

Digital Copyright Law

*Exploring the Changing Interface Between Copyright and Regulation in the
Digital Environment*

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PhD

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July 2013

Word count: 98,020

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Abstract

This thesis seeks to address and clarify the changing interface between copyright law and other forms of regulation in the digital environment, in the context of recorded music. This is in order to explain the problems that rightsholders have had in tackling the issue of unauthorised copyright infringement facilitated by digital technologies. Copyright law is inextricably bound-up with technological developments, but the 'convergence' of content into a single digital form was perceived as problematic by rightsholders and was deemed to warrant increased regulation through law. However, the problem is that the reliance on copyright law in the digital environment ignores the other regulatory influences in operation. The use of copyright law in a 'preventative' sense also ignores the fact that other regulatory factors may positively encourage users to behave, and consume in ways that may not be directly governed by copyright. The issues digital technologies have posed for rightsholders in the music industry are not addressed, or even potentially addressable directly through law, because the regulatory picture is complex. The work of Lawrence Lessig, in relation to his regulatory 'modalities' can be applied in this context in order to identify and understand the other forms of regulation that exist in the digital environment, and which govern user behaviour and consumption. By combining his work with that of other scholars in the field, a bespoke 'Lessigan' framework is formulated to address and analyse those other regulatory factors in conjunction with actions undertaken by rightsholders to secure their copyrights in the digital age. The thesis will analyse the effect such reliance on copyright law may have on these regulatory influences, and the creative potential of the digital environment.

Contents

Acknowledgments	7
Chapter 1: Introduction	9
1. Research methodology	12
2. Context	16
2.1 Content industries	16
2.2 Rightsholders	21
2.3 Creativity	22
2.4 Originality and Fixation	24
2.5 Creative environment	25
2.6 Users	33
3. Research	34
Chapter 2: Essential background – copyright and new technologies	39
1. Philosophy	40
1.1 Utilitarianism	41
1.2 Natural rights	49
1.3 Personality	52
2. Horrible Histories	54
2.1 The Internet	58
2.2 MP3	62
2.3 Peer-to-peer	66
2.4 The ‘Holy Trinity’	70
3. Regulation	76
3.1 WIPO Treaties	78
4. Conclusion	81
Chapter 3: Modalities of Regulation	84
1. Introduction	85
2. The Law	88
3. Norms	95

3.1 Community	98
4. Markets	104
4.1 'Free'	105
4.2 Market concentration	110
5. Architecture	119
5.1 Digital Architecture	121
6. Conclusion	127
Chapter 4: Napster and peer-to-peer	131
1. Introduction	132
2. Napster	133
2.1 Infringement	134
2.2 Fair use	138
2.2.1 Sampling	143
2.2.2 Space-shifting	145
3. Grokster	148
3.1 Supreme Court decision	149
3.2 Inducement	150
4. The Pirate Bay	153
4.1 Principle offence	154
4.2 Complicity	154
5. 'If it looks like a duck...'	156
Chapter 5: Digital Rights Management	166
1. Introduction	167
2. Legal Background	168
3. Definition	171
4. Traditional fences, traditional problems	176
4.1 DRM and copyright exceptions	177
5. Remix?	187
6. Better business models	194
6.1 Streaming	195
6.2 The position of users	198

7. Conclusion	204
Chapter 6: ISP Liability	210
1. Introduction	211
2. Legal Principles	213
3. European Approaches	221
3.1 Belgium	221
3.2 Ireland	224
3.3 Spain	230
3.4 France	235
3.5 The ECJ	237
4. The UK	241
4.1 Judicial Review	243
4.2 Beyond 'graduated response'? Newzbin(z)	247
5. Conclusion	255
5.1 ISPs and the law	255
5.2 ISSPs and content	257
Chapter 7: Creative Commons	265
1. Introduction	266
2. The Creative Commons Movement	267
2.1 Operation	270
3. Incompatibility	274
3.1 Commons incompatibility	277
3.2 Copyright incompatibility	281
3.3 Content incompatibility	287
4. Intermediaries	291
4.1 Revenue	294
5. Conclusion	298
Chapter 8: Conclusion	305
1. Research Value	307
2. Research findings	308

