:379, [45].

[637] *ITV Broadcasting v TV CatchUp,* Case C-607/11 [2013] 3 *CMLR* (1) 1 (ECJ).

[638] *ITV Broadcasting v TV CatchUp,* Case C-607/11 [2013] 3 *CMLR* (1) 1 (ECJ) at [24]; This point has also been reiterated in *Wullems,* Case C-527/15, EU:C:2017:300, [33]; *Ziggo BV,* Case C-610/15, EU:C:2017:456, [28] (ECJ).

[639] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), at 4.3.2.3.

[640] *ITV Broadcasting v TV CatchUp,* Case C-607/11 [2013] 3 *CMLR* (1) 1 (ECJ), at [39].

[641] See *AKM v Zurs.net Betriebs GmbH,* Case C-138/16, EU:C:2017:218 (ECJ) – This case that seems to represent a contrasting viewpoint, but is nonetheless considered to be likely ruled as confined to its facts and/or overruled by legislative intervention,

[642] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ).

public that was not taken into account by the copyright holders when they authorised the initial communication to the public.[643]

Interestingly, albeit in a different context,[644] a similar line of reasoning was given in the *Allposters* case.[645] Here, an alteration of the copy of the protected work, which provided a result closer to the original, was considered to be sufficient to constitute a new reproduction of that work.[646] This was held to be within the meaning of Article 2(a) of Directive 2001/29, which is covered by the exclusive right of the author and requires his permission.[647] It is suggested again, that the proposed reforms could help to alleviate some of the associated issues here due to the increased compliance with copyright that could be induced by reduction in prices proposed.[648]

---

[643] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ), at [24] (see, by analogy, *SGAE*, paragraphs 40 and 42; order of 18 March 2010 in Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, paragraph 38; and *ITV Broadcasting and Others*, paragraph 39).

[644] This is discussed in chapter 4 at 4.4.2.

[645] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015].

[646] S.17 CDPA 1988; *VG Wort v. KYOCERA Document Solutions Deutschland GmbH,* Joined Cases C-457/11, C-458/11, C-459/11, and 460/11, EU:C:2013:34, [AG33] (AG Sharpston, referring to reproduction as the 'fundamental' right); cf. J. Litman, *Digital Copyright* (2001), 180 *ff* (proposing instead a general right to control commercial exploitation); See also, chapter 4 at 4.3.1, 4.7 and 4.7.1 respectively.

[647] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [43]-[49]; Download from peer-to-peer systems - Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] [43]-[46]; Often the most passive/incidental acts are caught by the reproduction right, such as upload onto a USB – *Technische Universitat Darnstadt* v. *Eugen Ulmer KG,* Case C-117/13, EU:C:2014:2196, [52] (ECJ); when infringers access an internet stream – *FAPL v. British Communications* [2017] EWHC 480 (Ch) [31] (Arnold J); this also includes the image created on a television screen being regarded as a copy for the purposes of what constitutes a reproduction here – *FAPL,* Joined Cases C-403/08 and C-429/08 [2011] *ECR* I-9083, [159]; *Football Association Premier League Limited and ors v. QC Leisure and ors and Karen Murphy v. Media Protection Services Ltd {'FAPL'),* Joined Cases C-403/08 and C429/08 [2011] *ECR* I-9083 (ECJ, Grand Chamber) at [198]; *ITV Broadcasting Ltd v. TV Catchup Ltd* [2011] EWHC 1874 *(Pat)*.

[648] For more information, see the discussion in this chapter at 3.2; See also, chapter 5 at 5.5; Devos, K., *Tax Compliance Theory and the Literature* (Springer Publishing 2014).

3.5.1.3 Who makes a communication?

In most situations, it will be relatively clear who is responsible for making a communication. This is usually the person who uploads or streams the material. However, in instances where video-sharing platforms (like YouTube) provide the means to which their users can upload works onto their sites, can it be said that they are 'communicating' that material?

Traditionally, UK law has distinguished between primary liability and accessory liability, and for an accessory to be liable, they must have procured or induced an act, or it must have been the result of their common design.[649] The legal theory, referred to as inducing infringement' (discussed in chapter 5),[650] has been used to find similar defendants liable in subsequent litigation, notably in the 2010 US District Court decision involving the file-sharing service LimeWire.[651]

For example, in *Twentieth Century Fox v Sky UK,*[652] a distinction was drawn by Birss J between communication to the public and accessory liability when assessing the operationality of a website[653] called 'Popcorn Time'.[654] This site was fundamental to an arrangement that enabled peer-to-peer users to view unauthorised streams of movies. In the case, Birss J found that 'Popcorn Time' did not communicate the films to the public, and instead, it was considered to provide a mechanism that would enable access to the streams. Rather, taking into account the perspective of the users, it was the application (on their computers) that was considered to be the origin of the

---

[649] The same act could be both an act of primary liability and give rise to accessory liability for the acts of others by way of 'inducement': *Twentieth Century Fox Film v Newzbin* [2010] EWHC 608 (Ch) (Kitchin J).

[650] See the discussion in chapter 5 at 5.7.3.3(a)(ii).

[651] See *Arista Records LLC v Lime Group LLC,* No.06 CV 5936 (KMW) (US S.D.N.Y. May 25, 2010) *in* Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 26-136.

[652] [2015] *EWHC* 1082 (Ch).

[653] *Football Association Premier League Limited and ors v. QC Leisure and ors and Karen Murphy v. Media Protection Services Ltd {'FAPL'),* Joined Cases C-403/08 and C429/08 [2011] *ECR* I-9083 (ECJ, Grand Chamber) at [194].

[654] For an illustrative analysis of the technical functionality of how 'Popcorn Time' operates, see *Twentieth Century Fox v Sky UK* [2015] *EWHC* 1082 (Ch) at [17]-[24].

communication.[655] Instead, the court did however, find that the providers of the 'Popcorn Time' were liable as accessories, jointly with the operators of the host websites. This is primarily due to the technical functionality of the application which served to procure the users access to the host website and thereby to make the unauthorized communication.[656]

Dinwoodie notes that the CJEU however has abstained from defining the question of responsibility, and has instead chose to widen the conceptual aspects of 'communication' as opposed to addressing questions of responsibility.[657] The implications of this were outlined by the CJEU in the case of *Stichting Brein v Ziggo BV*,[658] where it was acknowledged that many people may be involved in very different ways in a communication, and the Court found that operators of a website also communicated the works to the public. This was based on the notion that the acts of indexing, categorizing, and deleting unusable file, procured a situation where access to the platform by users was less difficult. Thus, it is submitted that although this ruling could strengthen a right holder's armoury against the perpetuation of illegally streamed content, it can also be aid to act as a potential limitation on those caught in the wider net of liability. Nonetheless, the ruling means that rights owners also now have a potential claim of infringement against viewers, but this could also assist to limit the market for devices that assist with illegal streaming.[659]

Therefore, it is hypothesised that this broad definition has ensured that multiple individuals or entities within the infringement chain, could now be separately and distinctly, deemed as legally responsible for unauthorised communicative acts. This approach has been adopted by the High Court of England and Wales, in both the case of *Twentieth Century Fox Film v Newzbin*,[660] (with similar orders being made against

---

[655] *Twentieth Century Fox v Sky UK* [2015] *EWHC* 1082 (Ch) at [40]-[42].

[656] *Twentieth Century Fox v Sky UK* [2015] *EWHC* 1082 (Ch) at [55].

[657] G. B. Dinwoodie, 'A Comparative Analysis of Secondary Liability of Online Service Providers', in Dinwoodie (ed.), *Secondary Liability of Online Service Providers* (2017).

[658] Case C-610/15, EU:C:2017:456 (ECJ, Second Chamber).

[659] <https://www.mondaq.com/uk/copyright/613162/online-copyright-communication-to-the-public-right-is-being-redefined> (Accessed: 21/04/2018).

[660] [2010] *EWHC* 608 (Ch) (Kitchin J).

ISPs in relation to Newzbin).[661] This also includes multiple cases concerning the matter of blocking injunctions[662] for issues concerning streaming sites,[663] other BitTorrent

[661] As explained in *Dramatico Entertainment Ltd v British Sky Broadcasting* [2012] EWHC 268 (Ch); [2012] E.C.D.R. 14 at [3] and [4].

[662] *Dramatico Entertainment Ltd v British Sky Broadcasting [2012] EWHC 268 (Ch); [2012] E.C.D.R. 14* citing *Twentieth Century Fox Corp v Newzbin [2010] E.C.D.R. 8; [2010] E.M.L.R. 17* para.89. ("In a case which involves an allegation of authorisation by supply, these circumstances may include the nature of the relationship between the alleged authoriser and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable it will be used to infringe, the degree of control which the supplier retains and whether he has taken any steps to prevent infringement.") *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd [2012] EWHC 1152 (Ch)*; *Scarlet Exteneded SA v Société belge des auteurs, compositeurs et editeurs SCRL (SABAM) (C-70/10 [2012] E.C.D.R. 4; Paramount Home Entertainment International v British Sky Broadcasting* [2013] *EWHC* 3479)Ch) (Arnold J) ('SolarMovie') at [12] (setting out features for a 'communication to the public'); *Football Association Premier League v BSB* [2013] *EWHC* 2058 (Ch), [2013] *ECDR* (14) 377, [39]-[42] (aggregating streams, indexing them and offering a simple link for users to gain access was considered to be 'responsible for the communication'); Such site-blocking injunctions must, however, be specific: the CJEU has suggested that, while injunctions could be granted against ISP's whose services are being used by a third party for infringement, these injunctions may not go so far as to the extent that they otherwise require the service provider (as a preventative measure) to install a filtering system for monitoring the traffic of all customers indiscriminately to identify and block infringing files;
On blocking injunctions see *K. O'Sullivan "Enforcing Copyright Online: Internet Service Provider Obligations and the European Charter of Fundamental Rights" [2014] E.I.P.R. pp.577–583*; See also, *FAPL v British Communications* [2017] *EWHC* 480 (Ch) (Arnold J); *EMI Records v British Sky Broadcasting* [2013] *EWHC* 379 (Ch), [2013] *ECDR* (8) 224 ('The Pirate Bay'), [46] (communication involves both operators of website and users); See also R. Arnold 'Website-blocking Injunctions: The Question of Legislative Basis' [2015] E.I.P.R. at 623–630, which contains an extensive account of the corpus of current case law and assesses the impact of art.10(2) of the European Convention of Human Rights and the ECHR cases of *Delfi v Estonia (App. No.64569/09, 16 June 2015) and Yildirim v Turkey (App. No.3111/10, 18 December 2012)*. Moreover, on September 24, 2015 the European Commission also began a consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy. The consultation contains questions pertaining to whether online intermediaries should (or should not) be subject to a duty of care in relation to illegal content: <https://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud> [Accessed 9 January 2017]; See also, Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 21-253, 26-137.

sites,[664] and other associated websites,[665] including websites selling counterfeit goods,[666] which have proved successful in some regard.[667]

3.5.1.4 Will the passage of Article 17 of the European Union Directive on Copyright in the Digital Single Market affect the current situation?

The passing of the European Union Directive on Copyright in the Digital Single Market (hereinafter ECDM),[668] can be traced back to the Public Consultation on the Review

---

[663] *The Football Association Premier League Ltd v British Sky Broadcasting Ltd [2013] EWHC 2058 (Ch); [2013] E.C.D.R. 14* and *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd [2013] EWHC 3479 (Ch); [2014] E.C.D.R. 7;* For the facts, see paras 21-60 above. In each case, the users and operators used the ISPs' services to infringe: see at [51] and [39] respectively.

[664] *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch); [2013] E.C.D.R. 8 and 1967 *Ltd v British Sky Broadcasting Ltd* [2014] EWHC 4444 (Ch); [2015] E.M.L.R. 8.See para.21-59 above. In each case, both users and operators had used the ISPs' services to commit infringing acts: for more information see at [88] and [24] respectively.

[665] *Twentieth Century Fox Film Corporation v SKY UK Ltd* [2015] EWHC 1082 (Ch). The operators of the target websites used the ISPs' services to infringe: [59]. For more information, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) current ed. at para.21-61.

[666] *Cartier International AG* v *British Sky Broadcasting Ltd* [2016] EWCA Civ 658; See also, *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch); [2015] E.M.L.R. 10 at [155]. This decision was upheld on appeal: *Cartier International AG v British Sky Broadcasting Ltd* [2016] EWCA Civ 658; [2017] R.P.C. 3; [2016] E.M.L.R. 23 (for the decision of the Supreme Court on the incidence of costs *see Cartier International AG v British Telecommunications Plc* [2018] UKSC 28; Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) current ed. at para.21-259A).

[667] Empirical research conducted by Danaher, Smith and Telang suggested that the blocking of 53 major piracy websites in November 2014 had a significant impact on UK access to blocked websites. UK users visiting blocked websites reduced 90 per cent with no increase to unblocked websites – Taken from: Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577.

[668] COM/2016/0593 final - 2016/0280 (COD); For an earlier overview of the directive, see Shapiro, T., and Hansson., "The DSM Copyright Directive — EU copyright will indeed never be the same" (2019) 41 E.I.P.R. 404; For a critical review of the legislation, see Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41; For more information on

of EU Copyright Rules, held between December 2013 and March 2014,[669] amongst other things.[670] This included a leaked Commission "white paper" in June 2014,[671] and a more recent Communication "Towards a modern, more European copyright framework" in December 2015 which explicitly stated the intention to regulate content-sharing platforms.[672] Also, in September 2016, the Commission released yet another Communication entitled "Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market."[673] The legislation was eventually approved by the Council on 15/17 April by a qualified majority,[674] despite

---

the Directive and the events leading up to its passage and possible implications, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), Part VII, chapter 24, Part 5, Section D.

669 Commission, "Public Consultation on the Review of EU Copyright Rules" (2013) (on file with the author).

670 The consultation covered a broad range of issues on the application of EU copyright rules in the digital environment, including territoriality, the definition of online rights and exceptions, fair remuneration, and even the possibility of single EU copyright title. The consultation produced thousands of responses, summarised by the Commission in a report published in July 2014 - Commission, "Report on the responses to the Public Consultation on the Review of the EU Copyright Rules", Directorate General Internal Market and Services, Directorate D — Intellectual property, D1 — Copyright (July 2014) (on file with the author) *in* Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41.

671 Commission, White Paper, "A Copyright Policy for Creativity and Innovation the European Union" (2014), https://www.dropbox.com/s/0xcflgrav01tqlb/White%20Paper%20%28internal%20draft%29%20%281%29.PDF[Accessed 29 October 2019] – in Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41.

672 Commission, "Towards a modern, more European copyright framework", COM(2015) 626 final (9 December (2015), p.10. Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41.

673 COM/2016/0592 final.

674 Commission, "Copyright reform clears final hurdle: Commission welcomes approval of modernised rules fit for digital age" (15 April 2019), http://europa.eu/rapid/press-release_IP-19-2151_en.htm [Accessed 30 October 2019].

hard opposition.[675] It marks the end of a controversial legislative process at EU level but the potential beginning of a contentious process of national implementation.[676]

Specifically, it requires social media platforms like YouTube, Facebook and Twitter to take more responsibility for copyrighted material being shared illegally on their platforms, and this may have further implications for this area.[677] This requirement has led to it being called an industrial policy tool, shaped more by effective lobbying than evidence and expertise[678] and has become a tool for industrial policy, focused on protecting the interests of incumbent right holders.[679]

---

[675] (e.g. Multiple expert statements by trusted research institutes and academics - *Create, "The Copyright Directive: Articles 11 and 13 must go — Statement from European Academics in advance of the Plenary Vote on 26 March 2019" (24 March 2019)*, https://tinyurl.com/yxmudrdg[Accessed 30 October 2019]. (Disclosure: I have signed and co-ordinated a number of these statements); The resistance included civil society protests - Julia Reda, 'EU copyright reform: Our fight was not in vain' (18 April 2019), https://juliareda.eu/2019/04/not-in-vain/> [Accessed 30 October 2019]; digital rights NGOs - Liberties, "Article 13 Open letter — Monitoring and Filtering of Internet Content is Unacceptable" (16 October 2017), https://www.liberties.eu/en/news/delete-article-thirteen-open-letter/13194 [Accessed 30 October 2019]; Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41.

[676] The passage of the ECDM has already seen a Member State file an action for annulment under art.263 TFEU in relation to Article 17 - The Polish Government has filed an action for annulment under art.263 TFEU, focusing on the most problematic aspects of art.17, discussed below. See *Poland v Parliament and Council* (C-401/19) (Action brought on 24 May 2019). See also Tomasz Targosz, "Poland's Challenge to the DSM Directive — and the Battle Rages On …" (10 June 2019), Kluwer Copyright Blog, http://copyrightblog.kluweriplaw.com/2019/06/10/polands-challenge-to-the-dsm-directive-and-the-battle-rages-on/ [Accessed 29 October 2019] - Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41.

[677] C. Angelopoulos, European Intermediary Liability in Copyright (Wolters Kluwer, 2017); J. Riordan, The Liability of Internet Intermediaries (Oxford, 2016); G. B. Dinwoodie (ed.), *Secondary liability of Online Service Providers* (2017).

[678] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [28].

[679] Kretschmer, 'European Copyright Reform: is it possible?' *(7 May 2019), re:publica19*, https://www.youtube.com/watch?v=ZyujNlpxu9k[Accessed 30 October 2019] - Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [40].

This is argued to be because high international intellectual property standards meant that “private property rights in creative expression and innovation have been strongly institutionalised in an international regime that is one-sidedly driven by the economic interests of corporate players.”[680] This is due to the fact that capitalism is an indirect system of governance based on a complex and continually evolving political bargain. Thus, private actors are empowered by a political authority to own and control the use of property for private gain subject to a set of laws and regulations.[681] Consequently, despite opposition, Quintais asserts that lobbying by right holders’ representatives—especially the recording industry and (music) collecting societies—appears to have been the most intense and effective, often outweighing empirical research in support of opposite views leading up to the passage of ECDM.[682]

For purposes here, however, there is now a requirement, under Article 17, for information society service providers that store and provide access to large amounts of works or other subject-matter uploaded by their users, Namely, this is that they shall, in cooperation with rightsholders, prevent the availability of such works or other subject-matter identified by rightsholders through the cooperation with the service providers.[683] This particular provision comes from, Article 17(1),[684] which critics claim will have a detrimental impact on creators online,[685] with YouTube, and YouTubers,

---

[680] Frankel, S. and Gervais, D., *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge University Press, 2014), p.252; Also, there was an emphasis on the money invested in *Baigent v Random House Group Ltd* [2006] F.S.R. 893 Ch D *at* 904-918.

[681] Scott. B.R., *The political economy of capitalism* (Harvard Business School, 2006).

[682] See Corporate Europe Observatory, "Copyright Directive: how competing big business lobbies drowned out critical voices" (10 December 2018), https://corporateeurope.org/en/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical-voices; [Accessed 14 October 2019] On this topic, see also Kretschmer, M., "European copyright reform: Is it possible?" (7 May 2019), re:publica19, https://www.youtube.com/watch?v=ZyujNlpxu9k[Accessed 30 October 2019]; and Benjamin Farrand, "Towards a modern, more European copyright framework", or, how to rebrand the same old approach? (2019) 41 E.I.P.R. 6. - Quintais, J.P., ‘The new copyright in the Digital Single Market Directive: a critical look’ E.I.P.R. [2020], 42(1), 28-41.

[683] Article 17(1), COM/2016/0593 final - 2016/0280 (COD).

[684] COM/2016/0593 final - 2016/0280 (COD).

[685]<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&cad=rja&uact=8&ved=2ahUKEwiAn9Dk8O_hAhUjTxUIHWvhDfUQFjAKegQIBBAB&url=https%3A%2F%2Fwww.youtube.co

being the most vocal opponents.[686] More specifically, Article 17, requires online platforms to filter or remove copyrighted material from their websites via the utilization of content recognition technologies.

Specifically, two obligations are identified upon 'hosts', that is 'information society service providers that store and provide access to large amounts of works or other subject-matter uploaded by their users.' This is argued to be problematic not just because it is difficult to filter out infringing material only, but also, it is near impossible to objectively ascertain whether a use has, in fact, been infringing as permitted uses may be caught.[687] This is postulated to be because the more that information regulation, such as copyright, becomes broader in terms of its own subject-matter, and in terms of its fluidity, then the more likely such regulation will come to cover more aspects of societal interactions to a deeper level.[688]

Significantly, Article 17 is aimed at tackling the so-called value gap, that is, the alleged mismatch between the value that online sharing platforms extract from creative

---

m%2Fintl%2Fen-GB%2Fsaveyourinternet%2F&usg=AOvVaw3Go0asYc5mD68YBcZuWdKm> (Accessed: 26/03/2019); https://www.businessinsider.com/youtube-is-pushing-back-against-article-13-2018-11?r=US&IR=T (Accessed: 26/03/2019); <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=15&cad=rja&uact=8&ved=2ahUKEwiAn9Dk8O_hAhUjTxUIHWvhDfUQFjAOegQICRAB&url=https%3A%2F%2Fwww.cnbc.com%2F2018%2F10%2F22%2Fyoutube-susan-wojcicki-creators-protest-eu-article-13-copyright-law.html&usg=AOvVaw36tIEoIoMIC0dedcPx04Rm> (Accessed: 26/03/2019).

[686] <https://www.theverge.com/2019/3/27/18283800/youtube-copyright-directive-article-13-memes-grandayy-philip-defranco-european-union> (Accessed: 21/04/2019).

[687] For example, such as parodies and quotations. Moreover, the problems may be greater in some fields, such as photography, than others, such as perhaps recorded sounds. It is still nonetheless unclear as to what the true extent may be as case law will develop such items in due course.

[688] Griffin, J., 'Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly; See also, M. Csikzentmihalyi, *Creativity: Flow and psychology of discovery and invention* (Harper Collins Publishers, 1996) pp.77-83; R. Weisberg, *Creativity: Beyond the Myth of Genius* (1993); R.S. Albert and M.A. Runco, *A History of Research on Creativity* in R.J. Sternberg, *Handbook of Creativity* (1999).

content and the revenue returned to the copyright holders.[689] Recital 62[690] of the ECDM specifically mentions “piracy” in ambiguous language when defining online content-sharing service providers. They are defined as platforms with a profit-making purpose that store and give the public access to a large amount of works/subject-matter uploaded by their users, which they organise and promote.[691]

As a result, it is postulated that, in accordance with the above points,[692] that the proposals[693] can also help to counteract the workings of art.17 by creating the possibility of producing cheaper works.[694] In turn, this could indirectly limit unauthorised sharing or usage on online platforms as access to works would be cheaper overall.[695] By implication, this could also mean that there is less emphasis placed on content recognition technologies to limit, filter, or, remove works, whereby more focus could be directed towards creating new avenues of compliance, especially since enforcement costs are reduced under the proposed system.[696] This is because

---

[689] Angelopoulos and Quintais, ‘Fixing Copyright Reform’ [2019] 10 J.I.P.I.T.E.C. 222. See also Annemarie Bridy, ‘EU Copyright Reform: Grappling With the Google Effect’ [2019] Vanderbilt J. Entertainment & Tech. L. SSRN, https://ssrn.com/abstract=3412249 [Accessed 30 October 2019] (with a "critique the ‘value gap’ as a policy rationale for altering the scope of generally applicable copyright safe harbors"); and Niva Elkin-Koren, Yifat Nahmias, and Maayan Perel (Filmar), ‘Is It Time to Abolish Safe Harbor? When Rhetoric Clouds Policy Goals’ [2019] Stanford Law & Policy Review (forthcoming), SSRN, https://ssrn.com/abstract=3344213 [Accessed 30 October 2019] in Quintais, J.P., ‘The new copyright in the Digital Single Market Directive: a critical look’ E.I.P.R. [2020], 42(1), 28-41.

[690] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.) (Text with EEA relevance).

[691] Recital 62 DSM Directive provides further guidance on how to interpret the definition. The same Recital mentions “piracy” websites in ambiguous language, which appears allow Member States to exclude these not from the scope of the OCSSP definition but rather from the special liability regime in art.17(4).

[692] For more information, see this chapter at 3.2.

[693] See chapter 5 at 5.3 and 5.5 respectively.

[694] For more information, see chapter 5 at 5.5.3(a).

[695] For more information, see chapter 5 at 5.2, 5.3, 5.5, and, 5.9 respectively.

[696] On enforcement, see chapter 5 at 5.7, and specifically, 5.7.3.3; On how costs will be driven down regarding the introduction and enforcement of the proposals, see 5.7.3.3(c)(iii).

works could more financially accessible and so there may be less need to filter material by intermediaries as compliance with copyright could be increased[697] as legitimate uses could be encouraged under the proposed system.[698]

Despite this, although this remains uncertain, it is argued that the current law may see that 'communication' and the notion of liability of those involved in a 'chain' of communication may be extended even further. In turn, it is suggested that this could lead to 'communication to the public' becoming even more all-encompassing regarding liability. This is suggested to be the result of the introduction of the ECDM legislation that sees a "normative preference for private ordering over public choice in EU copyright law."[699] This is further postulated on the basis that the current ECDM passage would suggest that copyright regulation is "hemming" online activity[700] and those that provide the means in which to do so "even more tightly."[701] Thus, although not part of 'communication' per se, the acts covered by it will no doubt be questioned in the context of the communication right[702] and it is likely in the current legal climate that the concept of communication, and circumstances capable of procuring liability, are likely to increase exponentially as a result. This is considered to be especially likely

---

[697] See chapter 5.5 generally, see also, section 5.9.

[698] See chapter 5 at 5.5.3(a).

[699] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41.

[700] *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012); EWCA Civ 1740; [2013] Bus. L.R. 414 (CA (Civ Div)).

[701] Horkheimer, M., and T.W., Adorno., *Dialectic of Enlightenment* (Eds, G.S., Noerr and E., Jephcott, Stanford University Press 2002), p.106.

[702] The communication right has been central to the development of the current success of the streaming business model of the *Football Association of the Premier League* due to its capacity to be used in accordance with "blocking injunctions" – Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577; See also, *FAPL v. British Communications* [2017] *EWHC* 480 (Ch), [33] (per Arnold J); *FAPL,* Joined Cases C-403/08 and C-429/08 [2011] *ECR* I-9083, [159], see also, *Football Association Premier League Limited and ors v. QC Leisure and ors and Karen Murphy v. Media Protection Services Ltd {'FAPL'),* Joined Cases C-403/08 and C429/08 [2011] *ECR* I-9083 (ECJ, Grand Chamber).

in light of the historical evolution of the concept.[703] Ultimately, it is argued that the act of 'communicating' is therefore likely to be expanded even further under Article 17.[704]

This could also mean that what constitutes 'reproduction' and 'authorisation' may also be expanded under the current law as the focus is contended to be increasingly based around restricting what can be done with information.[705] This is also argued as being responsible for the perpetuation of an environment of 'licencing'[706] in order to limit the scenarios where works can be shared without legal consequence.[707] This legal development has been hypothesised to come from the fact that capitalism is inseparable from the movement of deterritorialization. However, this movement is exorcised through fictitious and artificial reterritorializations that have occurred within, and are manifested throughout, the copyright legal system. This is due to the digital age and the 'deterritorializing' potential that 'communications' have to negatively affect

---

[703] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), pp.1-113.

[704] To an extent this could already be arguably achieved under s.296ZG CDPA 1988, (incorporating Article 7 Directive 2001/29/EC) concerning Electronic Right Management Information (ERMI) - However, it is argued that this section is a lot more niche and Article 17 (Directive 2019/790) is likely to generate a lot more debate around its imposition, as it is argued to have a wider application than s.296ZG.

[705] Toynbee, J., 'Copyright, the work and phonographic orality in music' Social and Legal Studies, (2006), 15(1) pp.77–99.

[706] For more information, see chapter 4 generally.

[707] J. Groom, I. Silverman, and B. Clark, 'Still Lost in the Labyrinth?' [2017] *EIPR* 591; Koo, J., The Right of Communication to the Public in EU Copyright Law (Hart Publishing, 2019)p.117; C. Angelopoulos, *European intermediary liability in Copyright: A Tort-Based Analysis* (Information Law Series Volume 39 Kluwer Law Intnl [2016]; *Reha Training Gesellschaft fur Sport-und Unfallrehabilitation mbH v Gesellschaft fur musikaliche Auffurhungs-und mechanische Vervielfaltigungrechte eV (GEMA),* Case C-117/15, EU:C:2016:379, [36] (ECJ, Grand Chamber) (this was the subject of a broad interpretation); As stated, the Court of Justice has aimed at securing a 'high level of protection' that has resulted in subsequently 'broad' interpretations of what constitutes a communication - Referring to info. Soc. Dir, Recitals 9, 10, 23: *Stitching Brein v. Ziggo BV and XS4All Internet BV,* Case C-610/15, EU:C:2017:456, [22] (ECJ) (high level); *Verwertungsgesselenschaft Rundfunk GmbH v. Hettegger Hotel Edelweiss GmbH,* Case C-641/15, EU:C:2016:795, [AG14] (Ag Spunzar) (a very 'broad' right, but less discussion in this case was given); The need for a 'high level' of protection was reiterated in *SGAE v Rafael Hotels* [2006] para 36.

the digital music economy.[708] Thus, the expansion of the communication right is considered to be an example of the 'reterritorialization' effects of capitalism in the digital age.

Therefore, it can be said that copyright law has become the backbone in which rightsholders rely upon to achieve the process of economic exploitation because it is private property that constitutes the centre of the fictitious reterritorializations of capitalism under the communication right. Thus, without it, the objective representation of intangibles would cease to be objective, they would become a subjective infinite – that is to say, imaginary – effectively lose all consistency. This is because unless they are supported by a legal structure that determines the place and the functions of the subject of representation, as well as the objects represented as intangible property, then the formal relations between them all would mean they would cease to exist.[709]

This has made luxury itself into a means of investment [by limiting] "production for production's sake"[710] (although this is not always the case)[711] in a copyright system that rediscovers the primitive connections for [intellectual] labour, on condition – on the sole condition – that they be linked to capital and to the new reterritorialized full

---

[708] Nicolaou, A., 'How streaming saved the music industry' The Financial Times: January 16 2017. Available at: https://www.ft.com/content/cd99b95e-d8ba-11e6-944b-e7eb37a6aa8e (Accessed: 10/05/2017).

[709] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.348.

[710] Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039; Case C-419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright' May [2016], Queen Mary University London; See also the discussion in chapter 4 at 4.4 and 4.4.2 respectively.

[711] The opposite conclusion to *Allposters* was reached, where a company that removed copyrighted images from the surface of greeting cards and then applied them to ceramic plaques was held as having no duplication in this instance, and so no reproduction.*CM Paula Company v. Logan*, 355 F. Supp. 189 (N.D. Tex. 1973) US District Court for the Northern District of Texas - 355 F. Supp. 189 (N.D. Tex. 1973) March 5, 1973; In comparison, see *Mirage Editions Inc v Albuquerque A.R.T. Co.* 856 F. 2d. 1341 (9th Cir. 1988); See also the discussion in chapter 4 at 4.4.1.

body that has been enhanced by digital contracts.[712] For the recipient, this is the reterritorialization of the digital network through legally-induced privatisation via the decoding of the instruments of production through proprietary appropriation. This then procures the loss of the means of consumption through the dissolution of means in which information can be distributed without legal consequence.[713] In turn, this has created what is described in the next chapter as a 'two-tier' system of protection in the digital world.[714]

3.5.2 The situation in the US

3.5.2.1 Right of public performance under §106.

Public performing rights came relatively late in US statutory copyright development. Under this section, there was a longstanding emphasis on 'for profit' over the public's interest in access regarding the interpretation of this right.[722] However, since then, there has been a shift toward protecting authors from 'market harm'.[723] Congress first recognized the right as to dramatic compositions in 1856, and to music compositions in 1897. As to the latter, however, the main source of revenue for the composer had been by the way of royalties from the sale of copies of his or her work in the form of sheet music, and sometimes these ran into large sums: but since then, the

---

[712] For more information, see chapter 4 at 4.4.

[713] Deleuze, G. and F. Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.260; On the issue of legal consequence and how individuals fear that any online activity will be the subject of legal proceedings without prior authorization of rightsholders, see generally chapters 2 and 4.

[714] See the discussion in chapter 4 at 4.5.

[722] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), at 5.2.3 *generally*; See also, *Herbert v Stanley; John Church Company v Hilliard Hotel Company* 242 US 591 (1917); Wu, T., 'Copyright's Communications Policy' (2004) 103 Michigan Law Review 278, 305; See also, the US Second Circuit Decision in *Associated Music Publishers Inc v Debs Memorial Radio Fund Inc* 141 F 2d 852 (2d Cir 1944) 855 – (a non-profit radio station was held to be 'for profit' because it 'resulted in profit to the advertisers and to an increment to its own treasury, whereby it might repay its indebtedness...and avoid an annual deficit.)

[723] The replaced the "for profit" criterion under the 1976 Copyright Act – HR Rep No 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 62-63.

contemporaneous decline in the revenue gained via the sale of copies, served to wake up composers to the economic possibilities inherent in the performing right.

Nonetheless, this section will explain briefly the basis of these rights for the purposes of introduction and understanding, but it will focus primarily on §106(6)[724] as these are the most relevant for the purposes of this thesis. This is because this section governs the digital performance right in sound recordings and its limitations and how these impact on the current system of protection.

In 1909, the Copyright Act – which retained the right of public performance of dramatic works – was amended to give to the owner of copyright in a musical composition the exclusive right to perform it 'publicly for profit'. As was not unusual with the 1990 Act, none of the central terms – such as perform, public, or profit – was defined, and it fell to the courts to give meaning to this language. This was not an easy task pursuant to the development of new technologies for the dissemination of music. However, in the landmark US Supreme Court decision of *Herbert v Shanley,*[725] it was held that a musical performance by a small orchestra in a restaurant was 'for profit' despite the fact that no separate admission charge was made to hear the music.[726]

These phrases have been interpreted liberally by the lower courts, to cover things such as live music accompanying silent motion pictures which required a licence from the copyright owner.[727] This also includes a broadcast of music, on a commercial-free program, by a non-profit radio station which paid for one-third of its airtime by accepting commercial advertising.[728] Moreover, this is also the case where a radio broadcast was a "public" performance, even though members of the public received the broadcasts on their sets were in their private homes and in separate locations.[729]

---

[724] US Copyright Act 1976.

[725] 242 U.S. 591 (1917).

[726] This can be contrasted with the CJEU decision of Case C-135/10 *Societa Consortile,* [2012] *ECDR* (16) 276 (ECJ) – (holding that the playing of a radio broadcast to patients in a dental surgery does not constitute a 'communication' to 'the public') – Compare these to *OSA,* Case C-351/12, EU:C:2014:110 (ECJ); C-117/15 *Reha Training,* case, EU:C:2016:379.

[727] *M. Witmark & Sons v. Pastime Amusement Co.,* 298 F. 470 (E.D.S.C.), ***aff'd,*** 2 F.2d 1020 (4th Cir. 1925).

[728] *Associated Music Pubs. V. Debs Mem. Radio Fund, Inc.,* 141 F.2d 852 (2d Cir. 1944).

[729] *Jerome H. Remick & Co. v. American Auto. Accessories Co.,* 5 F.2d 411 (6th Cir. 1925).

3.5.2.2 The impact of technological advances

New technologies, which allowed for the intermediate re-transmissions of radio and television broadcasts, further compounded the definitional complexities confronted by the courts under the 1990 Act. This meant considering the question of whether these re-transmissions constitute performances. Pursuant to this, in a somewhat controversial decision in 1931, the Supreme Court held that a hotel proprietor "performed" music by making the sounds of radio broadcasts audible by placing receivers and loudspeakers in public and private rooms in the hotel in the case of *Buck v. Jewell-La Salle Realty Co*.[730]

However, in contrast to this decision, the Supreme Court in *Twentieth Century music Corp, v. Aiken*,[731] ruled that a fast-food restaurant owner who played radio programs through four small speakers he had installed in the ceiling of his shop did not "perform." Instead, it was ruled that he was doing little more than turning on the radio, and those who listen to the broadcast through the use of radio receivers do not perform the composition.[732]

---

[730] 283 U.S. 191 (1931) - On the precise facts, the broadcasts of the neighbouring radio station were themselves unauthorized, which later the Supreme Court underlined as the primary reason for the hotels liability in the case); Liebesman, Y.J., 'When Does Copyright Law Require Technology Blindness? Aiken Meets Aero' 30 Berkeley Tech. L.J. 1383, 1389 [2015] at 1391. The Court took special note that the hotel owner installed the radio receivers for the entertainment of his guests. Also, entertaining others seemed to lead to the clear conclusion of a public performance; *Taken from* McGraw, T., Music Streaming: Where Interactive & Non-Interactive Services Fit Under the Homestyle Exemption, 10 Wm. & Mary Bus. L. Rev. 269 (2018), https://scholarship.law.wm.edu/wmblr/ vol10/iss1/6; A similar decision was reached in Case C-306-05*Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hotels SL,* [2006] *ECR* I-11519.

[731] 422 U.S. 151 (1975).

[732] By similar comparison, see Case C-135/10 *Societa Consortile,* [2012] *ECDR* (16) 276 (ECJ).

3.5.2.3 The meaning of 'perform' under the 1976 Act

Under §.101 of the 1976 act, as used in the title, the following terms and their variant forms mean the following:

> "...To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."[733]

To "perform" a work, under the definition in section 101, includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime. A performance may be accomplished: either directly or by means of any device or process. This includes all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or invented.

In the (Second Circuit) case of *US v. American Society of Composers,*[734] Circuit Judge Walker held that downloads are not musical performances that are contemporaneously perceived by the listener. They are simply transfers of electronic files received by the transfer containing digital copies from an online server to a local hard drive. Therefore, the downloaded songs are not performed in any perceptible manner during the transfers; the user must take some further action to play the songs after they are downloaded. By implication, this implies that the electronic download itself involves no recitation, rendering, or playing of the musical work encoded in the digital transmission, whereby the download is not a performance of the work, as defined by §101.[735]

In coming to its conclusion, it is asserted that the court reached a seemingly paradoxical conclusion when viewed in accordance with the 1997 World Intellectual

---

[733] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 64 (1976).

[734] *US v. American Society of Composers, Authors and Publishers (Applications of RealNetworks, Inc., Yahoo! Inc)* 627 F.3d 64 (2d Cir. 2010).

[735] 627 F.3d 64 (2d Cir. 2010).

Property Organization Copyright Treaty ("WIPO Treaty") that required the Court to find that downloads of musical works constitute public performances.

This is because the WIPO Treaty, under Article 8, provides that:

> "[T]he exclusive right of authorizing any communication to the public of their works, by wire or by wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."

However, the US congress has nonetheless chosen to suggest that the treaty does not "require any change in the substance of copyright rights."[736] This conclusion was arrived at, in part, because the Copyright Act 1976 already permits copyright holders to control the 'reproduction' and 'distribution' (both discussed in chapter 4)[737] of their musical works over the Internet. Again, regarding the extent to which a download implicates these rights, the conclusion seems to be that a download that does not also trigger the public performance right does not infringe on Article 8 of the WIPO Copyright Treaty. The other policy arguments raised by ASCAP in the *US v. American Society of Composers,*[738] related to the global harmony of doctrine, and adequate compensation – are better addressed to Congress, which has the power to amend the Copyright Act 1976.[739]

In turn, Internet Companies' [streaming] transmission also illustrate why a download is not a public performance. A stream is an electronic transmission that renders the musical work audible as it is received by the client-computers temporary memory. This transmission, like a television or radio broadcast, is a performance because there is a playing of the song that is received simultaneously with the transmission.[740] Moreover,

---

[736] H.R. Rep. No. 105-551(I), at 9 (1998).

[737] The exclusive rights of 'reproduction' and 'distribution' are discussed in chapter 4 generally, in particular, see sections 4.7 and 4.7.1 respectively.

[738] *US v. American Society of Composers, Authors and Publishers (Applications of RealNetworks, Inc., Yahoo! Inc)* 627 F.3d 64 (2d Cir. 2010).

[739] *Eldred v. Ashcroft,* 537 U.S. 186, 205-07 (2003).

[740] See e.g. *Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151, 158 (1975) - This case was decided under the 1909 Copyright Act, which was the precursor to the 1976 Copyright Act, which is now the applicable law.

in *Columbia Pictures v. Prof'l Real Estate*[741] it was held that downloaded music works are transmitted at one point in time and performed at another, meaning that a transmittal without a performance does not constitute a "public performance."[742]

3.5.2.4 'Public' performances under the 1976 act

To perform or display a work "publicly" under §101 means –

> "(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;
>
> *or*
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."

Under clause (1) of the definition of 'publicly' in section 101, a performance or display is 'public' if it takes place 'at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered' according to a US Congress House Report.[743] Significantly, a fundamental aim in the procurement of this definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer v. Wyatt,*[744] was that performances in 'semi-public' places such as clubs, schools, lodges, and factories, are 'public performances' and therefore subject to copyright control.

---

[741] *Columbia Pictures Indus., Inc., v. Prof'l Real Estate Investors, Inc.,* 866 F.2d 278, 282 (9th Cir. 1989) (holding that renting videodiscs to a hotel guest for playback in the guest's room does not constitute the 'transmission' of a public performance).

[742] Ibid.

[743] H.R. Rep. No. 94-1476, 9$^{4th.,}$ Cong., 2d Sess. 64-65 (1976).

[744] *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt,* 21 C.O. Bull. 203 (D.Md. 1932).

In addition, clause (2) of the definition of 'publicly' in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. As such, in *Jerome H. Remick & Co. v. American Automobile Accessories Co.*,[745] it was held that just because a radio performance was held in a place where members of the public were not all in the same place or able to converse with each other, it was still nonetheless held that these listeners were capable of being construed as members of the audience.[746] Moreover, the definition of 'transmit' – to communicate a performance or display 'by any device or process whereby images or sound are received beyond the place from which they are sent' – is broad enough to include all conceivable forms and combinations of wired and wireless communications media.[747]

Essentially, this means that every method by which the images or sounds comprising a performance or display are picked up and conveyed is a 'transmission,' and if the transmission reaches the public in any form, the case within the scope of causes (4) or (5) of §106.[748] This thesis argues that this 'all-encompassing' legislative approach[749] is quintessentially capitalistic because to survive and further expand, capitalism had to shift from colonisation in the strict sense to colonisation in a more encompassing sense.[750] This is because it is argued to have reached the limits of the exploitation of labour, and capital then begins to transgress them. In doing so, it starts to exploit

---

[745] *Jerome H. Remick & Co. v. American Automobile Accessories Co.,* 5 F.2d 411, 411–12 (6th Cir. 1925).

[746] *Twentieth Century Music Corp.*, 422 U.S. at 159.

[747] 17 U.S.C. § 101 (2010).

[748] 17 U.S.C. 1976.

[749] Macmillan, F., *New Directions in Copyright Law* (Volume 6, Edward Elgar Publishing, 2007), p.4.

[750] On 'colonisation' see this chapter at 3.4 and 3.5.4.1 respectively; Habermas, J., *Theory of Communicative Action,* Vol. 2 (1987) pp.332-373 on colonisation. Habermas argued that the bureaucratic state has become dysfunctional, either because it has 'colonized other life-worlds" or because it has inappropriately interfered with the functioning of other subsystems – (G. Teubner, *Dilemmas of Law in the Welfare State* (1986).

intellectual, communicative, symbolic or emotional labour that is produced outside of the sphere of production.[751] The US system moved towards protecting authors from 'market harm'[752] as opposed to the traditional 'for profit' requirement.[753]

The reason for this is argued to be because the former is more encompassing than the latter, but this may seem somewhat confusing in light of the following. This is because the former approach meant that "virtually no performance which is paid for directly or indirectly c[ould] ever be regarded as not for profit."[754] Yet, the latter now means that the courts look to the inability of authors to reap future rewards of their labour, and this is argued to be extending the reach of what may be construed as 'harm' through the 'for profit' nature of the defendants activities.[755] In turn, this is then

---

[751] Vandenberghe, F. 'Deleuzian capitalism', Philosophy & Social Criticism, 34(8) [2008]: 877-903; Sheila Slaughter and Gary Rhoades, *Academic capitalism and the new economy: Markets, State and Higher Education*, (John Hopkins University Press, 2010), p.4.

[752] The replaced the "for profit" criterion under the 1976 Copyright Act – HR Rep No 94-1476 (1976) (House Report on the Final Bill for the US Copyright Act 1976) 62-63; See also, *Herbert v Stanley; John Church Company v Hilliard Hotel Company* 242 US 591 (1917); By similar comparison, see the discussion in chapter 4 at 4.4.2; See also, Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [48]; Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright' May [2016], Queen Mary University London; For an opposite conclusion to the CJEU, the Canadian Supreme Court suggested that in similar circumstances there was no reproduction of a work under copyright law when an image is transferred to an alternative medium, see – *Galerie a'Art du Petit Champlain Inc v Theberge* [2002] SC 34 (Supreme Court, Canada).

[753] Lydia Pallas Loren, 'The Evolving Role of for Profit Use in Copyright Law: Lessons from the 1909 Act' [2009] 26 Santa Clara Computer & High Technology Law Journal 280.

[754] Nimmer, M.B., *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (Mathew Bender, 1974) vol 1, § 107.32.

[755] In considering whether there is a communication to "the public", it is not irrelevant that the communication is of a profit-making nature: Case C-306-05 *Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hotels SL,* [2006] *ECR* I-11519 at – [44]; *Phonographic Performance (Ireland) Ltd v Ireland* (C-162/10) EU:C:2012:141 at – [36]; *Airfield NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA* (Sabam) (C-431/09) *Airfield NV v Agicoa Belgium* BVBA (C-432/09) [2012] E.C.D.R. 3 at – [80]; *Football Association Premier League Ltd v British Sky Broadcasting Ltd* [2013] E.C.D.R. 14 at [204]-[206]; *Societa Consortile Fonografici (SCF) v Del Corso* (C-135/10) [2012] EU:C:2012:140 at [88]-[90].

justified as infringement on its relevance to 'the public'[756] and it is asserted that these two criterion have been construed with the copyright owners' interests in mind[757] under capitalism. This has created what Schumpeter calls a "creative destruction"[758] which is the idea that every piece of business strategy acquires its true significance only against the background of the process and within the situation created by it.[759] Thus, the interpretation of the *public performance* right cannot be understood outside of its role in the perennial gale of creative destruction.[760]

Therefore, the current approach to interpretation is suggested to be limited to conceptions of markets to those controlled by "incumbent disseminators or copyright owners" and this prevents a more "dynamic and comprehensive" approach to infringement.[761] This is postulated to be for the purpose of ensuring that minimal matter escapes the regulation of the copyright system in capitalist society. Thus, under the present law, a performance made available by transmission to the public at large is 'public' even though the recipients are not gathered in a single place.[762] This is also the case even there is no proof that any of the potential recipients was operating his receiving apparatus at the time transmission.[763]

---

[756] E.g. *On Command Video Corporation v Columbia Pictures Industries* 777 F Supp 787 (ND Cal 1991) 790, and *American Broadcasting Companies, Inc, et al, v Aereo, Inc,* 134 S Ct 2498 (2014) 2508.

[757] Wendy J Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors' (1982) 82(8) Columbia Law Review 1600; See also, David M Diesen and Shubha Ghosh, 'The Foundations of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction' (2005) 47 *Arizona Law Review* 61.

[758] See Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 2013) pp.83-4 in Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), pp.37 and 179.

[759] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019) at p.39.

[760] See Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 2013) pp.83-4; See also, William J Abernathy and Kim B Clark, 'Innovation: Mapping the Winds of Creative Destruction' (1985) 14(1) *Research Policy* 3, 4, 6 & 14.

[761] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.179, 180-5.

[762] H.R. Rep. No. 94-1476, 9$^{4th.,}$ Cong., 2d Sess. 64-65 (1976).

[763] §106(4), (5), 17 U.S.C. 1976.

This is asserted to be because interested parties like to explain the culture industry in technological terms. Its millions of participants, they argue, demand reproduction processes which inevitably lead to the use of standard products to meet the same needs at countless locations.[764] Therefore, the technical antithesis between few production centres and widely dispersed reception necessitates organization and planning by those in control.[765] So, 'public' even though the recipients were not gathered in a single place, without proof that any of the potential recipients were operating any receiving apparatus at the time transmission, they were still nonetheless held to be within the concept of 'public'.

This is considered to stem primarily from the fact that for some of the incumbents of the industrial information economy the pressure from social production was experienced as "pure threat." [766] The clash between these incumbents and the new practices that was most widely reported in the media in the first five years of the twenty-first century, has 'driven' much of the policy-making, legislation, and litigation in this area.[767] It is argued that this was to push for the much needed proprietary-based legal-certainty, the 'calculable universe,' that is essential in capitalist societies,[768] and which has been a central reason as to why capitalism flourishes in the West and why property rights get spread so far.[769]

Moreover, the same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel

---

[764] Horkheimer, M., and T.W., Adorno., *Dialectic of Enlightenment* (Eds, G.S., Noerr and E., Jephcott, Stanford University Press 2002) p.95; Vandenberghe, F. 'Deleuzian capitalism', Philosophy & Social Criticism, 34(8) [2008]: 877-903.

[765] Adorno, T.W., *The Culture Industry* (Edited by J. M. Bernstein, Routledge Classics 1991), p.17; Steiner, R., 'The Threefold Social Order', Anthroposophic Press, Inc. New York, (1966), chapter III.

[766] Benkler, Yochai, *The Wealth of Networks: How Social Protection Transforms Markets and Freedom.* New Haven, CT: Yale University Press (2006), at 126.

[767] Ibid.

[768] Trubek, D.M., 'Max Weber on Law and the Rise of Capitalism' Faculty Scholarship Series [1972] Paper 4001, p.736-39; Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4993&context=fss_papers Accessed: 12/9/2014.

[769] De Soto, H., *The Mystery of Capital: Why capitalism triumphs in the West and failed everywhere else* (Black Swan Publishing, 2001), at 67.

rooms or the subscribers of a cable television service.[770] This is because clause (2)[771] of the definition of 'publicly' is applicable 'whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.'[772]

Consequently, 'to perform' a work is defined in the Act as, 'in the case of a motion picture or other audio-visual work, to show its images in any sequence or to make the sounds accompanying it audible.' As the House report notes, this definition means that an individual is performing a work whenever he does anything by which the work is transmitted, repeated or made to recur.[773] This also means that in *Columbia Pictures v. Redd Horne*.[774] the playing of a video cassette constitutes a performance section 101.

3.5.2.5 The digital performance right in sound recordings and its limitations

3.5.2.5.1 The digital transmission public performance right

The US Copyright Act 1976 did not extend the public performance right to sound recordings. Since 1995, however, producers and performers of sound recordings have enjoyed public performance rights with respect to digital audio transmissions as a result of amendments made to the 1976 Act by the Digital Performance in Sound Recordings Act of 1995 (hereinafter DPRA). This was enacted in response to the absence of a performance right for sound recordings in the Copyright Act of 1976, as

---

[770] *Columbia Pictures Industries, Inc. v Aveco, Inc.* 800 F.2d 59 (3d Cir. 1986).

[771] 17 U.S.C. 1976 §106(2)

[772] Ibid.

[773] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 63, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5676-77.

[774] *Columbia Pictures Industries v. Redd Horne,* 749 F.2d 154, 158 (3d Cir. (1984); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5674; *see* S. Rep. No. 473, 94th Cong., 1st Sess. 57 (1975).

well as an underlying fear that digital technology would otherwise undermine sales of physical records.[775]

As such, in November 1995, major amendments to §106 extended, for the first in US law, limited public-performance rights to owners of copyright in sound recordings. This meant that §106(6)[776] now added to the list of exclusive rights, which, in the case of sound recordings, was to perform the copyright work publicly by means of a digital audio transmission. However, the performance right for sound recordings under the DPRA is limited to transmissions over a digital transmission, so it is not as expansive as the performance right for other types of copyrighted works.[777]

In addition to the new performance right in §106(6), the DPRA amendments added to §114 several subsections that limit the right. What this did was categorize services under three tiers, based on the service's potential impact on record sales.[778]

Firstly, these relate to the notion that some digital audio transmission public performances are wholly exempt from the copyright owner's right, some are subject to a compulsory licence, and some are fully subject to the copyright owners control. Nonetheless, entirely exempted from the new exclusive digital-audio-transmission right are, among other transmissions, traditional radio and television broadcasts, background music services such as Muzak, and transmissions within business establishments (such as restaurants, department stores, and hotels).

However, two primary types of online music streaming services exist: noninteractive and interactive. A noninteractive service, such as Pandora or an Internet radio station, does not allow a user to choose the exact song he or she wants to hear. On the other hand, an interactive, on-demand service allows a user to choose a particular song or album in the service's catalogue to listen to. On-demand services like Spotify have

---

[775] Martin, Rebecca, 'The Digital Performance Right in the Sound Recordings Act of 1995: Can it Protect U.S. Sound Recording Copyright Owners in a Global Market?' (1996) *Cardozo Arts Entertainment Law Journal, 14: 733*.

[776] 17 U.S.C. § 106(6).

[777] Cohen, Julie, Lydia Loren, Ruth Okedji, and Maureen O,Rourke, 'Copyright in a Global Information Economy' (New York: Aspen, 2006), at 466-67.

[778] Myers, Kellen, 'The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties'. Federal Communications Law Journal, 61: 439-40.

played a significant role in the recent growth of digital streaming services.[779] For example, in 2011, paid subscriptions in the United States for these services were estimated at approximately 1.8 million.[780] Yet, by 2014, paid subscriptions in the United States for on-demand services more than quadrupled, reaching approximately 7.7 million, with paid subscription revenues growing to approximately $799 million.[7] Significantly, revenues from all streaming services (which would also include noninteractive services like Pandora) accounted for 27 percent of total U.S. music industry revenues in 2014.[781]

Also, transmissions by various types of non-interactive subscription services were subjected to compulsory licencing in the event voluntary licences (given shelter against antitrust challenges) cannot be negotiated, with other transmissions are fully subject to the copyright owners' §106(6) right.

The DPRA also amended §115 of the 1976 Act. This meant that new interactive services compensated not only sound recording copyright owners (under §106(6) and 114), but also, songwriters and music publishers. This compensation was for lost 'mechanical royalties' that would otherwise ordinarily be forthcoming under §115 via amendment. There have also been further developments with regards to this area, as on October 11, 2018, President Donald Trump signed the Orrin G. hatch-Bob Goodlatte Music Modernization Act ("MMA") into law. The significance of the MMA is that it is intended to "modernize copyright law" as applied to songwriters, music publishers, digital music providers, record labels, and others involved in the creation and distribution of music.[782]

---

[779]<https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2015-16/january-february/digital-dilemmas-music-industry-confronts-licensing-on-demand-streaming-services/#6> accessed:19/03/2019.

[780] Joshua P. Friedlander, 'Recording Indus. Ass'n of Am., News and Notes on 2014 RIAA Music Industry Shipment and Revenue Statistics' 1 (2014), http://riaa.com/media/D1F4E3E8-D3E0-FCEE-BB55-FD8B35BC8785.pdf accessed:11/10/2019.

[781] Ibid at 1-2.

[782] The MMA consists of three parts: Title I establishes a licensing collective to grant blanket mechanical licenses to digital music service providers and collect and distribute royalties to music composition rights owners; Title II creates a royalty structure to compensate owners of pre-1972

The MMA consists of three parts: Title I establishes a licensing collective to grant blanket mechanical licenses to digital music service providers and collect and distribute royalties to music composition rights owners; Title II creates a royalty structure to compensate owners of pre-1972 sound recordings; and Title III provides a statutory right for producers, mixers, and sound engineers to collect royalties for digital transmissions of sound recordings.[783]

Secondly, Congress further amended §114 as the 1995 expansion of the sound recording copyright omitted a principal form of Internet exploitation: audio (streaming) or (webcasting) of recorded performances. These transmissions originate on the internet and are generally non-subscription.[784] Yet, the difference is that the geographic factors that apply to radio stations do not apply to websites and can reach a worldwide audience. Consequently, under the 1995 provisions, webcasts that were neither subscription nor interactive were entirely exempt from the sound recording copyright owners right.

However, the 1998 amendments addressed this omission by retaining the three-tier structure created in 1995. This was achieved by wholly exempting from the right not all qualifying non-subscription transmissions, but only non-subscription broadcast transmissions. By implication, this meant that the exemption would not cover most webcast transmissions. This was primarily due to the statute broadly defining a 'broadcast' as one 'made by a terrestrial broadcast station licenced as such by the Federal Communications Commission (FCC) under §114(j)(3).[785] This then meant that all qualifying non-subscription transmissions were added to the class of transmissions that were subject to the statutory licence.[786]

---

sound recordings; and Title III provides a statutory right for producers, mixers, and sound engineers to collect royalties for digital transmissions of sound recordings; See also,

[783] <http://ipkitten.blogspot.com/2020/03/guest-post-one-database-to-rule-them.html> accessed: 19/05/2020).

[784] For example, the user enters the URL for the "Internet Radio" website, much as she or he would otherwise access a conventional radio station – 17 U.S.C. § 114(j)(3).

[785] 17 U.S.C.

[786] The amendments retain the 'sound recording performance complement' and they bar the transmitting entity to accommodate technological measures imposed by the sound recording

Thirdly, despite the 1998 amendments narrowing the scope of digital transmissions that would otherwise be wholly exempt from the performance right, they left the status of analogue transmissions unaltered. This means that an over-the-air broadcaster pays no royalties to sound recording copyright owners, while webcasters pay at least the compulsory licence fees. However, Copyright owners and the Digital Media Association (DMA) contended that the exemption was limited to over the air transmissions, and the Copyright Office endorsed this view.[787] In doing so, it stated, amongst others things, that this was to ensure that "legitimate copies were purchased in the market place" to prevent a listener making a "high-quality unauthorized reproduction of a sound recording directly from the transmission."[788] This view was affirmed in the case of *Bonneville International v. Peters*.[789]

3.5.2.6 Crossed wires or a clear connection: when is a public performance (not) also a reproduction (or) distribution of copies?

As will be seen in the next chapter, digital communications will often implicate both the reproduction and distribution rights. For example, one reason for this is because it will be seen that it is materially impossible, under the law of physics, for the same material to be distributed and exist in two places at once at the same time.[790] The implications of this, for purposes here, is that digital transfers, due to their technical operation,[791] consequently creates secondary copies at the point of transfer[792] and this attracts copyright liability.

---

copyright owner to prevent users or other third parties from scanning the transmissions for the purpose of selecting particular transmissions - §114 (d)(2)(c)(i)-(ix).

[787] *See* 65 Fed.Reg. 77, 292 (Dec. 11, 2000).

[788] Ibid.

[789] *Bonneville International Corp. v. peters,* 347 F.3d 485 (3d Cir. 2003).

[790] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013) 6 [4] citing *London-Sire Records, Inc v John Doe 1* 542 F. Supp 2D 153 (D. Mass 2008); For more information, see 4.4. & 4.5, respectively.

[791] *MDY Industries., LLC* v. *Blizzard Entertainment., Inc.,* 629 F.3d 928, 937 (9th Cir. 2010) at 935-36.

[792] See chapter at 4.4 & 4.5 respectively.

This happened in *Capitol Records v. ReDigi inc*[793] where the court rejected the arguments regarding §109(a)[794] suggesting that policy required reconsideration of the first-sale doctrine in light of technological advances.[795] The court held that the fist-sale doctrine did not apply because users did not upload and transfer their own individual phonorecord. Instead, it was considered that they uploaded and sold a reproduction of the phonorecord. The consequence of this was that the first sale did not protect them from infringement suits as these acts were, for technical purposes, reproductions, and so the acts were classed as distributions of reproductions.[796]

By implication, this brought a second into existence, (which was then distributed) to another. Thus, at those precise moments, there is both a reproduction, and subsequent distribution, which breached §106(3) of the US Copyright Act (1976).[797] This is argued to be because the production of goods in capitalist society will adapt to the wants, through the agency of associations that will spring up in all manner of connections and attempt to escape the chains of the state, only to be brought back in by it under the law.[798]

However, all rights may often converge on the internet,[799] whereby the latter two rights, (including the public performance/display), will often come into play, such as in the audio streaming of recorded musical compositions. In a report, the Copyright Office acknowledged that, formally the communication of a musical work by means of audio streaming could be characterized as a public performance received by the public in different places at different times. It also acknowledged that the same communication could also be characterised under the RAM copying doctrine, which is the idea that when a computer program is run, or an e-book in RAM when a PDF file is accessed, the RAM doctrine means that uses of a digital file can qualify as infringing the

---

[793] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[794] 17 U.S.C.

[795] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, (S.D.N.Y. 2013).

[796] Ibid.

[797] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013) 2 [5].

[798] Steiner, R., 'The Threefold Social Order', Anthroposophic Press, Inc. New York, (1966), chapter III.

[799] For a discussion of convergence within network theory, see S. Menon, Policy Initiative Dilemmas on Media Convergence: A Cross National Perspective (2006) 24 Prometheus 59, 60.

reproduction of the work.[800] This characterisation could be procured via the fact that the running of a program creates a series of technically procured reproductions made in the computer of the audio stream recipient.[801] However, the effects of the RAM copy doctrine have been seemingly reduced in the case of *Cartoon Network, LP v. CSC Holdings, Inc.,*[802] where a copy of a work that existed for approximately 1.2 seconds did not qualify as a reproduction of the work.

As a result, although not a conclusion per se, the Copyright Office recommended, amongst other things, the introduction of a 'symmetrical' exemption from the performance right when the digital communication is a download. This was in order to prevent the otherwise impractical scenario where there would otherwise need to be a purchase of two separate licences for each respective exclusive right that would otherwise be contravened by such acts. This is because in US law, by defining each right as exclusive,[803] the law makes clear that should anyone else purport to exercise

---

[800] Mulligan, Christina, 'Copyright without Copying' Cornell Journal of Law and Public Policy: Vol. 27 : Issue 2, Article 5 (2017); Litman, J., 'The Exclusive Right to Read' 13 Cardozo Arts & Entertainment. L.J. 29, 31-32 (1994); Aaron Perzanowski, 'Fixing RAM Copies' 104 Northwestern University Law Review 1067, 1070-71 (2010) (arguing that the RAM doctrine has been increasingly embraced by an increasing number of courts); For the UK position, see s.28A CDPA 1988; The maker of cached copies will in any event normally have a defence under r.18 of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013); *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London 2016), at 21-139; *Public Relations Consultants Association Ltd v the Newspaper Licensing Agency Ltd* [2013] UKSC 18; [2013] E.C.D.R. 10; [2013] E.M.L.R. 21 at [2]; P.B. Hugenholtz, 'Caching and Copyright: The Right of Temporary Copyright' [2000] *EIPR* 482, 483; *Sony Computer Entertainment Inc v. Owen* [2002] *EMLR* (34) 742, 747.

[801] *MDY Industries., LLC* v. *Blizzard Entertainment., Inc.,* 629 F.3d 928, 937 (9th Cir. 2010) (held that RAM copying doctrine was actionable under 17 U.S.C. §106); Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act, U.S. Copyright Office, the Librarian of Congress, Aug. 29, 2001, Washington D.C. 2001 *in* Robert A. Gorman, Jane C. Ginsburg, and R. Anthony Reese, '*Copyright: Cases and Materials*,' Foundation Press, University Casebook Series, (2017), p881. On section §106 see pp.920-21; Litman, J., *Digital Copyright*, (Promethus Books 2001) p.92.

[802] 536 F.3d 121 (2d Cir. 2008).

[803] Malevanny, N., Online Music Distribution – How much Exclusivity is Needed?: A Study of International, European, German and U.S. Copyright Systems and Their Objectives, (Springer-Verlag, 2019).

these rights without authorization, he or she would be behaving 'impermissibly' in capitalist society.[804]

Regarding whether the downloading of a digital music file constitutes a public performance of the song embodied in the file, the American Society of Composers, Authors, and Publishers) (ASCAP) suggested that this was technically possible on a practical level. However, the Second Circuit (in rejecting such arguments) said that this was not the case in *US v. ASCAP*.[805]

Comparatively, it is also likely that such a decision would be reached in the UK, in accordance with the CJEU jurisprudence regarding the communication right and the rules relating to a 'new public'.[806]

---

[804] Robert Brauneis & Rogere Schechter, Copyright: A Contemporary Approach 227 (2nd ed. 2018) *in* McGraw, T., 'Music Streaming: Where Interactive & Non-Interactive Services Fit Under the Homestyle Exemption' 10 Wm. & Mary Bus. L. Rev. 269 (2018), https://scholarship.law.wm.edu/wmblr/ vol10/iss1/6; Trubek, D.M., 'Max Weber on Law and the Rise of Capitalism' Faculty Scholarship Series [1972] Paper 4001, p.736; Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4993&context=fss_papers Accessed: 12/9/2014.

[805] *U.S. v. ASCAP (Applications of RealNetworks, Inc.,),* 627 F.3d 64 (2d Cir. 2010).

[806] The concept was first deployed in Case C-306-05 *Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hotels SL,* [2006] *ECR* I-11519; Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ), at [24]; See chapter 4 at 4.4.2; *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019); Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039 Case C- 419/; *Art & Allposters International BV v. Stichting Pictoright* [2015] Case C-263/18.

3.6 Bringing the elements together: how the communication and public display rights laid the foundation for the streaming model discussed in the next chapter

It is contended that copyright law analysis still often centres around how information is disseminated.807 The exclusive rights of communication in the UK (section 20),[808] and the public display right in the US (section 106),[809] have been pivotal in shaping the law of the present day. As such, it is asserted that they have played a subsequently "central" role in the "shaping of the landscape of the digital market."[810]

The way they have done this is by providing what is described as a 'cradle' away from P2P file-sharing and into the current streaming model discussed in the fourth chapter. It is suggested that this has predominantly benefitted rightsholders, essentially performing what is described as a 'bridge-gap' function.[811] However, consumers can also benefit from this with free music available from streaming service Spotify, although it is limited.[812] The rationale behind this 'bridge-gap' submission is based on the fact that the communication and public performance rights were conceived as part of a suite of reforms under the WIPO Digital Agenda.

These reforms set out 'the work and objectives of the World Intellectual Property Organisation (WIPO) with respect to electronic commerce, the digital economy, and intellectual property.'[813] The WIPO Copyright Treaty (WCT) and WIPO Performances

---

807 Nimmer, M.B., 'The Nature of Rights Protected by Copyright' (1962) 10 UCLA Law Review 60, 62 ('As the very name "copyright suggests, the right to copy represents the most fundamental, as well as historically the first, right in the domain of literary property'); Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.6.

808 Specifically section 20(2) CDPA 1988.

809 Specifically, see 17 U.S.C §106(6).

810 Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.5.

811 See chapter 4 at 4.6

812 https://www.spotify.com/uk/signup/ (Accessed: 09/01/2019).

813 World Intellectual property Organization, 'WIPO Digital Agenda: Memorandum of the Director General' (24th Session, WIPO General Assembly, WO/GA/24/11, 22 September 1999) in Foong, C.,

and Phonograms Treaty (WPPT), collectively known as the 'Internet treaties'[814] established the broad making available right to address on-demand transmissions of copyright works and other subject matter through interactive systems. This meant coverage of not just 'push' technologies, but also 'pull' technologies.[815] This was to fill in the gaps left by the technology-centric rights of copyright's foundational international treaty, the Berne Convention for the Protection of Literary and Artistic Works[816] which covered online communications incompletely and otherwise imperfectly.[817]

However, as with the processes of deterritorialization and reterritorialization, one can never go far enough in the direction of these processes – in other words, it is submitted that copyright hasn't seen anything yet. It is argued that the proliferation of copyright legal doctrine will only continue in a digital and capitalist copyright world – as deterritorialization and reterritorialization can never go far enough. It is an irreversible process that creates artificial reterritorializations in response to the deterritorializations presented by digital technology.[818]

The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age (Edward Elgar Publishing, 2019), p.4.

[814] Ficsor, M., *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford University press, 2002) pp.414-15. Taken from Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.4.

[815] WIPO, 'Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference (on Certain Copyright and Neighbouring Rights Questions, Geneva, 2-2- December 1996), WIPO Doc CRNR/DC/4 (30 August 1996)' 44, in Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.4.

[816] Berne Convention for the Protection of Literary and Artistic Works, signed 9 September 1886, (entered into force 5 December 1887) ('*Berne Convention*'), as amended on 28 September 1979, WIPO Lex No TRT?BERNE?001 (entered into force 19 November 1984).

[817] Jane C, Ginsburg, 'The (New?) Right of Making Available to the Public' in Vaver, D. and Bently, L., (eds), *Property in the New Millennium: Essays in Honour of William R. Cornish* (Cambridge University Press, 2004) 234-37 in Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.4.

[818] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.366.

This is argued to be why the advancement in online communications has proliferated – to the point where controlling copies represents a new paradigm, where copyright owners are continually seeking to control the various means of access rather than the copies themselves.[819] It is posited that this change in the dynamic of copyright regulation is not just down to technological advances themselves, although they can be said to be part of it.[820] Instead, it is asserted that this forms yet another example of the capitalist process of reterritorialization due to the otherwise perceived deterritorialization that would otherwise have stemmed from failing to control the access points in the digital world.

What is meant by this is that capitalism has broken down (deterritorialized) the original purposes of copyright like the dissemination of information.[821] It then reformed the system in the digital era to focus around controlling the access points (reterritorialized it to achieve capitalist ends of maximum profit by removing or minimising any opportunities to escape the coding of the copyright system).[822] The result is that the existence of an 'act of communication' to the public must be considered broadly[823] to minimise such opportunities and to ensure a high level of protection in accordance with, inter alia, recitals 4 and 9 of the preamble to Directive 2001/29.[824]

---

[819] Fitzgerald, B., 'Copyright in the Age of Access' in Gilchrist, J., and Fitgerald, B., (eds), *Copyright, Property and the Social Contract: The Reconceptualisation of Copyright* (Springer International, 2018) 183 in Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.5.

[820] For more information, see chapter 2 at 2.2 *generally.*

[821] An act for the Encouragement of Learning, by Vesting Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein Mentioned"- Statute of Anne 1709. See: (http://www.copyrighthistory.com/anne.html) Accessed: 13/10/2014.

[822] Boyle, J., *The Public Domain* (Yale University Press, 2008); Lessig also notes that state governments and government agencies are have been subjected to capture from the beginning – (Lessig, Free Culture, (2004), p.6.).

[823] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ), at [17]; (see, to that effect, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 193.

[824] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [47], [48], [49]; See also, the judgments in *SGAE*, C-306/05, EU:C:2006:764, paragraph 36; *Peek & Cloppenburg*, EU:C:2008:232, paragraph 37; and *Football Association Premier League and Others*, EU:C:2011:631, paragraph 186); (see, by analogy, judgment in *Football Association Premier*

Thus, rather than let anything 'escape' coding[825] or circumvent restrictions,[826] the copyright system used the aforementioned exclusive rights to repress whatever escaped the axiomatics and the applications of reterritorialization in other flows. It is argued that this was done "irrespective" of whether users avail themselves of such opportunities to flout the rules,[827] regardless of the method used.[828] This is in order to keep the flows from escaping the system and maintain the application of the axiomatic framework of copyright in the digital age.[829] This was designed to extend to an "indeterminate number of potential recipients...and a fairly large number of persons."[830] This is argued to be so that information in the digital age would not end up on the 'edge of the reach of the state'[831] and escape the coding (regulation) of the copyright system whereby profits would otherwise escape or fail to be realized.

League and Others, EU:C:2011:631, paragraphs 107 to 109); *Reha Training Gesellschaft fur Sport- und Unfallrehabilitation mbH v Gesellschaft fur musikaliche Auffurhungs-und mechanische Vervielfaltigungrechte eV (GEMA),* Case C-117/15, EU:C:2016:379, [36] (ECJ, Grand Chamber) (this was the subject of a broad interpretation); Referring to info. Soc. Dir, Recitals 9, 10, 23: *Stitching Brein v. Ziggo BV and XS4All Internet BV,* Case C-610/15, EU:C:2017:456, [22] (ECJ) (high level); *Verwertungsgesselenschaft Rundfunk GmbH v. Hettegger Hotel Edelweiss GmbH,* Case C-641/15, EU:C:2016:795, [AG14] (Ag Spunzar) (a very 'broad' right, but less discussion in this case was given); The need for a 'high level' of protection was reiterated in *SGAE v Rafael Hotels* [2006] para 36.

[825] Deleuze, G. and F. Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.178.

[826] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ), at [31].

[827] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ), at [19] (see, by analogy, Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 43).

[828] *Bestwater International GmbH v. Mebes,* C-348/13, EU:C:2014:2315 (ECJ).

[829] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.365.

[830] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ), at [21] (*SGAE,* paragraphs 37 and 38, and *ITV Broadcasting and Others* [2013] ECR, paragraph 32); *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch), [2014] E.C.D.R. 7, [2013] 11 WLUK 310 at [109]; *Warner Music UK Ltd v Tunein Inc* [2019] EWHC 2923 (Ch) [2019] 11 WLUK 6 at [121],[125],[127],[130]-[131].

[831] Griffin, J., 'A call for a doctrine of information justice' [2016] Intellectual Property Quarterly.

Moreover, it is suggested that this extension of reterritorialization has now been furthered through the use of digital contracts.[832]

This is postulated to be because the more the capitalist machine deterritorializes, decodes and axiomatizes flows in order to extract surplus value from them, the more its ancillary apparatuses, like copyright law, do their utmost to reterritorialize. This is done by absorbing in the process a larger and larger share of surplus value by preventing the escape of flows.[833] This is then facilitated by controlling the access points of the digital market[834] where the work or subject matter has been made available on the internet without the permission of the rightsholder.[835] This is argued to be behind the growth of the panopticon in 'softer forms' of life like the market and entertainment industry.[836] For example, reality shows and YouTube are becoming an asset and a social norm (the fundamental logic behind YouTube is: the more views the better) which has led to terms such as "panopticommodity"[837] due to the commodification[838] of surveillance online. The reason for this stems from the fact that capitalism is innovative, whereby it consistently draws on the knowledge that it does

---

[832] See chapter 4 *generally.*

[833] See the discussion in this chapter at 3.4 and 3.5 respectively; Often the most passive/incidental acts are caught by the reproduction right, such as upload onto a USB – *Technische Universitat Darnstadt* v. *Eugen Ulmer KG,* Case C-117/13, EU:C:2014:2196, [52] (ECJ); Download from peer-to-peer systems - Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] [43]-[46]; and when they access an Internet stream – *FAPL v. British Communications* [2017] EWHC 480 (Ch) [31] (Arnold J).

[834] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983) pp.48-9; This same concept is discussed (but in the context of surveillance) in Galič, M., Timan, T. & Koops, B. Bentham, 'Deleuze and Beyond: An Overview of Surveillance Theories from the Panopticon to Participation'. Philos. Technol. 30, [2017] 9–37. at 4.1 and 4.2.

[835] *GS Media NV v. Sanoma Media Netherlands BV et al.,* Case C-160/15, EU:C:2016:644 (ECJ).

[836] Galič, M., Timan, T. & Koops, B. Bentham, 'Deleuze and Beyond: An Overview of Surveillance Theories from the Panopticon to Participation'. Philos. Technol. 30, [2017] 9–37. at 4.1.

[837] On 'commodification' see Lyon, D. The search for surveillance theories (2006) - In D. Lyon (Ed.), Theorising surveillance: The panopticon and beyond (pp. 3–20). Portland: Willan Publishing.

[838] Terranova, T, 'Free Labour: Producing Culture for the Digital Economy' Social Text, [2000] 63 (18), p.35; available at: http://web.mit.edu/schock/www/docs/18.2terranova.pdf (Accessed: 9/12/2017).

not produce itself, but that is the result of individual and collective processes of communication, cooperation and learning that occur in society.[839]

As a result, the essentiality of the doctrines of communication (in the UK) and public performance (in the US) cannot be understated in the digital environment. This is because the traditional reliance on distribution of multiple copies of copyright works for income generation is being displaced by digital technologies and the online markets procured by them.[840] This is argued to represent a quintessential example of 'the short-term gratification of immediate consumption'[841] – which negates the need for the physical distribution of tangible copies. The result of this, as noted by Westkamp, is that in these markets, the economic value[842] now remains fundamental in 'accessing'

---

[839] Vandenberghe, F. 'Deleuzian capitalism', Philosophy & Social Criticism, 34(8) [2008]: 877-903.

[840] Stevens, J., 'The secondary sale, copyright conundrum – Why we need a secondary market for digital content.' (2016) Australian Intellectual Property Journal, 26(4), pp. 179-194; See also chapter 4 at 4.6.

[841] This was raised in the context of discussing the central question of copyright policy. Dr Gurry stated: How can society make cultural works available to the widest possible public at affordable prices, whilst at the same time, assuring a dignified economic existence to creators and performers and the business associates that help them navigate the economic system? It is a question that implies a series of balances: between availability, on the one hand, and control of the distribution of works as a means of extracting value, on the other hand: between consumers and producers; between the interests of society and those of the individual creator; and between the short-term gratification of immediate consumption and the long-term process of providing economic incentives that reward creativity and foster a dynamic culture. – Gurry, F., 'The Future of Copyright' (at the Blue Sky Conference: Future Directions in Copyright Law, Sydney, 25 February 2011); Gurry, F., 'Foreword: The Future of Copyright' in Brian Fitzgerald and John Gilchrist (eds), *Copyright Perspectives: Past, Present and Prospect* (Springer, 2015) vi. Taken from Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.3.

