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Larsson, Stefan; Svensson, Måns; Mezei, Péter; De Kaminski, Marcin

Published in:
The WIPO Journal

2014

The Digital Intellectual Property Challenge Revisited: File-sharing and Copyright Development in Hungary

Stefan Larsson*
Internet Institute, Lund University, Sweden

Måns Svensson
Internet Institute, Lund University, Sweden

Péter Mezei
Institute of Comparative Law, University of Szeged, Hungary

Marcin de Kaminski
Internet Institute, Lund University, Sweden

Copyright offences; Criminal liability; File sharing; Hungary

Introduction

What type of a crime is online copyright infringement, often referred to as "online piracy" or "electronic piracy"?[1] Many studies have shown how a majority of primarily the younger generation has file-shared copyright-protected files, or in general does not feel that there is something wrong with this.[2] This particular behaviour, which may be at odds with a near globally homogenous regulation, is closely connected to digital development and takes part in a context with strong political and industrial influences. The fact that unauthorised file-sharing is, most often, criminalised, in combination with its commonness, makes it a (cyber) criminological issue of perhaps unusual character. This however by no means diminishes the need for understanding the causes or logic of this oft-illegal behaviour.

* This study is partly funded by the Swedish Research Council (dnr 2013-336).

[1] Epaminondas E. Panas and Vassilia E. Ninni, "Ethical Decision Making in Electronic Piracy: An Explanatory Model Based on the Diffusion of Innovation Theory and Theory of Planned Behavior" (2011) 5 Int'l J. Cyber Criminology 836.

[2] Cf. Yuval Feldman and Janice Nadler, "The Law and Norms of File-sharing" (2006) 43 San Diego L. Rev. 577; Katarzyna Gracz, "Bridging the Gaps between Social and Legal Norms Concerning Protection of Intellectual and Artistic Creations: On the Crisis of Copyright Law in the Digital Era" (2013) 16 J. World Intell. Prop. 39; Stefan Larsson, "Conceptions of Copyright in a Digital Context: A Comparison between French and American File-sharers" (2014) *Lexis—E-journal in English Lexicology* 89; Stefan Larsson, "Metaphors and Norms: Understanding Copyright Law in a Digital Society", PhD Thesis, Lund Studies in Sociology of Law, Lund University, 2011; Stefan Larsson, Susan Wnukowska-Mtonga, Måns Svensson and Marcin de Kaminski, "Parallel Norms: File-sharing and Contemporary Copyright Development in Australia" (2014) J. World Intell. Prop. (forthcoming); Måns Svensson and Stefan Larsson, "Intellectual Property Law Compliance in Europe: Illegal File-sharing and the Role of Social Norms" (2012) 14 New Media & Soc'y 1147.

Even if studies on online piracy from a theoretical viewpoint of low self-control,[3] rational-choice,[4] strain,[5] neutralisation[6] and deterrence theory[7] has aimed at explaining illegal file-sharing, the fact remains that a key feature of this behaviour is that it is so common that it may straddle "the crucial boundary between criminal and non-criminal behaviour", as noted by Nelken regarding white-collar crime.[8] The dilemma that Nelken identifies is that many white-collar crimes are "merely technically criminal" and are not socially considered on par with ordinary crimes and therefore do not "satisfy the requirements of a sociological definition of crime".[9] In fact, like white-collar crime, illegal file-sharing may illustrate

> "the possibility of divergence between legal, social, and political definitions of criminality—but in so doing it reminds us of the artificiality of all definitions of crime".[10]

The challenge that illegal file-sharing poses to legal criminalisation is addressed in this study. Nonetheless, the pretexts and reasons for the specific character of file-sharing behaviour and norms in a community likely, to various degrees, correlate with the specifics in the legal regulation relating to a particular jurisdiction. Therefore, we argue for the importance of empirically studying both the legal development and the file-sharing practices existing in parallel to the legal development within the domain's specific jurisdiction. This study will elaborate quite extensively on the contemporary development and the status of copyright in Hungary. This is followed by a sample of Hungarian respondents to a survey on file-sharing, which is then compared with a large set of global respondents in order to determine the specific character of the former sample—if such character is found.

Purpose and research questions

The purpose of this article is to better understand digitally mediated copyright infringement in relation to the legal structures for criminalising online file-sharing of copyrighted content. Focusing on Hungary, This case study has two main aspects: first, it consists of a legal investigation of trends in contemporary Hungarian copyright law; and second, it provides a contrasting, empirical survey of actual file-sharing behaviour in Hungary. Specifically, this survey explores three questions:

1. In terms of demographics, who are the typical Hungarian file-sharers?
2. To what extent do Hungarian file-sharers diverge from others?
3. What is the character of Hungarian IP regulation in relation to international treaties and trade agreements, enforcement, the role of the Internet Service Providers (ISPs) and its contemporary development in general?