3. The Law	317
4. And finally	321
Bibliography	322
Appendix	361
Published work	362

Acknowledgements

I would like to offer my sincerest thanks to my supervisory team of Professor Chris Wadlow of the University of East Anglia (UEA) and Dr. Daithi Mac Sithigh of the University of Edinburgh. Their constant support, encouragement, constructive criticism, and feedback has been of great help to me over the course of writing this thesis. Chris, your knowledge, ability to help me view my work from alternative perspectives through your challenging of my own viewpoints in our meetings, and constructive feedback has been invaluable to me in completing this thesis. Daithi, your thoughts and ideas, as well as your detailed feedback have been of great assistance, as well as your suggestions regarding source materials. Their supervision has, I believe, helped consolidate this piece of work and led to a much more coherent, solid, and robust body of research.

I would also like to express my gratitude to Mr. Robert Heverly, Assistant Professor of Law at Albany Law School. As my original supervisor when I began this thesis, his assistance at this early stage was a great help to me. I began to develop my specific interest in Digital Copyright Law under his tutelage during my LLM degree at UEA in 2005-2006, during which period he was also my academic advisor.

I would like to thank Professor Norma Dawson of Queen's University, Belfast for nurturing my interest in Intellectual Property Law during my undergraduate studies.

I do want to say a particular thanks to my friends and PhD colleagues who have supported me during this process. In particular: Chris, Ciaran, Martin, Russell and Sam; thank you for the laughs and the music.

Finally, I could not have reached this point in my life without the unwavering support of my Mum and Dad who have supported me constantly during my studies. For your patience, guidance, support, and love, I am truly grateful.

Chapter 1: Introduction

Introduction

This thesis seeks to address and clarify the changing interface between copyright law and other forms of regulation in the digital environment, in the context of recorded music. This is in order to explain the problems that rightsholders have had in tackling the issue of unauthorised copyright infringement facilitated by digital technologies. The problem is that the reliance on copyright law in the digital environment ignores the other regulatory influences in operation and this thesis will proceed to analyse the effect such reliance on copyright law may have on these regulatory influences, and the creative potential of the digital environment.

In its conception, copyright could be said to have evolved in line with technological developments, (from the printing press and beyond) leading to the copyright system that we may recognise today. Copyright law is inextricably bound-up with technological developments; perhaps never more-so than when users became universally connected on the Internet. This, and other related digital technologies, allowed the opportunity for wide-ranging and virtually cost-free sharing of content. Digital technology has facilitated the convergence of content into a single digital form available through a digital platform i.e. the Internet. In the past, there was a stable pattern of control over content, but the impact of digital technology has led to a loss of 'centrality' in terms of reproduction and distribution of content¹. This was perceived as problematic by rightsholders who have since utilised copyright law in order to secure their rights in the digital age.

However, digital technology has operated to the benefit of the user; as such, there appears to be a fundamental dichotomy between the interests of rightsholders and those of users. It has also created an environment where consumption and production of content may be strongly intertwined, such that the creative potential of digital content, digital technologies and the digital environment must be appreciated, The focus of this thesis will be on

¹ See chapter 2, p73.

the digital music market with as the music industry was largely the first victim of digital technology², and it is an area close to the author's own heart³.

The issues digital technologies have posed for rightsholders in the music industry are not addressed, or even potentially addressable directly through law, because the regulatory picture is much more complex. The use of copyright law in a 'preventative' sense ignores the fact that other regulatory factors may positively encourage users to act, behave, and consume in a certain way that is not directly governed by copyright. The regulatory environment is complex and may encourage as well as discourage behaviour. It is intrinsically linked with digital technology through the engendering of norms and the opening up of new markets through the opportunities afforded by such technology. However, the focus of copyright regulation was on the cause of its diminished effect i.e. digital technologies, thus ignoring other regulatory influences.

The author will seek to address and analyse these other regulatory factors in conjunction with actions undertaken by rightsholders to secure their copyrights in the digital age. It will determine an answer to the related questions of: what other regulatory factors does an emphasis on copyright regulation threaten to ignore? And, what effect might such a course of action have on regulation in the digital environment?