[842] Bently and Sherman notes that perhaps, more accurately, the law has turned its attention away from the value of the labour embodied in the protected subject matter, to the value of the object itself...meaning that value now tend[s] to mean the macro-economic value of the property rather than, as had been the case previously, the quantity of the mental labour embodied in the property in question - Bently, L. and Sherman, B., *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge University Press, 1999), pp.174-195.

the work – that is, experiencing a transient representation of the work without necessarily acquiring a tangible copy.[843]

Consequently, it is hypothesized that if the current approach remains in the digital environment, it is unlikely that the aim of perfecting copyright's dissemination function can be achieved.[844] This is considered to be exacerbated with the issues created by the licensing approach in chapter four regarding the practicality, or impracticality, pertaining to the dissemination of digital works in the current market for those attempting to access works without the prospect of legal liability.[845]

Yet, as will be explained in the fifth chapter, it is submitted that the reforms proposed can help deal with such issues by the anticipated reduction in costs across the copyright spectrum as access will be more economically viable, leading to the potentiality of enhanced access and increased production as a result.[846] Thus, the reforms could increase the disseminatory capacity of works by making such distributions cheaper. In turn, this could indirectly encourage compliance and minimise what would otherwise be considered to be unauthorised distributions as legitimate markets could seem more appealing.[847] The reforms also deal with the issue

---

[843] See Ginsberg, J.C., 'From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law' in Hugh Hansen (ed), *US Intellectual Property Law and Policy* (Edward Elgar, 2000) 39; Westkamp, G., 'Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law' (2004) 36(5) *George Washington international Law Review* 1057 – Taken from Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), pp3-4.

[844] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.8.

[845] See chapter 4 generally, more specifically at 4.7 and 4.7.1.

[846] See chapter 5 at 5.5.

[847] Note that there is no empirical evidence to support this directly. However, Danaher Smith and Telang 'Website Blocking Revisited' (18 April 2016), SSRN, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795> [Accessed 30 June 2019] did find that in the aftermath of the November 2014 website blocks, there was a 6% increase in subscriptions to legitimate sources such as Netflix and a 10% increase in videos viewed on legitimate ad-revenue supported sources such as BBC and Channel 5's streaming sites. Furthermore, it is arguable that an increase in affordable legitimate content may reduce piracy: J. Poort and J. Quintais, 'Global Online Piracy Study' Institute for Information Law, University of

of contracts (discussed extensively in chapter four)[848] and the associated implications of such items when applied in the context of exclusive copyright's, which is also dealt with in the final chapter.[849]

This is important as such items are an essential feature of the future of copyright law as without efficient dissemination of copyright to the public, the benefits flowing from the copyright system will not be fully realised.[850] This is considered to be fundamental as both functions are intrinsic to the foundational legislation of modern copyright law, the Statute of Anne, which for the first time vested copyright in authors and was explicitly titled 'an Act for the encouragement of learning'.[851]

However, it is asserted that the movement away from such foundational aspects is unsurprising. This is based on the fact that this is what the completion of the process of reterritorialization is, more laws,[852] more regulation: a world created in the process of its tendency, its coming undone, its deterritorialization – not at all hope, but the finding of a 'finished design'. This is to the point where copyright becomes so artificial that the movement of deterritorialization creates of necessity and by itself a new copyright, more copyrights, and heightened regulation and the curtailment of

---

Amsterdam [2018]*, p.27*; Taken from Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577 at [577].

[848] Specifically, this looks at the relationships with licences and copyright and how the legal principles of both are used to limit what can be done with digital copyright works as there is no secondary markets as with tangible copies. For more information on this, see chapter 4 at 4.4, 4.5, and 4.7 respectively.

[849] See chapter 5.

[850] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.7.

[851] The full title of the act was 'An Act for the encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned': *Statute of Anne 1710* (London).

[852] See e.g. H.R. 1836, Fair Play Fair Pay Act, 115th Cong. (2017) (giving sound recording copyright owners new exclusive right to perform their sound recordings over AM and FM radio); C. Geiger, O. Bulayenko and G. Frosio, 'The Introduction of a Neighbouring Right for Press Publishers at EU Level: The Unneeded (and Unwanted) Reform' [2017] 39 EIPR 202.

access.[853] Therefore, for writers like Professor Spoo, what lawmakers call 'progress' in the free market is really just a "single, ongoing catastrophe and a piling up of proprietary ruins, copyright after copyright."[854]

3.7 Concluding comments

This chapter has looked at how this evolution of copyright and the internet is an example of the developmental aspects of capitalism. Specifically, this involved looking at the way in which capitalism consistently looks for new ways and methods in which to turn assets into productive agents of capital generation. This also included assessing the ways in which it expands pre-existing avenues for doing so under proprietary rights and the economic value this attracts.[909]

The result is that capitalism has created a situation where copyright has maintained its position over content where it now remains a capitalist commodity in a digital media regime.[911] This has created a 'global copyright congestion' which seems more 'perverse' and' 'antiquated' in the era of digital technology' under laws bent on recapturing the past for private interests.[914] This has been done by using legal doctrines like the rights of communication, and, public performance, discussed in this chapter. Thus, although the digital network has made possible the unprecedented sharing and collaboration of information, they have also been the subject of a digital enclosure.[924]

---

[853] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983), p.366-7.

[854] Spoo, R., *Without Copyrights: Piracy, Publishing and the Public Domain* (Oxford University Press, 2013), p.274.

[909] Accord, Ginsburg, 'The Place of the Author in Copyright' pp.66-67; See also e.g. J. Litman, 'Information Privacy/Information Property' [2000] 52 Stan.L.Rev. 1283, 1295-301.

[911] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.52.

[914] Spoo, R., *Without Copyrights: Piracy, Publishing and the Public Domain* (Oxford University Press, 2013), p.274.

[924] Murdock, G., 'Political Economies as Moral Economies: Commodities, Gifts, and Public Goods' [2011] in Hesmondhalgh, D., *The Cultural Industries* (3rd eds. SAGE Publications 2013) p.71; Also, James Boyle offers an interesting account of how digital technology has fallen victim to the

This current digital environment is based on a complex social discourse that has been created by economic, political, and sociological forces, where copyright is increasingly driven by access, and restricting that access. This is to the point where we are left with what seems to be an 'ad-hoc', and 'fact-specific' system that fails to instil confidence in contemporary copyright law.[927] This is because in Western capitalist society the only individuals who predominantly benefit from sophisticated property systems are a tiny minority who can afford it.[928]

Under this, is it asserted that rightsholders have proactively altered the relations of production and strengthened their positions in the digital age by restricting access. Thus, although the digital transformation has been a game-changer, the game is still won by the music industries who win by creating the rules.[929] The result is that rights, as part of the free-market ideology—otherwise known as the new libertarianism of global intellectual property—are now essential to the modern world of global commerce.[930]

"enclosure" tactics facilitated by rightsholders and enabled y copyright law in Boyle, J., *The Public Domain* (Yale University Press, 2008).

[927] Foong, C., *The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar Publishing, 2019), p.2.

[928] De Soto, H., The Mystery of Capital: Why capitalism triumphs in the West and failed everywhere else (Black Swan Publishing, 2001), p.67. (It should be noted that although De Soto is talking about Western Property systems in the tangible sense, it is argued that this analysis, by virtue of the strong property element present in the copyright sector, that the account he offers is equally applicable here).

[929] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.xxi.

[930] P. Morris, 'The contemporary ideological legitimacy of global intellectual property rights' I.P.Q. (2020), 1, 44-73; See also, Schnyder and Siems, *The Ordoliberal Variety of Neoliberalism* in Konzelmann and Fovargue Davies (eds), *Banking Systems in the Crisis: The Faces of Liberal Capitalism* (Routledge, 2013), p.4, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142529> [Accessed 6 February 2020] – in Asterios Pliakos and Aikaterini Dedouli-Lazaraki, 'Granting exclusive rights to public or privileged undertakings under EU competition law: article 106(1) TFEU combined with article 102 TFEU' E.C.L.R. [2020], 41(4), 195-209; This is only necessary insofar as is necessary to protect and preserve the prerequisites of the competitive system - Not direct state intervention (Talbot,

This is created a confiscation and hiding of wealth like never before, demonstrating that capitalism has invaded physical as well as virtual space, with subjects becoming the objects of abstract exchanges that take place nowhere else other than in their virtual world.[932] In part, this is perhaps because of the broader growth of capitalism within society, and the fact that, in the UK, the development of the system is predominantly around the capitalist principles of economic rights.[933]

To this end, the next chapter will outline how rightsholders are utilising technology through contractual methods in the form of digital licences. These remove works outside of the remit of copyright law under what is described as a 'two-tier' system of protection.[942] The significance of this is the impact on the ability of individuals to invoke otherwise legitimate statutory limitations on the exclusive rights granted by copyright law,[943] that are designed to limit the exercise of such exclusive powers.[944] This means that contracts could also detrimentally impact the enforceability of the proposed reforms.[945] This could be done by removing otherwise copyrighted-protected items

'Ordoliberalism and Balancing Competition Goals in the Development of the European Union' [2016] 61 The Antitrust Bull. 267); Wernhard Möschel*, Competition Policy from an Ordo Point of View in* Alan Peacock and Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (Palgrave Macmillan, 1989)*,* p.142.

[932] Forrester, V., 'L'horreur economique' (Paris: Fayard, 1996) in De Soto, H., *The Mystery of Capital: Why capitalism triumphs in the West and failed everywhere else* (Black Swan Publishing, 2001), p.236.

[933] Griffin, J., 'A call for a doctrine of 'information justice' *Intellectual Property Quarterly* (2016).

[942] For more information, see chapter 4 at 4.5.

[943] 17 U.S.C. §109(a) (1976); s.18(3)(a) CDPA 1988; Info. Soc. Dir., Art. 4(2), allows for exhaustion in cases of 'first sale or other transfer of ownership in the Community'.

[944] See chapter 4 at 4.4, 4.5, 4.7 and 4.7.1 respectively.

[945] For a comprehensive account of the reforms explained in their entirety, see chapter 5at 5.4.1(c).

outside of their remit[946] and in some cases, extending copyright-style protection where it would otherwise be limited.[947]

Chapter five then deals with both types of contracts by proposing the imposition of a legislative framework.[948] This will prevent contracts being used to subvert the reform proposals, whilst at the same time providing a greater degree of commercial certainty. This will be achieved by recommending that a clear framework be established in accordance with current case law to ensure their fluid implementation in an attempt to minimise commercial and legal disruption. Importantly, these proposals embody the foundational underpinnings behind the creation and existence of copyright, like the dissemination of information, through driving down prices which is predicted to create a more financially accessible system which could benefit some authors.[949]

---

[946] In the UK, see chapter 4 at 4.4.2; See also, Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039 Case C- 419/13 at [38], [42], [43], [44], [45], [46], [47], [48], [49] - (The significance of the decision is that the CJEU held that a transferee of software from an original purchaser is a 'lawful acquirer' (even though a licence term affecting the original purchaser purported to prevent such transfer); *Art & Allposters International BV v. Stichting Pictoright* [2015] Case C-263/18; *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019) (the Court determined, in a quintessentially *Usedsoft* fashion, that there is no exhaustion of online media even if incidentally bound up in a computer program that might be the subject of the *Usedsoft* decision); In the US, see chapter 4 at 4.4.1; See also, *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013) at [655] – (the first sale defence is limited to tangible artefacts that the copyright owner can inject into the stream of commerce); K. Moon, 'Resale of Digital Content: UsedSoft v ReDigi' [2013] 24(6) European Intellectual Property Review 193.

[947] See chapter 4 at 4.4 generally, and more specifically, at 4.3.2; See also, *Jacobsen v Katzer* 535 F.3d 1373 (Court of Appeals, Federal Circuit, 2008); Care has to be taken with this case, since the licence is one that provides a condition of use which might otherwise result in copyright infringement. The broader case which extended copyright protection to an area where it was previously denied was in *ProCD, Inc.* v *ZeidenBerg,* 86 F.3d 1447 (7th Circuit, 1996); *MDY Industries., LLC* v. *Blizzard Entertainment., Inc.,* 629 F.3d 928, 937 (9th Cir. 2010) (copyright violations by breaches of a license agreement because of the fact that copies of a program are created when it runs).

[948] See chapter 5 at 5.4.1

[949] See chapter 5 at 5.5; See also e.g. Cohen, J.E., *Configuring the Networked Self* (New Haven 2012), 223-66; Gervais, Collective Management of Copyright and Related Rights, pp. 191-215; W. Patry, *How to Fix Copyright* (Oxford Uni. Press. 2011), at 177-88; J. Silbey, *The Eureka Myth:*

Creators, Innovators and Everyday Intellectual Property (Stanford Press. 2015), 274-85; M. Van Houweling, "Making Copyright Work for Authors Who Write to Be Read" (2015) 38 Columbia Journal of Law & the Arts 381; R.A. Reese, 'Optional Copyright Renewal: Lessons for Designing Copyright Systems' The 38 Annual Horace J. Manges Lecture (2015) 39 Columbia Journal of Law & the Arts 145.

Chapter 4.

The role of contracts.

4.1 Introduction.

The thesis has concentrated upon how the copyright system has been influenced by capitalism and how this has resulted in a predominant emphasis on the economic interests of rightsholders in the digital music industry. To this end, the previous chapters emphasised how advancements in digital technology enabled the manifestation of a copyright infrastructure that operated to encourage maximal compliance. This was achieved through an environment of panoptic surveillance adopted by the music industry[1] in response to the issue of file-sharing that was "bulldozing the ramshackle castles of the copyright industries."[2] This resulted in an extensive range of activity being held capable of liability.[3] This was then argued to lay the foundations for the 'streaming' model under signal copyrights.[4]

---

[1] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 8; Arditi, D., 'Disciplining the Consumer: File-Sharers under the Watchful Eye of the Music Industry' (2011).

[2] Cornish, W., Intellectual Property: Omnipresent, Distracting, Irrelevant (Oxford University Press 2004) pp.50-1.

[3] The notion of what constitutes an act of making available has been given a rather extensive meaning in cases of file sharing – *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch). In this case, anyone using peer-to-peer software so that others can access files will amount to making available in the UK (even if those who access the files are, in many cases, outside of the UK). *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch); *A&M Records v. Napster, 239 F.3d* and *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct 2764 (US Supreme Court, 2005); See also, R. Arnold, 'Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of Protection' (2011) 1 *QMJIP* 272; See also, chapter 2 at 2.3.

[4] For more information, see chapter 3 at 3.5; On 'streaming' see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 26-141.

The answer by the music industry was to create contractual methods of consuming music online. This was to safeguard[5] the unauthorised distribution of music against the seemingly unlimited capacity to do so as a result of digital technology.[6] Licensing has been chosen as the next method of digital exploitation due to the way that contracts exploit the copyright legal infrastructure via the diminished applicability of the 'first sale'[7] and 'exhaustion'[8] doctrines. The subsequent effect that this has on the statutory limitations prescribed by copyright regarding the exclusive rights of 'reproduction' and 'distribution' is discussed below.[9] This chapter will argue that digital

---

[5] Park. D. J., *Conglomerate Rock: The Music Industry's Quest to Divide Music and Conquer Wallets* (Lanham, MD: Lexington Books 2007) at 94; Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), pp.136-38.

[6] See the discussion in chapter 2 at 2.2; Rheingold, H., *The Virtual Community: Homesteading on the Electronic Frontier* (Revised edition, Cam. MA: MIT Press 2000); Castells, M., The Rise of the Network Society (Volume 1 of The Information Age, 1996).

[7] The first sale doctrine is codified in the US copyright statute 17 USC Sec. 109(a) and operates as a narrow limitation on the exclusive distribution right of owners under Sec. 106(3). Sec. 109(a) states: "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."

[8] *See* the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (the "Software Directive") and the European Directive on the Harmonization of Certain Aspects of Intellectual Property and Related Rights in the Information Society (2001/29/EC). The Software Directive at Art. 4(2) states: "The first sale in the [European Union] of a copy of a program by the rightsholder or with his consent shall exhaust the distribution right within the [European Union] of that copy, with the exception of the right to control further rental of the program or a copy thereof." In similar vein, the InfoSoc Directive Art. 4(2) states: "The distribution right shall not be exhausted within the [European Union] in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the [European Union] of that object is made by the rightsholder or with his consent."; See also, Longdin, L. and Lim, P.H., 'Inexhaustible distribution rights for copyright owners and the foreclosure of secondary markets for used software' IIC [2013], 44(5), 541-568 at [547].

[9] For more information, see this chapter at 4.7.

licences are maximising the exploitation[10] and imperative control[11] that rightsholders can exert in the digital age[12] particularly over consumers.[13] This is opposed to the predominant physical method of distribution historically.[14] The chapter then considers how they do so by virtue of the fact that they enable the terms of the relationship to be dictated to a greater extent as the agreements give rise to obligations which are enabled[15] and recognised by law.[16]

The chapter considers how the imposition of contractual agreements, particularly in the digital sphere, has increased unilateral rightsholder control.[17] It then analyses how this control has expanded due to the relationship of copyright with contract law in the context of digital technology. This also includes the practical implications this has had

---

[10] Copyright is treated as a form of personal property right that can be 'exploited' in a number of ways, most importantly by assignment or license – CDPA 1988, ss.1 and 90(1); Posner argues that wealth maximisation exemplifies both utility and autonomy – Posner, R., *The Economics of Justice* (Harvard Uni Press 1983) p.115.

[11] The example given by Weber here refers to a corporate group, by virtue of the fact that the members are subjected to the legitimate exercise of imperative control, that is to 'authority', and so are labelled as an 'imperatively coordinated' group. He also notes that in this case, 'imperative control' is confined to the legitimate type, but it is not possible in English to speak here of an 'authoritarian' group. The citizens of any state, no matter how 'democratic,' are 'imperatively controlled' because they are subject to law – (Weber, M., *The Theory of Social and Economic Organisation* (The Free Press, 1947), pp.152-53.

[12] For more information, see this chapter at 4.6.

[13] For more information, see the discussion in this chapter generally, and in particular, parts 4.5 and 4.6 respectively; See also, Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007); *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016); Savic, M., 'The Legality of Resale of Digital Content after UsedSoft in Subsequent German and CJEU Case Law' [2015] EIPR 414-29.

[14] For more information, see Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), Part IV.

[15] See the discussion in this chapter at 4.5; See also, s.28(1) Copyright Designs and Patents Act 1988, and 17 U.S.C. §109(d) (1976).

[16] Edwin Peel, The Law of Contract (14th eds. Sweet and Maxwell 2015), p.1; See also, this chapter at 4.5, 4.5.1, and 4.6 respectively.

[17] See this chapter at 4.5.1.

for users regarding the accessibility of works electronically.[18] Electronic contracts are to be recognised as valid and enforceable under UK law. This is under the E-Commerce Directive Art.9(1)[19] (as implemented via the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No.2013).[20] Similarly, such agreements are recognised under US law via 17 U.S.C. §109 (1976).[21]

This chapter then assesses how the current situation is the result of the digital dissemination of information removing the intermediaries from the distribution process.[22] Thus, a consumer who would have bought a CD directly from a retailer can now be supplied with an equivalent digital version over the internet directly from the copyright holder. This direct contract means that the rights owner can enforce any rights that they may have under copyright. However, this can now also include additional obligations imposed as part of the agreement.[23]

---

[18] For more information, see 4.2.

[19] E-Commerce Dir., Art.9(1); There are certain exceptions that cannot be overridden by contract under the following subsections: CDPA 1988, ss50, 50B, 296A(1)(a), 296A(1)(b), 296A(1)(c); For guidance on how the directive could apply post-Brexit, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770360/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf (Accessed: 4/02/2019).

[20]The Directive was originally implemented by the Electronic Commerce (EC Directive) Regulations 2002 (“the 2002 Regulations”), which amongst other things implemented the Country of Origin principle and liability provisions to all UK legislation in the 'coordinated field' made before these Regulations - <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770360/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf> (Accessed: 4/02/2019).

[21] More specifically, U.S.C. §109(d) (2012) as this section specifies that the first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as someone who as obtained it subject to contract, like a licensee.

[22] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), pp.120-124.

[23] Issues of fitness for use and quality of digital content supplied by traders to consumers is regulated in part by the Consumer Rights Act 2015, Ch.3. The European Commission, as part of the Digital Single Market strategy, has proposed harmonization: Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content, COM (2015) 634 final. The proposal requires the supplier of digital content to have undertaken relevant rights clearances in relation to

The effect of this is that under the current licensing approach, the distributor can enforce any rights they have in copyright against the recipient.[24] Yet, they can also enforce any other obligations they have against them contractually.[25] The concern is that these click-through contracts will extend copyright owners rights beyond their existing scope.[26] However, the digital revolution has also caused the democratization of the production, promotion and distribution of music where small-scale organizations such as independent labels or self-releasing artists, have also generated commercial success.[27]

Nonetheless, although these are relevant points, the discussion here concerns digital contracts due to the effect they can have on the copyright system in the music area. It is asserted that the increasing use of electronic resources has made the use of such contracts become the norm.[28] The chapter demonstrates that the result is that items are licenced not purchased, increasing the potential for the delicate balance between owners and users in statutory copyright to be sacrificed in the current environment.[29] The reason for this is because items which are licenced and not sold have the capacity, more so in the digital context,[30] to circumvent the limitations on the

---

third party intellectual property rights, but in other respects the proposed legislation leaves intellectual property rights intact.

[24] See this chapter generally. In particular, see sections 4.4, 4.5.

[25] The issue of fitness for use and quality of digital content supplied by traders to consumers is regulated by the Consumer Rights Act 2015.

[26] Malevanny N, 'Relevant Rights and Their Applicability to Online Music Uses. In: Online Music Distribution - How Much Exclusivity Is Needed?' [2019] Munich Studies on Innovation and Competition, vol 12. Springer, Berlin, Heidelberg, pp.13-69, 317-339; See also, P. Johnson, 'All Wrapped Up? A Review of the Enforceability of "Shrink-Wrap" and "Click-Wrap" Licenses in the United Kingdom and the United States' (2003) *EIPR* 98.

[27] Malevanny N, 'Relevant Rights and Their Applicability to Online Music Uses. In: Online Music Distribution - How Much Exclusivity Is Needed?' [2019] Munich Studies on Innovation and Competition, vol 12. Springer, Berlin, Heidelberg, pp.1-5.

[28] For more information, see this chapter at 4.2.

[29] Longdin, L. and Lim, P.H., 'Inexhaustible distribution rights for copyright owners and the foreclosure of secondary markets for used software' IIC [2013], 44(5), 541-568 at [550].

[30] This is primarily facilitated by the fact that both doctrines (first sale & exhaustion) usually only apply to tangible copies of works. For more information, see A. Ohly, 'Economic Rights', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright Law* [2009], 237-8. See also, Case C-

distribution right in a particular copy of a work that would otherwise be exhausted after its first sale. However, it is important to note that the matter of whether an act of electronic transfer has been made by way of a sale is often difficult to investigate.[31]

In the UK, this concerns what is known as the 'exhaustion'[32] right.[33] This is the principle that once a copy has been issued within the European Economic Area (EEA), thereafter; that copy can be resold in the UK under s.18(3)(a) of the 1988 Act.[34] This has been recognized in the context of trade between member states,[35] but extended

---

419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; M Savič, 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378; (reviewing the benefits of the US concept of exhaustion and pushing the notion that it needs to continue in the digital sphere and not be restricted).

[31] Case C-166/15 *Aleksandrs Ranks* v. *Finansu un ekonmisko noziegumu izmeklesanas prokutura, Microsoft Corp.*, EU:C:2016:762, [43], [44] (ECJ) (in relation to exhaustion of electronic copies, differentiating between 'back up' copies made by the transferee, in relation to which there is no exhaustion, and copies received directly from the copyright-holder.)

[32] Note that the rules shall be subject to Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019/265 by virtue of section 8(1) of the European Union (Withdrawal) Act 2018; On exhaustion, see R. Hilty and K. Koklu, 'Software Agreements: Stocktaking and Outlook – Lessons from the Oracle v. UsedSoft Case from a Comparative Law Perspective' [2013] 44(3) *IIC 263;* E. F. Schulze, 'Resale of Digital Content such as Music, Films or eBooks under European Law' [2014] 36(1) *European Intellectual Property Review 9*; E. Rosati, 'Online Exhaustion' [2015] 10 *JULP* 673; Bill Batchelor and G. Montani, 'Exhaustion, essential subject matter and other CJEU judicial tools to update copyright for an online economy', J.I.P.L.P. [2015], 10(8), 591-600; Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright' May [2016], Queen Mary University London; M Savič, 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378.

[33] This is discussed in greater detail, with the surrounding legislation and case law, in this chapter at 4.4.

[34] CDPA 1988 s.18(3)(a) of the sets out the principle of exhaustion by stating that the subsequent distribution of copies of a work (such as selling on a purchased copy second-hand) will not infringe the rightsholder's distribution right.; Info. Soc. Dir. Art.4(2) – defines this as 'the first sale or other transfer of ownership...of that object'; The early beginning of the doctrine can be traced back to the case *of Consten SaRL and Grundig GmbH **v** Commission* (1966) Case 56/64; Case C-456/06 *Peek & Cloppenburg SA v Cassina SpA,* [2008] *ECR* I-2731 (ECJ).

[35] C-78/70 *Deutsche Grammophon v. Metro,* Case [1971] *ECR* 487; The key reason behind this was primarily due to the fact that laws relating to copyright and related rights operate to produce barriers

by Directives into the definition of the right and thus is equally applicable to transactions within each state.[36] This relates to each and every act of distribution, that is, transfer of ownership (as it is understood by the CJEU in *Peek & Cloppenburg* v. *Cassina SpA*).[37] For purposes here, it has been widely assumed that this is only applicable to the distribution of tangible copies[38] (as is generally assumed following *Allposters v. Stichting Pictoright*).[39] This is to the point where the notion of exhaustion is now attached to specifically to tangibility.[40]

---

to trade within the internal market – Perhaps the clearest example of this was the decision in Case C-341/87 *EMI Electrola GmbH v. Patricia Im-und Export,* [1989] *ECR* 79 (highlighting how differences in calculating the term of protection for sound recordings in different member states led to barriers to trade).

[36] Software Dir., Art. 4(c); Database Dir., Art.5(c); Rel. Rights Dire., Art 9(2); The various directives define the scope of exhaustion in different terms. For example, Info. Soc. Dir. Art.4(2) – defines this as 'the first sale or other transfer of ownership...of that object'.

[37] Case C-456/06 *Peek & Cloppenburg SA v. Cassina SpA,* [2008] ECR I-2731(ECJ).

[38] A. Ohly, 'Economic Rights', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright Law* (2009), 237-8. See also, Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015].

[39] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; M Savič, 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378; Headdon, T., 'The Allposters problem: reproduction, alteration and the misappropriation of value' E.I.P.R. [2018], 40(8), 501-509; For more information, these matters are discussed extensively in this chapter at 4.4.2.

[40] S. Karapapa., Exhaustion of Rights on Digital Content Under EU Copyright: Positive and Normative Perspectives (November 4, 2018). Forthcoming, Aplin, T. (ed) Research Handbook on Intellectual Property and Digital Technologies (Cheltenham, Edward Elgar: 2019). Available at: SSRN: https://ssrn.com/abstract=3278149.

Yet, computer programs[41] are to an extent considered exempt[42] where the copy is destroyed by the reseller under the *UsedSoft GmbH v. Oracle* decision.[43] This case has generated considerable academic commentary[44] and has most recently been described as leaving the question of 'digital' exhaustion as an 'open' matter.[45] Nonetheless, the long-awaited Judgement of the Court (Grand Chamber) in the *Tom Kabinet* case[46] has helped in providing some legal certainty concerning the application

---

[41] To aid understanding, see L Longdin and P. H. Lim, 'Inexhaustible Distribution Rights for Copyright Owners and the Foreclosure of Secondary Markets for Software' [2013] 44(5) *IIC* 541 (comparing the position on resale of digitally distributed software in the European Union, United States, and New Zealand).

[42] For more information, see this chapter at 4.4.2; See also, Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright' May [2016], Queen Mary University London; See also, Savic, M., 'The Legality of Resale of Digital Content after UsedSoft in Subsequent German and CJEU Case Law' [2015] EIPR 414-29.

[43] Case C-128/11, EU:C:2012:407 (Grand Chamber), [47], [49], [58], and [61]; For more information, see this chapter at 4.4 and 4.4.2 respectively.

[44] R. Hilty and K. Koklu, 'Software Agreements: Stocktaking and Outlook – Lessons from the Oracle v. UsedSoft Case from a Comparative Law Perspective' [2013] 44(3) *IIC 263;* E. F. Schulze, 'Resale of Digital Content such as Music, Films or eBooks under European Law' [2014] 36(1) *European Intellectual Property Review 9*; See also, *Football Association Premier League Ltd v QC Leisure* (C-403/08) *Murphy v Media Protection Services Ltd* (C-429/08) European Court of Justice (Grand Chamber) 04 October 2011; For a succinct account of the possible implications of the primary objective of EU integration—single market, free flow of goods—on the principle of exhaustion (the EU-autonomous interpretation of the exhaustion principle), see Paul L.C. Torremans, 'The future implications of the UsedSoft decision' Create Working Paper No.2 [2014], <http://www.create.ac.uk/publications/future-implications-usedsoft/> [Accessed May 20, 2018]; K. Moon, 'Resale of Digital Content: UsedSoft v ReDigi' [2013] 24(6) European Intellectual Property Review 193; B. Batchelor and D. Keohane, 'UsedSoft – Where to now for Software Vendors?' [2012] *ECLR* 545; C. Stotgers, 'When is Copyright Exhausted by a Software License?: UsedSoft v Oracle' [2012] *EIPR* 787.

[45] S. Karapapa., Exhaustion of Rights on Digital Content Under EU Copyright: Positive and Normative Perspectives (November 4, 2018). Forthcoming, Aplin, T. (ed) Research Handbook on Intellectual Property and Digital Technologies (Cheltenham, Edward Elgar: 2019). Available at: SSRN: <https://ssrn.com/abstract=3278149> accessed: 21/12/2019.

[46] Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* v *Tom Kabinet Internet BV and Others* 19 December 2019.

of the exhaustion principle to intangible artefacts beyond computer programs[47] and is discussed below.[48]

In the US, the equivalent doctrine is known as the first-sale doctrine,[49] under 17 U.S.C §109(a). This is where the copyright owner's distribution right in a particular copy of the work is "exhausted"[50] after its first sale. The 'first sale' doctrine regulates the rights of the copyright and chattel owners by establishing that once authorized copies have been lawfully distributed, the property rights of the chattel owners prevail. It was first constitutionally codified under 17 U.S.C. §41 (1909) following its (often regarded) creation in the seminal US Supreme Court decision of *Bobbs-Merrill Co. v. Straus*.[52] Yet, the humble beginnings regarding the legal principles created by this case can be traced back even earlier.[53]

This chapter will demonstrate that these doctrines are being contractually circumvented in the digital age,[54] enabling the procurement of both scarcity, and an

---

[47] Some regard Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] as only applying to tangible assets e.g. M Savič, 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378, E. Rosati, 'Online exhaustion' [2015] 10 *JIPLP* 673. However, a case concerning entirely different facts specifically excluded any comment or cross-over pertaining to the matters in the case and the matter of digital exhaustion – C-174/15 *Vereniging Openbare Bibliotheken v. Stitching Leenrecht*, EU:C:2016:459, [AG54] (AG Szpunar).

[48] See this chapter at 4.4; See also, Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* v *Tom Kabinet Internet BV and Others* 19 December 2019.

[49] The doctrine is often traced back to the US Supreme Court's decision in *Bobbs-Merrill Co. v. Straus, discussed* in *Vernor v. Autodesk, Inc.,* immediately following, the doctrine's roots in fact extend back to the mid-18th century, to the Lord Chancellor's decision in *Pope v. Curl,* 2 Atk. 342 (Ch. 1741).

[50] This is discussed in greater detail, with the surrounding legislation and case law, in this chapter at parts 4.4 and 4.4.1 respectively; Perzanowski. A. and Schultz, J., 'Digital Exhaustion' 58 UCLA Law. Rev. 889 [2011]; O-A Rognstad, 'Legally Flawed but Politically Sound' [2014] Oslo Law Review 1; L Longdin and P. H. Lim, 'Inexhaustible Distribution Rights for Copyright Owners and the Foreclosure of Secondary Markets for Software' [2013] 44(5) *IIC* 541 (comparing the position on resale of digitally distributed software in the European Union, United States, and New Zealand).

[52] (Supreme Court, 1908).

[53] For more information, see this chapter at 4.4.

[54] Ibid.

increase in owner control, over their assets in capitalist society. This represents what is considered to be a return to the past as this contractual regulation will be argued as akin to the effects of the conditions created by the Licensing of the Press Act 1662.[55]

The chapter then demonstrates that this prevents the application of copyright limitations such as those provided for under Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works.[56] This includes the defence of 'fair use' in the US and is codified under §.107 of the 1976 Act.[57] In the UK, such limitations are categorized as 'permitted acts' which are listed under chapter III CDPA 1988.[58] However, limitations on the exclusive rights enjoyed by copyright owners are considerably limited due to their 'extraordinary precision and rigidity'.[59] This remains

---

[55] The Licensing of the Press Act 1662 is an Act of the Parliament of England (14 Car. II. c. 33), long title "An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Books and Pamphlets and for regulating of Printing and Printing Presses." – For more information, see this chapter at 4.7.1.

[56] This is otherwise known as the 'Three-Step' Test under the Berne Convention, Article 9, and this is discussed in chapter 5 at 5.3.2; Note, there is a requirement that these limitations do not do not prejudice the legitimate interests of the rightsholders - Info. Soc. Dir., Art. 5(5); Marrakesh Dir, Art. 3(1) ('applied'); Rel. Rights Dir., Art. 10 ('applied'); Proposal for a Directive on Copyright in the Digital Single Market, COM(2016) 593, Art. 6(applying Art 5(5) to proposed new mandatory exceptions).

[57] Copyright Act of 1976, 17 U.S.C. §.107; On Fair Use, see *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F.Supp. 957 (D. N.H., 1978); *Italian Book Corp., v. American Broadcasting Co.*, 458 F.Supp. 65 (S.D. N.Y., 1978); These can be compared with the contrasting cases of *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005); *Capitol Records Inc. v. Alaujan*, 2009 WL 5873136 (D. Mass., 7/27/09).

[58] Copyright Designs and Patents Act 1988; See also, Info. Soc., Dir., Art. 5; The traditional approach of the UK courts: *Newspaper Licensing Agency v Marks & Spencer* [2000] 4 *All ER 239* (CA), 257 (Chadwick LJ); See also, Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20. On defences under European law and the E-Commerce Directive 2000/31/EC and the public interest defence see chapters' 21 and 24 respectively.

[59] *Pro Sieben Media* v. *Carlton UK Television* [1988] FSR 43, 48; *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605; See also, *Fraser Woodward v BBC* [2005] EWHC 472 (Ch), [2005] EMLR 22.

the case, despite two reviews of their implementation.[60] The Court of Justice of the European Union (CJEU) has also indicated a preference for a 'narrow' interpretation of copyright exceptions.[61] This illustrates the high level of protection favoured in this area regarding the reproduction and distribution of articles.[62]

Many argue that the increase in direct licensing has diminished the role of copyright exceptions and levies through contract.[63] For instance, the *Reprobel*[64] decision by the CJEU opened the potentiality of publishers and other licensees or assignees to claim such compensation in accordance with any contractual agreement made with the author (or rightsholder). This prompted a decision by the EU to insert Article 16[65] into the Directive on Copyright in the Digital Single Market.[66] The reason for this is because

---

[60] A. Gowers, 'Gowers Review of Intellectual Property' [2006], ch.4, 39, [3.26]; Ian Hargreaves., 'Digital opportunity: A review of intellectual property and growth' [2011], 3, 8.

[61] *Infopaq Int. v. Dansk Dagblades Forening,* Case C-5/08 [2009] *ECR* I-6569 (ECJ) (*'Infopaq I'*), [57]; *Painer,* Case C-145/10 [2012] *ECDR* (6) 89 (ECJ), [109]; *AKM v Zurs.net Betriebs GmbH,* Case C-138/16, EU:C:2017:218, [27]-[38] (ECJ); *VCAST v RTI SpA, Case C-265/16,* EU:C:2017:913, [32].

[62] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [47], [48], [49]; See also, the judgments in *Football Association Premier League and Others*, EU:C:2011:631, paragraph 186); (see, by analogy, judgment in *Football Association Premier League and Others*, EU:C:2011:631, paragraphs 107 to 109); *SGAE*, C-306/05, EU:C:2006:764, paragraph 36; *Peek & Cloppenburg*, EU:C:2008:232, paragraph 37.

[63] Kretschmer, M., 'Private Copying and Fair Compensation: An Empirical Study of Copyright Levies in Europe' [2011] (22 out of the then 27 Member states hd such schemes); Karapapa, S., Private Copying (Routledge 2012); For background, see B, Hugenholtz, 'The Story of the tape Recorder and the History of Copyright Levies', in B. Sherman and L. Wiseman, (eds), *Copyright and the Challenge of the New* [2012], ch.7. See also, *Microsoft Mobile Sales International Oy,* Case C-110/15, EU:C:2016:326, [AG23] (AG Wahl) (noting that the increase in direct licensing of consumers and the diminishing importance of the private copying exception and levy); See also, *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH v Amazon* C-572/14: [2016].

[64] *Hewlett-Packard Belgium SPRL v. Reprobel SCRL,* Case C-572/13, EU:C:2015:750 (ECJ),[47], [48].

[65] See DSM Directive, Recital 60.

[66] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC - Originally, it was listed as Article 12 (now Article 16) which specified that (a member

the nature of the digital transaction takes this potential applicability of legitimate limitations away.[67] This allows copyright owners to exert control over their assets once they are transferred to customers under licence. The chapter will argue that this opens up the potentiality for claims of contractual breach, in both the UK[68] and the US.[69] This is because the mere fact that an activity falls within one of the permitted acts does not mean that it does not contravene some other legal right (like contract),[70] creating what is described as a 'two-tier' system of protection and exploitation for owners.[71]

Yet, digital rights management (DRM) is also a method assisting copyright owners in controlling access to digital works and limiting potential transfers.[72] It is further used to track and limit uses[73] as did the music industry when selling songs online via iTunes,[74] in an attempt at curbing illegal file-sharing.[75] However, this will not be

---

state may specify that a transfer of a license to a publisher confers on the latter a 'sufficient legal basis' to be entitled to a share of compensation).

[67] For more information, see this chapter at 4.4.

[68] CDPA 1988, s.28(1).

[69] 17 U.S.C. §.109(d) (1976).

[70] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 9-20.

[71] For more information, see this chapter at 4.5.

[72] *See* McKenzie, E., Note, A Book by Any Other Name: E-books and the First Sale Doctrine, 12 Chi. Kent. Journal of Intellectual Property, 57, 63 *in* Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015).

[73] *See* Digital Rights Management (DRM) & Libraries, Am. Libr. Assoc, http://www.ala.org/advocacy/copyright/digitalrights [http://perma.cc/D88E-HLHD] accessed: 21/01/2018.

[74] Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015). at 181.

[75] *See* McKenzie, E., Note, A Book by Any Other Name: E-books and the First Sale Doctrine, 12 Chi. Kent. Journal of Intellectual Property, at 62 *in* Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015). .

considered here as the top music companies have predominantly abandoned the use of DRM[76] with the iTunes Store selling all music DRM-free.[77]

The chapter will then consider whether the proposed reforms will be impacted by the functionality of contracts in the digital music age. It will argue that any proposals should be aimed at limiting the use of these contractual methods if they are to be effective. The reason for this is based on the fact that contracts could have the potential to distort the proposals effectiveness by enabling rightsholders to sidestep them.[78] This will be dealt with under the legislative aspect of the proposals that are outlined briefly at the end of the chapter,[79] and are discussed in their entirety in chapter five.

---

[76] In February 2007, Apple CEO Steve Jobs posted an open letter on Apple's website, in which he appealed to music companies to stop selling music with DRM. *See* Apple CEO Steve Jobs' Posts Rare Open Letter: 'Thoughts on Music'—Calls for DRM-Free Music, Macdailynews (Feb. 6, 2007, 2:59PM), <http://macdailynews.com/2007/02/06/apple_ceo_steve_jobs_posts_rare_open_letter_thoughts_on_music/ [http://perma.cc/EPY7-CQ8J]>. Within a year, all of the major music companies abandoned the use of DRM. *See* Catherine Holahan, *Sony BMG Plans to Drop DRM*, Bloomberg businesss week (Jan. 4, 2008), http://www.businessweek.com/stories/2008-01-04/sony-bmg-plans-to-drop-drmbusinessweek-business-news-stock-market-and-financial-advice [http://perma.cc/V58V-WTYK] accessed:21/08/2017 ("In a move that would mark the end of a digital music era, Sony BMG Music Entertainment is finalizing plans to sell songs without the copyright protection software that has long restricted the use of music downloaded from the Internet . . . . Sony BMG would become the last of the top four music labels to drop DRM"). Taken from Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015). . Northwestern University Law Review, Vol. 109, No. 1, (2015); See also, <https://www.licensinglive.com/blog/2010/09/the-music-industry-is-dropping-drm-why-doesnt-the-software-industry-follow/> accessed: 14/09/2018); Apple iTunes also began selling music without DRM restrictions as early as 2007, under iTunes Plus, for an added price – Garrity, Brian. 2007. "Adding up iTunes Plus" *Billboard,* June 23.

[77] Lettice, John, 'Apple iTunes Store Goes '100% DRM-Free' – Allegedly. [2009] *Register.* http://www.theregister.co.uk/2009/01/06/macworld_itunes/ accessed: 21/02/2018.

[78] Griffin, J., 'The interface between copyright and contract: Suggestions for the future' [2011] European Journal of Law and Technology, Vol. 2, No.1.

[79] See this chapter at 4.4

4.2 Contract and copyright: what is the difference?

Copyright law has an *in rem* application in that it provides a property right against the world.[80] It also provides legal protection for works that might otherwise be reproduced without the threat of legal sanction. In contrast, under the *in personam* nature of contractual agreements, no obligations can be imposed on any person or agent, except the parties to it as per the UK cases of *Tweddle* v. *Atkinson*[81] and *Dunlop Pneumatic Tyre Co Ltd v Selfridge*.[82] In the same way, Judge Easterbrook in the US case of *ProCD. Inc.* v. *Zeidenberg*[83] argued that rights created by contract were not 'equivalent' to rights created by copyright. For him, copyright law created a property right against the world, whereas contracts are used by individuals in order to utilize that property against other individuals.[84] In the UK, there has been no such statement made, but the closest equivalent is section 28(1).[85]

The factor which distinguishes contract from other legal obligations is that they are based on the agreement of the contracting parties.[86] This position generally remains true, even though it is subject to a number of exceptions. As a whole, the law is often concerned with the objective appearance[87] of the agreement regarding consent for reasons of commercial convenience.[88] Yet, there are some similarities in contract law,

---

[80] Griffin, J., 'The interface between copyright and contract: suggestions for the future', European Journal of Law and Technology, Vol. 2, No.1, [2011]; For the UK see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright*, 17th edition, Sweet and Maxwell, London (2005) at 2-01 and 7-14. For the US see Barrett, 'Intellectual Property: Cases and Materials', (5th eds, West Academic 2011) at 2, 394.

[81] [1861] EWHC J57 (QB), (1861) 1 B&S 393 at 398. This case and *Dunlop* flow from the notion that "consideration must move from the promise" - - *Barber* v *Fox* (1862) 2 Wms.Saund. 134, n.(e); *Thomas* v *Thomas* (1842) 2 Q.B. 851 at 859.

[82] *Dunlop Pneumatic Tyre Co Ltd* v *Selfridge & Co Ltd* [1915] UKHL 1.

[83] *ProCD. Inc.* v *Zeidenberg* 86 F. 3d 1447 (7th Circuit, 1996).

[84] Ibid at 1454.

[85] CDPA 1988; This is discussed below at 4.4.2.

[86] For more information, see Edwin Peel, 'The Law of Contract' 14th eds, (2015) at 1-001.

[87] This is argued to strengthen the terms imposed under the license agreements outlined here. For more information, see this chapter at 4;.3.1, 4.5, and 4.5.1 respectively.

[88] *Smith v Hughes* (1871) L.R. 6 QB 597 at 607; *OT Africa Line Limited v Vickers Plc* [1996] 1 Lloyd's Rep. 700; See also, Professor Howarth, 'The meaning of Objectivity in Contract', [1984] 100 L.Q.R.

as it often describes itself as more private than public, interpretation is more about objective than subjective understanding, and consideration is more about form than substance.[89]

Contracts, however, have an *in personam* character. This means that they cannot be enforced against the world, but can be enforced against the parties to the agreement.[90] In copyright, this relationship often exists between the creator or exclusive licensee of a work,[91] which is generally the distributor, and the recipient.[92] For instance, the writer of a piece of literature may assign copyright to the publisher, who may then use contracts to govern how the work is used by the recipients. Thus, an author of an

265; However, there has been disagreement with the 'objectivity' principle regarding the former, the key point to understand is that the analysis can contain elements of subjectivity even when analysing contractual agreements objectively – See Vorster J. 'A Comment on the Meaning of Objectivity in Contract' [1987] 103 L.Q.R. 274.

[89] Dalton, C., 'An Essay in the Deconstruction of Contract Doctrine' 94 Yale L.J. [1985]. Available at: https://digitalcommons.law.yale.edu/ylj/vol94/iss5/1 accessed:21/03/2017.

[90] It is important to note that (The Contracts (Rights of Third Parties) Act 1999 does make an improvement to the law in that it reforms a doctrine of privity, which many parties regarded as unjust and commercially inconvenient (For the purpose of understanding, the doctrine of privity is the longstanding principle in both UK and US law that only parties to a contract can sue and be sued under that agreement. The result of the aforementioned legislation (in the UK) has meant that some third parties who did not provide adequate consideration for the agreement may still be able to have some rights within the agreement under English contract law) – For more information, see *Chitty on Contracts* (33rd ed., Sweet and Maxwell, 2019) vol 1, pt.II ch.3; In the US, Judge Easterbrook argued that rights created by contract were not 'equivalent' to rights created by copyright. For him, copyright law created a property right against the world, whereas contracts are used by individuals in order to utilize that property against other individuals – *ProCD. Inc.* v *Zeidenberg* 86 F. 3d 1447 (7th Circuit, 1996) at 1454; For more information, see the discussion in this chapter at 4.2.1

[91] On "exclusive licensees" see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), chapter 5, Part 7, Section C; For the purposes of the 1988 Act, s.92(1) an "exclusive license" is a license in writing, signed by or on behalf of the copyright owner, authorising the licensee to the exclusion of all other persons, including the person granting the license, to exercise a right which would otherwise be exercisable exclusively by the copyright owner – CDPA 1988.

[92] K. Stechova, 'Can an Exclusive Licensee Ever be the Owner? An Examination of the Non-Assignability of Author's Economic Rights in the Czech Republic' submitted as an LL.M. thesis at the Centre for Commercial Law Studies, Queen Mary University of London, [2010].

academic journal article may assign copyright to the publisher, and the publisher may then allow students to access it via an online service.[93] However, the structural elements pertaining to contracts in the copyright sector is highly complex, as, in addition to the contractual relationship between the author and publisher, there are also relationships involving marketing agencies, recording artists, collecting societies, and overseas publishers.[94]

Digital licensing has created a situation where the traditional distinction between copyright as a right against the world, and a contract being an agreement between individuals, is breaking down in the online context.[95] This is because the licensing of copyright works is becoming increasingly common on a one-to-one basis.[96] This is argued to represent the "societal realization of the defeat of reflection, the realization of subsumptive reason, [and] the unification of many under one."[97] This is due to the fact, as Adorno would argue, that in reality, a cycle of manipulation and retroactive need is unifying the system. The problem that is not mentioned is that the basis on which technology is gaining power over society is the power of those whose economic position is the strongest and is being extended through contract.[98]

The reason for this is because copyright owners are able to contractually dictate the terms of the relationship with the users of the licensed work.[99] This is enabled by the way in which these agreements operate in the digital landscape.[100] Thus, otherwise

---

[93] The problems that contracts can create pertaining to accessibility of items online were part of motivation for deciding to undertake a thesis on copyright law. For more information, see discussion in chapter 1 at 1.3

[94] It should be noted that such a list is not exhaustive – (Fisher, W., 'Promises to Keep', Stanford Law and Politics, Stanford (2004) at 60-81).

[95] *ProCD* v *Zeidenberg,* 86 F.3d 1447 (7th Circuit, 1996).

[96] Griffin, J., 'The interface between copyright and contract: suggestions for the future', European Journal of Law and Technology, Vol. 2, No.1, [2011].

[97] Adorno, T.W., *The Culture Industry* (Edited by J. M. Bernstein, Routledge Classics 1991), p.11.

[98] Horkheimer, M., and T.W., Adorno., *Dialectic of Enlightenment* (Eds, G.S., Noerr and E., Jephcott, Stanford University Press 2002) p.95.

[99] See this chapter at 4.4 & 4.5.

[100] An interesting account of how digital technology, like the internet, drastically altered the role of copyright, see, Boyle, J., *The Public Domain* (Yale University Press, 2008); On the way in which this transition effected the changes in the music industry, see Arditi, D., *iTake-over: The Recording*

justifiable behaviours in the physical context, such as the transfer of a tangible item, can now be contractually prohibited in the digital world and create an actionable breach of contract.[101] This is due to the uncomfortable legal position of these agreements that has enabled copyright limitations to be "sidestepped."[102]

In essence, the enforceability of these agreements enables what can be fairly described as a 'personalised' level of exploitation.[103] This will be demonstrated to prevent the creation of secondary markets[104] by the way that licenses prevent further distributions of the digital work due to the technical functionality of the artefacts they regulate within copyright.[105]

4.3 From P2P, downloading, to streaming and licences.

File-sharing had the potential to procure mass "disintermediation"[106] (removal of the middle-man) in the copyright system. This threatened the normal physical means of

Industry in the Digital Era (Rowman and Littlefield Publishing, 2015); To see how the role of property needs to be changed if copyright is to work in the long term, see Merges, R.P., *Justifying Intellectual Property* (Harvard University Press 2011), chapter 8.

[101] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20.; See also, this chapter at 4.5 and 4.5.1.

[102] Griffin, J., 'The interface between copyright and contract: Suggestions for the future' [2011] European Journal of Law and Technology, Vol. 2, No.1.

[103] '2002 EU IP Contracts Study' a study called 'Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union'commissioned by European Commission, DG Internal market to IViR, Amsterdam in 2002 (Study contract No. ETD/2000/B5-3001/E/69) L. Guibault, P.B. Hugenholtz.

[104] Longdin, L. and Lim, P.H., 'Inexhaustible distribution rights for copyright owners and the foreclosure of secondary markets for used software' IIC [2013], 44(5), 541-568.

[105] For example, in *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013) at 6 [4] citing *London-Sire Records, Inc v John Doe 1* 542 F. Supp 2D 153 (D. Mass 2008) – It was held that "ReDigi was (distributing reproductions) as it was materially impossible, under the law of physics, for the same material to be distributed and exist in two places at once at the same time."; For more information, see this chapter at 4.5 & 4.7.

[106] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.105.

distribution that worked to the major labels advantage.[107] The music industry then used the panoptic surveillance discussed in chapter two[108] to procure compliance within the music industry, but this was not enough for the industry to procure sufficient control in the digital music area.[109]

The next step by the music industry was to find a way to profitably distribute music online and the first instance of this came with online download services.[110] This received backing from Apple iTunes which enabled the purchase of AAC files online by song or album, subject to licence. The other alternative offered was streaming services, like Spotify, that allows users to listen for free up to twenty hours,[111] (or for a fixed fee per month, with paying users able to download), all subject to licence.

As a result, the fundamental basis behind both subscription and download services is that music listeners will no longer own the music;[112] rather, they will rent it.[113] Thus, as soon as a user fails to pay the fee (or cancels the subscription), and the computer or device that stores the music is connected to the internet, the files then cease to work

---

[107] Garnham, N. and Ingilis, F., 'Capitalism and Communication: Global Culture and the Economics and Information' Newbury Park, [1990] CA Sage Publications; Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.107, see also pp.6-20.

[108] For more information, see chapter 2 at 2.3 and 2.5 *generally*.

[109] *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch); *A&M Records v. Napster, 239 F.3d* and *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct 2764 (US Supreme Court, 2005); See also, R. Arnold, 'Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of protection' [2011] 1 QMJIP 272.

[110] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), Part I, Part IV.

[111] <https://www.spotify.com/uk/signup/> accessed: 09/01/2019.

[112] See generally, Mazzone, J., *Copyfraud and other abuses of intellectual property law* (Stanford Law Books, 2011), pp118-140; Lessig, L., *Code: and Other Laws of Cyberspace* (Basic Books 1999); Lessig, L., *The Future of Ideas* (Vintage Books, 2001).

[113] In the UK, see Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039; Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; In the US, see, *Vernor v Autodesk*, Inc., 621 F. 3d 1102 (9th Cir. 2010); *UMG Recordings, Inc. v. Augusto* 628 F.3d 1175 (9th Cir. 2011); *Kirtsaeng v John Wiley & Sons, Inc,* 133 S Ct 1351 (2013); Omega SA v Costco Wholesale Corp (2015) US App Lexis 830 (9th Cir., Cal., Jan 20, 2015); *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

because the use of that subscription is contingent on a fee.[114] Moreover, if any such items are transferred, there is also the renewed potential that there may be either an infringement of the rights to reproduction and/or distribution.[115] This also includes claims in contract as the files are subject to agreement not sold.

4.3.1 The role of contracts in the digital copyright world

In the digital environment contracts are used by copyright owners to control the use of their works online.[116] Many also seek broader, stronger and longer control over protected works than would be available within the analogue world, or in legislation.[117] Thus, the imposition of digital agreements means rightsholders can govern beyond the physical context[118] as they are intangible[119] and are sold subject to license.[120] This enables copyright owners to minimize any subsequent distributions that may be carried out by 'users' (by users, this means primarily the individual consumers who wish to utilize copyright-protected material). This is because certain acts now require

---

[114] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), pp.120124.

[115] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[116] For more information, see this chapter at 4.3.1 and 4.3.2 respectively; See also, Lindsay, D., 'The law and economics of copyright, contract and mass market licenses' Research Paper prepared for the Centre for Copyright Studies Ltd, [2002], at 6, 7.

[117] Griffin, J., 'The interface between copyright and contract: Suggestions for the future' [2011] European Journal of Law and Technology, Vol. 2, No.1; See also, '2010 SABIP Study' a Research commissioned in 2010 to a group of copyright and economics academics by the Strategic Advisory Board for Intellectual Property Policy (SABIP) called 'Relationship between Copyright and Contract Law'.

[118] For more information, see this chapter at 4.4, 4.5, 4.7 respectively.

[119] In the UK, see Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039; Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; In the US, see, *Vernor v Autodesk*, Inc., 621 F. 3d 1102 (9th Cir. 2010); *UMG Recordings, Inc. v. Augusto* 628 F.3d 1175 (9th Cir. 2011); *Kirtsaeng v John Wiley & Sons, Inc,* 133 S Ct 1351 (2013); Omega SA v Costco Wholesale Corp (2015) US App Lexis 830 (9th Cir., Cal., Jan 20, 2015); *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[120] In the UK see s.28(1) CDPA 1988; In the US, see 17 U.S.C. §109(d); For more information, see this chapter at 4.5 and 4.5.1 respectively.

the consent of copyright owners, with copyright law now acting to increase the influence of these contractual terms.[121]

For example, it is not uncommon to see digital music licensed to consumers, subject to terms such as "You shall be authorised to use iTunes Products only for personal, non-commercial use";122 and "we grant you a limited, non-exclusive, revocable licence to make use of the [service], and a limited, non-exclusive, revocable licence to make personal, non-commercial, entertainment use of the Content (the "Licence")."123 As a result, what would otherwise be the simple transfer of a physical CD to a friend via lending, or being sold to a charity shop etc under s.18(3)[124] or §.109(a);[125] now becomes an issue of potential contractual breach as a result of technological developments.

It is postulated that this is serving to maximise the control that rightsholders can exert because the first state of affairs prevails only where those who strive for profit do so by creating a scarcity condition.[126] For example, the Apple iTunes, in their user agreement that accompanies the music downloaded from the service they provide writes that:

---

[121] See this chapter at 4.5, 4.7.

[122] For more information see: iTunes Terms and Conditions: <http://www.apple.com/legal/internet-services/itunes/uk/terms.html> accessed: 11/1/2016 (However, Apple does allow for files to be shared between what they term a "family" which allows up to "six" members of the group to be given access to that information).

[123] See, Spotify Terms and Conditions: <https://www.spotify.com/uk/legal/end-user-agreement/> accessed: 11.11.18.

[124] CDPA 1988 s.18(3)(a) sets out the principle of exhaustion by stating that the subsequent distribution of copies of a work (such as selling on a purchased copy second-hand) will not infringe the rightsholder's distribution right.; Info. Soc. Dir. Art.4(2) – defines this as 'the first sale or other transfer of ownership...of that object'; The early beginning of the doctrine can be traced back to the case *of Consten SaRL and Grundig GmbH v Commission* [1966] Case 56/64; *Peek & Cloppenburg SA v Cassina SpA,* Case C-456/06 [2008] *ECR* I-2731 (ECJ); See also, 4.4 and 4.4.2 of this chapter.

[125] See also, 4.4 and 4.4.1 of this chapter.

[126] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.340; For an opposing view, see - H. Demsetz, 'Industry Structure, Market Rivalry and Public Policy' [1973] 16 J Law and Economics, 1-9, at 3.

> "iTunes is the provider of the Service, which permits you to access, purchase or rent a licence for digital content ("iTunes Products") for end user use only under the terms and conditions set forth in this Agreement…You agree that the iTunes Products are provided to you by way of a licence only..."[127]

The increasing usage of licence agreements is suggested to have resulted from the influences exerted by a society that is dominated by a certain type of motive, the profit-motive.[128] This has created what is described as contractual profit-making activity, which is activity that is orientated to opportunities for seeking new powers of control over goods on a single occasion. This is done repeatedly, or continuously, and is orientated by acquisition via peaceful methods to exploit market situations.[129] For instance, legislation such as s.18(3)(a)[130] and §.109(a)[131] create an environment whereby contracts can be enforced at the expense of copyright limitations.[132] These very agreements can be said to receive legislative approval by virtue of items such as

[127] For more information see: iTunes Terms and Conditions: <http://www.apple.com/legal/internet-services/itunes/uk/terms.html> accessed: 11/1/2016 (However, Apple does allow for files to be shared between what they term a "family" which allows up to "six" members of the group to be given access to that information).

[128] Dobb, M., *Studies in the development of capitalism* (Routledge and Kegan Paul, 1963), p.6; For more information on the role of profit in shaping the activities of individuals in modern capitalist society, see chapter 2 generally.

[129] Weber, M., *Economy and Society: An Outline of Interpretive Sociology* (vol 1, Uni. California. Press. 1978) pp.90-91.

[130] CDPA 1988; Info. Soc. Dir., Art. 4(2), allows for exhaustion in cases of 'first sale or other transfer of ownership in the Community'; See also this chapter at 4.4 and 4.4.2.

[131] 17 U.S.C. (1976); See also this chapter at 4.4 and 4.4.1.

[132] See this chapter at 4.4.

the E-Commerce Directive Art.9(1),[133] and also both s.28(1)[134] and §109(d)[135] that assist the enforceability of contractual terms[136] in the copyright system.[137]

The contractual practices that have developed in the digital music industry are submitted to be a deliberately intensified exploitation of an already existing market monopoly. This has been done to create a new investment outlet by retaining control over subsequent distributions via contract because property owners operating in capitalist societies develop environments that support their financial needs.[138] Thus, it can be said that what is presented as progress in the culture industry, via the new formats it offers up, like iTunes and Spotify, remains a disguise for consistent sameness, simply a different way to secure music sales. It has also been suggested that the streaming model of Spotify is an application of digital technology that simply

---

[133] E-Commerce Dir., Art.9(1); There are certain exceptions that cannot be overridden by contract under the following subsections: CDPA 1988, ss50, 50B, 296A(1)(a), 296A(1)(b), 296A(1)(c); For guidance on how the directive could apply post-Brexit, see <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770360/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf> accessed: 4/02/2019.

[134] CDPA 1988; See also this chapter at 4.5.

[135] 17 U.S.C. §109(d) (1976) as this section specifies that the first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as someone who as obtained it subject to contract, like a licensee; See also this chapter at 4.5.

[136] For more information, see this chapter at 4.7.

[137] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20; See also, this chapter at 4.4, 4.5.

[138] Harvey, D. *The Geopolitics of Capitalism* (1985) at 150, in Gregory, D. and Urry, J. (eds.): *Social Relations and Spatial Structures*. (London), pp. 128-163; Taken from Wilmsmeier, G., Monios, J. [2015] The production of capitalist “smooth” space in global port operations. Journal of Transport Geography. 47: 59-69; Heidegger would suggest that the current system is an attempt to gain ‘mastery’ over technology - Callister, P. D.,, ‘Law and Heidegger's Question Concerning Technology: A Prolegomenon to Future Law Librarianship’ Law Library Journal, Vol. 99, pp. 285-305, 2007. Available at SSRN: <https://ssrn.com/abstract=960134> accessed: 21/2/1016); On primitive accumulation generally, see Brewer, A., *A guide to Marx’s Capital* (Cambridge University Press, 1984), Part 8; “The so-called primitive accumulation, therefore, is nothing else than the historical process of divorcing the producer from the means of production” – Marx, K., *Selected Writings in Sociology and Social Philosophy* (Trans. By T.B. Bottomore, McGraw-Hill Paperbacks, 1956), p.133.

developed improved peer-to-peer network sharing that was labelled as a general platform of media distribution.[139] For example, Spotify co-founder and CEO, Daniel Ek, claims to have built the streaming model on his love for the Napster consumer experience, whereby he wanted to see if it could be a viable business and create a similar experience for users.[140] Therefore, it is submitted that "everywhere the changes mask a skeleton which has changed just a little as the profit motive itself since the time it first gained its predominance over culture."[141]

In reality, the current situation amounts to what David Harvey calls "accumulation by dispossession."[142] This is based on the idea that rightsholders were able to assert legal control over activity that was previously regulated.[143] These digital assets have been accumulated by subjecting them to contractual regulation, essentially privatising them to enable their continuous commodification as a result of capitalism. This is because the commodification of cultural forms entails wholesale dispossessions and the music industry is notorious for this.[144] This creates "primitive accumulation"[145] which is the idea rightsholders are pushing a violence that necessarily operates through the state, but which precedes the capitalist mode of production and makes possible the capitalist mode of production itself. However, this is not violence of a physical kind, or unlawful, or criminal type, it is lawful violence permitted by state-enforced contracts where violence contributes to the creation of that which it is used against, contributing to the creation of that which it captures under contract.[147]

---

[139] Eriksson, M., Fleischer, R., Johansson, A., Snickars, P., Vonderau. P., *Spotify Teardown: Inside the Black Box of Streaming Music* (Cambridge: MIT Press 2019).

[140] <https://qz.com/1683609/how-the-music-industry-shifted-from-napster-to-spotify/> accessed: 21/11/2019.

[141] Adorno, T.W., *The Culture Industry* (Edited by J. M. Bernstein, Routledge Classics 1991), p.100; See also, Horkheimer, M., and T.W., Adorno., *Dialectic of Enlightenment* (Verso Books 1997), pp.94-136.

[142] For more information, see Harvey, D., *The New Imperialism* (Oxford University Press 2003), chapter 4.

[143] Namely CDPA 1988 s.18(3)(a) (Exhaustion) and 17 U.S.C §109(a) (First Sale).

[144] Harvey, D., 'The 'new' Imperialism: Accumulation by Dispossession' The Socialist Register [2004], <http://socialistregister.com/index.php/srv/article/view/5811#.WCtBTXd0e8U> accessed: 8/9/2015.

[145] Deleuze, G. and Guattari, F., *A Thousand Plateaus* Continuum books, (1987), p.494.

[147] Deleuze, G. and Guattari, F., *A Thousand Plateaus* Continuum books, (1987), p.495.

It is argued that rightsholders are using contracts to extend their governance of assets beyond copyright. This includes situations where copyright would not normally apply, or, to prevent copyright from applying at all by exploiting the operation of contracts in the digital world.[148] These agreements prevent a potential transfer of the asset to any greater number of individuals than is otherwise explicitly stipulated within the terms of the particular agreement. This also ensures that ownership is only for as long as is permitted by the owner which has the effect of procuring artificial scarcity. The significance of this, in theory, is that the amount of digital versions sold will increase because nothing can be freely transferred after purchase. Thus, it is suggested that the majority of unauthorised reproductions of musical works are likely to infringe copyright in light of recent US,[149] UK,[150] (note, the EU mandatory exemption for temporary reproductions),[151] and CJEU decisions,[152] as well as the relevant legislation

---

[148] This specifically relates to how they benefit from the rules on contractual enforceability – see this chapter at 4.1, 4.2, 4.4, 4.5, respectively.

[149] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[150] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; Often the most passive/incidental acts are caught by the reproduction right, such as upload onto a USB – *Technische Universitat Darnstadt* v. *Eugen Ulmer KG,* Case C-117/13, EU:C:2014:2196, [52] (ECJ); *ITV Broadcasting Ltd v. TV Catchup Ltd* [2011] EWHC 1874 (Pat); Download from peer-to-peer systems - Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] [43]-[46]; and when they access an Internet stream – *FAPL v. British Communications* [2017] EWHC 480 (Ch) [31] (Arnold J); this also includes the image created on a television screen being regarded as a copy for the purposes of what constitutes a reproduction here – *FAPL,* Joined Cases C-403/08 and C-429/08 [2011] *ECR* I-9083, [159], see also, *FAPL Ltd and ors v. QC Leisure and ors and Karen Murphy v. Media Protection Services Ltd,* Joined Cases C-403/08 and C429/08 [2011] *ECR* I-9083 (ECJ, Grand Chamber).

[151] Art. 5(1) InfoSoc Directive mandatorily exempts from the reproduction right of Art. 2 InfoSoc Directive certain temporary acts of reproduction. The exception is rather complex, with its applicability depending on five conditions – For more information on these conditions, see Malevanny, N., 'Online Music Distribution – How much Exclusivity is Needed?: A Study of International, European, German and U.S. Copyright Systems and Their Objectives', Springer-Verlag (2019), pp.33-7.

[152] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); For more information on this decision and the implications of it for reproduction, and other copyright-related issues, see this chapter at 4.5.1; See also, Hopton,

governing reproductions (Art. 2,[153] s.17,[154] §106(1),[155] but this is different to a mere transfer).[156]

The Spotify Terms and Conditions of Use are suggested to create numerous instances for which liability can be potentially procured. For example, they state, amongst other items, that:

> "The Spotify Service and the Content are the property of Spotify or Spotify's licensors. We grant you a limited, non-exclusive, revocable licence...remain[ing] in effect until and unless terminated by you or Spotify. You...are using the Content for your own personal, non-commercial, use...and will not redistribute or transfer the Spotify Service or the Content. The Spotify software applications and the Content are licensed, not sold, to you...You agree to abide by our User guidelines and not to use the Spotify Service, the Content, or any part thereof in any manner not expressly permitted by the Agreements...Spotify grants no right, title, or interest to you in the Spotify Service or Content..."[157]

P.,'Advantage Kraftwerk in long running copyright dispute: Pelham (C-476/17) (also known as the Metall auf Metall case)' Ent. L.R. [2019], 30(8), 279-281.

[153] Art. 2 Information Society Directive which requires member states to confer on authors, film producers, phonogram producers, and broadcasters, 'the exclusive right authorize or prohibit direct, or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part'.

[154] CDPA 1988; C-458/11*VG Wort v. KYOCERA Document Solutions Deutschland GmbH,* Joined Cases C-457/11, C-459/11, and 460/11, EU:C:2013:34, [AG33] (AG Sharpston, referring to reproduction as the 'fundamental' right); cf. J. Litman, *Digital Copyright* (2001), 180 (proposing instead a general right to control commercial exploitation).

[155] 17 U.S.C. Under US law, 'copies' are material objects that are to which a work is foxed – *Paha Pubs., Inc. v. Enmark Gas Corp,,* 22 U.S.P.Q.2d 1076 (N.D.Tex 1992). For digital media, electronic files are considered to be comprehended within this definition despite the lack of physicality – *London-Sire Records v. Does,* 542 F.Supp.2d 153 (D.Mass.2008).

[156] This same scenario is discussed below in this section within the context of unauthorised reproductions that were otherwise held legitimate under copyright law, despite being held contrary to the terms of a software license agreement – Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039.

[157] See, Spotify Terms and Conditions: <https://www.spotify.com/uk/legal/end-user-agreement/> accessed: 11.11.18.

The licensing method for digital music is considered to be a substantial alteration in the recorded commodity meaning that in effect, the fees go to paying for a music subscription. However, upon cessation of that subscription, there is nothing to show for the funds paid into the system unless the subscription is continued.[158] This is considered to be a quintessentially capitalistic approach because according to Reckwitz, the capitalist economy is distinguished from all forms of pre-modern economy by its extraordinary dynamic use of new, productivity-increasing technologies and by its exploitation of new means of generating surplus value.[159]

Yet, it is important to note that Spotify does give 'free' options for both streaming and downloading services, but again, all functions are subject to licence.[160] The reason for this kind of practice is because copyright owners, and record labels in particular, are concerned with the ownership of the copyright in the recorded content. This is because they are always able to exploit the means of production, which is vital in technological shifts such as digitalisation under the current approach.[161] This means that they can continually exploit the copyrights they own and enable the repurposing of content to "calculate, amass, repackage, and transport the entertainment product across the borders of both new technologies and media forms."[162] This then further extends to various others users who are confined to the limitations of the agreement that they are deemed to have agreed to upon usage of the service or product.[163]

---

[158] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), pp.121-22.

[159] Reckwitz, A., *The Invention of Creativity: Modern Society and the Culture of the New,* (Polity press, 2017), 86.

[160] <https://www.spotify.com/uk/signup/> accessed: 09/01/2019.

[161] An excellent account of the practical elements of this discussion is detailed in Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), ch.2.

[162] Caldwell, J. 'Convergence Television: Aggregating the Form and Repurposing Content in the Culture of Conglomeration. (2004)' in *Television after TV: Essays on a Medium in Transition,* edited by Lynn Spigel and Jan Olsson. Durham, NC: Duke University Press.

[163] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.26.

4.3.2 The decline of contractual freedom in the digital age and the role that this has played in the creation of the present system

The present-day significance of contract is the result of the way digital technology enables one-to-one contracts on a global scale. Private law contracts are a result of the legal reflex of the market orientation of our society.[164] As such, the contract, in the sense of a voluntary agreement constituting the legal relationship for the foundation of claims and obligations, has been widely used throughout various stages of legal history.[165] Today, the situation is vastly different. In the digital copyright sector, the common form of such a legal relationship is now in the form of a 'click wrap' licence which typically takes the form of a page of text to which a user must signal agreement in order to use or access the content.[169]

The significance of such developments is that recipients of digitalised information are theoretically free[170] to contract. This is insofar as they can accept the obligations of the agreement and view the material or they can refuse to do so.[171] However, the

[164] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.672.

[165] For a general account of the historical development of contract, including the underlying theoretical aspects behind the construction of contracts, like the intention to create legal relations, as well as the doctrines used to limit the enforceability of certain agreements, such as Estoppel, see Stephen. A. Smith., 'Contract Theory' (Clarendon Law Series, Oxford University Press, 2004).

[169] For more information, see Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, (2008), chapter 5 at 5.2.3.2

[170] Not infrequently the weaker party to a prospective contract even agrees in advance not to retract his offer while the offeree reserves for himself the power to accept or refuse – see, *Cole, McIntyre, Norfleet Co. v. Hollaway,* 141 Tenn. 679, 214 S. W. 817 (1919).

[171] These agreements come in many forms, from End User License Agreements (EULA), Click-Wrap, Browse-Wrap, and Shrink-Wrap licenses, they all revolve around the notion that access is dependent upon acceptance of the terms, or sometimes, implied acceptance can be held on the basis of opening the box and clicking 'I agree' to the EULA on the computer - Griffin, J., 'The interface between copyright and contract: Suggestions for the future' [2011] European Journal of Law and Technology, Vol. 2, No.1; See also, 'Microsoft Windows XP Professional End-User License Agreement' - available at <http://www.microsoft.com/windowsxp/eula/home.mspx>, Article 4.

consequence of this is that they will be unable to access it.[172] In the US software cases of Jacobsen v Katzer173 and MDY Industries v. Blizzard Entertainment[174] contractual terms[175] have gained significance in copyright.[176] Yet, the enforcement of a copyright license raises critical junctures that lie at the intersection of copyright and contract law.[177]

In the former case, it was decided that breach of an 'open source' copyright licence to control the future distribution and modification[178] was enforceable. In the UK, the same scenario would likely be a bare licence, not a contract, due to a lack of

[172] *Jacobsen v Katzer* 535 F.3d 1373 (Court of Appeals, Federal Circuit, 2008); Care has to be taken with this case, since the license is one that provides a condition of use which might otherwise result in copyright infringement. The broader case which extended copyright protection to an area where it was previously denied was in *ProCD, Inc.* v *ZeidenBerg,* 86 F.3d 1447 (7th Circuit, 1996).

[173] 535 F.3d 1371 (Court of Appeals, Federal Circuit, 2008).

[174] *MDY Industries., LLC* v. *Blizzard Entertainment., Inc.,* 629 F.3d 928, 937 (9th Cir. 2010); See also, chapter 5 at 5.4.1(c)(ii).

[175] Note, there is a distinction made between license conditions and contractual covenants according to US State contract law – *Foad Consulting Group v. Musil Govan Azzalino*, 270 F.3d 821, 827 (9th Cir. 2001); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989)) at 1120; On recovery for copyright infringement based on breach of a license agreement, see – *Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1315-16 (Fed. Cir. 2005).

[176] A licensee can be sued for copyright infringement if they act outside of the scope of the license agreement – *S.O.S., Inc. v. Payday, Inc*., 886 F.2d 1081, 1087 (9th Cir. 1989)).

[177] *S.O.S., Inc. v. Payday, Inc.,* 886 F.2d 1081, 1087 (9th Cir. 1989)) at 1122; However, a non-exclusive license normally means that any right to sue licensees for copyright infringement is otherwise waived and may only sue for breach of contract - *Sun Microsystems, Inc. v. Microsoft Corp.,* 188 F.3d 1115 (9th Cir. 1999) at 1121.

[178] *Jacobsen* v. *Katzer* 535 F.3d 1373 (Fed Cir, 2008) at 1.

consideration.[179] Essentially, the Katzer decision[180] means that licenses are enforceable as contracts (which may also impose conditions on re-use),[181] but there are also arguments to suggest the contrary.[182]

In the latter case, *MDY Industries* the was held liable for contributory copyright infringement[183] because the company (*MDY Industries*) sold software that enabled Blizzard's customers to contravene their End User License Agreement (EULA) and Terms of Use (TOU) contracts with Blizzard.[184] This was because copies of the program were created when it runs[185] and access often relies on prior

---

[179] There is no UK equivalent of *Jacobsen*, but if a UK court was to decide such a case, Solicitor Mark Henley (*Director at Wragge & Co. LLP*) suggests that "there would be every likelihood that no contract would be found and the Artistic License would be considered a bare licence. Breach of its terms might take the licensee outside the scope of the licence or alternatively might entitle the licensor to revoke the licence even without providing reasonable notice. Either way, interim injunctive relief might be available to prevent further "unauthorised" use by the licensee pending trial." – (Henley. M., 'Jacobsen v Katzer and Kamind Associates – An English Legal Perspective' International Free and Open Source Software and Law Review, Volume 1, no.1, Rev.41 [2009]; Daniela Simone, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge University Press 2019), p.92.

[180] 535 F.3d 1371 (Court of Appeals, Federal Circuit, 2008).

[181] Ibid.

[182] Henley. M., 'Jacobsen v Katzer and Kamind Associates – An English Legal Perspective' International Free and Open Source Software and Law Review, Volume 1, no.1, Rev.41 [2009]; R. Gomulkiewicz, 'Conditions and Covenantsin License Contracts: Tales from a Test of the Artistic License' [2009] 17(3) Texas Intellectual Property LJ 335.

[183] For more information, see the discussion in chapter 5 at 5.7.3.3(a)(ii).

[184] *MDY Industries., LLC* v. *Blizzard Entertainment., Inc.,* 629 F.3d 928, 937 (9th Cir. 2010) at 935; See also, *Greenwood v. CompuCredit Corp*., 615 F.3d 1204, 1212 (9th Cir. 2010).

[185] *MDY Industries., LLC* v. *Blizzard Entertainment., Inc.,* 629 F.3d 928, 937 (9th Cir. 2010) at 935-36; The running of a computer program results in a temporary copy of the program in the memory of the computer being created in the random access memory (RAM). It is this creation of copies that implicates copyright law and unlike other copyright protected items, when the items (software) is sold under a licence, the licencee needs permission to access his copy of the program and is therefore bound by the term of that agreement therein – (Etten, J.V., 'Copyright Enforcement of non-copyright terms: MDY v. Blizzard and Krause v. Titleserv' [2012], Duke University School of Law); For more information on the technical aspects of this process, see Jeff Tyson, How Computer

acceptance of the agreement terms.[186] By implication, this means that over-the-counter buyers of computer games are licensees who are bound by the individual terms of the EULA.[188] The result of this meant that users were only licensees rather than owners of the game, whereby they were legally bound to operate it under circumstances dictated by the contractual terms of the EULA.[189] Thus, the issue of whether, and to what extent, copyright holders should be allowed to sue under copyright law as a result of licence violations is likely to expand as software use and licensing continue to develop.[190]

It is argued that the current system operates akin to the unequal relationship between the worker and their employer. This is because although the worker is formerly free to enter into any contract with his employer, the reality is that they are often constrained

---

Memory Works, Computer memory basics, <http://computer.howstuffworks.com/computer-memory1.htm> last accessed: 12/2/2016).