In May 2012, the Cybernorms research group conducted a survey on file-sharing in collaboration with the infamous website, The Pirate Bay (TPB). The survey was reached via a link from TPB's main page by clicking a remodelled TPB logo termed "The Research Bay" depicting a magnifying glass over a pirate ship. Visitors who clicked on the altered logo were transferred to an online survey that was open for 72

[3] George E. Higgins, "Can Self-Control Theory Help Understand The Software Piracy Problem" (2005) 26 *Deviant Behavior* 1.
[4] George E. Higgins, "Digital Piracy, Self-Control Theory, and Rational Choice: An Examination of the Role of Value" (2007) 1 Int'l J. Cyber Criminology 33.
[5] Sameer Hinduja, "General Strain, Self-Control, and Music Piracy" (2012) 6 Int'l J. Cyber Criminology 951; Stefan Larsson, Måns Svensson and Marcin de Kaminski, "Online Piracy, Anonymity and Social Change: Deviance through Innovation" (2012) 19 *Convergence* 95.
[6] George E. Higgins, Scott E. Wolfe and Catherine D. Marcum, "Music Piracy and Neutralization: A Preliminary Trajectory Analysis from Short-Term Longitudinal Data" (2008) 2 Int'l J. Cyber Criminology 324.
[7] Ram D. Gopal, G. Lawrence Sanders, Sudip Bhattacharjee, Manish Agrawal and Suzanne C. Wagner, "A Behavioral Model of Digital Music Piracy" (2004) 14 J. Organizational Computing & Electronic Com. 89; George E. Higgins, Abby L. Wilson and Brian D. Fell, "An Application of Deterrence Theory to Software Piracy" (2005) 12 J. Crim. Just. & Popular Culture 166.
[8] David Nelken, "White-collar and Corporate Crime" in Mike Maguire, Rodney Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2012), p.631.
[9] Nelken, "White-collar and Corporate Crime" in Maguire, Morgan and Reiner (eds), *The Oxford Handbook of Criminology* (2012), p.632.
[10] Nelken, "White-collar and Corporate Crime" in Maguire, Morgan and Reiner (eds), *The Oxford Handbook of Criminology* (2012), p.632.

hours. The survey received over 96,000 respondents, of which 568 answered that they were from Hungary. These data form the empirical basis for this study. They also allow Hungarian respondents to be compared with the global population.[11]

Background on illegal file-sharing

So, while being reminded by Nelken of the "artificiality of all definitions of crime",[12] we turn to the explicit case of online file-sharing as a copyright infringing activity *en masse*. Peer-to-peer (P2P) file sharing "has gained notoriety for facilitating Internet piracy" internationally.[13] In a study on social norms relating to copyright, Svensson and Larsson conclude:

> "The sharing of computer programs, movies and music via the internet marks an *all-time-high* in the persistent controversy between intellectual property owners and the users of different reproduction technologies".[14]

This indicates, much like what the American legal scholar Lawrence Lessig argues,[15] that the issue is bigger and more structural than just relating to a few deviants and that it regards a generation of Internet "natives".[16] As Lysonski and Durvasula point out, the lawsuits seem to have neither slowed down the rate of unauthorised file sharing nor solved the issue.[17] Moreover, others have noticed that the use of tools that make file-sharers harder to trace in an online context are more common amongst high-frequency sharers,[18] and the overall use of these tools are increasing,[19] indicating that the enforcement of legislation is increasingly difficult.

There have been numerous attempts to stimulate, or more brutally enforce, stronger compliance with intellectual property law online. These efforts, which originate from industrial representatives, rights holding organisations and governmental policymakers, include massive amounts of lawsuits[20]; developing digital "locks"[21]; forbidding circumvention of such "locks" (as in the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT) and the EU InfoSoc Directive); cutting of internet access after so-called "three (or more) strikes"[22]; adding decoys to the file-sharing networks—what Lundblad has called "noise tactics"[23]; various attempts to gain stronger control over the Internet and over access to "rogue websites" that disseminate copyrighted content,

[11] For an Australian comparison, see Larsson, et al., "Parallel Norms" (2014) J. World Intell. Prop. (forthcoming).
[12] Nelken, "White-collar and Corporate Crime" in Maguire, Morgan and Reiner (eds), *The Oxford Handbook of Criminology* (2012), p.632.
[13] John Lambrick, "Piracy, File Sharing … and Legal Fig Leaves" (2009) 4 J. Int'l Com. L. & Tech. 185, 185.
[14] Måns Svensson and Stefan Larsson, "Intellectual Property Law Compliance in Europe: Illegal File-sharing and the Role of Social Norms" (2012) 14 New Media & Soc'y 1147, 1147; cf. Larsson, "Metaphors and Norms", 2011.
[15] Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008).
[16] Cf. John Palfrey and Urs Gasser, *Born Digital: Understanding the First Generation of Digital Natives* (New York: Basic Books, 2008).
[17] Steven Lysonski and Srinivas Durvasula, "Digital Piracy of MP3s: Consumer and Ethical Predispositions" (2008) 25 J. Consumer Marketing 167.
[18] Stefan Larsson, Måns Svensson, Marcin de Kaminski, Kari Rönkkö and Johanna Alkan Olsson, "Law, Norms, Piracy and Online Anonymity—Practices of De-identification in the Global File Sharing Community" (2012) 6 J. Res. Interactive Marketing 260.
[19] Larsson, Svensson and de Kaminski, "Online Piracy, Anonymity and Social Change" (2012) 19 *Convergence* 95.
[20] Jordana Boag, "The Battle of Piracy Versus Privacy: How the Recording Industry Association of America (RIAA) Is Using the Digital Millennium Copyright Act as Its Weapon against Internet Users' Privacy Rights" (2005) 41 Cal. W. L. Rev. 241.
[21] Stefan Larsson, "The Path Dependence of European Copyright" (2011) 8 *SCRIPTed* 8.
[22] On the UK Digital Economy Act, see Enrico Bonadio, "File-sharing, Copyright and Freedom of Speech" (2011) 33 Eur. Intell. Prop. Rev. 619, 625; Dinusha Mendis, "Digital Economy Act 2010: Fighting a Losing Battle? Why the 'Three Strikes' Law Is Not the Answer to Copyright Law's Latest Challenge" (2013) 17 Int'l Rev. L., Computers & Tech. 60. On New Zealand, see Simon Fogarty, "New Zealand: Copyright (Infringing File-sharing) Amendment Bill" (2010) 11 Computer L. Rev. Int'l 60, 61. On the French "graduated response" system, see Bonadio, "File-sharing, Copyright and Freedom of Speech" (2011) 33 Eur. Intell. Prop. Rev. 619, 624–625, Dóra Hajdú, "A fájlcserélés elleni küzdelem egy lehetséges útja—Három a francia igazság?" (2011) 8 *Infokommunikáció és Jog* 95; Alain Strowel and Vicky Hanley, "Secondary Liability for Copyright Infringement with Regard to Hyperlinks" in Alain Strowel (ed.), *Peer-to-peer File-sharing and Secondary Liability in Copyright Law* (Cheltenham: Edward Elgar, 2009), pp.77–80.
[23] Nicklas Lundblad, "Noise Tactics in the Copyright Wars" (2006) 20 Int'l Rev. L., Computers & Tech. 311.