In order to do this, the following issues will need to be addressed:

- An appropriate purpose and justification of copyright in light of digital technologies;
- The issues that digital technology has presented for rightsholders and which they have attempted to regulate through copyright.

² See chapter 4, pp132-133. Napster was the first popular (and popularised) p2p file-sharing program and its capability was limited to music i.e. 'sound recordings'.

³ As a somewhat of a 'failed' musician and also a user who grew up with the technologies central to this thesis. As such, this piece of research marks the end of a journey that began in 2000 when he downloaded the Napster software.

- The complexity of the digital environment: the additional forms of regulation in the digital environment that influence user-behaviour.
- The impact that the emphasis on copyright regulation has had in relation to these other regulatory factors in the digital environment; and,
- The effect has this had on digital technology itself, the behaviour of users, and the market for digital content.

The thesis will undertake a systematic analysis of regulation in the digital environment. It will do this through developing a bespoke regulatory methodological framework specific to digital music content. In this context, it will then proceed to address the initiatives undertaken by rightsholders and creators to safeguard their rights online. Finally, the effect of copyright regulation on the digital environment will be addressed in relation to the other established regulatory influences.

1. Research methodology

This research will be qualitative in nature. Although it may be asserted that research in this field requires a quantitative element, the existing quantitative research at the time the thesis was originally undertaken⁴ demonstrated little and was at the time, unreliable⁵. Therefore, such research has not been chosen as a basis for argument in this instance, and the author believes that a qualitative approach to the topic and the surrounding literature will stand much more robustly. Whilst quantitative data has an important role to play in

⁴ The process of writing this thesis began in 2007.

⁵ 'Official' reports are largely limited to the extent because the evidential base overwhelmingly focuses on the negative impact of illegal downloading, see BOP Consulting, *'Changing Attitudes and Behaviour in the 'Non-Internet' Digital World and Their Implications For Intellectual Property'*, (2009, Strategic Advisory Board for Intellectual Property Policy), pp22-33. See also, Weatherall, K., Webster, E., and Bently, L., *'IP Enforcement in the UK and Beyond: A Literature Review'*, (2009, Strategic Advisory Board for Intellectual Property Policy), where the authors eloquently sum up the problems associated with such figures, p23: "...the reports themselves are suspect of being self-serving. There is, after all, no incentive for industry players or peak bodies to underestimate rates of infringement."

this field, the author asserts that there is also a need to understand the deeper policy issues at stake in order to complement, clarify and help explain any related quantitative findings. Although quantitative sources have been rejected as a methodological base for the research, it will on occasion, be necessary to refer to some sources of a quantitative nature for illustrative purposes where appropriate.

The choice of research topic has been motivated and informed by the author's own experiences⁶ and interests and this has been reflected in the choice of source materials considered which necessarily go beyond the purely legal; drawing on philosophical, sociological, historical and economic fields. Sources from these areas have an important and valuable role to play in exploring the issues addressed in this thesis. In particular, the use of technological sources is important as understanding the relevant technologies in question necessarily leads to a more thorough understanding of the legal issues that they have implicated⁷. In addition, considering wider and more sociological source material relating to the business practices of the music industry also provides a valuable context against which the actions by rightsholders and users can be examined and understood.

It is unnecessary to delve into the past history of copyright, however that does not negate the need for an historical approach to this research. Although the issues addressed in this thesis are relatively recent, that does not mean that sources used must also be as 'recent'. In fact, looking at older historical sources (when required) can help provide valuable background and context that is lacking in the current debate. This thesis has both a historical and a contemporary context; although many of the initiatives that will be chronicled have occurred over the last decade or so, they are nonetheless based on copyright law which has much deeper historical roots. It will be unnecessary to delve into these, instead focussing on copyright's more

⁶ For example, see chapter 3, p89 and p127.

⁷ See chapter 2, pp57-70.

recent history in the context of 'disruptive' digital technologies⁸. Although historical sources will be utilised, these correspond to the more recent history of copyright and digital technologies as providing worthwhile and necessary context to this research.