[186] For more information, see Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, [2008], chapter 5 at 5.2.3.2; See also, Boyle, J., *The Public Domain* (Yale University Press, 2008), p.61; The most common form of a 'click-wrap' license is when there is a license page impositioned which always has to be agreed prior to the individual being able to access the work. For example, a shrink-wrap license was used to enable copyright-style protection, where copyright law itself denied such protection – (*ProCD, Inc.* v *ZeidenBerg,* 86 F.3d 1447 (7th Circuit, 1996) at 1454). The issue with this decision is that such licenses have the ability, at least in the US context, to bind the majority of those who access the work; However, this is also a likely happening in the UK system, when taking into account section 28(1) CDPA 1988, and Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039.

[188] This is now often the case, particularly online - See Rifkin, J., *The Age of Access* (Penguin Books, London, 2000).

[189] Volftsun, A., 'District Court declares purchasers of Software to be Licensees' Harvard Journal of Law and Technology, July 21, [2008] http://jolt.law.harvard.edu/digest/mdy-v-blizzard accessed: 8/2/2015).

[190] Etten, J.V., 'Copyright Enforcement of non-copyright terms: MDY v. Blizzard and Krause v. Titleserv' [2012], Duke University School of Law, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1221&context=dltr accessed: 18/3/2017.

to do so by circumstances.[191] Thus, although such a transaction appears to be free,[192] the reality is that most workers have no alternative,[193] and such agreements are far from free.[194] Comparatively, the recipients of digitalised material online are contended to be subjected to all the same conditions as the worker. Those who access works subject to licence online are postulated to have no choice in the practical sense other than to be bound by the terms therein. This is because capitalist production hems users in so tightly that they unresistingly succumb to whatever is proffered to them.[195] Thus, it can be fairly argued that the 'choice' of individuals to use legitimate services can be seen as examples of what Posner calls "coerced transactions"[196] in contract.[197] These are transactions that involve use of the legitimate market that are indirectly facilitated by the direct legal prohibitions pertaining to the laws on theft.[198]

---

[191] Weber, M., *Economy and Society* (University of California Press Version, 1978), pp.729-31; Life is now being increasingly lived online and this has the effect of strengthening the general level of enforceability of these agreements - Balkin, J.M., 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds', 90 Virginia Law Review 2043 [2004]; Lastowka, G, & Hunter, D., 'The Laws of the Virtual Worlds' 92 California Law Review 1 [2004]; Moringiello, J.M, 'What Virtual Worlds Can Do for Property Law', 62 Florida Law Review 159 [2010].

[192] To borrow from Kessler: "The freedom of contract dogma is the real hero or villain in the drama... but it prefers to remain in the safety of the background if possible, leaving the actual fighting to consideration and to the host of other satellites-all of which is very often represent confusion to the audience which vaguely senses the unreality of the atmosphere" – Kessler, 'Contracts of Adhesion-Some Thoughts About Freedom of Contract',43 Colum. L. Rev. 629, 639 [1943] in Dalton, C., 'An Essay in the Deconstruction of Contract Doctrine' 94 Yale L.J. [1985].

[193] Mensch, 'Freedom of Contract as Ideology' Stanford Law Review 753-772 at 767; Smith., S.A., 'Contract Theory' (Clarendon Law Series, Oxford University Press, 2004).

[194] Smith, A., 'An Inquiry into the Nature and Causes of the Wealth of Nations' at 64-86 in Smith, A., 'Lectures on Jurisprudence 472-74 (R. Meek, D. Raphael & P. Stein eds. 1978) in Mensch, 'Freedom of Contract as Ideology' Stanford Law Review 753-772.

[195] Horkhaimer, M., and T.W., Adorno., *Dialectic of Enlightenment* (Eds., G.S., Noerr and E., Jephcott, Stanford University Press 2002), p.106.

[196] Posner R. *Economic Analysis of Law* (4th edn, 1992) pp.251-2; See also, A. T. Kronman and Posner, R., *The Economics of Contract* [1979]; See also, *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch) at [59].

[197] Bigwood, R., 'Coercion in Contract: The Theoretical Constructs of Duress' The University of Toronto Law Journal 46, no. 2 [1996]: 201-71. accessed June 25, 2020.

[198] Posner, R., *Economic Analysis of Law*, (4th edn) Little Brown and Company (1992).

What this does is increase the control that rightsholders can exert over their assets and create new avenues of revenue because the scenario becomes one where just like the employer, the more powerful party, can set the terms. To offer the job, "take it or leave it"[199] and, given the normally pressing economic need of the worker, to impose obligations upon him.

However, it is recognised that recipients of cultural goods are not subject to the same circumstances as the employee. Yet, it is considered to be seemingly unrealistic to expect those accessing cultural goods online to simply forgo such access. This is because we live in an age where human experience as a whole is becoming more and more virtualized.[201] Also, the majority of works on the internet are often accessed under licence rather than a sale of the work.[202] This is to the point where you cannot access the work until you have clicked and accepted the terms and conditions.[203] Moreover, it is suggested that this is increasingly significant given that 'only one or two in 1,000 shoppers access a product's [license] for at least a total duration of 1 second'.[204]

Therefore, result of contractual freedom, somewhat paradoxically, is the opening of the opportunity to use, by the clever utilisation of property ownership in the market these resources without the usual copyright restraints. They have been used as a means for the achievement of power over others, and so the legally enforceable creation of contractual provisions are supportive of their very power and autonomy.[205]

---

[199] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.730.

[201] Balkin, J.M., 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds', 90 Virginia Law Review 2043 [2004]; Lastowka, G, & Hunter, D., 'The Laws of the Virtual Worlds' 92 California Law Review 1 [2004]; Moringiello, J.M, 'What Virtual Worlds Can Do for Property Law', 62 Florida Law Review 159 [2010].

[202] See Rifkin, J., *The Age of Access* (Penguin Books, London, 2000).

[203] Boyle, J., *The Public Domain* (Yale University Press, 2008), p.61; A similar result is also likely to be reached in the UK system, when taking into account section 28(1) CDPA 1988.

[204] See Yannis Bakos et al, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' 43 J. Leg. Stud. 1, 3 [2014].

[205] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.729-31; To see how property has played a role in the digital age, particularly in relation contractual restrictions and the ability of individuals to access information, see Efroni, Z., 'Access-right: The Future of Digital Copyright Law' (Oxford University Press, 2011), chapter 2.

This is because the development of a free enterprise system required a flexible legal institution to ensure the exchange of goods and services on the market and contract provides this "elasticity."[206]

This has meant the establishment of digital licences in a society that is increasingly being lived online[207] has increased the relative coercion in the culture economy. This is contended to have created a new state of affairs for the music industry.[208] This is because the imposition of contractual methods in the digital world has meant that users are now quintessential borrowers of the material, subject to the restrictions imposed by the terms of the agreement. Under this, usage can be further controlled due to the incapacitation of copyright limitations.[209] It is to these matters we now turn.

4.4 The beginning of the end for copyright limitations on digital distribution?

There are limits on copyright owner's rights regarding the distribution of their works. In the UK, this relates primarily to the exhaustion doctrine. This affirms the idea that once a copy has been issued within 'the Community', thereafter; the copy can be resold and this relates to each and every act of distribution, that is, transfer of ownership.[210] The distribution right would act to curtail any attempted restriction on 'any subsequent distribution' in the UK under section 18(3)(a)[211] as copyright owners cannot control the resale under the exhaustion principle.

---

[206] Kessler, F., 'Contracts of Adhesion-Some Thoughts About Freedom of Contract' (1943). Faculty Scholarship Series. Paper 2731.

[207] Rainie, L., 'The Rise of e-reading' Pew Internet and American Life project, [2014], <http://libraries.pewinternet.org/2012/04/04/the-rise-of-e-reading/> accessed- 9/10/2014.

[208] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 7.

[209] Mazzone, J., *Copyfraud and other abuses of intellectual property law* (Stanford Law Books, 2011), pp.118-140.

[210] *Case C-456/06 Peek & Cloppenburg SA v. Cassina SpA,* [2008] ECR I-2731(ECJ).

[211] CDPA 1988; Info. Soc. Dir., Art. 4(2), allows for exhaustion in cases of 'first sale or other transfer of ownership in the Community'.

However, as stated at the outset of this chapter, it has been widely assumed that this is only applicable to the distribution of tangible copies.[212] This is due to the decision of *Allposters v. Stichting Pictoright*.[213] Thus, consent to the download of a work cannot be regarded as consent to the distribution. As a result, the distribution right cannot have been exhausted. Therefore, the *Usedsoft* principle does not apply to works other than software because *Usedsoft* was itself concerned with the distribution of a tangible copy.[214]

The consequence of this is that there can be no exhaustion where the transfer of digital copies is electronic to consumers.[215] This is highlighted in Recital 28 of the Information Society Directive (2001/29/EC). This only refers to the distribution of 'tangible articles', with Recital 29 stating that the question of exhaustion does not arise in the case of services and on-line services in particular.[216] The only instance where this can be deemed exempt (and thus capable of further transfer) is in the case of computer programs, where the substance of the arrangement is to transfer the copy for an indefinite period, provided however that the original copy is destroyed.[217]

The equivalent doctrine in the US, is the 'first-sale' doctrine. This was first constitutionally codified under 17 U.S.C. §41 (1909) following its (often regarded)

---

[212] A. Ohly, 'Economic Rights', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright Law* (2009), 237-8. See also, Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015].

[213] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015];]; M Savič, 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378.

[214] Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright' May [2016], Queen Mary University London.

[215] Perzanowski. A. and Schultz, J., 'Digital Exhaustion' 58 UCLA Law. Rev. 889 [2011]; (reviewing the benefits of the US concept of exhaustion and pushing the notion that it needs to continue in the digital sphere and not be restricted); Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015). . Northwestern University Law Review, Vol. 109, No. 1, (2015) (Reis proposes a secondary digital market place for digital articles in the US system to ensure that goods maintain some economic value to the transferee and will inevitably provide cheaper access to secondary users).

[216] Info. Soc. Directive., Recital 29.

[217] Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039.

creation in the seminal US Supreme Court decision of *Bobbs-Merrill Co. v. Straus*.[218] Yet, the doctrine's historical roots extend back to the mid-18th century, to the Lord Chancellor's decision in *Pope v. Curl,* 2 Atk. 342 (Ch. 1741). The latter case outlined that unpublished letters entail two kinds of property. The first was the property in the paper which belonged to the recipient of the letter. The second was the property in the right to publish the words which remained with the writer. Moreover, the chattel rights of the owner in the physical property are limited to that material object, and the acquisition of the chattel does not bring with it the right to make copies.[219]

The significance of this for modern copyright is that this arguably set the foundations for the distribution right (due to the separation of rights) that was underlying the creation of the first sale doctrine. The doctrine was an attempt to limit the rights of copyright owners in the public interest, playing an important role in American copyright law for over a century.[220] This is because it can be fairly said that the doctrine turns on the distinction between the work and the copy. This means that chattel owners may dispose of their physical object, but may not make copies as this would infringe the incorporeal rights in the work. Thus, the first sale doctrine can be said to serve its purpose in the context of a sale. However, issues are created when the work is licenced as no chattel rights are acquired, thereby exempting the execution of this regulatory mechanism.

Copyright today is now codified under 17 U.S.C §109(a) (1976) and is where the copyright owner's distribution right in a particular copy of the work is 'exhausted' after its first sale under the doctrine.[221] The first sale doctrine regulates the rights of the copyright and chattel owners by establishing that once authorized copies have been lawfully distributed, the property rights of the chattel owners prevail. The doctrine

---

[218] (Supreme Court, 1908).

[219] This principle was reaffirmed in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989) (commissioning party owned the sculpture but not copyright; artist permitted access to sculpture in order to access his copyright); *Pope v Curl* (1741) 2 Atk 341, 26 ER 608; *Cooper* v *Stephens* [1895] 1 *Ch 567.*

[220] *Kirtaseng* v. *John Wiley & Sons, Inc.,* 133 S. Ct. 1351, 1363 (2013) as per Justice Breyer at [1363].

[221] The principle is often traced back to the US Supreme Court's decision in *Bobbs-Merrill Co. v. Straus* 210 U.S. 339 (1908).

prevents the copyright owner from controlling future transfers of a particular copy of a copyrighted work after he has transferred its "material ownership" [222] to another.

In *United States v. Powell.,*[224] it was held that when a copyright owner parts with title to a particular copy of his copyrighted work, he thereby divests himself of his exclusive right to vend that particular copy.[225] However, it is argued that this is only applicable to the distribution of tangible copies in the US. This is based on the decision by the United States District Court of New York in *Capitol Records LLC* v. *ReDigi Inc*.[226] In this case it was ruled that the first sale doctrine would not allow customers to resell their pre-owned digital music files as the first sale defence is limited to tangible artefacts that the copyright owner can inject into the stream of commerce.[227]

It is asserted that this intensifies the exploitation that owners can exert in the digital world by "locking up"[228] information under 'click-wrap' and 'click-through' style agreements.[230] This is because when the transfer to the user is accompanied by terms dictating how the item can be used, this means that the contractual control that rightsholders are able to procure is increased with minimal action.[231] Yet, this is significant as this imposition risks upsetting the 'balance' between owners and users in statutory copyright, a point which has often been emphasized in both the UK,[232] and

---

[222] *Columbia Pictures Industries v. Redd Horne,* 749 F.2d 154, 158 (3d Cir. (1984) at [159].

[224] *United States v. Powell,* 701 F.2d 70, 72 (8th Cir. 1983).

[225] *United States v. Moore,* 604 F.2d 1228, 1232 (9th Cir. 1979).

[226] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[227] Ibid at 655. Also, at 656 – "The first sale doctrine was enacted in a world where the ease and speed of data transfer could not have been imagined."

[228] For more information, see Boyle, J., *The Public Domain* (Yale University Press, 2008); Similar discussions are also outlined in: Lessig, L., *Free Culture* (Penguin Press, 2004); Lessig, L., *The Future of Ideas* (Vintage Books, 2001), p.177.

[230] On the enforceability of these agreements see: Johnson, P., 'All Wrapped Up? A Review of the Enforceability of "Shrink-Wrap" and "Click-Wrap" Licenses in the United Kingdom and the United States' [2003] EIPR 98.

[231] Weber and Parsons, *Weber, M. and Parsons, T., The Theory of Social and Economic Organization (The Free Press, New York 1947),* (The Free Press, New York 1947), p.161.

[232] *FAPL,* Joined Cases C-403/08 and C-429-08 [2011] *ECR* I-9083 (ECJ, Grand Chamber), *Painer,* Case C-145/10 [2012] *ECDR* (6) 89 (ECJ), [132], [134]; *Deckmyn,* Case C 201/13, EU:C:2014:458), [27]; *England & Wales Cricket Board v. Tixdaq* [2016] *EWHC* 575 (Ch), [73].

the US.[233] Specifically, this relates to the fact that there is a need to ensure a 'fair balance' between the rights and interests of authors and those of users.[234]

4.4.1 The US approach

In *Bobbs-Merrill Company* v *Straus*[235] the US supreme court identified some ideological aspects within copyright law as containing principles which could not be overridden. As stated, the case is often touted as establishing the first sale doctrine. In the case, the Plaintiff-copyright owner sold his book with a printed notice announcing that any retailer who sold the book for less than one dollar was responsible for copyright infringement. The Plaintiff sought injunctive relief on these grounds. The Supreme Court rejected the claim, holding that its exclusive distribution right applied only to first sales of copies of the work.

The distribution right did not permit the Plaintiff to dictate that subsequent sales of the work below a particular price were infringing. More specifically, the court ruled, in the words of Justice Day, that:

> "the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract."[236]

For understanding, the privity doctrine is based on the notion that only the parties to the contract can assert rights under, or benefit from, the agreement. This means that

---

[233] In the US, when measuring whether an act is fair use, the court looks at four factors in particular to determine whether a usage is 'fair' in order to maintain a balance between authors and users. These are: The nature if the copyrighted work; The amount and substantiality of the portion taken - *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994); The purpose and character of the use (the transformative factor) - *Warner Bros. Entertainment, Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D. N.Y. 2008); The effect upon the potential market - *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

[234] Article 5 of Directive 2001/29/EC specifically provides for 'numerous exceptions'; See also, *Padawan SL v. SGAE,* Case C-467/08 [2010] ECR I-10555, [AG43]; Case C-110/15 *Microsoft Mobile Sales International Oy v. Ministero per I beni e le attivita culturali*, EU:C:2016:326, {AG20] (AG Wahl).

[235] *Bobbs-Merrill Company* v *Straus* (Supreme Court, 1908).

[236] *Bobbs-Merrill Company* v *Straus* (Supreme Court, 1908) at 350.

a third party cannot acquire contract rights from a contract to which they are not a party if they have not provided consideration.[237] The court further noted that its decision applied solely to the rights of a copyright owner that distributed his work without a licence agreement.[238] The significance of this for purposes here is the potential effects that it could be said to have in securing the legitimation and enforceability of digital contracts.

This is problematic as the strict construction of the privity rule is argued to strengthen the enforceability of digital licences. This is because any 'licenced' item will otherwise fall outside of the scope of the first-sale doctrine. However, the rules on privity mean that every time a licenced digital product is accessed or purchased, the agreement becomes an *in personam* one, between the rightsholder and the recipient. This is because users are 'directly' agreeing to terms in the digital age through usage or access, which appears to satisfy the requirements of privity in *Bobbs Merrill*.

Consequently, in situations where there is deemed to be privity of contract, the clause will always take effect.[239] Thus, when privity is established, there can be potential claims in both copyright and contract. This is because the work will generally be protected by copyright. Yet, access is often governed by these 'click-wrap'[240] and 'browse-wrap'[241] agreements. As a result, users will be bound by their terms and could

---

[237] On the doctrine of privity, see UK law: *Tweddle* v. *Atkinson* (1861) 1 B&S 393 or 121 ER 762; For the US, see, *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 719, 92 L.ed. 898 (1948); However, rights may be acquired pursuant to the passage of the UK Contracts (Rights of Third Parties) Act 1999.

[238] Ibid at 350; This notion has also been codified into US law under the Copyright Act 1976 under §109(a).

[239] Griffin, J., 'The interface between copyright and contract: Suggestions for the future' [2011] European Journal of Law and Technology, Vol. 2, No.1.

[240] A click-wrap agreement, in contrast to a browse-wrap agreement, requires users to affirmatively check a box to assent to terms or click "I agree" or "Yes" icon before they can download or access digital content – (Seringhaus, M., 'E-book Transactions: Amazon "kindles" the Copy Ownership Debate" 12 Yale Journal of Law and Technology., 147, 199, (2009) in Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015). Northwestern University Law Review, Vol. 109, No. 1, (2015) at 197.

[241] A browse-wrap agreement is a type of licencing agreement that "exists in the background and purports to bind a user simply by their visiting a website" - (Seringhaus, M., 'E-book Transactions:

face contractual liability for a breach.[242] This applies even where there is no copyright violation and vice-versa, creating a 'dual-system' of protection for copyright holders.[243]

Nonetheless, several decisions after *Bobbs* have broadened the scope of the application of the doctrine to an extent.[244] However, it was *Capitol Records* v *ReDigi*[245] that offered the closest the US system has got so far to a full-scale consideration of the application of the doctrine to digital musical content.

In the case[246] ReDigi's operation was challenged by Capitol Records as violating multiple aspects of the US Copyright Act (1976. This consisted of vicarious, and contributory, copyright infringement, and inducement of copyright infringement.[247] ReDigi opposed the action, claiming that the US first sale doctrine supported its business model.[248] The district court disagreed and granted summary judgement for Capitol Records. It held that ReDigi reproduced files on its servers and distributed copies to its customers. Significantly, the court found no statutory basis for a digital first sale doctrine, concluding that the text of the statute 'clearly' precluded the application of the doctrine to dematerialized copies.[249] The distribution was held to be one "which plainly [fits] within the sort of transaction that §106(3) (distribution) was

---

Amazon "kindles" the Copy Ownership Debate" 12 Yale Journal of Law and Technology., 147, 199, (2009) in Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015). . Northwestern University Law Review, Vol. 109, No. 1, (2015) at 197.

[242] In the UK see CDPA 1988 s.28(1); In the US, see 17 U.S.C. §109(d); For more information, see this chapter at 4.5.

[243] For more information, see this chapter at 4.5

[244] *Vernor v Autodesk*, Inc., 621 F. 3d 1102 (9th Cir. 2010); UMG Recordings, Inc. v. Augusto 628 F.3d 1175 (9th Cir. 2011); *Kirtsaeng v John Wiley & Sons, Inc,* 133 S Ct 1351 (2013); Omega SA v Costco Wholesale Corp (2015) US App Lexis 830 (9th Cir., Cal., Jan 20, 2015).

[245] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[246] Ibid.

[247] Ibid.

[248] As found under 17 U.S.C. §109(a).

[249] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013). See also, the discussion in Gorman, Ginsburg, and Reese, "Copyright: Cases and Materials" (9th ed), University Casebook Series, Foundation Press, pp.840-844.

intended to reach [and is, therefore, a] 'distribution' of a phonorecord."[250] Accordingly, the court concluded that the first sale defence did not permit sales of digital music files on ReDigi's website.

As a result, although ReDigi backed by some powerful voices, it seems that the Second Circuit will not rule in its favour for fear of the "Pandora's box it might open."[251] This notion is based on what Professor Burgunder calls the amicus brief of law scholars. This rests on the philosophical notion that the first sale doctrine derives from the right — or entitlement — that owners of objects have to dispose of their property. The fundamental question is whether the owner's property pertains only to the physical items that incidentally include the copyrighted works, or whether the ownership interest can ever actually extend to the copyrighted aspects as well [i.e. the intangible exchanges].[252]

Therefore, the nature of digital technology is again considered to be pushing the boundaries of copyright law and digital works towards the "edge of the reach of the state"[253] in an attempt to "free"[254] itself from the confines of copyright limitations. This can also be suggested in some ways to be a "withering away"[256] or "abolition" (*Aufhebung*)[257] of the state. This is because these agreements are given legal

---

[250] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013), 8, His Honour Judge Sullivan citing *London-Sire,* 542 F Supp 2d. 153 at 173-74.

[251] <http://www.ipwatchdog.com/2017/10/11/digital-resale-copyrights-second-circuit-wont-buy/id=88965/> accessed: 04/07/2018).

[252] Ibid.

[253] Griffin, J., 'A call for a doctrine of information justice' [2016] Intellectual Property Quarterly.

[254] For more information, see Heidegger, M., *The Question Concerning Technology* (Trans. William Lovitt, Harper Torchbooks 1977); Karl Marx *Critique of Hegel's Philosophy of Right* (Cambridge Uni Press, 1844).

[256] Jessop, B., 'Recent Theories of the Capitalist State' Cambridge Journal of Economics, Volume 1, Issue 4, December (1977), Pages 353-373, https://doi.org/10.1093/oxfordjournals.cje.a035370 accessed: 21/09/2016.

[257] In Hegelian philosophy: the process by which the conflict between two opposed or contrasting things or ideas is resolved by the emergence of a new idea, which both preserves or transcends them - Avineri, *The Social and Political thought of Karl Marx* (1968), noted the two different terms derive from different intellectual traditions. Engels *Absterben* is a "biological similie", Marx's *Aufhebung* is "a philosophical term with clear dialectical overtones" (p.203).

credibility through their enforceability via the state apparatus (like the courts).[258] However, the associated inapplicability of statutory limitations in the digital context[259] and the fact that copyright owners set the terms of the contracts,[260] is submitted to amount to an oxymoronic situation that can be said to both strengthen and wither away the state.

This is because, on one hand, it can be said that rightsholders rely on the state to ensure that they can exploit their digital works, but this can also be seen as a form of submission to the state.[261] Equally, however, the fact the agreements are crafted to suit private interests and can remain outside of state-based statutory limitations, it can be said that the state has lost some of its regulatory power in this respect.[262] Thus, it is asserted that rightsholders have developed a system of information regulation to which they are the regulators.[263] This is because access is often dependant on agreement with the terms they create. Thus, because continued compliance is essential for the duration of it.[264]

Going further, it can be said that such developments have not just forced the law to adapt,[265] but it can now be said that the law is also being used to prevent the creation

---

[258] Deleuze, G. and Guattari, F., *A Thousand Plateaus* (Bloomsbury Academic, 1988), Ch.13.

[259] See this chapter at 4.4.

[260] For more information, see this chapter at 4.7.1.

[261] For more information, see Foucault, M., *Power* (Volume 3, edited by James Faubion, 2002), pp.1-83.

[262] Issues similar to this are discussed in Foucault, M., *Power: The essential works of Foucault 1954-1984* (Volume 3, edited by James Faubion, 2002), p.83.

[263] The logistics of this are explained in Foucault, M. 1973. 'Truth and juridical forms. Parts II & III' In Michel Foucault: Power - essential works of Foucault 1954-1984 Volume 3, edited by M. Faubion. Trans. inter alia R. Hurley, 1 – 89. London: Penguin Books, 2002.

[264] This is discussed in this chapter at 4.3.1; See also, Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 7.

[265] *A&M Records v. Napster*, 239 F.3d; *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct 2764 (US Supreme Court, 2005) – These cases were the landmark decisions which determined that peer-to-peer file-sharing and the distribution/reproduction of another's work unauthorised was considered to be an infringement of copyright even if done without the expectation or receipt of financial gain.

of secondary markets by limiting distributions.[266] This is due to the technical functionality of these artefacts and their position regarding the enforceability of statutory limitations.

Ultimately, *ReDigi* is argued to support the imposition of digital licences by exempting non-physical works from the remit of the otherwise 'limiting' first sale doctrine. This increases the control generally that copyright owners have over their works in the US. It also illustrates the difficulties of applying digital works to pre-digital doctrines against the legal architecture that governs digital uses and distribution.

4.4.2 The UK approach

> "Copyright protection includes the exclusive right to control the distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightsholder or with his consent exhausts the right to control the resale of that object in the community"[267]

The principle of exhaustion[268] operates similarly that of the US first sale doctrine in the digital environment. The application of the principle in the digital context was first examined in the case of *UsedSoft GmbH v. Oracle International Corp*[269] and has since generated considerable discussion.[270] The case concerned the principle of exhaustion

---

[266] *Vernor v Autodesk*, Inc., 621 F. 3d 1102 (9th Cir. 2010); *UMG Recordings, Inc. v. Augusto* 628 F.3d 1175 (9th Cir. 2011); *Kirtsaeng v John Wiley & Sons, Inc,* 133 S Ct 1351 (2013); Omega SA v Costco Wholesale Corp (2015) US App Lexis 830 (9th Cir., Cal., Jan 20, 2015); *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013); In the UK see - Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039*Art & Allposters,* Case C-419/13, EU:C:2015;27 (ECJ); See also, Rosenmeier, Szkalej, and Wolk, EU Copyright Law: Subsistence, Exploitation and Protection of Rights, (Wolters Kluwer 2019) at §7.02, 03; For more information, see this chapter 4 at 4.5.1.

[267] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, 2001 O.J. (L 167) 28.

[268] For a general overview, see Rosenmeier, Szkalej, and Wolk, EU Copyright Law: Subsistence, Exploitation and Protection of Rights, (Wolters Kluwer 2019), chapter 7.

[269] Case C-128/11 [2012] 3 *CMLR* (44) 1039.

[270] The case has created a considerable amount of commentary: R. Hilty and K. Koklu, 'Software Agreements: Stocktaking and Outlook – Lessons from the Oracle v. UsedSoft Case from a Comparative Law Perspective' [2013] 44(3) *IIC 263;* E. F. Schulze, 'Resale of Digital Content such as Music, Films or eBooks under European Law' [2014] 36(1) *European Intellectual Property*

in the context of ‘used’ software in digital form.[271] In the case, it was held that the exhaustion doctrine applied to computer programs.[272]

In arriving at the decision, the Court of Justice of the European Union (CJEU) also considered what amounts to lawful acquisition of the software, if there was a licence preventing its resale, and whether the copyright in lawfully acquired software was exhausted by the resale.[273] The CJEU ruled that lawful acquisition occurs at the point where the software is downloaded onto the user’s computer,[274] and for exhaustion to apply, “the original acquirer must make the copy downloaded onto his computer ‘unusable’ at the time of its resale”[275] with a later decision also ruling out back-up copies.[276]

The CJEU also concluded that the exhaustion doctrine applied to computer programs made electronically where the substance of the arrangement is to transfer the copy to the user for an indefinite period in return for the payment of a fee, thereby constituting a ‘sale’ to activate the exhaustion doctrine.[277] Thus, the case was seemingly settled on exhaustion being activated by a licence agreement which, by its indefinite nature, was held as constituting an agreement that had all the hallmarks of a transaction equivalent to a ‘sale’ (and thus functionally the same as a copy on a CD-ROM or DVD).

The significance of the decision is that the CJEU held that a transferee of software from an original purchaser is a ‘lawful acquirer’ (even though a licence term affecting

---

Review 9. K. Moon, ‘Resale of Digital Content: UsedSoft v ReDigi’ [2013] 24(6) European Intellectual Property Review 193.

[271] It should also be noted that the EU exhaustion principle is also separately incorporated I the EU Software Directive 2009/24/EC of the European Parliament and of the Council of Europe on 23 April 2009 on the legal protection of computer programs, Articles 2 and 4.

[272] Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039

[273] Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039 at [30-34].

[274] Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039 at [59].

[275] Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039 at [78], [87].

[276] Case C-166/15 *Aleksandrs Ranks* v. *Finansu un ekonmisko noziegumu izmeklesanas prokutura, Microsoft Corp.*, EU:C:2016:762, [43]-[44] (ECJ) (this also includes situations where recipients had damaged, destroyed, or lost the original material medium).

[277] Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039 at [38], [42], [43], [44], [45], [46], [47], [48], [49].

the original purchaser purported to prevent such transfer).[278] This shows that a copyright owner can no longer enforce the contractually prescribed prohibitions on the resale of a copy when the agreement, by its duration, has become tantamount to a 'sale'. This is argued to be because a key motivation behind the decision was due to the integrative function that the exhaustion principle adds to the single market.[279]

It is asserted that the *UsedSoft* decision can be used to support the usage of drafting mechanisms to otherwise prevent exhaustion from applying. This can include reducing the licence terms, or again, subjecting the licensee to yearly renewals. This would theoretically remove the legal roadblocks experienced by the creators of *UsedSoft*. Interestingly, it is unlikely that a similar conclusion would be arrived at in the US, whereby it was held in *Microsoft Corp.* v *Harmony Computers and Electronics, Inc*[280] that the first-sale doctrine is inapplicable in instances where software has been licensed and not sold.[281]

However, *UsedSoft* can be said to be limited to the software context[282] following the long-awaited recent Judgement of the Court (Grand Chamber) in *Nederlands v Kabinet*[283] in December 2019. In the case, the Court found that the supply by downloading, for permanent use, of an e-book, is not covered by the right of 'distribution to the public' provided for by Article 4(1) of Directive 2001/29.[284] Nonetheless, it did rule that it is covered by the right of 'communication to the public'

---

[278] Case C-128/11 [2012] 3 *CMLR* (44) 1039 at [75], [76], [77], [78], [80], [81], [82].

[279] Morris, S., 'Beyond Trade: Global Digital Exhaustion in International Economic Regulation' [2014] 36(1) Campbell Law Review 107, pp.118-20.

[280] 846 F. Supp. 208 (E.D.N.Y 1994).

[281] 846 F. Supp. at 213 – (the first-sale defence did not apply as the defendant failed to trace the "chain of title" and establish proof of first sale); For more information, see Nimmer, D., *Copyright: Sacred text, Technology, and the DMCA* (Kluwer Law International, 2003), pp.282-284; See also, the Ninth Circuit decision of *Microsoft Corp v. DAK Industries Inc* 66 F.3d 1091 (9th Cir. 1995); Longdin, L. and Lim, P.H., 'Inexhaustible distribution rights for copyright owners and the foreclosure of secondary markets for used software' IIC [2013], 44(5), 541-568.

[282] E. Rosati, 'Online Exhaustion' [2015] 10 *JULP* 673

[283] Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019).

[284] Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019) at [36], [45].

provided for in Article 3(1)[285] but exhaustion is explicitly excluded under paragraph 3[286] in order for authors to obtain and appropriate reward for their works.[287]

Consequently, the Court determined, in what is postulated to be a quintessentially *UsedSoft* fashion, that there is no exhaustion of online media (even where it is incidentally bound up in a computer program).[288] By implication, this means that there is no exhaustion of digital copies because they do not deteriorate with use and a secondary copy is a perfectly good substitute for a new electronic version.[289] Yet, the *UsedSoft* decision was also limited to a degree, although not reversed, in *Art & Allposters v. Stichting Pictoright*[290] concerning exhaustion of tangible artefacts.

This is because the decision limits how an individual can use their licenced product in what appears to be a decision predominantly motivated around maximising the economic exploitability of protected works.[291] The decision has been described as

---

[285] Directive 2001/29/EC; Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019) at [35], [36], [41], [60], [62], [63], [66], [69], [72].

[286] (The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article) – Article 3(3) Directive 2001/29/EC.

[287] Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019) at [48]; (see, to that effect, judgment of 19 November 2015, *SBS Belgium*, C-325/14, EU:C:2015:764, paragraph 14 and the case-law cited).

[288] <http://the1709blog.blogspot.com/2019/12/tom-kabinet-decision-no-digital.html> accessed: 10/01/2020); Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019) at [53]-[55].

[289] Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019) at [48], [58].

[290] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; For a general commentary on the case, see Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) *Art & Allposters International BV v Stitching Pictoright'* May 2016, Queen Mary University London.

[291] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [48]; See also, *Football Association Premier League and Others*, EU:C:2011:631, Paras 107-109; Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325.; However, the economic analysis of law has come to dominate academic thinking about law, and not

highly significant,[292] with Headdon suggesting that it has "arguably opened up the possibility of an additional line of argument for copyright holders to control the exploitation of works previously put on the market by or with their consent."[293] The court was asked to consider the limits to the exhaustion principle regarding the practice of taking lawfully marketed posters of famous works and transferring the licenced image onto a canvas for resale. The court held that:

Firstly, the exhaustion doctrine did not apply in a situation where a reproduction of a protected work, after having been lawfully marketed in the European Union with the copyright holder's consent, has undergone an alteration of its medium. This was the transfer of that reproduction from a paper poster onto a canvas, which was placed on the market again in its new form[294] under a "canvas transfer"[295] technique. The exhaustion principle applied only to the 'object' transferred or sold. Thus, as the defendant presented the claimant's picture on a different object, he could not claim exhaustion to the newly marketed object.[297] It was also held that this alteration of the copy of the protected work, which provided a result closer to the original, was sufficient to constitute a new reproduction of that work under Article 2(a) of Directive 2001/29, which is covered by the exclusive right of the author and requires his permission.[298]

---

just the more obvious commercial areas – A. T. Kronman and Posner, R., *The Economics of Contract* (Little Brown, 1979), B. Ackerman, *The Economic Foundations of Property Law* (Aspen Publishing, 1975), F. Easterbrook and D. Fischel, *The Economic Structure of Corporate Law* (Harv. Uni. Press. 1991); S. Shavell, *Economic Analysis of Accident Law* (Harv. Uni. Press. 1987).

[292] See references in M Savič, 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378, 378, n 2, *in* Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) *Art & Allposters International BV v Stitching Pictoright'* May 2016, Queen Mary University London.

[293] Headdon, T., 'The Allposters problem: reproduction, alteration and the misappropriation of value' E.I.P.R. [2018], 40(8), 501-509.

[294] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [49]

[295] 'Exhaustion of rights (first sale doctrine): what are the broader implications of the CJEU's ruling in Art & Allposters?' (January 30, 2015), *IP Kat blog*, http://ipkitten.blogspot.nl/2015/01/exhaustion-of-rights-first-sale.html [Accessed March 29, 2015]. Taken from M Savič, 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378; See also, Yoo, C.S., 'Copyright and Product Differentiation', 79 N.Y.U.L. Rev. 212 (2004).

[297] Case C-419/13 *Art & Allposters*, EU:C:2015;27 (ECJ) [35], [39].

[298] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [43].

Secondly, because the economic value of the canvases significantly exceeded that of the posters, it was concluded that if the distribution right was exhausted upon the first sale of the posters, then the rightsholders would have been deprived of the appropriate reward for the commercial exploitation of their works. This involved looking at the economic value of the exploitation (sale), in comparison to a canvas transfer, which was held to significantly exceed that of a paper poster.[299]

It is asserted that this demonstrates a deliberate minimisation of what can be done with the lawfully marketed work to maximise the ability of righholders to economically exploit their assets. However, it can also be regarded as a deliberate limitation on what licensees can do with works pertaining to their ability to profit from them. This is because part of the courts' conclusion was justified on the basis that the copyright holders did not consent to the distribution of the canvas transfers, at least not expressly. Accordingly, by applying the rule of exhaustion of the distribution right, the court held that such an application would deprive those rightsholders of the possibility of prohibiting those objects from being distributed or, in the event of distribution, of requiring appropriate reward for the commercial exploitation of those same works.[300] Due to this, it can be said that is it the "actual content of contract [or lack of]...is what facilitates capitalism [under] the systematization of law."[301]

The court also referred to Article 4.2 of Directive 2001/29 which states that exhaustion applies only to the first sale of the "object."[302] Notably, it also relied on Recital 28 to Directive 2001/28 and Articles 6 and 7 of the WIPO Copyright Treaty[303] holding the

---

[299] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [48]; See also, *Football Association Premier League and Others, EU:C:2011:631, Paras 107-109*; Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019) at [48].

[300] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [48].

[301] Chase-Dunn, C., *Global Formation: Structures of the World Economy* (Update edn. Rowman and Littlefield Publishers, 1998), p.350.

[302] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [34]; See also paras [35], [36], [37], [38], [39], [40] and [46].

[303] The Treaty was adopted by the Diplomatic Conference of 20 Dec 1996, at which the Treaty itself was also adopted.

view that exhaustion of the distribution right only applies to tangible objects.[304] It is asserted that the claimants, in this case, have benefitted by the legal order of the state.[305] This is because they have exploited their assets in circumstances that have been factually guaranteed to them by the consensually accepted interpretation of a legal norm under copyright. This is achieved with the aid of a "coercive apparatus (the courts) that is backed up by a guaranty that is simply based upon the validity of their legal position."[306]

This has created a situation wherein so far as the judge allows the coercive guaranty to enter a particular case for ever so concrete reasons, he creates, at least under certain circumstances, the empirical validity of a general norm as law simply because his "maxim acquires significance beyond the particular case."[307] In sum, this is argued to represent what Weber would call a legal order, which exists in capitalist society wherever coercive means, physical or psychological, are available, i.e. wherever there is a group of persons ready to use them for such a purpose when certain circumstances arise.[308]

Yet, in the US case of *CM Paula Co.* v. *Logan*[309] the opposite conclusion to *Allposters* was reached, where a company that removed copyrighted images from the surface of greeting cards and then applied them to ceramic plaques was held as having no duplication in this instance, and so no reproduction. It could be suggested, albeit stretching the conceptual and contextual boundaries here, that the transfer of the ink in some way maintained some elements of physicality to satisfy the decision in order to maintain 'regularity' in the copyright system.[310]

Furthermore, *Allposters* supports the notion that a purchaser of a digital work effectively owns the words or notes in a fashion divorced from the object in the digital

---

[304] Ibid at paras [34-40].

[305] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.315.

[306] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.315.

[307] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.758.

[308] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.317.

[309] *CM Paula Company v. Logan*, 355 F. Supp. 189 (N.D. Tex. 1973) US District Court for the Northern District of Texas - 355 F. Supp. 189 (N.D. Tex. 1973) March 5, 1973; In comparison, see *Mirage Editions Inc v Albuquerque A.R.T. Co.* 856 F. 2d. 1341 (9th Cir. 1988).

[310] Weber, M., *Economy and Society* (University of California Press, 1978), at 63ff.

context. This is because when seemingly similar circumstances were applied in the digital context, the opposite was reached, as the court in *CM Paula Co.* v. *Logan* allowed the company in the case of tangible articles to take the copyrighted media and place them on other physical objects without procuring a reproduction, but in *Allposters* the opposite conclusion was reached.

The conclusion of *Allposters* is also significant because of the inherent focus the court gave to the potential economic detriment that would have been incurred by the claimant if the case had been decided in another way.[311] The court highlighted this where it stated that applying the rule of exhaustion of the distribution right would have deprived those rightsholders of the possibility of prohibiting those objects from being distributed. Alternatively, in the event of distribution, it would prevent them from requiring appropriate reward for the commercial exploitation of their works. To be appropriate, such remuneration must be reasonable regarding the economic value of the exploitation of the protected work and the canvas transfers economic value significantly exceeded that of the posters in the case.[312]

It is argued that this inherently economically-orientated *ratio* is considered to lend itself to the view that the CJEU may have adopted a "market-orientated, normative basis for its decision on the concept of reproduction";[313] concluding that there was a

---

[311] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [48]; On the issue of exploitation, specifically in relation to phonograms, see the discussion below at 4.5.1; See also, the recent CJEU decision pursuant to a referral from the German Federal Court - Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018).

[312] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [48]; This can be contrasted with the US Supreme Court case of *Herbert v Stanley; John Church Company v Hilliard Hotel Company* 242 US 594 (1917) (emphasis added) – (in this case it was held that there was a need for a broad interpretation of *public performance* in order to prevent the defendants' ability to 'compete with and even destroy the success of the monopoly the law intends the plaintiff to have').

[313] Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright' May [2016], Queen Mary University London; For an opposite conclusion to the CJEU, the Canadian Supreme Court suggested that in similar circumstances there was no reproduction of a work under copyright law when an image is transferred to an alternative medium, see – *Galerie a'Art du Petit Champlain Inc v Theberge* [2002] SC 34 (Supreme Court, Canada).

reproduction on the facts at issue in *Art & Allposters* because separate licensing markets existed for paper posters and canvas transfers and the defendant's activities had deprived the rightsholders of an appropriate fee. Comparatively, this also has similarities to the US approach under the performance right that looks to protected authors from 'market harm'.[315]

Therefore, the focus of the CJEU is argued to be on "formal rationality"[316] rather than commodity production in capitalist society. This is because formal rationality is the concern for the efficiency of means rather than a direct focus on ends.[317] This assertion comes from the fact that the court in *Allposters* arguably focused on maintaining the economic interests of the rightsholder.[319] This was done by interpreting exhaustion in a restrictive manner, and reproduction in a broad sense, to ensure that the economic efficiency of copyright was maximised regarding the exploitability of the images for the licensors.[320] This was opposed to a focus on an increased number of commodities (the transfer of the paintings onto a canvas) that would have arguably otherwise been created if the case was decided differently. This is contended to be because the deliberate creation of lack is a function of the market economy of the dominant class.[321]

Griffiths argues that this interpretation has meant that reproduction will also occur whenever an object (embodying a copy of a work) is altered in such a way as to create a new object. Yet, it is not entirely clear whether the identification of a "new object" in such circumstances is simply factual, technical enquiry or whether a more normative, market-related enquiry is envisaged. Ultimately, this limits the amount that can get to

---

[315] *Herbert v Stanley; John Church Company v Hilliard Hotel Company* 242 US 591 (1917).

[316] Chase-Dunn, C., *Global Formation: Structures of the World Economy*, (Rownman and Littlefield Publishers, 1998), p.350.

[317] Ibid.

[319] (C-419/13) *Art & Allposters International BV v Stitching Pictoright'* at [26]-[28],]40], [42]-[48].

[320] Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright' May [2016], Queen Mary University London.

[321] Deleuze, G. and Guattari, F., *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Academic, 1983) pp.40-1.

market without permission.[322] Consequently, it is contended that this increases the influence of licences whereby the court gave a seemingly restrictive interpretation of the facts and the exhaustion doctrine based on ensuring a "high level of protection."[323]

The conclusive elements of this decision were supported by the "principal objective" of the Information Society Directive, which was to establish a high level of protection for authors, allowing them to obtain appropriate reward for their works.[324] It also, to some extent, harmonized the reproduction, communication, and distribution rights, as well as limiting the number and scope of the exceptions (or defences) that a national regime can operate. Significantly, this heralded a shift from 'vertical'[325] harmonization to 'horizontal' harmonization.[326]

Ultimately, *Allposters* is contended to increase the level of exploitation in the digital world generally that rightsholders can exert under contracts. The decision added, "a new weapon to the armoury of the copyright holder...and is akin to copyright moonlighting as a law against unfair competition as opposed to being about reproduction."[327] This is because the *UsedSoft* principle does not apply to online downloads under the Information Society Directive, nor does it apply to intangible artefacts other than software. Thus, the exhaustion principle is presumptively confined to the tangible realm.[328] As a result, it can be reasonably suggested that in the current

---

[322] Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright' May [2016], Queen Mary University London.

[323] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [47]

[324] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [47] (with reference to 306/05) *SGAE v Rafael Hotels* [36]; (C-456/06) *Peek & Cloppenburg* [37]; (C-403/08 & 429/08) *FA Premier Keague v QC Leisure* [186]).

[325] See R.H. Coase, *The Nature of the Firm*, 4 Economica 506 (1937).

[326] As the title of the Directive makes clear, its remit was only to harmonize 'certain aspects of copyright. The sloppy use of the shorthand 'Copyright Directive' by the Court can be traced back to the opinions of Advocate-General Sharpston in *Laserdisken ApS v. Kulturministeriet,* Case C-479/04 [2006] *ECR I-8089* and *SGAE v. Rafael Hotels SL,* Case C-306/05 [2006] *ECR* I-11, 519. The Court, for the most part, resisted the shorthand.

[327] Headdon, T., 'The Allposters problem: reproduction, alteration and the misappropriation of value' E.I.P.R. [2018], 40(8), 501-509.

[328] Slavic, M., 'The CJEU *Allposter* case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378.

copyright system, both in the UK, and the US, that the ideas of economic growth and competition have come to have a more compelling charm for the twentieth-century judicial mind. This has resulted in emerging contractarian theories which purport to base liability on will, consent, or meeting of the minds.[329] However, the current situation could also be said to be partially the result of what Griffin describes as a "legislative desire to protect owners from unauthorised reproduction of their works."[330] This is based on the fact that although judges make the decisions, they do so on a legislative basis.

4.5 The creation of a two-tier system of protection in the digital world?

In the UK, the only statutory provision which governs the relationship between contracts and copyright is to be found in the Fair Dealing chapter.[331] The Fair Dealing provisions are statutory sections which detail various 'permitted acts' of infringement, and are to be seen as an fundamental part of copyright law as opposed to a mere defence[332] as they are not defences.[333] However, according to s.28(1) of the Copyright, Designs, and Patents Act 1988:

[329] Gilmore, 'From Tort to Contract: Industrialisation and the Law' (Book Review) 86 Yale Law Journal 785 (1977) at 789 *in* Morton Horwitz and the 'Transformation of American Legal History' Vol. 23, Issue 4 23 William & Mary Law Review 663 (1982).

[330] Griffin, J., 'Copyright Evolution: Creation, Regulation and the Decline of Substantively Rational Copyright Law' [2013] Intellectual Property Quarterly.

[331] CDPA 1988 Chapter III; See also, R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact* (2005), ch.9.

[332] "The fair dealing exception …is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively …'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation" - *CCH Canadian Ltd v Law Society of Upper Canada [2004] SCC 13 (Can. Sup. Ct)*: citing D. Vaver, Copyright Law (Toronto: Irwin Law, 2000) p.171.

[333] CDPA 1988 s.97.

> "..[the provisions] relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts."[334]

According to this subsection, even though an act[335] may be carried out without infringing copyright (so long as it is proven by the defendant that an exception applies),[336] this does not prevent rights being asserted under an agreement stipulating the contrary and create "a breach of contract, even though there may be no infringement of copyright."[337] Thus, if a work supplied to a user under an agreement whereby no part of it is to be copied, but then such a copy is made, users will be in breach of contract, even if there is no contravention of copyright.

Although this may seem obvious, research conducted after the passage of the Bill showed that there was considerable confusion over this issue.[338] Also, this is considered to be exacerbated by the fact that the courts often construe such matters strictly against the defendant as they amount to derogations of the proprietary rights

---

[334] CDPA 1988 s.28(1); See also, Griffin, J., 'The interface between copyright and contract: suggestions for the future' European Journal of Law and Technology, Vol. 2, No.1, [2011].

[335] The act must fall within one of the 'permitted' acts in (Chapter III CDPA 1988) which include: (the making of temporary copies), general (which includes the fair dealing exceptions of research and private study (s.29(1) and (1C); text and data analysis for non-commercial research; criticism, review, quotation and news reporting (s.30(1)); caricature, parody or pastiche (s.30A(1)); as well as incidental inclusion of copyright material), exceptions for disabled people, education, libraries and archives, public administration, computer programs, databases, designs, typefaces, works in electronic form, miscellaneous provisions relating to literary, dramatic, musical and artistic works, miscellaneous provisions relating to the lending of works, miscellaneous provisions relating to films and sound recordings and miscellaneous provisions relating to broadcasts (including incidental recording for purposes of broadcasts and recording for purposes of time-shifting).

[336] *Sillitoe v Mcgraw Hill Book Co* [1983] F.S.R. 545 at 558.

[337] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20.

[338] Report: 'Hansard' HL Vol.501, cols 227–228. The report also shows that s.28(1) has a more limited effect in relation to computer programs, databases and broadcasts; See also, Sims, A., 'Strangling Their Creation: The Courts' Treatment of Fair Dealing in Copyright Law Since 1911' [2010] *IPQ* 192.

of the copyright owner.[339] Thus, the onus of proof is on the defendant to prove that one of the exceptions applies to the act in question.[340] However, the structure of the Act might suggest that the permitted acts can only be relied upon in civil actions, but it is suggested they could also apply equally in the context of criminal offences,[341] since if the act was permitted it cannot have been an infringement or an offence.[342]

In the US, 17 U.S.C. §.109(d) is considered to have a similar effect to s.28(1) in the UK. §109(d) enables the direct omission of licenced works statutorily from the regulation of the first sale doctrine. This can be said to be a direct endorsement of the notion that the first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as a licensee.[343]

By implication, both s.28(1) and §.109(d) can mean that copyright protects works in the case of a copyright violation, can also create further rights under contract that are particular to the terms of that agreement. This creates what can be fairly deemed to be a two-tier system of protection. To explain, in *Capitol Records*[344] the court rejected the arguments regarding §109(a) which suggested that policy required reconsideration of the first-sale doctrine in light of technological advances.[345] Instead, the court held that the fist-sale doctrine did not apply because users did not upload and transfer their phonorecord. Instead, they uploaded and sold a reproduction of the phonorecord, the first sale did not protect them from infringement suits as these acts were, for technical purposes, reproductions, and so were classed as distributions of reproductions.[346]

---

[339] See *Beloff v Pressdram Ltd* [1973] F.S.R. 33; *Distillers Co (Biochemicals) Ltd v The Times Newspapers Ltd* [1975] Q.B. 613; *The Longman Group Ltd v Canington Technical Institute Board of Governors* [1991] 2 N.Z.L.R. 574 (High Court of NZ).

[340] Sillitoe v Mcgraw Hill Book Co [1983] F.S.R. 545 at 558.

[341] CDPA 1988 s.107; See also, Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at Ch.23.

[342] CDPA 1988 s.107(1)(e), (2)(b), (3)(b). Also see *Thames & Hudson Limited v Design and Artists Copyright Society Limited* [1995] F.S.R. 153.

[343] 17 U.S.C. §.109(d) (1976).

[344] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[345] Ibid at 655.

[346] Ibid at 655.

This was because ReDigi was held to be (distributing reproductions) as it was materially impossible, under the law of physics, for the same material to be distributed and exist in two places at once at the same time.[347] Thus, it was held to be a reproduction even if the material was deleted. This was because the new file could not have been transferred without first being copied (and thus making a new reproduction) of that file. By implication, this brought a second into existence, (which was then distributed) to another. Consequently, at those precise moments, there was both reproduction and subsequent distribution, which breached §106(3) of the US Copyright Act (1976).[348]

There are similarities in the decisions of *Capitol Records*[349] (and) *Allposters*[350] regarding the perceived distribution. This because in both instances, it was held that the acts, although slightly different, were still nonetheless considered to be 'reproductions' and this can be seen as a somewhat predictable conclusion in the copyright legal area. For instance, courts in the US have consistently held that the unauthorized duplication of digital music files over the Internet infringes a copyright owner's exclusive right to reproduce;[351] whilst in the UK, one factor that is common to all works is that infringement takes place whether the copy is permanent, transient, temporary, or even incidental to some other use of the work.[352]

Therefore, subsequent transfers were held unlawful under their respective copyright laws as they were considered to breach the exclusive right of distribution. The significance of this is that there is nothing in these instances that would prevent a breach of contract claim if, for example, no breach was found in copyright as there is no exhaustion of the exclusive rights. Thus, contracts could still impede future transfers per se because there will be no distribution and this then reinforces the

---

[347] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013) 6 [4] citing *London-Sire Records, Inc v John Doe 1* 542 F. Supp 2D 153 (D. Mass 2008).

[348] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013) 2 [5].

[349] Ibid.

[350] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015].

[351] *A & M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1014 (9th Cir.2001).

[352] See *England & Wales Cricket Board* v. *Tixdaq* [2016] *EWHC* 575 (Ch), [60]; See also, R. Arnold, 'Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of protection' [2011] 1 QMJIP 272.

applicability of the e-contract as the terms dictate the usage here.[353] This is argued to create a two-tier system of protection that sees copyright and contract increase the control copyright owners have over their works; whilst also acting as a potential safety net if copyright is inapplicable under this contractual fallback. This is because the increased use of licences on the internet and digital works will bind recipients through a contractual clause, whereby a legitimate reproduction could be prevented and the access agreement could bind all users who legitimately access the work.[354]

This is procured on the basis that digital consumers are not the owners of the content they receive, but mere licensees with a right to read, view, or listen to the work.[355] Ownership remains with the provider, and the maintenance of access depends on the consumer's compliance with the provider's terms. This is contended to be made worse by the fact that the sales pages generally fail to indicate that the transaction is a licence and not a sale. This is because typically, the contract governing the transaction when someone buys digital content means there is no transfer of title. Thus, the transaction becomes a "permission" that is usually "revocable" to commit some act that would otherwise be "unlawful" due to the agreement.[356] This is because the digital economy is a new economy based on the networking of human intelligence which functions on contractual control.[357]

Moreover, this is considered to be exacerbated in light of the developments (or lack of) regarding the enactment of the Digital Millennium Copyright Act 1998 (DMCA),[358] which was an attempt by the US to implement the World Intellectual property

---

[353] Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019).

[354] Griffin, J., 'The interface between copyright and contract: Suggestions for the future' [2011] European Journal of Law and Technology, Vol. 2, No.1.

[355] Mazzone, J., *Copyfraud and other abuses of intellectual property law* (Stanford Law Books, 2011), p.118.

[356] Black's Law Dictionary 1059 (10th ed. 2014) (on the definition of a license). Taken from: Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015). . Northwestern University Law Review, Vol. 109, No. 1, (2015) at 183.

[357] Tapscott, D., *The Digital Economy,* (New York: McGraw-Hill, 1996), p.xiii.

[358] To amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes.

Organisation treaties.[359] This was a report, (Section 104), that was directed at the Register of Copyrights by the Assistant Secretary for Communications and Information of the Department of Counsel. This joint report to Congress was about the relationship between existing and emergent technology and the operation of sections 109 and 117 of Title 17, United States Code.[360]

The report refused to expand §.109 on the basis that the issue was not deemed to be a "compelling" one.[361] These findings were furthered by the US copyright office comments in the report where it highlighted that it would decline to endorse a "digital first sale doctrine" which would modify the US Copyright Act to exempt a digital copy forwarded to one recipient so as long as the original was deleted.[362] The reasoning primarily centred around economic and practical difficulties such as the lack of assurance that users would delete their pre-existing copies, and that that the first sale doctrine's impact on normal exploitation of the work is far greater than a physical copy first sale doctrine,[363] a point that was reiterated in *Capitol Records,*[364] and the recent CJEU *Tom Kabinet* case.[365]

Lessig would argue that this is because we live in a technological environment that is "ill-suited" to fix the flow of internet innovation. The introduction of new technology disrupted old markets, particularly copyright owners who sold through well-established distribution mechanisms, and these have now been enhanced by contractual control.[366] Thus, Griffin notes that it is the desire of the capitalist market to gain access to information usage. Due to this, he writes that capitalism has attempted to "obtain

---

[359] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). Available at <https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> accessed: 19/11/2018.

[360] Ibid.

[361] Ibid.

[362] Ibid.

[363] Ibid.

[364] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013) – the court highlighted that the justifications of the first sale doctrine in the physical world could not be imported into the digital domain.

[365] Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* v *Tom Kabinet Internet BV and Others* 19 December 2019 (Accessed: 11/01/2020) at [48], [58].

[366] *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.* 380 F.3d 1154 1167 (9th Cir. 2004).

regulation of the flows of information" through contract in the digital world and these have now become "reflected in the semantic and structural paradigms of the state."[367]

The reason for this is contended to stem from the fact that law is but an element – a crucial one – in the continuing social struggle, a socioeconomic phenomenon, its principles biased towards socioeconomic elites.[368] Thus, the combination of increased usage of licences on the internet and an increasing amount of individuals choosing to access information this way, sometimes with no other option,[369] means that more recipients will become subject to these copyright style contractual clauses. As such, it seems that "copyright industries' ability to sidestep copyright limitations will increase dramatically as more and more expression becomes available primarily online"[370] and disrupt the balance that copyright tries to achieve.[371]

4.5.1 Has the scope of the terms of agreements been increased as a result of developments in copyright law?

It is predicted that digital contracts will give rightsholders the ultimate say in what users can do with the material they access. This is because failure to operate within the confines of a licence or obtain express agreement in which to do a particular act is likely to fall contrary to copyright law itself under the current system.

To explain, Professor Kretchmer provides an example. He writes that:

> "Suppose Mr. A, an author, has written a book to get published and marketed. He negotiates with publisher P for that purpose. A and P agree on a publishing contract, which stipulates that A will supply the work to P for the purpose of printing and sale, and that P will pay a specific royalty to A for each book that

---

[367] Griffin, J., 'A call for a doctrine of information justice' [2016] Intellectual Property Quarterly.

[368] Morton Horwitz, 'Transformation of American Legal History', Vol. 23, Issue 4 23 William & Mary Law Review 663 (1982).

[369] See Rifkin, J., *The Age of Access* (Penguin Books, London, 2000).

[370] Netanel, N.W., *Copyright's Paradox* (Oxford University Press, 2008) p.70

[371] E.g. – "We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded." – Per Lord Mansfield in *Sayre* v *Moore* (1785) at 362.

is sold. Upon signing of the contract, A duly supplies the work to P. However, at the end of the day, two things emerge; (1) even though there have been sales of the book, P has not paid any royalties to A, and (2) it has been detected that a second publisher, Q, has also produced and sold copies of the same book. Q has no contractual relationship with either A or P. What can A do? I would argue that A can sue P for breach of contract, and A can sue Q for breach of copyright law. In principle, A cannot sue P for breach of copyright law, since the contract between them gives P the right to produce and market the book."[372]

It is argued that the issues surrounding 'exhaustion'[373] and 'first sale'[374] that are discussed above,[375] have added to this scenario in the digital context due to the current rules regarding digitally transferred articles.[376] Specifically, this suggests that in the same scenario (but one which is procured by way of a digital license), (A) would be able to sue (Q) for breach of the exclusive copyrights of reproduction in both the UK,[377] and the US,[378] as well as unauthorised distribution.[379] This also includes the potential to sue both (P) and (Q) for a breach of contract by permission being presumed by

---

[372] This was an example taken from research carried out by the Strategic Advisory Board for Intellectual Property Policy, but was subjected to heavy amendments for contextual purposes. For more information, see Professor Martin Kretchmer, Associate Professor Derclaye, E., Favale, M., Watt, R., 'The Relationship Between Copyright and Contract Law' (2010), p.18 http://eprints.bournemouth.ac.uk/16091/1/contractlaw-report.pdf accessed: 11/4/2018.

[373] See this chapter 4.4.2

[374] See this chapter 4.4.1

[375] See this chapter at 4.4 and 4.5 respectively.

[376] For more information, see this chapter at 4.2, 4.4, 4.5 respectively.

[377] See s.18 CDPA in the UK, Info Soc., Art. 4(2);

[378] See §106(3) of the US Copyright Act (1976); See also *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730 (1989) (commissioning party owned the sculpture but not copyright, artist permitted access to the sculpture in order to access his copyright; *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[379] Case C-456/06 *Peek & Cloppenburg SA v. Cassina SpA,* [2008] ECR I-2731(ECJ); Also, due to the lack of 'permission' it is likely that this could be treated as an unauthorised reproduction and distribution, but then the initial distribution in the physical world would suggest no, but licensed transfers in the digital area are likely to be judged/treated differently - *Art & Allposters,* Case C-419/13, EU:C:2015;27 (ECJ); In the US, see *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

mere ‘access’ to the work that is often the subject of a ‘click-wrap’ license that has to be ‘agreed’ to before the material being accessed. This is considered to be the case as the courts generally enforce these click-wrap agreements in both the US[380] and the UK.[381] This is primarily according to the operationality of contractual privity in the digital world.[382]

This is contended to reinforce the notion that there is now a two-tier system of protection and control over intangible assets, particularly in the digital music industry. This is argued to be further fuelled by the recent CJEU decision of *Martin Hass* v *Ralf Hütter*[383] (referred from the German Federal Court of Justice). This considered, amongst other things, whether it is an infringement of a phonogram producer’s exclusive right under Article 2(c)[384] to reproduce that phonogram if someone takes very short snatches from the phonogram and transfers them to another phonogram.

For clarity, ‘sampling’ was described in the case, by AG Szpunar,[385] as:

> “the process of taking, by means of electronic equipment, a portion or sample (hence the name of the technique) of a phonogram for the purpose of using it as an element in a new composition in another phonogram. When reused, those samples are often mixed, modified and repeated in a loop in such a way as to be more or less utilized in the new work…..those samples may be of

---

[380] See e.g., in the US – *Specht* v. *Netscape Communications Corp.,* 206 F.3d 17, 22 n.4 (2d Cir 2002).

[381] For the UK, see C-322/14 *Jaouad El Majdoub* v *CarsOnTheWeb*. Deutschland GmbH [2015] (21 May 2015) (Note that the decision in the *CarsOnTheWeb* case is a bit of a double-edged sword insofar as it confirms the enforceability of click-wrap agreements in the business to business context will be welcomed by many online businesses; Yet, it also implies that businesses need to be alert to the danger of inadvertently agreeing to unusual or onerous contractual terms when purchasing goods or services online).

[382] See this chapter at 4.4.1

[383] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); *Pelham GMBH v Hutter* (EU:C:2018:1002): 29 July 2019; EU:C:2019:624; [2020] F.S.R.6.

[384] Directive 2001/29/EC.

[385] For further details of AG Szpunar’s commentary on these points see - Bryant, C. and Heeley, R., ‘The Kraftwerk case—does a two-second sample infringe copyright?’ [2019] 30 Ent. L.R. 125-128.

different lengths; of a duration of between less than a second and several tens of seconds."[386]

Article 2(c) provides that phonogram producers have the exclusive right to utilize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole *or in part* of their phonogram. This question is important in determining what precisely is meant by 'reproduction in part'.[387]

From the outset in his Opinion, the AG was confident in his submission that:

> "It goes without saying that such an act amounts to reproduction within the meaning of Article 2 of Directive 2001/29, which concerns...any 'direct or indirect, temporary or permanent reproduction by any means and any form, in whole or in part' of subject matter. Sampling (generally) involves the direct and permanent reproduction, by digital means and in digital form, of a portion or sample of a phonogram. It therefore...[is]...quite clear that that act amounts to an infringement of the right of producers of the phonogram in question to authorise or prohibit such a reproduction made without their permission."[388]

The potentiality that sampling rights may be subject to a 'de minimis' (i.e. quantitative criteria) threshold was also considered in the case. This criterion stemmed from the earlier case of *Infopaq International*[389] where the court found that the literary works at issue, in that case, consisted of words which, considered in isolation, were not protected by copyright. Only their original arrangement was protected as an intellectual creation of the author of the work.[390] On this subject, in *Martin Hass* v *Ralf Hütter,* the court noted that "the author of a literary work cannot appropriate common

---

386 Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [1].

387 Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [6].

388 Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [26].

389 Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465).

390 Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraphs 44 to 46); In the UK, see *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 W.L.R. 2416, citing as an example *Kenrick & Co v Lawrence & Co (1890) 25 Q.B.D. 99*, adapted to apply to the post-*Infopaq* position.

words or expressions, in the same way, that a composer cannot claim an exclusive right over the notes or a painter a right over the colours."[391] The court highlighted that this did not, however, introduce any de minimis threshold in copyright law, as *Infopaq* still applied to long as the work was sufficiently original to constitute the authors own intellectual creation.[392]

Ultimately, it was ruled that that the reasoning in *Infopaq* did not apply to phonograms, thus ruling out the potentiality of any de minimis criteria being introduced here. This was because a phonogram was not considered to be an intellectual creation but rather a fixation of sounds, protected as an indivisible whole, incidentally requiring no "originality"[393] for a phonogram. This is because it is not protected as a result of its creativeness, but due to the financial and organisational investment. However, it was true that a sound or word could not be monopolised by an author. Yet, from the moment they are recorded, that same sound performed by a musician would fall within the scope of copyright and related rights.

The fact that the right of a phonogram producer is aimed at protecting his legitimate financial investment (i.e. protection of property against piracy) did not mean that the right did not also cover other exploitation, such as authorising or prohibiting sampling. It was also deemed incorrect to limit the legitimate financial interests of producers of phonograms to protection against the distribution or the communication

---

391 Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [29].

392 Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [28] citing Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraph 39 and paragraph 1 of the operative part).

393 For a general account of what originality is, see 'EU legislation and case law on originality: an overview' in Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), Part 4, Section A, IV; On the meaning of 'originality' in the context of Directive 2001/29/EC – see, *Infopaq International A/S v Danske Dagblades Forening (Case C-5/08) [2009] E.C.R. I-6569; [2009] E.C.D.R. 15*, noting that the same is true for databases and photographs. In Case C-145/10 *Painer v Standard Verlags GmbH* [2012] E.C.D.R. 6, this was expressly confirmed in respect of photographs.

of their phonograms as such to the public.[394] As a result, it seems that "even approximately two seconds"[395] of unlicensed sampling, from a phonogram is regarded as copyright infringement in absence of express authorization.

The case has been described as "music to the ears of phonogram producers" in the UK and EU.**[396]** This has created a scenario where culture is purchased by the "sip" rather than by the "glass."[397] Thus, licences can be said to be only accessible "to the owners of property and thus in effect support their very autonomy and power positions."**[398]** This is because even the smallest use of digital material must be subject to the express permissions of the rightsholder, as it is protected "in whole or in part"**[399]** despite Directive 2001/29 [having] no references to the protection of a substantial part of a phonogram.

Hopton notes that another point of interest is how the English courts will choose to apply this judgment. Unlike art.2(c) of the Copyright Directive which refers to "whole or in part", the Copyright, Designs and Patents Act 1988 refers to "whole or any *substantial* part."[400] He suggests, on the basis, that if national law cannot embody

---

[394] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [30], [31], [32], [33]; See also, Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 *CMLR* (44) 1039*Art & Allposters,* Case C-419/13, EU:C:2015;27 (ECJ); Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* v *Tom Kabinet Internet BV and Others* 19 December 2019, at [48], [58].

[395] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [14] and [25]; Bryant, C. and Heeley, R., 'The Kraftwerk case - does a two-second sample infringe copyright?' Ent. L.R. [2019] 30(4), 125-128; In the US, see Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 200 *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007); *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016); See also, Bartlett, C., 'Bridgeport Music's Two-Second Sample Rule Puts the Big Chill on the Music Industry', 15 DePaul J. Art, Tech. & Intell. Prop. L. 301 (2005).

[396] <https://intellectualpropertyblog.fieldfisher.com/2018/ag-opinion-brings-music-to-the-ears-of-phonogram-producers> accessed: 02/01/2019.

[397] Boyle, J., *The Public Domain (*Yale University Press, 2008), p.57

[398] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.730.

[399] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben* [2018] at [38].

[400] Hopton, P.,'Advantage Kraftwerk in long running copyright dispute: Pelham (C-476/17) (also known as the Metall auf Metall case)' Ent. L.R. [2019], 30(8), 279-281 at [281]; ("he question

new exceptions,[401] then it must follow that the English courts will interpret English law in line with this judgment and deem that a sample recognisable to the ear is a "substantial part" and an unrecognisable sample is not. Yet, in a post-Brexit world, of course, this might not necessarily always be the case.[402]

The US decision by the Sixth Circuit in *Bridgeport Music v. Justin Combs Publishing*,[403] which has attracted criticism,[404] confirmed copyright infringement liability against Sean 'Diddy' Combs and his Bad Boy record label. This was also on the basis that there was no de minimis exception to claims alleging copyright infringement of a sound recording. Significantly, the Biggie record sampled just 'five seconds' of horns from 'Singin' In The Morning', but Diddy nonetheless had failed to obtain a licence for its use.

Following this, the song's copyright owners Bridgeport Music and Westbound Records sued for infringement, with a US jury awarding $733,878 in damages to Bridgeport, and punitive damages of $3.5 million to Westbound. However, in allowing common sense to prevail, the trial judge overturned the award, ruling instead that Bridgeport should receive $150,000 in statutory damages, with Westbound receiving $366,939 in actual damages. However, despite what may be deemed a small victory in the context of sampling costs for creators, when broken down, the sum works out at over $100,000 per second of music.[405]

---

whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken.") - *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 W.L.R. 273 per Lord Reid at [276]; (whether the part taken is substantial must be determined by its quality rather than its quantity – *Designers Guild v Williams* [2000] 1 WLR 2426, 2426 per Lord Millet; See also, *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 W.L.R. 273 per Lord Pearce at [293].

[401] For instance, Directive 2001/29/EC provides for numerous exceptions – Case C-467/08 *Padawan SL v SGAE,* [2010] *ECR* I-10555, [AG43].

[402] Hopton, P.,'Advantage Kraftwerk in long running copyright dispute: Pelham (C-476/17) (also known as the Metall auf Metall case)' Ent. L.R. [2019], 30(8), 279-281 at [281].

[403] *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007).

[404] Mueller, J., 'All Mixed Up: Bridgeport Music v. Dimension Films and de Minimis Digital Sampling', Indiana Law Journal*,* (2006) 81, 435-63; Somoano, M.K., 'Bridgeport Music Inc. v. Dimension Films: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?' Berkeley Technology Law Journal*,* (2006), 21, 289-309.

[405] <http://www.soundonsound.com/sound-advice/sample-clearance> accessed: 21/6/2016.

Yet, it is important to note that the *Bridgeport* decision has been altered to some extent by the US Ninth Circuit, in *Salsoul* v. *Ciccone*.[406] Here, it was ruled that the de minimis exception applies to infringement actions concerning copyrighted sound recordings, as it applies to all other copyright infringement actions. However, Judge Silverman in the case, dissenting, wrote that the court should follow the Sixth Circuit and hold that use of an identical copy of a portion of a copyrighted fixed sound recording is an infringement.[407] There have also been no further rulings.

It is asserted that the current legal stance creates not only the creation of a two-tier system, but that contracts could allow reproduction, or distribution, to be 'personalised' under the agreement with the background support of copyright as a safety net. This is because a lack of express permission is likely to amount to an 'unauthorised' reproduction whether it is 'in part' or 'substantial' under the current system. It is also This is because cases are likely to hinge on the precise wording of the agreements to assess permission, as it seems that reproduction occurs irrespective of whether the user values the work for its expressive or communicative content.[408]

Moreover, there are likely to be a "great number of cases where the position is not clear-cut."[409] In turn, this is considered to naturally increase the issues here as it is likely that users will be even more reluctant to do acts that may be perceived as having the potential to operate beyond the confines of the agreement, or as Griffin would argue, the decision in *Martin Hass* v *Ralf Hütter*[410] may result in contracts being used in a manner that "restricts" creative re-uses.[411]

The consequence of legal uncertainty is that an extraordinary amount of creativity will either never be exercised, or never be exercised in the open, and could drive the

---

[406] *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016).

[407] *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016).

[408] See e.g.. J. Litman, 'Festischizing Copies', in R. Okediji (ed.), *Copyright in An Age of Limitations and Exceptions* (2017).

[409] Hopton, P., 'Advantage Kraftwerk in long running copyright dispute: Pelham (C-476/17) (also known as the Metall auf Metall case)' Ent. L.R. [2019], 30(8), 279-281 at [281].

[410] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018).

[411] Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, Ph.D. [2010] p.166.

process underground.[412] For purposes here, creativity is the ability of individuals to access works and also, their ability to use those works freely (either to create new works or distribute interesting pieces to others) without the prospect of legal reprisal when creating and producing new forms of culture that are transformative and socially valuable pieces.[413]

This is considered to be supported by the fact that these decisions[414] can be said to have transferability to those who licence music generally like the Spotify agreements above. This can increase the control rightsholders exert on a societal level, reducing the potential to derive maximum value from any works due to the contractual limits on usage and the uncertainty associated with them.[415] As such, any contravention of the incorporated terms and conditions within the agreement could mean users procure an unauthorised reproduction or distribution as they do not own the property they licence.

Ultimately, the effect of the decisions,[419] notwithstanding s.28(1), and §109(d), is that not only do copyright owners get to limit future distributions of their works, and on their chosen terms when intangible works are licenced; but also, this means that an act that would otherwise be permitted by copyright can be restricted by contract. For example, if a contractual clause states that no copy of the work in question may be made, regardless of how much, and then a copy is made, then a breach of contract will arise regardless of whether or not the act constitutes a valid action within copyright. Consequently, if a work was only made available digitally under the current rules, then

---

[412] Lessig*, Free Culture* (2004), p.185

[413] Werde, B. 'Defiant Downloads Rise From the Underground', (New York Times, 25 February 2004) in Rimmer, M., *Digital Copyright and the Consumer revolution: Hand of my iPod* (MPG Books 2007), p.134.

[414] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007).

[415] *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* [2009] FCA 799 (30 July 2009); Bright Tunes Music v Harrisongs Music 420 F. Supp. 177 (S.D.N.Y. 1976) – in Sharkova, K., 'The author, the fan and the in-between: in search of a copyright regime for the everyday creative' [2018] E.I.P.R. , 40(12), 784-796.

[419] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018).

a copyright owners decision to "discontinue any further transmissions of the work could well be effective to deny all access to the work."[420]

It asserted that current case law[421] serves to strengthen the terms of these digital agreements. This is because any usage that is considered to be outside of the agreement and thus lacking in the prerequisite authorization will be considered as likely to amount to unlicensed, and subsequently, infringing use. Moreover, although in an employment-type license concerning computer programs, in *SAS v SAS* [2020][422] the CJEU held that:

> "Directives 2004/48 and 2009/24 must be interpreted as meaning that a breach of a clause in a license agreement for a computer program relating to intellectual property rights of the owner of the copyright of that program falls within the concept of "infringement of intellectual property rights"...and that, therefore, that owner must be able to benefit from the guarantees provided for by th[ose] directive[s], regardless of the liability regime applicable under national law."[423]

The effect of this is submitted to create a situation where even if the activity is non-commercial, a secondary work utilising the loosely outlined protectable expressions of a song may still be considered to be interfering with the capacity of the original right holder to commercialise and make available through their own chosen means.[424] Therefore, it can be said that the basis for this system rests on the control of distribution, both contractually, and ensuring that goods remain 'undistributed' to procure the benefits discussed here.[425] However, the use of such a mechanism can

---

[420] Reece RA, *"The First Sale Doctrine in the Era of Digital Networks."*, (2003), 44(2) BC L Rev 577, p.630.

[421] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

[422] Case C-666/18 *IT Development v Free Mobile SAS* [2020] E.C.D.R. 7

[423] Case C-666/18 *IT Development v Free Mobile SAS* [2020] E.C.D.R. 7 at [49].

[424] Sharkova, K., 'The author, the fan and the in-between: in search of a copyright regime for the everyday creative' [2018] E.I.P.R. , 40(12), 784-796.

[425] For example, in *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013) at 6 [4] citing *London-Sire Records, Inc v John Doe 1* 542 F. Supp 2D 153 (D. Mass 2008); See also,

discourage re-use because access can be terminated at any time (e.g. if contractual terms regarding re-use are broken for instance) and the only way to access it is through an access mechanism.[426]

Many websites also contain standard terms and conditions of use which require users to waive rights that they would otherwise enjoy under copyright law which treat copyright limitations as "mere contractual default rules."[427] Thus, it is argued that this is not just the possession of private property, but also the direct coercion exorcised based on purely personal claims to authority.[428] This is because once copyright is characterized as a form of property, allowing for the scope of its exclusive privileges and exclusionary right to be extended with little regard for its underlying purpose via these contractual methods.[429]

As a result, the current imposition of digital contracts is argued to represent an "externalization of internality"[430] by copyright owners. This is because licenses arguably enable the individualized exploitation of their material where the licensor can decide their terms. These are reinforced by the weight of the law to "facilitate"[431] the

---

Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015] at [48]; See also, *Football Association Premier League and Others, EU:C:2011:631, Paras 107-109*; Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019) at [48].