such as in the US SOPA/PIPA proposals[24] or in the Anti-Counterfeiting Trade Agreement (ACTA)[25]; and forcing Google to downgrade search results for sites with high numbers of so-called "copyright removal notices" such as BitTorrent sites, after much pressure from the content industry and the American copyright holders' organisation RIAA.[26]

The legal background of P2P file-sharing in Hungary

The Hungarian conformist approach

Since Hungary's accession to the Berne Convention for the Protection of Literary and Artistic Works in 1922, the Hungarian legislature follows a conformist approach in respect to international intellectual property law. Hungary has not only joined and rapidly implemented the newly created treaties and agreements, but it has also played a vital role in their formulation. The Hungarian delegations have always been present at the relevant diplomatic conferences of WIPO or the WTO, and they have also played an important, though definitely not leading, role in EU legislative processes. Their presence is equally evident if we take a look at those international norms that have more or less relevance to P2P file-sharing. The Hungarian legislature have implemented, almost verbatim, the exclusive right of "making available to the public" (WCT art.8; WPPT art.14; EU InfoSoc Directive art.3), the provisions on digital rights management systems (technical protection measures) (WCT art.11; WPPT art.18; InfoSoc Directive art.6) and the EU Directives on Electronic Commerce (2000/31) and Intellectual Property Enforcement (2004/48). Similarly, the Hungarian Government signed the ACTA in January 2012, even though the Hungarian copyright lawyers heavily criticised the agreement.[27]

Civil law liability in Hungary

The conformist approach means that the Hungarian copyright regime theoretically includes all the relevant provisions that might be applicable to finding civil liability of the private users and the intermediaries involved in P2P file-sharing. This is, however, partly misleading, since these factors are not the only decisive ones in solving legal disputes. This is clearly proven by the specific legal patterns related to the private users of P2P file-sharing services.

The use of BitTorrent services presumes the downloading of at least one segment of data (here: protected subject-matter) and the simultaneous sharing of the already downloaded content. To translate it to the language of copyright law, users affect the respective right holders' exclusive rights of reproduction and of making available to the public. Article 35(1) of the Hungarian Copyright Act (HCA) allows for making copies of protected subject-matter (except for software) solely for private purposes, irrespective of whether the source material is acquired from legal or illegal sources.[28] In contrast, the HCA does not grant any limitation or exception related to the private user's right of making available to the public. This means that due to the dynamic operation of the BitTorrent protocol, any user who accesses a source material also becomes a disseminator, and thereby loses the statutory benefit of the private copying exception. This loss follows from the ancient Roman premise of *nemo plus iuris* ("no one can transfer to another a larger right than he himself has") which has formed a part of the Hungarian Civil Law.[29] Indeed, art.6:524 of the Hungarian Civil Code allows the right holders to sue two separate users for the "same" activity: the user

[24] Sandra Schmitz, "The US SOPA and PIPA—A European Perspective" (2013) 27 Int'l Rev. L., Computers & Tech. 213; Peter K. Yu, "The Alphabet Soup of Transborder Intellectual Property Enforcement" (2012) 60 Drake L. Rev. Discourse 16, 28–33.
[25] Peter K. Yu, "Six Secret (and Now Open) Fears of ACTA" (2011) 64 SMU L. Rev. 975.
[26] Stefan Larsson, "Sociology of Law in a Digital Society. A Tweet from Global Bukowina" (2013) 15 *Societas/Communitas* 281.
[27] Péter Mezei, *A fájlcsere dilemma—A perek lassúak, az internet gyors* (Budapest: HVG-Orac, 2012), pp.220–229.
[28] Contrary to this, under the settled case law in Germany, the lawful nature of the source material is a prerequisite to the application of the private copying exception: Mezei, *A fájlcsere dilemma* (2012), p.156.
[29] Mezei, *A fájlcsere dilemma* (2012), pp.167–171.

who makes the work available to the public and the user who downloads it. Acting collectively, both users are equally liable for each other's act.[30]

Another dimension of the liability of private users is the so-called "three strikes regime".[31] Neither a public[32] nor private[33] three strikes regime is on the agenda in Hungary yet. This would be extremely difficult in light of the strong resistance to this form of law enforcement in Hungarian society, which has worked as a catalyst for strengthening the Hungarian pirate movement in the past few years.