Case law forms an important basis for this research and has been used accordingly. Both a chronological and comparative approach to relevant case law have been utilised in this work. A chronological approach is applied in chapter 4 on peer-to-peer (p2p) technology⁹ in order to effectively trace and analyse the development of copyright doctrine in line with the technological evolution of p2p services. As a relatively settled body of case-law, it was felt that this approach would best reflect the developments in copyright law retrospectively, before attention turns to more contemporary issues. In chapter 6 on ISP liability¹⁰, a comparative approach to case law has been adopted in order to highlight the complexities and disparities between jurisdictions on this issue at a similar point in time. As there is little by way of coherent case law on this matter, it was felt that a comparative (as opposed to chronological) approach would be more effective here in order to highlight and contrast the variety of case law that has developed in parallel.

In the digital environment, there are many regulatory forces in operation and in competition beyond copyright law which require explanation in order to build a more nuanced portrayal of the digital environment as it affects the behaviour of users¹¹. Because the unauthorised infringement of digital copyright continues, it is necessary to outline and articulate those factors which may affect users who engage in such practice. This must necessarily reflect factors *appreciable to users* and from this, the limitations and effects of the initiatives on the part of rightsholders may be seen. As a result, a theoretical 'Lessigan' framework will be developed from the work of

⁸ See chapter 2, pp57-70.

⁹ Chapter 4, pp131-165.

¹⁰ Chapter 6, pp210-264.

¹¹ See chapter 3, pp84-130.

Lawrence Lessig in 'Code'¹² where he deals with regulation in the online environment. Through building a comprehensive regulatory picture by combining the work of Lessig with that of other scholars, the actions by rightsholders may then be analysed in relation to other competing regulatory factors. On the basis of this approach, this thesis will build a clear picture of regulatory factors in the digital environment and demonstrate how digital copyright law can and may influence these. .

The process of writing this thesis has also been marked by a number of governmental reviews and reports on Intellectual Property, notably: 'The Gowers Review of Intellectual Property' (2006)¹³ and the 'Digital Britain' report (2009)¹⁴. Most recently, there has been Hargreaves' report on 'Digital Opportunity: A review of Intellectual Property and Growth' (2011)¹⁵. However, the impact of these consultations has been minimal with little (if any) recommendations translated into legislation. This process seems to be characterised by further consultations on various proposals which are deemed necessary,¹⁶ such that their outcomes may inevitably be rendered obsolete by technological developments. As such, they are of limited substantive relevance to this work. Instead, the sources used in this work are much broader.

The themes of this thesis are international in nature; therefore, the UK, US and European jurisdictions have been selected for examination as required. It will involve critically analysing and comparing an array of scholarly literature and case law in these areas in order to draw a set of conclusions on each component issue. These will then be combined in the overall

¹² Lessig, L., 'Code (Version 2.0)', (2006, Basic Books).

¹³ Available from: <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>

¹⁴ Available from: <http://www.official-documents.gov.uk/document/cm76/7650/7650.pdf>

¹⁵ Department of Business, Innovation and Skills (BIS). Available from: <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

¹⁶ See generally, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth', (2011), available from: <http://www.ipo.gov.uk/types/hargreaves.htm>

conclusion at the end of this work. The thesis will proceed in a chronological fashion detailing and critiquing the strategies that have been employed by rightsholders to maintain their control over content in the digital environment. This will necessarily involve looking at technological sources in order to present a clear explanation of how the relevant digital technology was developed, and how it operates. In order to address the issues effectively and because they go beyond the purely legal, it will also be necessary to deal with historical sources as well as sources from technological, sociological, and law and economics fields.

The thesis can add to the current debate on digital copyright law by providing a reasoned critique of foregoing policy and practice in the area. It is hoped that the work and consolidated conclusions presented will stand as an authoritative body of research, which can form a basis from which to evaluate future policy and regulatory changes in this area.

2. Context

As this thesis seeks to address the issue regulation in the digital environment with regard to digital content (specifically recorded music) and also the creative potential that digital technology has created, it is first necessary to define the terms and issues in relation to 'content industries' and rightsholders. It is also important to highlight the creative potential of the digital environment, and within this, the role of users. As this research ultimately concerns copyright law itself, this can necessarily be applied to defining these terms.