[426] Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, Ph.D. [2010] p.166.

[427] Netanel, N.W., *Copyright's Paradox* (Oxford University Press, 2008) p.70.

[428] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.731; To see how copyright is enforced primarily through the courts, including the environment of control that this creates in capitalist society, see chapter 3 *generally*.

[429] Balganesh, S, 'Debunking Blackstonian Copyright' 118 Yale Law Journal [2009] 1126-1181, http://www.jstor.org/stable/40389483?seq=1#page_scan_tab_contents accessed:21/11/2015; Netanel also agrees that the expansion of copyright has been highly influenced by the factors permeated into the copyright system by the property concept, see Netanel, N.W., *Copyright's Paradox* (Oxford University Press, 2008) p.6.

[430] Demsetz, H., 'Toward a Theory of Property Rights', 57 Am. Econ. Rev. Papers & Proc. 347 [1967].

[431] Durkheim gives an interesting account on how contracts facilitate "contractual solidarity" to procure individual action and how the importance of contract increases depending on the scale of the transaction and is particularly pertinent to twentieth-century development – S. Lukes and A. Scull,

exploitation of their property in a manner that goes beyond that which was originally contemplated in the Statute of Anne 1709.[432] This means that there is now a more common factual scenario where "the use of contractual clauses has a greater impact because the *in rem – in personam* distinction is of less importance because the [digital] information has to be accessed on an in personam basis."[433]

Significantly, this is postulated to imply that contracts which bind those who come to them in such a manner make copyright style "exclusivity" relevant only when it is otherwise required by owners.[434] For example, when someone is in breach of an agreement they can be found liable for copyright infringement as the material relates to copyright content. However, licences in the digital format can be capable of going beyond the copyright legal doctrine as such agreements are no longer limited by copyright and statutory limitations like the first sale[435] and exhaustion doctrines.[436]

It is postulated that this creates an inherent level of inequality that is successfully hidden by the belief in freedom of contract[437] and opportunity in capitalist society[438]

Durkheim and the Law (2013), chapter 8; Interestingly, Durkheim neglects the concept of the state, regarding it as important but refuses to analyse why it is important and what interests it serves.

[432] "An act for the Encouragement of Learning, by Vesting Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein Mentioned"- Statute of Anne 1709. See: <http://www.copyrighthistory.com/anne.html> accessed:13/10/2014.

[433] Griffin, J., 'The interface between copyright and contract: Suggestions for the future' [2011] European Journal of Law and Technology, Vol. 2, No.1.

[434] Malevanny, N., 'Online Music Distribution – How much Exclusivity is Needed?: A Study of International, European, German and U.S. Copyright Systems and Their Objectives', Springer-Verlag (2019).

[435] *Quality king Distributors, Inc.* v. *L'Anza Research International. Inc.* 523 U.S. 135 [1998] - (Reaffirming *Bobbs-Merril* where it outlined that, "the first sale doctrine would not provide a defence to...any nonowner such as a bailee...[or] a licensee." at [146-7]).

[436] M Savič, 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378

[437] Epstein, R.A., Contracts Small and Contract Large: Contract Law Through the Lens of Laissez-Faire' Coase-Sandor Institute for Law & Economics [2007] Working Paper No. 49.

[438] Tushnet, 'Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies' 57 Texas Law Review, 1307, 1347-1350 (1979) *in* Morton Horwitz, 'Transformation of American Legal History', Vol. 23, Issue 4 23 William & Mary Law Review 663 (1982).

where access is continually subject to the terms of their respective licence agreements. Considering this, it is fair to say that the predictions of Cornish have become prophetic in the current environment. In 2004, writing in relation to e-contracts and how they will be governed within wider copyright law, he predicted that:

> "the legal machinery will be required primarily to underpin the e-contracts...[c]opyright will not even be needed to define the material in which there is a property right to be licenced. The contract can relate to material that is outside of any copyright of an author or producer...and can require payment even where copyright law creates an exception, such as downloading for browsing, detailed private study, or criticism."[439]

It has been argued that contracts are considered to have been central to the music industry in the digital age. It is posited that will likely remain the case as they are a key method in which extended control can be retained over digital works. However, such items can be reasonably said to procure their strength from their non-physical elements and how the law approaches the regulation of such items in the digital world, it can be said that the current issues will remain something of an intellectual struggle for some time. For instance, without requiring an element of physicality, this could open the doors for the establishment of digital music file-sharing systems based on lawful digital transfers, (although this seems unlikely),[440] potentially resurrecting the sites like Napster and Grokster,[441] but this time with a solid legal foundation.[442]

---

[439] Cornish, W., Intellectual Property: Omnipresent, Distracting, Irrelevant (Oxford University Press 2004), p.55; *Pro Sieben Media v. Carlton UK Television* [1998] *FSR* 43, 48 (Laddie J); See also, the more liberal interpretation of CDPA 1988, s.30(1) in *Pro Sieben Media v. Carlton Television* [1999] *FSR* 610, 614 (Walker LJ).

[440] *Polydor Ltd* v *Brown* [2005] EWHC 3191 (Ch); *A&M Records v. Napster, 239 F.3d* and *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct 2764 (US Supreme Court, 2005); *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y 2013).

[441] For more information, see the discussion in chapter 2 at 2.6 *generally.*

[442] <http://www.ipwatchdog.com/2017/10/11/digital-resale-copyrights-second-circuit-wont-buy/id=88965/ accessed: 03/02/2019.

It is hypothesised that the current approach has seen the courts interpret contract law to benefit "commercially sophisticated insiders"[443] which has "operat[ed] to the detriment of consumers."[444] This is considered to provide a possible explanation as to why there has been such a reluctance (or opposition) to apply the first sale and exhaustion doctrines to the digital world, which would procure secondary markets.[445] This is because such markets would conceivably benefit consumers as they could partially reimburse themselves after they are finished with the product, whilst at the same time, a lawful acquirer will be likely to obtain it cheaper. This subject has been described as a "hot topic"[446] and is supported by Stevens, who argues that a secondary economy would create reduced prices,[447] and some argue that it may even serve to increase the legitimacy of copyright law.[448]

---

[443] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [28].

[444] M.J. Horwitz, 'The Transformation of American Law' 1780-1860, (London: Harvard University Press, 1977), p.192; D. Sugarman, (1980), 7 Brit. J. Law & Society, 297; See also, W. Holt, 'Molton Horwitz and the Transformation of American Legal History' William and Mary Law Review, Vol. 4, 663-723.

[445] Stevens, J., 'The secondary sale, copyright conundrum – Why we need a secondary market for digital content.' (2016) Australian Intellectual Property Journal, 26(4), pp.179-194.

[446] Phillips, J., 'Canvassing Opinion: a guest post on Art & Allposters' (September 11, 2014), The 1709 Blog,http://the1709blog.blogspot.nl/2014/09/canvassing-opinion-guest-post-on-art.html ; also 'Which is the CJEU copyright case to look most forward to? Probably Art & Allposters' (August 12, 2014), The IP Kat Blog, http://ipkitten.blogspot.nl/2014/08/which-is-cjeu-copyright-case-to-look.html [Both accessed June 23, 2018].

[447] Stevens, J., 'The secondary sale, copyright conundrum – Why we need a secondary market for digital content.' (2016) Australian Intellectual Property Journal, 26(4), pp. 179-194; See also, *inter alia* Landes W., and Posner, R., 'An economic analysis of copyright law'18 [1989] Journal of Legal Studies 325; Breyer, S., 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs', 84 Harvard Law Review 281 (1970); Demsetz, H., "Economic, Legal and Political Dimensions of Competition, North-Holland Publishing Company, Amsterdam (1982).

[448] Dootson P and Suzor N, 'The Game of Clones and the Australian Tax: Divergent Views about Copyright Business Models and the Willingness of Australian Consumers to Infringe' [2015] 38(1) UNSW Law Journal 206, at 208.

Mysoor suggests that a reasonable solution could be to use the "doctrine of implied licence."[449] This is to help address what she regards as the conflation of the complexities of exhaustion by regarding the statutory principle of exhaustion itself as a licence implied by a statute into a transaction because certain circumstances, i.e. certain policy reasons, are satisfied. In this sense, implied licence would be used to reframe the context within which the statutory exhaustion takes place under an "Implied Licence Framework for Exhaustion."[450]

Yet, the reforms[451] discussed in chapter 5[452] aim to help counteract these issues by creating the possibility of producing cheaper works to lessen the severity of such items which could decrease costs throughout copyright.[453] This would deal with the need to have such an implied licence framework as the proposals could counteract this as they provide a framework designed to encourage creative re-uses under a legislative scheme that also deals with contracts.[454] This is done by reducing the cost of production through placing a temporary limit on the price that can be charged for a copyrighted item, regarding both sale and re-use[455] and could also facilitate the reduction in prices advocated by Stevens.

---

[449] The "implied license" doctrine is relatively limited in relation to intellectual property. Implied licenses are often what ends up being asserted where there are gaps in existing contractual relationships. It is a way of articulating the subjective (or even objective) intent of the parties involved. Sometimes "implied license" is used as a way of superseding or bypassing explicit contract provisions (or filling in gaps where contract language is vague or poorly framed). Simply put, an implied license is an unwritten license which permits a party (the licensee) to do something that would normally require the express permission of the owner (the licensor). Implied licenses may arise as a consequence of actions by the licensor that a reasonable person would believe (including the licensee) that they have the necessary permissions.

[450] Mysoor, P., 'Exhaustion, non-exhaustion and implied license', International Review of Intellectual Property and Competition Law [2018].

[451] For a brief overview, see chapter 5 at 5.3.

[452] See chapter 5 at 5.5 generally.

[453] For more information, see chapter 5 at 5.5.3(a).

[454] For more information, see chapter 4 at 4.8 and chapter 5 at 5.4.1(c).

[455] On re-use, see chapter 5 at 5.4.1(b) and 5.4.1(c).

4.6 How the current approach saved the music industry?[456]

> "File-sharing tore apart the music industry business model, destroying over half its value in revenues; to now, it looks as though the internet may have resurrected the business model it almost killed with fee-based subscription streaming generating 100m paying subscribers worldwide.[457]

The expansion[458] of subscription services like Spotify[459] is argued to have been procured by the current licensing approach. This has seen commentators like Jimmy Lovine, former CEO of Interscope Records, to go from remarking the music industry as "dead"[460] to proclaiming that the only solution for the music industry is "digital subscription, because without it, there is no business."[461]

Yet, before this, particularly during the file-sharing days, the music industry was referred to as a "disaster"[462] until "music streaming services, like Spotify, [took] music out of th[ose] dark days."[463] This is because as revenues declined and music companies lashed out, they began legal battles with those who illegally downloaded music and invested in campaigns to try to teach young people the value of intellectual property.[464] However, the growth of licensing changed this and streaming breathed life

---

[456] <https://www.theguardian.com/music/2018/apr/24/weve-got-more-money-swirling-around-how-streaming-saved-the-music-industry> accessed: 21/01/2019).

[457] Nicolaou, A., 'How streaming saved the music industry' The Financial Times: January 16 2017. available at: https://www.ft.com/content/cd99b95e-d8ba-11e6-944b-e7eb37a6aa8e accessed: 10/05/2017).

[458] <https://www.telegraph.co.uk/technology/2019/04/29/spotify-hits-100m-premium-subscribers-international-expansion/> accessed: 21/01/2020); See also the discussion in chapter 2 at 2.6.

[459] <https://www.bbc.com/news/av/business-22164268/spotify-s-global-expansion-plans> accessed: 23/01/2020.

[460] Fricke, D., 'The Main with the Magic Ears' *Rolling Stone*, April (2012) in Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.121.

[461] Ibid.

[462] <https://www.theguardian.com/music/2018/apr/24/weve-got-more-money-swirling-around-how-streaming-saved-the-music-industry> accessed: 21/01/2019).

[463] Ibid.

[464] <https://www.cnbc.com/2017/02/24/prince-didnt-like-streaming-but-it-could-be-a-big-boost-to-his-estate-anyway.html> accessed: 12/11/2018); See also, the discussion in chapter 2 at 2.3, 2.4, and 2.6.

back into what was perceived as a declining industry and has become *the* alternative to physical music, making up approximately one-quarter of all income for most content providers.[465]

Griffin suggests that the proliferation of these contractual methods which have enabled the proliferation of streaming under licensing has been because the issue has been "sidestepped"[466] in a capitalist system that "expands and intensif[ies] in response to the falling rate of profit."[467] This is based on the fact that licensing can be seen as an intensification of a pre-existing music market, through deliberate contractual governance that is designed to limit the amount of consumer freedom that would otherwise be previously available to tangible assets under copyright. This is because, in a capitalist society, property owners get over the potentiality of a crisis by both "forced destruction of new markets, and more thorough exploitation of old ones."[468]

The current approach minimises the amount that can be distributed (maximising scarcity) and this is contended to serve the purpose of intensifying the avenues of exploitation due to the limitations induced by contract under a relatively new business model. Yet, there are also concerns about whether being copyright is being used as a means of "censorship, a restraint on creativity, and a way of restricting the supply of music, and so on."[469] Notwithstanding this, it is asserted that online music has become an expanding market that will soon overtake conventional music sales in physical stores.[470] This is also considered to be a reason why streaming services such as

---

[465] McDaniels, Robb, 'Please Adjust Your Bet' *Billboard,* January 25 2014 in Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing, 2015) in Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.x.

[466] Griffin, J., 'The interface between copyright and contract: Suggestions for the future' [2011] European Journal of Law and Technology, Vol. 2, No.1

[467] Jones, G. and Roffe, J., *Deleuze's Philisophical Language* (Edinburgh University Press, 2009), p.152.

[468] Marx, K., *Selected Writings in Sociology and Social Philosophy* (Trans. By T.B. Bottomore, McGraw-Hill Paperbacks, 1956), p.143.

[469] Frith, S. and Marshall, L., *Music and Copyright* (2nd edn. Edinburgh: Edinburgh University Press 2004) , p.5.

[470] Wiebe, A., *Right Clearance for Online Music: Legal and Practical Problems from the Perspective of a Content Provider and Alternative Models* (Medien und Recht Publishing, 2014), p.1.

Spotify are overtaking downloaded music formats like iTunes which has seen a decline in the imitation offline shop “download-to-own”[471] model.

Instead, innovative services offer new kinds of digital experience (iTunes, Spotify, Deezer). Business models include downloads on a pay-per-act or pay-as-you-go basis (iTunes, Amazon, Nokia Music, Beatport), download on a subscription basis (Emusic), or streaming for free on an advertising basis and streaming on a subscription base (Spotify, Rhapsbody).[472] In turn, this has meant that purchases of online music and the number of subscribers to online streaming services are rapidly increasing.[473]

It is postulated that the contractual restriction in the current system creates a greater level of demand (and scarcity) for the protected item. This is because the instances where the user can act (and thus transfer via lending for example) without the prior consent of the copyright holder is diminished in the digital world. Correspondingly, the amount available generally can be said to decrease concomitantly due to limitation specifically provided for in the agreements, as material cannot be distributed as freely as in the tangible context without incurring liability.[474] However, this is contended to be exacerbated by the lack of applicability regarding the first-sale and exhaustion doctrines respectively.[475] This would mean that any contravention by distribution

[471] <https://www.theguardian.com/media/2017/jan/05/film-and-tv-streaming-and-downloads-overtake-dvd-sales-for-first-time-netflix-amazon-uk> accessed: 21/08/2019).

[472] Dang N. G., Dejean, S., & Moreau, F. (2012). Are streaming and other music consumption modes substitutes or complements? http://ssrn.com/abstract=2025071 accessed:12/08/2019); Sebastian Felix Schwemer, *Licensing and Access to Content in the European Union: Regulation between Copyright and Competition Law* (Cambridge University press, 2019).

[473] Wiebe, A., *Right Clearance for Online Music: Legal and Practical Problems from the Perspective of a Content Provider and Alternative Models* (Medien und Recht Publishing, 2014), p.3; See also, Dang N. G., Dejean, S., & Moreau, F. (2012). Are streaming and other music consumption modes substitutes or complements?

[474] In the UK see s.28(1) CDPA 1988; In the US, see 17 U.S.C. §109(d); For more information, see this chapter at 4.5.

[475] See this chapter at 4.4.1 and 4.4.2 respectively.

would generally be viewed as a breach of contract or breach of the distribution right under UK[476] and US law.[477]

This had led to calls for a secondary market for digital goods on public policy grounds.[478] There have been further calls for a specific doctrine to accompany the existing legal provisions as a result of the inability to invoke the previous doctrines under a proposed "digital transfer" doctrine.[479] This would allow consumers to do with electronic copies what they have long been able to do with physical ones[480] which has been a consistent "problem" in the digital age.[481] For example, if someone desires to resell, lend, or give away e-books or digital content to another, all that person has to do is hand over his Kindle full of e-books. But this action would violate the Kindle Store Terms of Use and is thus not a viable solution.[482]

---

[476] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* v *Tom Kabinet Internet BV and Others* [2019].

[477] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y 2013); Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015].

[478] Stevens, J., 'The secondary sale, copyright conundrum – Why we need a secondary market for digital content.' (2016) Australian Intellectual Property Journal, 26(4), pp. 179-194.

[479] Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015). . Northwestern University Law Review, Vol. 109, No. 1, (2015). Available at SSRN: https://ssrn.com/abstract=2744447 (Accessed: 14/09/2018); (Reis proposes a secondary digital market place for digital articles in the US system to ensure that goods maintain some economic value to the transferee and will inevitably provide cheaper access to secondary users).

[480] Villasenor, J., 'Rethinking a Digital First Sale Doctrine in a Post-Kirtsaeng World: The Cause for Caution' Competition Policy International, May (2013).

[481] Clark. D. A., 'Kirtsaeng and the First Sale Doctrine's Digital Problem', 66 Stan, L. Rev., Online 17, 23 [2013].

[482] Reis, S., 'Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era' Northwestern Law Review (March 1, 2015). . Northwestern University Law Review, Vol. 109, No. 1, 2015. <https://ssrn.com/abstract=2744447>; *See, e.g.*, *Kindle Store Terms of Use*, Amazon (Sept. 6, 2012), <http://www.amazon.com/gp/help/ customer/display.html?nodeId=201014950 [http://perma.cc/ST4U-N53K]>; Baker, N., 'A New Page: Can the Kindle Really Improve on the

Therefore, contracts, although principally a way of controlling how a work is exploited, are suggested to have become a principal means of exploitation in the digital music industry. It is argued that this is because the individualistic ethos of contractarian legalism plays a necessarily central role in the advancement and stabilisation of a society based on commodities, exchange, and profit.[484]

This is based on the notion that parties to a contract often regard "legal enforceability" by the state as either "unnecessary" or as "self-evident" in capitalist society.[485] Thus, it is submitted that copyright owners are using contracts to enforce their private will in a manner that operates through the state due to the reliance on the legal system itself.

However, this operation is also on the "edge of the reach" of the State[486] because the rights prevent State-based copyright limitations from applying, meaning that private terms are enforced that exclude State regulation.[487] This is argued to be the reason why "ubiquitous contracting is now a fact of life"[488] because the capitalist economy requires the certainty and predictability of legal consequences provided by contracts for economic planning.[489]

As a result, it is suggested that these agreements are designed to create higher levels of consumer engagement with licenced digital music to the point that there is now a focus on increasing control over works rather than to secure means for consumption.[490] This is contended to be the reason why between 2009-2016, the music industry has witnessed a noticeable drop in 'ownership' of music and a

---

Book?' *New Yorker,* Aug. 3, [2009], 27 in Mazzone, J., *Copyfraud and other abuses of intellectual property law* (Stanford Law Books, 2011), p.119.

[484] K. Marx, *Capital: A Critique of Political Economy* 84, 87, 170, 176, 271, 398-399, 540, 574, 583-84, 624 (Int'l Pub. Ed. New York 1967) (1st ed. 1867) *in* Morton Horwitz, 'Transformation of American Legal History'*,* Vol. 23, Issue 4 23 William & Mary Law Review 663 (1982).

[485] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.756.

[486] Griffin, J., 'A call for a doctrine of information justice' [2016] Intellectual Property Quarterly; See also, chapter 2 at 2.5.

[487] For more information, see this chapter at 4.4 *generally*.

[488] Merges, R.P., *Justifying Intellectual Property* (Harvard University Press 2011), p.262.

[489] Horwitz, *The Transformation of American Law 1780-1860* (1977)*,* p.81; See also, the discussion in chapter 3 at 3.3; See also, the discussion in this chapter at 4.3.1

[490] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.91.

considerable rise in 'paid' (licensed) access.[491] Yet, the terms imposed are often inconsistent with the balance that copyright law aims for, with many, but not all, "conflict[ing] with the limited protection copyright law is [designed] to give"[492] and they restrict what can be done with the licenced material. As such, the predicted growth of the streaming industry outlined below[493] can be reasonably said to be attributable to the restrictive nature of these agreements. Specifically, this relates to their level of enforceability beyond normal copyright constraints which is procured under digital technology and the certainty that this offers for licensors.

4.7 How re-use has been affected in the current system: are licences a limitation on creativity?[521]

The overall result of these developments has been the manifestation of a legal environment where creativity[522] inadvertently suffers in the name of profit preservation and asset regulation for copyright holders in the digital age. For example, The Verve's single "Bitter Sweet Symphony", which used an unlicensed sample from an orchestral version of The Rolling Stones' song "The Last Time" was derived from the song (not the performance) and was deemed to infringe copyright. As such, The Verve were ordered to pay 100 per cent royalties to Mick Jagger and Keith Richards.[523]

Moreover, Paul's Boutique, which was released in 1989, by the Beastie Boys which pioneered the use of dense sampling with success. However, subsequent Beastie

---

[491] <https://copyrightandtechnology.com/2017/04/12/in-music-drm-grows-while-ownership-shrinks/> accessed: 12/09/2018.

[492] Lessig, L., *The Future of Ideas* (Vintage Books, 2001), p.257.

[493] See this chapter at 4.6.1.

[521] Creativity is expressed here as the ability of individuals/recipients to use the internet and other copyrighted goods, without fear of legal reprisal. The basic tenet of the claim is that even though the majority of recipient's activity may be perfectly legal under copyright, the argument is that the environment created by the current copyright system is preventing people from using cultural goods for fear of legal repercussions.

[522] It is important to note that this is not designed to be an exhaustive account of 'creativity' generally within copyright (as this is beyond the discussion of this thesis), but instead, to explain how the effects pertaining to the matters discussed within this chapter have consequentially restricted the ability of individuals for the reasons discussed.

[523] *Gowers Review* [2006] p.67.

Boys albums have not followed this same technique, because of high transaction costs necessary for a label to clear the work for release to avoid copyright infringement argues Griffin.[528] Significantly, in an extract from the Gowers Review (2006),[529] when questioned about how the change in the IP framework had affected their work, The Beastie Boys commented that:

> "We can't just go crazy and sample everything and anything like we did on Paul's Boutique. It's limiting in the sense that if we're going to grab a two-bar section of something now, we're going to have to think about how much we really need it."[530]

Regarding the US, the report[531] also outlined that in the case of *Bridgeport Music Inc. v. Dimension Films,*[532] it was ruled that samples which rise "to a level of legally cognizable appropriation" have to be licensed, but that *de minimis* sampling was still to be considered fair use. This was, however, reversed in the appeal to this case, where the court ruled the three-note sample was not fair use and that musicians should "get a license or do not sample."[533]

It is suggested that these items have been caused by an overly strong property regime[534] that is causing the underuse of resources.**[535]** This is because questions about ownership that create legal disputes can serve to stagnate the creative

---

[528] Steuer, E., 'The remix Masters', Wired, Issue 12-11 (2004) available at <http://www.wired.com/wired/archive/12.11/beastie.html> accessed: 17 August 2007 *in* Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, Ph.D. (2010).

[529] A. Gowers, *Gowers Review of Intellectual Property* [2006]. The report can be found at: http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf last accessed: 22/4/2015.

[530] A. Gowers, *Gowers Review of Intellectual Property* [2006], p.67.

[531] A. Gowers, *Gowers Review of Intellectual Property* [2006].

[532] *Bridgeport Music Inc. v. Dimension Films*, 230 F. Supp.2d 830, 841 (M.D. Tenn. 2002).

[533] *Bridgeport Music Inc. v. Dimension Films*, 410 F.3d 792, (2005).

[534] Griffin, J., 'Making a new copyright economy: A new system parallel to the notion of proprietary exploitation in Copyright' Intellectual Property Quarterly [2013].

[535] On 'property' and the role this has played in creating the current system, see chapter 3 at 3.2 and 3.3 *generally.*

development of resources.[536] Thus, transaction costs, holdouts, and rent-seeking may prevent otherwise economically justified conversions from taking place, even if the property rights are "clearly defined" and contracts are subject to the "rule of law" this can still procure underuse.[537]

However, Waelde and Schlesinger argue that while it cannot be argued that the payment of money per se cramps creativity, it is somewhat unlikely that all musicians with few resources will actively use the samples they would like in new productions.[538] Yet, the reforms propose to help eradicate this by decreasing the cost of works, amongst other things.[539] As a result, copyright law in the digital age can now be deemed to reflect a system that restricts creativity in the music industry, whereby it has become inherently focused upon the needs of rightsholders within the modern copyright system under proprietary rights that are contractually enforced. This has created an environment where the phrase "get a hit, get an infringement suit"[540] still remains as relevant today as it did in 2004 and can be said to be the result of laws that are looked upon as "commands" backed up by the state.[541]

---

[536] Heller, M.A. 'The Tragedy of the Anti-commons: Property in the Transition from Marx to Markets' Harv. L. Rev. 111, no. 3 (1998): 621-88; The essence of Heller's argument is that the conversion of property into private rights can cause under-use, as there is no system of regulation that guarantees its effective usage for wider society. As such, the article also argues that the difficulties of overcoming a tragedy of the anti-commons suggests that policymakers should pay more attention to the content of property bundles, rather than focusing just on the clarity of rights.

[537] Heller, M.A. 'The Tragedy of the Anti-commons: Property in the Transition from Marx to Markets' Harvard Law Review 111, no. 3 [1998]: 621-88; Hardin, G., *The Tragedy of the Commons*, 162 Science 1243 [1968].

[538] Waelde, C. and Schlesinger, P., 'Music and Dance: Beyond Copyright Text?' *(in) Scripted,* Volume 8, Issue 3, December 2011.

[539] For more information, see chapter 5 at 5.5.

[540] Hull, G.P., *The Recording Industry* (2nd eds, Routledge Publishing, 2004), p.63.

[541] Posner, R.A., *Economic Analysis of Law* (Boston: Little, Brown, 1972), p.393; For example, in *Bridgeport Music v. Dimension Films Inc*. 410 F.3d 792 at 801 (6th Cir. 2005) per Guy J it was stated that users should "get a license or do not sample"; Gowers *Review* (2006) p.67; For more information, see the discussion in this chapter generally, and in particular, parts 4.5, 4.6, respectively; See also, Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018); *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007); *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016);

The economically orientated characteristics of the discourse throughout this area have created the tendency for analysis' here to focus around methods of quantification,[542] where users are told to "get a license or do not sample."[543] However, it can be said that the law turned its attention away from the value of the labour embodied in the protected subject matter, to the value of the work itself. Thus, "value now tend[s] to mean the macro-economic value of the property..."[544] In turn, this is acting to restrict what individuals can do with the information, due to the costs associated with re-use and challenging a copyright claim, but also, by the nature of the terms that have to be agreed to prior to accessing digital works which is restricting access to works.

Becker and Posner also note that part of the reason for this is because the boundaries of fair use are ill-defined,[545] and copyright owners try to narrow them as much as possible, insisting that even minute excerpts need a license.[546] Although clearer defined boundaries concerning fair use may encourage more users to assert their rights at trial, it is equally contended that high clearance fees will continue to prevent the establishment of new online music services**[547]** and is something which the reforms

---

Savic, M., 'The Legality of Resale of Digital Content after UsedSoft in Subsequent German and CJEU Case Law' [2015] EIPR 414-29.

[542] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325.

[543] *Bridgeport Music v. Dimension Films Inc*. 410 F.3d 792 at 801 (6th Cir. 2005) per Guy J.

[544] Bently, L. and Sherman, B., *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge University Press, 1999), pp.174-195; See also, *Bamgboye and Another v Reed and Others* [2002] EWHC 2922 (QB) 2002 WL 31961976.

[545] See, e.g., *Princeton Univ. Press v. Mich. Document Servs.*, Inc., 99 F.3d 1381, 1387 (6th Cir. 1996) (rejecting fair use defence and finding copyright infringements when commercial copying service compiled and sold course packets to students at the University of Michigan containing large portions of copyrighted works); *Basic Books, Inc. v. Kinko's Graphics Corp.,* 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991) (rejecting fair use defense and finding copyright infringement by Kinko's in preparing course packets for students at New York schools), in Mazzone, J., 'Copyfraud' Brooklyn Law School, Legal Studies Paper No. 40; New York University Law Review, Vol. 81, [2006] at 1026..

[546] Posner, R., 'Do patent and copyright law restrict competition and creativity excessively?' Becker-Posner Blog (9/3/2012) <http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html> accessed: 22/3/2017.

[547] Balganesh, S., 'Copyright Infringement Markets' (February 13, 2013). Columbia Law Review, Vol. 113, 2013; University of Pennsylvania, Institute for Law & Economics Research Paper No. 13-7.

could deal with.[548] Thus, by restricting, either through high duties, or outright prohibition, the monopoly of the market is essentially secured to the industry employed in producing them.[549] The result of these developments is argued to suggest that creativity in copyright has been insufficiently considered in copyright law. This has led to restrictive contracts in the digital world that exempt otherwise limiting doctrines from being used, and where costly rights clearances for risk of infringement claims have increased this "permission culture."[550]

The perpetuation of this kind of environment also falls in direct contravention of the historic judgement handed down by Lord Mansfield, in *Sayre* v *Moore*.[551] In this case, he dissented that:

> "We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded."[552]

It is further asserted that the current digital environment is also operating in stark contrast to some of the seminal UK cases like the *Da Vinci Code*[553] and *Designers Guild.*[554] Concerning this, Griffin notes that the courts otherwise attempted to achieve a balanced level of protection against the ability of recipients to re-use element of the

---

<http://ssrn.com/abstract=2233065> accessed: 12/5/2015; Heins. M, & Beckles, T., 'Will Fair Use Survive? Free Expression in the Age of Copyright Control' (New York University Brendan Centre for Justice 2005) ("Threatening 'cease and desist' letters cause many people to give up their fair use rights").

[548] The reforms could help lessen the impact of such high fees by driving down costs – see the discussion in chapter 5 at 5.5.3(a).

[549] Smith, A., 'The Invisible Hand' (Penguin Books, 2008), p.54.

[550] Lessig, L., *Free Culture* (2004), pp.xiv-8.

[551] *Sayre* v *Moore* (1785) the report of which is available within *Cary* v *Longman* 1 East 357 (1801) at 358

[552] *Sayre* v *Moore ibid.,* at 362.

[553] *Baigent v The Random House Group* [2007] FSR 579.

[554] *Designers Guild v Williams* [2001] 1 WLR 2416.

work.[555] However, it is suggested that such attempts are still nonetheless restricted to those situations outside of the contractual scenarios and there will continue to be a presumption that all unauthorised uses are going to be the subject of infringement proceedings.[556]

This is because multimedia digital formats and online communication challenge the current practice and this has resulted in an assumption that all copyrighted materials must be used only with "permission."[557] Thus, creativity has been displaced as an overriding concern in modern copyright law[558] and the courts have become too influenced by the immediate arguments of the parties to a case.[559] The consequence of this has meant that there are now "strained" relations between creativity and commercial life.[560]

This is because we have entered a transition, a moment during which there is a shift from traditional forms of economic regulation to that of information regulation in capitalist society. Griffin also suggests that this transformation is occurring because of the infrastructure of the digital information age and the way in which it influences our

---

[555] Griffin, J., 'The interface between copyright and contract: Suggestions for the future' [2011] European Journal of Law and Technology, Vol. 2, No.1.

[556] Mazzone, J., 'Copyfraud' Brooklyn Law School, Legal Studies Paper No. 40; New York University Law Review, Vol. 81, [2006] at 1026: <http://ssrn.com/abstract=787244> accessed: 22/5/2015; Griffin, J. and Nair, A., 'Making Threats of Copyright Infringement' [2013] International Review of Law, Computers and Technology; See also, chapter 2 at 2.3.

[557] Aufderheide, P., Milosevic, T., and Bello, B., 'The impact of copyright permissions on the US visual arts community: The consequences of fear of fair use' SAGE Publications, [2015]; Whalen M, 'What's wrong with this picture? An examination of art historians attitudes about electronic publishing opportunities and the consequences of their continuing love affair with print' Art Documentation: Bulletin of the Art Libraries Society of North America [2009] 28(2): 13–22; Bielstein SM, *Permissions, a Survival Guide: Blunt Talk about Art as Intellectual Property* (University of Chicago Press, 2006).

[558] Bently and Sherman, *The making of Intellectual Property Law* (Cambridge University Press, 1999), p.43.

[559] Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, Ph.D. [2010].

[560] A. Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (University of Chicago Press 2009), p.7.

means of capitalist interaction by maintaining a degree of imbalance between rightsholders and recipients.[561] This change is argued to be the result of socioeconomic compulsion, where the source of legal change in the copyright system comes from society and the economy itself.[562]

It is postulated that this implies the existence of a "living law"[563] underlying the formal rules of the copyright system and it is the task of judge to integrate these two types of law, as the centre of legal gravity lies in society itself.[564] As a result, the law was developed so that the conditions for the existence of the music industry were maintained in the digital age, to the point where digital production "enhanced" rather than "undermined" the commercial positions of copyright owners.[565]

4.7.1 A repeat of the past?

It is postulated that the copyright industry is seeing a privatised return to the past, which is the idea that rightsholders are indirectly employing, on behalf of the state, their own method of regulation that is akin to the effects of the English Licensing of the Press Act 1662.[566] This was an act for preventing the "frequent abuses in printing seditious treasonable and unlicensed books and pamphlets and for regulating of

---

[561] Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016]

[562] Regarding the capitalist influences that are operative within society and the way these have influenced the development of the current system, see chapter 3 generally; For an interesting account of the role that capitalism has played in the developmental aspects of society and the implications of this for the future, see Harari, Y.H., *Homo Deus: A Brief History of Tomorrow* (Penguin Random House, 2015), chapters 6 and 7.

[563] L. Brandeis, 'The Living Law' [1916] 10 Illinois Law Review 461; E. Ehrlich, *Fundamental Principles of the Sociology of Law* (Transaction Publishers, 1936).

[564] Ehrlich, E. 'The Structure of the Legal Proposition' in Fundamental Principles in the Sociology of Law, by Eugen Ehrlich, translated by Walter Lewis Moll, pp.198-203, 501-503, (Cambridge, Mass.: Harvard University Press 1936) – Taken from M.D.A. Freeman, *Introduction to Jurisprudence* (Sweet and Maxwell, 8th Edition 2008), p.847; D. Nelken, 'Law in action or living law?' [1984] 4 legal studies 157, who argues that Ehrlich's approach, though underestimating the importance of, and need for, legislative intervention, is a better focus for empirical research, being more firmly related to sociological theory.

[565] Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), p.xiii.

[566] Licencing Act of the Press Act 1662, 14 car.II.

printing and printing presses."[567] The significance of introducing this is because it required all intended publications to be registered with the government-approved Stationers' Company, giving the Stationers the ultimate say in what got printed and what did not.[568]

In the US, this can be compared with the 'courtesy of the trade' provisions that were prevalent prior to the enactment of formal copyright legislation. These granted an informal exclusive right of publication to the first American publisher to announce plans to issue an un-copyrighted foreign book domestically. It was not, however, a legal obligation, but instead, a gentleman's agreement (a framework of informal rules and punishments in absence of legal protections). This meant that participating publishing houses recognised such a right and refrained from what they called "printing on" the announcing firm (those who printed the foreign work first on American soil).[569] As such, the publisher Isaac K. Funk, who was frequently charged with rank piracy, attacked courtesy as a "law" that had not been "framed" and described it as a mere "right of possession" based primarily on the principle of "first grab."[570]

---

[567] See Licencing Act of the Press Act 1662, 14 car.II, c.33; Deazley, Ronan. 2008a. "Commentary on the Licensing Act, 1662." In Primary Sources on Copyright (1450–1900), ed. Bently. L, and Kretschmer. M., Cambridge: University of Cambridge, Faculty of Law <http:// www.copyrighthistory.org.> Taken from: Nipps, K., 'Cum Privilegio: Licensing of the Press Act of 1662' [2014] The Library Quarterly: Information, Community, Policy 84 (4) (October): 494–500. doi:10.1086/677787, <https://dash.harvard.edu/bitstream/handle/1/17219056/677787.pdf?sequence=1> accessed: 25/2/2016.

[568] Nipps, K., 'Cum Privilegio: Licensing of the Press Act of 1662' [2014] The Library Quarterly: Information, Community, Policy 84 (4) (October): 494–500. doi:10.1086/677787.

[569] Spoo, R., *Without Copyrights: Piracy, Publishing and the Public Domain* (Oxford University Press, 2013), pp.30-64.

[570] Pound to Price, 3/14/1927, in Alpert, B.S., "Ezra Pound, John Price, and *The Exile,*" Paideuma: Modern and Contemporary Poetry and Poetics, Vol. 2, No. 3 (Winter 1973), 439-40; Groves, J.D., *Courtesy of the Trade in Books 1550-1800* (Oxford: Clarendon Press, 1989) *in* Casper et al., *Industrial Book: 1840-1880* (University of North Carolina Press, 2007) at 147-48; For a similar analysis, see Garvey, E.G., '*Ambivalent Advertising: Books, Prestige, and the Circulation of Publicity*' 170-89 *in* Keastle and Radway, *Print in Motion* (Vol.IV, University of North Carolina Press, 2009) at 175.

The contractual agreements discussed in this chapter are contended to provide evidence of the dispensability of legal coercion, that is dispensed only with the coercive legal power of the state.[571] This is because these historical methods are argued to be akin to that which rightsholders have manifested for themselves through digital contracts that can be fairly described as a quintessential right of possession.

This is because digital licences are enabling rightsholders to circumvent copyright by 'contracting' themselves out of what would otherwise be contextually applicable legal limitations on the exclusive rights of copyright owners created by the State. Thus, these contracts are performing what can be fairly argued as a "facilitative" function as facilitative laws and contractual instruments are agencies of State policy through which private individuals may expand or contract their autonomy to subvert official State policy.[572]

Ultimately, consumers who commit contravening acts under the agreement which governs the articles they access, although potentially justified under copyright, can now be pursued for redress under what now becomes a violation of owners private contractual rights. Thus, such activity can be fairly regarded as enabling rightsholders to establish their own code of conduct in the same way as the stationers who were regarded by many as establishing their "own code of conduct, independent of the state itself."[573]

Therefore, because the 1662 legislation gave the stationers the ultimate say in what got printed and what did not, and the fact that contracts can be used to circumvent copyright and create a cause of action in law against those who breach the agreement is highlighted to not only extend copyright protection; but it arguably overrides it, to the point where rightsholders are now able to control what is distributed, and what is not.[574]

---

[571] Weber, M., *Economy and Society* (University of California Press Version, 1978), p.756.

[572] G. R. Rubin and Sugarman, D., *Law, Economy and Society: Essays in Legal History English Law 1750-1914* (Professional Books, 1984) p.10-11; See also, D. Sugarman, *Company Law and the Rise of Capitalism*, (Unpublished, 1982).

[573] Johns, A., *Piracy: The intellectual property wars from Guttenberg to Gates* (University of Chicago Press, 2009), p.18.

[574] For a brief account of how the stationers register played a vital role in upholding order in London's commerce of print in the mid-seventeenth century, see Johns, A., *Piracy: The intellectual property wars from Guttenberg to Gates* (University of Chicago Press, 2009), chapters 2 and 3.

It can also be argued that a motive for the orchestration of this kind of environment is because capitalists require predictable legal consequences[575] to govern the interrelationship between law and technology. This is because the use and copy of digital works are notoriously interwoven at many stages in the digital world[576] where contracts become "supportive" of the 'streaming' distribution model, as opposed to being "unsupportive."[577] Thus, the nature of digital works, and the way they are primarily accessed, means that contractual enforceability is strengthened due to things like privity. This is due to the *in personam* factor having *in rem* application almost every time as the nature of the transaction becomes 'direct' in the digital world. This seemingly enhances the enforceability of these agreements, whilst at the same time, limiting the distributive capacities of recipients, in both the UK,[578] and the US.[579]

In turn, these items are then further backed up by the regulatory functionality of copyright law on technology when viewed in light of the fact that mere distribution is always going to create another copy.[580] This is because as soon as society figures out new ways to share ideas that advance the common good, private interests advance

---

[575] Trubek, D.M., 'Max Weber on Law and the Rise of Capitalism' Faculty Scholarship Series [1972] Paper 4001, Available at: <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4993&context=fss_papers> accessed: 12/9/2014.

[576] Perzanowski. A. and Schultz, J., 'Digital Exhaustion' 58 UCLA Law. Rev. 889 [2011] at 902.

[577] Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, Ph.D. [2010], p.175.

[578] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015]; See also, M Savič, 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378.

[579] The reproduction right, under US law, (§.106(1)), cannot be a digital first sale defence because a digital transfer requires reproduction of the content in addition to distribution, and the reproduction is a distinct exclusive right of copyright holders granted by §.109(a); For more information, see *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y 2013).

[580] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y 2013) 2 [5]; This creates what can be fairly argued as an almost *strict liability* scenario - Costanza, N., 'Digital Music Garage Sale: An Analysis of Capitol Records, LLC v. ReDigi Inc. and a Proposal for Legislative Reform in Copyright Enabling a Secondary Market for Digital Music' Hastings Communication Law Journal, Vol 37, Issue 1, [2015].

to prevent this from happening, to maintain the old systems that benefit the "elite" in capitalist society.[582]

However, despite the law appearing to favour the entrenchment of contractual agreements and the diminished (if not made impossible) the enforceability of limiting copyright doctrines in the digital sphere, there is no need for this to remain so. Since the Statute of Anne 1710, many of the details of copyright law have changed, and since the creation of the first sale and exhaustion doctrines are somewhat ill-suited to regulating items that were otherwise not in the contemplation at the time of their respective creations. This was arguably recognised by the court in *ReDigi*, where it outlined that it "could not, of its own accord condone the wholesale application of the first sale defence to the digital sphere, particularly when congress has declined to take that step."[583] Recognising this, it is suggested that if such matters are not dealt with, then the reforms could be undermined in a similar manner by contracts. It is to these matters we now turn.[584]

4.8 Proposal for reform.

So far, the chapter has outlined the issues surrounding the imposition of contracts in terms of how they interact with copyright law. In doing so, it assessed the capacity of:

- (a) those contracts that remove legitimate copyright limitations on the exclusive rights of copyright owners (like the distribution right)[585] by virtue of their digital format;

and

- (b) those which go beyond the remit of copyright itself to prevent otherwise legitimate acts from being held justifiable under copyright law due to provisions such as s.28(1), and §109(d).

---

[582] Mason, M., 'The Pirate's Dilemma: How Youth Culture is Reinventing Capitalism' (Free Press, 2008), pp.141-142.

[583] *Capitol Records, LLC v. ReDigi Inc.,* 934 F. Supp. 2d 640, 655 (S.D.N.Y 2013) at [660].

[584] How the reforms seek to prevent contracts from undermining them are discussed more extensively in chapter 5 at 5.4.

[585] See §106(3) in the US, and s.18 CDPA in the UK, Info Soc., Art. 4(2).

To this end, the chapter has focused on how the current copyright system has been effected by the use of contracts. This included the way the courts have seemingly assisted rightsholders in safeguarding their ability to maximally exploit their assets by assessing copyright infringement predominantly in light of the potential effects that such infringement can be said to have on the existing financial interests of rightsholders.

The chapter has focused on assessing the way such contracts are enforced to ensure that any reform exercise is not undermined by the strategic use of contracts to sidestep the proposals. In support, Hargreaves, in his 2011 government review on intellectual property,[586] also stated that the government should legislate to ensure that other copyright exceptions are protected from override by contract.[587]

It is suggested that both (a) and (b) of contract should be the focus of any reform in the copyright system. This stems from the challenge that they are contended to represent regarding the successful imposition of the proposed reforms, in that they may restrict the re-use of copyright works,[588] as well as providing a way to 'contract out' of them.

Chapter five deals with both types of contracts by proposing the imposition of a legislative framework.[589] This is to ensure that it is not possible to contract out of the reforms and will be assessed under current case law to facilitate their fluid implementation in an attempt to minimise commercial and legal disruption.

---

[586] Hargreaves, I., 'Digital Opportunity: A review of Intellectual Property and growth' (2011), p.8 (Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf) accessed: 21/11/2014.

[587] Hargreaves, I., 'Digital Opportunity: A review of Intellectual Property and growth' (2011), Recommendation 5, and 51, [5.40] (explaining that permitting contractual variation 'replaces clarity...with uncertainty'). For more information, see this same review at chapter 9, p.229.

[588] The re-use right is namely that there cannot be a reproduction of the work that is subject to copyright protection without the permission of the rightsholder- (Remember that copyright protects the form in which ideas are expressed, not the ideas themselves- see, inter alia, *Designers Guild* [2000] 1 W.L.R. 2416 at 2423; *Jefferys v Boosey* (1854) 10 AII E.R. 681 PC (UK)*; Donoghue v Allied Newspapers Ltd* [1938] Ch. 106 Ch D; This is dealt with in chapter 5 at 5.4.1(b) and 5.4.1(c).

[589] See chapter 5 at 5.4 *generally.*

Two situations were discussed in this chapter in which contracts will have an impact. These were the way they affect:

- (a) What users can do with the material they purchase or access;

and

- (b) The extent to which contracts can either extend copyright law or remove the ability of individuals to rely on copyright to produce what could otherwise be a legitimate reproduction and/or distribution depending on the wider circumstances of each scenario.

It is suggested that some regulation of these situations is necessary in order to ensure that the proposed reforms are not undermined. Consequently, the thesis will set out in chapter five a 'capping' system[590] which introduces two main principles.

First of all, no contract within the general subject matter of copyright should be used in a way that serves to either circumvent the proposals or prevent a reliance upon copyright law. This will apply to situations where copyright-based limitations or defences would otherwise be available if it were not for the restrictions imposed by the agreement. Thus, the scheme outlined in chapter five is structured in a way so as to prevent owners from limiting the re-use of works by raising prices to make up for any profits they feel have been lost under the reforms.[591]

Secondly, it is asserted that any reformed system should also provide a stronger bargaining position to those who wish to re-use existing works, all of which are considered in accordance with the Berne Convention.[592] Ultimately, the overriding aim of the scheme is to make the accessibility of copyright works easier and cheaper. The reforms propose to do so by lowering the overall cost that can be charged for both sale and re-use.

---

[590] For a brief account of exactly what these are, see chapter 5 at 5.3 *generally.*

[591] For more information, see chapter 5 at 5.4.1(b).

[592] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised in Paris on July 24, 1971 and amended in 1979, S, Treaty Doc. No. 99-27 (1986) [The 1979 amended version does not appear on *UNTS* or *ILM*, but the 1971 Paris version is available at 1161 *UNTS* 30 (1971)].

The reforms proposed explicitly consider the issue of rightsholders restricting re-uses for the purposes of encouraging creativity by driving down costs across the culture sector. This could help alleviate high clearance fees, as well as limit the prices that can be charged for re-uses by copyright owners for a limited number of times. In turn, this could encourage the creative re-use of works via a more financially accessible system.[593]

The proposed system will also give equal consideration to how rightsholders have been influenced by external factors, like capitalism.[594] The purpose of this is to work with the aspects that have influenced the development of the current system that does not operate in isolation of a capitalist system to which there is no alternative.[595] It is suggested that such an approach is fundamental to create workable change in a society where capitalism that has come to dominate economic life.[596] Therefore, it is submitted that if one wants to work in the direction called for by the forces of human evolution, one must not be deluded into considering the idea that the management of social systems could be anywhere else other than within the confines of capitalism.[597]

4.9 Concluding comments

The previous chapters have looked at how the old regime of intellectual property, operating as a form of industrial competition policy has been replaced. Now, intellectual property is on the desktop and is implicated in routine creative, communicative, and just plain consumptive acts that each of us performs every day.[598]

---

[593] For more information, see chapter 5 at 5.5.3.

[594] For more information, see chapter 3 generally.

[595] Harari, Y.H., *Homo Deus: A Brief History of Tomorrow* (Penguin Random House, 2015); For an opposing view, see Streeck, W., *How will capitalism end?* (Verso Books, 2016) - (Wolfgang Streeck argues that we are witnessing a long and painful period of cumulative decay: of intensifying frictions, of fragility and uncertainty, and of a steady succession of normal accidents); Alternatives to capitalism have also been offered - Mason, P., *Post-capitalism: A guide to our future* (Penguin Publishing 2016); Bregman, R., *Utopia for Realists: And How We Can Get There* (Bloomsbury Publishing, 2017).

[596] Weber, M., *The Protestant ethic and Spirit of Capitalism* (London: Unwin University Books, 1971, 11th impression) p.55.

[597] Steiner, R., *The Threefold Social Order* (Anthroposophic Press, 1966), chapter III.

[598] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ).

The result is that the triggers of copyright – reproduction, distribution – can be activated by individual "footsteps."[599] This chapter and the discussion within the previous chapters have demonstrated that copyright has become a system that has been influenced by capitalism, becoming focused around the economic interests of rightsholders. The manifestation of this environment has been built on a foundation of proprietary rights and is procured through an environment of legally-based control in the digital age.

The thesis has postulated that this has been the result of a capitalist "transition" within copyright,[600] where rightsholders are attempting to perfect the control that they have over their assets by contractual methods in the music industry. The chapter has suggested that this situation has been exacerbated by what has been regarded as an increasing level of information that is now accessed electronically as a result of advancements in technology. This has created a scenario where users have little choice other than to agree to the terms of digital contracts which are mandatorily imposed by rightsholders as a precondition of access. The courts are considered to have played an assistive role in procuring the current environment to ensure that the economic interests of rightsholders have remained paramount. This is considered to have added implicit legal weight to the 'terms' of these agreements for risk of unauthorised usage and the perceived legal consequences that flow as a result.[601]

The findings in this chapter also raise the question of whether digital downloads will ever be exhausted.[602] Thus, it becomes reasonable to conclude that rightsholders will

---

[599] Boyle, J., *The Public Domain (*Yale University Press, 2008), pp.50-52.

[600] For more information, see Arditi, D., *iTake-over: The Recording Industry in the Digital Era* (Rowman and Littlefield Publishing 2015), chapter 1; Also, see generally chapter 3.

[601] For more information, see the discussion in this chapter generally, and in particular, parts 4.5, 4.6 respectively; See also, Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December [2018]; *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470, 486-90 (6th Cir. 2007); *VMG Salsoul, LLC* v. *Ciccone,* No. 13-57104 (9th Cir. 2016); Savic, M., 'The Legality of Resale of Digital Content after UsedSoft in Subsequent German and CJEU Case Law' [2015] EIPR 414-29.

[602] See references in M Savič, 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378, 378, n 2, *in* Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright' May [2016], Queen Mary University London.

conceivably be able to manifest increased control in the future as the ability of individuals to use contracts to circumvent copyright law is likely to continue under the current rules and this could also affect the reforms if this is not sufficiently dealt with. As a result, two situations were distinguished by this thesis as being situations in which contracts will have an impact on the ability of individuals to freely use their accessed article.

- These were those which seek to govern what users can do with the material they purchase or access.

and

- Those which either extend copyright law or remove the ability of individuals to rely on copyright to produce what would otherwise be a legitimate reproduction and/or distribution.

The result of this, is that, products that once were the property of the consumer in the sense that they had the ability to transfer their purchased item to an unlimited number of people by lend or sale, is now devoid of any proprietary transfer as it is 'licenced'. This is significant because in the current digital environment the imposition of contracts within the music industry has created a complete network of contractual relationships, each of which originates in a "deliberately planned process of power acquisition, control, and disposal."[603]

Consequently, for now, at least, it appears that not only do the handcuffs of network effects are indeed "golden."[604] This is because the doctrine of contract brings the whole weight of the social fabric upon the man who has bound himself by a promise. His freedom to consists in being able to make or abstain from making a binding promise. Yet, when he has made it, the State uses its whole despotic power to compel

[603] Weber and Parsons, *Weber, M. and Parsons, T., The Theory of Social and Economic Organization* (The Free Press, New York 1947), (The Free Press, 1947), p.163; See also, this thesis at chapter 3.

[604] It should be noted that in this instance, Boyle is talking about the nature of the Free and Open Source software system, and how these are affected by the digital environment, but it is argued that this is equally applicable here – Boyle, J., *The Public Domain* (Yale University Press, 2008), p.191.

or prevent his free action."[605] The sanctions of law become drivers of the performance of contractual obligations[606] where contracts now operate as "institutional licenses for sectional interests."[607]

The next chapter will outline reform proposals which embody the foundational underpinnings behind the creation and existence of copyright. like the dissemination of information. This could be achieved through driving down prices which is predicted to create a more financially accessible system. The proposals will also recommend the outlawing of agreements which prevent the application, or otherwise obscure the enforcement, of legitimate copyright limitations. This will be done to the effect that the reforms are still applicable under the agreement. However, this does not affect individual contractual enforceability, except where the terms of the agreement act to otherwise prevent the enforceability of the reforms.[608]

It is, however, acknowledged that there are provisions in the 1988 Act[609] that can be said to go beyond EU requirements and, in a number of other situations, applies to contractual provisions that seek to override exceptions.[610] These exceptions are applied using two different techniques, which are sometimes that the contractual provisions are declared 'void',[611] or they are declared otherwise 'unenforceable'[612]

---

[605] T.H. Farrer, 'Freedom of Contract' Fortnightly Review, XXIX [N.S.] (1881);- G. R. Rubin and Sugarman, D., *Law, Economy and Society: Essays in Legal History English Law 1750-1914* (Professional Books, 1984) p.192.

[606] G. R. Rubin and Sugarman, D., *Law, Economy and Society: Essays in Legal History English Law 1750-1914* (Professional Books, 1984) p.193.

[607] Avineri, S., *Social and Political Thought of Marx* (Cambridge University Press, 1968) p.23.

[608] See chapter 5 at 5.4 *generally.*

[609] CDPA 1988 s.28(1).

[610] Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011) at 8.

[611] CDPA 1988, ss.36(4), 50A, 50B, 296A(1)(a), 296A(1)(b), 296A(1)(c), and 296B.

[612] CDPA 1988, 29(4B) (research and private study), 29A(5) (data analytics), 30(4) (quotation), 30a(2) (parody etc), 32(3) (teaching), 31F(8) (disability), 32(3) (instruction), 41(5) (library copying for other libraries), 42(7) (library copying to replace missing parts), and 42A(6) (library copying of published works for user research). Cf. CDPA 1988, ss. 40B (use on-site in cultural institutions), 43(3)(b) (prohibited copying of unpublished works), which are capable of being overridden by contract.

insofar as they attempt to prevent the applicability of a certain exception under proprietary rights.[613]

As a result, the reforms recognise the underlying principle that copyright is fundamentally a property right.[614] This is based on the fact that proprietary rights have been a foundational aspect of copyright since the inception of this legal area under the Statute of Anne in 1710.[615] Moreover, the notion of private property is the outcome of the social creativeness that is associated with individual human ability that provides for the free and independent use of the means of production.[616]

The aim is to lessen the overt focus upon economic exploitation and enhance the transferability of digital assets by freeing up some of the constraints through creating more financially accessible works[617] and limiting the impact of contracts.[618] This is to push copyright towards "the more interdependent social, political and economic processes that it is meant to serve."[619] This is because in the public interest, the Statute of Anne limited the term of protection. Thus, in adapting the copyright law to the needs of the twenty-first century, the challenge is to respect the fundamentals of that law and to meet the needs of both creators and the public interest alike.[620]

---

[613] For more information see chapter 5 5.4.1(a)(i), 5.4.1(a)(ii).

[614] See chapter 3 at 3.2

[615] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned 1710 (8 Ann. C. 19); Copyright is a property right under s.1(1) Copyright, Design and Patents Act 1988, and protects against exploitation of the copyright work by others under s.16 CDPA 1988.

[616] Steiner, R., *The Threefold Social Order* (Anthroposophic Press, Inc. New York, 1966), chapter III.

[617] See chapter 5 at 5.5.3.

[618] See chapter 5 at 5.4.

[619] Balganesh, S, 'Debunking Blackstonian Copyright' 118 Yale Law Journal [2009] 1126-1181 at 1181, <http://www.jstor.org/stable/40389483?seq=1#page_scan_tab_contents> accessed: 21/11/2015; On the benefits of the reforms, see chapter 5 at 5.5.

[620] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20; See also, On the future of copyright, see: E. Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Cheltenham: Edward Elgar Publishing, 2009); B. Fitzgerald, 'Copyright 2010: The Future of Copyright' E.I.P.R. [2008], 30(2), 43; C. Geiger, 'The future of copyright in Europe: striking a fair balance between protection and access to information' I.P.Q. [2010], 1. R. Deazley, *Rethinking Copyright—History, Theory, Language* (Cheltenham: Edward Elgar Publishing, 2006); B. Atkinson and B. Fitzgerald (eds),

Therefore, it is argued that reducing prices and increasing overall accessibility could help achieve this. This is because an accessible system of culture is not one without property, or where artists do not get paid, as this may remove the incentive to progress[621] and to use resources efficiently.[622] A culture without property, or in which creators can't get paid, is anarchy, not freedom. Anarchy is not what is advanced here, but instead, a balance between anarchy and control, capitalism and copyright. [623]

Copyright Law: Vol III: Copyright in the 21st Century (Farnham: Ashgate, 2011); Z. Efoni, *Access-right: the future of digital copyright law* (New York: OUP, 2011).

[621] H. Demsetz, 'Industry Structure, Market Rivalry and Public Policy' [1973] 16 J Law and Economics, 1-9 at 3.

[622] Posner R. *Economic Analysis of Law* (1973) p.10.

[623] Lessig*, Free Culture* (2004), p.xvi

Chapter 5

Implementation of the proposed framework in the UK and the US music industry.

5.1 Introduction.

The thesis has so far contended two complementary points in relation to the evolution of copyright law and its current functionality.

Firstly, that capitalism has played a fundamental role in the creation of the current copyright system. As a result the system now focuses predominantly upon the existing interests of rightsholders, whereby it has become centred around exclusivity, and economic exploitation. This has been perpetuated by an environment of panoptic control[1] where users activities are being monitored,[2] or held as a contractual breach,[3] in an attempt to enforce compliance and minimise infringing activity. The purpose of this was to generate maximal profits to ensure the continued extension of capitalist commodification in the digital age under copyright law.[4]

Secondly, this has served to discourage creativity (and what can be done with copyright works)[5] for fear of being summoned before the courts,[6] or, risk being in breach of copyright or contract (under a 'two-tier' system of protection).[7] This has strengthened existing threats provisions (under a 'decentralized' system),[8] which included using the court process to eliminate commercial competitors.[9] This was argued to have been exacerbated by the costs associated with simply contesting an

---

[1] For more information, see chapter 2 at 2.3.

[2] For more information, see chapter 2 at 2.3.1.1(b).

[3] See chapter 4 generally, and at 4.5.

[4] Devos, K., *Tax Compliance Theory and the Literature* (Springer Publishing 2014); See also, part 5.5 in this chapter generally, and specifically, 5.5.3(a).

[5] See chapter 4 at 4.7.

[6] See chapter 2 generally.

[7] See chapter 4 at 4.3, 4.4, 4.5 and 4.7 respectively.

[8] See chapter 2 at 2.5.

[9] See chapter 2 at 2.6.

infringement allegation[10] because even a £2,000 claim for copyright infringement can run up costs of around £20-£30,000.[11]

To this end, chapter two argued that the changes brought in by the advancement of digital technology represented a challenge to the music industry.[12] The existing music industry right holders (publishers) sought to resolve the challenge to existing markets by the utilisation of the law and technology.[13] The chapter then considered the consequences, analysing how this created a self-serving system of panoptic surveillance.[14] That system saw threats of legal sanction move away from judicial scrutiny to the point where, infringement allegations became a predominantly uncontested affair.[15] The chapter then looked at how there has been a gradual extension of legal liability for copyright infringement online, where information service providers have become policers of content in an attempt to avoid being sued.**[16]** It also assessed how a lack of specific defences to copyright-related claims led to copyright law becoming a "self-defining, [self-serving] autopoietic prophecy"[17] in a decentralized system.[18]

---

[10] See the discussion in chapter 2 at 2.3, 2.5; Gibson, J., 'Risk Aversion and Rights Accretion in Intellectual Property Law' 116 Yale Law Journal 882, 887-906 [2007]; Aufderheide, P. and Jaszi, P., *Reclaiming fair use* (University of Chicago Press, 2011), ch.1.

[11] Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011), p.83.

[12] For more information, see chapter 2 at 2.2.1

[13] Callister, P. D., 'Law and Heidegger's Question Concerning Technology: A Prolegomenon to Future Law Librarianship' Law Library Journal, Vol. 99, pp. 285-305, [2007]. Available at SSRN: https://ssrn.com/abstract=960134 accessed: 21/2/1016.

[14] See chapter 2 at 2.3, 2.4 and 2.5.

[15] For more information, see chapter 3 at 2.3 and 2.5 generally.

[16] For more information, see chapter 2 at 2.3.1.1(a), 2.3.1.1(b) and chapter 3 at 3.5.1.4 respectively; O'Sullivan, K.T., 'Copyright and internet service provider "liability": the emerging realpolitik of intermediary obligations' IIC [2019], 50(5), 527-558; Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577; See also, M. Husovec, 'Injunctions against Innocent Third parties: The case of website blocking' (2013) *JIPITEC.*

[17] Griffin, J., 'A call for a doctrine of 'information justice' Intellectual Property Quarterly [2016]; See also, Luhmann, *The Autopoiesis of Social Systems* in (Sociocybernetic Paradoxes 1986), pp.172-192; Luhmann, *A Sociological Theory of Law* [1985], Teubner and Febbraio, *State Law, and Economy as Autopoietic Systems* [1992].

[18] For more information, see chapter 2 at 2.5.

Chapter three, then critically analysed how capitalism manifests an attitude of accumulation among individuals that is perpetuated through the notion of property.[19] This assessed the role that property has played in the commodification of culture against the backdrop of digital technological advances under capitalism. This was argued as an attempt by both rightsholders, and the State, to create environments that are conducive to profit-making.[20] This revealed that individuals are acting subconsciously, "unwittingly", and "in concert",[21] to facilitate the development of capitalism within the culture sector.[22] This resulted in the withering away of copyright limitations,[23] that are more about exploitation than creation. It then considered the role of the exclusive rights of communication (in the UK),[24] and, the public performance right (in the US)[25] in the creation of the current 'streaming' business model discussed in chapter 4.[26]

Chapter four then analysed imposition of digitalised contracts in the current copyright system. The chapter demonstrated that this resulted in an increase in rightsholder control through the use of digital licenses. This was then contended to have been exacerbated by digital technology due to its relationship with contract law and the practical implications this has had for users regarding the accessibility of works electronically.[27] This included the fact that 'electronic contracts' are to be recognised as valid and enforceable under UK law by virtue of the E-Commerce Directive Art.9(1)[28] (as implemented via the Electronic Commerce (EC Directive) Regulations

---

[19] See this chapter at 3.2.

[20] May argues that the inherent tendency for the capitalism is to continually search for areas of new investment – (May, C., *A Global Political Economy of Intellectual Property Rights*, (Abingdon: Routledge 2000); See also, chapter 3 at 3.4.

[21] Smith, A., *The Wealth of Nations* (Book IV, 1776) in Griffin, J., 'A call for a doctrine of information justice' Intellectual Law Quarterly, [2016].

[22] See chapter 3 at 3.4.

[23] Rel. Rights Dir., Art. 10(1); See chapter 3 at 3.4 and 3.5 *generally.*

[24] See chapter 3 at 3.5.1.

[25] See this chapter at 3.5.2.

[26] See chapter 3 at 3.5.

[27] For more information, see 4.2.

[28] E-Commerce Dir., Art.9(1); There are certain exceptions that cannot be overridden by contract under the following subsections: CDPA 1988, ss50, 50B, 296A(1)(a), 296A(1)(b), 296A(1)(c); For

2002 (SI 2002 No.2013), and under US law via 17 U.S.C. §109.[29] The end result was that two situations were discussed where contracts will have an impact. These were the way they affect:

> (a) what users can do with the material they purchase or access, *and*
>
> (b) the extent to which contracts can either extend copyright law or remove the ability of individuals to rely on copyright to produce what could otherwise be a legitimate reproduction and/or distribution depending on the wider circumstances of each scenario.

It is suggested that some regulation of these situations is necessary in order to ensure that the proposed reforms are not undermined.

This chapter seeks to flesh out the items discussed within the thesis by taking into consideration the aspects from the previous chapters and incorporating them into the supplementary proposals. These are designed to work alongside the current system of legal protection. These reforms are not intended to repeal any of the existing laws in the UK, or the US. Instead, the capping system proposed is aimed at regulating works as opposed to reducing protection. The aim of the proposals is to provide a framework that will have effect beyond their enforcement, but in a way that works with capitalism and the current regulatory bodies:[30] "in an economy where intangible assets are more valuable than ever, IP is more important than ever."[31]

---

guidance on how the directive could apply post-Brexit, see <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770360/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf> accessed: 4/02/2019.

[29] More specifically, U.S.C. §109(d) (2012) as this section specifies that the first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as someone who as obtained it subject to contract, like a licensee.

[30] For more information, see this chapter at 5.7.3.3(c) *generally.*

[31] Merges, R.P., *Justifying Intellectual Property* (Harvard University Press 2011), p.291.

The reason for this is to create a reform strategy that works with the ideological aspects of the capitalist system[32] that have perpetuated the current environment,[33] with the aim of increasing creativity by driving down production and re-use[34] costs across the culture sector. It is suggested that this comprehensive drive-down in fees generally within copyright is likely to facilitate a correlative proliferation in the amount of information that is disseminated, as the cost of production, purchase, and re-use, will fall for reasons that are not strictly related to the reforms per se.[35]

The proposed system aims to establish ways in which there could be a greater degree of focus upon the creative re-use of works[36] with little effect on the quality of works produced.[37] Content recipients, and their re-use of works, will be the central theme behind the proposed system. This also includes ensuring that the impartiality of the proposals and their associated regulatory procedures remain paramount.[38] It will do so by setting out ways in which costs could be reduced in the copyright system. This is to aid and encourage creative re-uses of works, as well as ensuring that enforcement is dealt with beyond a single body.[39] It will be suggested that there is a need to consider both rightsholders and recipients in any reformed system, if there is to be a system that is viable for the long-term.[40]

The proposals to the UK and US copyright system are based around two fundamental issues. Firstly, there is a need to consider the current economic environment in which

---

[32] On capitalism, see chapter 3 *generally*.

[33] See chapter 2 at 2.3 *generally*.

[34] The re-use right is namely that there cannot be a reproduction of the work that is subject to copyright protection without the permission of the rightsholder- (Remember that copyright protects the form in which ideas are expressed, not the ideas themselves- see, inter alia, *Designers Guild [2000] 1 W.L.R. 2416* at 2423; *Jefferys v Boosey (1854*) 10 AII E.R. 681 PC (UK); *Donoghue v Allied Newspapers Ltd* [1938] Ch. 106 Ch D.

[35] See this chapter at 5.5.3(a).

[36] See this chapter at 5.5.3(a), 5.4..1(b), 5.4.1(c) respectively.

[37] For more information, see this chapter at 5.5.2.

[38] See this chapter at 5.7.3.1; On the need for independent regulatory authorities, see Walters and Haahr, *Governing Europe: Discourse, Governmentality and European Integration* (Routledge, 2005), p.52.

[39] See this chapter at 5.7, 5.7.1 and 5.7.2.

[40] See this chapter at 5.5.3(a).

copyright has developed in order to produce reform that operates in conjunction with it. This also includes looking at potential limitations to the operation of the proposals, like contracts,[41] as well as looking at both the current UK[42] and US[43] legal infrastructures. This is to explore methods to assist in the efficient implementation and enforceability of the reforms.[44] Secondly, there is a need to consider how to ensure the proposed system will encourage creative re-use through driving down prices.[45] With this, a set of criteria are outlined,[46] which also includes considering the most appropriate method for administering the proposed system.[47] The reason for the focus on price is based on the notion that price is the fundamental coordinator that brings together all parties in the copyright system and markets generally.[48]

5.2 The importance of recognising the current environment in approaching reform.

As technology has developed content recipients are able to manipulate existing works in an increasing number of ways[49] due to the "emancipatory effect" of digital technology.[50] However, a combination of high costs, and a legal framework based on proprietary rights that is predominantly focused on economic exploitation, has diminished such potential.[51]

In previous chapters, it was suggested that copyright places too much emphasis on preserving the existing financial interests of rightsholders as a result of capitalism. This

---

[41] See this chapter at 5.4.

[42] See this chapter at 5.7.1

[43] See this chapter at 5.7.2

[44] See this chapter at 5.7.

[45] See this chapter at 5.5.3(a)

[46] See this chapter at 5.3

[47] See this chapter at 5.7.3.3(c)(i),and (ii).

[48] (e.g. Posner notes that there is no coordinator – except price) - Posner, R.A., *Hayek, Law, & Cognition,* NYU Journal of Law and Liberty 147 [2005] at 149.

[49] Schneiderman, B., *Software Psychology: Human Factors in Computers and Information Systems* (Little, Brown Pub. 1980); See also, Lanier, J., *You are not a Gadget* (Penguin Books, 2010).

[50] Jenkins H., *Convergence Culture* (New York University Press 2006); See also, chapter 2 at 2.3.

[51] See generally, chapters 2, 3, 4.

is because copyrights provide right holders with rights,[53] which Griffin notes include "*inter alia* the exclusive rights of reproduction, and distribution, in the UK adaptation and, in the US, derivation."[54] This has created a "permission culture"[55] that has been argued to be damaging to creativity because of the clearing fees that have to be paid,[56] as well as the costs associated with defending a copyright claim.[57] This also includes the amount of damages awarded.[58]

The proposals aim to counteract the effects that have been inflicted upon the current system, in that it provides a framework designed to encourage creative re-uses. This

---

[53] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 1-31.

[54] For more information, see Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, (2008) chapter 6 at 6.2.; For the rights in the UK, see CDPA 1988 s.16, and for rights in the US, see 17 United States Copyright Act 1976 § 106. (Both relate to the justifiable limitations on the exclusive rights of owners under what is known as "fair-use").

[55] Lessig, L., "Free Culture", (New York, 2004), pp.192-93.

[56] See chapter 4 at 4.7 and 4.7.1; *Bridgeport Music Inc. v. Dimension Films*, 230 F. Supp.2d 830, 841 (M.D. Tenn. 2002); *Bridgeport Music Inc. v. Dimension Films*, 410 F.3d 792, (2005) (a three-note sample was not considered to be fair use and users were told to "get a license or do not sample"); Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018) at [14] and [25] – (*"even approximately two seconds"* of unlicensed sampling, from a phonogram (i.e. a sound recording) is regarded as copyright infringement in absence of express authorization).

[57] Balganesh, S., 'Copyright Infringement Markets' (February 13, 2013). Columbia Law Review, Vol. 113, 2013; University of Pennsylvania, Institute for Law & Economics Research Paper No. 13-7; Gibson, J., 'Risk Aversion and Rights Accretion in Intellectual Property Law' 116 Yale Law Journal 882, 887-906 [2007]; Aufderheide, P. and Jaszi, P., *Reclaiming fair use* (University of Chicago Press, 2011), ch.1.

[58] *Reformation Publishing Company Limited v Cruiseco Limited and anor* [2018] EWHC 2761 (Ch) – (a large part of the judgment looked at what type of damages would be appropriate and the recent cases of *One Step (Support) Ltd v Morris - Garnier* [2018] UKSC 20, and the Court of Appeal decision in *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308 and concluded the term "Wrotham Park damages" to cover all the types of remedy should no longer be used; See also the discussion in this chapter at 5.5.3(a).

is achieved by reducing the cost of production through placing a temporary limit[59] on the price that can be charged for a copyrighted item, pertaining to both sale and re-use.[60] By changing the prices (lowering them), it is argued that this would help alleviate the operationality of the current system. This is because the proposals could indirectly enable access to works due to the possible reduction in costs overall across the copyright spectrum. This could also incidentally increase compliance with copyright due to the reduced prices and lessen piracy as a corollary effect.[61] Although it is impossible to eradicate piracy, in the absence of more affordable and accessible options, there will always be illegal pirate streams.[62]

However, it could be suggested that a simple solution would be to shut down all non-permitted data streams, although this may create further issues. For example, Minitel (which was a computer terminal that connected to remote services via uplink[63]), and

---

[59] Tirole, J., *The Theory of Industrial Organization* (Cambridge, MA: MIT Press, 1988), Para 9.4, 367ff.

[60] In terms of what items would be covered by the law, this is covered by the existing scheme of legal protection i.e. whatever items are capable of being protected by copyright are also capable of being protected under the current scheme. However, 'Artistic' works are not included under the reforms, for more information, see this chapter at 5.6.

[61] Devos, K., *Tax Compliance Theory and the Literature* (Springer Publishing 2014); See also, part 5.5 in this chapter generally, and specifically, 5.5.3(a).

[62] *BBC, "Premier League: Third of fans say they watch illegal streams of matches – survey", (4 July 2017)*, <https://www.bbc.com/sport/football/40483486>; *The Guardian, "Premier League launches major fightback against illegal streaming" (29 March 2017)*, <https://www.theguardian.com/football/2017/mar/29/premier-league-illegal-streaming-tv-audiences> [Both accessed 30 June 2019] – Taken from: Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577 at [576]; (Illegal Streaming Mobile Piracy Surged in France 2017) - <https://variety.com/2018/digital/news/illegal-streaming-mobile-piracy-france-2017-1202833883/> accessed 21/06/2020.

[63] (An uplink is a port found on network hubs, switches, and routers that allows a connection between computers or other network devices. For example, a home network may have a router connected to a broadband connection through the uplink port, so an Internet connection can be shared with all computers on the network.) - <https://www.computerhope.com/jargon/u/uplink.htm> accessed: 09/03/18.

which operated comparatively like a modern Google Chromebook.[64] Importantly, Minitel operated as an open network and was a huge success[65] but was decommissioned in 2012 after 30 years of service due to the networks ability to move with the advances of the internet. Fundamentally, the success of Minitel was, in part, due to the fact that it was subject to government regulation and was an open network.

Minitel blended state intervention (build and maintain the marketplace) with market-impartiality (giving all parties the capacity to sell legal products and services) These factors were the catalyst for the boom of Minitel.[66] Therefore, to help combat illegal streams, the reforms could facilitate cheaper, and subsequently, more accessible options, and this could create incentives for people to channel their transactions through the legitimate market.[68] However, empirical evidence to support this assertion is potentially lacking.[69]

This is important as the current copyright system does not adequately consider the wider issue of creativity. Access to works is being discouraged by a combination of

---

[64] With a Minitel, one could read the news, take part in multi-player interactive gaming, grocery shop for same-day delivery, reserve theatre tickets in Paris, purchase said tickets using a credit card, remotely control thermostats and other home appliances, manage a bank account, chat, and date.

[65] With free terminals at home or work, people in France could connect to more than 25,000 online services long before the world wide web had even been invented - <https://www.theatlantic.com/technology/archive/2017/06/minitel/530646/> accessed: 08/04/2019.

[66] Ibid.

[68] Posner. R, *Economic Analysis of Law*, (4th edn, 1992), pp.251-2.

[69] Note that there is no empirical evidence to support this directly. However, Danaher Smith and Telang 'Website Blocking Revisited' (18 April 2016), SSRN, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795> [Accessed 30 June 2019] did find that in the aftermath of the November 2014 website blocks, there was a 6% increase in subscriptions to legitimate sources such as Netflix and a 10% increase in videos viewed on legitimate ad-revenue supported sources such as BBC and Channel 5's streaming sites. Furthermore, it is arguable that an increase in affordable legitimate content may reduce piracy: J. Poort and J. Quintais, 'Global Online Piracy Study' Institute for Information Law, University of Amsterdam [2018]*, p.27*; Taken from Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577 at [577].

legal threats,[70] controlling access points,[71] contractual methods,[72] and high costs (to the point where infringement is being 'monetized'),[73] that are made possible by copyright laws in capitalist society.[74]

Chapters two and three focused on how the capitalist ideology has influenced the development of the current legal environment. They then analysed how, and why, this has been enforced through copyright within a panoptic-style system of surveillance. The chapters revealed inadequacies within the current system which have also resulted in the formulation of restrictive legal doctrines that are more about exploitation than creation in the name of profit. This was then argued to have been facilitated by the exclusive rights of communication (in the UK),[75] and, the public performance right[76] (in the US),[77] including how the 'streaming' business model discussed in chapter 4 was built on these rights.