The liability of intermediaries is a more problematic issue in Hungary. Intermediaries include both service operators of file-sharing software or platforms and Internet service (access) providers. The various pieces of worldwide case law are evidence that operators of different file-sharing services can be found liable for the contribution to, or the inducement of, illegal activities of private users.[34] These decisions are based on some kind of secondary (civil) liability doctrines. The members of the European Union, however, rarely have special secondary liability doctrines in the field of copyright law. For example, TPB was generally found liable based on the Criminal Law of Sweden. The charges against Mininova were rooted in the e-commerce provisions of the Netherlands.[35] There are several countries in the European Union that have secondary liability doctrines within the frames of general civil law. A great example is the German concept of "Störerhaftung" ("disturbance liability"), which provided the basis in several important cases against the operators of websites that offered illegal sources for users in Germany.[36]

The Hungarian Civil Code (Act V of 2013), which came into effect on March 15, 2014, includes similar provisions (arts 6:519 and 6:524); however, no file-sharing related civil or copyright law decision based upon these sections has been published yet. Indeed, the Expert Opinion 07/08/1 of the Hungarian Copyright Expert Board stressed, in 2008, that operators of so-called DC++ file-sharing services are not directly liable for their users' activities. Consequently the court might order them to terminate the contribution to infringements committed by the user or to disclose information related to the infringing users. This is partially due to the right holders' inadequate sources for collecting evidence and for initiating proceedings against infringers. Indeed, right holders rely more often on criminal law and state resources to combat file-sharing.

ISPs are subject to legal proceedings worldwide as well, but the right holders have historically lost the first few court decisions.[37] ISPs were originally charged with direct or indirect copyright infringements. However, effective safe harbour provisions are applied to ISPs both in the United States and the European Union (cf. DMCA s.512; EU E-Commerce-Directive arts 12–14). ISPs are therefore exempt from civil liability as long as they either do not have any actual knowledge of the infringements or block access to, or delete, the infringing materials expeditiously after becoming aware of the illegal use of their services, as in the Swedish court case against TPB.[38] Notwithstanding the above, ISPs have recently been subjected

[30] Ákos Kőhidi, "A polgári jogi felelősség digitális határai Európában—A P2P rendszerekben megvalósuló szerzői jogi jogsértések felelősségtani vonatkozásai", PhD Thesis, Széchenyi István Egyetem, Állam- és Jogtudományi Doktori Iskola, 2012, pp.169–170, available at: *http://doktiskjog.sze.hu/images/doktori.hu-ra/kohidi%20akos/A%20polg%C3%A1ri%20jogi%20felel%C5%91ss%C3%A9g%20digit%C3%A1lis%20hat%C3%A1rai%20Eur%C3%B3p%C3%A1ban.pdf* [Accessed March 25, 2014].

[31] Enrico Bonadio, "File-sharing, Copyright and Freedom of Speech" (2011) 33 Eur. Intell. Prop. Rev. 619; Annemarie Bridy, "Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement" (2010) 89 Or. L. Rev. 81; Mendis, "Digital Economy Act 2010" (2013) 17 Int'l Rev. L., Computers & Tech. 60.

[32] Operated in France, for example. In addition, the Digital Economy Act of the United Kingdom and the Copyright (Infringing File-Sharing) Amendment Act of New Zealand envisioned a similar, but not identical, (statutorily regulated) graduated response regime.

[33] Running in Ireland and started in the United States during 2013: Bridy, "Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement" (2010) 89 Or. L. Rev. 81; Eva Nagle, "'To Every Cow its Calf, to Every Book its Copy'—Copyright and Illegal Downloading after EMI (Ireland) Ltd v Eircom" (2010) 21 Ent. L. Rev. 209; Peter K. Yu, "The Graduated Response" (2010) 62 Fla. L. Rev. 1373.

[34] For comparisons with the Napster, Grokster, Kazaa, isoHunt and Limewire cases in the United States, see Strowel (ed.), *Peer-to-peer File-sharing and Secondary Liability in Copyright Law* (2009).

[35] Mezei, *A fájlcsere dilemma* (2012), pp.112–126.

[36] Ákos Kőhidi, "A polgári jogi felelősség digitális határai Európában", 2012, pp.122–136; Gerald Spindler and Matthias Leistner, "Secondary Copyright Infringement—New Perspectives in Germany and Europe" (2006) 37 IIC 798; Gerald Spindler, "Präzisierung der Störerhaftung im Internet—Besprechung des BGH-Urteils 'Kinderhochstühle im Internet'" (2011) 113 GRUR 101.

[37] Cf. Lambrick, "Piracy, File Sharing … and Legal Fig Leaves" (2009) 4 J. Int'l Com. L. & Tech. 185.