2.1 'Content industries'

Creativity is central to the cultural/creative industries¹⁷ and it will therefore be necessary to define what such industries are in the context of this thesis. In 1998 in the UK, the term 'creative industries' was defined to mean:

¹⁷ See generally, Hesmondhalgh, D., *The Cultural Industries (Second Edition)*, (2007, SAGE Publications).

“Those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual Property.”¹⁸

Such industries were thus taken to include advertising, architecture, the art and antiques market, crafts, design, designer fashion, film and video, interactive leisure software, music, the performing arts, publishing, software and computer services, television and video¹⁹. This definition has become more streamlined to an extent (on the current Department for Culture, Media and Sport website) to constitute advertising, the arts market, design, fashion, film, the music industry and publishing²⁰. However, as a socio-political definition, this does not necessarily aid the task of defining the content industries within copyright, and thus the scope of this thesis.

Copyright is thus a dominant feature of such industries and is acknowledged to provide incentives to create and disseminate the expression of ideas²¹: *“A unifying feature of the cultural industries is that at their core creativity is protected by copyright.”²²* Therefore, an attempt to define such industries must begin with the content they produce, which is thus protected by copyright. As such, it will be necessary to examine this issue from a more substantive legal, and statutory base.

¹⁸ Department for Culture, Media and Sport, *‘Creative Industries Mapping Document 2001’*, p5. Available from:
http://webarchive.nationalarchives.gov.uk/http://www.culture.gov.uk/reference_library/publications/4632.aspx/

¹⁹ Department for Culture, Media and Sport, *‘Creative Industries Mapping Document 2001’*, p5. Available from:
http://webarchive.nationalarchives.gov.uk/http://www.culture.gov.uk/reference_library/publications/4632.aspx/

²⁰ See: http://www.culture.gov.uk/about_us/default.aspx

²¹ Towse, R., *‘Creativity, Incentive and reward: An Economic Analysis of Copyright and Culture in the Information Age’*, (2001, Elgar), pp9-10.

²² Towse, R., *‘Creativity, Incentive and reward: An Economic Analysis of Copyright and Culture in the Information Age’*, (2001, Elgar), p35.

Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works (1886)²³ provides protection for a broad range of works under this heading, stating that:

*“The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression...”*²⁴

‘Cinematographic’ works are protected (as coming under ‘authorial’ works²⁵), but there is no reference to sound recordings as such. This was to be articulated under articles 3 and 5 in the Rome Convention, 1961; the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation²⁶. Under article 1 of the Convention²⁷, such protection was not to prejudice the protection in literary and artistic works and therefore exists alongside it (as a form of

²³ Available from: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. Henceforth, the Berne Convention.

²⁴ Art.2(1), in full:

“The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.”

²⁵ Art.4(a), Berne Convention.

²⁶ Art.3(b): *“‘phonogram’ means any exclusively aural fixation of sounds of a performance or of other sounds;”* and, art.5, Protected Phonograms. Available from: http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html

²⁷ Art.1, Safeguard of Copyright Proper: *“Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.”*

‘neighbouring rights’); thus supporting an ‘industry’ for such works²⁸. There is a very broad list of works which are protected by copyright, but some of these may not necessarily seem inherently ‘creative’ (for example, ‘published editions’ in the UK²⁹); it is necessary to be more specific.

The author will make reference to the ‘content industries’ throughout the course of this thesis which will negate some of the categories stated above. However, there is justification for using the term ‘content’ within copyright law itself in terms of the requirement fixation as ‘embodying’ constituent components of a copyright work; such components can be said to be the *content* of the work. In particular, this will involve ‘sound recordings’.. In the UK, a ‘sound recording’ is defined as:

(a) a recording of sounds, from which the sounds may be reproduced,

or,

(b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced

*regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.*³⁰

Although the definition of this category of works necessarily limits the protection of it to the actual ‘sounds’ themselves, further requirements as to ‘substantiality’³¹ indicate that such works can be seen to have constituent elements.

²⁸ Spence, M., *‘Intellectual Property’*, (2007, Oxford University Press), p75.

²⁹ S.8, Copyright, Designs and Patents Act (CDPA), 1988. Henceforth, CDPA.

³⁰ S.5A, CDPA.

³¹ S.16(2)(a), CDPA: “References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it - (a) in relation to the work as a whole or any substantial part of it.”