Chapter four considered why there is a need to counteract the problem of contracts that have served to increase the amount of control that rightsholders have over their protected assets. This also included the how contracts prevent the applicability of legitimate copyright limitations on the exclusive rights granted by law. This is procured through the contractual mechanics of license agreements in the digital age under a 'two-tier' system of protection.[78] The purpose of doing so was postulated to be for the purpose of ensuring that the reforms remain effective in the face of such items. This was to prevent righthoders from simply contracting out of the reformed system, otherwise rendering them partially effective at best.

---

[70] See chapter 2, more specifically, see 2.3 and 2.5 respectively.

[71] For more information, see chapter 3 at 3.7 generally, more specifically, see section 8.10.

[72] For more information, see chapter 4 generally.

[73] For more information, see chapter 2 at 2.3, and 2.3.1.2(a) respectively.

[74] See chapter 3 at 3.3 and 3.4.

[75] See this chapter at 3.5.1 *generally.*

[76] Note, there is a UK right of ('public performance') – which is a right on the copyright owner to perform the work in public (s.19 CDPA); See also, *FAPL,* Joined Cases C-403/08 and C-429/08 [2011] *ECR* I-9083 (ECJ, Grand Chamber), [200]-[203]; Kitchin J. also confirmed that s.19 represents an overlap between (s.20 CDPA 'communication to the public') – *FAPL v. QC Leisure* [2012] EWHC 108 (Ch), [63].

[77] See this chapter at 3.5.2.

[78] See chapter 4 at 4.3, 4.4, 4.5 and 4.7 respectively.

The thesis has focused on the factors that have contributed to the shaping of the law by identifying the external developments that have created the current system that is predominantly focused on economic exploitation. The proposals aim to learn from these same items to encourage access to existing content and facilitate creative re-uses by reducing the cost of producing and accessing content. In support of this cost-reducing approach, Landes and Posner in economic terms[79] suggest that if legal copyright protection reaches a certain level, for instance, in the costs of rights clearing, this will reduce the number of works being created. In turn, this will limit the amount of stimuli for future works thereby limiting future creativity.[80]

It is posited that there is a need to consider reforms which directly tackle the issue of rising costs, not necessarily to the point where an author is 'free' to 'borrow' material from an earlier one[81] but instead, to reduce the cost of borrowing that material overall. This could result in cheaper works being produced for consumers and future authors that could correlatively increase the dissemination of works. This is because "the costs of developing a new idea are likely to be low in most cases relative to the potential reward from licensing the idea to others, and so there would be a mad rush to develop and copyright ideas. Resources would be sucked into developing ideas with minimal expression, and the ideas thus developed would be banked in the hope that a later author would pay for their use. Although the development of new ideas would be accelerated, the dissemination of ideas might not be."[82]

The reforms could counteract this, by providing a 'stimuli' that works in tandem with the capitalist ideology, by ensuring that the measures are only temporary. This could prevent the withholding of works as both sale and re-use would be covered. Thus, to withhold works in the hope that a later author would pay for their use would make little

---

[79] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325. at 326 and 332.

[80] For more information, see Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, (2008) chapter 6 at 6.2; Also, see this chapter at 5.5

[81] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325. at 333.

[82] W.M. Landes and R.A. Posner, "An Economic Analysis of Copyright Law" (1989) 18 J. Legal Stud. 325, 350.

economic sense under the proposed system as this would prevent owners charging their chosen price.

It is suggested that any approach to reform should operate in accordance with the principles governing the capitalist system, because although it may not last forever,[83] it is the current economic system of both the UK and the USA and so it is contended that any reforms must necessarily work in conjunction with it.[84] This is because instead of collapsing under crisis, capitalism generally adapts and mutates as although swathes of capital can be destroyed, business models can be scrapped, empires can be liquidated in global wars – the system survives, albeit it in a different form.[87] The thesis will then consider what bodies would be the most appropriate in administering the proposed system,[88] including how it will be enforced.[89]

5.3 The capping system: A basic overview.

The basic tenet of the capping system offered by this thesis operates on the basis that:

[83] Mason, P., *Post-capitalism: A guide to our future* (Penguin Publishing, 2016), chapter 8.

[84] Harari, Y.H., *Homo Deus: A Brief History of Tomorrow* (Penguin Random House, 2015).

[87] Mason, P., *Post-capitalism: A guide to our future* (Penguin Publishing, 2016), pp.31-48.

[88] See this chapter at 5.7 generally.

[89] See this chapter at 5.7.3.3(c)(i), (ii), (iii).

(The size of the work)[90] = (The maximum price[91] it can be market for until (x) number of copies/amount are/is sold in accordance with the figure imposed by the capping system)[92]

Rightsholders and distributors will have to declare the accuracy of their own numbers under a formal system of registration.[93] Then, once the qualifying (number/amount/duration) of (works) have been sold/licensed in accordance with the rules imposed by the guidelines provided: the work can be sold/licensed at a rate chosen by the owner.

For simplicity, the analysis focuses on copyright protection for (items) and other written works, but it should be noted that the proposals are applicable, "mutatis mutandis, to other forms of expression as well."[94]

In essence, the capping aspect of the proposals works by applying what are known as 'price controls' to the current copyright system, which is the ability to set maximum and minimum prices.[95] The reforms would set a 'maximum price' that could be charged in

---

[90] 'Size' is not defined explicitly here because it is considered to be a quantitative matter that should be outlined by the statutory proposals which should be considered within the wider context of the culture economy. In addition, such an analysis is deemed to be a matter for governmental consideration based on the fact that to provide a comprehensive analysis of potential prices and sizes is argued to be beyond the scope of this thesis, as this is designed to provide a framework for more detailed reform within the copyright sector to be developed.

[91] For purposes here, no specific number of items (or) duration is provided, neither are specific prices because the framework provided is intended to offer a basic outline without any specific numbers. Instead, it is designed to provide a model in which accurate numbers can be inserted into, and implemented into law by way of a fully-fledged extensive economic analysis. In addition, it is suggested that such an analysis is deemed to be beyond the scope of this thesis and so to provide specifics pertaining to numbers beyond the scope of this piece.

[92] The proposals are applicable, mutatis mutandis, to other forms of expression – Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[93] For more information, see this chapter at 5.7.3.3(a).

[94] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[95] <https://www.economicshelp.org/blog/621/economics/price-controls-advantages-and-disadvantages/> accessed: 19/02/2019.

relation to works sold and re-used, and the price of works cannot go above a certain level until a certain amount have been sold/re-used.[96] The aim overall, is to reduce prices below the market equilibrium price, and this could reduce prices overall across the copyright system even after the 'capped' phase.[97]

Advantages of this approach include:

1. Could lead to lower prices for consumers.[98] This may be important if the supplier has monopoly power to exploit customers. For example, a copyright owner who owns all the rights in a work in a specific area can charge excessive prices. Maximum prices are a method to bring prices closer to a 'fair' and 'competitive equilibrium to the copyright system post-reform.[99]
2. Maximum prices are usually reserved for socially important goods and purposes,[100] but it is also suggested that they can be used to help alleviate rising prices in the copyright area for the multiple reasons.[101]

Disadvantages of this approach are:

3. That it will lead to lower supply. If owners get a lower price, there may be less incentive to supply the good, and the number or quality of goods on the market could decline. The reforms aim to counteract this potential drawback under the following basis. The quality of the work will directly impact on an author's ability to charge their chosen price based on the fact they need to surpass the number of works required to be sold before they can attain pricing freedom (the ability to no longer be limited by the pricing limits imposed by the cap). This is suggested to help combat any concerns about reduced quality and/or supply.[102]

---

[96] There is a reason why 'quantity' here is used over a 'time' based approach – for more information, see this chapter at 5.3.1.

[97] See also, part 5.5 in this chapter generally, and specifically, 5.5.3(a).

[98] See this chapter at 5.5.3 and 5.5.3(a) respectively.

[99] For more information, see this chapter at 5.5.3(a).

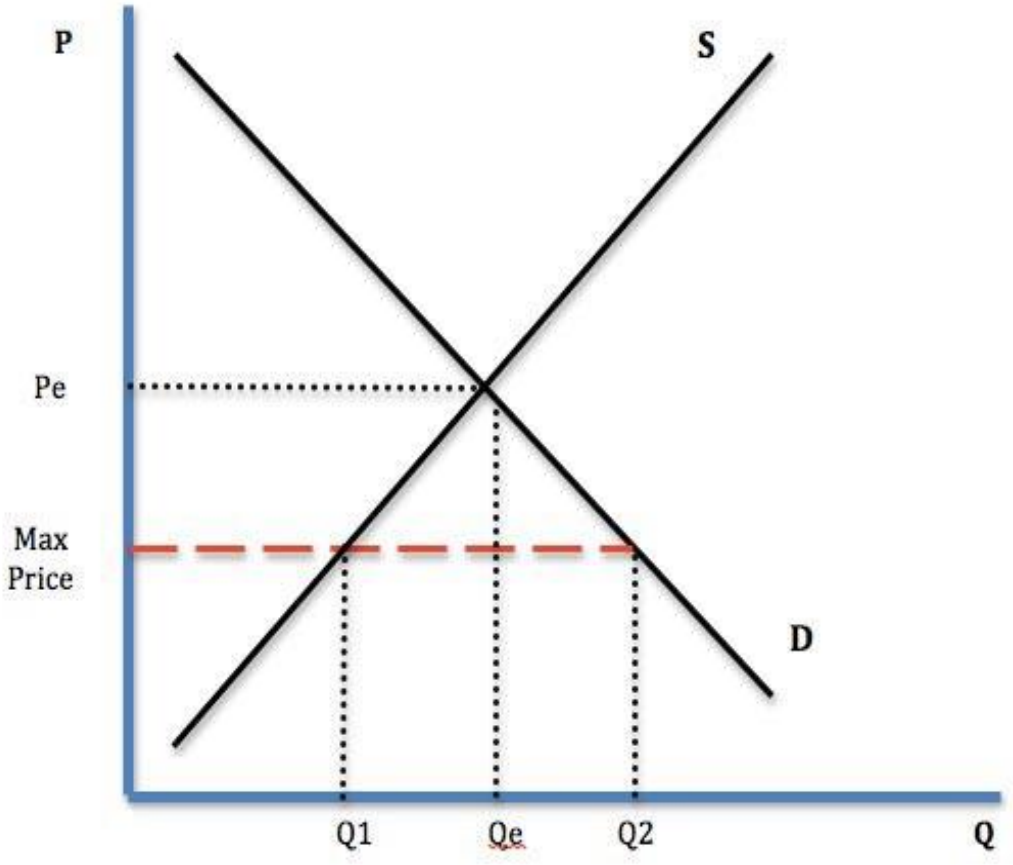
[100] *Amazon.com,* Case C-521/11 EU:C:2013:515, [49] – The CJEU in this case ruled that compensatory funds could be used for social and cultural establishments.

[101] For more information, see this chapter at 5.5 generally.

[102] For more information, see this chapter at 5.5.2.

4. A maximum price will also lead to a shortage – where demand will exceed supply – The reforms could deal with this under the time-based approach used,[103] and also, the fact that the capping limitations could capitalise on the principles of competition in capitalist society could reduce costs further.[104]

To illustrate how maximum prices work, the graph below shows what happens when maximum price is applied under market conditions. The equilibrium price is Pe. A maximum price leads to demand of Q2, but a fall in supply to Q1.[105]



[106]

To avoid any unnecessary or otherwise repetitive explanation regarding how the reforms will procure the above advantages, and, deal with the associated

[103] This is discussed further in this chapter at 5.3.1

[104] For more information, see this chapter at 5.5, and 5.5.3(a) respectively.

[105] <https://www.economicshelp.org/concepts/maximum-prices/> accessed: 19/05/2018).

[106] Ibid.

disadvantages, it is important to note in this section that the above points are dealt with later in this chapter.[107]

5.3.1 Why is there an emphasis on the quantity sold as opposed to a specified time limit under the proposed reforms?

The importance of a quantity-sold approach, as opposed to a time-based method, is based on the hypothesis. Simply, that if rightsholders were given an allocated time-frame in which to charge a particular fee, it is argued that they would artificially restrict the amount available until the designated period expires in capitalist society via the capitalist practice of 'hoarding'[108] (the withholding of goods in an attempt to induce scarcity to raise prices).

It is asserted that rightsholders would adopt such practices to minimise the effects of a temporary reduction in price, as owners would essentially be able to modify their output. This is to curtail any potential losses perceived by them under a time-based method and this would be problematic in attempting to reduce prices. This is considered to be particularly important given the fact that the function of 'hoarding' goods is 'simply ignored in the capitalist economy. It is ignored to the point where the hoarding of goods is the same as the withdrawal of goods but with a characteristic price increase as a consequence."[109] Tangentially, it is postulated that the envisaged hoarding by capitalists under a time-based approach to reform is a reasonable prediction. This is because rightsholders could be reasonably said to adopt such practices for the purpose of reducing what may be perceived as a form of financial 'loss' due to the temporarily lowered prices under the proposals during the initial stages of the caps.

Specifically, under a time-based approach, it is submitted that rightsholders would adopt the practice of hoarding not necessarily to induce an artificial rise in prices, but instead, to reduce the damage caused by a time-based restriction via minimising the

---

[108] Ibid.

[109] Backhaus, J., *Joseph Alois Schumpter: Entrepreneurship, Style and Vision* (Kluwer Academic Publishers, 2003), Ch.3, pp.93-94; On the way in which capitalists hoard money and disrupt the normal function of capital as a tool of exchange rather than accumulation, see Fornas, J., *Capitalism: A companion to Marx's Economy Critique* (Routledge Publishing, 2013), pp.47-8.

amount released. By adopting the quantity-based approach outlined, as opposed to, a time-based method, it is suggested that works could potentially remain of sufficient quality[110] despite the initial limitations. Yet, their price, including those for creation and re-use, could be significantly lower by virtue of what will be demonstrated below[111] as an increased degree of economic efficiency[112] throughout the system because of the anticipated effects of the reforms.

This is predicted to encourage owners to make a concerted effort to bypass the restrictive price limitations in place by using a numbers approach. This is simply to ensure they could make the most of the pricing freedom available after the required amount has been satisfied under the proposed system. This is based on the notion that in capitalist society, man is under the perception that 'time is money' and a man who can earn ten shillings a day by his labour, [but] sits idle, [essentially] throw[s] away, five shillings.[113]

The same analysis can be applied to the proposed reforms. It could be suggested that for every time a rightsholder keeps their works within the boundaries of the caps, they are, in essence, throwing away extra shillings that they perceive could be made under their own independently chosen price. This method could be useful as rightsholders are influenced by the inherent need to make profit within capitalist society,[114] and because for a new work to be created, the expected return — typically, [shall be] assume[d] exclusively, from the sale of copies—must exceed the expected cost.[115]

---

[110] For more information, see this chapter at 5.5.2.

[111] For more information, see this chapter at 5.5, and 5.7, *generally*; On price reduction, see this chapter at 5.5.3(a).

[112] R. J. Van den Bergh and P. D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (2nd edn, Sweet & Maxwell, 2006), 29–30; See also, Posner R. *Economic Analysis of Law (*1973); H. Demsetz, 'Industry Structure, Market Rivalry and Public Policy' [1973] 16 J Law and Economics, 1-9.

[113] Weber, M., *The Protestant Ethic and Spirit of Capitalism* (Trans, Stephen Kalberg, Roxbury Publishing, 2002), p.14.

[114] Weber, M., *The Protestant ethic and Spirit of Capitalism* (London: Unwin University Books, 1971, 11th impression); See also, chapters 2 and 4 generally.

[115] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

Therefore, it is for these reasons that a time-based approach is argued to be an ineffective way in which to efficiently implement the proposals. Also, the benefits of a quantitative approach are suggested to be substantiated by Landes and Posner. They maintain the assumption that there is a 'downward-slumping demand curve' in relation to copyrighted works.[116] As such, it is hypothesised that these factors are likely to create a greater desire among rightsholders to bypass the limitations proposed on the sale of protected articles. This is in order to benefit from the early popularity of the asset and to retain their pricing freedom for the reasons mentioned herein.

In any event, it is recognised that more popular works will sell more, and therefore, have a better chance of benefitting from the current proposals than less popular works. Nonetheless, it is contended that such items are likely to occur regardless of the approach taken as "if there is no market interest in a work, even an extended copyright [or absence of a 'capped' phase] will not save it."[117] It is also contended that due to the reduced rates envisaged, both consumers and potential creators will have to pay less money to access works. This could facilitate a subsequent rise in creativity, and thus, the objective of the reforms, as more popular works will inevitably have a better chance of market success regardless of what system is proposed.[118]

However, it is also recognised that this analysis could equally suggest that prices could rise after the works are no longer subjected to the proposed capping phase. Although this is a potentiality, it is nonetheless argued that the consequential elements produced by the reforms,[119] could actually see a reduction in both the prices associated with sale, and re-use, post-reform. This is based on the premise that production costs will be reduced. This implies that the cost of expression will fall (as well as during the capped stage). In turn, this could transcend to a lower price charged for the finished

---

[116] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325. at n.5.

[117] Dallon, C., 'The problem with congress and copyright law: Forgetting the past and ignoring the public interest' 44 Santa Clara Law Review 365 (2004).

[118] Geiger, C., 'The future of copyright in Europe: striking a fair balance between protection and access to information' I.P.Q. [2010], 1. R.; Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[119] Namely that prices will be reduced across the copyright area as individual publishers bargain for the best deal and compete for custom to maximise revenue in capitalist society.

item and lower sale costs overall, with the potential for increased dissemination of works.[120]

Correspondingly, to deal with re-use is considered to be especially important. This is because licensing and other transaction costs to obtain permission to copy such works often raises the cost of creating new works – and this can lower the number of works created.[121] Landes and Posner highlight that copyright holders might, therefore, find it in their self-interest, ex ante, to limit copyright protection.[122] Instead, it is hypothesised that rather than limit copyright protection, similar results can be achieved by limiting the cost that can be charged for a work (which also applies to re-use), due to the predicted reduction in production costs that could be induced by the proposals.[123]

5.3.2 Impact on associated laws and potential barriers to implementation.

It has already been outlined that the proposed changes do not seek to alter any of the current laws per se, in that there is no permanent limitation on the legal rights of owners. However, the fact the reforms indirectly hinder the ability of rightsholders to exploit their works through the caps imposed must be considered. It is suggested that this could be problematic in terms of compliance with the Berne Convention[124] and

---

[120] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325.; For more information, see the discussion in this chapter at 5.5 generally, and, specifically at 5.5.3(a).

[121] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325. at 332; A parallel analysis (independent of Landes and Posner's) of the novelty requirement in patent law is found in Scotchmer. S, & Green, J., 'Novelty and Disclosure in Patent Law' (Berkeley and Harvard, unpublished manuscript, May 12, 1988). The authors point out that the more stringent the requirement, making it harder to get a patent, the greater the gains from patenting but the less information useful to other inventors will be disclosed (patent applicants must disclose their inventions in the application).

[122] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325. at 333.

[123] For more information, see the discussion in this chapter at 5.5.3(a).

[124] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised in Paris on July 24, 1971 and amended in 1979, S, Treaty Doc. No. 99-27 (1986) [The 1979 amended version does not appear on *UNTS* or *ILM*, but the 1971 Paris version is available at 1161 *UNTS* 30 (1971)]; On the Berne Convention generally, see Davies, G., Garnett, K., Harbottle, N. Caddick,

TRIPS,[125] as well as other international provisions.[126] The Berne Convention[127] states, in relation to the reproduction right, under Article 9(2) that:

> "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[128]

These three requirements, namely that such permission may be granted (a) in certain special cases, where the reproduction; (b) does not conflict with the normal exploitation of the work; and (c) does not unreasonably prejudice the legitimate interests of the author; are known as the Berne "three-step" test. These criteria apply cumulatively, and the meaning and significance of the three-step test[129] has been considered extensively.[130] Article 9(2) of Berne is considered by UK law pursuant to Art.5(5) of Directive 2001/29/EC. However, it is important to note that the three-step

---

(eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 23-04.

[125] Agreement of Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, 15th December 1993, 33 ILM 81 (1994).

[126] Malevanny, N., 'Online Music Distribution – How much Exclusivity is Needed?: A Study of International, European, German and U.S. Copyright Systems and Their Objectives', Springer-Verlag (2019), chapter 3.

[127] Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) 1886 (Berne, September 9, 1886).

[128] Article 9(2). Berne Convention for the Protection of Literary and Artistic Works.

[129] Unlike the three-step test in international copyright law, it is uncertain whether the three-step test in the InfoSoc Directive is addressed to national courts as well as the legislatures of the Member States - Recent case law of the Court of Justice of the European Union ('CJEU') has provided guidance in this respect. Although the Court has held that Article 5(5) of the InfoSoc Directive is not intended to affect the substantive content of the exceptions contained in Article 5(1), (2) and (3) thereof...it appears from the CJEU's jurisprudence that the three-step test in the InfoSoc Directive is addressed at national legislators and courts alike – Richard Arnold and Eleonora Rosati, 'Are National Courts the Addressees of the InfoSoc Three-Step Test?' (2015) 10(10) Journal of Intellectual Property Law & Practice 741-749.

[130] For more information, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 23-33, 23-138.

test has never been incorporated into UK copyright legislation,[131] but was recently described as "relevant"[133] by the UK High Court.

The proposals, despite limiting the ability of an owner to exploit their works, are nonetheless held to comply with article 9(2) due to their temporary nature, as well as being compliant with Article 10 of the WIPO Copyright Treaty,[134] which states:

> "(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author;
>
> (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."

An alternative line of argument could be that the reforms aim to provide a system of remuneration for rightsholders that does not conflict with the normal exploitation of a work as the restrictions apply for a limited period. Moreover, the potential for owners to earn higher levels of remuneration for their works can be influenced by their ability to obtain cheaper methods of production under the current system.[135]

---

[131] For more information, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 9-02.

[133] *Warner Music UK Ltd Sony Music Entertainment UK Ltd (for themselves and as representative Claimants on behalf of the members of their respective corporate groups) v Tunein Inc* [2019] EWHC 2923 (Ch) [2019] 11 WLUK 6 at [184].

[134] WIPO Copyright Treaty (Adopted in Geneva, 20 December 1996) Article 10.

[135] '2016 Print Remuneration Study' a study called "*Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works"* prepared in 2016 for the European Commission DG Communications Networks, Content and Technology / DG Internal Market by Europe Economics and IViR (Study internal contact No. MARKT/2014/088/D1/ST/OP); '2015 EU Remuneration Study' a study called "*Remuneration of authors and performers for the use of their works and fixations of their performances*" prepared in 2015 for the European Commission DG Communications Networks, Content & Technology / DG

The temporary nature of the system is unlikely to unreasonably prejudice the legitimate interests of the author because the limitations are not permanent, and member states may enact exceptions which have a minimally prejudicial effect on the rightsholder.[136] Also, art.2(b) and art.3(2)(a) of Directive 2001/29 must be interpreted as not precluding national legislation which establishes, as regards the exploitation of audio-visual archives by a body set up for that purpose, a rebuttable presumption that the performer has authorised the fixation and exploitation of his performances, where that performer is involved in the recording of an audiovisual work so that it may be broadcast.[137]

Thus, it is asserted that because there is no reduction in the legal rights of the author other than their ability to exploit their works for a limited time, it is likely that the measures will comply with article 9(2) and could be deemed a 'special case'. This is due to the fact that the proposals could increase access to works and because writers such as Senftleben argue that "special cases"[138] have been added for specific policy reasons.[139] In support, Christophe et al., state that the "open-ended" wording of the three-step test supports "flexible approaches" that seek to strike an appropriate "balance"[140] "in copyright law…[and] it may thus be better to see the test as an important link between continental European and Anglo-American copyright systems than as a prohibition of domestic open-ended exceptions."[141]

Internal Market by Europe Economics and IViR as part of the Digital Single market Strategy preparation (Study internal contract No. MARKT/2013/080/D); See also, this chapter at 5.5.3(a).

[136] *Warner Music UK Ltd Sony Music Entertainment UK Ltd (for themselves and as representative Claimants on behalf of the members of their respective corporate groups) v Tunein Inc* [2019] EWHC 2923 (Ch) [2019] 11 WLUK 6 at [184]-[186] (see also, recital 35 Directive 2001/29/EC and Case C-463/12 *Copydan*).

[137] *Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam) v Institut national de l'audiovisuel* [2020] E.C.D.R. 4 at H6.

[138] *Spiegel Online GmbH v Volker Beck* [2019] E.C.D.R 24 at [37].

[139] Senftleben, M., 'Copyright Limitations and the three step test', Kluwer, The Hague (2004) at 156.

[140] Current copyright statutes such as the CDPA , and judicial interpretation of them, are a means by which the general public may begin their investment in the rationalisation of copyright. The current statutes are invariably described as a "balance" between stakeholders - *Gowers Review* (2006), p.1.

[141] Geiger, Christophe; Gervais, Daniel; and Senftleben, Martin, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law.' [2013]. PIJIP Research Paper no. 2013-04.

It is suggested that a wide application of 'special cases' can be used to justify the current approach because of the level of restriction that is apparent within the current copyright system. In turn, the reforms can be considered as a special case to help facilitate a more cost-effective system for potential creators and users. An application of this nature is contended to be supported by the preamble of the 1996 World Copyright Treaty (WCT),[142] whereby it stresses the necessity "…to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention."[143] This is considered to be of heightened importance in the US, for example, where the constitution emphasises the interests of authors. It states that the purpose of protection is, "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[144]

Consequently, it is posited that the proposed system could comply with the provisions outlined in the three-step test. This is because it enables rightsholders to obtain financial reward for their works, as well as for re-use, but subject to a temporary restriction that once bypassed, will allow for the otherwise unhindered exploitation of their works. This is important as the World Trade Organisation Panel (WTOP), (a quasi-judicial body in charge of adjudicating disputes between Members in the first

---

[142] WIPO Copyright Treaty (WCT) (1996) - <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_226.pdf> accessed: 16/02/2019.

[143] NR/DC/4, § 12.09. Moreover, it was raised in the course of the deliberations of Main Committee I. See WIPO Doc. CRNR/DC/102, 72 and 74. Cf. as to the reference to the Berne Convention ('as reflected in the Berne Convention'), A. Françon, 'La conférence diplomatique sur certaines questions de droit d'auteur et de droits voisins', *Revue Internationale du Droit d'Auteur* 1997, p. 3 (9); S. Ricketson, 'The Boundaries of Copyright: Its Proper E&Ls: International Conventions and Cohen Jehoram, 'Some Principles of Exceptions to Copyright', in: P. Ganea/C. Heath/G. Schricker (eds.), *Urheberrecht Gestern – Heute – Morgen, Festschrift für Adolf Dietz zum 65. Geburtstag*, München: C.H. Beck 2001, p. 382; *Taken from* Geiger, Christophe; Gervais, Daniel; and Senftleben, Martin. 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law.' (2013). PIJIP Research Paper no. 2013-04.

[144] The Constitution of the United States, Article 1, Section 8.

instance),[145] commented in relation to the 'normal exploitation of the work' part of the test. It considered that a "...conflict arises when the exception or limitation enters into economic competition with the ways that rightsholders normally extract economic value from that right to the work (copyrighted material) and thereby deprives them of significant or tangible commercial gain."[146] Regarding whether an exception or limitation must not unreasonably prejudice the legitimate interests of the right holder, the panel found that there is unreasonable prejudice where an exception or limitation causes, or has the potential to cause, an unreasonable loss of income to the copyright holder.[147] It is suggested that the reforms would be supported by this for the reasons discussed herein.[148] Moreover, a short-term restriction on price competition effected by the proposals is generally not considered anti-competitive,[149] especially when

---

[145] <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm> accessed: 21/04/2019.

[146] Davies, G., Garnett, K., Harbottle (eds), "*Copinger and Skone James on Copyright*", 17th edition, Sweet and Maxwell, London, (2016) at 23-139; Panel Report WT/DS160/R of June 15, 2000: United States—s.110(5) of the Copyright Act at para 6.183.

[147] Concerning the Panel Report, see J.C. Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-StepTest' for Copyright Exceptions", (2001) 187 RIDA 3; K.J. Koelman, "Fixing the Three-Step Test" [2006] E.I.P.R 28(8), 407-412 in Davies, G., Garnett, K., Harbottle (eds), "Copinger and Skone James on Copyright", 17th edition, Sweet and Maxwell, London, (2016) at 23-139. Y. Gaubic, "Les exceptions au droit d'auteur: un nouvel avenir", [2001] Communication Commerce éléctronique, no.6, 12; M. Ficsor, "How much of What? The 'Three-StepTest' and its application in two recent WTO dispute settlement cases", (2002) 192 RIDA 110; D.J. Brennan, "The Three-Step Test Frenzy—Why the TRIPs Panel Decision might be considered Per Incuriam", [2002] IPQ 2, 212; ; B.C. Goldmann, "Victory for Songwriters in WTO Music Royalties Dispute between U.S. and E.U.—Background of the Conflict Over the Extension of Homestyle Exemption", (2001) 32 IIC 412; and J. Bornkamm, "Copyright and the Public Interest—The Three-Step Test in International Copyright", paper delivered at the Fordham University School of Law 10th Annual Conference on International Intellectual Property Law and Policy, New York, April 4-5, 2002.

[148] See also, this chapter at 5.3.3, 5.5, and 5.5.3(a).

[149] *Landes/Posner*, The Economic Structure of Intellectual Property Law, p. 374; *Drexl*, in: Drexl (ed.), Research Handbook on Intellectual Property and Competition Law, 27, 45–46; See also, *Kolstad*, in: Drexl (ed.), Research Handbook on Intellectual Property and Competition Law, 3, 6–10; *Landes/Posner*, The Economic Structure of Intellectual Property Law, p. 374; *Yow*, 34 World Competition L. & Econ. Rev. 287, 288; for further references see *Hilty*, in: Rosén (ed.), Individualism and Collectiveness in Intellectual Property Law, 3, 5, footnote 7; Taken from Malevanny N, 'Relevant

taking into account the long-term perspective of the reforms and their associated benefits.

5.3.3 A 'temporary' advantage: why the capping system can be used as a 'source of inspiration' for national lawmakers

The temporary nature of the reforms can use the three-step test as a source of inspiration for legislators seeking to institute flexible exceptions and limitations at the domestic level in the digital environment.[150] It is, however, acknowledged that UK has chosen not to transpose the test, [but] it is already within the relevant copyright exceptions.[151] The Court of Justice of the European Union has yet to confront the obvious tension between the 'three-step test' and the idea that exceptions are to fairly balance the fundamental rights and interests of owners and users.[152] This is

Rights and Their Applicability to Online Music Uses. In: Online Music Distribution - How Much Exclusivity Is Needed?' [2019] Munich Studies on Innovation and Competition, vol 12. Springer, Berlin, Heidelberg, pp.317-330.

[150] Geiger, Christophe; Gervais, Daniel; and Senftleben, Martin. 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law.' [2013]. PIJIP Research Paper no. 2013-04.

[151] Arnold & Rosati, 'Are national courts the addressees of the InfoSoc three-step test?' [2015] 10(10) *Journal of Intellectual Property Law & Practice* at 743; DTI, Consultation paper on implementation (August 2002), 11-12, as reported in Cornish and Others, Intellectual property, cit, §12.37. See also M Hart – S Holmes, 'Implementation of the Copyright Directive in the United Kingdom' [2004] 26(6) EIPR 254, 255.

[152] J. Griffiths, 'Fair Dealing after *Deckmyn',* in M. Richardson and S. Ricketson (eds), Research Handbook on IP in Media and Entertainment [2017], ch. 3, 96-100; See also, Case C-201/13 *Deckmyn and Vrijheidsfonds v. Vandersteen*, EU:C:2014:458, [AG29] (AG Cruz Villallon).

uncertain[153] because the test has never officially been interpreted by the CJEU[154] and remains an "unanswered" question officially[155] in what has been described as a "total failure"[156] of harmonization. However, this can be used to support the proposals in accordance with the three-step test. This is because even in those Member States that have "not transposed the language of the three-step test into their own legal systems, courts must determine not only whether the acts of the defendant in question are eligible for the application of a certain exception or limitation, but also whether they comply with the cumulative conditions set in the InfoSoc three-step test."[158]

Under the current approach, this could be something that could become a feasible option and would enable some boundaries to be set pertaining to the aforementioned challenges. Moreover, this supported by the comments of the US delegation in the 1996 Diplomatic Conference which adopted the World Intellectual Property

---

[153] Despite several precedents – among other things – at the EU level, the wording of Article 5(5) (which incorporates the three-step test into the InfoSoc Directive) of the InfoSoc Directive does not clarify with sufficient certainty who the addressees of this provision are – For more information, see L Guibault – G Westkamp – T Rieber-Mohn, 'Study on the implementation and effect in Member States' laws of Directive 2001/297EC on the harmonisation of certain aspects of copyright and related rights in the Information Society [2012], Amsterdam Law School Research Paper No 2012-28, 57; Case C-527/15 *Stichting Brein v. Jack Frederik Wullems*, EU:C:2017:300 (ECJ); C-435/12 *ACI Adam BV v. Stichting de Thuiskopie*, EU:C:2014:254 (ECJ).

[154] Arnold & Rosati, 'Are national courts the addressees of the InfoSoc three-step test?' (2015) 10 (10) Journal of Intellectual Property Law & Practice, 741-749; See also, Garnett, kevin, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright,* 17th edn (Sweet & Maxwell, London 2016) 9-68, 9-70; Richardson, M. & Ricketson, S. *Research Handbook on Intellectual Property in Media and Entertainment*, (Edward Elgar, 2017), pp.96-101.

[155] Griffiths, J., 'The "three-step test" in European copyright law – problems and solutions' [2009] 2009/4 IPQ 428, 431.

[156] MC Janssens 'The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation', in E Derclaye (ed) *Research handbook on the future of EU copyright* (Edward Elgar, 2009), p.332 – Taken from Rosati, Eleonora, 'Non-commercial quotation and freedom of panorama: useful and lawful?' (2017) Journal of Intellectual Property Information Technology and E-Commerce Law, 8 (4), 311-321.

[158] Arnold, R., and Rosati, E., 'Are National Courts the Addressees of the InfoSoc Three-Step Test?' (2015) 10(10) Journal of Intellectual Property Law & Practice 741-749.

Organisation (WIPO) 'Internet' treaties.[160] The delegation stressed that the three-step test "should be understood to permit contracting parties to carry forward, and appropriately extend into the digital environment, limitations and exceptions in their national laws which were considered acceptable under the Berne Convention."[161]

Consequently, under the proposed system the normal exploitation of works will not be undermined, nor will it deprive authors of significant financial gain. This is because exploitation will be achieved through a combination of purchasing the original work at a 'capped' rate by content recipients who, after the expiration of the designated period, will then be able to charge their chosen rates. Thus, it is contended that the proposed system represents a valid exception to the exclusive rights of copyright owners under Article 9(2) of the Berne Convention. It is asserted that the proposals do not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights holder because they do not tax them.[162] This includes the fact

---

[160] The WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) - (known together as the "Internet Treaties"), set down international norms aimed at preventing unauthorized access to and use of creative works on the Internet or other digital networks. Among other things, both the WCT and the WPPT address the challenges posed by today's digital technologies, in particular the dissemination of protected material over digital networks such as the Internet. For this reason, they are often referred to as the "Internet treaties."; See also, Recitals 15, 25, 26, 30 and 32 of Directive 2001/29 EC in *Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam) v Institut national de l'audiovisuel* [2020] E.C.D.R. 4 (Opinion of AG Hogan at II.A.6)

[161] See Minutes of Main Committee I, WIPO Doc. CRNR/DC/102, 70 *in* Geiger, Christophe; Gervais, Daniel; and Senftleben, Martin. 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law.' [2013]. Arnold and Rosati put forward a similar notion, namely that both national courts and legislatures should apply the test when considering copyright matters, specifically those situations where there is a need to consider the balance between authors and users rights - R. Arnold and E. Rosati, 'Are National courts the Addressees of the Info Soc Three-Step Test? [2015] 10 (10) JIPLP 741-9; PIJIP Research Paper no. 2013-04; See also, WIPO Copyright Treaty (adopted in Geneva on December 20, 1996) Article 25 The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

[162] See this chapter at 5.5

that they are only temporary, and also have economic benefits for potential authors that could see the overall cost of production fall.[163]

This reduction could mean that rightsholders experience an increased economic value for their works. This is based on the fact that the revenue generated by their works is likely to increase because less money could potentially be spent on production under the proposed system. Tangentially, this is also asserted to help support the fact that the reforms are not to be viewed as to "unreasonably prejudice the legitimate interests of the author"[164] regarding the ability of the author to extract economic value from the work.

5.4 The issue of contracts.

In chapter four, it was demonstrated that there is a need to counteract the use of contractual methods that increase the control rightsholders have over their protected assets. This included the capacity of contracts to deny legitimate copyright limitations on the exclusive rights granted by the law, through the contractual mechanics of license agreements in the digital age.

Contracts are deemed to be an essential point of consideration in the formulation of any reform proposal. This is to ensure that they are effective as contracts could be used to diminish the operationality of the proposals. There should be a legislative provision whereby any attempt to procure a situation where the reforms are otherwise contracted out of will be 'triggered' by such items. This will not necessarily render the contract void, but will render any limitations on the reforms as an invalid part of the agreement. The remainder of the agreement will remain otherwise valid.

The decision to specifically deal with contracts[165] when attempting to regulate any aspects of the copyright system is considered to be fundamental if the reforms are going to be successful and to prevent confusion.[166] Professor Ian Hargreaves would

---

[163] For more information, see this chapter at 5.5.3(a).

[164] Article 9(2). Berne Convention for the Protection of Literary and Artistic Works.

[165] For more information on the effect of contracts on the current system, see chapter 4 *generally.*

[166] Hargreaves Review, Recommendation 5, and 51, [5.40] (explaining that permitting contractual variation 'replaces clarity...with uncertainty'). For more information, see this same review at chapter 9, p.229.

seemingly agree, where he proposed a recommendation in his 2011 review, when talking about limits to copyright. He recommended that "the Government should legislate to ensure that...copyright exceptions are protected from override by contract."[167]

5.4.1(a) How to decide when an agreement is invalid under the proposals, and what about the intention of the parties: are they relevant or not?

5.4.1(a)(i) The UK approach

In terms of how to assess which agreements would otherwise fall within the 'but for' test, in the UK, the standard for establishing '*causation*' in negligence could be used. Tortious liability has been referred to in copyright on numerous occasions[168] and the *but for* test is considered to provide a viable method of ascertaining the objective meaning of specific contractual terms.[169]

Under this, the courts could assess whether or not a contract has been *used* to undermine the enforceability of the reforms and *but for* such items, the reforms would otherwise apply.[170]

---

[167] For more information, see Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011) at p.8; See also, the discussion in this chapter at 5.4; See also chapter 4 at 4.8.

[168] R. Arnold, 'Website-blocking Injunctions: The Question of Legislative Basis' [2015] E.I.P.R. 623–630; *Twentieth Century Fox Film v. Newzbin* [2010] *EWHC* 608 (Ch) (Kitchin J); Hetcher, S., 'The Immorality of Strict Liability' in Copyright, 17 Marq. Intell. Prop. L. Rev. 1, 4–5 [2013]; Goold, Patrick Russell, 'Unbundling the 'Tort' of Copyright Infringement' (September 14, 2016). Virginia Law Review, Vol. 102, 2016.

[169] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 at [60]; c.f. *The Aktor* [2008] EWHC 1330 (Comm); [2008] 2 Lloyd's Rep. 246 at [38]; *Dunlop Haywards (DHL) Ltd v Erinaceous Insurance Services Ltd* [2009] EWCA Civ 354; [2009] Lloyds Rep. I.R. 464 at [66]. Earlier authorities had seemed to endorse a subjective approach: see, e.g. *IRC v Raphael* [1935] A.C. 96, 143 ("real intention"); *The Nai Genova* [1984] 1 Lloyd's Rep. 353 at 359; *Munt v Beasley* [2006] EWCA Civ 370 at [36]; Nicholson Air Servs., Inc. v. Bd. of County Comm'rs, 706 A.2d 124, 132 (Md. Ct. Spec. App. 1998).

[170] The test and its surrounding discussion in this chapter is by no means any attempt at providing an exhaustive or otherwise comprehensive account of the law in this area, or legal causation as a whole for that matter, but simply, to show that the mechanics of it can be used to create a viable approach in which to assist in the successful implementation of the current proposals; Note, it can also be said that IP is, in fact, also a tort - Garg, Richa, Tort in Intellectual Property (September 5,

The *but for* test was established in *Barnett v Chelsea and Kensington HMC* [1969],[171] where it was ruled that that the question to be asked is: *'but for' the defendant's actions, would the claimant have suffered the loss?* If yes, the defendant is not liable. If no, the defendant is liable.[172] Thus, it is suggested that a simple application of the 'but for' test will suffice in assessing whether or not a contract has been *used* to undermine the enforceability of the reforms, *and*, would otherwise have successfully *done* so if the court did not intervene.

So, the question would operate similarly to the above, namely: *'but* for' the contractual agreement, would the article have been otherwise exempt from the regulation of the capping system? If yes, the contract remains and nothing is changed. If no, the contract is changed to otherwise give effect to the agreement in a manner that is as close as is reasonably practicable to the parties objective intentions, or, if the contract was for the explicit purpose of removing the work outside of the remit of the reforms, it will be declared void if no other purpose can be found.[173]

The *but for* test is considered to provide a 'simplistic' and 'straightforward' approach, which is adaptable in most circumstances: as in the majority of cases, courts determine *causation* on the basis of 'common sense'.[174] The test, therefore, looks not at the bare acts or omissions, but instead, for the preclusive elements caused by the specifics of the agreement.[175] Such a view, would be considered to be a *singularist*

2010). Available at SSRN: <https://ssrn.com/abstract=1672183 or http://dx.doi.org/10.2139/ssrn.1672183> accessed: 3/05/2018.

[171] 1 QB 428.

[172] *Barnett v Chelsea and Kensington HMC* [1969] 1 QB 428; *Chester v Afshar* [2004] 3 WLR 927.

[173] These same principles will also apply in the US – see this chapter at 5.4(a)(ii).

[174] Steel, S. 'Proof of Causation in Tort Law' Law Quarterly Review [2017] 133 (Jul), 516-520.

[175] The decision in the Court of Appeal in *Robbins v Bexley LBC* [2013] EWCA Civ 1233 is inconsistent with this principle and looks wrong. Fundamentally, the Court of Appeal held the defendant council liable for damage done to the claimants' house. The Court of Appeal held the defendant council liable for the damage caused by their *breaching* the duty of care that they owed the claimants, but rather a case of holding the defendants liable for the damage caused by their *failing to try* to comply with the duty of care that they owed the claimants; See also, Stapleton, S., 'Choosing What We Mean by "Causation" in the Law,' 73 MO. L. REV. 433–480 (2008).

one by Moore,[176] a well-known writer on causation issues. His central argument in *Causation and Responsibility* is to substantiate the core notion of causation. Moore denies that token causal relations are 'grounded in laws of nature, counterfactuals, or any other general features of the world;'[177] and simply that, albeit somewhat uncomprehensive pertaining to his entire account,[178] is that this would suggest that 'omissions...are literally no things at all.'[179]

Ultimately, it is hypothesised that the *but for* test is a beneficial method in which to assess contracts within the context of the reforms. This due to the inherently objective nature of causation when it comes to deciding whether contracts (or specific terms) operate to otherwise undermine the enforceability of the capping system.[180] This is because deciding the meaning of specific contractual terms is considered to be an inherently objective test (as established in *Chartbrook Ltd v Persimmon Homes Ltd*).[181] In the case, the court was concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."[182] The court looks, therefore, at the contract as a

---

[176] Moore, M., *Causation and Responsibility* (Oxford Uni Press, 2009), chapter 20 *in* Schaffer, J., Disconnection and Responsibility' Legal Theory, 18, [2012] at 399-435; Schaffer, J., 'The Metaphysics of Causation' [2007] Stanford Encyclopaedia of Philosophy. <plato.stanford.edu/entries/causation-metaphysics.Google> Scholar accessed: 21/09/2018.

[177] Ibid.

[178] Moore, M., *Causation and Responsibility* (Oxford Uni Press, 2009).

[179] Moore, M., *Causation and Responsibility* (Oxford Uni Press, 2009), P.129.

[180] Ibid at 77.

[181] [2009] UKHL 38; [2009] 1 A.C. 1101 at [60]; c.f. *The Aktor* [2008] EWHC 1330 (Comm); [2008] 2 Lloyd's Rep. 246 at [38]; *Dunlop Haywards (DHL) Ltd v Erinaceous Insurance Services Ltd* [2009] EWCA Civ 354; [2009] Lloyds Rep. I.R. 464 at [66]. Earlier authorities had seemed to endorse a subjective approach: see, e.g. *IRC v Raphael* [1935] A.C. 96, 143 ("real intention"); *The Nai Genova* [1984] 1 Lloyd's Rep. 353 at 359; *Munt v Beasley* [2006] EWCA Civ 370 at [36].

[182] Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, para 14.

whole and considers not only the words of the relevant clauses, but also the "documentary, factual and commercial context."[183]

Therefore, the *but for* test, is postulated to be a suitable approach because ascertaining the *effect* of contractual terms is likely to be one that is decided on its objective facts in the UK system.[184] The reason for this submission is that any analysis would conceivably involve looking at the *outcome* produced by the contract itself on an objective *factual* basis, as it is likely that the *outcome* produced by the contract is what will determine the *result* (i.e. does it operate to effectuate the 'contracting out' of the reforms). This is because the written instrument will often require an *objective* approach in ascertaining the *realities* of the situation. This is due to the fact that it is the *effect* of the contractual agreement that is being looked at, within the context of copyright, namely whether *or* not it operates to remove the work outside of the proposed reforms.

5.4.1(a)(ii) The US approach

It is argued that a similar method could be followed in the US because the traditional approach to factual causation seeks to determine whether the outcome would have happened even if the defendant had taken care. This is also known as the *but-for* test: *Causation can be established if the injury would not have happened but for the defendant's negligence*.[185] In essence, the factual cause means the whole set of

---

[183] *Arnold -v- Britton* [2015] UKSC 36, (*Arnold*), Lord Neuberger, para 15; *BCCI -v- Ali* (No.1) [2002] 1 AC 251; "This is not necessarily the dictionary meaning of the word, but that which is generally understood". But the court will not "attribute to the parties an intention which they plainly could not have had" and will not rewrite the contract (*The Antaios Compania Naviera SA -v- Salen Rederierna AB* [1985] 1 AC 191 and *Co-Operative Wholesale Society Limited -v- National Westminster Bank PLC* [1995] 1 EGLR 97).

[184] Davies, P.S., *JC Smith's: The Law of Contract* (Oxford University press, 2016), chapter 2.

[185] Hylton, K., *Tort Law: a modern perspective* (Cambridge University Press, 2016), p.195, see also, chapter 12 *generally*; In more complex cases, the courts use a different approach, known as the *substantial factor* test that has been developed as an alternative specifically for cases in which there are intervening factors (including, for example, other negligent actors) that could easily account for the plaintiff's injury – *New York Central Railroad Co. v. Grimstad* 264 F. 334 (2d Cir. 1920); *Stubbs v. City of Rochester*, 124 N.E. 137 (N.Y. 1919); *Zuchowicz v. United States,* 140 F.3d 381 (2d Cir. 1998).

conditions preceding the result and necessary to produce it, in the sense that the absence of one of them would have given a different result.[186] The *but-for* test is a test commonly used in both US tort law, and, criminal law, to determine factual causation, and is the most widely accepted test for determining this.[187] The test asks, "*but for the existence of X, would Y have occurred?*" If the answer is yes, then factor X is an actual cause of result Y.[188]

This again is extremely similar to the UK system, in that the question to be asked revolves around the same quintessential factors, namely: *'but for' the defendant's actions, would the claimant have suffered the loss?* If yes, the defendant is not liable. If no, the defendant is liable. However, the *but-for* test has been criticised for its usage of both "hypothetical and counterfactual analysis."'[189] That is, the *but-for* test assumes a state of affairs that does not exist and asks what would have happened under imagined circumstances.[190] Moreover, when the language of the contract is clear, the court will presume that the parties intended what they expressed objectively. This is even where the expression differs from the parties' intentions at the time they created the contract,[191] whereby the parties' intentions are subordinated to the intrinsic meaning of the words.[192]

---

[186] Williams, G., 'Causation and the Law' The Cambridge Law Journal, Vol. 19, No. 1 (Apr., 1961), at 63-64.

[187] Ibid at 62-63; *Reynolds v. Texas & Pacific Railway*, 37 La. Ann. 694 (1885); Fischer, D.A., 'Causation in Fact in Omission Cases', 1992 Utah L. Rev. 1335 (1992).

[188] It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss – *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235 at para. 32, [1996] 3 S.C.R. 458, [1997] 1 W.W.R. 97 (original emphasis).

[189] Grady, M.F., *Proximate Cause and the Law of Negligence,* 69 Iowa L. Rev. 363, 392 (1984).

[190] Fischer, D.A., Causation in Fact in Omission Cases, 1992 Utah L. Rev. 1335 (1992).

[191] *Nicholson Air Servs., Inc. v. Bd. of County Comm'rs*, 706 A.2d 124, 132 (Md. Ct. Spec. App. 1998); *see* Restatement of Contracts §230 illus. 1 (1932) – Taken from Perillo, J.M., 'The Origins of the Objective Theory of Contract Formation and Interpretation', 69 Fordham L. Rev. 427 (2000).

[192] For one of many such statements, see *Rickman v.Carstairs,* 5 B. & Ad. 650, 662-63 (K.B. 1833) ("Unfortunately, however, they have used words which will not, we think, effectuate that intention. The question in this and other cases of construction of written instruments is, not what was the

Consequently, it is also submitted that a similar application of the 'but for' test will suffice in the US specifically concerning whether or not a contract has been *used* to undermine the enforceability of the reforms, *and*, would otherwise have successfully *done* so if the court did not intervene using a similar analysis.

This would also achieve the results put forward by one US commentator, who thereupon proposed a different solution to the problems generated by contracts in copyright – invoking contract law principles to bar the enforceability of terms unless clearly brought to the user's attention, though devices such as enhanced notice, (except without the requirement to demonstrate the latter as the reforms would deal with the effects of the terms themselves).[193]

5.4.1(b) The need to deal with re-use

The issue of re-use must also be dealt with effectively by the proposed reforms. It is argued that rightsholders will use this to mitigate against any loss they feel they have incurred under the temporary restriction on prices. This is because this is a practice which has been shown to have the correlative effect of raising the overall cost of producing future works.[194] This has also discouraged creativity via contract[195] and otherwise negating the potential benefits envisaged under the reforms.[196] This is the

---

intention of the parties, but what is the meaning of the words they have used."). But one finds an occasional enlightened case holding that words of art can be overcome by other language found in a written instrument. *See, e.g., Sherman's Lessee v. Dill*, 4 Yeates 295 (Pa. 1806) - Perillo, J.M., 'The Origins of the Objective Theory of Contract Formation and Interpretation', 69 Fordham L. Rev. 427 (2000).

[193] See BJ Ard, 'Notice and Remedies in Copyright Licencing', 80 Mo. L. Rev. 313, 369-76 (2015). In this manner, "the contractualization of copyright should not [be construed as] offering unfettered power to licencors.' at 359.

[194] Landes W., and Posner, R., 'An economic analysis of copyright law'18 [1989] Journal of Legal Studies 325.

[195] See chapter 4 at 4.4, 4.5, and 4.7.

[196] See *inter alia* Landes W., and Posner, R., 'An economic analysis of copyright law'18 [1989] Journal of Legal Studies 325; Breyer, S., 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs', 84 Harvard Law Review281 (1970); Demsetz, H., "Economic, Legal and Political Dimensions of Competition, North-Holland Publishing Company, Amsterdam (1982); '2002 EU IP Contracts Study' a study called 'Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union' commissioned by European

notion that individuals and potential authors are unwilling to re-use works to produce new ones for fear of legal action and the high costs associated with both litigation and re-use discussed within the thesis, and, this could create the presumption that all unauthorised uses will be the subject of an infringement claim.[197]

It is essential to consider these issues when formulating reforms as opposed to merely laying down a system that could encourage creative re-use. This is to ensure the successful implementation of the proposed system so it cannot be overridden by contract in the context of re-use.[198] Making re-use financially accessible is also considered to be of heightened importance. This is because of the increased literacy of populations, rising levels of education and in particular the widespread availability of technology meant an increase in the ability of content recipients to re-use works.[199] Consequently, it is argued that if re-use is not considered in the reforms, then the proposals will be diminished by higher fees being charged for re-use if left unregulated.

5.4.1(c) A legislative solution operating in conjunction with the reforms.

It has been argued that there be a specific legislative provision created to help solve the issue of rightsholders 'contracting' out of copyright law. I will now consider the use of contracts to negate the enforceability of legitimate legal limitations on the exclusivity

Commission, DG Internal market to IViR, Amsterdam in 2002 (Study contract No. ETD/2000/B5-3001/E/69) L. Guibault, P.B. Hugenholtz; See also, chapter 4 at 4.7 and 4.7.1 respectively.

[197] See chapter 2 at 2.3 *generally*; See also chapter 4 at 4.5 and 4.5.1 respectively; Mazzone, J., 'Copyfraud' Brooklyn Law School, Legal Studies Paper No. 40; New York University Law Review, Vol. 81, [2006] at 1026.; See also Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. 'Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions' [2006] Journal of Law and Economics, 49, 91-114.

[198] In the UK see CDPA 1988 s.28(1); In the US, see 17 U.S.C. §109(d); For more information, see chapter 4 at 4.5.

[199] Chartier, R., 'The practical impact of writing', in Finkelstein, D., and McCleery, A., *The book history reader* (Routledge, London 2002) at 118-142.

afforded by copyright, like fair dealing (in the UK),[200] and fair use (in the US).[201] In the US, 'fair use' is codified under §.107 of the 1976 Act.[202]

5.4.1(c)(i) The situation in the UK

In the UK, they are categorised as 'permitted acts' which are listed under chapter III of Part 1 of the 1988 Act.[203] The reason for dealing with contracts is because they have the capacity to diminish the enforceability of the proposed system, much in the same way as the increase in direct licencing has diminished the role of copyright exceptions and levies.[204]

The fundamental purpose of creating a specific legislative provision is designed to prevent the effectuation and subsequent enforceability of any form of contractual

---

[200] See chapter III of the Copyright Designs and Patents Act 1988.

[201] See 17 U.S.C. §107; For an interesting account to the necessity of fair use and some general background information, see H.H. Rep. No. 94-1476. 94th Cong., Sess. 65-66 (1976); On the application of the doctrine to the creation of new works see, *Campbell v. Acuff-Rose Music, Inc*. 510 U.S. 569, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

[202] Copyright Act of 1976, 17 U.S.C. §.107; On Fair Use, see *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F.Supp. 957 (D. N.H., 1978); *Italian Book Corp., v. American Broadcasting Co.*, 458 F.Supp. 65 (S.D. N.Y., 1978); These can be compared with the contrasting cases of *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005); *Capitol Records Inc. v. Alaujan*, 2009 WL 5873136 (D. Mass., 7/27/09).

[203] Copyright Designs and Patents Act 1988; See also, Info. Soc., Dir., Art. 5; The traditional approach of the UK courts: *Newspaper Licensing Agency v Marks & Spencer* [2000] 4 All ER 239 (CA), 257 (Chadwick LJ); See also, Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20. On defences under European law and the E-Commerce Directive 2000/31/EC and the public interest defence see chapters' 21 and 24 respectively.

[204] Kretschmer, M., 'Private Copying and Fair Compensation: An Empirical Study of Copyright Levies in Europe' [2011] (22 out of the then 27 Member states adopted these schemes); Karapapa, S., Private Copying (Routledge 2012); For background, see B. Hugenholtz, The Story of the tape Recorder and the History of Copyright Levies', in B. Sherman and L. Wiseman, (eds), Copyright and the Challenge of the New (2012), ch.7. See also, *Microsoft Mobile Sales International Oy,* Case C-110/15, EU:C:2016:326, [AG23] (AG Wahl) (noting that the increase in direct licensing of consumers and the diminishing importance of the private copyring exception and levy); See also, *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH v Amazon* C-572/14: [2016].

agreement that has the consequence of removing an otherwise copyright protected item out of the proposals. This is considered to be made increasingly necessary by the fact that these very agreements can be said to receive legislative approval under laws such as the E-Commerce Directive Art.9(1)[205] (as implemented via the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No.2013),[206] and also, both s.28(1),[207] and §109(d).[208] The is due to the fact that these provisions arguably assist in the enforceability of individualistic contractual terms[209] in the copyright system.[210] Again, this is considered to be of heightened importance in the UK, as s.28(1) is the only statutory provision under UK law which governs the relationship between contracts and copyright and is contained in the Fair Dealing chapter.[211] It states that:

---

[205] E-Commerce Dir., Art.9(1); There are certain exceptions that cannot be overridden by contract under the following subsections: CDPA 1988, ss50, 50B, 296A(1)(a), 296A(1)(b), 296A(1)(c); For guidance on how the directive could apply post-Brexit, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770360/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf (Accessed: 4/02/2019).

[206] The Directive was originally implemented by the Electronic Commerce (EC Directive) Regulations 2002 ("the 2002 Regulations"), which amongst other things implemented the Country of Origin principle and liability provisions to all UK legislation in the 'coordinated field' made before these Regulations - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770360/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf (Accessed: 4/02/2019).

[207] CDPA 1988; See also this chapter at 4.5 respectively.

[208] 17 U.S.C. §109(d) (1976) as this section specifies that the first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as someone who as obtained it subject to contract, like a licensee; See also chapter 4 at 4.5 and 4.5.1 respectively.

[209] For more information, see chapter 4 at 4.7.1

[210] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20; See also, this chapter at 4.4 and 4.5 respectively.

[211] See ss.29 and 30 of the CDPA (1988) respectively.

> "..[the provisions] relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts."[212]

This means that just because an activity falls within one of the permitted acts, it does not mean that it does not contravene some other legal right, whereby an act that would otherwise be justified by copyright can be restricted by contract. By implication, this means that such items could equally prevent the proposed system from applying in a similar way.[213] Therefore, the fact that an act may be done without infringing copyright does not, however, mean that such an act will not be a breach of some other right or obligation, such as an express contractual term, restricting the doing of any of the specified acts.[214] This is reinforced by the fact that the Act provides that the permitted acts are to be construed independently of each other, so that just because an act does not fall within one provision does not mean that it is not covered by another.[215]

Sharing such concerns, although somewhat prophetically in light of the modern day copyright system, is Griffin. He highlighted in 2011 that because of s.28(1), it is likely that there will be an increased use of licenses on the internet and digital works will bind recipients through a copyright style contractual clause.[216] An otherwise legal reproduction could be prevented; the access agreement could bind all users who legally (contractually) access the work or prevent reliance on otherwise legitimate copyright limitations, or procure copyright violations by contractual breaches.[217] This

---

[212] CDPA 1988 s.28.

[213] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20.

[214] CDPA 1988, s.28(1); See also, Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20.

[215] CDPA 1988, s.28(4).

[216] *Jacobsen v Katzer* 535 F.3d 1373 (Court of Appeals, Federal Circuit, 2008); Care has to be taken with this case, since the license is one that provides a condition of use which might otherwise result in copyright infringement. The broader case which extended copyright protection to an area where it was previously denied was in *ProCD, Inc.* v *ZeidenBerg,* 86 F.3d 1447 (7th Circuit, 1996); Compare with Case C-128/11 *UsedSoft GmbH v. Oracle International Corp* [2012] 3 CMLR (44) 1039.

[217] *Jacobsen v Katzer* 535 F.3d 1373 (Court of Appeals, Federal Circuit, 2008); *MDY Industries., LLC* v. *Blizzard Entertainment., Inc.,* 629 F.3d 928, 937 (9th Cir. 2010); Griffin, J., 'The interface

process is manifested by the fact that digital consumers are not the owners of the content they receive, but mere licensees with a right to read, view, or listen to the work.[218] Ownership remains with the provider, and the maintenance of access depends on the consumers compliance with the provider's terms that come with that intangible item.[219]

Therefore, it is essential to deal with the issue of contracts to maximise legal certainty for the long-term enforceability of the reforms. In this connection, it is suggested, that this approach would be supported by the principles iterated in recitals 1, 6 and 7 in the preamble to Directive 2001/29 as the objectives of the directive are, inter alia, to remedy the legislative differences and legal uncertainty that exist in relation to copyright protection.[220]

5.4.1(c)(ii) The situation in the US

In the US, §109(d)[221] specifies that the first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as someone who as obtained it subject to contract, like a licensee.[222]

By comparison, in the UK, any such distribution would act to curtail any attempted restriction on 'any subsequent distribution' in the UK under section 18(3)(a) CDPA

---

between copyright and contract: suggestions for the future', European Journal of Law and Technology, Vol. 2, No.1, (2011).

[218] For more information, see chapter 4 at 4.5 and 4.9 respectively.

[219] Mazzone, J., *Copyfraud and other abuses of intellectual property law* (Stanford Law Books, 2011), p.118; For more information on this, see 4.5 and 4.5.1 respectively; In the UK see *Jaouad El Majdoub* v *CarsOnTheWeb. Deutschland GmbH* [2015] (C-322/14) (21 May 2015, see also, Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 9-20; In the US, see *Jacobsen v Katzer*, 535 F.3d 1373, 1382 (Fed. Cir. 2008) (treatise quoted); ***Fantsastic Flakes, Inc. v. Pickwick Int'l, Inc.***, 661 F.2d 479 (5th Cir. 1981) (Treatise cited). See *County of Ventura v. Blackburn*, 362 F.2d 515 (9th Cir. 1966).

[220] Case C-466/12 *Svensson and ors v. Retriever Sverige AB,* EU:C:2014:76 (ECJ), at [34]; *Warner Music UK Ltd v Tunein Inc* [2019] EWHC 2923 (Ch); [2020] E.C.D.R. 8.

[221] 17 U.S.C. (1976).

[222] See also chapter 4 at 4.5 and 4.5.1 respectively.

1988,[223] as copyright owners cannot control the resale under the exhaustion principle. For purposes here, it has however, been widely assumed that this is only applicable to the distribution of tangible copies[224] (as is generally assumed following *Allposters v. Stichting Pictoright*).[225] As such, consent to the download of a work cannot be regarded as consent to distribution and, as a result, the distribution right cannot have been exhausted...and the *Usedsoft* principle does not apply to works other than software...because *Usedsoft* was itself concerned with the distribution of a tangible copy.[226] This is considered to be increasingly the case following the recent CJEU decisions of *Nederlands v Kabinet*[227] and *Martin Hass v Ralf Hütter*[228] as discussed in the fourth chapter.[229]

If these items are not dealt with by a legislative scheme, it is argued that copyright owners will get to limit future distributions of their works, and on their chosen terms when intangible works are licensed. This also means that an act that would otherwise be permitted by copyright can be restricted by contract, which includes the applicability of the reforms.

This means that if a work was only made available digitally, then "a copyright owners decision to discontinue any further transmissions of the work could well be effective to

---

[223] CDPA 1988; Info. Soc. Dir., Art. 4(2), allows for exhaustion in cases of 'first sale or other transfer of ownership in the Community'.

[224] A. Ohly, 'Economic Rights', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright Law* (2009), 237-8. See also, Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015].

[225] Case C- 419/13 *Art & Allposters International BV v. Stichting Pictoright* [2015];]; M Savič, 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] European Intellectual Property Review 378.

[226] Griffiths, J., 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright' May [2016], Queen Mary University London.

[227] Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* December (2019).

[228] Case C- 476/17 *Pelham GmbH, Moses Pelham, Martin Hass v Ralf Hütter, Florian Schneider-Esleben*, 12 December (2018).

[229] For more information, see chapter 4 generally.

deny all access to the work."[230] Moreover, the issue of dealing with contractual circumvention methods is considered to be of further importance in the US (albeit in the context of computer programs) as a result of the US Ninth Circuit decision in *MDY Industries* v *Blizzard Entertainment*.[231] In this case, it was ruled that a licensee's violation of a contract (numerous Terms of Use and an End User License Agreement)[232] could constitute copyright infringement,[233] [but] there must be a nexus between the condition and the licensors exclusive rights of copyright.[234]

This is due to the fact that legislation often falls behind the advancement of technology,[235] and digital technology is considered to be pushing the boundaries of copyright law and digital works towards the "edge of the reach of the state."[236]

Consequently, because a legal system has an impetus of its own, a professional tradition which may operate for good or ill and it is submitted that the reforms can provide legal certainty in relation to contract. This is not necessarily the exclusive task

---

[230] Reece R.A., *"The First Sale Doctrine in the Era of Digital Networks."*, (2003), 44(2) BC L Rev 577, p.630; For more information, see chapter 4 at 4.5.1.

[231] *MDY Indus, LLC v. Blizzard Entertainment, Inc.,* 629 F.3d 928, 935 (9th Cir. 2010); *Jacobsen v Katzer* 535 F.3d 1373 (Court of Appeals, Federal Circuit, 2008); See also, Chapter 4 at 4.3.2.

[232] MDY Indus, LLC v. Blizzard Entertainment, Inc., 629 F.3d 928, 935 (9th Cir. 2010) at 938.

[233] *Jacobsen v Katzer*, 535 F.3d 1373, 1382 (Fed. Cir. 2008) (treatise quoted); *Fantsastic Flakes, Inc. v. Pickwick Int'l, Inc.,* 661 F.2d 479 (5th Cir. 1981) (Treatise cited). See *County of Ventura v. Blackburn*, 362 F.2d 515 (9th Cir. 1966).

[234] A footnote in the court's opinion nonetheless preserved the possibility of a contrary ruling in the event of failure to remit payment, even though earning royalties does not nominally fall among the copyright owner's exclusive rights. In other words, the ernstwhile nonpaying licencsee might become a copyright infringer for those purposes - *MDY Indus, LLC v. Blizzard Entertainment, Inc.,* 629 F.3d 928, 935 (9th Cir. 2010) at 941 ("we view payment as ***sui generis****"*); See also, *Nimmer on Copyright,* Vol 1, §10.15[A][5] (issue 102-7/2017 Pub.465); This may also conflict with ***T****he Chamberlain Group, Inc.* v. *Skylink Technologies*, Inc., 381 F.3d 1178 (Fed. Cir. 2004).

[235] <https://www.lexology.com/library/detail.aspx?g=a2fc93d5-d055-41ad-9963-f29600f943b4> (Accessed: 21/03/2019); <https://www.technologyreview.com/s/526401/laws-and-ethics-cant-keep-pace-with-technology/> (Accessed: 21/03/2019); <https://research.asu.edu/smart-tech-sprints-forward-law-lags-behind> (Accessed: 21/03/2019).

[236] Griffin, J., 'A call for a doctrine of information justice' [2016] Intellectual Property Quarterly See also the discussion in chapter 2 at 2.4.2, chapter 3 at 3.4.

of the legislator as the task of lawyers and judges is to understand the social foundations of legal rules and thereby develop them for the good of society.[237]

However, with the move away from download-to-own towards more flexible business models (such as subscriptions), it seems unlikely that this will be seen as a policy priority, and so the current proposals could help alleviate the need for a fully-fledged legislative overhaul as they would operate only in the instances discussed herein.[238]

5.4.2 How the reforms could work with compulsory licencing and create a more cost-effective system[239]

The existence of compulsory licenses in both the US and the UK, are supported by two provisions of the Berne Convention that explicitly permit national legislatures to grant such licenses,[240] with collective licensing in the online music industry being the most developed as a matter of law and practice.[241] Article 13 of the convention empowers each country to limit the rights of the authors of musical works and accompanying lyrics who have already authorised the making of a sound recording of their works to a right to equitable remuneration in respect of the making of future such recordings.[242] Similarly, art.11bis(2) allows the author's exclusive right to authorise the

---

[237] E. Ehrlich, *Fundamental Principles of Sociology of Law* (1936). For a sympathetic critique and detailed discussion of Ehlrich's thought see Littlefield (1967) 19 Maine L. Rev. 1.; See also, R. Pound, *Philosophy of Law* (revised ed. 1954) pp.42-47.

[238] See also this chapter at 5.5

[239] For more information, see this section at 5.4.2.3

[240] For a useful analysis of Berne in the context of the US jukebox license, see Martin, 'The Berne Convention and the US Compulsory License for Jukeboxes: Why the Song Could not Remain the Same' J Copyright Socy USA [1990] 262 at 296-307 in Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 28-06.

[241] Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [39]; Article 17 has been suggested to have a liability regime for OCSSPs with the explicit objective of imposing a licensing obligation for the content they make accessible - Making a similar point, see Samuelson, P., "Legally Speaking: Europe's Controversial Digital Copyright Directive Finalized" (2018) 61 Communications of the ACM 20 (on file with the author).

[242] "Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorised by the latter, to authorise the sound

communication to the public of the work,[243] by broadcasting or related means, to be restricted to a right of equitable remuneration.[244]

5.4.2.1 Compulsory licencing in the UK [245]

Although copyright is a property right, in certain limited circumstances the law permits uses of works without the consent of the copyright owner if the user complies with specified conditions. This includes the payment of a fee,[246] compelling the copyright owner to license the particular use of the work under a "compulsory license" or "license of right."[247] Also, under Article 5(2)(b) of the Infosoc Directive[248] member states can offer exceptions that permit the making of 'reproductions on any medium by a natural

---

recording of that musical work, together with such words, if any." See Ricketson and Ginsburg, International Copyright and Neighbouring Rights (2006), paras 13.59 et seq. Art.14 makes it explicit that this does not apply to cinematographic reproductions. For the full text of the Berne Convention (Paris Act 1971), see Vol.2 F1.

[243] *Warner Music UK Ltd v Tunein Inc* [2019] EWHC 2923 (Ch), 2019 WL 05684849 at [36]-[37].

[244] "It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but those conditions … shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration." Note that arts 13 and 11bis state that the right to equitable remuneration shall "*in the absence of agreement* be fixed by competent authority [emphasis added]". A literal reading of these provisions would suggest that countries of the Union are only entitled to grant compulsory licenses, and are not free to introduce a statutory license (see para.28-02, above). This is not, however, how the effect of this provision has historically been understood. For the full text of the Berne Convention (Paris Act 1971), see Vol.2 at F1.

[245] For more information, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at chapter 28.

[246] Thus, in jurisprudential terms, the grant of a compulsory license converts a property rule into a liability rule. See further, Kaplow and Sharell, 'Property Rules Versus Liability Rules: An Economic Analysis' (1996) 109 Harv. L.Rev. 713. Ayres and Talley, 'Solomonic Bargaining: Dividing a Legal Entitlement to facilitate Coasean Trade' (1995) 104 Yale LJ. 1027; For consideration in the context of intellectual property; Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at chapter 28, Part 2, section Merges, A., 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations' (1996) 84 Cal. L. Rev. 1293.

[247] Compare Patents Act 1977 (c.37) ss.46-54.

[248] Information Society Directive 2001/29/EC.

person for private use and for ends that are directly or indirectly commercial' with many EU member states having broad private copying exceptions.[249]

Apart from the existing provisions, the UK has historically recognised four situations where non-voluntary licenses were made available. The first compulsory license was introduced into the UK by the Literary Copyright Act 1842.[250] A second non-voluntary license was available after 1847. This was to permit the importation of reprints of works into the colonies, on payment of a customs duty which was to be redistributed to author,[251] but was abandoned in 1911.[252] A third such license was introduced by the proviso to s.3 of the 1911 Act. This gave a statutory license to reproduce for sale any work after the expiration of 25 (or, in the case of pre-1911 works, 30) years from the date of death of the author, with the rate being calculated at 10 per cent on the price at which the work was published.[253] The fourth license—the statutory recording license—was introduced in 1911 and was maintained in the 1956 Act.[254] Under this license manufacturers were entitled to make records of musical works which had previously been recorded with the consent of the copyright owner, provided the manufacturer gave the copyright owner notice of his intention to do so and paid a

---

[249] Karapapa, S., *Private Copying* (Routledge 2012).

[250] Literary Copyright Act 1842 (5 & 6 Vict. c.45) s.5. It might be noted, however, that the Statute of Anne 1709 (8 Anne c.19) contained a provision which allowed for a maximum price to be set on the sale of particular books, a provision which has been described as "analogous" to a compulsory license. See Latman, Gorman and Ginsburg, Copyright for the Nineties, 3rd edn (New York: Matthew Bender, 1989) p.4.

[251] Colonial Copyright Act 1847 (10 & 11 Vict. c.95). This was introduced primarily at the behest of the Canadians, who subsequently charged a duty of 12.5 per cent. However, very little was collected: Report of the Commission on Copyright 1878 (C-2036) paras 182-197.

[252] Copyright Act 1911, s.37, sch. 2.

[253] Concern existed as to whether such a provision conflicted with the requirements of the Berne Convention, and the provision was not re-enacted in the 1956 Act – Again, repeal occurred in the light of the recommendations of the Gregory Committee: Report of the Copyright Committee, 1952 (Cmnd.8662), para.23. However, it should be noted that although the 1956 Act repealed s.3 of the 1911 Act it maintained the effect of the proviso as a defence after 1956 in relation to reproductions of pre-1957 works in respect of which the requisite notice had been given.

[254] Copyright Act 1956 s.8; Copyright Act 1911 s.19. For a detailed discussion of the provisions, see Copinger, 12th edn, paras 827 et seq. See also *Discount Inter-Shopping Co Ltd v Micrometre Ltd* [1984] Ch. 369; [1984] R.P.C. 198.

royalty. Further provision was made so that words previously associated with such a recording might also be reproduced.[255]

In the current copyright system, a further useful distinction can be drawn between statutory licenses and compulsory licenses properly so called. In the case of a statutory license the rate is fixed by law, whereas in the case of a compulsory license the rate is left to be negotiated, but in neither case can use be refused or prevented, but either can be referred to as non-voluntary licenses.[256] They are available in nine distinct circumstances,[257] and where the copyright owner has violated art.102 of the Treaty on the Functioning of the European Union (TFEU) or the Competition Act 1998 by abusing dominant position.[258] There are extensive financial penalties for failing to comply with a Commission order to issue a license.[259]

5.4.2.2 Compulsory licencing in the US

The concept of the compulsory license was introduced into US law in 1909. The Supreme Court had already decided in *White-Smith Publishing Co. v Apollo Co.,*[260] that piano rolls (and by analogy phonograph records and the like) did not embody a system of notation that could be read and hence were not "copies" of the musical composition within the meaning of the law, but constituted merely parts of the devices for mechanically performing the music.[261]

---

[255] Copyright Act 1956, s.8(5).

[256] Historically, the UK has adopted a mixture of statutory and compulsory licenses, although since 1989 the preference has clearly been for compulsory licenses.

[257] For more information, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 28-03.

[258] I. Govaere, *The Use and Abuse of Intellectual Property Rights* (Sweet and Maxwell, 1996), 135-50; *RTE and Independent Television Publications v. Commission* [1995] 4 CMLR 18.

[259] A fine of €899 million: European Commission, 'Antitrust: Commission imposes €899 million Penalty in Microsoft for Non-compliance with March 2004 Decision' (27 February 2008) Press Release IP/08/318.

[260] 209 U.S. 1 (1908).

[261] The exclusive right of the copyright owner to public performance already existed under the 1987 act, and this undoubtedly included such performance by mechanical instruments. It was the right to make such devices that was lacking, so Congress undertook to grant such a right, but without intending to extend the right of copyright to the mechanical devices themselves – H.R. Rep. No. 2222, 60th Cong., 2d Sess. 9 (1909); On the music industry's adaptation to this, see *generally,*

In the US, copyright protection is not absolute and in some instances, the Copyright Act removes certain reproductions, performances, and displays from the copyright owners exclusive control and substitutes a "compulsory licencing" scheme. These compromise provisions permit certain uses of the copyright work without the copyright owners consent, but requires the user to adhere to statutory formalities, and to pay specified fees to the copyright owner.

Specifically, in relation to phonorecords, under §115,[262] apparently bases compulsory licensing on the making or licensing of the first recording, even if no authorized records are distributed to the public, but it is not a catch-all mechanism.[263] Thus, in *ABKCO v. Stellar Records*[264] the court clarified the scope of the §115 compulsory license as well as the meaning of "phonorecord" under the 1976 Act.[265] It ruled that compulsory licenses do not give it the right to publish the compositions lyrics on a screen as they enjoy independent copyright protection as "literary works"[266] protected under §106(1). Thus, compulsory licenses did permit the recording of a cover version of a song, but it did not extend such coverage to include a copy of the lyrics running on the screen as this would require additional permission from the copyright holder.[267]

Rosenlund, 'Compulsory Licencing of Musical Compositions for Phonorecords Under the Copyright Act of 1976', 30 Hastings L.J. 683 [1979].

[262] 17 U.S.C.

[263] Under the current clause, a compulsory license would be available to anyone as soon as "phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner." – H.R. Rep. No. 94-1476 94th Cong., 2d Sess. 107-09 (1976).

[264] *ABKCO Music, Inc. v. Stellar Records, Inc.,* 96 F.3d 60 (2d Cir. 1996); See also the technically contrasting decisions of *Accord, Leadsinger Inc. v. BMG Music Publishing,* 512 F.3d 522 (9th Cir. 2008); *EMI Entertainment World v. Priddis Music,* 505 F.Suppd.2d 1217 (D.Utah 2007).