[38] Stefan Larsson, "Metaphors, Law and Digital Phenomena: The Swedish Pirate Bay Court Case" (2013) 21 Int'l J.L. & Info. Tech. 329.

to court orders to block access to infringing websites (in most TPB cases) in countries such as the United Kingdom, Denmark, Finland and Italy.[39]

The situation for Hungarian ISPs differs from the previous set of facts. It is true that Hungary has a detailed set of rules for e-commerce service operators, and as mentioned above, this statute mirrors the DMCA rather than the EU directive. However, the social environment is unique in nature. The Hungarian language is used by only approximately 15 million people. Movies regularly, and TV-shows almost always, display Hungarian translation which, combined with the low number of foreign language speakers, has contributed to the appearance of "national" trackers, mainly used by Hungarians. This serves as a clear explanation for the popularity of Hungarian darknet sites in the country[40] and within the Hungarian communities beyond the country's borders.[41] Consequently, ISPs have much less "actual knowledge" of these darknet sites, not to mention the fact that many darknet sites operate their servers outside of Hungary and are consequently not subject to Hungarian jurisdiction and the HCA. This means that the indirect fight (via ISPs) against file-sharers turns out to be very difficult, if not impossible, in Hungary.

Another reason for the lack of civil or copyright law cases against ISPs is the purely rational fact that the Hungarian market is much smaller than many other markets in Europe or the United States. Similarly, the probability of any successful claim for damages (and the actual payment of damages) is much lower compared to the above countries. Even though the effective Hungarian Civil Code includes a provision on "general damages" (art.6:531), this is not at all similar to the "statutory damages" of the US Copyright Act (s.504(c)). The latter allows US federal judges to award—in lieu of the amount of actual damages—a minimum of US$750 and a maximum of US$30,000 in damages for any infringement, if the copyright holder has registered her work at the US Copyright Office (s.412). Under the Hungarian rule of "general damages", however, where the precise amount of damages is impossible to discover, judges may award an amount of damages for the infringed parties that is capable of compensating for the damages suffered by the right holder. Accordingly, the Hungarian civil law favours actual damages over punitive damages. The two types of damages discussed above may lead to extremely different amounts per infringement, which provides disincentives to suing users in Hungary. It is simply not worth it for right holders to go to court to fight "average file-sharers".

Criminal law liability in Hungary

Article 329/A of the Hungarian Criminal Code of 1978 called for the punishment of those who infringe upon the copyright or related right of any right holder for the purpose of gaining financial advantage or thereby causing financial injury. Although the basic punishment could have been imprisonment for up to two years, art.38(3) of the Criminal Code allowed for the substitution of imprisonment for alternative sanctions—for example, fines. Gaining financial advantage is generally not a part of an average file-sharer's activities, and criminal courts therefore regularly relied on the statutory term "causing financial injury".

Hungarian criminal law lists damages (loss of value of one's property) and loss of profit under financial injury. File-sharing does not cause any loss to the value of any copyright or related right. However, loss of profit might be shown in a court proceeding. Since the former criminal law system did not include any petty offence in respect to copyright infringement (where the distinction between a petty offence and a misdemeanour depended upon the amount of financial injury caused by the user), the punishment for even a single act of reproduction or of making available to the public would contravene the Hungarian Criminal

[39] Mezei, *A fájlcsere dilemma* (2012), pp.187–194.

[40] Mezei, *A fájlcsere dilemma* (2012), pp.100–102, 105–108; Chao Zhang, Prithula Dhungel, Di Wu, Zhengye Liu and Keith W. Ross, "BitTorrent Darknets", available at: *http://cis.poly.edu/~ross/papers/Darknet.pdf* [Accessed March 27, 2014].

[41] Balázs Bodó, "Set the Fox to Watch the Geese: Voluntary, Bottom-up IP Regimes in Piratical File-sharing Communities" in Martin Fredriksson and James Arvanitakis (eds), *Piracy: Leakages from Modernity* (Los Angeles: Litwin Books, 2013).

Code. This regulation did not seem to be in accordance with the "ultima ratio" feature of modern criminal law.[42]

The irrationality of the existing system led the legislators to modify the above regulation within the frames of the most recent criminal law reform. Article 385 of the new Hungarian Criminal Code is an almost verbatim copy of the former text, with some serious differences. First, "gaining financial advantage" is no longer a prerequisite to finding the basic version of the misdemeanour (art.385(1)). Secondly, art.385(5) stipulates that, where the reproduction or the making available to the public occurs without the user's intention to gain either direct or indirect financial advantage, she is not committing any crime. This paragraph refers, however, only to art.385(1). Article 385(3) criminalises acts that lead to a loss of profit above 500.001 HUF (approximately €1,700). This means that users who technically cause any right holder a loss of that amount shall be deemed criminals. Thirdly, art.461(2)(d) declares as petty offences infringements of copyright or related rights that lead to less than 100.000 HUF (approximately €330) in loss of profit.

This solution leads to a comical situation. Those file-sharers who download or make available to the public works of a value of up to 100.000 HUF are committing a petty offence and may be prosecuted by the police. Those who commit infringements of a value between 100.001 and 500.000 HUF will not be prosecuted under art.385(5). Those who cause a loss of profit of over 500.000 HUF face sanctions (imprisonment or fine) under art.385(3). This chaotic provision of the new Criminal Code entered into force on July 1, 2013.

Studying Hungarian file-sharers

After studying the trends in contemporary Hungarian copyright law, including law, international treaties, court rulings and related doctrines, this article provides the findings of an online survey that was conducted to study demographics, frequencies and opinions on file-sharing. This survey allows for Hungarian respondents to be compared with a near global population.