For example, a 'film' (i.e. a cinematographic work) is defined as:

*(1) In this Part "film" means a recording on any medium from which a moving image may by any means be produced.*³²

Although the legislative definition of such a work does not embody any constituent elements, it has been held that a film can be a recording of a dramatic work and can thus be protected on this related level³³. Similar protection exists for such works in the United States where 'motion' pictures (and other audiovisual works), and sound recordings are protected under s.102(a)(6) and (7) in Title 17 of the US Code³⁴. This is also the case when it comes to sound recordings which can embody an underlying composition which, in many cases, can involve literary and musical copyrights³⁵. Therefore, because such works can be said to 'embody', or consist of, different elements, they *have* content i.e. contain content. As such, the industries which produce such works can thus be said to be the 'content industries'; primarily the music industry. As stated, the main focus of this

³² S.5B, CDPA.

³³ *Norowzian v. Arks* (No. 2) [2000] EMLR 67.

³⁴ Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code. Sound recordings are defined as: "*works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.*" Phonorecords are defined as: "*material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.*" Motion pictures are defined as: "*audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.*" Available from:

<http://www.copyright.gov/title17/92chap1.html#102>

³⁵ L Abramston and S Bate, '*To sample or not to sample?*', (1997) *Ent Lr* 8(6) 193-196, p193.

thesis will be on recorded music (in digital form), although reference may also be made to other forms of digital content where appropriate.

2.2 Rightsholders

'Sound recordings'³⁶ are regarded as 'entrepreneurial works' under copyright law; reflecting the fact that there is not always a single individual responsible for creating such a work³⁷. Although there may be creative individuals and performers who may be involved in the process of making a sound recording, there is a statutory provision that the owner of a sound recording is the 'producer'³⁸. In many cases, the record company will be the undertaking who made the arrangements for the recording to be made, and will therefore be the first owner of copyright in that particular piece of content³⁹. As such, it is the copyright *owner* who has the specified exclusive rights in relation to that content⁴⁰. Therefore, they may be regarded as 'rightsholders'.

Rightsholders operate with a necessary commercial element since they will have potentially invested a lot of money in the production and associated promotion of the content⁴¹: *"It can take up to a million pounds or more for a major record company to launch a new act. They will want to own the copyright outright."*⁴² In this respect, the existence and operation of such rightsholders is arguably necessary as they possess the resources required to 'launch' a new act⁴³ and thus facilitate entry into the profession.

Nonetheless, it is important to understand this 'commerciality' as a factor behind the actions of rightsholders which will be analysed in this body of research.

2.3. Creativity

³⁶ Protected under s.5, CDPA.

³⁷ See chapter 2, pp42-43.

³⁸ S.9(2), CDPA.

³⁹ Harrison, A., *'Music: The Business'*, (2008, Virgin Books), p60.

⁴⁰ S.2(1), CDPA.

⁴¹ Harrison, A., *'Music: The Business'*, (2008, Virgin Books), pp63-64.

⁴² *Ibid*, p60, and see chapter 7, p285.

⁴³ Although the 'quality' of such acts may be questionable, see also chapter 3, p111.

Creativity (in a broad sense) is arguably something which copyright aims to promote through encouraging and rewarding the production of creative works. It has been stated that: “... *the more we talk about creativity, the more it disappears from view.*”⁴⁴ However, ‘creativity’ is nonetheless important to this thesis:

*“Creativity is universally agreed to be a good that copyright law should seek to promote, yet copyright scholarship and policymaking have proceeded largely on the basis of assumptions about what it actually is.”*⁴⁵

Therefore, it must be ascertained what this term actually means in relation to recorded music, although: “*The very task of definition is suspect.*”⁴⁶ In contrast to defining the content industries, creativity has arguably much less of a legal dimension, and more of a sociological one. The etymological meaning of creativity is one involving physical activity or an activity that has physical and observable results⁴⁷. In this sense, it may be distinguishable from some form of mental process, products, antecedents, the capacity/ability to create, and originality⁴⁸. To an extent, the idea of creativity can be ascribed by reference to the ‘traditional’ process of creating itself, or perhaps more accurately, to the traditional and abstract notion of authorship⁴⁹:

“Each individual is immersed in his/her field of endeavour, and is constantly thinking of new literary works, new scientific advances, new

⁴⁴ Cohen, J.E., ‘*Creativity and Culture in Copyright Theory*’, (2007) 40 UC Davis L Rev 1151-1205, p1152.