[265] The US also has other compulsory licensing systems – for example, the digital home recording royalty (Audio Home Recording Act 1992), as well as the Digital Performance Right in Sound Recordings License under §114, including the cable television compulsory license contained within §111. For more information, see Botein, M., 'Compulsory licensing vs private negotiations in peer-to-peer file sharing' 11(6) Journal of Internet Law 15 [2008] at 16 .

[266] 1 Nimmer §205[B].

[267] This is similar to the UK position, whereby most licenses do not permit you to reuse the work - For more information, see http://copyrightuser.org/using-and-reusing/ (Last accessed: 15/2/2017); See also, '2014 Creators' Contracts Study' a study called 'Contractual Arrangements Applicable to

5.4.2.3 Why the reforms could achieve more than compulsory licenses: a long-term approach

In the UK, few non-voluntary licenses exist because international standards to which the UK has committed itself are generally antipathetic to such provisions,[268] and the exploitation of rights are generally the copyright owners prerogative.[269] In the US, a consistent difficulty arises from the relatively restrained scope of the licenses. For example, former Register of Copyrights Marybeth Peters lamented that §115 is not up to the task of meeting the licencing needs of the 21st Century and simply places continual artificial limits on the free marketplace.[270]

Moreover, so-called extended collective license systems (ECL systems) are primarily aimed at including the rights from non-represented right holders (so-called "outsiders"), in order to create a complete repertoire for the user. By doing that ECL systems improve the collective rights management (CRM). Yet, as a form of "blanket paying mechanism" the CRM and, in particular, ECL systems have worked quite well in the past.[271]

Whether such instruments could work effectively under new conditions like fast-changing online markets is debatable according to Trumpke.[272] This also includes potential issues regarding the ECL compatibility with European and International Law.[273] Specifically, this refers to the previously discussed Berne Convention "three-

---

Creators: Law and Practice of Selected Member States' commissioned by the European Parliament, DG for Internal Policies in 2014 to a group of copyright and economics academics led by S. Dusollier.

[268] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 28-06.

[269] Cas C-7/97 *Oscar Bronner v. Mediaprint,* [1998] *ECR* I-7791, 7811 [AG-56].

[270] Statement on Music Licencing Reform of Marybeth Peters before the Subcommittee on Intellectual property, Committee on the Judiciary, United States Senate 109th Congress, 1st Session, July 12th, 2005.

[271] Kung-Chung Liu, Reto M. Hilty, *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer-Verlag GmbH Germany, 2017) , p.86, and 4.4.2.

[272] Ibid.

[273] Kung-Chung Liu, Reto M. Hilty, *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer-Verlag GmbH Germany, 2017) at 5.2.

step test"[274] which applies to all "limitations and exceptions."[275] Also, at the European level, there is an increasingly closed catalogue of limits that Member States can operate to restrict the exclusive rights of copyright owners under national law.[276]

Licenses are further considered to be inappropriate here. This is because they are often viewed as a "suspect device" in copyright law generally,[277] as well as being administratively cumbersome.[278] This also includes being perceived as contrary to copyright's overall free market philosophy"[279] amongst others things.[280] It is argued that the reforms will help get around such issues because they are not permanent. Thus, any issues pertaining to how they are perceived will only be for a limited time.

It is contended that this minimises any potential interruption of the free market as they are temporary and can have lasting effects on the cost of works overall in the copyright sector. This not only limits any intrusion on the exploitability of copyright holders monopolies,[281] but this could also create a cheaper, more efficient, and subsequently, more accessible market.[282] Moreover, this approach is likely to be further supported

---

[274] See the discussion in this chapter at 5.3.2.

[275] Article 13, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); Article 8, WIPO Copyright Treaty (WCT); There is debate as to whether the ECL model would be a limitation or an exemption - Trumpke, F., 'The Extended Collective License – A Matter of Exclusivity?' [2012], NIR 2012, 264-294.

[276] Article 5 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[277] Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' [1990] 90 Col. L.Rev. 1865 at 1872.

[278] See further, Scrutton, The Law of Copyright (1883), at 14.

[279] Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' [1990] 90 Col. L.Rev. 1865 at 1924.

[280] Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016) at 28-08.

[281] For more information on how these reforms will comply with the various international conventions and obligations of both the US and the UK, see this chapter at 5.3.2.

[282] For more information on the benefits that the reforms could have on the copyright market, see this chapter at 5.5

by the 2019 UK High Court decision of *Warner Music UK Ltd v Tunein Inc.*[283] In this case, it was held that neither Art 5(2)(b) of Directive 2001/29, nor the Directive itself, as a whole, prevents any member state from enacting a narrower exception as long as the narrower exception satisfies the Berne three step test provided for in Art.5(5).[284]

Finally, it is suggested that the greater emphasis on direct licencing amongst consumers that has diminished the importance of things such as the private copying exception,[285] especially in light of *Reprobel*,[286] and Article 16 of the Directive on Copyright in the Digital Single Market,[287] further supports the decision to move away from licencing as a reform strategy. Also, the legal use of works outside of a country on the basis of a national ECL model is not possible due to the principle of territoriality.[288] This is particularly relevant as creative content is increasingly distributed in non-physical formats across national borders through different networks

---

[283] *Warner Music UK Ltd Sony Music Entertainment UK Ltd (for themselves and as representative Claimants on behalf of the members of their respective corporate groups) v Tunein Inc* [2019] EWHC 2923 (Ch) [2019] 11 WLUK 6.

[284] *Ibid* at [186]; (Art.5(5) Directive 2001/29/EC – The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightsholder.)

[285] Case C-110/15 *Microsoft Mobile Sales International Oy*, EU:C:2016:326, [AG23] (AG Wahl) (noting the increase in direct licencing of consumers is diminishing the importance of the private copying exception.

[286] Case C-572/13 *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*, EU:C:2015:750 (ECJ),[48] (Presumably, publishers and other licensees or assignees can claim such compensation in accordance with any contractual agreement made with the author (or right holder).

[287] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC - Originally, it was listed as Article 12 (now Article 16) which specified that (a member state may specify that a transfer of a license to a publisher confers on the latter a 'sufficient legal basis' to be entitled to a share of compensation); See also the discussion in chapter 2 at 2.3.

[288] On 'territoriality' see Polčák R., 'Territoriality of Copyright Law' (2020) - in: Szczepanik P., Zahrádka P., Macek J., Stepan P. (eds) Digital Peripheries. Springer Series in Media Industries. Springer, Cham.

and devices, whereby it is questionable whether the national models of ECL systems may have a future at all.[289]

In essence, it seems increasingly likely that licencing, specifically methods such as the ECL approach, will be unsuitable in online markets. However, such a system could operate within a territorial-based framework that is combined with reciprocal agreements between national CMOs; or by introducing a country of origin or transmission rule,[290] whereby ECL systems may work on a national basis.[291]

5.5 A temporary approach for lasting results: the overall changes envisaged under these reforms.

5.5.1 Why not use taxation?

In terms of how to administer such a system, Fisher argues that it is desirable to fund it by way of direct taxation, but this is not the preferred approach here.[292] This is because the proposed capping method is based on the idea that it is not as direct as taxation, as taxing rightsholders could be unappealing according to Smith. [293] He writes that taxation could diminish the individual incentive to work, save, and invest,

---

[289] As far as Europe is concerned this development has also been identified by the European Commission, which clearly strives to facilitate cross-border use of works by promoting transnational or pan-European licensing; European Commission (2015), A Digital Single Market Strategy for Europe, COM - Kung-Chung Liu, Reto M. Hilty, *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer-Verlag GmbH Germany, 2017) , pp.97-8.

[290] Under a "country of transmission rule" a user would only have to obtain a license from the country where the copyrighted work was made available, since the relevant act would be interpreted as occurring in the country of origin regarding transmission. A familiar rule was created for satellite distribution in Europe (Article 1 Paragraph 2(b) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission) - M. Hilty, *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer-Verlag GmbH Germany, 2017) , p.98.

[291] M. Hilty, *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer-Verlag GmbH Germany, 2017), p.98.

[292] Fisher is a strong proponent of direct taxation to fund and facilitate copyright reforms – William Fisher, 'Promises to Keep' Stanford Law and Politics, Stanford (2004) chapter 6.

[293] Smith, A., His Life, Thought, and Legacy (Eds. Ryan Patrick Hanley, Princeton University Press 2016).

and otherwise comply with the proposals.[294] This is based on the notion that any direct removal of funds may create an environment where potential authors and existing owners feel that they are being deprived of their efforts. Also, taxation has been regarded as having minimal effects on allotment[295] and to the incentive which otherwise results from particular tax policies that are endorsed and administered directly by the State.[296] For instance, Posner posits that taxation can have disincentivising effects, procure increase inequality, and create excessive expenditures for accountants and tax advisors.[297]

It is contended that this is partly because taxes are increasingly susceptible to the amount individuals perceive is being taken from them, because as "taxpayers' incomes increase, the level of evasion also increase[s]"[298] based on their permanent and reductionist nature. The proposals are considered to be a better approach here as they are less intrusive than taxes because they are not a permanent limitation. They also do not take funds directly out of their pockets because every tax "ought to be so contrived as both to take out and keep out of the pockets of the people as little as possible."[299]

This approach would likely attract support from Hargreaves in his 2011 review, where he suggested that "government[s] should firmly resist over regulation of activities which do prejudice the central objective of copyright, namely the provision of incentives to creators."[300] As such, a non-taxing approach is deemed to be of enhanced importance in ensuring compliance with any proposals in the capitalist

---

[294] Smith, A., His Life, Thought, and Legacy (Eds. Ryan Patrick Hanley, Princeton University Press 2016), pp.240-41.

[295] Posner, R., *Economic Analysis of Law*, 77 (1973) at 222-30.

[296] Posner, R., *Economic Analysis of Law*, 77 (1973) at 238-42.

[297] Posner, R., *Economic Analysis of Law*, 77 (1973) at 239-41, 245-50; See also, Blum & Kalven, 'The Uneasy Case for Progressive Taxation' 19 U. Chicago Law Review 417 (1952) (holding the view that progressive taxation can be supported by little more that intuitive arguments and that there is little support for the success of such frameworks as a whole).

[298] Devos, K., *Tax Compliance Theory and the Literature* (Springer Publishing 2014), p.16.

[299] Smith, A., *The Wealth of Nations* (1776), Book IV, ii.b.6 *in* m Smith, A., His Life, Thought, and Legacy (Eds. Ryan Patrick Hanley, Princeton University Press 2016), p.240.

[300] Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011) at p.8.

system. This is because individuals and corporations could view taxation distastefully. This is due to the sense of loss and evasion becomes a worthwhile consequence if the financial rewards outweigh the costs associated with compliance (and this could improve the ease of enforceability of the proposals).[301]

Moreover, the current approach is also considered to be especially important as even temporary taxation could still, under the above line of argument, create a sense of loss that is likely to be carried into the market in the form of higher prices by rightsholders who feel that they have lost money under taxes. This is also considered to be a better approach as in *EGEDA v Adminicon del Estado,*[302] it was held that any scheme raised through taxation must not charge those, e.g. corporations, who are not engaged in things like private copying and the current system could bypass such issues as costs would only occur in the event of a breach of the system.

5.5.2 How the reforms could increase the quality of copyright works

The temporary nature of the reforms could push 'quality'[303] to the top of rightsholders agendas. This is because profit is contended to be their main motivation in a society that operates like a "workshop" which is "organised for the production of wealth" under capitalism.[304] To explain further, it is submitted that the quality of the work will directly

---

[301] Alingham and Sandmo, "Income tax evasion: A theoretical analysis" *Journal of Public Economics*, 1972, vol. 1, issue 3-4, pages 323-338; Sibichen, K. Mathew, "Making people pay: The economic sociology of taxation" Penguin Books, (2013); Compliance is also argued to be encouraged by the penalty system proposed, where financial gains made my way of deliberate contraventions of the systems will be subject to a 'doubling' of the fee – For more information, see 5.7.3.3(a) *generally*.

[302] Case C-470/14, EU:C:2016: 418 (ECJ), [26]; See also, *Hewlett-Packard Belgium SPRL v. Reprobel SCRL,* Case C-572/13, EU:C:2015:750 (ECJ), [48] (on reprographic levy under Art 5(2)(a), noting that pricniples applicable should parallel those for private copying compensation schemes under Art 5(2)(b)).

[303] For the purpose of understanding, the term 'quality' refers to 'good-quality' works, which is works of a high/superior standard in comparison to other pieces of a similar nature - he standard of something as measured against other things of a similar kind; the degree of excellence of something.

[304] Marx, K., *Selected Writings in Sociology and Social Philosophy*, (Trans. By T.B. Bottomore, McGraw-Hill Paperbacks, 1956), p.91.

impact on an author's ability to charge their own rates. This is based on the fact they need to surpass the number of works required to be sold/licensed before they can attain pricing freedom (the ability to no longer be limited by the pricing limits imposed by the cap).

This provides what is predicted to be an indirect 'incentivising' mechanism that capitalises on the profit-making mentality perpetuated by capitalism.[305] In theory, the longer a work stays within the confines of the caps, the longer it will take for an owner to charge their own rates. As such, this could create a scenario where rightsholders will attempt to focus on the quality of the works in order to bypass the pricing limitations. This is contended to cause creators to focus on the quality of the works produced under the limited prices they can charge for this same reason. This is in order to bypass these limits and the best way to do this is to create high quality works with a corresponding level of demand that will enable them to do so in the quickest timeframe.

As a result, the temporary nature of these reforms remains a central element to their proposed success because owners could look to bypass the limits imposed. Thus, the production of high-quality works is contended to likely be the most tenable way possible in the contemplation of those creating works. Ultimately, it is hypothesised that this will ensure that quality works remain a forefront consideration for those subject to the capping proposals.

5.5.3 How the reforms can drive-down overall prices in the copyright industry

It is argued that in order for owners to maximise the profits made, even during the capping phase, because individuals are rational maximisers of their satisfactions where legal rules are used in a process of utility calculation,[306] that is, individuals would look to maximise their own profits under the current system under this idea.[307] Based

[305] For more information, see chapter 3 generally.

[306] McAdams, R.H., 'The Origin, Development, and Regulation of Norms' Michigan Law Review 96 (November): (1997), 338-427; FRIEDMAN, M., AND L. J. SAVAGE, 'The Utility Analysis of Choices Involving Risk' Journal of Political Economy 56 (August 1948), 279-304.

[307] Jolls, Christine, Cass R. Sunstein, and Richard Thaler, 'A Behavioural Approach to Law and Economics' Stanford Law Review 50 (May): (1998), 1471-1550; Posner, Eric *Law and Social*

on this notion, it is likely that they are going to look for cheaper methods of production,[308] but this is not always the case.[309] This idea is based on the notion that "for a new work to be created, the expected return – typically, and…exclusively, from the sale of copies – must exceed the expected cost."[310] Consequently, it is not unreasonable to suggest that during the 'capped' phase, (whereby rightsholders are restricted in the price that can be charged for the protected works until the number of copies sold/re-used has been satisfied) the overall cost of production could come down. This is important for writers like Professor Merges, who states that new schemes need to accommodate the needs of consumers and users by facilitating and encouraging cheap and easy IP permission.[311]

In addition, it was submitted that there is a need to deal with the issue of re-use, in reform.[312] This was to ensure that the benefits envisaged under the proposals are not counteracted by higher prices pertaining to re-use. This is in an attempt by rightsholders to recoup what may be deemed lost profits due to the pricing limitations imposed by the proposals. However, recognising re-use is also important as there are further benefits beyond limiting the potentiality of high prices being charged. This relates to the fact that the restriction on the prices that can be charged for re-use in the reforms could also serve to add to this 'reduction-effect'. This is based on the fact that less has to be paid by creators to 'sample' or 'clear' works for commercial reproduction which is a prominent issue in the current system that is discouraging creativity.[313]

Norms, (Cambridge, MA: Harvard University Press 2000); Duxbury, Neil, *Patterns of American Jurisprudence*, (Oxford University Press 1995); Duxbury, Neil, 'Signalling and Social Norms' Oxford Journal of Legal Studies 21 (Winter) [2001] 719-36.

[308] Landes, W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] *Journal of Legal Studies* 325-63. In addition, see also the 'invisible hand' of capitalism – (Smith, A., *The Wealth of Nations* (1776), Book IV, chapter II).

[309] Posner, Richard A. *Frontiers of Legal Theory*, (Cambridge, MA: Harvard University Press 2001).

[310] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[311] Merges, R.P., *Justifying Intellectual Property* (Harvard University Press 2011), p.290.

[312] See chapter 4 at 4.7 and 4.8, and also, the discussion in this chapter at 5.4.1(b) respectively.

[313] See chapter 4 at 4.7.

David Ricardo, one of the most influential economists of the early nineteenth century, established that the labour-theory was as firmly in the public mind as supply and demand is now.[314] He suggested that if you can use less labour in making something, it should be cheaper and more profitable.[315] If you cut the amount of labour needed to produce hats, "their price will ultimately fall to their new natural price, although demand should be doubled, trebled or quadrupled."[316] This is argued to be applicable to the operation of the proposed system, particularly pertaining to its effects. For example, in the same way as machines could make manufacturing fees fall due less labour being needed during their creation, thereby reducing the overall natural price; it is argued that the same theory can be applied under the reforms.

Based on the predicted rivalry amongst publishers competing for business, it is likely that rightsholders will look for the most cost-effective methods in which to publish their works. The way this would work is that publishers operating under the reforms can be reasonably said to ask the following question, namely that:

> Is the value of offering a lesser fee to an author in the short term greater than the value to be gained by securing a better deal long term in revenues from sales?[317]

In answering this question, publishers may decide to drop their own rates (and potentially give better deals to authors) in an attempt to remain competitive.[318] It is argued that this will further result in an incidental reduction in the cost of works overall due to the potential increase in rational exchanges which are made only when there is advantage to be gained by both parties. In this case, this would be the publishers

---

[314] Ricardo, D., 'Towards the Free Machine' (http://www.econlib.org/library/Ricardo/ricPri.html) *in* Mason, P.,, *Post-capitalism: A guide to our future* (Penguin Publishing 2016), p.148.

[315] Mason, P.,, *Post-capitalism: A guide to our future* (Penguin Publishing 2016), at p.148.

[316] Mason, P.,, *Post-capitalism: A guide to our future* (Penguin Publishing 2016), pp.148-9; Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325.

[317] Stigler, G.J., *The Theory of Price*, (4th edn, Macmillan Publishers, 1987); R. H. Coase, 'The Problem of Social Cost', Chicago Journal of Law and Economics, (1960), Volume 3, chapter 1.

[318] Besen, S., Kirby, S. and Salop, S. 'An Economic Analysis of Copyright Collectives', [1992] *Va. L. Rev.* 78: 383–411; Besen, S. and Raskind L.J. 'An Introduction to the Law and Economics of Intellectual Property', (1991), J. Econ. Perspectives 5:3.

and the authors who will both have to negotiate in order to obtain a deal that represents a beneficial transaction for them based on cost.

For instance, the 'cost' of any productive service in producing *A* is the maximum amount it could produce elsewhere.[319] Thus, it is fair to suggest that publisher *A* may decide to reduce the costs associated with publication (or give a better deal) to the author, if, in his view, the work could produce more value elsewhere. In addition, there is the potential that rival publisher *B* may also recognise this fact, which is considered to be facilitated by the fact that both publishers will be acting in their self-interest.[320] This is posited to ensure that the natural rules of competition produce a better result for authors and the copyright system generally.[321]

This same theoretical analysis can mean that a wider range of potential authors may be encouraged to produce works because of the lowered prices predicted under the proposals. This is based on the notion that the increased financial accessibility in the copyright system may create higher levels of opportunity by making works more accessible. This could mean that the investment made in creating a work (time and money) may transcend to an increase in the maximum amount it could produce elsewhere under this analysis because the cost of getting a work to market, in theory, will be cheaper.[322]

Yet, such determinations are not always directly correlative to the capacity of new market entrants to succeed,[323] although Posner suggests that State intervention to create new market entrants is sometimes preferable.[324] Nonetheless, it is asserted that

---

[319] Stigler, G.J., *The Theory of Price*, (4th edn, Macmillan Publishers, 1987); R. H. Coase, *The Problem of Social Cost*, Chicago Journal of Law and Economics, [1960] Volume 3, chapter 7.

[320] See this chapter at 5.5.3.

[321] Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925; Robert. A. Cord and Daniel, J. Hammond, *Milton Friedman: Contributions to Economics and Public Policy*, (Oxford University Press, 2016).

[322] Alehian, A., 'Costs and Outputs' in *The Allocation of Economic Resources,* Palo Alto, California: (Stanford University Press, 1959); Stigler, G. J., 'The Division of Labor Is Limited by the Extent of the Market', Journal of Political Economy*,* 59 (June 1951), 185-93; Stigler, G.J., *The Theory of Price*, (4th edn, Macmillan Publishers, 1987), pp.165-77.

[323] Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925.

[324] Posner, R., *Economic Analysis of Law*, 77 (1973) at 111-29.

it is not the role of the reforms[325] to ensure the market success or failure of individuals authors, but instead, to increase the level of creativity in copyright by providing a framework in which to do so.[326] This is based on the fact that the initial reductions are suggested to create not just an increased amount of engagement and creativity in the creation and usage of copyright works in the digital world, but also, demand will likely increase as a result based on the notion that works,[327] even after the 'capped' stage will be cheaper for the reasons stated herein.[328]

It is important to note that items like e-books are also capable of being subjected to these reforms. This means that print-based formats will not be too disadvantaged (although kindle books are nonetheless cheaper to produce).[329] This can minimise the impact on high street retailers of physical copies. This is because the quantity of every commodity which human industry can either produce or purchase regulates itself in every country according to the effectual demand; or according to the demand of those who are willing to pay the whole rent, labour, and profits which must be paid in order to get to the market.[330] Thus, "for a new work to be created, the expected return—typically, [shall be] assume[d] exclusively, from the sale of copies—must exceed the expected cost."[331]

In essence, it is argued that due to these factors, both groups (rightsholders and publishers) will be acting in concert, unwittingly almost, as it may seem, to produce greater economic efficiency across the copyright system through their pursuit of profit,

---

[325] R. H. Coase, 'The Problem of Social Cost' Chicago Journal of Law and Economics, [1960], Volume 3; Stigler, G.J., *The Theory of Price*, (4th edn, Macmillan Publishers, 1987), chapter 20.

[326] Stigler, G.J., *The Theory of Price*, (4th edn, Macmillan Publishers, 1987), pp.321-24; S. Mill, *Principles of Political Economy,* Bk. V, chapter VIII, (1848).

[327] It is argued that the issues discussed in chapter 4 at 4.7 will be lessened based on the notion that works will be more financially accessible.

[328] Similar approaches discussed here are also in Merges, R.P. and Nelson, R.R., 'On the Complex Economics of Patents Scope' [1990], 90 Col. L. Rev. 839.

[329] Dan Costa, PC Magazine E-Book Readers Can Do Better (February 2008), p.66; See also, <http://www.dailymail.co.uk/sciencetech/article-2205109/Is-Kindle-really-killing-book-Digital-book-sales-soar-188--physical-sales-hold-steady.html> accessed: 2/5/2016.

[330] Smith, A., 'The Invisible Hand' (Penguin Books, 2008), p.29.

[331] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325.

inadvertently pushed by the "invisible hand."[332] The invisible hand argument asserts that self-interest has the unintended consequence of serving the public good, for as we seek to benefit ourselves by serving the market more efficiently and effectively, we serve others.[333]

This is because in the process of production, humans tend to produce only by working jointly in a specific way and by reciprocally trading definite connections with each other.[334] To aid understanding of this concept, Smith uses the example of greyhounds running on a track, who are not bound by any formal agreement, but still nonetheless create the appearance of moving together on a mutual basis for the attainment of a common goal, namely chasing after the same hare.[335]

It is postulated that it is only within these types of social connections and relations does the production of copyright goods take place. This is because the creation of the current system in response to the changes in digital technology was the result of rightsholders and the State working together. This was to create an environment that ensured that copyright remained a profitable business model in the digital age.[336] Also, the very creation of copyrighted works can be fairly said to stem from previous authors exchanging (whether fairly or not)[337] their works (usually for a fee). This is so that others can produce something new that will have a definite connection to the previous work, through the exchange carried out via humans working together in a specific

---

[332] Smith, A., *The Wealth of Nations* (Book IV, 1776), Ch.II.

[333] Berry, Paganelli, & Smith, *The Oxford Handbook of Adam Smith* (Oxford University Press, 2013), pp.253-59; Hrlich, 1., and G. S. Becker, 'Market Insurance, Self-Insurance, and Self-Protection,' Journal of Political Economy*,* 80 (August 1972), 623-48.

[334] Marx, K., *Selected Writings in Sociology and Social Philosophy*, (Trans. By T.B. Bottomore, McGraw-Hill Paperbacks, 1956), p.146.

[335] Smith, A., 'The Invisible Hand' (Penguin Books, 2008), pp.14-15); For a brief account of this theory, see Adam Smith, *His Life, Thought, and Legacy* (Eds. By Ryan Patrick Hanley, Princeton University Press 2016), pp.234-238.

[336] Kretschmer, "European Copyright Reform: is it possible?" (7 May 2019), re:publica19, https://www.youtube.com/watch?v=ZyujNlpxu9k[Accessed 30 October 2019] - Quintais, J.P., 'The new copyright in the Digital Single Market Directive: a critical look' E.I.P.R. [2020], 42(1), 28-41 at [40]; See also, the discussion in chapter 4 at 4.6.

[337] For example, see Spoo, R., *Without Copyrights: Piracy, Publishing and the Public Domain* (Oxford University Press, 2013), pp.3-4; On courtesy, see Spoo's book at pp.30-64.

manner and a reciprocal fashion to benefit themselves. This is due to a "certain propensity within human nature" to create the "division of labour, from which so many advantages are derived" with regards to "truck, barter, and the exchange [of] one thing for another."[338] By implication, this could reduce the cost of publication services[339] as rightsholders and potential authors in capitalist society will purchase "whatever part of the produce or utilise whatever area of expertise that he has occasion for…by the general disposition of truck, barter or exchange."[340]

In the same way, the entire evolution of the copyright system pursuant to advances in digital technology are contended to be driven by the self-interested motives of copyright owners. This was to preserve their own profit-making infrastructures (their business model) against the emergence of peer-to-peer and related decentralized content storage and distribution technologies [that] disrupted the traditional functioning of many content industry business platforms.[341]

This saw them push for a whole set of distinct demands for higher legal "fencing."[342] This is because "to a large extent, in present-day economic life, men are providing for themselves"[343] through the assignment of value to intellectual labour in relation to the individual human being and what we now call law.[344]

---

[338] Smith, A., 'The Invisible Hand' (Penguin Books, 2008), p.14.

[339] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[340] Smith, A., 'The Invisible Hand' (Penguin Books, 2008), p.19.

[341] See the discussion in chapter 2 at 2.3 generally; See also, Merrill, S. A., and William, J. Raduchel, 'Copyright in the Digital Era: Building Evidence for Policy' Committee on the Impact of Copyright Policy on Innovation in the Digital Era, Board on Science, Technology, and Economic Policy, Policy on Global Afairs, The National Academies Press (2013), p.17, in particular, see chapter 2. Available at: https://www.nap.edu/read/14686/chapter/1 (Accessed: 4/8/2016).

[342] Cornish, W., Intellectual Property: Omnipresent, Distracting, Irrelevant (Oxford University Press 2004) pp.55-6; Cornish also notes that the examples of such laws are those like the Digital Millenium Copyright Act of 1998 and the EC's Directive on Copyright in the Information Society of 2001 at (p.56); See also, chapters 2 and 3 respectively.

[343] Steiner, R., 'World Economy: The formation of a science of world economics' (Rudolf Steiner Press 1977), p.44.

[344] Steiner, R., World Economy: The formation of a science of world economics (Rudolf Steiner Press 1977), p.39.

5.5.3(a) Post-reform: how costs could remain lower in the long-term after the capping-phase expires

A further effect of this reduction in production costs is a potential increase in the amount of information that is disseminated. This is because the drive-down in prices pertaining to creation, and re-use, which could also see costs reduced at the point of sale post-reform due to the reduction in production costs for rightsholders. This also includes limiting the effects of Article 17.[345] This is because neoclassical economic theory suggests that competition produces the best outcomes for society as "in competitive markets prices are kept down, and other benefits, such as quality, choice, and innovation, flow to consumers…"[346] However, this theoretical stance is open to criticism,[347] because while it is motivated by empirical observation, the analysis is based on theoretical models, often with restrictive premises far removed from reality. Nonetheless, in spite of this, it is important to note for purposes here that the cost of expression to authors of copyrighted works increases as copyright protection increases, meaning that there is less material an author can borrow from other copyright holders without infringing their copyrights, whereby the cost of creating his work will be greater.[348]

If a later author is free to borrow material from an earlier one, the later author's cost of expression is reduced; and, from an ex-ante viewpoint, every author is both an earlier author[349] from whom a later author might want to borrow material and the later author himself. In the former role, he desires maximum copyright protection for works he

---

[345] Directive 2019/790; For more information, see the discussion in chapter 3 at 3.5.1.4.

[346] Jones, A., and Sufrin, B., *EU Competition Law* (Oxford University Press, 2016), p.86.

[347] See R.J. van den Bergh and P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Antwerp/Oxford: Intersentia/Hart Publishing, 2001), at 16, who emphasize the great divergences among economic schools since classical theory. However, competition economics has been nourished by these interactions between movements, schools, and doctrines so that today it is relatively stable and reliable, at least in those applications with a longer history.

[348] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325..

[349] Jaszi, P., 'On the Author Effect: Contemporary Copyright and Collective Creativity' Cardozo Arts & Entertainment Law Journal 10, no. 2 (1992), 293-320.

creates; in the latter, he prefers minimum protection for works created earlier by others.[350] This suggests that copyright law raises the cost of expression.

How this analysis relates to the reforms comes from the notion that rather than limit copyright protection, it is contended that by simply limiting the cost that can be charged for a work (which also applies to re-use); the following could be achieved, but without reducing copyright protection. This is due to the predicted reduction in production costs that could be induced by the proposals because "natural prices are determined by the cost of production, independent of demand."[351]

This is based on the idea that creators under this system will have lower rates to recoup when considering the market price of works.[352] This is because of the reduction in both licenses and production costs that are anticipated under the reforms. It is predicted that this could induce socially efficient incentives to create new works that result from the above self-interested bargaining, and also, the tendency of capitalists to consistently look for new ways to accumulate profit under the notion of self-interest.[353] However, such arguments are predictive in this economic system, but it is asserted that there is little alternative to such items because it is so easy for the economy to be thus and thus...[and] the economy of the entire earth which we can call "world economy" – cannot be absolutely determined, but only relatively so.[354]

It is argued that the reforms could encourage increased compliance from two mutually opposed, but interested groups, rightsholders and recipients, for the self-interested reasons outlined above. This is due to the fact that law is not simply a set of spoken, written or formalised rules that people blindly follow, but instead, law represents the formalisation of behavioural rules, about which a high percentage of people agree. It

---

[350] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[351] Smith, A., His Life, Thought, and Legacy (Eds. Ryan Patrick Hanley, Princeton University Press 2016), p.242. (It should also be noted that this is, of course, not the entire story of economic growth, but nonetheless one essential element according to Smith); See also, this chapter at 5.5).3(a).

[352] Landes W., and Posner, R., 'An economic analysis of copyright law' 18 [1989] Journal of Legal Studies 325

[353] See chapter 3 *generally*.

[354] Steiner, R., 'World Economy: The formation of a science of world economics' (Rudolf Steiner Press 1977), p.180.

reflects behavioural propensities that offer benefits to those who follow them and when people do not recognise or believe in these potential benefits, laws are often disregarded or disobeyed.[355]

Notwithstanding the submissions herein, the reforms could create cheaper works, and processes, overall, across the copyright spectrum as competition is seen as a behavioural process.[356] Thus, easier accessibility could lessen the restrictive aspects of the current system as lower prices could mean less unlicensed or infringing activities based on the fact that compliance would be more financially accessible.[357] It is asserted that Hargreaves would support this, stipulating that it is important to ensure that measures are not designed or implemented in a way that alienates consumers and undermines work in education and extending the appeal of legitimate markets.[358] Moreover, the issue of costs in the UK is considered to be particularly important, whereby it was established in *Reformation Publishing v Cruiseco*[359] a general starting point for a reasonable license fee for 1 year for 2 songs is £155,000.[360]

---

[355] Gruter, M., *Law and the Mind* (Londone: Sage, 1991), p.62 in De Soto, H., 'The Mystery of Capital: Why capitalism triumphs in the West and failed everywhere else' (Black Swan Publishing, 2001), pp.185-6; See also, Litman, J., *Digital Copyright* (2001).

[356] McNulty, P., 'A Note on the History of Perfect Competition' [1967] 75 J Political Economy 395, who mentions the influence of other writers in the seventeenth century; McNulty, P., 'Economic Theory and the Meaning of Competition' [1968] 82 Quarterly J Economics 639.

[357] It is arguable that an increase in affordable legitimate content may reduce piracy: J. Poort and J. Quintais, 'Global Online Piracy Study' Institute for Information Law, University of Amsterdam [2018], p.27; Taken from Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577 at [577]; See also, this chapter at 5.2.

[358] Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011), at 8.45.

[359] *Reformation Publishing Company Limited v Cruiseco Limited and anor* [2018] EWHC 2761 (Ch) – (a large part of the judgment looked at what type of damages would be appropriate and the recent cases of *One Step (Support) Ltd v Morris - Garnier* [2018] UKSC 20, and the Court of Appeal decision in *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308 and concluded the term "Wrotham Park damages" to cover all the types of remedy should no longer be used.

[360] A large part of the judgment looked at what type of damages would be appropriate and the recent cases of *One Step (Support) Ltd v Morris - Garnier* [2018] UKSC 20, and the Court of Appeal decision in *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA

5.6 Why artistic works are not included in the reformed system.[361]

One of the assumptions within copyright, which is occasionally challenged but not comprehensively so, is the notion that copyright exists primarily for providing monetary reward/incentive in exchange for the exploitation of a copyrighted work.[362] The result of this is that economy, particularly monetary economy, led to the increased perception of artistic works as commercial instruments."[363]

This is because as the market conditions for capitalism developed, the market transformed art[364] into a commodity, which it had never before been and price has become the foremost factor.[365] This is based on the fact that price, often has an

---

Civ 1308 and concluded the term "Wrotham Park damages" to cover all the types of remedy should no longer be used.

[361] For what is deemed to constitute an 'artistic' work for the sake of clarity, see sections 4(1)(a), (b),(c),(2)(a),(b) of the CDPA 1988. This is because the majority of the law used here to facilitate the enforcement of the proposals is UK law as these reforms are aimed primarily at UK enforcement, and the purpose of this section is to discuss when certain items will be covered by the reforms and when they will not. Also, the aim here is not to give a comprehensive account of what 'art' is, or what would qualify as art, as not only is this considered as irrelevant to the central basis of the discussion here, but also, such a discussion is likely to be beyond the scope of this thesis.

[362] *Millar v Taylor (1769)* 98 E.R. 201 at 220 (explicitly); *Donaldson v Beckett* (1774) 1 E.R. 837 at 845 –To see how the reproduction of art has been influenced by both technology and capitalism, to the point where "mechanical reproduction" has "emancipated the work of art from its parasitical dependence on ritual" into an item to be "reproducible" for the consumer see Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction* (Trans. J.A. Underwood, Penguin Publishing, 2008); For a shortened version, see Walter Benjamin, *Illuminations* (eds. Hannah Arendt, Trans. Harry Zorn, Random House, 2015), pp.211-44.

[363] Bueys, *What is Money?* (2010), pp.16-17; Regarding a more diversified cultural debate, see M. Adorno and T. W. Horkenheimer, *Dialectic of Entitlement* (trans. J. Cumming, 1972), p.xv *in* Griffin, J., 'Making a new Copyright Economy: A new system parallel to the notion of proprietary exploitation in Copyright' [2013] Intellectual Property Quarterly.

[364] For purposes here, 'art' is considered the expression or application of human creative skill and imagination, typically in a visual form such as painting or sculpture, producing works to be appreciated primarily for their beauty or emotional power that are catagorised by their aesthetic appeal and elements of artistic craftsmanship.

[365] Marx, K. and Engels, F., *On literature and art: a selection of writings* (edited by Lee Baxandall and Stefan Morawski, International general publishing New York, 1974), p.19; Richard A. Posner &

interconnectedness that shows how the interplay of subjective social relationships results in the objective expression of a particular price-formation that constitutes the overall sale price; i.e., to the extent that it rests on a true judgement of objective processes.[366]

Thus, in the same way, it is suggested that although subjective influences like the desire to obtain capital have conceivably caused art to become a commodity[367] with price as the foremost factor, the subjective aesthetic qualities of art are hypothesised to be fundamentally problematic pertaining to any objective quantification of such items.[368] This is because they are viewed primarily in terms of their "artistic craftsmanship" qualities in cases like *Lucasfilm Ltd v Ainsworth*,[369] and are suggested to be practically incapable of a quantification-based analysis as a result of what Steiner regards as the interconnectedness between the subjective valuation of an artwork and the objective price listed.[370]

William M. Landes, 'The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles' Coase-Sandor Institute for Law & Economics Working Paper No. 40, [1996].

[366] Steiner, R., 'World Economy: The formation of a science of world economics' (Rudolf Steiner Press 1977), pp.149-161.

[367] Marx, K. and Engels, F., *On literature and art: a selection of writings* (edited by Lee Baxandall and Stefan Morawski, International general publishing New York, 1974), pp.1-20.

[368] Luc Boltanski and Eve Chiapello, *The New Spirit of Capitalism,* (London: Verso, 2005), pp. 419-482; Bell, D., *The Cultural Contradictions of Capitalism,* (New York: Basic Books, 1976).

[369] *Lucasfilm Ltd and others v Ainsworth and another* [2011] UKSC 39, [2012] 1 AC 208 (SC) 228D; For a detailed account of the case, see Clark, S., 'Star Wars: New Hope or Lost Cause? [2010] *Copyright World* (This does talk about the 2009 case, but the decision remained the same on appeal) (Last accessed: 22/5/2015) (Available at: <http://www.blplaw.com/media/pdfs/publications/copyright_world_star_wars.pdf)>; March and Clark, *'Lucasfilm Ltd v Ainsworth: The Force of Copyright Protection for Three-Dimensional Designs as Sculptures or Works of Artistic Craftsmanship'* [2009] *European Intellectual Property Review,* Issue 7.

[370] Steiner, R., *World Economy: The formation of a science of world economics* (Rudolf Steiner Press 1977), pp.11-23.

This is because you "cannot quantify art"[371] and any attempt to apply the reforms to items that are often judged on aesthetic qualities,[372] artistic craftsmanship[373] and artistic 'merit' and 'purpose'[374] is considered to be difficult in light of these factors. This view is supported by Australia's Highest Court as in *Burge v. Swarbrick*.[375] This is because whilst refusing to provide 'any exhaustive and fully predictive identification of what can and cannot amount to a "work of craftsmanship", the court concluded that they key factor that separates protected works of artistic craftsmanship from mere industrial designs is the significance of 'functional constraints' and the degree of 'freedom of design choice' which are often prohibited in functional articles for industrial usage. This is due to the need to apply principles of mathematics, physics, and engineering in their construction, rather than making something visually or aesthetically appealing as this is increasingly difficult to define objectively.[376]

---

[371] <https://bolesblogs.com/2008/11/21/the-role-of-the-artist-in-society/> (Last accessed: 19/3/2017).

[372] *Lucasfilm Ltd and others v Ainsworth and another* [2011] UKSC 39, [2012] 1 AC 208 (SC) 228D; For a general account as to how artistic craftsmanship is assessed, including the controversies surrounding the application of this test, see Patrick Masiyakurima, 'Copyright in Works of Artistic Craftsmanship: An Analysis' Oxford Journal of Legal Studies, Vol. 36, No. 3 (2016), pp. 505-534. Also, in *Lucasfilm Ltd and others v Ainsworth and another* [2009] F.S.R. 9 (Ch) 103, 153, Mann J agreed that 'artistic purpose' was key – at [118]; Evans-Lombe J referred approvingly to the view of the New Zealand High Court that the question of whether a work of artistic craftsmanship could not depend purely on the intention of the creator; the finished work must have some artistic quality, in the sense of being produced by someone with creative ability and having aesthetic appeal – *Bonz Group v. Cooke* [1994] 3 NZLR 26.

[373] *Hensher v Restawile* [1975] R.P.C. 31 – See Lord Reid at [54], Lord Kilbrandon at [72] both look at intent to create a work of art, whilst Lord Morris and Lord Viscount called for a detached judgement regarding the intent of the author and more specifically of the artistic aesthetic elements of the work at [57], [62-63]; For a concentrated analysis of the examination pertaining to this area from the Australian High Court, see *Burge v Swarbuck* [2007] F.S.R. 27; However, regarding the analysis given in the *Hensher*, there was no display of uniformity by the Lords in their approach.

[374] *Lucasfilm Ltd and others v Ainsworth and another* [2009] F.S.R. (2) 103, 154, at [121] per Mann J; There was also emphasis on the functionality of the article pertaining to its usage in delegated role play – 154 at [123].

[375] *Burge v. Swarbrick* [2007] *HCA* 17, (2007) 234 *ALR* 204, 81 ALJR 950 at [82]-[84].

[376] Ibid at [82]-[84].

5.7 Change for the future: how the reforms add to the copyright legal infrastructure.

In chapters two and three, it was outlined how the structure of the copyright legal system has influenced the current approach that focuses predominantly on economic exploitation. This also involved looking at how this has resulted in the manifestation of an environment of panoptic control that restricts the re-use of copyright content. Chapter four suggested that this economically-orientated focus has been exacerbated by the usage of contracts in the digital sphere, whereby rightsholders have been able to increase the amount of control that they exert over their assets beyond what would otherwise be available under copyright, limiting re-use in multiple ways.[377] In the same way, the Libraries and Archives Copyright Alliance said that collecting societies have "been reluctant or perhaps their members have been reluctant to allow digital licensing because they are nervous [and] scared of what the consequences are."[378]

Therefore, the proposed reforms suggest that a greater emphasis on re-use may be achieved by statute requiring:

- That a limit be placed on what can be charged for a work for both sale and re-use
- That contractual agreements which seek to remove an item outside of the scope of the proposals be declared void

It is suggested that because there will be a degree of restriction for what can be charged for a copyrighted work for a limited period, including the validity of certain contractual agreements, there is a need for a legal body to be able to enforce and assess these restrictions on a case-by-case basis. This is to help facilitate legal certainty by considering such matters in light of current case law and the new legislation. This could safeguard against any technological developments changing the assumed balance of copyright law as has occurred with the development of digital technology in order to maximise the efficiency of the law.[379] This could strengthen the

[377] For more information see chapter 4 at sections 4.4, 4.5, 4.6, and, 4.7 respectively.

[378] House of Commons Innovation, Universities, Science and Skills Committee, The work and operation of the Copyright Tribunal, TSO, London, (2008), pp.10-11.

[379] Posner, R.A., *Economic Analysis of Law* 26 (6th ed. 2003).

practical enforceability of the proposals against contracts discussed in chapter 4. It is suggested that in the UK, a Tribunal could fulfil this role, and in the US, a body similar to the Copyright Royalty Board could be used to implement the capping scheme. Yet, due to the original nature of the proposals, there is no pre-existing knowledge per se as to how the reforms outlined by the thesis could be administered and overseen by an outside organisation. As such, the thesis will now discuss how this could be achieved in the UK and the US.

5.7.1 Enforcement in the UK.

The proposed system could be overseen by the UK's Copyright Tribunal[380] which would be responsible for the administration and monitoring of the capping system,[381] as the current role of the Copyright Tribunal is also to administer and monitor licensing bodies and grant/negotiate copyright licenses,[382] as well as determine royalty rates in absence of a relevant agreement under sections 182D(4) and 191H.[383] However, it is acknowledged that in a report by the House of Commons Innovation, Universities, Science and Skills Committee, it was pointed out that cases heard by the Tribunal are often substantial in size and lengthy, involving a large number of parties and substantial costs, with wide-ranging judgements which has raised questions over its competence.[384]

---

[380] The Copyright Tribunal's primary purpose is to resolve commercial licensing disputes between copyright owners or their agents (collecting societies) and people who use copyrighted material in their business – <https://www.gov.uk/government/organisations/copyright-tribunal/about> accessed: 22/4/2016.

[381] It should be noted however that the Copyright Tribunal is an independent body, but it lacks its own administrative support. This is provided by the UK Intellectual Property Office (the operating name of the Patent Office since April 2007).

[382] CDPA 1988, s.116(2) For details see Freegard, M., '40 years on: An appraisal of the UK Copyright Tribunal, 1957-1996' 177 Revue Internationale du Droit d'autuer 2 (1998) *in* Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, Ph.D. (2010) chapter 6 at 6.10.1

[383] CDPA 1988.

[384] House of Commons Innovation, Universities, Science and Skills Committee, The work and operation of the Copyright Tribunal', TSO, London, (2008) p.5.

5.7.2 Enforcement in the US.

Regarding the US, the Copyright Royalty Board is part of the U.S. Library of Congress and it consists of three Copyright Royalty Board judges who determine royalty rates for statutory licenses as provided by the U.S. Copyright Royalty and Reform Act of 2004.385 The duties of this organisation involve the determination of both the rates and terms of the copyright statutory licenses, which also includes determinations regarding the distribution of statutory license royalties collected by the Copyright Office.386 Thus, in the same way as the UK Tribunal, the US Royalty Board could oversee the running of the proposed system regarding administration, and enforcement, of duties.

5.7.3 How the proposals can work with current US and UK bodies to reduce costs and streamline enforcement

It is asserted that the proposals would need to coincide with the current existing enforcement bodies in both the UK and US on a collaborative basis in order to save money and streamline enforcement. For example, the system could operate in a manner similar to the methods proposed in a 2007 review of the UK Copyright Tribunal by the UK Intellectual Property Office (IPO), which recommended that the staff of the Copyright Tribunal should share offices with the IPO in an attempt to provide cost-effective accommodation.[387]

---

[385] The Copyright Royalty and Distribution Reform Act of 2004 (CRDRA), was signed into law by President Bush on November 30, 2004. The law makes extensive changes to the procedural framework for adjudicating royalty rates for compulsory licenses under the Copyright Act. The law repeals and re-enacts chapter 8 of Title 17 of the U.S. Code, 17 U.S.C. §§ 801-805. The previous *ad hoc* three-member Copyright Arbitration Royalty Panel is replaced by standing Copyright Royalty Judges appointed for six-year terms – CRS Report for Congress, 'The Copyright Royalty and Distribution Reform Act of 2004' (Order Code RS2152) – <https://www.everycrsreport.com/files/20041216_RS21512_61f2a8fdbeaeda23d4de7558299b204c91f96a9d.pdf> accessed: 21/08/2019.

[386] <https://www.copyright.gov/licensing/> accessed:16/3/2017.

[387] UK-IPO, Review of the Copyright Tribunal, DTI, Newport (2007) at 39 (Available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501038/Disc_log_attachment_to_460.pdf)> accessed: 22/5/2017.

To create more efficient and impartial enforcement, the reformed body could have individuals who are appointed to explicitly consider the interests of creative re-users, whilst at the same time, these groups can also operate within the pre-existing bodies particular to each jurisdiction to avoid excessive costs. The members could consist of authors, publishers and creative re-users in a tripartite structure.[388]

Due to the fact that the system is specifically designed to reduce costs within copyright, it is further suggested that the members appointed be regulated by a Non-Departmental Public Body (NDPB)[389] that could oversee the day-to-day workings of those selected to ensure that they are acting in the best interests of both rightsholders and recipients.

5.7.3.1 The UK approach

Building on the above, this approach is considered to be particularly important since, for instance, in the UK, the impartiality of the Tribunal could be called into question regarding its members, which consists of:

> "...a Chairman, two deputies and a pool of up to eight lay members. The Chairman and deputies are appointed by the Lord Chancellor, in consultation with Scottish ministers. The Lord Chancellor is also responsible for issuing the Tribunal's Rules, which set out its scope and operational parameters. The lay members are appointed by the Secretary of State for Innovation, Universities, and Skills."[390]

The chairing of the UK group, and appointment of members could be authorised under the discretion of the Secretary of State and these selections could be independently assessed by the NDPB to maximise the impartiality of the system. This is particularly important since the independence of the Tribunal has been called into question in a

---

[388] Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, Ph.D. (2010) chapter 6 at 6.10.3

[389] NDPBs are not an integral part of any government department and carry out their work at arm's length from ministers, although ministers are ultimately responsible to parliament for the activities of bodies sponsored by their department.

[390] House of Commons Innovation, Universities, Science and Skills Committee, 'The work and operation of the Copyright Tribunal', TSO, London, (2008) p.5.

government report.[391] Thus, it is deemed of paramount importance to have an independent appeals service that will listen to appeals and decide whether the decisions of the reformed body have been issued correctly. This is to ensure impartiality and equal treatment of all parties concerned to enhance user confidence in the system.

This is considered to be of heightened importance as there have been criticisms that the current UK Tribunal does not treat all parties fairly.[392] Moreover, this could also help to deal with the criticisms of the current rules in the UK system, which only allows for appeals from the Copyright Tribunal on points of law to the High Court,[393] but again, the normal deference is given to a specialist tribunal like the Copyright Tribunal.[394]

5.7.3.2 The US approach

Regarding the US, it is suggested that the judges of the Copyright Royalty Board could oversee this role. However, writers like Griffin suggest that the appointment of representatives of creative re-users could prove increasingly difficult in both the US, and the UK. He postulates that the selection process would stem from "the appointment of authors who have been on record as having previously obtained a license from right holders [and] such information could be obtained from clearinghouses."[395]

---

[391] House of Commons Innovation, Universities, Science and Skills Committee, The work and operation of the Copyright Tribunal', TSO, London, (2008) p.30.

[392] House of Commons Innovation, Universities, Science and Skills Committee, 'The work and operation of the Copyright Tribunal', TSO, London, (2008), pp.12-13.

[393] CDPA 1988, s.152.

[394] See *ITV Network Limited v. Performing Right Society Ltd* [2017] EWHC 234 (Ch), [18].

[395] Griffin, J., 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' University of Bristol, Ph.D. (2010) chapter 6 at 6.10.3

5.7.3.3 The overall operation of the proposed systems and how they will be enforced in both the UK and the US.[396]

The legal functionality of the reformed bodies would operate akin to, and within, the UK's Copyright Tribunal or the US Copyright Royalty Board, in that the judgements handed down by each respective organisation could be subjected to a domestic appeal. This would then be subject to a review by the NDPB first, and if this procedure is exhausted, then the parties can have a right to appeal. This facility would be run by a series of trained assessors who would have various backgrounds with many years of dispute resolution experience, which could be lay members chosen on the basis of specific expertise as was recommended by the Monopolies and Mergers Association.[397]

The proposed systems will be enforced alongside the current systems of protection, but it will be up to rightsholders and distributors to declare the accuracy of their own numbers under a formal system of registration.[398] Contraventions will be assessed as either 'accidental' contraventions, whereby the penalty will be equivalent to all of the additional funds generated from all sales that were beyond the limits imposed by the capping scheme, or funds will be increased in the case of 'deliberate' or 'repeated' contraventions.[399]

---

[396] The majority of the law used here to facilitate the enforcement of the proposals is UK law as these reforms are aimed primarily at UK enforcement. However, the US system is considered equally to the UK system pertaining to enforcement agencies, but legal liability could arguably be modelled similarly in the US under the UK principles outlined within this section by direct legislative extension, as well as using the existing enforcement agencies discussed here.

[397] House of Commons Innovation, Universities, Science and Skills Committee, 'The work and operation of the Copyright Tribunal', TSO, London, (2008) p.4. <(https://www.publications.parliament.uk/pa/cm200708/cmselect/cmdius/637/637.pdf)> accessed: 3/6/2016).

[398] This will operate in the same way as the old system of registration in the days of the Stationers Company whereby to obtain protection, the items in question had to be formally registered by the stationer's company. However, rather than to obtain protection, the system can ensure compliance and reduce costs associated with gathering information if it becomes a statutory requirement for rightsholders to prove that they have acted in compliance with the current regulations.

[399] See this chapter at 5.7.3.3(a).

In cases where the contravention is a genuine mistake by the rightsholder, the fine imposed will be all of the additional money generated from all sales that are outside the limits imposed by the capping scheme. So, righthlders will have their funds reimbursed as if they had complied with the reforms, minus additional funds. This is similar to what has been labelled an 'incremental approach', where it has been suggested that, to determine the profits payable, the courts should compare the profit that the defendant made with that which they have made had they not used the infringing material or process, the 'increment' being the profits attributable to the infringement.[400] However, this approach seems to have received little judicial support, being rejected on a number of occasions in favour of a less refined approach, under which the courts simply apportion the total net profits,[401] but this could be a benefit here for sake of simplicity.

Such information could be procured by a process similar to that of an 'account of profits' under UK law[402] which is an equitable remedy that deprives the defendant of any profits made as a result of their infringement under s.96(2).[403] The significance of this is that although such an approach is often considered a "laborious and expensive procedure that is infrequently resorted to,"[404] it can still nonetheless afford a sight of

[400] *Siddell v. Vickers* (1888) 5 *RPC* 416; *My Kinda Town v. Soll* [1983] *RPC* 15.

[401] *Potton v. Yorkclose* [1990] *FSR* 11 (incremental approach is suitable only where the infringement was in the process of producing the work).

[402] For the history, see L. Bently and C. Mitchell, 'Combining Money Awards for Patent Infringement: *Spring Form Inc. v. Toy Brokers Ltd'* [2003] Restitution L Rev 79; See also, T. Moody-Stuart, 'Quantum in Accounts: The Acid Test' [1999] EIPR 147.

[403] CDPA 1988; This is not a notional computation as with damages, but an investigation of actual accounts. It has been used as a personal remedy against unjust enrichment: see esp. *Attorney-General v Observer* [1990] 1 A.C. 109 at 262, 265-67, 288, 293-94; See also, *My Kinda Town v. Soll* [1982] *FSR* 147 (passing off); *Peter Pan v. Corsetes Silhouette* [1963] 3 *All ER* 402 (breach of confidence); *Attorney-General v. Blake* [2000] 3 WLR 625, 641 (Lord Nicholls) (contractual breach of confidence).

[404] Cornish, Llewelyn and Aplin, *Intellectual Property: Patents, Copyright, and trade Marks and Allied Rights* (7th eds.) Sweet and Maxwell Publishing, (2010), p. 85.

customers' names and other information about the defendant that would be conceivably conducive to investigatory and enforcement procedure.[405]

The court can refuse this remedy as it is equitable (and therefore discretionary)[406] but it will not be refused where the defendant had knowledge of the infringing conduct.[407] The profits sought would be those actually made by the defendant through the infringement,[408] or if there are multiple defendants, the profit each and every one of them has made,[409] and there is no defence of innocence.[410] This could be a reasonable method in which to make a defendant who contravenes the system account for profits and otherwise prevent their unjust enrichment,[411] so that only net profits made via the contravention, deducting profits attributable to the defendant's own efforts will be the measure.[412]

In the US, it is suggested that this could be achieved by an extension of 17 USC §504(1)(b)[413] whereby the state could be entitled to recover the actual damages

---

[405] There is a discretion to order the discovery concerning infringing acts in relation to damages as well as an account: *Smith Kline & French v Doncaster Pharmaceuticals* [1989] F.S.R. 401; and see *Minnesota Mining v Jefferies* [1993] F.S.R. 189 FC (Aust.).

[406] *Hollister Inc. v Medik Ostmy Supplies* [2013] *FSR* (24) 502, [55] (Kitchin LJ).

[407] *Bodo Sperlein Ltd v Sabichi Ltd* [2015] EWHC 1242 (IPEC).

[408] CDPA 1988, s.96(2).

[409] *Hotel Cipriani SRL v. Cipriani (Grosvenor Street)* [2010] EWHC 628 (Ch), [7].

[410] Copyright is a proprietary right and is infringed by invasion of the right, except to the extent that the statute provides otherwise. Innocence is therefore not a defence to a claim for primary infringement of copyright - *Wienerworld Ltd v. Vision Video Ltd* [1998] FSR 832; See, e.g. *Mansell v Valley Printing Company* [1908] 2 Ch. 441; *Lee v Simpson* 136 E.R. 349, (1847) 3 C.B. 871; *Hoffman v Drug Abuse Resistance Education (UK) Ltd* [2012] EWPCC 2, at [17], [18]. See, further, Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), at 7–37.

[411] *Colburn v Simms* (1843) 2 Hare 543.

[412] *Delfe v Delamonte* (1857) 3 K. & J. 581; *Polton Ltd v Yorkclose Ltd* [1990] F.S.R. 11. A different view has been taken in Germany, *Re Treatment of Overheads in Profit Calculation* [2002] E.C.D.R. 289.

[413] 17 U.S.C. §504(1)(b).

suffered as a result of the infringement, and where it is 'deliberate', this could be covered by 17 USC §504(c)(2)[414] which deals with wilful infringements.[415]

5.7.3.3(a) Punishing contraventions and how to assess costs

It is suggested that costs should be doubled if a contravention is proven to be 'deliberate.'[416] This could operate to persuade the user to comply and the reason for the 'doubling' is based on the ideas advocated by Posner, who notes that the consequence needs to be greater than mere compensation in order to provide the necessary incentive to refrain from contravening activity.[417] It is argued that such an approach is correct, as if the price of deliberate non-compliance is simply the cost of getting 'caught' (i.e. simply the money gained, so the defendant would in effect, break-even), then there is no real deterrent. The basis for such an assertion can be said to be substantiated by the then, House of Lords decision in the context of exemplary damages[418] in the case of *Rookes v Barnard* [1964][419] where Lord Devlin ruled that:

> '…those [circumstances] in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff...Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity…'[420]

---

[414] 17 U.S.C.

[415] This is discussed in this chapter at 5.7.3.3(a)

[416] Whether or not a contravention is decided to be 'deliberate' could be analysed in a manner similar to secondary liability for copyright infringement in the UK, that is only committed when the defendant knew or had reason to believe a defined state of affairs relating to infringement – (CDPA 1988 s.22).

[417] Posner R. *Economic Analysis of Law (*4th edn, 1992).

[418] Also known as exemplary damages, retributory damages or vindictive damages. Damages awarded in excess of the *claimants* loss. They are intended to punish the defendant rather than compensate the claimant and are only available in precise and limited circumstances such as where the defendant is guilty of oppressive or unconstitutional action or has calculated that the money to be made from his wrongdoing will probably exceed the damages payable (see *Rookes v Barnard* [1964] AC 1129 and *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29).

[419] AC 1129; See also, Lord Reid's view in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1098.

[420] Ibid at [1226].

Therefore, in the decision recent decision of *AXA Insurance UK plc v Financial Claims Solutions Ltd and others*[421] the UK Court of Appeal ruled that there was a need to deter others from engaging in such activities. The Court of Appeal was therefore of the view that this was in fact a *paradigm case* for the award of exemplary damages and each respondent was accordingly ordered to pay *Axa* a further £20,000.[422] As a result, it is argued that the current approach would prevent the need for judicial determination of such matters, although this is not necessarily prevented, which could prevent the calculative behaviours of those attempting to contravene the proposed system in the same way as the defendants did in the *Axa* case. It is suggested this approach is of further importance due to the fact that individuals tend to favour a "status quo bias, that is, the psychological tendency of people to maintain current arrangements" rather than departing from them.[423]

In terms of deliberate contraventions, factors that are indicative of such behaviour will include items such as repeated offences and the extent to which the non-compliant individual went to avoid legal detection. The compensation should be paid by those who take advantage of the exception (and thus cause the harm).[424] It is asserted that compensation can be provided in a manner similar to that envisaged by the CJEU in the *Amazon* case,[425] where the funds could be used to pay for social and cultural establishments.

This does not rule out the potentiality that the money acquired could also be used to secure compensation for authors indirectly, through the setting up of establishments designed to assist those in need of financial assistance under this approach.[426] This approach is argued to be supported by the Chicago School (or the *behaviouralist*

---

[421] [2018] EWCA Civ 1330.

[422] <https://www.lexisnexis.co.uk/blog/dispute-resolution/court-of-appeal-affirms-basis-for-awarding-exemplary-damages-axa-insurance-uk-plc-v-financial-claims-solutions-ltd> accessed: 21/12/2019)).

[423] Rizzo, Mario J. and Whitman, D.G., 'The Knowledge Problem of New Paternalism' Brigham Young University Law Review [2009]: 905–968 at 915 *in* Thomas J. Miceli, *The Oxford Handbook of Law and Economics: Methodology and Concepts*, (Vol 1, Oxford University Press, 2017), at 4.2.2.

[424] *Padawan, SL v SGAE,* [2010] Case C-467/08 *ECR* I-10555, [45]; Case C-462/09 *Thuiskopie* [2011] *ECR* I-5331, [26].

[425] Case C-521/11 *Amazon.com,* EU:C:2013:515, [49].

[426] Case C-462/09 *Thuiskopie*, [2011] *ECR* I-5331, [29], [39].

movement)[427] that advocates the view that authorities should limit their intervention to the detection of collusive *behaviours* (which show no efficiency) and, where necessary, to punish them when they appear.[428]

5.7.3.3(a)(i) How deliberate contraventions could be assessed in the UK

Whether or not a contravention is considered to be 'deliberate' could be analysed in a manner similar to secondary liability[429] for copyright infringement in the UK.[430] This is only committed when the defendant knew or had reason to believe a defined state of

---

[427] A.I. Gavil, W.E. Kovacic, and J.B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, American Casebook Series (St Paul, MN: Thomson West, 2002), at 67–8; The founders of this movement were Aaron Director, Robert Bork, Demsetz, H., Posner, R., and George Stigler. The Chicago School differed from the Harvard structuralists both methodologically and ideologically - See Posner, R., 'The Chicago School of Antitrust Analysis' [1979] 127 U Penn L Rev 925, at 944 who establishes the issue of economic concentration and deconcentration policies as the fundamental difference between the Chicago School and the Harvard School; See also, See R.J. van den Bergh and P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective*(Antwerp/Oxford: Intersentia/Hart Publishing, 2001), at 16, who emphasize the great divergences among economic schools since classical theory. However, competition economics has been nourished by these interactions between movements, schools, and doctrines so that today it is relatively stable and reliable, at least in those applications with a longer history.

[428] This doctrine is echoed in Germany, where Professor Hoppmann criticized the structure/performance link and came out in favour of a competition policy targeting behaviour – see R.J. van den Bergh and P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective*(Antwerp/Oxford: Intersentia/Hart Publishing, 2001), at 40 and 45; See also, Posner, R.A., *A Failure of Capitalism: The Crisis of 08' and the descent into Depression* (Cambridge, MA: Harvard University Press, 2009).

[429] Secondary liability differs by Member State – See C Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Kluwer Law International BV, 2017).

[430] S.23 CDPA 1988; For more information, on 'secondary liability' see, Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), chapter 8.

affairs relating to infringement,[431] as opposed to primary liability which occurs without regard to the defendants state of mind.[432]

Any 'knowledge'[433] or act by the infringer, or associated infringers,[434] must stem from the idea that they 'know' or have 'reason to believe' that they were committing the act in relation to an infringing article that does not comply with the reformed system, and should be restricted to secondary liability at the domestic level.[435] Also, the concept of 'authorization'[436] which is a copyright owners right to authorise others to do any of the restricted acts,[437] can be used here. This would cover situations where grants (or purports to grant) to a third person the right to do an act in contravention of the

---

[431] CDPA 1988 s.22. (The entirety of secondary infringement in relation to the specific acts is contained in ss.23-26, as well as ss296-299 which deals with unlawful decryption of decrypted signals and subverting copyright-protection measures).

[432] Thus, making the deliberateness or otherwise of the defendant's conduct not relevant to the assessment of infringement: Laddie J., *Electronic Techniques v Critchley Components* [1997] F.S.R. 401 at 410; *Sony Music Entertainment v Easyinternetcafe* [2003] E.W.H.C. 62.

[433] On 'knowledge' see *LA Gear Inc v Hi-Tec Sports PLC* [1992] FSR 121 at [129], [131]; *Pensher Security Door Co Ltd v Sunderland City Council* [2000] RPC 249 at [284]; *Hutchison Personal Communications v Hook Advertising* [1995] FSR 365 at [383]-[384]; *ZYX Music GmbH v King* [1997] E.M.L.R. 319 at [343].

[434] An act, depending on the facts of each case, could be both an act of primary liability and give rise to accessory liability for the acts of others by way of 'inducement': *Twentieth Century Fox Film v Newzbin* [2010] EWHC 608 (Ch) (Kitchin J); (a defendant may procure an infringement by inducement, incitement or persuasion) – *CBS Songs Ltd v Amstrad Consumer Electronics plc & Another* [1988] 2 A11 ER 484 at [496]; In the US, this is known as "inducing infringement", and has been used to find similar defendants liable in subsequent litigation, notably in the 2010 District Court decision involving P2P service LimeWire - *Arista Records LLC v Lime Group LLC,* No.06 CV 5936 (KMW) (US S.D.N.Y. May 25, 2010) - B. Sisario, 'Major Record Labels Settle Suit With LimeWire', New York Times, May 12, 2011).

[435] For example, see laws on accessory liability in the UK; By comparison, see störerhaftung in Germany under section 1004 of the German Civil Code.

[436] The leading case on authorisation in the UK is *Twentieth Century Fox v. Newzbin* [2010] *EWHC* 608 (Ch). A similar result was reached in the US via the route of tortious liability under the notion of 'inducement': see *Metro-Goldwyn-Mayer Studios Inc. v. Grokster,* 545 *US* 913, 125 *S. Ct.* 2764 (2005).

[437] CDPA 1988, s.16(2).

reforms.[438] This can include scenarios where third parties are used or involved.[439] It can also cover situations where websites are used to distribute copies in contravention of the proposals,[440] as well as those who facilitate[441] the supply, or manufacture, of equipment to do so.[442]

Moreover, a difficulty here may be with ascertaining liability as the question of 'actual' knowledge has been described as a heavy one[443] and is an objective test.[444] Essentially, the defendant must have been in a position from which they are able to evaluate the information given to them,.[445] This also includes having a reasonable time in which to consider whether or not they were breaching the capping system.[446]

---

[438] *Falcon v. Famous Players* [1926] 2 *KB* 474, 491.

[439] *PPL v. GGK Trading* [2016] *EWHC* 2642 (Ch), [60] (Master Clark) – nightclub manager was held liable for authorisation of the infringements of a DJ despite having no direct connection to the songs chosen.

[440] *Twentieth Century Fox v. Newzbin* [2010] *EWHC* 608 (Ch); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster,* 545 *US* 913, 125 *S. Ct.* 2764 (2005).

[441] *Dramatico Entertainment v. British Sky Broadcasting* [2012] *EWHC* 268 (Ch), [73]-[81]; *EMI Records v. British Sky Broadcasting* [2013] *EWHC* 379 (Ch), [52]-[70];

[442] *CBS Songs v. Amstrad* [1988] AC 1013.

[443] *Infabrics Ltd v Jaytex Shirt Co. Ltd [1978] F.S.R. 451*(at first instance); *Sillitoe v McGraw-Hill Book Co.* [1983] F.S.R. 545.

[444] *Vermaat v. Boncrest (No.2)* [2002] *FSR* (21) 331, [30].

[445] *LA Gear v. Hi-Tec Sports* [1992] *FSR* 121, 129.

[446] The normal period is often 14 days. Cf. *Monsoon v. Indian Advertising* [1995] *FSR* 365; *Metix UK v. Maughan* [1997] *FSR* 718.

5.7.3.3(a)(ii) How deliberate contraventions could be assessed in the US

The assessment of contraventions could be analysed under vicarious[447] and contributory[448] liability[449] under US law.[450] Unlike contributory infringement, knowledge is not an element of vicarious liability.[451]

To establish vicarious copyright liability,[452] it must be demonstrated that there has been a direct infringement,[453] and (1) that the infringer has sufficient control[454] and

[447] The landmark case for vicarious copyright liability – *Shapiro Bernstein and Co. v. H. L. Green Co.,* 316 F.2d 304 (2d Cir. 1963).

[448] One who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer – *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.,* 443 F.2d 1159, 1162 (2d. Cir. 1971); *see also Fonovisa, Inc. v. Cherry Auction, Inc.,* 76 F.3d 259, 264 (9th Cir. 1996).

[449] For a review of the development of vicarious and contributory liability in US law and how it has been developed in response to technological developments, see Kathryn D. Holt, Grokster and Beyond: Secondary Liability for Copyright Infringement During Live Musical Performances, 19 J. Intell. Prop. L. 173 (2011).

[450] Napster could be held liable for contributory and vicarious copyright infringement, affirming the District Court holding in *A&M Records, Inc. v. Napster, Inc. (No. C 99-5183 MHP No. C 00-0074 MHP), United States District Court for the Northern District of California* - in *A&M Records, Inc. v. Napster* 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913 (2005).

[451] Nimmer on Copyright §12.04[A][1] at 12-70.

[452] A well-established principle of copyright law is that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers...The Committee has decided that no justification exists for changing existing law, and causing a significant erosion of the public performance right - H.R. REP. No. 94-1476, *§* 501, at 159-60 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674.

[453] See *A&M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1013 n.2 (9th Cir. 2001) ("Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.").

[454] Major Bob Music, v. Stubbs, 851 F. Supp. 475, 480 (S.D. Ga. 1994) (holding defendant bar-owner vicariously liable because she had "the right and ability to control the activities at her establishment").

ability[455] to supervise the infringement,[456] which includes any premises[457] or activity used to infringe,[458] and, (2) has obtained direct financial benefit[459] as a result.[460]

However, lesser requirements have been satisfactory, such as those promulgated under the "draw theory"[461] based around indirect financial benefit which was developed by the Ninth Circuit. The two prongs of this offence should be analysed together using the "totality of relationship"[463] approach. This looks at all aspects of the relationship between the infringer and the vicariously liable party particular to the direct infringement.[464]

---

[455] *Warner Bros., Inc. v. Lobster Pot, Inc.*, 582 F. Supp. 478, 483 (N.D. Ohio 1984) - (stating active supervision is not required as long as the defendant has "the 'right and ability' to supervise the infringing activities".

[456] *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.,* 443 F.2d 1159, 1160 (2d Cir. 1971); *Deutsch v. Arnold,* 98 F.2d 686 (2d Cir. 1938); cf. *Fromont v. Aeolian Co.,* 254 F. 592 (S.D.N.Y. 1918); See also, Charles S. Wright, *Actual Versus Legal Control Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998,75* Wash. L. Rev. 1005, 1012 (2000).

[457] *Broadcast Music, Inc. v. CDZ, Inc*., 724 F. Supp. 2d 930, 937 (C.D. Ill. 2010).

[458] *Buck v. Jewell-LaSalle Realty Co.,* 283 U.S. 191, 198-99 (1931); *Dreamland Ball Room, Inc., v. Shapiro, Berstein & Co.,* 36 F.2d 354 (7th Cir. 1929); See also, H.R. REP. No. 94-1476, *§* 501, at 159-60.

[459] The leading case requires an *"obvious and direct financial benefit"* - Shapiro, *Bernstein & Co. v. H.L. Green, Co.,* 316 F.2d 304, 307 (2d Cir. 1963); *see also Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913, 930 (2005) (one *"infringes* vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it");

[460] *Shapiro Bernstein and Co. v. H. L. Green Co.,* 316 F.2d 304 (2d Cir. 1963).

[461] *Fonovisa, Inc. v. Cherry Auction, Inc.,* 76 F.3d 259 (9th Cit. 1996).

[463] 6 William F. Patry, Patry on Copyright § 21:66 (2010) *in* Holt, K.D., 'Grokster and Beyond: Secondary Liability for Copyright Infringement During Live Musical Performances', 19 J. Intell. Prop. L. 173 (2011).

[464] Ibid.

To establish contributory copyright infringement, the defendant must (1) have knowledge[465] of the direct infringement[466] and (2) must have materially contributed to the infringement.[467] This is often known as "inducing infringement"[468] and has been used to find defendants liable in litigation, notably in the 2010 District Court decision involving P2P service LimeWire in the case of *Arista Records LLC v Lime Group LLC*.[469]

Essentially, the infringer must "know or have reason to know"[470] of activity that is in contravention of the proposals. Thus, there is a requirement to establish that the

---

[465] Courts have found liability based upon actual knowledge of specific acts of copyright infringement - *A&M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1013 (9th Cir. 2001) - (However, the Ninth Circuit declined to hold Napster liable for contributory copyright infringement merely because its product was not capable of substantial non-infringing uses. Despite the court failing to impose liability for the contributory infringement, the court did find that Napster met the requisite knowledge requirement because it had actual knowledge of specific instances of infringement and had the capacity thereof to block such infringing articles) – at [1021-22].

[466] The requirement of 'constructive' knowledge resulted from the Supreme Court ruling in *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. at 419-20; 'Constructive knowledge' in this case was held on the basis that Sony had "sold equipment with constructive knowledge of the fact tha their customers may use that equipment to make unauthorised copies of copyrighted material)- at [439]; See also, *Aimster Copyright Litigation* 334 F.3d 643, 644 (7th Cir. 2003) at 650-1.

[467] *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.,* 443 F.2d 1159, 1162 (2d. Cir. 1971) at 1162; *See also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) ("One infringes contributorily by intentionally inducing or encouraging direct infringement."); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001) (defining contributory copyright infringement according to the *Gershwin* standard); Kathryn D. Holt, 'Grokster and Beyond: Secondary Liability for Copyright Infringement During Live Musical Performances', 19 J. Intell. Prop. L. 173 (2011) at II.

[468] Sisario, B., 'Major Record Labels Settle Suit With LimeWire', New York Times, May 12, 2011).

[469] *No.06 CV 5936 (KMW) (US S.D.N.Y. May 25, 2010).*

[470] *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.,* 443 F.2d 1159, 1162 (2d. Cir. 1971); See also *Mathew Bender & Co. v. West Publ'g Co.,* 158 F.3d 693, 706 (2d Cir. 1998) (this case found contributory liability where either "(i) personal conduct that encourages or assists the infringement; and (ii) provision of machinery or goods that facilitate the *infringement*" exists).

Distributors had “specific knowledge of infringement at a time which they contribute[d] to the infringement, and, they fail[ed] to act upon that information.”[471]

The requirement of material contribution, is simply, that the defendant must have materially contributed to the direct act of infringement. In assessing this, the court looks at the role played by the defendant in the infringing activity which must be “more than ‘mere[ly] quantitative’ to the primary infringement....Participation must be substantial.”[472] There are two ways that this can be established. The first is through active causation, also known as, inducement,[473] which requires proof that a person induced, caused or materially contributed to the infringing conduct of another.[474] The second way is through providing the means of infringement.[475]

Ultimately, these approaches could help to procure liability where sales have been conducted in breach of the proposed system,[476] and in situations where individuals who have sufficient control of premises.[477] This will also help deal with bodies in the online world that operate in contravention of the proposals,[478] giving the reforms maximum coverage.

---

[471] *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*., 259 F. Supp. 2d 1029 (C.D. Cal. (2003) at [1036] (citing *A&M Records v. Napster, 239 F.3d* at 1021); *Cable/Home Communication Corp. v. Network Prods., Inc.,* 902 F.2d 829, 845 & 846 (11th Cir. 1990).

[472] *Livnat v. Lavi*, No. 96 CIV. 4967 (RWS), 1998 WL 43221, (S.D.N.Y. Feb. 2, 1993).

[473] 6 William F. Patry, Patry on Copyright § 21:48 (2010).

[474] *Jalbert v. Grautski*, 554 F. Supp. 2d 57, 72 (D. Mass. 2008).

[475] *Fonovisa, Inc. v. Cherry Auction, Inc.,* 76 F.3d 259 (9th Cit. 1996).

[476] *Shapiro Bernstein and Co. v. H. L. Green Co.,* 316 F.2d 304 (2d Cir. 1963); See also, *Columbia Pictures Indus., Inc. v. Aveco, Inc.,* 800 F.2d 59 (3d Cir. 1986).

[477] In some cases, the so called ‘dance-hall-cases’ the operator of an entertainment venue was held liable for infringing performances when the operator (1) could control the premises and (2) obtained a direct financial benefit from the audience, who paid to enjoy the infringing performance. *See, e.g. Buck v. Jewell-LaSalle Realty Co.,* 283 U.S. 191, 198-99 (1931); *Dreamland Ball Room, Inc, v. Shapiro, Bernstein & co.,* 36 F.2d 354 (7th Cir. 1929).

[478] *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.,* 259 F. Supp. 2d 1029 (C.D. Cal. (2003) at [1036] (citing *A&M Records v. Napster, 239 F.3d* at 1021); *A & M Records, Inc. v. Napster, Inc.* 114 F.Supp.2d 896 (N.D.Cal. 2000); *A & M Records, Inc. v. Napster, Inc* 239 F.3d 1004 (Court of Appeals, 9th Circuit 2001).

5.7.3.3(a)(iii) Why use these approaches?

The reason for these approaches is because it is likely that the contravention of this system will relate directly to dealings in copies where multiple actors could all be, separately and distinctly, be regarded as legally responsible.[479] In the US, there could be assistance by way of vicarious copyright infringement for sales of items procured in contravention of the reforms.[480] Particularly, this can apply to instances where the operator could control the premises/store/location of contravention,[481] including those online.[482] This is not intended to affect the existing law on primary and secondary infringement in the UK, or the US.