As mentioned earlier, in May 2012, we conducted a survey on file-sharing via collaboration with the actual BitTorrent site TPB. The survey, which was reached via a link from the main page of TPB, was open for 72 hours. Analysing all tables, we performed a chi-square test at the 5 per cent significance level with a null hypothesis of no difference between the countries. We also compared the response alternatives within Hungary.

Empirical findings from surveying a file sharing community

This section deals with the findings in the online survey. In this survey, 568 respondents answered that they were from Hungary, which represents 0.59 per cent of all the 96,659 respondents in the global study. Although the Hungarian sample is small compared with the global sample, it is in fact large when viewed as a study of the *file-sharing community* in Hungary, as opposed to the entire Hungarian population. It is therefore likely that the findings are representative of this particular community in Hungary, but unlikely all Hungarians. On a similar note, one can point to the fact that there are numerous file-sharing studies that have been carried out with smaller samples and that still contribute important findings regarding the particular communities, behaviours and normative preferences they study.[43] This being stated, there are commentators stating that Hungarians may be sceptical towards these kinds of relatively open surveys,

[42] Mezei, *A fájlcsere dilemma* (2012), pp.179–184.

[43] As with Feldman and Nadler, "The Law and Norms of File-sharing" (2006) 43 San Diego L. Rev. 577, which had a sample of 240 undergraduate students at a public university in the United States.

and they may fear that their anonymity will suffer even if precautionary measures have been taken to protect the respondents' identities.[44]

Of the global group, a majority of 52.5 per cent were from Europe, followed by 25 per cent from North America. When it came to gender distribution in the global group of 96,114 respondents, a very strong majority of 93.6 per cent (89,931) were male and 6.4 per cent (6,183) were female. This overrepresentation of men is consistent through all age groups, and the female share in Hungary is exactly the same: 6.4 per cent (36) as in the global population. Furthermore, file-sharers tend to be young. Globally, 57.4 per cent of the respondents are younger than 25, and 5.9 per cent are older than 45, which is quite similar to the Hungarian population (see Table 1).

Table 1: Respondents' age in Hungary v. Global.[45]

		0–17	18–24	25–29	30–36	37–45	46–52	53–65	66-	No response	Total respondents
Global	Nr	13,393	40,846	17,166	11,260	6,266	2,486	2,245	816	2,181	*94,478*
	%	14.2	43.2	18.2	11.9	6.6	2.6	2.4	0.9		
Hungary	Nr	75	278	107	70	28	5	5	0	0	*568*
	%	13.2	48.9	18.8	12.3	4.9	0.9	0.9	0		

Media types

A question of key interest concerns what kind of media is shared when file-sharing takes place. Music is still one of the most shared media types (63.6 per cent globally, 65.6 per cent in Hungary), followed by movies (78.6 per cent globally, 78.1 per cent in Hungary), TV shows (62.6 per cent globally, 58.2 per cent in Hungary) and games or software (56.5 per cent globally, 66.5 per cent in Hungary). The Hungarian respondents stand out in relation to the global population in terms of a higher degree of sharing of games or software and a slightly higher degree of sharing of e-books (see Table 2).

Table 2. Media type that is being shared (multiple options are possible).[46]

	Hungary		Global	
	Count	**Per cent**	**Count**	**Per cent**
Music	362	65.6	56,986	63.6
Movies	431	78.1	70,404	78.6
TV Shows	321	58.2	56,058	62.6
Sports Material	28	5.1	5,423	6.1
Games/Software	367	66.5	50,607	56.5
E-books	192	34.8	27,090	30.2
Pornography	102	18.5	13,960	15.6
Other	72	13.0	12,410	13.9
No response	16		7,102	

[44] Balázs Bodó, *A szerzői jog kalózai—A kalózok szerepe a kulturális termelés és csere folyamataiban a könyvnyomtatástól a fájlcserélő hálózatokig* (Budapest: Typotex, 2011).

[45] There is a statistically significant difference between the different age groups of the respondents both within Hungary and when comparing Hungary to Global.

[46] Regarding the file sharing of different media types and comparing Hungary and Global, there is a statistically significant difference between Hungary and Global at the 5 per cent significance level.

	Hungary		Global	
	Count	**Per cent**	**Count**	**Per cent**
Total response	*552*		*89,557*	

Alternative techniques for sharing files

Not the least where law and its enforcement are concerned, the format or specific method used for file-sharing is of interest. BitTorrent is, of course, not the only technique used for sharing files. For example, so-called one click hosting sites, where you can share a folder or upload files for others to download via a specific link, are used by almost half of the global respondents (48.2 per cent) and 44.7 per cent of the Hungarian respondents (see Table 3). Note that 54.6 per cent in the global survey claim to use offline sharing—for example, USB sticks, mobile phones, CDs—while, a much lower 42.1 per cent of the Hungarian respondents claim the same. Hungary stands out in the data mainly in regard to the higher degree of use of other or private BitTorrent trackers, taking into account the weaker online law enforcement and the stronger fight against bootleg copies in Hungary. One of the key reasons why Hungary is not included in the Special 301 Report of the United States Trade Representative since 2010 was the successive elimination of bootleg markets in the major cities in the previous years.