⁴⁵ Ibid, p1151.

⁴⁶ Epstein, R., ‘*In Response: Defining Creativity*’, (1980) The Behaviour Analyst 3(2), 65, p65

⁴⁷ Götze, I.L., ‘*On Defining Creativity*’, (1981) The Journal of Aesthetics and Art Criticism 39(3), 297-301, p298.

⁴⁸ Ibid, p298.

⁴⁹ See chapter 2 pp49-54, and chapter 5, pp190-191.

*theatrical productions. These conscious enterprises are interrupted by the affairs of daily living. Distractions abound.*⁵⁰

This may provide an instructive starting point⁵¹, but whilst there are undoubtedly creative people in the world, and a commercial structure which supports such professionals, “... *to define creativity by reference to capacity or potential is to define it by what cannot be known until it is actualised.*”⁵² Although this suggests that some element of the ‘unknown’ may also be necessary in the definition of creative behaviour⁵³, it is perhaps necessary and more appropriate to consider the ‘actualisation’ itself, under copyright law.

2.4 Originality and Fixation

⁵⁰ Götze, I.L., ‘*On Defining Creativity*’, (1981) *The Journal of Aesthetics and Art Criticism* 39(3), 297-301, p299. This can undoubtedly arise from the individual themselves; as Robin Peckhold of the band Fleet Foxes has stated: “*Because if you’re creative, that doesn’t just stop ... and it doesn’t schedule in other people’s timing...*” As quoted in, ‘*How Fleet Foxes are handling high expectations second time around*’, (2011) *The Guardian*, available from: <http://www.guardian.co.uk/music/2011/jun/16/fleet-foxes-stardom>

⁵¹ Cohen, J.E., ‘*Creativity and Culture in Copyright Theory*’, (2007) 40 *UC Davis L Rev* 1151-1205, p1178.

⁵² Götze, I.L., ‘*On Defining Creativity*’, (1981) *The Journal of Aesthetics and Art Criticism* 39(3), 297-301, p298.

⁵³ “*I suggest that we are more likely to call behaviour ‘creative’ when its controlling variables are unknown (emphasis added).*” See, Epstein, R., ‘*In Response: Defining Creativity*’, (1980) *The Behaviour Analyst* 3(2), 65. Although hopefully not to the extent evidenced by former US Defence Secretary Donald Rumsfeld in 2002. See, ‘*Rum remark wins Rumsfeld an award*’, (2003) *BBC News*: “*There are known knowns; there are things we know we think we know. We also know that there are known unknowns.*” Available from: <http://news.bbc.co.uk/1/hi/3254852.stm>

“*If I knew what I was going to do next, I wouldn’t do it.*” Frank Gehry on the creative process’ as tweeted by John Dickerson (@jdickerson) on 04/07/11 (last accessed 27/07/11). John Dickerson is a political correspondent for *Slate* magazine and an analyst for *CBS News*. Frank Gehry is a world-famous architect.

Copyright law offers no standard for creativity, it merely defines the scope of protection and requires that works be 'original'⁵⁴. According to Dr. Laurence J. Peter: "*Originality is the fine art of remembering what you hear but forgetting where you heard it.*"⁵⁵ Legally, the British and European concept of originality is concerned with the relationship between the author/creator and the work, and operates as a threshold level for determining copyright protection. More specifically, the British idea of originality reflects the fact that works emanate from the author⁵⁶, but also that they must involve some exercise of the requisite skill, labour, or judgement in the production of the work⁵⁷. The US approach also requires originality, but is framed in a slightly different way and judicial reference to creativity here has stated: "*Original, as the term is used in copyright, means only that the work was independently created by the author ... and that it possess at least some minimal degree of creativity.*"⁵⁸ 'Musical works' (the content which a sound recording may embody) must be original⁵⁹; however, there is no requirement under UK copyright law that sound recordings have to be original per se; they are deemed to have copyright protection unless they are copies of pre-existing recordings⁶⁰. As such, creativity must be channelled into how the work is fixed or recorded. The aspect of 'originality' (a requirement for copyright subsistence⁶¹) is one which can be conflated with creativity; however, "... *originality as a quality cannot be assumed to be necessarily and invariably present in any and every productive process...*"⁶² Similarly, creativity, as a

⁵⁴ Towse, R., 'Creativity, Copyright and the Creative Industries Paradigm', (2010), KYKLOS 63(3) 461-478, p463.