Simply, the principles used in assessing secondary infringement are deemed the most appropriate here as the majority of the offences, due to the nature of the reformed system, are likely to include dealing in copies. This can include, but is not necessarily limited to, selling works in contravention,[483] offering or exposing for sale,[484] and also,

---

[479] *Twentieth Century Fox Film v. Newzbin* [2010] *EWHC* 608 (Ch) (Kitchin J); *Stichting Brein v. Ziggo BV* Case C-610/15, EU:C:2017:456 (ECJ, Second Chamber) at [36]; *Stichting Brein v. Ziggo BV and XS4All Internet BV,* Case C-610/15, EU:C:2017:99, [AG53].

[480] *Shapiro Bernstein and Co. v. H. L. Green Co.,* 316 F.2d 304 (2d Cir. 1963). On the issue of 'lack of knowledge' of the infringing acts – *Deutsch v. Arnold,* 98 F.2d 686 (2d. Cir. 1938); cf. *Fromount v. Aeolian Co.* 254 F. 592 (S.D.N.Y) 1918).

[481] In some cases, the so called 'dance-hall-cases' the operator of an entertainment venue was held liable for infringing performances when the operator (1) could control the premises and (2) obtained a direct financial benefit from the audience, who paid to enjoy the infringing performance. *See, e.g. Buck v. Jewell-LaSalle Realty Co.,* 283 U.S. 191, 198-99 (1931); *Dreamland Ball Room, Inc, v. Shapiro, Bernstein & co.,* 36 F.2d 354 (7th Cir. 1929).

[482] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. (2003) at [1036] (citing *A&M Records v. Napster, 239 F.3d* at 1021); *A & M Records, Inc. v. Napster, Inc*. 114 F.Supp.2d 896 (N.D.Cal. 2000); *A & M Records, Inc. v. Napster, Inc* 239 F.3d 1004 (Court of Appeals, 9th Circuit 2001).

[483] In *Phillips v Holmes* [1988] R.P.C. 613; *Shapiro Bernstein and Co. v. H. L. Green Co.,* 316 F.2d 304 (2d Cir. 1963); See also, *Columbia Pictures Indus., Inc. v. Aveco, Inc*., 800 F.2d 59 (3d Cir. 1986).

[484] CDPA 1988. s.107(1)(a), (c), (d).

knowingly providing the apparatus or premises[485] to facilitate[486] the sale of an item in a manner that is not in compliance with the reforms. This could also include online marketplaces, payment service providers, and advertisers that may enable contravening activity.[487]

5.7.3.3(b) How to calculate the profits made under a contravention: an apportionment approach

In terms of how to calculate profits under the remedy of account, the approach of the court could be to determine what profits have been created, in a legal sense, by those contraventions.[488] Regarding what these figures may amount to, it can be reasonably said that 'a proper combination of quantitative and qualitative analyses (such as mathematical averages to approximate the harm caused) in order to draw inferences' of minimal harm; could reasonably be used to establish the 'specific legal question' that could arise. Namely, as to whether the harm caused by breaches of the capping system was so extensive as to render the harm minimal or non-existent.[489]

Member states of the European Union would have a 'wide discretion' when deciding who must discharge the responsibility to provide compensation.[490] This is not an isolated numerical approximation, but one of 'judicial estimation' that takes into account the aforementioned factors.[491] In doing so, an 'apportionment approach' can be used to ascertain the profits made by the defendant from the activity in question.[492]

---

[485] *See, e.g. Buck v. Jewell-LaSalle Realty Co.,* 283 U.S. 191, 198-99 (1931); *Dreamland Ball Room, Inc, v. Shapiro, Bernstein & co.,* 36 F.2d 354 (7th Cir. 1929).

[486] *Fonovisa, Inc. v. Cherry Auction, Inc.,* 76 F.3d 259 (9th Cit. 1996).

[487] In the UK, see CDPA 1988 ss.22-26; *Twentieth Century Fox Film v. Newzbin* [2010] *EWHC* 608 (Ch) (Kitchin J); A similar result was reached in the US via the route of tortious liability under the notion of 'inducement': see *Metro-Goldwyn-Mayer Studios Inc. v. Grokster,* 545 *US* 913, 125 *S. Ct.* 2764 (2005).

[488] *Calanese v. BP* [1999] *rpc* 203; *Union Carbide v. BP* [1998] *FSR* 1, 6.

[489] *R (on the application of British Academy of Songwriters, Composers and Authors) v. Secretary of State for Business, Innovation & Skills* [2015] *EWHC* 2041 (Admin), [2015] *RPC* (26) 703.

[490] *Thuiskopie,* Case C-462/09, [2011] *ECR* I-5331, [23]; *Amazon.com,* Case C-521/11 EU:C:2013:515, [20].

[491] *Universities UK v. Copyright Licensing Agency* [2002] *RPC* (36) 693, 726, [177].

[492] *Potton v. Yorkclose* [1990] *FSR* 11, 18.

This could be used to define the portion of the profits that are attributable to the contravention and this is not a mathematical exercise,[493] but one of reasonable approximation.[494]

This may also relate to bank accounts and other financial assets[495] and can also include the forced disclosure of the names of the consignors or consignees responsible. However, this will be possible only if this is necessary to dispose fairly of a claim or to save costs, as contained in r.31.17 of the Civil Procedure Rules.[496]

5.7.3.3(b)(i) The role of the courts in gathering and securing evidence

The so-called 'Norwich Pharmacal Order'[497] can be used as a "fully-fledged"[498] remedy in the process of gathering evidence against larger scale infringers. This is because it is an application for final relief, not an interim remedy.[500] Specifically, in cases where

---

[493] *Design & Display Ltd v. Ooo Abbott and anor* [2016] EWCA *Civ* 95, [53] (mathematic precision is impossible when using account of profits).

[494] *My Kinda Town v. Soll* [1993] *RPC* 15.

[495] In order to ensure such efficacy, the court may allow cross-examination on affidavits in defence: *House of Spring Gardens v Waite* [1985] F.S.R. 173 CA.

[496] *CHC Software v Hopkins F.S.R. 241; Ashworth Security Hospital v MGN* [2003] F.S.R. 311, disapproving Sedley L.J., *Interbrew v Financial Times* [2002] E.M.L.R. 24.

[497] *Norwich Pharmacal Company & Ors v Customs And Excise* [1973] UKHL 6, [1974] AC 133 (26 June 1973); These orders were not available in Scottish law. Accordingly, provision was made by the Intellectual Property (Enforcement, etc) Regulation 2006 (SI 2006/1028), reg. 4.

[498] Husovec. M, Accountable, not liable: injunctions against intermediaries. TILEC discussion paper no. 2016-012:1-76, p.40 - https://ssrn.com/abstract=2773768; In the context of online copyright enforcement, the industry has broadly used this relief to pursue attempts to force individuals into settlement for alleged online infringement. Historical figures bear out the point, e.g. in Germany in 2013, 446 right holders pursued 108,975 letters for settlement totalling 90m. *See* summary of German interest group IGGDAW findings of 2013 at https://torrentfreak.com/lawyers-sent-109000-piracy-threats-in-germany-during-2013-140304/ - O'Sullivan, K.T., 'Copyright and internet service provider "liability": the emerging realpolitik of intermediary obligations' IIC [2019], 50(5), 527-558.

[500] *Ab Bank v Abu Dhabi Commercial Bank PJSC* [2017] 1 WLR 810 at [10] (Teare J); See also, *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch) at [12].

there are individuals acting for those higher up in a more leading role, but this may be seen as "disproportionate."[501]

The UK body can also use freezing orders[502] to prevent the transfer of assets or monies, where the organisation can show that they are entitled to money from a

[501] *Golden Eye (International) Ltd and others v Telefonica UK Ltd* [2012] EWHC 723(Ch) (26 March 2012) at [36]. However, in respect to the order in question, it should be noted that if the information can be obtained another way, then a "Norwich Pharmacal" order is unlikely to be issued, and would be seen as "disproportionate" – See (*Rugby Football Union* v *Consolidated Information Service* [2012] UKSC 55; Blocking injunctions can also be used against ISP's whereby they can be ordered to block customer access to websites, such as Newzbin and the Pirate Bay, containing or giving access to copyright material without the permission of the relevant rights holder – *Twentieth Century Fox Film Corp. v. British Telecommunications Plc* [2011] *EWHC* 1981 (Ch), [2011] *RPC* 855; M. Husovec, 'Injunctions against Innocent Third Parties: The case of Website Blocking' [2013] JIPITEC (arguing that these remedies signify a transformation in the nature of remedies from tortious to *in rem*); *Twentieth Century Fox Film Corp. v. British Telecommunications Plc* (No.2) [2011] *EWHC* 2174 (Ch); *Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd (No.2)* [2012] *EWHC* 1152 (Ch), [2012] 3 *CMLR* (15) 360; *Paramount Home Entertainment International v. British Sky Broadcasting Ltd* [2013] *EWHC* 3479 (Ch), [2014] *ECDR* (7) 101; *Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd* [2012] *EWHC* 268 (Ch), [2012] 3 *CMLR* (14) 328; *Football Association Premier League v. British Telecommunications* [2017] *ECDR* (17) 346; The blocking injunction was also used in relation to websites selling counterfeit goods - Cartier International AG v British Sky Broadcasting Ltd [2016] EWCA Civ 658; *Arista Records LLC v Lime Group LLC,* No.06 CV 5936 (KMW) (US S.D.N.Y. May 25, 2010) - In granting summary judgment for the plaintiff record companies, the court found that several LimeWire-related defendants: were aware of the substantial infringement being committed by LimeWire users; purposefully marketed LimeWire to individuals who were known to use file-sharing programs to share copyrighted recordings or who expressed an interest in doing so; assisted users in committing infringement; experienced business growth that depended greatly on LimeWire users' ability to commit infringement; and did not implement in a meaningful way any technological barriers or design choices to diminish infringement. On October 26, 2010, the court entered a permanent injunction against the LimeWire defendants and ordered most of the service's functions to be disabled. In May 2011, the defendants settled the litigation with the record-industry plaintiffs for a reported US $105 million) - (source: B. Sisario, 'Major Record Labels Settle Suit With LimeWire', New York Times, May 12, 2011).

[502] On 'freezing orders' see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), Part VI, chapter 21, Part 7, Section B; Enforcement Directive art.9(3) provides that the judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy

defendant (who has breached the terms of the capping system). They will also have to show that there is a real risk that the defendant will remove assets from the jurisdiction, or deal with them so as to render them unavailable or untraceable. The court may grant an injunction to restrain the defendant from removing them from the jurisdiction, or from dealing with the assets (whether located within the jurisdiction or not).[503]

However, this approach may be doubtful in the US, as the Supreme Court ruled against the usage of such orders.[504] However, a similar result could be reached using a Temporary Restraining Order,[505] but this still nonetheless has a more limited application[506] in comparison to the former and this could weaken enforcement powers in the US.

There are a number of factors to be weighed up when deciding to grant such an order in the UK,[507] but fundamentally, these concern the necessity to protect property rights under Article 17(2) of the European Charter of Rights and Freedoms (ECRF),[508] which

---

themselves with a sufficient degree of certainty that the applicant is the rightsholder and that the applicant's rights are being infringed, or that such infringement is imminent. There is no express provision in the CPR to this effect, but it is implicit in the rules of practice as to the strength of the case required before interim relief will be granted; The freezing injunction is granted under Practice Direction 25A—Interim Injunctions.

[503] This remedy was created by way of a judicial intervention in the case of *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1975] 2 Lloyd's Report 509; [1980] 1 All ER 213; For more information on freezing order, see "Freezing Injunctions: A Nuclear Weapon for the Commercial Litigator" Presented by Hefin Rees, Delivered to Carter-Ruck Solicitors, London, on the 8th December 2009; This can also provide an assistive function in the delivery up of goods under s.99 CDPA 1988 where there is suspected actionable infringement under s.96 of the same act.

[504] *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308 (1999): A similar approach was reached in the New York Court of Appeals in the case of *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank,* 94 N.Y.2d 541 (N.Y.2000).

[505] Federal Rules of Civil Procedure §65

[506] Tamaruya Masayuki, 'The Anglo-American Perspective on Freezing Injunctions' Civil Justice Quarterly. 29 (3): 250-369.

[507] See *Rugby Football Union v. Viagogo Ltd* [2012] 1 *WLR* 333, [44]-[45] (Lord Kerr of Tonaghmore JSC); *Golden Eye (International) Ltd and anor v. Telefonica UK Ltd* [2012] *RPC* 28, at [117].

[508] ECHR, First Protocol, Art. 1; Charter, Art. 17(2).

is not absolute, but declares that 'intellectual property shall be protected'.[509] This also includes the right to property under Article 1, Protocol 1 of the (ECRF).[510] Therefore, any such orders must be proportionately[511] and individually[512] balanced in terms of protecting authors and allowing for access,[513] as this is necessary to balance the interests and rights of rightsholders and recipients.[514] There is also a need to preserve the identification of those involved under Article 8 of the European Convention on Human Rights (ECHR)[515] in accordance with the margin of appreciation.[516]

These are essential considerations as the principles of 'proportionality' and 'certainty' are derived from general principles of EU law,[517] and these are basic, unwritten ideas

---

[509] Charter of Fundamental Rights of the European Union [2000] *OJ* C364; S. Peers. T. Hervey, J. Kenner, and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014); The precise coverage of the term 'intellectual property' has been given a broad interpretation – WIPO Convention (1967), Art.2(viii), EC Statement 2005/95/EC on the Enforcement Directive 2004/48/EC.

[510] *Golden Eye (International) Ltd and anor v. Telefonica UK Ltd* [2012] *RPC* 28, [116]-[147]; This approach was endorsed by the UK Supreme Court in *Rugby Football Union v. Consolidated Information Services Ltd* [2012] 1 *WLR* 333, [44]-[45].

[511] *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch) at [15-17]; See also, *Golden Eye (International) Ltd and anor v. Telefonica UK Ltd* [2012] *RPC* 28 at [18].

[512] *Mircom International Content Management & Consulting Ltd v Virgin Media Ltd* [2019] EWHC 1827 (Ch) at [17].

[513] Koo, J., The Right of Communication to the Public in EU Copyright Law (Hart Publishing, 2019) Part 3, II, A.

[514] When granting an injunction it is necessary to consider the Charter of Fundamental Rights of the European Union to balance the interests and rights which would include Article 8 (privacy).

[515] ECHR, Art. 8(1); Charter, Art.7.

[516] The 'margin of appreciation' refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the ECHR; On the way this has been applied in the context of Article 8, and its purported limitations, see Professor Westkamp, G., 'Private life and the margin of appreciation, introductory note to the European Court of Human Rights: Alex Springer AG v. Germany and Von Hannover (No.2), International Legal Materials Vol. 51, No. 4 (2012), at 631-684.

[517] The general principles of EU law include: proportionality, legal certainty, equality, subsidiarity and fundamental rights.

that underlie the functionality of the EU legal system.[518] They have been labelled as 'controversial'[519] 'gap-fillers'[520] and means of 'derogation'[521] but this in no way is an attempt to play down their influence in copyright law.[522]

The CJEU has often used the concept of proportionality to mitigate against the rigor of the applications of legal doctrines and to ensure that the suitability of court orders and civil remedies[523] are sufficient when the law is applied.[524] Moreover, art.17 of the

[518] The general principles of the EU are often inferred from the decisions of the CJEU. For example, the proportionality principle was developed in Case C-11/70 *Internationale Handelgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114 and Case C-331/88 *The Queen v Minister for Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa et al* [1990] ECLI:EU:C:1990:391.

[519] C Semmelmann, 'General Principles of EU Law: The Ghost in the Platonic Heaven in Need of Conceptual Clarification' [2013] 2 Pittsburgh Papers on the European Union 1, 4–5. Also see P Morvan, 'What's a Principle?' [2012] 20(2) European Review of Private Law 313, 322, who states that there is no one size fit all approach in regards to principles. Thus, different aspects of law may have different conceptions about principles and their roles *in* Koo, J., The Right of Communication to the Public in EU Copyright Law (Hart Publishing, 2019) at 8-9.

[520] Tridimas, T., *The General Principles of EU Law*, 2nd edn (Oxford University Press 2006) and N de Boer, LDijkman and Kampen, S.V., 'The Changing Role of Principles in the European Multilayered Legal Order: Conference Report of the Symposium "Principles and the Law"', Utrecht University, 25 May 2011' [2012] 20(2) European Review of Private Law 425, 428–29 *in* Koo, J., The Right of Communication to the Public in EU Copyright Law (Hart Publishing, 2019)p.9.

[521] C Sieburgh, 'Principles in Private Law: From Luxury to Necessity – Multi-Layered Legal Systems and the Generative Force of Principles' [2012] 20(2) *European Review of Private Law* 295, 301.

[522] Morvan suggests that principles exist to set aside concrete legal provisions that have inopportune effects in a specific case – Morvan, P., 'What's a Principle?' [2012] 20(2) European Review of Private Law 313 at 319.

[523] On civil remedies, see Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), *Copinger and Skone James on Copyright* (17th edition, Sweet and Maxwell, London, 2016), Part VI.

[524] Case C-275/06 *Prodctores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECLI:EU:C:2008:54, paras 68 and 70, *Scarlet Extended v SABAM* [2011] para 48, Case C-461/10 *Bonnier Audio AB v Perfect Communication Sweden AB* [2012] ECLI:EU:C:2012:219, para 59 and *UPC Telekabel* [2014] para 46. Also see Case C-355/12 *Nintendo Co Ltd and others v PC Box Srl and another* [2014] ECLI:EU:C:2014:25, para 30.

Berne convention could also be used in a similar regard, and has been suggested as a way to justify compulsory licensing,[525] in that it specifically provides that:

> "…the provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to *permit*, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production [emphasis added]."[526]

Ultimately, all of these rights will be individual to each particular case. This is because neither right automatically has precedence over the other and to solve the conflict involves an intense focus on the comparative importance of the specific rights being claimed in the individual case and the justifications for interfering with or restricting each right. Most decisions, however, when assessing proportionality are simply decided on the balance of convenience.[527]

5.7.3.3(c) Practical enforcement by UK and US regulatory bodies

5.7.3.3(c)(i) How this could be enforced in the UK

The HMRC, which is the UK customs authority responsible for national policy governing IP rights enforcement at the UK external border, could be drafted in as a secondary mechanism. This is because, in certain circumstances, HMRC (and Border Force, the law enforcement command within the Home Office responsible for carrying out the frontier interventions that implement this policy) are empowered to detain goods that may infringe intellectual property rights such as copyright.[528]

The effectiveness of the HMRC can be assisted by Trading Standards officers in the UK, who are also under a statutory duty to enforce copyright and have the powers,

---

[525] For more information, see Ricketson and Ginsburg, International Copyright and Neighbouring Rights (2006), paras 13.91-13.92.

[526] Berne Convention (Paris Act 1971) art.17; Vol.2 F1.

[527] *Warner Lambert v. Sandoz* [2016] *EWHC* 3317 (pat), at [75] (Arnold J).

[528] The international Comparative Legal Guide to Copyright to: Copyright 2017, (3rd Edition), Published by Global Legal Group, in association with Bird & Bird LLP. <https://www.twobirds.com/~/media/copyright-chapter-iclg-bird--bird-2016.pdf?la=en> accessed: 22/3/2017.

among others, to make test purchases of infringing goods,[529] to enter premises and to inspect and seize goods and documents which infringe,[530] and can be done without obtaining a court order as long as it is done by, or with the permission of, the copyright owner.[531]

The *Anton Pillar* order could also be of assistance here. In *EMI Ltd v Pandit,*[532] it was held that in exceptional circumstances the court would make an order on an ex parte application authorising the claimant to search the defendant's premises and to seize evidence of infringement, including infringing copies. This was affirmed in *Anton Pillar KG v Manufacturing Processes Ltd,*[533] but confined it to narrow circumstances with specific conditions required.[534]

However, the draconian nature of the order has criticised, and where it is granted, but the claimant has failed to disclose material facts likely to influence the initial decision, this can in exceptional circumstances lead to the order being set aside.[535] The principles developed by the courts were given statutory force by the Civil Procedure

---

[529] S.107A CDPA 1988; This is also known as a "Trap Order".

[530] The international Comparative Legal Guide to Copyright to: Copyright 2017, (3rd Edition), Published by Global Legal Group, in association with Bird & Bird LLP. <https://www.twobirds.com/~/media/copyright-chapter-iclg-bird--bird-2016.pdf?la=en> accessed: 22/3/2017.

[531] CDPA 1988, ss.100, 196.

[532] [1975] 1 A11 E.R. 418.

[533] [1976] Ch. 55.

[534] (a) a strong prima facie case of infringement must be shown (b) there must be a real and serious possibility of damage to the claimant flowing from the defendant's alleged activities (c) there must be clear evidence of a real possibility that the defendant would have destroyed or otherwise disposed of evidence of infringement had the claimant sought inspection following an order inter partes proceedings; and (d) the claimant must give a cross-undertaking in damages to the defendant, providing an indemnity in the event that the claimant's case proves to be unfounded.

[535] *Brinks Mat Ltd v Elcombe* [1988] 1 W.L.R. 1350; *Dormeuil Freres SA v Nocilian International (Textiles) Ltd* [1988] 1 W.L.R. 1362; *Bebehani v Salim* [1989] 2 A11 E.R. 143; *Tate Access Floors v Boswell* [1990] 3 A11 E.R. 303; *Lagenes Ltd v It's At (U.K.) Ltd v Chemiculture Ltd* [1993] F.S.R. 270; *Intergraph Corporation v Solid Systems CAD Services Ltd* [1993] F.S.R. 617; *Elvee Ltd v Taylor* [2002] F.S.R. 738.

Act 1997, s.7(2) and the order would be available under Practice Direction Pt 25 of the Civil Procedure Rules and may be conditional.[536]

These procedures could be strengthened by extending the powers granted to rightsholders under the various provisions contained in s.100[537] to also cover articles sold contrary to the limitations specified by the reforms. These could be treated as "prohibited goods"[538] sold in non-compliance of the reforms, including those imported in contravention of the proposals. The mere act of importation could also attract criminal liability as the act of importation itself could be a criminal offence.[540]

This can help strengthen the role of enforcement bodies like the HMRC because it enables owners to seize infringing copies and other articles of a work which are found exposed or otherwise immediately available for sale or hire, and in respect of which the copyright owner would be entitled to apply for an order under s.99.[541] These goods may then be seized and detained by him or a person authorised by him.[542]

5.7.3.3(c)(ii) How this could be enforced in the US

In the US, the enforcement of the proposals could be strengthened by being run in accordance with the strategy that was announced by the Department of Justice (DOJ) in January 2016 that involves working with businesses in an effort to combat intellectual property based crimes.[543] Thus, like the proposed role of the HMRC, the Federal Bureau of Investigations (FBI), which is the domestic intelligence and security service of the United States, could work with its investigative partners at the National Intellectual Property Rights Coordination Center (NIPRCC). They could play an

---

[536] Civil Procedure Act 1997, s.7(6); On conditions, see *Universal Thermosensors Ltd v Hibben* [1992] F.S.R. 361 – (this case had 7 guidelines to be observed in the execution of such orders that were clarified by a Practice Direction issued in 1994, which then was replaced by the CPR Practice Direction 25 which sets out guidelines for orders and includes as an annex a Standard Form Order.

[537] CDPA 1988.

[538] CDPA 1988 S.111(1),(2), (3).

[540] CDPA 1988 s.107(1)(b).

[541] CDPA 1988.

[542] S.100(1) CDPA 1988

[543] <https://www.dsac.gov/news/countering-the-growing-intellectual-property-theft-threat> accessed: 24/2/2017.

integral part in this strategy to enhance compliance with the reforms by assisting with any investigatory and enforcement practices.[544]

5.7.3.3(c)(iii) How enforcement could be enhanced by conducting random surveillance under existing statutory powers

The enforcement bodies could be used to ensure that the reforms are upheld more effectively, that is, compliance with them could be increased if searches are conducted in a random fashion. The new system would operate in a manner similar to the effect of the panoptic system discussed in chapter two.[545] This is due to the random nature of the searches which could be facilitated by the use of Covert Human Intelligence Sources (CHIS) in the UK.[546]

For the purpose of understanding, a CHIS is defined in s.28(8) of the Regulation of Investigatory Powers Act 2000 as "a person who establishes or maintains a relationship with another person for the covert purpose of obtaining information or providing access to information to another person, or covertly disclosing information obtained by use of such a relationship, or as a consequence of the existence of such a relationship."[547]

A similar approach in the US could be adopted because, under US law, government agents acting in a similar way to a CHIS will be covered by the Intelligence Identities Protection Act 1982,[548] which prevents the disclosure of covert agents.[549]

---

[544] <https://www.fbi.gov/investigate/white-collar-crime/piracy-ip-theft> accessed: 22/4/2017).

[545] See chapter 2 at 2.3 and 2.4 respectively.

[546] The use of covert human intelligence sources (CHIS's), has been regulated by the Regulation of Investigatory Powers Act 2000 (RIPA), specifically Part II, since its inception into United Kingdom law on the 2nd October 2000.

[547] Regulation of Investigatory Powers Act 2000 s.28(8); For more information on the nature of this form of surveillance, including the manner and methods in which it can and is used, see Home Office, 'Covert Surveillance and Property Interference: Code of Practice' December 2014 Pursuant to section 71(4) of the Regulation of Investigatory Powers Act 2000 Available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384975/Covert_Surveillance_Property_Interrefernce_web__2_.pdf> accessed: 3/11/2016.

[548] Title 50 of the United States Code §§421-426.

[549] Intelligence Identities Protection Act 1982 §421(c)

5.7.3.3(c)(iv) The proposed effects of deploying this approach

The proposed approach would involve an undercover-type operation in the form of covert surveillance. It is hypothesised that in accordance with the randomised nature of the proposed searches, this could mean that agencies like the HMRC, and FBI, would become enforcers. They would place those who fail to comply with the reforms under the observation of a permanent petty tribunal that is constituted by the relevant regulatory body.[550] The effect of this could see a reduction in the overall cost of investigative and enforcement procedures due to the potential pre-emptive compliance that could be generated by this approach, increasing the 'power' of enforcement agencies under this panoptic-style approach.[551] This is because power is something which circulates, or as something which only functions in the form of a chain. As such, power under this approach would be employed through a net-like organisation where individuals are the vehicles of power, not the point of application.[552] Moreover, such individuals may often feel empowered under this approach in the online context where they feel a sense of responsibility to be part of policing the system.[553]

Consequently, enforcement mechanisms like this, even at their most constraining, are oppressive measures which can be productive and could give rise to new forms of compliant behaviour. This is opposed to simply closing down or censoring certain forms of activity, whereby individuals become active subjects rather than passive

---

[550] Foucault, M., *Power: The essential works of Foucault 1954-1984* (Volume 3, edited by James Faubion, 2002), p.83.

[551] For more information, see chapter 2 at 2.3 and 2.4 respectively; See also, Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R. Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions. [2006] Journal of Law and Economics, 49, 91-114, and in particular, Tables 10, 11; Piet, B., 'File-sharing – fight, ignore or compete: paid download services vs. P2P networks' Telematics and Informatics, 22 (1-2): 41-55: <d_Services_vs_P2P-Networks> accessed: 19/5/2015.

[552] Foucault, M., *Power/knowledge: Selected Interviews and Other Writings, 1972-1977* (eds. Colin Gordon, Prometheus Books 1980), p.98.

[553] Albrechtslund, A. Online social networking as participatory surveillance. First Monday, 13(3), 3. <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2142/1949> accessed 24 July 2019.

ones.[554] This method is designed to induce potentially non-compliant individuals to a state of conscious and permanent visibility.

This will facilitate compliance with the reforms, as the actions conducted by enforcement bodies subject the individual to a set of procedures. This is based on the notion, as discussed by Frank, that the psychological impact of threats provisions on the individual, the potentiality of a threat being carried out can have greater influential effects than if the act were to be carried out itself.[555] I will now consider how the proposed administrative bodies and current system of enforcement could be funded.

5.8 How to fund the current approach: maximising value by minimising the differentiation in the roles of regulatory bodies

In terms of providing funding for running this system, this could be administered directly by the State, which could investigate the optimal manner in which to fund such a system over time. This is to decide the optimal level of funding that is needed overall. This approach is considered to be understandable in the digital age because at this moment, given our state of knowledge, Hargreaves notes that "no-one in the UK could make an informed assessment of what is the right level of resource for online and offline enforcement in the UK. We can only guess and get on with it, using rigorous evaluation to develop the kind of cost-benefit framework described by the WIPO."[556]

However, it is asserted that the nature of this funding would potentially impair the impartiality of this system to a degree. This is because there may be some element of 'political' influence if governmental funds are used. Yet, due to the checks and balances that are also administered within the proposed system, it is likely that in any event, such a factor will remain minimally, if at all, influential in the day-to-day

---

[554] Foucault, M., *The History of Sexuality Volume I: An Introduction by Michael Foucault* (Trans. R. Hurley, Pantheon Books, New York, 1978).

[555] Frank, J., *Law and the Modern Mind,* (New York: Tudor Publishing 1949), Ch.1. (*Law and the Modern Mind* is a 1930 book by Jerome Frank which argued that judicial decisions were more influenced by psychological factors than by objective legal premises); The book has also been the subject of criticism, see Lon Luvois Fuller, Thomas W. Bechtler, *Law in a Social Context: Liber Amicorum Honouring Professor Lon L. Fuller* (Kluwer, 1978), p.17.

[556] Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011), at 8.48.

functioning of the system. Nonetheless, it is recognised that if the recommendations are accepted, then this will increase the amount of administrative work required by the Tribunal which will inevitably increase running costs.

To help combat this, albeit from outside of the Tribunal itself, it is hypothesised that because the relevant roles of bodies such as the HMRC and the Trading Standards officers are not significantly different from their original duties, it is asserted that these roles will incur minimal costs. This is important when considering the fact that the UK Copyright Tribunal has been regarded as lacking financial resources to the point where its funding has been regarded as "inadequate."[557]

The fact that the reforms will operate within the pre-existing bodies particular to each jurisdiction to avoid excessive costs could mean that running fees and set-up costs are minimised. It is likely that this could ensure that the imposition and subsequent running of the procedure will be more fluid due to its similarity with pre-existing practices and legislation. Thus, any overzealous practices could be easier to spot.[558] This is particularly important because the main issue regarding the imposition of the reforms is suggested to likely lie in the costs associated with investigative practices. This includes the need to introduce new enforcement policies if the system was drastically different in this regard, which this system does not for these reasons and so there will be less resources used if the system was entirely different to current procedures. This is because "enforcement needs to be carefully tracked and its impacts correctly understood. If this is not done, resources will be wasted and further harm may be done to the interests of everyone concerned."[559]

---

[557] House of Commons Innovation, Universities, Science and Skills Committee, 'The work and operation of the Copyright Tribunal', TSO, London, (2008) p.14; See also, UK-IPO, Review of the Copyright Tribunal, DTI, Newport (2007) at 18 available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501038/Disc_log_attachment_to_460.pdf)> last accessed: 22/5/2017).

[558] House of Commons Innovation, Universities, Science and Skills Committee, 'The work and operation of the Copyright Tribunal', TSO, London, (2008), part 3.

[559] Hargreaves, I., *Digital Opportunity: A review of Intellectual Property and growth* (2011), at 8.44.

Thus, the system is based on operating as efficiently as possible by minimally altering the pre-existing roles for the reasons stipulated herein. Most of the running costs would involve setting rates and administering disputes; it is worth noting that the current UK Copyright Tribunal, and the US Copyright Royalty Board, both do this.

A potential drawback is that a House of Commons report suggested that funding for the Tribunal does need to be improved upon,[560] although its current costs are marginal. [561] Considering this, the existing duties of the regulatory bodies of the proposed UK and US bodies are not a considerable step beyond their respective current roles under the proposals.

As a result, it is asserted that any additional funding would be used to deal with the possibility of a greater case load when determining disputes in the first instance or appeals. These additional funds could comprise of either pre-existing funding with some 'pragmatic' allocative action by the state should it be needed.[562] Alternatively, money could also be used under the current penalties system proposed because "to be pragmatic is to be instrumental, forward looking, empirical, sceptical, and antidogmatic."[563]

---

[560] House of Commons Innovation, Universities, Science and Skills Committee, The work and operation of the Copyright Tribunal' ibid., See also; UK-IPO, Review of the Copyright Tribunal', DTI, Newport (2007) at 18.

[561] *Universities UK Ltd v Copyright Licensing Agency Ltd, Design and Artists Copyright Society Ltd intervening*, [2002] RPC 693 (Copyright Tribunal) at [14]; See also House of Commons Innovation, Universities, Science and Skills Committee, The work and operation of the Copyright Tribunal', TSO, London, (2008) at 30; House of Commons Innovation, Universities, Science and Skills Committee, 'The work and operation of the Copyright Tribunal: Government response to the Committee's second report of session 2007-08', 5th special report of session 2007-08, TSO (2008) at 14.

[562] C.G. Veljanovski in A. Ogus and C.G. Veljanovski, *Readings in the Economics of Law and Regulation,* (Oxford Uni. Press. 1984), p.22.

[563] Posner, R., *Overcoming Law* (Cambridge: Harvard University Press 1995), p.11.

5.9 Concluding comments

The proposed system would reduce costs across copyright in relation to sale and re-use for a limited period. This could transcend to reduced production fees and a further reduction in the overall cost of works generally for the reasons discussed.

This could increase both the amount of information disseminated and creative activity in relation to works by providing considerably greater certainty for the purchasers and re-users of copyright content. This includes a possible reduction in both infringements, and threats of, infringement proceedings, as a whole by the extension of legitimate markets through increased financial accessibility. This is based on the predicted cost reductions in relation to the price of works, and those for re-uses, which may increase the willingness to use legitimate sources.[564]

The reforms also include preventing the ability of digital contracts, as discussed in chapter 4,[565] to otherwise restrict the current system. Licencing disputes for 'unlicensed' works used could be less prevalent as the works will be more financially accessible under the current proposals. This may result in an increased willingness to license and could help alleviate issues like those experienced by the Beastie Boys in the Gowers Review (2006),[566] where Gowers commented that the current system is "limiting in the sense that if we're going to grab a two-bar section of something now, we're going to have to think about how much we really need it."[567]

---

[564] It is arguable that an increase in affordable legitimate content may reduce piracy: J. Poort and J. Quintais, 'Global Online Piracy Study' Institute for Information Law, University of Amsterdam [2018], p.27; Taken from Koo, J., 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577 at [577].

[565] See chapter 4 generally, and more specifically, see sections 4.3, 4.4, 4.5 and 4.8 respectively.

[566] A. Gowers, *Gowers Review of Intellectual Property* [2006]. The report can be found at: <http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf> accessed: 22/4/2015.

[567] A. Gowers, *Gowers Review of Intellectual Property* [2006], p.67.

With this, the goals of the proposals specifically are:

- That a limit be placed on what can be charged for an item dependent on its size[568] at the point of sale and re-use until the restrictions have been satisfied.
- That contractual agreements and/or clauses which serve to remove items outside of the scope of the proposals be declared void.
- That cheaper works will be provided under the proposals that could increase the overall level of creativity due to the reduced costs envisaged pertaining to production and consumption.

These goals will be achieved by:

- A formal system of registration that requires rightsholders and distributors to declare, and objectively prove, that they have acted in compliance with the proposed system. Failure to do so, whether accidentally or deliberate, will result in the confiscation of funds generated pursuant to accidental and deliberate breaches. This however can be challenged, with the option of having the matter reviewed by a further external body.
- An extension of the current roles carried out by the UK Copyright Tribunal, or the US Copyright Royalty Board. This also includes extensions of the roles of both HMRC and Trading Standard officers in the UK (or in the US, the FBI and the NIPRCC). This is done by applying the existing powers of these bodies to strengthen the enforceability of the reforms and to minimise costs. This will be done by detaining goods that are being sold in excess of the caps through test purchases and entering potential premises that are suspected of infringing. They can then seize goods and documentation that will help to support

[568] 'Size' is not defined explicitly here because it is considered to be a quantitative matter that should be outlined by the statutory proposals which should be considered within the wider context of the culture economy. In addition, such an analysis is deemed to be a matter for governmental consideration based on the fact that to provide a comprehensive analysis of potential prices and sizes is argued to be beyond the scope of this thesis, as this is designed to provide a framework for more detailed reform within the copyright sector to be developed.

prosecutions against non-compliant groups and individuals. This will be carried out at random intervals.[569]

The system will be funded by:

- Pre-existing funding with some pragmatic allocative action by the State
- Money obtained from the proposed penalty procedure[570]

The proposals are argued to sufficiently consider rightsholders and recipients by facilitating cost-effective re-uses, whilst also attempting to maintain an incentive to create in a society dominated by capitalism for which there is no alternative other than to work within its confines.[571] With this, it is asserted that the demands of the market will necessarily recreate authorial incentives from somewhere, even if it is hard to specify where right now.[572] Considering this, it is hypothesised that it is in the interests of the proposed system to work with, and learn from, the ideological aspects of the current legal framework and the factors that have led copyright law to its modern day position.

Daniel Davenport

July 10th 2020.

---

[569] For more information, see chapter 2 at 2.3 and 2.5.

[570] See this chapter at 5.7.3.3.

[571] Harari, Y.H., *Homo Deus: A Brief History of Tomorrow* (Penguin Random House, 2015); For an opposing view, see Streeck, W., *How will capitalism end?* (Verso Books, 2016) - (Wolfgang Streeck argues that we are witnessing a long and painful period of cumulative decay: of intensifying frictions, of fragility and uncertainty, and of a steady succession of normal accidents); Alternatives to capitalism have also been offered - Mason, P., *Post-capitalism: A guide to our future* (Penguin Publishing 2016); Bregman, R., *Utopia for Realists: And How We Can Get There* (Bloomsbury Publishing, 2017).

[572] An example cited is *Metro-Goldwyn-Mayer Studios, Inc v Grokster, Ltd* 380 F 3d 1154) 9th Cir 2004) 1167, where Thomas J states: “The introduction of new technologies is always disruptive of old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests , whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player.” – Wu, T., ‘Copyrights Communications Policy’, Michigan Law Review 163, 363-4.

Bibliography

Articles

Asterios Pliakos and Aikaterini Dedouli-Lazaraki, 'Granting exclusive rights to public or privileged undertakings under EU competition law: article 106(1) TFEU combined with article 102 TFEU' E.C.L.R. [2020], 41(4), 195-209.

Audrey Horton, 'Intellectual Property (Unjustified Threats) Act 2017' - https://www.twobirds.com/en/news/articles/2017/uk/it-and-ip-law-bytes-june-2017/intellectual-property-unjustified-threats-act-2017 (Accessed: 21/05/2018).

Arnold R, Essential reading on intermediary accountability: injunctions against intermediaries in the European Union: accountable but not liable? J Intell Prop Law Pract [2018] 13(3): 247-249

A. Sims, 'Strangling Their Creation: The Courts' Treatment of Fair Dealing in Copyright Law Since 1911' [2010] IPQ 192.

Alingham and Sandmo., 'Income tax evasion: A theoretical analysis', Journal of Public Economics, vol. 1, issue 3-4 (1972).

Aaron Perzanowski, 'Fixing RAM Copies' 104 Northwestern University Law Review 1067, 1070-71 (2010).

Angelopoulos and Quintais, 'Fixing Copyright Reform' [2019] 10 J.I.P.I.T.E.C. 222.

Annemarie Bridy, 'EU Copyright Reform: Grappling With the Google Effect' [2019] Vanderbilt J. Entertainment & Tech. L. Rev. Rev.

Akash Sachdeva and Jonathan McDonald, 'The use of Norwich Pharmacal orders to identify online infringers - an old remedy updated for modern times' Entertainment Law Review (2013).

An introduction to Michael Foucault's Concept of Power in The Irish Anarchist Review, Issue 4, October (2011). Available at: http://www.wsm.ie/c/michel- foucault-power-introduction (Accessed: 10/4/2015).

Anderson, M., ‘Threats Provisions: time to abolish them?’, IP Draughts (2011). Available at: http://ipdraughts.wordpress.com/2011/05/26/ip-threats-provisions-time-to- abolish-them/ (Accessed 22/5/2016)

Anna Nicolaou, ‘How streaming saved the music industry’ The Financial Times: January 16 2017. Available at: https://www.ft.com/content/cd99b95e-d8ba-11e6-944b-e7eb37a6aa8e (Accessed: 10/05/2017).

Aaron Perzanowski & Jason Schultz, ‘Digital Exhaustion’ 58 UCLA Law. Rev. 889 [2011].

Arditi, D., ‘iTunes: Breaking Barriers and Building Walls’, Popular Music and Society 37 (4): 408-424 (2014).

A, Plant., ‘The Economics of Copyright’ (1934) *Economica* 167.

Arnold and Porter LLP., ‘Intellectual Property Protection and Enforcement Manual: A Practical and Legal Guide for Protecting Your Intellectual Property Rights’, The Global Intellectual Property Centre. Available at: (http://www.intellectual property rights - policy.eu/media/pts/1/Brand_Enforcement_Manual_FINAL.pdf) Accessed: 3/3/2015.

Astbury, R., ‘The Renewal of the Licencing Act in 1693 and its Lapse in 1695’, Oxford Journals, Available at: https://oup.silverchair-cdn.com/oup/backfile/Content_public/Journal/library/s5-XXXIII/4/10.1093_library_s5XXXIII.4.296/1/296.pdf?Expires=1488016123&Signature=DWUDAiPwEr3K6vC 4I7qMEtcpVTx6I9BC57Y~z7Byi-ksC1MHwkGyaTrSvnP3G4X6vDg938UCH02MrHZRtjFLSAG~GmUgfwu9Vdtx2 yvV0EkjQwyHYuMjTNIbg8yWy3i14UU6gQF1rju~R-gjQGQNf56kV1hfuzmJQaTRBU8Gzz7VF75In-IxoWXcst~U~75KQDnWSvhqpHMjYEQo1uT6KABgTTKpIdIobtxa1gbVF0Z2a1 OtcEHR0g7MfNjVTpaNkbgflNcMn39Tm4S61ws9BJBD3zHpvNt9~P2CD617Mp FmGeckShjD-KIMiw7N0J8nAaj329txXLdPhMf9~cHPPA__&Key-Pair-Id=APKAIUCZBIA4LVPAVW3Q (Accessed: 3/11/2015).

Allen, A., ‘Lawyers Tell UK Government You Can’t Jail Online Pirates for 10 Years’, available at http://www.eteknix.com/lawyers-tell-uk-government-cant-jail- online-pirates-10-years/ (Accessed: 5/3/2017).

Benjamin Farrand, ‘Towards a modern, more European copyright framework or how to rebrand the same old approach? (2019) 41 E.I.P.R. 6.

Bellemare, M. F. & Holmberg, A. M. “The Determinants of Music Piracy in a Sample of College Students,” (2010), Duke University – Sanford School of Public Policy; Duke University – Department of Economics.

Baran and Sweezy., ‘Monopoly Capital’, Economic Development and Cultural Change, vol. 16, No.1 (1967).

Bently, L., ‘What is Intellectual Property?’ (2012) 71 CLJ 501

Botein, M., ‘Compulsory licensing vs private negotiations in peer- to-peer file sharing’ 11(6) Journal of Internet Law 15 [2008].

Bakker, Piet., ‘File-sharing – fight, ignore or compete: paid download services vs. P2P networks’, ResearchGate Telematics and Informatics, 22 (1-2): 41-55: Available at: https://www.researchgate.net/publication/222277073_File-Sharing-Fight_Ignore_or_Compete_Paid_Download_Services_vs_P2P-Networks (Accessed: 19/5/2015)

Balganesh, S., ‘Debunking Blackstonian Copyright’, 118 Yale Law Journal (2009) 1126-1181.Available at http://www.jstor.org/stable/40389483?seq=1#page_scan_tab_contents (Accessed: 21/11/2015).

Balganesh, Shyamkrishna., ‘Copyright Infringement Markets’ (February 13, 2013). Columbia Law Review, Vol. 113, 2013, Forthcoming;; University of Pennsylvania, Institute for Law & Economics Research Paper No. 13-7. Available at SSRN: http://ssrn.com/abstract=2233065;; (Accessed: 12/5/2015).

Bridy AM, ‘Why pirates (still) won't behave: regulating P2P in the decade after Napster’ Rutgers Law J [2009], 40(3): 565-611.

Balganesh, Shyamkrishna., ‘The Uneasy Case Against Copyright Trolls’, 86 South California Law Review (2013).

Balganesh, Shyamkrishna., ‘Foreseeability and Copyright Incentives’, 122 Harvard Law Review 1569, 1570 (2009). Available at: http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11454&context =journal_articles (Accessed: 19/3/2016).

Blum & Kalven, ‘The Uneasy Case for Progressive Taxation’ 19 U. Chicago Law Review 417 (1952).

Balganesh, Shyamkrishna., ‘The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying’, 125 Harvard Law Review, 1664, 1667-74 (2012).

BJ Ard, ‘Notice and Remedies in Copyright Licencing’, 80 Mo. L. Rev. 313, 369-76 (2015).

Barker, J. Cam., ‘Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement,’ Texas Law Review, Vol. 83, No. 2 83 Texas L. Rev. 525 (2004). Available at: SSRN: http://ssrn.com/abstract=660601 (Accessed: 2/11/2015).

Benkler, Y., ‘Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain’, New York University Law Review, 74(2) (1999).

Berry, J.N., ‘The real purpose of Copyright’, Library Journal, 07/01/2000. Available at: http://lj.libraryjournal.com/2000/07/copyright/the-real-purpose-of- copyright/ (Accessed: 24/10/2014).

Berry, K., ‘EU - UsedSoft v Oracle: ECJ approves sale of ‘used’ software’, Linklaters Technology, Media and Telecommunications News, 26 November 2012. Available at: http://www.linklaters.com/Insights/Publication1403Newsletter/TMT-News- November-

2012/Pages/EU-Used-Soft-Oracle-ECJ-approves-sale-used- software.aspx (Accessed: 18/5/2015).

Besen, S.M., and Kirby, S.N., & Salop, S.C., 'An Economic Analysis of Copyright Collectives', Virginia Law Review, 78 (1), 383-411 (1992).

Balkin, J.M. 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds' 90 Virginia Law Review [2004] 2043.

Besen, Stanley M., 'Private Copying, Reproduction Costs, and the Supply of Intellectual Property', Information Economics and Policy 2(1), (1986).

Bob Jessop, 'Recent Theories of the Capitalist State' Cambridge Journal of Economics, Volume 1, Issue 4, December (1977), Pages 353-373, https://doi.org/10.1093/oxfordjournals.cje.a035370 accessed: 21/09/2016.

Bhattacharjee, S., Lertwachara, K., Gopal R. D., & Marsden, J. R., 'Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions', Journal of Law and Economics, 49, 91-114 (2006).

Bill Batchelor and G. Montani, 'Exhaustion, essential subject matter and other CJEU judicial tools to update copyright for an online economy', J.I.P.L.P. [2015], 10(8), 591-600.

B. Batchelor and D. Keohane, 'UsedSoft – Where to now for Software Vendors?' [2012] ECLR 545.

Bibas, S., 'Plea Bargaining Outside the Shadow of trial,' (2004) 117 Harvard Law Review 2464, Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=464880 (Accessed: 14/3/2015).

Blackburn, D., 'On-line Piracy and Recorded Music Sales', Harvard University: Department of Economics, (2004) Available at: http://off-road.student.utwente.nl/filesharing/papers/blackburn_fs%20-%20On-line%20Piracy%20and%20Recorded%20Music%20Sales.pdf (Accessed:4/8/2015)

B.C. Goldmann, “Victory for Songwriters in WTO Music Royalties Dispute between U.S. and E.U.—Background of the Conflict Over the Extension of Homestyle Exemption”, (2001) 32 IIC 412.

Breyer, S., ‘The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs’, 84 Harvard Law Review 281 (1970).

Bentham, J., ‘Panopticon, Constitution, Colonies, Codification’, vol. 4, ed. Bowering [1838-43] (New York: Russel and Russel, (1971), Available at: http://oll.libertyfund.org/titles/bentham-the-works-of-jeremy-bentham-vol-4 (Accessed: 10/5/2016)

Beckerman, R, PC., ‘Legal Issues Arising from the RIAA’s lawsuits of intimidation brought against ordinary working people, and other important internet law issues’, (2008). Available at: http://recordingindustryvspeople.blogspot.co.uk/2008/10/transcript-of-june-17th-conference-in.html (October 28, 2008), (Accessed: 19/10/2016).

Communications Consumer Panel response to Ofcom’s interim statement and notice of a proposal to make an order in relation to the Online Infringement of Copyright and the Digital Economy Act 2010, Available at: http://www.communicationsconsumerpanel.org.uk/downloads/OCI.pdf (Accessed: 20/1/2017).

Commission, ‘Towards a modern, more European copyright framework’, COM(2015) 626 final (9 December (2015).

C. Stotgers, ‘When is Copyright Exhausted by a Software License?: UsedSoft v Oracle’ [2012] EIPR 787.

Contracts Study’ a study called ‘Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States’ commissioned by the European Parliament, DG for Internal Policies in 2014 to a group of copyright and economics academics led by S. Dusollier.

Callister, Paul D., ‘Law and Heidegger's Question Concerning Technology: A Prolegomenon to Future Law Librarianship’, Law Library Journal, Vol. 99, pp. 285-305, (2007). Available at: SSRN: https://ssrn.com/abstract=960134 (Accessed: 18/6/2015).

Charles S. Wright, Actual Versus Legal Control Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998, 75 [2000] Wash. L. Rev. 1005, 1012.

Charlotte Waelde and Philip Schlesinger, ‘Music and Dance: Beyond Copyright Text?’ (in) Scripted, Volume 8, Issue 3, December 2011.

Commission, "Copyright reform clears final hurdle: Commission welcomes approval of modernised rules fit for digital age" (15 April 2019), http://europa.eu/rapid/press-release_IP-19-2151_en.htm [Accessed 14.11.2019].

Commission, "Towards a modern, more European copyright framework", COM(2015) 626 final (9 December (2015).

Commission, White Paper, "A Copyright Policy for Creativity and Innovation the European Union" (2014), https://www.dropbox.com/s/0xcflgrav01tqlb/White%20Paper%20%28internal%20draft%29%20%281%29.PDF[Accessed 14.11.2019].

Create, "The Copyright Directive: Articles 11 and 13 must go — Statement from European Academics in advance of the Plenary Vote on 26 March 2019" (24 March 2019), https://tinyurl.com/yxmudrdg[Accessed 21 November 2019].

C Sieburgh, ‘Principles in Private Law: From Luxury to Necessity – Multi-Layered Legal Systems and the Generative Force of Principles’ [2012] 20(2) European Review of Private Law 295, 301.

Courtney Bartlett, ‘Bridgeport Music’s Two-Second Sample Rule Puts the Big Chill on the Music Industry’, 15 DePaul J. Art, Tech. & Intell. Prop. L. 301 (2005).

C. Geiger, O. Bulayenko and G. Frosio, ‘The Introduction of a Neighbouring Right for Press Publishers at EU Level: The Unneeded (and Unwanted) Reform’ [2017] 39 EIPR 202.

C. Angelopoulos, ‘Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence’ (Kluwer Blog, 6 October 2016).

C. Geiger, ‘The future of copyright in Europe: striking a fair balance between protection and access to information’ I.P.Q. [2010].

Calum Bryant and Rachael Heeley, ‘The Kraftwerk case - does a two-second sample infringe copyright?’ Ent. L.R. [2019], 30(4).

C Semmelmann, ‘General Principles of EU Law: The Ghost in the Platonic Heaven in Need of Conceptual Clarification’ [2013] 2 Pittsburgh Papers on the European Union 1, 1-5.

Cobia, ‘The Digital Millennium Copyright Act Takedown Notice Procedure’ (2009) 10 Minn. Journal of Law, Science, and Technology 387, 394.

Clark D. Asay, ‘Kirtsaeng and the First Sale Doctrine’s Digital Problem’, 66 Stan, L. Rev., Online 17, 23 [2013].

Clare Dalton, ‘An Essay in the Deconstruction of Contract Doctrine’ 94 Yale L.J. [1985]. Available at: https://digitalcommons.law.yale.edu/ylj/vol94/iss5/1 accessed:21/03/2017.

Campbell, Donald T. Downward Causation in Hierarchically Organised Biological Systems in Ayala; Dobzhansky, Studies in the philosophy of biology, 179–86.

Costanza, N., ‘Digital Music Garage Sale: An Analysis of Capitol Records, LLC v. ReDigi Inc. and a Proposal for Legislative Reform in Copyright Enabling a Secondary Market for Digital Music’ Hastings Communication Law Journal, Vol 37, Issue 1, (2015).

Carey, M. and Wall, D., ‘MP3: more beat to the byte’, International Review of Law, Computers and Technology 15 (1) (2001).

Clark, S., ‘Star Wars: New Hope or Lost Cause?’, Copyright World (2010) Available at: http://www.blplaw.com/media/pdfs/publications/copyright_world_star_wars.pdf (Accessed: 22/5/2015).

Cohen, J., ‘Creativity and culture in copyright theory’, 40 University of California Davis Law Review 1151 (2007).

Christman, Ed., ‘Wait, What? The Copyright Royalty Board, Webcasting Rates and Paying Artists, Explained. (2015), Available at: http://www.billboard.com/articles/business/6805644/copyright-royalty-board-webcasting-rates-explained-faq (Accessed: 12/2/2017).

Cheung, ‘The Structure of a Contract and the Theory of a Non-exclusive Resource’, 13 J.Law & Econ. 49 (1970).

Cenite, M. Wanzheng, M., Peiwen, C., & Chan, G. S., ‘More than Just Free Content: Motivations of Peer-to-Peer File Sharers’, Journal of Communication Inquiry, 33(3) (2009).

Cohen F.S., ‘Dialogue on Private Property,” Rutgers Law Review 357 (1954-55).

David Boles Blogs., ‘The Role of the Artist in Society’, November 21 (2008), Available at: https://bolesblogs.com/2008/11/21/the-role-of-the-artist-in-society/ (Accessed: 19/3/2017).

Demsetz, ‘Toward a Theory of Property Rights’ 57 Am. Econ. Rev. Papers & Proceedings 347 [1967].

Demsetz. H, ‘Industry Structure, Market Rivalry and Public Policy’ [1973] 16 J. Law. and Economics, 1-9.

D.J. Brennan, ‘The Three-Step Test Frenzy—Why the TRIPs Panel Decision might be considered Per Incuriam’, [2002] IPQ 2, 212.

Danaher Smith and Telang ‘Website Blocking Revisited’ (18 April 2016), SSRN, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795> [Accessed 30 June 2019]

Dootson P and Suzor N, ‘The Game of Clones and the Australian Tax: Divergent Views about Copyright Business Models and the Willingness of Australian Consumers to Infringe’ [2015] 38(1) UNSW Law Journal 206.

David Arditi, ‘Disciplining the Consumer: File-Sharers under the Watchful Eye of the Music Industry’ (2011).

Dinwoodie, Graeme B. ‘The Death of Ontology: A Teleological Approach to Trademark Law’ 84 [1999] Iowa L. Rev. 611.

David A. Fischer, Causation in Fact in Omission Cases, 1992 Utah L. Rev. 1335 (1992).

David Lyon, The Electronic Eye: The Rise of Surveillance Society—Computers and Social Control in Context (John Wiley and Sons, 2013).

Demsetz, The Exchange and Enforcement of Property Rights, 7 J.Law & Econ. 11 [1964].

David Arditi, ‘Music Everywhere: Setting a Digital Music Trap’, SAGE Journals, Vol.45, [2017].

Dallon, C.W., ‘The problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest’, 44 Santa Clara Law Review (2004).

Denegri-Knott, J., & Taylor, J., ‘The Labeling Game: A Conceptual Exploration of Deviance on the Internet,’ Social Science Computer Review, 23(1), (2005).

Dentith, S., ‘Political Economy, Fiction and the Language of Practical Ideology in Nineteenth-century England’, 8 Social History 186 (1983).

Deming Liu, ‘Reflections on the idea/expression dichotomy in English copyright law’ J.B.L. [2017] 1, 71-96.

Doctorow, C., ‘Creative License: How the hell did sampling get so screwed up and what the hell do we do about it?’, July 8 (2007), Available at:

http://boingboing.net/2011/07/08/creative-license-how.html
(Accessed: 19/11/2015).

Domestic Alliance Security Council., 'Countering the Growing Intellectual Property Theft Threat' (01/22/2016) Available at: https://www.dsac.gov/news/countering-the-growing-intellectual-property-theft- threat (Accessed: 24/2/2017).

Drahos, P.**,** 'Access to Knowledge: Time for a Treaty?', Bridges Monthly Review, Year 9, no 6-7, June/July, (2005).

Electronic Frontier Foundation., 'Copyright Trolls', EFF.ORG, https://www.eff.org/issues/copyright-trolls (Accessed May 28, 2012).

Elkin-Koren., 'Cyberlaw and social Change: A Democratic approach to copyright law in cyberspace', 14 Cardozo Arts and Entertainment Law Journal 215 (1996).

Ellickson, R.C., 'Property in Land', 102 Yale Law Journal 1315, 1362 (1993), available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1410&context=fss_papers (Accessed 16/12/2016).

Ernesto., 'Confessions of Convicted RIAA Victim Joel Tenenbaum' (September 16, 2010) (Available at: https://torrentfreak.com/confessions-of-a-convicted-riaa-victim-100916/) (Accessed: 09/3/2016).

Justin Van Etten, 'Copyright Enforcement of non-copyright terms: MDY v. Blizzard and Krause v. Titleserv' [2012], Duke University School of Law, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1221&context=dltr accessed: 18/3/2017.

Fedock, J.A., 'The RIAA v. The People: The Recording Industry's Misguided Attempt to Use the Legal System to Save Their Business Model', 32 Pepperdine Law Review, Issue 4 (2005), Available at: http://digitalcommons.pepperdine.edu/plr/vol32/iss4/7 (Accessed: 17/9/2014).

Francesco Rizzuto, 'Injunctions against intermediate online service providers', Computer and Telecommunications Law Review (2012), 18(3), 69-73.

Fedock, J.A., ‘RIAA v. The People: Five Years Later’ Electronic Frontier Foundation (2008). Accessed:13/8/2014 Available at: https://www.eff.org/files/eff-riaa-whitepaper.pdf (Accessed: 9/11/2015).

Francis Gurry, ‘The Future of Copyright’ (at the Blue Sky Conference: Future Directions in Copyright Law, Sydney, 25 February 2011).

Freezing Injunctions: A Nuclear Weapon for the Commercial Litigator, delivered by Hefin Rees to Carter-Ruck Solicitors, London, on the (8th December 2009).

Fiveash, K., ‘Judge mulls “wasted costs” as ACS: Law cases close’, The Register, available at: http://www.theregister.co.uk/2011/03/17acs_law_cases_closed_judge_considers_costs/) (Accessed: 22/8/2014).

Fiona Clark, Cases on Intellectual Property Law, Fleet Street Reports, [2020] 93-186.

Friedlander, J. P., ‘News and Notes on 2010 RIAA Music Shipment Data’, (2010). Retrieved from: http://76.74.24.142/548C3F4C-6B6D-F702-384C-D25E2AB93610.pdf (Accessed: 17/4/2015).

Gibson, J., ‘Risk Aversion and Rights Accretion in Intellectual Property Law’, 116 Yale Law Journal 882, 887-906 (2007).

Gordon, W.J., ‘Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors’, 82 Columbia Law Review 1600 (1982).

Gordon, W.J., ‘An Inquiry into the Merits of Copyright: The Challenges of 400

Consistency, Consent, and Encouragement Theory’, Stanford Law Review 1343 (1989).

Griffiths, J., ‘Exhuastion and the Alteration of Copyright Works in EU Copyright Law – (C-419/13) Art & Allposters International BV v Stitching Pictoright’ May (2016), Queen Mary University London.

Geiger, Christophe, Gervais, Daniel;; and Senftleben, Martin., 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law', Program on Information Justice and Intellectual Property Research Paper no. 2013-04 (2013).

George J. Stigler, The Theory of Price, (4th edn, Macmillan Publishers, 1987).

Geller, 'Beyond the Copyright Crisis', 55 Journal of the Copyright Society of the USA 165, 166 (2007-08).

Giletti, T., 'Why Pay if it's Free?: Streaming, Downloading, and Digital Music Consumption in the iTunes era', Media@LSE Electronic MSc Dissertation Series, Compiled by Dr. Bart Cammaerts and Dr. Nick Anstead, (2012), Available at: http://www.lse.ac.uk/media@lse/research/mediaworkingpapers/mscdissertation series/2011/71.pdf (Accessed: 3/7/2016).

Gilmore, Grant., 'Book Review: The Transformation of American Law, 1780- 1860', Faculty Scholarship Series (1977). Paper 2671. Available at: http://digitalcommons.law.yale.edu/fss_papers/2671 (Accessed: 25/8/2015)

Gilmore., 'From Tort to Contract: Industrialisation and the Law', (Book Review) 86 Yale Law Journal 785 (1977).

Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' 90 [1990] Col. Law Review 1865.

Glanville Williams, 'Causation and the Law' The Cambridge Law Journal, Vol. 19, No. 1 (Apr., 1961).

Graham, J., 'RIAA Lawsuits Bring Consternation, Chaos', USA TODAY, Sept. 10, (2003) Available at: http://usatoday30.usatoday.com/tech/news/techpolicy/2003- 09-10-riaa-suit-reax_x.htm (Accessed: 11/4/2015)

Graham Jones and Jon Roffe, Deleuze's Philisophical Language (Edinburgh University Press, 2009).

Gray, 'Property in Thin Air' [1991] Cambridge Law Journal 252.

Griffin, J., ‘A call for a doctrine of ‘information justice’ Intellectual Property Quarterly (2016).

Griffin, J., ‘300 Years of Copyright Law? A Not So Modest Proposal for Reform’, 28 J. Marshall J. Computer & Information Law (2010).

Griffin, J., ‘Copyright Evolution: Creation, Regulation and the Decline of Substantively Rational Copyright Law’, Intellectual Property Quarterly (2013)

Griffin, J., ‘The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform’, University of Bristol, Ph.D. (2010).

Griffin, J., ‘The interface between copyright and contract: suggestions for the future’, European Journal of Law and Technology, Vol. 2, No.1, (2011).

Griffin, J., ‘What Happened to Creativity? Is It Time to Reform Copyright Law?’ BILETA Conference, Glasgow Caledonian University, (2008).

G. Schwartz and M. Gardner, ‘Groundless Threats of Proceedings for IP Infringement’ [2006] Communications Law 85.

Griffin, J., & Nair, A., ‘Making Threats of Copyright Infringement’ International Review of Law, Computers and Technology (2013).

G., Monios, J. The production of capitalist “smooth” space in global port operations. Journal of Transport Geography, [2015] 47: 59-69.

Gross, Grant., ‘RIAA Suffers a Setback in Court.’ PC World Online, December 19 (2003). http://yahoo.pcworld.com/yahoo/article/0,aid,113961,00.asp. (Accessed: 21/10/2014).

Gracz, K., and Fillipi., P.D., ‘Regulatory failure of copyright law through the lenses of autopoietic systems theory’, International Journal of Law and Information Technology, Volume 22, Issue 4, 1 December (2014).

Griffin, J., ‘Making a new copyright economy: A new system parallel to the notion of proprietary exploitation in Copyright’, Intellectual Property Quarterly (2013).

Hurt, Robert M. and Robert M. Schuchman., 'The Economic Rationale of Copyright', American Economic Review (Papers and Proceedings), 56.

HM Courts and Tribunals Service, 'Guide to the Intellectual Property Enterprise Court Small Claims Track' Issued July (2014). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426129/patents-court-small-claims.pdf (Accessed: 19/8/2016).

Higgins, P., 'Trouble in Trolltown: Judges Increasingly Catch on to Copyright Trolls' Unfair Tactics', Electronic Frontier Foundation, Apr. 14, (2012), https://www.eff.org/deeplinks/2012/04/trouble-trolltown

Harvey, D., 'The new Imperialism: Accumulation by Dispossession', The Socialist Register (2004), Available at: http://socialistregister.com/index.php/srv/article/view/5811#.WCtBTXd0e8U (Accessed: 8/9/2015).

Hefin Rees, delivered to Carter-Ruck Solicitors, London, on the 8th December 2009, 'Freezing Injunctions: A Nuclear Weapon for the Commercial Litigator', Available at: https://hefinrees.wordpress.com/2010/04/20/freezing-injunctions-weapon-for-commercial-litigator/ (Accessed: 25/6/2015).

Heller, Michael A., 'The Tragedy of the Anti-commons: Property in the Transition from Marx to Markets', Harvard Law Review 111, no. 3 (1998).

Henley, M., 'Jacobsen v Katzer and Kamind Associates – An English Legal Perspective', International Free and Open Source Software and Law Review, Volume 1, no.1, (2009). Available at: http://www.ifosslr.org/ifosslr/article/view/4/13 (Last accessed: 5/11/2016).

Hernando De Soto., 'Why Capitalism Works in the West but Not Elsewhere', International Herald Tribune, January 5th, (2001). Available at: http://www.cato.org/publications/commentary/why-capitalism-works-west-not0elsewhere – (Accessed: 29/10/2014).

Hilty and Koklu., ‘Software Agreements: Stocktaking and Outlook – Lessons from the Oracle v. UsedSoft Case from a Comparative Law Perspective’ 44(3) International Review of Intellectual Property and Competition Law 263 (2013).

Hirsch, P.M., ‘Globalization of mass-media ownership: implications and effects’, Communication Research, 19(6) 677-81 (1992).

H. Hovenkamp, ‘Antitrust Policy After Chicago’ [1985] 84 Univ Mich LR 213, 226–229.

Holm, Håkan., ‘The Computer Generation's Willingness to Pay for Originals when Pirates are Present – A CV study’, Working Papers 2000:9, Lund University, Department of Economics, revised 01 Nov (2000). Available at: https://ideas.repec.org/p/hhs/lunewp/2000_009.html (Accessed: 19/3/2015).

Harmon, Elliot, ‘Notice-and-Stay-Down’ is really filter-everything’ Electronic Frontier Foundation <https://www.eff.org/deeplinks/2016/01/notice-and-stay-down-really-filter-everything> accessed: 19/05/20.

Home Office, ‘Covert Surveillance and Property Interference: Code of Practice: December 2014 Pursuant to section 71(4) of the Regulation of Investigatory Powers Act (2000)’, Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384975/Covert_Surveillance_Property_Interrefernce_web__2_.pdf (Accessed: 3/11/2016).

House of Commons Innovation, Universities, Science and Skills Committee, ‘The work and operation of the Copyright Tribunal’, TSO, London, (2008) Available at: https://www.publications.parliament.uk/pa/cm200708/cmselect/cmdius/637/637. pdf (Accessed: 3/6/2016).

HM Courts and Tribunals Service, ‘Guide to the Intellectual Property Enterprise Court Small Claims Track’ Issued July (2014). Available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426129/patents-court- small-claims.pdf> (Accessed: 19/8/2016).

Hannibal Travis, Copyright Class Struggle: Creative Economies in a Social Media Age, Entertainment Law Review, (2019), 30(4), 133-135.

Hui Kai Lung., 'Piracy and the Legitimate Demand for Recorded Music', School of computing, National University of Singapore (2001). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=262651
(Accessed: 12/4/2015).

Hunter, D., and Lastowka, F.G., 'Amateur-to-Amateur', 46 William & Mary Law Review 951 (2004), available at http://scholarship.law.wm.edu/wmlr/vol46/iss3/3 (Accessed: 6/11/2016).

Hunter & Gregory Lastowka, 'The Laws of the Virtual Worlds' 92 California Law Review [2004].

Hauhart, 'The Origin and Development of the British and American Patent and Copyright Laws' (1983) 5 Whittier Law Review 539, 558.

Holt, Wyth., 'Morton Horwitz and the Transformation of American Legal History', 23 William & Mary Law Review 663 (1982), Available at: http://scholarship.law.wm.edu/wmlr/vol23/iss4/5 (Accessed: 7/2//2016).

Kathryn D. Holt, 'Grokster and Beyond: Secondary Liability for Copyright Infringement During Live Musical Performances', 19 [2011] J. Intell. Prop. L. 173.

Hayek, F.A., 'The Use of Knowledge in Society', Menlo Park, California: Institute for Human Studies, (1977) [revised and reprinted from The American Economic Review, vol. 35, No. 4, Sept 1945].

I. Davies and T. Scourfield, 'Threats: Is the Current Regime Still Unjustified?' [2007] EIPR 259.

Isaac, R. Mark, and Vernon L. Smith. 'In Search of Predatory Pricing' Journal of Political Economy, 93.2 [1985] 320-345.

IFPI publishes Digital Music Report 2015 (14 April 2015) Available at: http://www.ifpi.org/news/Global-digital-music-revenues-match-physical-format- sales-for-first-time (Accessed: 07/1/2016).

Justin Koo, 'The influence of football on the development of the communication to the public right' E.I.P.R. [2019], 41(9), 571-577.

Jessica Litman, 'The Exclusive Right to Read' 13 Cardozo Arts & Entertainment. L.J. 29, 31-32 (1994).

J. Griffiths 'Preserving Judicial Freedom of Movement—Interpreting Fair Dealing in Copyright Law' [2000] I.P.Q. 164.

J Griffiths, 'The "three-step test" in European copyright law – problems and solutions' [2009] 2009/4 IPQ 428, 431.

John M. Cooper, 'Plato's Theory of Human Motivation' History of Philosophy Quarterly, Vol. 1, No. 1 (Jan., 1984).

John Villasenor, 'Rethinking a Digital First Sale Doctrine in a Post-Kirtsaeng World: The Cause for Caution' Competition Policy International, May (2013).

John Lettice, 'Apple iTunes Store Goes '100% DRM-Free' – Allegedly' (2009) Register. <http://www.theregister.co.uk/2009/01/06/macworld_itunes/> accessed: 21/02/2018.

Jolls, Christine, Cass R. Sunstein, and Richard Thaler, 'A Behavioural Approach to Law and Economics' Stanford Law Review 50 (May): (1998), 1471-1550.

Julia Reda, 'EU copyright reform: Our fight was not in vain' (18 April 2019), https://juliareda.eu/2019/04/not-in-vain/> accessed: 21/11.19.

J. Poort and J. Quintais, 'Global Online Piracy Study' Institute for Information Law, University of Amsterdam [2018].

J.C. Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-StepTest' for Copyright Exceptions', [2001] 187 RIDA 3.

Jeremy Phillips, ‘Canvassing Opinion: a guest post on Art & Allposters’ (September 11, 2014), The 1709 Blog, <http://the1709blog.blogspot.nl/2014/09/canvassing-opinion-guest-post-on-art.html> accessed:21/09/18.

Jaszi, Peter, ‘On the Author Effect: Contemporary Copyright and Collective Creativity’ Cardozo Arts & Entertainment Law Journal 10, no. 2 (1992), 293-320.

Jackson, M., ‘UPDATE2 UK ISPs to send First Internet Piracy Warning Letters this Month’, (January 10 2017) Available at: http://www.ispreview.co.uk/index.php/2017/01/big-uk-isps-send-first-internet- piracy-warning-letters-month.html (Accessed: 22/1/2017).

J. Groom, I. Silverman, and B. Clark, ‘Still Lost in the Labyrinth?’ [2017] EIPR 591.

Johnson D and Post D, ‘Law and Borders: The Rise of Law in Cyberspace’ 48 [1996] Stan. L. Rev. 1367.

Johnson, E.E., ‘Intellectual Property and the Incentive Fallacy’, 39 Florida State University Law Review 623 (2011).

Joseph Stiglitz, ‘Joseph Stiglitz Says Standard Economics is Wrong. Inequality and Unearned Income Kills the Economy’ (6 September 2016), Economics, <http://evonomics.com/joseph-stiglitz-inequality-unearned-income/> accessed 22 May 2019.

Jessica Litman, ‘What we don’t see when we see copyright as property’ Cambridge Law Journal [2018], 77(3), 536-558.

John, Foster, and McChesney, Robert Waterman, ‘The Internet’s Unholy Marriage to Capitalism’ Monthly Review, March (2011).

J. Koo, ‘Walking Forward with Backward facing Feet: The CJEU Decision in Reha Training and the Development of the Communication to the Public Right’ [2016] 11 JIPLP 732.

Juliet M. Moringiello, ‘‘What Virtual Worlds Can Do for Property Law’’ 62 Florida Law Review [2010] 159.

Joshua P. Friedlander, ‘Recording Indus. Ass’n of Am., News and Notes on 2014 RIAA Music Industry Shipment and Revenue Statistics’ 1 (2014), http://riaa.com/media/D1F4E3E8-D3E0-FCEE-BB55-FD8B35BC8785.pdf accessed:11/10/2019.

James M. Glass, ‘Notes on the Paranoid Factor in Political Philosophy: Fear, Anxiety, and Domination’ Political Philosophy, Vol 9, No. 2 (Jun. 1988).

Jones, S., ‘Music that Moves: Popular Music, Distribution and Network Technologies’, Cultural Studies, 16(2) (2002).

João Pedro Quintais, ‘The new copyright in the Digital Single Market Directive: a critical look’ E.I.P.R. [2020], 42(1), 28-41.

Jean O. Lanjuow & Josh Lerner., ‘The Enforcement of Intellectual Property Rights: A Survey of the Empirical Literature’, National Bureau of Economic Research Working Paper No. 6296, (1997). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=226053&rec=1&srcabs=1148735&alg=7&pos=1 (Accessed: 12/12/2014).

Jones, B., ‘Court Upholds $675k Verdict in RIAA Piracy Case’, (August 24, 2012) (Available at: https://torrentfreak.com/court-upholds-650k-verdict-in-riaa-piracy- case-120823/) (Accessed:6/7/2016).

João Pedro Quintais, ‘Untangling the hyperlinking web: In search of the online right of communication to the public’, (2018) 21 J. World Intell. Prop. 385.

Kay, J., ‘The Economics of Intellectual Property Rights’ 13 International Review of Law and Economics 337 (1993).

Kristina Groennings, ‘Costs and Benefits of the Recording Industry’s Litigation against Individuals’ 20 Berkeley Technology Law Journal [2005] 571.

Katerina Sharkova, ‘The author, the fan and the in-between: in search of a copyright regime for the everyday creative’ [2018] E.I.P.R. , 40(12), 784-796.

Kravets, D., ‘Dec. 7, 1999: RIAA Sues Napster’, (December 12, 2009) Available at: https://www.wired.com/2009/12/1207riaa-sues-napster/ (Accessed: 22/5/2015).

K. O’Sullivan Enforcing Copyright Online: Internet Service Provider Obligations and the European Charter of Fundamental Rights [2014] E.I.P.R. pp.577–583.

Kretschmer, ‘European Copyright Reform: is it possible?’ (7 May 2019), re:publica19, https://www.youtube.com/watch?v=ZyujNlpxu9k[Accessed 30 October 2019].

Kevin T. O'Sullivan, ‘Copyright and internet service provider "liability": the emerging realpolitik of intermediary obligations’ IIC [2019], 50(5), 527-558.

Kalberg, S., ‘Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History’, The American Journal of Sociology, Vol. 85, No. 5 (Mar., 1980), available at: http://www.bu.edu/sociology/files/2010/03/Weberstypes.pdf (Accessed 15/01/2016).

Kim, S., ‘Taking De Minimis out of the Mix: The Sixth Circuit Threatens to Pull the Plug on Digital Sampling in Bridgeport Music Inc. v. Dimension Films’, Villanova Sports and Entertainment Law Journal, 13, 103-31.

Kleiman, M. and Kilmer, B., ‘The dynamics of deterrence’, Department of Public Policy, University of California, 3250 Public Affairs Building, Los Angeles, CA 90095-1656;; Drug Policy Research Center, RAND, 1776 Main Street, Santa Monica, CA 90407-2138. Communicated by Thomas C. Schelling, University of Maryland, College Park, College Park, MD, June 15, 2009 (received for review September 7, 2007) Available at: http://www.pnas.org/content/106/34/14230.full.pdf (Accessed: 23/5/2017).

Leach, A., ‘UK brings in small-claims court for intellectual property: can’t afford a lawyer? Accept this much smaller payout’ 2 October (2012) Available at: https://www.theregister.co.uk/2012/10/02/ip_small_claims_track/
(Accessed: 10/5/2017).

Leeds, J., ‘Labels Win Suit Against Song Sharer,’ New York Times (2007) Accessed: 19/6/2016 Available at: http://www.nytimes.com/2007/10/05/business/media/05music.html?_r=0

Litman, J., ‘War and Peace: The 34th Annual Donald C. Brace Lecture’, 53 Journal of the Copyright Society 1 (2005) Available at: http://repository.law.umich.edu/other/30/ (Accessed: 22/5/2015).

Law Commission Report, ‘Patents, Trade Marks and Designs: Unjustified Threats (No. 360)’ [2015] - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/468450/51672_Law_Commission_HC_510_TEXT.pdf accessed: 23/09/2019.

Litman, J., ‘War Stories’ 20 Cardozo Arts & Entertainment Law Journal 337 (2002).

Litman, J., ‘Information Privacy/Information Property’ [2000] 52 Stan. L. Rev. 1283, 1295-301.

Labels File Notice of Appeal in Tenenbaum Case, July 22 (2010), available at http://copyrightsandcampaigns.blogspot.co.uk/2010/07/labels-file-notice-of- appeal-in.html (Accessed: 17/9/2016)

Laddie., ‘Copyright: over-strength, over-regulated, over-rated?’ European Intellectual Property Review 253-256 (1996).