Table 3. Other file-sharing techniques that are used (besides TPB) (multiple options are possible).[47]

	Hungary		Global	
	Count	**Per cent**	**Count**	**Per cent**
Other/Private BitTorrent Trackers	361	67.0	44,397	51.2
Other peer to peer networks	100	18.6	20,691	23.9
One click hosting sites (Dropbox, Rapidshare, Megafile etc.)	241	44.7	41,751	48.2
FTP servers	85	15.8	13,101	15.1
Instant messaging (MSN, Skype, Gtalk etc.)	109	20.2	21,319	24.6
E-mail	115	21.3	22,588	26.1
Offline file-sharing (USB sticks, mobile phones, burned CDs/DVDs)	227	42.1	47,347	54.6
Other	43	8	10,823	12.5
None	52	9.6	11,114	12.8
No response	29		9,974	
Total number of respondents	*539*		*86,685*	

Upload v download

BitTorrent technically means that while you download, you by default also share the same file (upload) with "the swarm" or network of nodes downloading the same file. However, it is clear that most file-sharers mainly intend to download and not to share with the community. Globally, a majority of 65.3 per cent never upload any new material to the community, and only about 12 per cent do so more than once a week. Of the Hungarian respondents, 68.1 per cent never upload and 6.6 per cent upload more than once a week, but the difference between Hungary and Global is not significant (see Table 4). The Hungarian respondents

[47] When looking at other file sharing-techniques, we also found a statistically significant difference between Hungary and Global as well as within Hungary comparing the different techniques.

download more than the global population, with 74.9 per cent claiming to download more than once a week (combined with "every or almost every day"), as compared with the 63.9 per cent in the global survey (see Table 5).

Table 4. Upload frequency of p2p file-sharing.[48]

Hungary						
	Never	*More than once a month*	*More than once a week*	*Every or almost every day*	*No response*	*Total*
Count	359	101	32	35	41	527
Per cent	68.1	19.2	6.1	6.6		
Global						
	Never	*More than once a month*	*More than once a week*	*Every or almost every day*	*No response*	*Total*
Count	55,607	19,420	5,730	4,387	11,515	85,144
Per cent	65.3	22.8	6.7	5.2		

Table 5. Download frequency of p2p file-sharing.[49]

Hungary						
	Never	*More than once a month*	*More than once a week*	*Every or almost every day*	*No response*	*Total*
Count	30	105	183	219	31	537
Per cent	5.6	19.6	34.1	40.8		
Global						
	Never	*More than once a month*	*More than once a week*	*Every or almost every day*	*No response*	*Total*
Count	6,771	24,489	26,898	28,405	10,096	86,563
Per cent	7.8	28.3	31.1	32.8		

Anonymity and file-sharing

The Hungarian respondents use anonymity tools to a lesser extent than the global population. One way to measure an increased awareness of the need for protection against legal actions in the file-sharing community is to ask about the use of anonymity services such as those with encryption. Approximately 16.4 per cent of the global respondents use some variant of VPN or encrypted anonymity service in the global population, and a lower 11.7 per cent of the Hungarian respondents do the same (see Table 6). Particularly, the use of purchased versions of anonymity tools is very low in Hungary. Even though international researchers indicate that the cost-free nature of file-sharing is one, but not the leading, motive for file-sharers,[50] the unwillingness of Hungarians to pay for a digital disguise is a clear indicator that, for these respondents, the costless nature of file-sharing is a commanding feature of this phenomenon. Noteworthy is that more than half of the respondents (in Hungary as well as globally) claim that they want

[48] We did not find a statistically significant difference between Hungary and Global when looking at the upload frequency. However, there is a statistically significant difference between the response alternatives in Hungary.

[49] We found a statistically significant difference between Hungary and Global when analysing the download frequency. We also found a statistically significant difference between the different response alternatives in Hungary.

[50] Annelies Huygen et al., "Ups and Downs—Economic and Cultural Effects of File-Sharing on Music, Film and Games", available at: *http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorised_translation.pdf* [Accessed March 25, 2014].

to be more anonymous online (see Table 6). The willingness to subscribe to a VPN service will definitely be greater in Hungary as soon as one or more major torrent indexing sites is shut down by court decisions. However, there have been no such known decisions yet.

Table 6. VPN as means for anonymity.[51]

		Yes, free	Yes, paid	No but I would like to be anonymous online	No, I don't care about anonymity	I do not know	No response	Total
Hungary	Count	52	9	285	114	61	47	521
	Per cent	10.0	1.7	54.7	21.9	11.7		
Global	Count	9,271	4,420	45,479	15,306	8,772	13,411	83,248
	Per cent	11.1	5.3	54.6	18.4	10.5		

Analysis

Here, we should refer back to the specific language that Hungarians have as a starting point of the analysis. Since the amount of foreign language speakers is generally lower in Hungary than in many other EU countries, a high proportion of Hungarians depend on the translated versions of movies. Darknet sites have therefore become extremely popular in respect to this type of subject matter. The same applies to e-books. The research of Bodó and Lakatos showed the popularity of sites that offer niche or out-of-market contents to the users. In respect to music, Hungarians also use domestic darknet sites, TPB and other options equally, such as YouTube, free streaming services and webcasting of legal radio channels. Regarding software (especially computer games), Hungarian darknet and international opennet sites have equal popularity.