Landes W., and Posner, R., ‘An economic analysis of copyright law’ 18 [1989] Journal of Legal Studies 325.

Lange, D., ‘Recognizing the Public Domain’, 44 Law & Contemporary Problems. 147. 147, 150 (1981). Available at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3642&context=lcp (Accessed: 3/9/2015).

Langenderfer, Jeff & Don Lloyd Cook., ‘Copyright Policies and Issues Raised by A&M Records v. Napster: ‘The Shot Heard “Round the World” or “Not with a Bang but a Whimper?”’, Journal of Public Policy and Marketing 20 (2): 280-88 (2001).

Lee, E.G., & Willging, T.E., ‘Defining the Problem of Cost in Federal Civil Litigation’, 60 DUKE Law Journal 765 (2010), Available at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1486&context=dlj (Accessed: 7/9.2016).

Lessig, L., ‘Laws that choke creativity’ (Last accessed: 22/4/2014) (Available at: https://www.youtube.com/watch?v=7Q25-S7jzgs) (Accessed: 22/7/2016).

L. Longdin and P. H. Lim, ‘Inexhaustible Distribution Rights for Copyright Owners and the Foreclosure of Secondary Markets for Software’ [2013] 44(5) IIC 541.

Leyshon, A., ‘Time–space (and Digital) Compression: Software Formats, Musical Networks, and the Reorganisation of the Music Industry’, Environment and Planning A, (2001), Vol. 33, 49-77. Available at: https://www.academia.edu/1367569/Time-Space_and_Digital_Compression_Software_Formats_Musical_Networks_and_the_Reorganisation_of_the_Music_Industry (Accessed: 26/8/2015).

Leyshon, A., Webb, P., French, S. Thrift, N., & Crewe, L, ‘On the reproduction of the musical economy after the internet’, Media, Culture and Society, 27(2) (2005).

Liebowitz, Stan J. & Richard Watt., ‘How to Best Ensure Remuneration for Creators in the Market for Music? Copyright and its Alternatives’, Journal of Economic Surveys, 20(4) (2007).

Lindvall, H., ‘Spotify should give indies a fair deal on royalties,’ (2011, February 1) The Guardian, Retrieved from: http://www.guardian.co.uk/media/pda/2011/feb/01/spotify-royalties- independents (Accessed: 19/4/2015).

Lionel Bently and Martin Kretschmer., ‘Cambridge: University of Cambridge, Faculty of Law in Primary Sources on Copyright (1450–1900)’, Available at: www.copyrighthistory.org (Accessed: 21/4/2016).

Litman, J., ‘The Demonization of Piracy: Challenging the Assumptions’, Tenth Conference on Computers, Freedom and Privacy, Toronto, Canada, April 6, (2000). Available at: http://www-personal.umich.edu/~jdlitman/papers/demon.pdf (Accessed: 7/11/2014).

Luhmann, F., (Senior Intellectual Property Attorney) ‘IAAL: What- Peer-to-Peer Developers Need to Know About Copyright Law’, (2006) Available at: https://www.eff.org/wp/iaal-what-peer-peer-developers-need-know-about- copyright-law (Accessed: 21/4/2016).

Lyon, J., ‘Revolution in Progress: Third-Party Funding of American Litigation’, 58 University of California Law Review 571, 577 (2010).

Lyon, D. Surveillance society: monitoring everyday life. Buckingham: Open University Press (2003).

Litman, J., ‘Copyright, Compromise and Legislative History’, Cornell Law Review 72 (1987).

March and Clark., ‘Lucasfilm Ltd v Ainsworth: The Force of Copyright Protection for Three-Dimensional Designs as Sculptures or Works of Artistic Craftsmanship’, European Intellectual Property Review, Issue 7 (2009).

Myers, Kellen, ‘The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties’. Federal Communications Law Journal, (2009) 61: 439-40.

Mazzone, Jason., ‘Copyfraud’, Brooklyn Law School, Legal Studies Paper No. 40;; New York University Law Review, Vol. 81 (2006). Available at SSRN: http://ssrn.com/abstract=787244 (Accessed: 22/5/2015).

Moon, K., ‘Resale of Digital Content: UsedSoft v ReDigi’, 24(6) European Intellectual Property Law Review 193 (2013).

Mensch, ‘Freedom of Contract as Ideology’ Stanford Law Review 753-772.

Molot, J.T., ‘Litigation Finance: A Market Solution to a Procedural Problem’, 99 Georgetown Law Journal 65, 90 (2010).

M. Husovec., ‘Injunctions against Innocent Third Parties: The case of Website Blocking’ Journal of Intellectual Property, Information Technology and Electronic Commerce Law (2013).

Martin, Rebecca, ‘The Digital Performance Right in the Sound Recordings Act of 1995: Can it Protect U.S. Sound Recording Copyright Owners in a Global Market?’ (1996) Cardozo Arts Entertainment Law Journal, 14: 733.

M Savic, ‘The Legality of Resale of Digital Content after UsedSoft in Subsequent German and CJEU Case Law’ [2015] EIPR 414-29.

M. Van. Houweling, "Making Copyright Work for Authors Who Write to Be Read" (2015) 38 Columbia Journal of Law & the Arts 381.

Menell, Peter S, ‘The American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age’ 61 J. [2014] Copyright Soc’y U.S.A. 235.

Martha Woodmansee. ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author’, Eighteenth Century Studies, (1984), 17(4), 425-28.

Mark F. Grady, Proximate Cause and the Law of Negligence, 69 Iowa L. Rev. 363, 392 (1984).

Mark, Henley., ‘Jacobsen v Katzer and Kamind Associates – An English Legal Perspective’ International Free and Open Source Software and Law Review, Volume 1, no.1, Rev.41 [2009].

Madden, Mary, and Amanda Lenhart., ‘Sharp Decline in Music File Swappers’, (2004) Pew Internet and American Life Project. Pew Research Centre. Available at: http://www.pewinternet.org/2004/01/04/sharp-decline-in-music-file-swappers/ (Accessed: 19/10/2015).

M. de Zwart, ‘A historical analysis of the birth of fair dealing and fair use: lessons for the digital age’ [2007] I.P.Q. 1, 60.

Mansell, R., ‘New Media Competition and Access: The Scarcity-Abundance Dialectic’, New Media & Society, (1999).

M. Ficsor, “How much of What? The ‘Three-StepTest’ and its application in two recent WTO dispute settlement cases”, (2002) 192 RIDA 110.

Mansell, R., ‘Political Economy, Power and New Media’, New Media and Society, (2004).

Martin Husovec, "How Europe Wants to Redefine Global Online Copyright Enforcement" in Tatiana Eleni Synodinou (ed.), Pluralism or Universalism in International Copyright Law (Kluwer Law, forthcoming), http://dx.doi.org/10.2139/ssrn.3372230 [accessed 14 December 2019].

Mansell, R., ‘New Media Competition and Access: The Scarcity-Abundance Dialectic’, New Media & Society, 1(2), 155-182, (1999).

Masayuki, T., ‘The Anglo-American Perspective on Freezing Injunctions’, Civil Justice Quarterly 29 Issue 3, 250-369 (2010) Available at: https://works.bepress.com/tamaruya/1/ (Accessed: 9/2/2015) .

Masiyakurima, P., ‘Copyright in Works of Artistic Craftsmanship: An Analysis’, Oxford Journal of Legal Studies, Vol. 36, No. 3 (2016).

Morris, S., ‘Beyond Trade: Global Digital Exhaustion in International Economic Regulation’ [2014] 36(1) Campbell Law Review 107.

McCourt, T. and Burkart, P., “When Creators, Corporations and Consumers Collide: Napster and the Development of On-line Music Distribution,’ (2003) Media Culture & Society 25(3).

Martin, ‘The Berne Convention and the US Compulsory License for Jukeboxes: Why the Song Could not Remain the Same’ J Copyright Socy USA [1990] 262, 296-307.

McMillan, G., ‘Appeals Court Approves $675,000 Fine for Student who Illegally Downloaded 30 Songs’, Available at: http://www.digitaltrends.com/music/appeals-court-denies-piracy-penalty-plea/ (Accessed: 22/23/4/2016).

M.F. Makeen, ‘Rationalising Performance “in public” under U.K. Copyright Law [2016] IPQ 117.

Melville. B. Nimmer, ‘The Nature of Rights Protected by Copyright’ (1962) 10 UCLA Law Review 60.

Michael Seringhaus, ‘E-book Transactions: Amazon “kindles” the Copy Ownership Debate” 12 Yale Journal of Law and Technology., 147, 199, (2009).

Merrill, S. A., and William, J. Raduchel, ‘Copyright in the Digital Era: Building Evidence for Policy’ Committee on the Impact of Copyright Policy on Innovation in the Digital Era, Board on Science, Technology, and Economic Policy, Policy on Global Affairs, The National Academies Press (2013).

Mossoff, A., ‘Is Copyright Property?’ [2005] 42 San Diego L.Rev. 29

Merges, R.P., ‘The Concept of Property in the Digital Era’ [2008] 45 Hous.L.R. 1239.

Mulligan, Christina, ‘Copyright without Copying’ Cornell Journal of Law and Public Policy: [2017] Vol. 27 : Issue 2, Article 5.

Mike Weatherly., ‘Copyright Education and Awareness: A Discussion Paper’, (2014). Available at: http://www.cubismlaw.com/wp-content/uploads/2015/06/mweatherly-copyright- education-awareness.pdf (Accessed: 21/8/2016).

Majorie Heins & Tricia Beckles, ‘Will Fair Use Survive? Free Expression in the Age of Copyright Control’ (New York University Brendan Centre for Justice 2005).

Molteni, L. & Ordanini, A., ‘Consumption Patterns, Digital Technology and Music Downloading’, Long Range Planning, 36, 389-406 (2003).

Mueller, J., ‘All Mixed Up: Bridgeport Music v. Dimension Films and de Minimis Digital Sampling’, Indiana Law Journal, (2006) 81, 435-63.

Nadan, C.H., ‘Software Licensing in the 21st Century: Are Software “Licences” Really Sales, and how will the Software Industry Respond?’, 32 American Intellectual Property Law Association Quarterly Journal 555, (2004).

Nikos Koutras, ‘History of copyright, growth and conceptual analysis: copyright protection and the emergence of open access’ I.P.Q. 2016, 2, 135-150.

Netanel, N., ‘Why has Copyright Expanded? Analysis and Critique’, UCLA School of Law, Public Law and Legal Theory Research Paper Series, Research Paper No. 07-34, Available at SSRN: http://ssrn.com/abstract=1066241 (Accessed: 2/1/2015).

N de Boer, LDijkman and S van Kampen, ‘The Changing Role of Principles in the European Multilayered Legal Order: Conference Report of the Symposium “Principles and the Law”’, Utrecht University, 25 May 2011’ [2012] 20(2) European Review of Private Law 425, 428–29.

Niva Elkin-Koren, Yifat Nahmias, and Maayan Perel (Filmar), ‘Is It Time to Abolish Safe Harbor? When Rhetoric Clouds Policy Goals’ [2019] Stanford Law & Policy Review (forthcoming), SSRN, https://ssrn.com/abstract=3344213 [Accessed 30 October 2019].

Nipps, Karen., ‘Cum Privilegio: Licensing of the Press Act of 1662’, The Library Quarterly: Information, Community, Policy 84 (4) (October) (2014).

O’Sullivan, M., ‘Making Copyright Ambidextrous: An Expose of Copyleft’ [2002] 2 Journal of Law and Information Technology.

Open Rights Group., ‘10 Years in prison for ordinary file-sharers’, Available at: https://www.openrightsgroup.org/campaigns/digital-economy-bill
(Accessed: 3/3/2017).

O-A Rognstad, ‘Legally Flawed but Politically Sound’ [2014] Oslo Law Review 1.

O’Donnell, ‘Lenz v. Universal Music Corp. and the Potential Effect of Fair Use Analysis Under the Takedown Procedures of §512 of the DMCA’ (2009) 10 Duke Law &

Technology Review, available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1194&context=dltr [Accessed 3 January 2019].

Palfrey, Gasser, Simun & Barnes., 'Youth, Creativity, and Copyright in the Digital Age', International Journal of Learning & Media, Spring (2009).

Peter Karol, 'Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case' 47 [2013] New England Law Review, Boston Research Paper No. 13-06.

Professor Martin Kretchmer, Associate Professor Estelle Derclaye, Marcella Favale, Associate Professor Richard Watt, 'The Relationship Between Copyright and Contract Law' (2010), p.18 http://eprints.bournemouth.ac.uk/16091/1/contractlaw-report.pdf accessed: 11/4/2018.

P. McNulty, 'Economic Theory and the Meaning of Competition' (1968) 82 Quarterly J Economics 639.

P. McNulty, 'A Note on the History of Perfect Competition' [1967] 75 J Political Economy 395.

P. Hopton, 'Advantage Kraftwerk in long running copyright dispute: Pelham (C-476/17) (also known as the Metall auf Metall case)' Ent. L.R. [2019], 30(8), 279-281.

P. Samuelson, 'Legally Speaking: Europe's Controversial Digital Copyright Directive Finalized' (2018) 61 Communications of the ACM 20 (on file with the author).

P. Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform 51 Wm & Mary L. Rev. 439, 454-55 [2009].

Parchomovsky, G., and Stein, A., The Relational Contingency of Rights (November 9, 2012). Virginia Law Review, Vol. 98, Pg. 1313, 2012;; U of Penn, Inst for Law & Economy Research Paper No. 12-11, Cardozo Law School Legal Studies Research Paper No. 355. Available at SSRN: http://ssrn.com/abstract=2018309 (Accessed: 18/5/2016).

Pamela Samuelson, ‘Preliminary Thoughts on Copyright reform’ (2007) 3 Utah Law Review 551, 565.

Posner, R.A., ‘The Economic Approach to Law’ 53 Texas Law Review 757 [1975].

Payne, M., ‘Hart’s Concept of a Legal System’, Vol. 18 William & Mary Law Review 287 (1976). Available at: http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2436&context=wmlr (Accessed: 3/10/2015).

Posner R.A., & Landes, W.M., ‘Indefinitely Renewable Copyright’, John M. Olin Program in Law and Economics Working Paper No. 154 (2002).

Posner, R.A., ‘Hayek, Law, & Cognition’, NYU Journal of Law and Liberty 147 [2005].

Posner, R.A., ‘Rational Choice, Behavioural Economics, and the Law’ 50 Stanford Law Review 1551 (1997).

Posner, R.A., ‘Exclusionary Practices and the Antitrust laws’ 41 U. Chi. L. Rev. 508, 510-13 (1974).

Paul L.C. Torremans, ‘The future implications of the UsedSoft decision’ Create Working Paper No.2 [2014].

Patrick, Masiyakurima., ‘Copyright in Works of Artistic Craftsmanship: An Analysis’ Oxford Journal of Legal Studies, Vol. 36, No. 3 (2016), pp. 505-534.

P. B. Hugenholtz and S. C. van Velze, ‘Communication to a New Public? Three Reasons why EU Copyright Law Can Do Without a “New Public”’ (2016) 47 IIC 796, 813.

P.B. Hugenholtz, ‘Caching and Copyright: The Right of Temporary Copyright’ [2000] EIPR 482.

Posner, R., ‘Do patent and copyright law restrict competition and creativity excessively?’, Becker-Posner Blog (9/3/2012) Available at: http://www.becker-

posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html (Accessed: 22/3/2017).

Posner, R.A., A Failure of Capitalism: The Crisis of 08' and the descent into Depression (Cambridge, MA: Harvard University Press, 2009)

Posner, Richard.A., 'Hegel and Employment at Will: A Comment', Cardozo Law Review, Vol. 10, (1999).

P. Morris, 'The contemporary ideological legitimacy of global intellectual property rights' I.P.Q. (2020), 1, 44-73.

Poorna Mysoor, 'Exhaustion, non-exhaustion and implied license', International Review of Intellectual Property and Competition Law [2018].

Professor Mathew Sag., 'IP Litigation in the United States District Courts – 2015 update', (January 5, 2016) Available at: http://ssrn.com/abstract=2711326 (Accessed: 4/10/2016).

Rosati, E. 'Online Exhaustion' [2015] 10 JULP 673.

Rosati, Eleonora 'Non-commercial quotation and freedom of panorama: useful and lawful?' (2017) Journal of Intellectual Property Information Technology and E-Commerce Law, 8 (4), 311-321

Arnold, R. and Eleonora Rosati, 'Are National Courts the Addressees of the InfoSoc Three-Step Test?' (2015) 10(10) Journal of Intellectual Property Law & Practice 741-749.

Arnold, R., 'Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of Protection' (2011) 1 QMJIP 272.

Rose, C., 'The Comedy of the Commons: Custom, Commerce, and Inherently Public Property', University of Chicago Law Review 53 (1986).

Rothman, J., 'The Questionable Use of Custom in Intellectual Property', 93 Virginia Law Review 1899, 1909-24 (2007).

Radin, M., ‘Online Standardization and the Integration of Text and Machine’, 70 Fordham Law Review 1125, 1141 (2002).

R.A. Reese, ‘Optional Copyright Renewal: Lessons for Designing Copyright Systems’ The 38 Annual Horace J. Manges Lecture (2015) 39 Columbia Journal of Law & the Arts 145.

Rainie, L., ‘The Rise of e-reading’ Pew Internet and American Life project, (2014), Available at: (http://libraries.pewinternet.org/2012/04/04/the-rise-of-e-reading/) (Accessed: 9/10/2014).

R. H. Coase, ‘The Problem of Social Cost’, Chicago Journal of Law and Economics, (1960).

Reece R.A., ’The First Sale Doctrine in the Era of Digital Networks.’, (2003), 44(2) BC L Rev 577.

Rosenlund, ‘Compulsory Licencing of Musical Compositions for Phonorecords Under the Copyright Act of 1976’, 30 Hastings L.J. 683 [1979].

R. Gomulkiewicz, ‘Conditions and Covenants in License Contracts: Tales from a Test of the Artistic License’ [2009] 17(3) Texas Intellectual Property LJ 335.

R. Coase The Nature of the Firm 4 (Economica Blackwell Pub. 1937).

R. Lobato and J. Thomas, ‘The Business of Anti-Piracy: New Zones of Enterprise in the Copyright Wars’ [2012] 6 Int J Comm 606.

Rainie, Lee & Mary Madden., ‘Pew Internet Project and Media Metrix Data Memo 6’ (Apr. 2004), Available at: http://www.pewintemet.org/pdfs/PIPFilesharing-April- 04.pdf (Accessed: 9/9/2016)

Rizzo, Mario J. and Douglas Glen Whitman ‘The Knowledge Problem of New Paternalism’ Brigham Young University Law Review [2009]: 905–968.

RIAA (Recording Industry Association of America)., ‘Recording Industry to Begin Collecting Evidence and Preparing Lawsuits against File `Sharers' Who Illegally Offer

Music Online', June 25. (2003), Available at: http://www.riaa.com/news/newsletter/062503.asp (Acessed: 15/11/2014).

RIAA News., 'IFPI: WORLD'S LARGEST MUSIC STREAM RIPPING SITE FACES INTERNATIONAL LEGAL ACTION', September 26, (2016) Available at: https://www.riaa.com/ifpi-worlds-largest-music-stream-ripping-site-faces-international-legal-action/ (Accessed 13/10/2016).

Riles, Annelise., 'Property as Legal Knowledge: Means and Ends', Cornell Law Faculty Publications, Paper 995 (2004) Available at: http://scholarship.law.cornell.edu/facpub/995 (Accessed: 4/3/2015)

Richard A. Epstein, "Contracts Small and Contract Large: Contract Law Through the Lens of Laissez-Faire" Coase-Sandor Institute for Law & Economics [2007] Working Paper No. 49.

Report: 'Hansard' HL Vol.501, cols 227–228.

Arnold, R. 'Website-blocking Injunctions: The Question of Legislative Basis' [2015] E.I.P.R. at 623–630.

Arnold, R., 'The Need for a New Copyright Act: A case Study in Law Reform' (2015) QMJIP 110-31.

Richwine, L., and Venugopal, A., 'Netflix records new sky-high share price and subscribers' The Independent, Available at: http://www.independent.co.uk/news/business/news/netflix-latest-news-share- price-subscribers-numbers-streaming-tv-june-us-a7846316.html Tuesday 18 July 2017. (Accessed: 19/7/2017).

Roberts, Paul., 'RIAA Sues 532 'Jon Does', (2004), PC World Online. Available at: http://www.pcworld.com/article/114387/article.html (Accessed: 22/7/2016).

Ruth Towse, Christian Handke and Paul Stepan., 'The Economics of Copyright Law: A Stocktake of the Literature', Review of Economic Research on Copyright Issues vol. 5(1) (2008).

Rapaczzynski, Andrzej., ‘The Roles of the State and the Market in Establishing Property Rights’, Journal of Economic Perspectives, Vol. 10, No. 2, Spring (1996).

Sisule F. Musungu., ‘Rethinking innovation, development and intellectual property in the UN: WIPO and beyond’, TRIPS issues papers No.5. Available at: (http://www.quno.org/sites/default/files/resources/Rethinking%2BIP%2B-%2BWIPO%2Band%2BBeyond.pdf) (Accessed: 10/9/2014.

Schulze, E.F., ‘Resale of Digital Content such as Music, Films or eBooks under European Law,’ 36(1) European Intellectual Property Law Review 9 (2014).

Stefan Michel, Digitisation of art in the public domain - museum urges Wikimedia to take down reproductions of out-of-protection artworks, J.I.P.L.P. [2019], 14(6), 427-429.

Salmon, R., ‘The SOS Guide TO Copyright Law On Sampling’, Available at: http://www.soundonsound.com/sound-advice/sample-clearance
(Accessed: 21/6/2016).

Schwartz., ‘Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation’, 90 Yale Law Journal 1717 (1981).

Sandra Marco Colino, ‘The antitrust "F" word: fairness considerations in competition law’ J.B.L. [2019], 5, 329-345.

Samtani Anil and Sharmaine Wong Kai Lin, ‘Can and should culture be copyrighted? E.I.P.R. [2018], 40(9), 553-556.

Stechova, K., ‘Can an Exclusive Licensee Ever be the Owner? An Examination of the Non-Assignability of Author’s Economic Rights in the Czech Republic’ submitted as an LL.M. thesis at the Centre for Commercial Law Studies, Queen Mary University of London, [2010].

S. Holmes., ‘Implementation of the Copyright Directive in the United Kingdom’ [2004] 26(6) EIPR 254, 255.

Savič, M., ‘The CJEU Allposters case: beginning of the end of digital exhaustion?’ [2015] European Intellectual Property Review 378.

Steel. S., ‘Proof of Causation in Tort Law. Law Quarterly Review’ [2017], 133 (Jul), 516-520

Sisario, B., ‘Grooveshark Shuts Down to Settle Copyright Infringement Suit’, The New York Times Online, Available at: http://www.nytimes.com/2015/05/01/business/media/grooveshark-shuts-down- to-settle-copyright-infringement-suit.html?_r=0 (Accessed: 14/5/2016).

Stevens, Jessica, ‘The secondary sale, copyright conundrum – Why we need a secondary market for digital content.’ (2016) Australian Intellectual Property Journal, 26(4), at 179-194.

Steinitz, M., ‘Whose Claim is this Anyway? Third Party Litigation Funding’, 95 Minnesota Law Review 1269-1366, (2011).

Stephey, M.J., ‘Lawrence Lessig: Decriminalizing the Remix’, The Skimmer, (Friday Oct 17 2008), Available at: http://content.time.com/time/business/article/0,8599,1851241,00.html (Accessed: 3/5/2015)

Stigler, G. J., ‘The Division of Labor Is Limited by the Extent of the Market’, Journal of Political Economy, 59 (June 1951), 185-93.

Senftleben et al., ‘The Recommendation on Measures to Safeguard Fundamental Rights’ [2018] 40 E.I.P.R. 149.

S. Aistars, D. Hartline and M. Schultz, Copyright Principles and Priorities to Foster a Creative Digital Marketplace [2016] 23 Geo. Mason L. Rev. 769.

Sarah Reis, ‘Toward a Digital Transfer Doctrine?: The First Sale Doctrine in the Digital Era’ Northwestern Law Review (March 1, 2015). . Northwestern University Law Review, Vol. 109, No. 1, [2015].

Sylvia Polydor, ‘The interplay between technology and trademark protection: a study of infringement, intermediary responsibility and protection measures in the digital age’ E.I.P.R. [2020], 42(1), 4-12.

S. Karapapa, ‘The Requirement for a “New Public” in EU Copyright Law’ [2017] ELR 63.

Sophie Stalla-Bourdillon, Eleonora Rosati, Karmen Turk et al., ‘A Brief Exegesis of the Proposed Copyright Directive’ (24 November 2016), SSRN, https://ssrn.com/abstract=2875296 [accessed 16 November 2019]

Stuart P. Green, ‘13 Ways to Steal a Bicycle: Theft Law in the Information Age’, [2012] 270-76.

Steuer, E., ‘The remix Masters’, Wired, issue 12-11 (2004) available at http://www.wired.com/wired/archive/12.11/beastie.html (Accessed: 17/08/2016).

Samuelson, S., ‘Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega J’, Intellectual Property Law 49 (1993). Available at: http://scholarship.law.berkeley.edu/facpubs/400 (Accessed: 21/5/2016).

Somoano, M.K., ‘Bridgeport Music Inc. v. Dimension Films: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?’ Berkeley Technology Law Journal, (2006), 21, 289-309.

Tenenbaum, Joel: a year on from being sued for $4.5m, (Tuesday 9 November 2010), Available at: https://www.theguardian.com/music/musicblog/2010/nov/09/joel-tenenbaum-a- year-on (Accessed: 12/9/2016)

Transcript of Jury Trial Day 2 at 68-70, Sony BMG Music Entm’t v. Tenenbaum, 721 F. Supp. 2d 85 (D. Mass. 2010) (No. 1:07-cv-11446).

Galič, M., Timan, T. & Koops, B. Bentham, ‘Deleuze and Beyond: An Overview of Surveillance Theories from the Panopticon to Participation’. Philos. Technol. 30, [2017] 9–37.

Talbot, ‘Ordoliberalism and Balancing Competition Goals in the Development of the European Union’ [2016] 61 The Antitrust Bull 267.

Torrent Freak, Received a Piracy Letter? UK Solicitor Will Defend You For Free’, (March 20, 2015) Available at: https://torrentfreak.com/received-a-piracy-letter- uk-solicitor-will-defend-you-for-free-150320/ (Accessed: 27/4/2016)

Toby Headdon, ‘The Allposters problem: reproduction, alteration and the misappropriation of value’ E.I.P.R. [2018], 40(8), 501-509.

Taylor McGraw, ‘Music Streaming: Where Interactive & Non-Interactive Services Fit Under the Homestyle Exemption’ 10 Wm. & Mary Bus. L. Rev. 269 (2018).

Torrent Freak: People Sued for Piracy in the U.S. Drops 84% Since 2010, (January 15, 2016) Available at: https://torrentfreak.com/people-sued-for-piracy-in-united-states-drops-84-since-2010-160114/ (Accessed: 15/5/2016)

Tenenbaum, J.N., Case 15-14 315, District of Massachusetts (01/03/2016) Available at: https://ia600408.us.archive.org/17/items/gov.uscourts.mab.462544/gov.uscourts.mab.462544.docket.html (Accessed: 18/10/2016).

Tenenbaum, J., ‘How it feels to be sued for $4.5million’, The Guardian Music Blog (July 2009) Last accessed: 11/7/2015, Available at: https://www.theguardian.com/music/musicblog/2009/jul/27/filesharing-music-industry)

Taekke, J. Digital Panopticism and Organizational Power’ Surveillance & Society, (2011) 8(4), 441–454.

T. Moody-Stuart, ‘Quantum in Accounts: The Acid Test’ [1999] EIPR 147.

Terranova, T., ‘Free Labour: Producing Culture for the Digital Economy’, Social Text, 63 (18), (2000), Available at: http://web.mit.edu/schock/www/docs/18.2terranova.pdf (Accessed: 9/12/2014).

The British Recorded Music Industry, ‘Digital Music Nation: The UK’s Legal and Illegal Digital Music Landscape’, (2010). Available at:

https://bpi.co.uk/assets/files/Digital%20Music%20Nation%202010.pdf (Accessed: 22/4/2015).

The Economist, ‘Justice in a Cold Climate: Austerity and the Law’, Available at: http://www.economist.com/news/britain/21629527-cuts-take-effect-justice- system-struggling-adapt-justice-cold-climate (Accessed: 10/5/2016).

The Economist., ‘Copyright Killing Creativity’, (2004) Available at: http://www.economist.com/node/2592996 (Accessed: 12/5/2016).

Trubek, David M., ‘Max Weber on Law and the Rise of Capitalism’ Faculty Scholarship Series. Paper 4001 (1972) Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4993&context=fss_papers (Accessed: 12/9/2014).

The international Comparative Legal Guide to Copyright to: Copyright 2017, (3rd Edition), Published by Global Legal Group, in association with Bird & Bird LLP. <https://www.twobirds.com/~/media/copyright-chapter-iclg-bird--bird-2016.pdf?la=en> accessed: 22/3/2017.

The International Intellectual Property Association (IPPA)., ‘IPPA 2002-2003 Estimated Trade Losses Due to Copyright Infringement and Piracy Levels In- country’, Released on November 2004, Available at: http://www.iipa.com (Accessed: 22/4/2015)

Toynbee, Jason., ‘Copyright, the work and phonographic orality in music’, Social and Legal Studies, 15(1) 77-99 (2006).

Toby Green, ‘Is open access affordable? Why current models do not work and why we need internet-era transformation of scholarly communications’, Wiley online Library, (24 Jan 2019) Available at: <https://onlinelibrary.wiley.com/doi/full/10.1002/leap.1219> (Accessed: 16/05/2019).

Tomasz Targosz, "Poland’s Challenge to the DSM Directive — and the Battle Rages On …" (10 June 2019), Kluwer Copyright

Blog, http://copyrightblog.kluweriplaw.com/2019/06/10/polands-challenge-to-the-dsm-directive-and-the-battle-rages-on/ [Accessed March 2020]

Timothy Wu, 'Copyrights Communications Policy', Michigan Law Review [2004] 163, 363-4.

Trumpke, F., 'The Extended Collective License – A Matter of Exclusivity?' [2012], NIR 2012, 264-294.

T. Shapiro and S. Hansson, 'The DSM Copyright Directive — EU copyright will indeed never be the same' [2019] 41 E.I.P.R. 404.

Tushnet., 'Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies', 57 Texas Law Review, 1307, 1347-1350 (1979).

Tyson, J., 'How Computer Memory Works, COMPUTER MEMORY BASICS', Available at: http://computer.howstuffworks.com/computer-memory1.htm (Accessed: 12/2/2016).

UK-IPO, Review of the Copyright Tribunal, DTI, Newport (2007) (Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501038/Disc_log_attachment_to_460.pdf) (Accessed: 22/5/2017).

World's Largest Internet Music Stream Ripping Site Faces International Legal Action, 26 September (2016), Available at: http://www.ifpi.org/news/Worlds- largest-music-stream-ripping-site-faces-international-legal-action
(Accessed: 13/10/2016).

Wlomert, Nils/Papies, Dominik, On-Demand Streaming Services and Music Industry Revenues – Insights from Spotify's Market Entry, 33 IJRM 314 [2016].

Wagman, Shane, 'I Want My MP3: Legal and Policy Barriers to a Legitimate Digital Music Marketplace' 17 J. Intell. Prop. L. [2009] 95.

Waldfogel, Joel, 'Bye, Bye, Miss American Pie? The Supply of New Recorded Music Since Napster' NBER Working Paper No. 16882, March 2011, available at http://www.nber.org/papers/w16882) (accessed: 21/02/2018).

Waldron, J., ‘From Authors to Copiers: Individual Rights and Social Values in Intellectual Property’, 68 Chicago-Kent Law Review 841, 844 (1993).

Williams, C., ‘Anti-piracy lawyers ‘knowingly targeted the innocent’, says law body,’ The Register, Available at: http://www.theregister.co.uk/2010/11/19/davenport_lyons_sra/ (Accessed: 24/8/2014).

Williams, C., ’Copyright lawyers accuse 25,000 UK videogame filesharers’, The Register Available at: http://www.theregister.co.uk/2008/08/20/davenport_lyons_25000/ (Accessed 27/1/2016).

Weiner, S., ‘Sony BMG Music Entertainment v. Tenenbaum’, Harvard Journal of Law and Technology (August 12, 2009) Available at: http://jolt.law.harvard.edu/digest/copyright/sony-bmg-music-entertainment-v-tenenbaum (Accessed: 23/5/2016).

Weiss, D., ‘Supreme Court Turns Down File-Sharing Appeal Challenging Remittitur Procedure’, (May 21, 2012) Available at: http://www.abajournal.com/news/article/supreme_court_turns_down_file_sharing_appeal_challenging_remittitur_procedu/ (Accessed: 3/10/2016)

Whalen, M., ‘What’s wrong with this picture? An examination of art historians’ attitudes about electronic publishing opportunities and the consequences of their continuing love affair with print’, Art Documentation: Bulletin of the Art Libraries Society of North America 28(2): 13–22 (2009).

Willet, J., ‘Marxism, Art and the Artist’, June 11, (2010) Available at: http://arthistoryunstuffed.com/marxism-art-artist/ (Accessed: 25/4/2015).

Winn, J., and Pullen, M., ‘Dispatches from the Front: Recent Skirmishes Along the Frontiers of Electronic Contracting Law’, 55 Business Lawyer 455 (1999).

Winseck Dwayne., ‘Financialisation and the ‘crisis’ of the media: the rise and fall of (some) media conglomerates in Canada’, Canadian Journal of Communication Vol.35,

No.3 (2010) Available at: http://www.cjc-online.ca/index.php/journal/article/view/2392/2965(Accessed: 8/6/2015).

Wirten, E.H., 'Out of Sight and Out of Mind: On the Cultural Hegemony of Intellectual Property (Critique)', Cultural Studies, 20 (2006).

Vandenberghe, F., 'Deleuzian capitalism', Philosophy & Social Criticism, 34(8) Vol 34 (2008).

Vorster J. 'A Comment on the Meaning of Objectivity in Contract' [1987] 103 L.Q.R. 274.

Volftsun, A., 'District Court declares purchasers of Software to be Licencees', Harvard Journal of Law and Technology, July 21, (2008). Available at: http://jolt.law.harvard.edu/digest/mdy-v-blizzard (Accessed: 8/2/2015).

Vanovermeire, V., 'The Concept of Lawful User in the Database Directive', 62 International Review of Intellectual Property and Competition Law (2000).

Westkamp G, Guibault, L, Rieber-Mohn T., 'Study on the implementation and effect in Member States' laws of Directive 2001/297EC on the harmonisation of certain aspects of copyright and related rights in the Information Society [2012], Amsterdam Law School Research Paper No 2012-28, 57.

Yoo, Christopher S., 'Copyright and Product Differentiation', 79 N.Y.U.L. Rev. 212 (2004).

Yvette Joy Liebesman, 'When Does Copyright Law Require Technology Blindness? Aiken Meets Aero' 30 Berkeley Tech. L.J. 1383, 1389 [2015].

Yannis Bakos et al, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' 43 J. Leg. Stud. 1, 3 [2014].

Zipursky, B., 'The Inner Morality of Private Law', 58 American journal of Jurisprudence 27-44 (2013) Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/601 (Accessed: 7/10/2014).

Books and Reports

Aplin, T. (ed) Research Handbook on Intellectual Property and Digital Technologies (Cheltenham, Edward Elgar: 2019).

Andreas Reckwitz, The Invention of Creativity: Modern Society and the Culture of the New, (Polity press 2017).

Alan H. Carling, Social Division (Verso Books 1991).

A. Perzanowski and J. Schultz, The End of Ownership (Cambridge, MA 2016).

Alan Peacock and Hans Willgerodt, German Neo-Liberals and the Social Market Economy (Palgrave Macmillan, 1989).

Amin, S., 'Obsolescent capitalism: contemporary politics and global disorder', (Trans. Patrick Camiller) Zed Books, New York, (2003).

Adam, J., Platonis Apologia Socratis (Cambridge University Press,1910).

Alain, Strowell, Peer-to-peer File Sharing and Secondary Liability in Copyright Law, (Edward Elgar Publishing 2009).

Akrivopoulou, C., 'Personal Data Privacy and Protection in the Surveillance Era: Technology and Practices', Information Science Reference, (2011).

Avineri, S., 'Social and Political Thought of Marx', Cambridge University Press, (1968).

Ayala, Francisco J. and Theodosius Dobzhansky, Studies in the philosophy of biology: Reduction and related problems (London: Macmillan, 1974).

Andersen, Peter B., Claus Emmeche, Niels O. Finnemann, and Peder V. Christiansen, Downward causation: Minds, bodies and matter (Aarhus: Aarhus Univ. Press, 2000).

Adorno, M., and T. W., Horkeheimer., 'Dialectic of Entitlement', (trans. J. Cumming), New York: Herder and Herder, (1972).

Andersen, Peter B., Claus Emmeche, Niels O. Finnemann, and Peder V. Christiansen, Downward causation: Minds, bodies and matter (Aarhus: Aarhus Univ. Press, 2000).

Alderman, J., 'Sonic Boom: Napster, P2P and the Battle for the Future of Music', London: Harper Collins, (2001).

American Intellectual Property Law Association, Report of the Economic Survey, (2011). Available at: http://www.aipla.org/learningcenter/library/books/econsurvey/2011/Pages/default.aspx (Accessed: 3/7/2015).

Aplin, T., 'Copyright Law in the Digital Society: The Challenges of Multimedia', Hart Publishing, (2005).

Andres Wiebe, Right Clearance for Online Music: Legal and Practical Problems from the Perspective of a Content Provider and Alternative Models (Medien und Recht Publishing, 2014).

Aufderheide, P., Milosevic, T., & Bello, B., 'The impact of copyright permissions on the US visual arts community: The consequences of fear of fair use', SAGE Publications, (2015).

Andrew Murray, 'Information Technology law: The Law and Society' (2nd edition), (Oxford University Press, 2013).

Alehian, A., 'Costs and Outputs' in The Allocation of Economic Resources, Palo Alto, California: (Stanford University Press, 1959).

Aufderheide & Jaszi., 'Reclaiming Fair Use', University of Chicago Press, (2011).

Alison Jones and Brenda Sufrin., 'EU Competition Law: Text, Cases, and Materials', Oxford University Press, (2016).

Adorno, Theodor, W., 'The Culture Industry', (Edited by J. M. Bernstein) Routledge Classics, (1991).

Analysys Mason ‘Final Report for the Department of Media, Culture and Sport, Fostering Creative Ambition in the Digital Economy’ Analysis in the Development of Policy Recommendations, (2009).

Backhaus, J., ‘Joseph Alois Schumpter: Entrepreneurship, Style and Vision’, Kluwer Academic Publishers, (2003).

Bork, R.H. The Antitrust Paradox: A Policy at War with Itself (Basic Books, 1978, reprinted with a new Introduction and Epilogue, 1993).

Bell, D., The Cultural Contradictions of Capitalism, (New York: Basic Books, 1976).

Bettig, R., ‘Copyrighting Culture: The Political Economy of Intellectual Property” Westview Press, (1996).

Barrett., 'Intellectual Property: Cases and Materials', (2nd eds) Minnesota University Press, (2001).

Benjamin, W., ‘The Work of Art in the Age of Mechanical Reproduction’, (Trans. J.A. Underwood) Penguin Publishing, (2008).

Burkart, P., and McCourt, T. Digital Music Wars: Ownership and Control of the Celestial Jukebox, (Lanham, MD: Rowman & Littlefield 2006).

Bruce A. Ackerman., ‘Private Property and the Constitution’, (Yale University Press 1997).

Bennett, A., and Waksman, S., ‘The SAGE Handbok of Popular Music’ SAGE Publications, (2015).

Benjamin, W., ‘Illuminations’, (eds. Hannah Arendt, Trans. Harry Zorn), Random House, (2015).

Besen, Stanley M., ‘New Technologies and Intellectual Property: An Economic Analysis’, RAND Report N-2601, (1987).

Betti Marenko and Jamie Basset., 'Deleuze and Design', Edinburgh University Press, (2015).

Beuys., 'What is Money?' Clairview Books, (2010).
Black's Law Dictionary 382 (7th eds) (Bryan A. Garner) West Publishing Co. Ltd, (1999).

Bottomore, T., 'Theories of Modern Capitalism' London: George Allen and Unwin Publishers, (1985).

Boldrin, M., and Levine, D., 'Against Intellectual Monopoly' (November 11, 2005), Chapter 7. Available at: http://levine.sscnet.ucla.edu/general/intellectual/against.htm (Accessed: 19/10/2014).

Bowker, R.R., 'Copyright: its History and its Law', Boston and New York: Houghton Mifflin Company, (1912).

B. Atkinson and B. Fitzgerald, Copyright Law: Vol III: Copyright in the 21st Century (Farnham: Ashgate, 2011).

Boyle, J., 'The Public Domain: Enclosing the Commons of the Mind', Yale University Press, (2008).

Lionel Bently and Brad Sherman, The Making of Modern Intellectual Property Law: The British Experience, 1760-1911 (Cambridge University Press, 1999).

Bruce R. Scott, "The Political Economy of Capitalism" Harvard Business School, (2006).

Brewer, A., 'A guide to Marx's Capital', Cambridge University Press, (1984).

Benkler, Yochai., 'The Wealth of Networks: How Social Protection Transforms Markets and Freedom', New Haven, CT: Yale University Press, (2006).

Brands, H.W., 'The Money Men: Capitalism, Democracy, and the Hundred Years' of War over the American Dollar', Atlas Books, (2006).

Berry, Paganelli, & Smith., ‘The Oxford Handbook of Adam Smith’, (Oxford University Press, 2013).

Bendix, R., ‘Max Weber: An Intellectual Portrait’, (University of California, 1977).

Birrell, A., The Law and History of Copyright in Books (Cassell and Company, 1899).

Baker, A.I, Gavil, W.E. and Kovacic, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy, American Casebook Series (St Paul, MN: Thomson West, 2002).

Bettig, R.V., and Hall, J.L., ‘Big Media, Big Money: Cultural Texts and Political Economics’, Rowman and Littlefield Publishing, (2003).

Barendt & Firth (eds)., ‘The Yearbook of Copyright and Media Law: 1999’, Vol. IV, Oxford: Oxford University Press, (1999).

Boyle, J., ‘Shamans, Software and Spleens’, Harvard University Press, (1996).

Beniger, J., ‘The Control Revolution: Technological and Economic Origins of the Information Society’, Cambridge, MA: Harvard University Press, (1986).

Chitty on Contracts (33rd ed., Sweet and Maxwell, 2019).

Casper et al., Industrial Book: 1840-1880 (University of North Carolina Press, 2007).

C. Doctorow., Information Doesn't Want to Be Free: Laws for the Internet Age (San Francisco 2014).

Charles Harrison and Paul Wood, Art in Theory, 1900-1990: An Anthology of Changing Ideas, (Oxford: Blackwell, (1999).

C.G. Veljanovski in A. Ogus and C.G. Veljanovski, Readings in the Economics of Law and Regulation, (Oxford Uni. Press. 1984).

Chartier, R., ‘The practical impact of writing’, in Finkelstein, D., and McCleery, A., The book history reader (Routledge, London 2002).

Castells, Manuel., 'The Rise of the Network Society: The Information Age: Economy, Society and Culture', Volume 1 Malden, MA: Blackwell Publishers, (1996).

Cheryl Foong, The Making Available Right, Realizing the Potential of Copyright's Dissemination Function in the Digital Age (Edward Elgar Publishing, 2019).

Chase-Dunn, C., 'Global Formation: Structures of the World Economy: Update Edition', Rowman and Littlefield Publishers, (1998).

Cornish and Llewelyn., 'Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights,' (6th edn), (2007).

Cornish, Llewelyn & Aplin., 'Intellectual Property: Patents, Copyright, Trademarks and Allied Rights', Sweet and Maxwell, 8th Edition, (2013).

Cornish, W., 'Intellectual Property: Omnipresent, Distracting, Irrelevant?', Oxford University Press, (2004).

Cohen, Julie, Lydia Loren, Ruth Okedji, and Maureen O,Rourke, 'Copyright in a Global Information Economy' (New York: Aspen, 2006).

C. Angelopoulos, European Intermediary Liability in Copyright (Wolters Kluwer, 2017).

Coser, L.A., 'Masks of Sociological Thought: Ideas in Historical and Social Change', (2nd edn) Harcourt Brace Jovanovich, (1977).

Csikzentmihalyi, M., 'Creativity: Flow and psychology of discovery and invention', Harper Collins Publishers, (1996).

Cornish, Llewelyn and Aplin., 'Intellectual Property: Patents, Copyright, and trade Marks and Allied Rights', (7th eds.) Sweet and Maxwell Publishing, (2010).

Cannan, E., London: Methuen & Co., Ltd (1904). Available at: http://www.econlib.org/library/Smith/smWNCover.html (Accessed: 14/8/2015).

David Nimmer, Copyright: Sacred text, Technology, and the DMCA (Kluwer Law International, 2003).

Deazley, R., Kretschmer, M., and Bently, L., ‘Privilege and Property: Essays on the History of Copyright’, Open Book Publishing, (2010).

Davies, G., Garnett, K., Harbottle, N. Caddick, (eds), Copinger and Skone James on Copyright (17th edition, Sweet and Maxwell, London, 2016).

David Arditi, iTake-over: The Recording Industry in the Digital Era (Rowman and Littlefield Publishing 2015)

David. M. Diesen, and Shubha, Ghosh., ‘The Foundations of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction’ (2005) 47 Arizona Law Review 61.

Deleuze, G., ‘Foucault’, (trans. and edited by Sean Hand), Bloomsbury Academic Publishing, (2006).

Duxbury, Neil, Patterns of American Jurisprudence, (Oxford University Press 1995).

Deleuze, G., and Guattari, F., ‘A Thousand Plateaus’, Bloomsbury Academic, (1988).

Deleuze, G., and Guattari, F., ‘A Thousand Plateaus’, Continuum books, (1987).

Duxbury, Neil, ‘Signalling and Social Norms’ Oxford Journal of Legal Studies 21 (Winter) [2001] 719-36.

Deleuze, G., and F, Guattari., ‘Anti-Oedipus: Capitalism and Schizophrenia’, Bloomsbury Academic, (1983).

Demsetz, H., ‘Economic, Legal and Political Dimensions of Competition’, North-Holland Publishing Company, Amsterdam, (1982).

Devos, K., ‘Tax Compliance Theory and the Literature’, Springer Publishing, (2014).

D. Warsh, Knowledge and the Wealth of Nations: A Story of Economic Discovery (New York, 2007).

Don, Tapscott., ‘The Digital Economy,’ New York: McGraw-Hill, (1996).

Deleuze, G., and Guattari, F., ‘New Mappings in Politics, Philosophy, and Culture’ (eds. Eleanor Kaufman and Kevin John Heller), University of Minnesota Press, (1998).

Drahos, P., ‘A Philosophy of Intellectual Property’, Ashgate Publishing, (1996).

Dobb, M., ‘Studies in the Development of Capitalism’, London Routledge, (1963).

Drahos, P., & John Braithwaite, ‘Information Feudalism’, London: Earthscan, (2002).

Evensky, J., ‘Adam Smith’s Wealth of Nations: A Readers Guide’ Cambridge University Press, (2015).

Edwin Peel, The Law of Contract (14th eds. Sweet and Maxwell 2015).

Efroni, Zohar., ‘Access-right: The Future of Digital Copyright Law’, Oxford University Press, (2011).

E. Ehrlich, Fundamental Principles of Sociology of Law (Harvard Uni Press 1936).

E. Derclaye (ed), Research Handbook on the Future of EU Copyright (Cheltenham: Edward Elgar Publishing, 2009).

Flinn, P.J., ‘Handbook of Intellectual Property: Claims and Remedies’, Wolters Kluwer (Law and Business), Aspen Publishers, (1999).

Frow, J., ‘Time and Commodity Culture’, Oxford University Press, (1997).

F. Easterbrook and D. Fischel, The Economic Structure of Corporate Law (Harv. Uni. Press. 1991).

Feather J., ‘Publishing, Piracy and Politics: A Historical Study of Copyright in Britain’, New York: Mansell, (1994).

Friedrich Hayek, Individualism and Economic Order (H Regnery & Co, Chicago, 1972).

Fuller, L., ‘The Morality of Law’, New Haven and London: Yale University Press, (1969).

Lon Luvois Fuller, Thomas W. Bechtler, Law in a Social Context: Liber Amicorum Honouring Professor Lon L. Fuller (Kluwer 1978).

Fred Turner, From Counterculture to Cyberculture: Stewart Brand, the Whole Earth Network, and the Rise of Digital Utopianism (Chicago: University of Chicago Press, 2010).

Fenwick and Locks., 'Copyright in the Digital Age: Industry Issues and Impacts', Simmonds and Hill Publishing, (2010).

Frank Furedi, How Fear Works: Culture of fear in the Twenty-First Century, (Bloomsbury Continium, 2018).

Ferguson, A., 'Principles of Moral and Political Science 1792', Edinburgh (reprint Heidelberg: Olms, (1995).

Fisher, W., 'Promises to Keep', Stanford Law and Politics, Stanford (2004).

Fornas, J., 'Capitalism: A companion to Marx's Economy Critique', Routledge Publishing, (2013).

Foucault, M., 'Discipline and Punish: The Birth of the Prison', Penguin Books, (1977).

Foucault, M., 'Power/knowledge: Selected Interviews and Other Writings, 1972- 1977', (eds. Colin Gordon) Prometheus Books, (1980).

Foucault, M., 'The History of Sexuality Volume I: An Introduction by Michael Foucault', (Translated from French by Robert Hurley) Pantheon Books, New York, (1978).

Frank, J., 'Law and the Modern Mind,' New York: Tudor Publishing, (1949).

Foucault, M., 'Power: The essential works of Foucault 1954-1984', Volume 3, edited by James Faubion, (2002).

Freeman, M.D.A., 'Introduction to Jurisprudence', Sweet and Maxwell, 8th Edition, (2008).

Frith & Marshall., 'Music and Copyright' (2nd edn.) Edinburgh: Edinburgh University Press, (2004).

Fulcher, J., 'Capitalism: A very short introduction,' Oxford University Press, (2004).

Freeman, M.D.A., 'Lloyds: Introduction to Jurisprudence' 9th ed, Sweet & Maxell, (2014).

Graham Murdock, 'Political Economies as Moral Economies: Commodities, Gifts, and Public Goods' (Blackwell Publishing, 2011).

George., J., Battersby and Charles., W., Grimes, '2015 Licensing Update' Wolters Kluwer, (2015).

Guido Westkamp (ed.) Emerging issues in Intellectual Property (Edward Elgar, Cheltenham, UK and Northampton, MA, USA, 2007).

Guido Westkamp, 'Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law' (2004) 36(5) George Washington international Law Review 1057.

Gowers, A., 'Gowers Review of Intellectual Property' (2006).

Guido Westkamp, 'Private life and the margin of appreciation, introductory note to the European Court of Human Rights: Alex Springer AG v. Germany and Von Hannover (No.2), International Legal Materials Vol. 51, No. 4 (2012), at 631-684.

Greenfield, S. and Osborn, G., 'Contract and Control in the Entertainment Industry', Aldershot: Dartmouth Ashgate publishing, (1998).

Gadamer. H.G., 'Truth and Method', (trans. G. Barden and J. Cumming) New York: Seabury Press, (1975).

Garnham, N. and Fred Ingilis, 'Capitalism and Communication: Global Culture and the Economics and Information' (Newbury Park, CA Sage Publications 1990)

Geary & Pabst., 'Blue Labour: Forging a new politics', I.B. Tauris, (2015).

Giddens, A., ‘The Nation State and Violence’, Volume Two, University of California Press, (1985).

Gray and Gray., ‘Elements of land law’ Oxford University Press, (5th eds), (2009).

Gruter, Margaret., ‘Law and the Mind’ (London Sage), (1991).

Gladwell, M., ‘The Tipping Point: How Little Things Can Make a Big Difference’, London: Abacus, (2000).

Gillespie, Tarleton., ‘Wired Shut: Copyright and the Shape of Digital Culture’, (Cambridge, MA: MIT Press, 2007).

G. B. Dinwoodie, Secondary Liability of Online Service providers (Springer, 2017).

Holton, R.J., ‘Globalization and the Nation-State’, Macmillan Press, (1998).

Harris, J.W., ‘Legal Philosophies’, (2nd edn), Oxford University Press, (2011).

Harari, Y.N., ‘Homo Deus: A Brief History of Tomorrow’, Penguin Random House, (2015).

Harvey, D., ‘Justice, Nature and the Geography of Difference,’ Oxford: Blackwell, (1996).

Hugh Hansen (ed), US Intellectual Property Law and Policy (Edward Elgar, 2000).

Horkheimer, M., ‘Eclipse of Reason’ A Continuum Book, The Seabury Press, (1947).

Howard, B., ‘Lex Machina Publishes Copyright Litigation Report’, (August 11, 2015) Available at: https://lexmachina.com/lex-machina-2015-end-of-year-trends/ (Accessed: 2/10/2016).

Hull, G.P., ‘The Recording Industry’ (2nd eds), Routledge Publishing (2004). Hunt, A., ‘The Sociological Movement in Law’, Macmillan Publishing, (1978).

Hilary E. Pearson, Information in a digital age - the challenge to copyright, C.L.S.R. (1996), 12(2), 90-94.

Heidegger, M., ‘The Question Concerning Technology, (Trans. William Lovitt) Harper Torch books, (1977).

Hernando De Soto., ‘The Mystery of Capital: Why capitalism triumphs in the West and failed everywhere else’, Black Swan Publishing, (2001).

Hesmondhalgh, D., ‘The Cultural Industries’, 3rd edition, SAGE Publications Ltd, (2013).

H. Kelsen, The Pure Theory of Law, (trans. M. Knight Berkely, CA: University of California, 1970).

Hargreaves, I., ‘Digital Opportunity: A Review of Intellectual Property and Growth’ (2011).

Harris, J.W., ‘Property and Justice’, Oxford University Press, (1996).

Hart, H.L.A., ‘The Concept of Law’ (2nd edn) Bulloch and Raz (eds.) Oxford University Press, (1994).

Horkheimer, M., and T.W., Adorno., ‘Dialectic of Enlightenment’, (Eds, G.S., Noerr and E., Jephcott), Stanford University Press, (2002).

Honneth, A., and Joas, H., (eds)., ‘Communicative Action: Essays on Jürgen Habermas Theory of Communicative Action’, Cambridge MA: The MIT Press;; Habermas, Jürgen, (1991).

Habermas, J., ‘The Theory of Communicative Action, Vol. 1: Reason and Rationalization of Society’, (trans. Thomas McCarthy), Boston: Beacon Press, (1985).

Habermas, J. Theory of Communicative Action, vol.2 (Wiley publications, 1992);

Habermas, J. Legitimation Crisis (London: Heineman 1976).

Harvey, D., ‘The New Imperialism’, Oxford University Press, (2003). Hoy, D.C., ‘Foucault: A Critical Reader’, Blackwell Publishers, (1986).

Horwitz, M.J., ‘The Transformation of American Law: 1780-1860’, London: Harvard University Press, (1977).

I. Govaere, The Use and Abuse of Intellectual Property Rights (Sweet and Maxwell, 1996).

J. Rowland Pennock and Munzer, A theory of Property (Cambridge University Press, 1990).

Jay A. Ciaffa, Max Weber and the problems of value-free social science: A critical examination of the Werturteilsstreit (Associated University Presses, Inc. 1998).

Jones, G., and Roffe, J., ‘Deleuze’s Philosophical Language’, Edinburgh University Press, (2009).

James Dalton and Louis Esposito, ‘Standard Oil and Predatory Pricing: Myth Paralleling Fact’ **(**Springer Review of Industrial Organization, 2011).

Joseph Schumpeter, Capitalism, Socialism and Democracy (Routledge, 2013).

Jeffrey D. Groves, Courtesy of the Trade in Books 1550-1800 (Oxford: Clarendon Press, 1989).

Johan Soderberg, Hacking Capitalism: The Free and Open Source Software Movement (Routledge Publishing, 2008).

Jameson, F., ‘Postmodernism, or the Cultural Logic of Late Capitalism’, London: Verso, (1991).

John Gilchrist and Brian Fitgerald (eds), Copyright, Property and the Social Contract: The Reconceptualisation of Copyright (Springer International, 2018).

J. Riordan, The Liability of Internet Intermediaries (Oxford Press, 2016).

Jarvis, S., ‘Adorno: A critical introduction’, New York: Routledge, (1998).

Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji, Maureen A. O'Rourke, Copyright in a Global Information Economy, (Wolters Kluwer Law & Business, 2019).

J. Griffiths and R. Howe (eds), Concepts of Property in Intellectual Property Law (Cambridge Uni. Press. 2013).

J. Silbey, The Eureka Myth: Creators, Innovators and Everyday Intellectual Property (Stanford University Press, 2015).

J.E. Cohen, Configuring the Networked Self (New Haven 2012).

Justin Koo, 'The Right of Communication to the Public in EU Copyright Law' (Hart Publishing, 2019).

Jenkins H., 'Convergence Culture', New York: New York University Press, (2006).

Johns, A., 'Piracy: The intellectual property wars from Guttenberg to Gates', University of Chicago Press, (2009).

Kautsky, K., 'The Social Revolution', (trans by A.M. and May Wood Simmonds), Charles and Kerr Publishing, (1903). Available at: https://www.marxists.org/archive/kautsky/1902/socrev/
(Accessed: 17/3/2016).

Keastle and Radway, Print in Motion (Vol.IV, University of North Carolina Press, 2009).

Kung-Chung Liu and Reto M Hilty, 'Remuneration of Copyright Owners: Regulatory Challenges of New Business Models,' (Springer-Verlag GmbH Germany, 2017).

Karl Marx Critique of Hegel's Philosophy of Right (Cambridge Uni Press, 1844).

Karl Popper and John. C. Eccles, The Self and its Brain (Routledge Publishing 1977).

Keith. Hylton., Tort Law: a modern perspective (Cambridge University Press, 2016).

Kittler, F., 'Gramophone, Film, Typewriter', Series: Writing Science, (1999).

Kronman, Anthony T., 'Max Weber- Jurists: Profiles in Legal Theory' Sanford University Press, (1983).

Kermit L. Hall., 'Oxford Companion to American Law', Oxford University Press, (2002).

Kaplan, B., ‘An Unhurried View of Copyright’ University of Michigan Press, (1967).

Laddie, J., Prescott, P., Vitoria, M., and Lane, L., The modern law of copyright and designs (Lexis Nexis Butterworths, 2018).

L. Hyde, Common as Air: Revolution, Art, and Ownership (New York 2010).

Luhmann, N., ‘A Sociological Theory of Law’, (eds. Martin Albrow), Routledge and Kegan Paul, (1985).

Lydia Pallas Loren, ‘The Evolving Role of for Profit Use in Copyright Law: Lessons from the 1909 Act’ [2009] 26 Santa Clara Computer & High Technology Law Journal 280.

Luc Boltanski and Eve Chiapello, The New Spirit of Capitalism, (London: Verso, 2005).

Lowenstein, J., ‘The Author’s Due: Printing and the Prehistory of Copyright’, Chicago: University of Chicago Press, (2002).

Ludwig von Mises., ‘The Free and Prosperous Commonwealth: An Exposition of the Ideas of Classic Liberalism’, Martino Publishing, (2012).

L. Brandeis, ‘The Living Law’ [1916] 10 Illinois Law Review 461; E. Ehrlich, Fundamental Principles of the Sociology of Law (Transaction Publishers, 1936).

Lessig, L., “The Future of Ideas: The fate of the Commons in a Connected World” Vintage Books, (2001).

Litman, J., ‘Digital Copyright’, New York: Prometheus Books, (2001). Lanier, J., ‘You are not a Gadget’, Penguin Books, (2010).

Lasch, C., ‘The Culture of Narcissism: American Life in an Age of Diminishing Expectations’, W.W. Norton & Company, (1978).

Lessig, L., ‘Code and Other Laws of Cyberspace’, New York: Basic Books, (1999).

Ludwig Von Mises., ‘Human Action: A Treatise on Economics’, William Hodge and Company Limited, (1949).

Lessig, L., ‘Free Culture: How Big Media uses Technology and Law to Lock Down Culture and Control Creativity’, Penguin Books, (2004).

Lyon, D. The search for surveillance theories (Routledge 2006).

Lyon, D. Surveillance studies: an overview. Cambridge: Polity (2007).

Locke, J., ‘The Second Treatise of Government’, (Edited by Thomas P. Peardon) Bobbs-Merrill Educational Publishing Indianapolis, (1952).

Macmillan, F., ‘New Directions in Copyright Law’, Edward Elgar Publishing, Volume 2, (2006).

Mazzone, J., ‘Copyfraud and other abuses of intellectual property law’, Stanford Law Books, (2011).

Merges, R.P., ‘Justifying Intellectual Property’, Harvard University Press, (2011).

Miliband, R., ‘The State in Capitalist Society: The Analysis of the Western System of Power’, Quartet Books London, (1973).

Marx, K., ‘Das Capital’, London: Penguin version, (1990).

M. Richardson and S. Ricketson (eds), Research Handbook on IP in Media and Entertainment [2017].

Marx, K., and Engels, F., ‘On literature and art: a selection of writings’, (eds Lee Baxandall and Stefan Morawski), International general publishing New York, (1974).

Murray Shanahan, The Technological Singularity (MIT Press Essential Knowledge Series, 2015).

Matt, Mason., ‘The Pirate’s Dilemma: How Youth Culture is Reinventing Capitalism’, The Free Press, (2008).

Maria Eriksson, Rasmus Fleischer, Anna Johansson, Pelle Snickars, Patrick Vonderau., Spotify Teardown: Inside the Black Box of Streaming Music (Cambridge: MIT Press 2019).

May, C., ‘A Global Political Economy of Intellectual Property Rights’, Abingdon: Routledge, (2000).

Marx, K., ‘Capital: A Critique of Political Economy’, (Int’l Pub. Ed. New York 1967) (1st ed. 1867).

Marx, K., ‘Capital’, Wordsworth Editions Ltd, (2013).

Madden, Mary, and Lenhart, A., ‘Music downloading, file-sharing and copyright’, Washington, DC: Pew Research Center. Available at: http://www.pewinternet.org/Reports/2003/ Music-Downloading-Filesharing-and-Copyright.aspx (Accessed: 17/4/2014).

Martin, H.J., ‘The History and Power of Writing’, Chicago: University of Chicago 430 Press, (1994).

Melville B Nimmer, Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas (Mathew Bender, vol 1, 1974).

M.J. Radin, Boilerplate (Princeton 2013).

Marx, K., ‘Capital: Volume 1, A critique of Political Economy’, New York: Penguin Classics, (1992).

Mills, S., ‘Michael Foucault’, Routledge Publications, (2003).

Karl Marx, Selected Writings in Sociology and Social Philosophy (Trans. By T.B. Bottomore, McGraw-Hill Paperbacks, 1956).

May, C., ‘Digital Rights Management: The Problem of expanding ownership rights’, Oxford: Chandos Publishing, (2007).

McLeod, K., ‘Freedom of Expression,’ Doubleday Books, New York, (2005).

Muller, J.Z., ‘The mind and the market: capitalism in Western thought’, Anchor Books, (2002).

MacFie, A.L., ‘The Individual in Society: Papers on Adam Smith’, London: George Allen & Unwin, (1967).

Nikita Malevanny, ‘Online Music Distribution – How much Exclusivity is Needed?: A Study of International, European, German and U.S. Copyright Systems and Their Objectives’, (Springer-Verlag 2019).

Nicholas Taleb, The Black Swan: The Impact of the Highly Improbably (New York, Random House, 2007).

Nassim Nicholas Taleb, Skin in the Game: Hidden Asymmetries in Daily Life, (Penguin, 2018).

N. Mercuro and S.G. Medema, Economics and the Law—From Posner to Post-Modernism (Princeton, NJ: Princeton University Press, 1997).

Netanel, N., ‘Copyright's Paradox,’ Oxford University Press, (2008).

Nicholas G and Inglis F. Capitalism and Communication: Global Culture and the Economics of Information. (Newbury Park, CA: Sage Publications 1990).

Nail, T., ‘Returning to Revolution: Deleuze, Guattari and Zapatismo’, Edinburgh University Press, (2012).

Newman, S., ‘Intellectual Property Law – Rights, Freedoms and Phonograms: Moral Rights and Adaptation Rights in Music and Other Copyright Works’, Computer Law & Security Report 13(1), (1997).

Otteson, J.R., ‘Adam Smith’s Marketplace of Life’, Cambridge University Press, (2002).

O. Williamson, Market and Hierarchies: Analysis and Antitrust Implications (New York: The Free Press, 1975).

Piketty, T., ‘Capital: in the twenty-first century’, The Belknap press of Harvard University Press, (2014).

Plato, Laws (Translated by A. E. Taylor (1961) in The Collected Dialogues of Plato, (Eds. by Edith Hamilton and Huntington Cairns, Bollingen, New York).

Plato, The Republic, (trans. Desmond Lee), (Penguin Books Ltd, 2007).

Pipes, Richard., 'The Russian Revolution', (New York: Vintage Books), (1991).

Park. D. J., Conglomerate Rock: The Music Industry's Quest to Divide Music and Conquer Wallets (Lanham, MD: Lexington Books 2007).

Putnam, G.H., 'Books and their makers in the Middle Ages', (Putnam and Sons Publishing, 1896).

Patterson, L.R., 'Copyright in Historical Perspective', Nashville, Vanderbilt University Press, (1968).

Peter Tschmuck, Creativity and innovation in the Music Industry (Springer Pub, 2012).

Polčák R., 'Territoriality of Copyright Law' (Springer Cham, 2020).

Patterson, L., 'The Nature of Copyright: A Law of Users Rights', University of Chicago Press, (1991).

Patterson, L. R., 'Copyright in a Historical Perspective', Nashville: Vanderbilt University Press, (1968).

P. Mason, Post-capitalism: A guide to our future (Penguin Publishing 2016).

Patry, William., 'Moral Panics and the Copyright Wars', New York: Oxford University Press, (2009).

Patry, How to Fix Copyright (Oxford Uni. Press. 2011).

Patton, P., 'Deleuze and the Political', Routledge Publishing, (2000).

Posner, R., 'Economic Analysis of Law', (4th edn) Little Brown and Company, (1992).

Posner, E., Law and Social Norms, (Cambridge, MA: Harvard University Press 2000).

Posner, Richard A. Frontiers of Legal Theory, (Cambridge, MA: Harvard University Press 2001).

Peltzman, Issues in Vertical Integration Policy, in Public Policy Toward Mergers 167 (Goodyear, California 1969).

Posner. R., 'When is parody fair use?' (1992) Journal of Legal Studies 67.

Posner, R. The Economics of Justice (Harvard University press, 1983)

Posner, R. Overcoming Law (Cambridge: Harvard University Press 1995).

Raphael, D.D., 'The Impartial Spectator: Adam Smith's Moral Philosophy', Oxford University Press, (1997).

R. Stallman, Free Software Free Society: Selected Essays of Richard M. Stallman (Free Software Foundation, 2002).

Robert Brauneis & Rogere Schechter, Copyright: A Contemporary Approach (2nd ed. West Academic, 2018).

Robert. A. Cord and Daniel, J. Hammond, Milton Friedman: Contributions to Economics and Public Policy, (Oxford University Press, 2016).

Ronald Dworkin, A Matter of Principle, (Clarendon Press, 1985).

Rose, M., 'Authors and Owners: The Invention of Copyright', Harvard University Press, (1995).

Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law for House Comm. On the Judiciary. 87th Cong., 1st Sess. 5 (Comm. Print 1961). Available at: https://www.copyright.gov/history/1961_registers_report.pdf (Accessed: 6/9/2015).

Robert Levine, Free Ride: How the internet is destroying the culture business and how it can fight back (Vintage Books 2011).

Ronald. L. Sandler., Ethics and Emerging Technologies, (Palgrave Macmillan 2014).

Reynolds L.D., & Wilson, N.G., ‘Scribes and Scholars: A Guide to the Transmission of Greek and Latin Literature’, (3rd eds) Oxford University Press, (1991).

R. Pound, Philosophy of Law (revised ed. Yale University Press, 1954).

Richardson, M. & Ricketson, S. Research Handbook on Intellectual Property in Media and Entertainment, (Edward Elgar, 2017).

R. Burrell and A. Coleman, Copyright Exceptions: The Digital Impact (2005).

Rosenmeier, Szkalej, and Wolk, EU Copyright Law: Subsistence, Exploitation and Protection of Rights (Wolters Kluwer, 2019).

Rimmer, M., ‘Digital Copyright and the Consumer revolution: Hand of my iPod’, MPG Books, (2007).

Rainie, Lee, et al. ‘The Impact of Recording Industry Suits Against File Swappers’, Pew Internet and American Life Project, (January 2004). Available at: http://www.pewinternet.org/files/old-media/Files/Reports/2004/PIP_File_Swapping_Memo_0104.pdf.pdf (Accessed: 15/9/2016).

Raghuram. G., and Luigi Zingales, Saving Capitalism from the Capitalists: Unleashing the Power of Financial Markets to Create Wealth and Spread Opportunity (Princeton University Press, 2004).

Robert C. Tucker (ed.), The Marx-Engels Reader, (New York and London: W. W. Norton, 1978).

Renner, K., ‘The Institutions of Private Law and their Social Functions’, Routledge and Kegan Paul, (1949).

Reyman, J., ‘The rhetoric of intellectual property: Copyright law and the regulation of digital culture’, Routledge publishing, (2010).

Rifkin, J., ‘The Age of Access’, Penguin Books, London, (2000).

R. Deazley, Rethinking Copyright—History, Theory, Language (Cheltenham: Edward Elgar Publishing, 2006).

Rheingold, H., The Virtual Community: Homesteading on the Electronic Frontier (Revised edition, Cam. MA: MIT Press 2000).

Rutger Bregman, Utopia for Realists: And How We Can Get There (Bloomsbury Publishing, 2017).

Robert C. Bird and Subhash C. Jain., 'The Global Challenge of Intellectual Property Rights', Edward Elgar Publishing Ltd, (2008).

Rubin, G.R., and Sugarman, D., 'Law, Economy and Society: Essays in Legal History English Law 1750-1914', Butterworths Law Nov, (1984).

Sibichen, K. Mathew, Making people pay: The economic sociology of taxation (Penguin Books, 2013).

Sennett, R., 'The Culture of the New Capitalism', New Haven: Yale University Press, (2006).

Susskind and Susskind., 'The Future of the Professions: How Technology Will Transform the work of Human Experts', Oxford University Press, (2015).

S. Menon, Policy Initiative Dilemmas on Media Convergence: A Cross National Perspective (Prometheus 2006).

S. Shavell, Economic Analysis of Accident Law (Harv. Uni. Press. 1987).

Soderberg, J., 'Hacking Capitalism: The Free and Open Source Software Movement', Routledge Publishing, (2008).

Senftleben, M., 'Copyright Limitations and the three step test', Kluwer Law International, The Hague, (2004).

Schofield, P. Bentham: a guide for the perplexed (London: Continuum, 2009).

Shoshana. Zuboff., The age of surveillance capitalism' (Public affairs, 2019).

S. Peers. T. Hervey, J. Kenner, and A. Ward (eds), The EU Charter of Fundamental Rights: A Commentary (Bloomsbury Professional, 2014).

Sebastian Felix Schwemer, Licensing and Access to Content in the European Union: Regulation between Copyright and Competition Law (Cambridge University press, 2019).

Shils, E., and Rheinstein, M., 'Max Weber on Law in Economy and Society,' Harvard University Press, (1954).

Shirky Clay., 'Here Comes Everybody', London: Penguin Books, (2008).

Stigler, G., The Organisation of Industry, (Homewood Publishing, 1968).

Smith, A., 'An Inquiry into the Nature and Causes of the Wealth of Nations 1776', (Trans. Edwin Canon, London: Methuen & Co Ltd, 5th edition, 1904).

Schnyder and Siems, The Ordoliberal Variety of Neoliberalism in Konzelmann and Fovargue Davies (eds), Banking Systems in the Crisis: The Faces of Liberal Capitalism (Routledge, 2013).

Smith, A., 'The Invisible Hand' (Penguin Books, 2008).

Smith, A., 'His Life, Thought, and Legacy' (Eds. Ryan Patrick Hanley), (Princeton University Press, 2016).

Smith, S.A., 'Contract Theory,' Clarendon Law Series, Oxford University Press, (2004).

Sara L. Latta, Cybercrime: Data Trails DO Tell Tales, (Enslow Publishers 2012).

Spoo, R., 'Without Copyrights: Piracy, Publishing and the Public Domain', Oxford University Press, (2013).

Susy Frankel and Daniel Gervais., 'The Evolution and Equilibrium of Copyright in the Digital Age', Cambridge University Press, (2014).

Seville, C., ‘The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century’, Cambridge University Press, (2009).

Sheila Slaughter and Gary Rhoades., ‘Academic Capitalism and the New Economy: Markets, State and Higher Education’, John Hopkins University Press, (2010).

Shapiro, S.J., ‘The Oxford Handbook of Jurisprudence and Philosophy of Law’, Oxford University Press, (2004).

Steiner, R., ‘World Economy: The formation of a science of world economics’, Rudolf Steiner Press, (1977).

Steiner, R., ‘The Threefold Social Order’, Anthroposophic Press, Inc. New York, (1966).

Sternberg, R.J., ‘Handbook of Creativity’, Cambridge University Press, (1999).

Schiller, Dan., ‘Digital Capitalism: Networking the Global Market System’, Cambridge, MA: MIT Press, (2000).

S. Karapapa, Private Copying (Routledge 2012).

Sibichen, K. Mathew., ‘Making people pay: The economic sociology of taxation’, Penguin Books, (2013).

Shaw, W.H., ‘Business Ethics: A Textbook with Cases’, Cengage Advantage, (2011).

Shanthi Kalathil and Taylor C. Boas, Open Networks Closed Regimes: The Impact of the Internet on Authoritarian Rule (Carnegie Endowment, 2003).

Teubner, G., ‘Dilemmas of Law in the Welfare State’, Walter de Gruyter Publishing, (1986).

Trapp, J.b. and L. Hellinga., ‘The Cambridge History of the Book in Britain: Volume III 1400-1557’, Cambridge University Press, (1999).

T Tridimas, The General Principles of EU Law, 2nd edn (Oxford University Press 2006).

Thomas L. Friedman, The Lexus and the Olive Tree: Understanding Globalisation (Anchor Publishing, 2000).

Thomas J. Miceli, The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts, (Oxford University Press, 2017).

Tian, Y., 'Re-thinking the political economy of copyright in the digital era' Routledge Publishing, (2009).

Thomas Sowell, Trickle Down Theory and Tax Cuts for the Rich (Stanford: Hoover Institution Press, 2012).

Vaver and Bently., 'Intellectual Property in the New Millennium: Essays in honour of William R. Cornish' Cambridge University Press, (2004).

Vaver, D., 'Intellectual Property Rights: Critical Concepts in Law' Vol 1, Routledge Publishing, (2006).

Von Neumann, J., 'The Computer and the Brain', Yale University Press, (1958).

Vaidhyanathan, S., 'The anarchist in the library: how the clash between freedom and control is hacking the real world and crashing the system,' Basic Books, (2004).

Vaidhyanathan, S., 'Copyrights and Copywrongs: The rise of Intellectual Property and how it threatens creativity', (2nd edition) New York University Press, New York, (2003).

Winseck, Dwayne., 'The political economies of media and the transformation of the global media industries', Bloomsbury Academic, (2011).

Wisniewski, J.B., The Economics of Law, Order, and Action: The Logic of Public Goods **(**Routledge 2018).

Weber, M., 'Economy and Society', (G. Roth & R. Wittich ed) University of California Press, (1968).

Weber, M., "The Protestant Ethic and the Spirit of Capitalism" (Translated by Talcott Parsons) George Allan and Unwin Ltd, London, (1930).

Weisberg, R., ‘Creativity: Beyond the Myth of Genius’ W.H. Freeman & Co Ltd, (1993).

Wasko, J., Graham Murdock and Helena Sousa (eds)., ‘The Handbook of Political Economy of Communications’, Malden, MA and Oxford: Wiley-Blackwell, (2011).

William Landes and Richard Posner, The Political Economy of Intellectual Property Law (AEI-Brookings, 2004).

William M. Landes and Richard A. Posner The Economic Structure of Intellectual Property Law (Harvard University Press, 2003).

Wallerstein, Collins, Mann, Derluguian, Hutton., ‘Does Capitalism have a Future’, Oxford University Press, (2013).

Wasko, J., ‘Understanding Disney’, Cambridge: Polity Press, (2001).

Watt, R., ‘Copyright and Economic Theory’ Edward Elgar Publishing, (2000).

Weber, M. ‘The Protestant ethic and Spirit of Capitalism’, London: Unwin University Books, 11th impression, (1971).

Weber, M., ‘Economy and Society’, University of California Press Version, (1978).

Woolfgang, Streeck., How will capitalism end? (Verso Books, 2016).

Weber, M., ‘The Protestant Ethic and Spirit of Capitalism’, (Trans, Stephen Kalberg) Roxbury Publishing, (2002).

Zuboff, In the age of the Smart Machine: the future of work and power (Basic Books, 1988).