As shown in Table 2 above, music is still one of the most shared media types, whereas the share in Hungary is slightly higher than the global average. The slightly higher number of music file-sharers is partially due to the lack of multiple legal services. Although Deezer (but not Spotify and Rhapsody) is present on the Hungarian market and although several music stores offer content to download, the number of these services is still extremely low compared with that in Western Europe or the United States. In respect to audio-visual contents, the main rationale for a lower proportion of file-sharers in Hungary is clearly due to the language barrier of Hungarians. The average language knowledge of Hungarians is visibly weaker than in many other European countries. This gap in knowledge logically led to the strengthening of darknet sites, where users are equally interested in the most recent contents (mainly movies) and those works that are otherwise inaccessible on the legal market.[52] The need for the original language releases is, however, equally visible. Many users claim that the official translations of movies and TV shows are poor. An extensive "subtitle subculture" has been developed in Hungary, where the original audio-visual content and an illegal subtitle is available within hours after the premiere in the United States (or elsewhere). Members of this subculture clearly compete with each other to produce the highest quality of subtitles. The language barrier is evidenced in sport events as well: users still tend to choose the original broadcast of football matches rather than downloading recorded versions from torrent

[51] There is a statistically significant difference in the results between the use of VPN both within Hungary and when comparing Hungary to Global.

[52] Balázs Bodó and Zoltán Lakatos, "A filmek online feketepiaca és a moziforgalmazás—A tranzakciószintű elemzés lehetőségei (Kulturális alkotások magyarországi online kalózközönségének empirikus vizsgálata) 1. Rész" (2010) 20 *Szociológiai Szemle* 34–75; László Németh, "Az elsők és a Másnaposok—filmkritika a torrentes letöltésekben?" (2012) 13 *Jogelméleti Szemle* 1.

sites or watch live streams.[53] The higher proportion of computer "pirates" must be motivated by the extreme prices of software on the Hungarian market.

Even if the Hungarian respondents use anonymity tools to a lesser extent than do the global population, the popularity of Hungarian darknet sites might mean that such tools are of no use. The sharing is hard to trace anyway, given the structural feature of "secret clubs" for sharing: rather than sharing visibly in the open, users hide the link between the internet protocol address and their offline identity. The common practice among Hungarian file-sharers to register two or more darknet sites is another barrier to a growing popularity of VPN services. This means, in practice, users will have other accounts to use for sharing data in case any major indexing site is shut down either by a court order or voluntarily.

The outcome of "The Research Bay" project and the experience of Hungarian researchers indicate that the most important motive of file-sharers in Hungary is to evade paying for copyrighted contents. As long as the price/value of legal downloading services is high compared to the average income of Hungarians, there is no reason for them to abandon illegal activities. The other main motive for using P2P services is the limited amount of legally accessible repertoire. There have been several impressive improvements in the music market: several, new, lawful streaming and downloading services (including Deezer, iTunes and T-Home) have entered the market in the last few years. YouTube also introduced its Hungarian channel and entered into an agreement with the competent collective rights management association to pay royalty for each and every view of music videos by Hungarian artists. There is no similar development in the movie, software or e-book market.

None of these reasons has any relation to the emerging "pirate thinking" of file-sharers in Sweden or Germany, however. The Pirate Parties (*Piratpartiet* in Sweden and *Piratenpartei* in Germany) tend to collect votes (mainly from the young generations) through platform rhetoric based on Internet freedoms and anti-copyright arguments. The Hungarian Pirate Party expressed its willingness to run in the 2014 parliamentary elections. However, it lacked voter support to register its party list and consequently did not even participate in the elections. Arguments mentioned above do not activate young people in a country which has a political environment that is based on *homo hominem lupus est* ("man is a wolf to his fellow man"). Likewise, although collective rights management associations are—unfoundedly—criticised by Hungarian users for collecting royalties on behalf and in favour of right holders, it is not enough to motivate file-sharers to "fight against" the content industry and to cooperate under the umbrella of any political organisation.

Conclusion

In this study we set out to better understand digitally mediated copyright infringement in relation to the legal structures for criminalising online file-sharing of copyrighted content. The focus of this case study is Hungary. On the one hand, we conduct a legal investigation of trends in contemporary Hungarian copyright law. On the other hand, we conduct an empirical survey of actual file-sharing behaviour in Hungary. Furthermore, the selection of 568 Hungarian respondents is compared with a large scale, near global population of over 96,000 respondents, which allows us to determine the distinctive traits of the Hungarian file-sharing community. The findings indicate that, due to their particular language, Hungarians are more motivated to set up and run their own darknet sites where copyrighted contents—mainly movies and TV-shows—are available not only in original releases, but with Hungarian translations as well. The key motivation for file-sharers in Hungary seems to be the sites' cost-free nature. As long as the price of copyrighted contents is high compared to their average income, Hungarians will not be motivated to use

[53] Péter Mezei, László Németh, Gergely Békés and Péter Munkácsi, "Empirikus felmérés a 2010-es Labdarúgó Világbajnokság torrent és streaming oldalakon való követéséről", available at: *http://www.scribd.com/doc/75640904/Empirikus-felmeres-a-2010-es-labdarugo-vilagbajnoksag-streaming-es-torrentoldalakon-valo-koveteser%C5%91l* [Accessed March 27, 2014].

subscription models or purchase works in hard copies. File-sharing, therefore, seems to represent resistance to the pricing models of works rather than any expression of political opinion or ideology.