⁵⁵ Bowden, P., 'Telling it Like It Is: A Book of Quotations', (2011, CreateSpace), p429.

⁵⁶ University of London Press v. University Tutorial Press [1916] 2 Ch 209.

⁵⁷ Ladbroke v. William Hill [1964] 1 All ER 465.

⁵⁸ Feist Publications, Inc. v. Rural Telephone Service Co., 499 US 340 (1991), at 345.

⁵⁹ S.1, CDPA,

⁶⁰ S.5A(2), CDPA.

⁶¹ S.1(1)(a), CDPA.

⁶² Götze, I.L., 'On Defining Creativity', (1981) The Journal of Aesthetics and Art Criticism 39(3), 297-301, p298.

requirement for copyright validity has been of little historic significance⁶³ and it may not necessarily seem apparent in every original copyrighted work⁶⁴. As such, creativity and originality must be seen as distinct issues. However, both may be said to relate to the content ultimately produced. As copyright can be said to protect (original) 'expressions' rather than 'ideas', the creative process can be said to centre around fixation in terms of originality; therefore, the primary focus should be on the 'fixed' product⁶⁵. In this case, the 'fixed' sound recording as embodying the creativity of those involved in its making – the artists, producer(s) and even remixers⁶⁶.

Nonetheless, it can be recognised that there is a distinction between creative output, i.e. a fixated copyright work, and creativity as an activity or process⁶⁷ situated in the digital environment.

2.5 Creative environment

The distinction between 'ideas' and 'expression' (fixation) has come to represent a theory of cultural transmission unique to copyright that resides primarily in the 'ideas' contained within the fixation⁶⁸. This is still true in the digital era: "*The digital world is closer to ideas than things...*"⁶⁹ As such, focussing solely on the creative product itself is too narrow (especially in the digital environment), but trying to provide a definition in terms of creative

⁶³ Clifford, R.D., '*Random Numbers, Chaos Theory, and Cogitation: a Search for the Minimal Creativity Standard in Copyright Law*', (2004) 82 Denv U L Rev 259-299, p260.

⁶⁴ For example, art.2(3) of Berne Convention protects 'translations' as 'original works' even though they may not appear inherently creative in themselves (however, the author does not, in any way, want to disparage the effort that goes into the production of such works)

⁶⁵ Clifford, R.D., '*Random Numbers, Chaos Theory, and Cogitation: a Search for the Minimal Creativity Standard in Copyright Law*', (2004) 82 Denv U L Rev 259-299, p271.

⁶⁶ Discussed further below, pp28-32. See also chapter 5, pp187-109.

⁶⁷ Towse, R., '*Creativity, Copyright and the Creative Industries Paradigm*', (2010), KYKLOS 63(3) 461-478, p474.

⁶⁸ Cohen, J.E., '*Creativity and Culture in Copyright Theory*', (2007) 40 UC Davis L Rev 1151-1205, p1171.

⁶⁹ Lessig, L., '*The Future of Ideas: The Fate of the Commons in a Connected World*', (2002, Vintage Books), p116.

behaviour may also not be desirable⁷⁰: “... *creation is an unpredictable activity.*”⁷¹ This raises issues in relation to the behaviour of artists and the environment in which they operate, which may be more important than trying to define creativity itself. Such an abstraction-based approach to content production marginalises questions of how people use culture and produce knowledge, and the conditions that foster and lead to creative experimentation⁷²; *this* is important to this thesis and necessarily involves digital technology⁷³ which plays a crucial role in the creative environment. Whilst there is a long way to go before effective incentives to individual creativity are understood⁷⁴, there *does* need to be some examination of the ‘methodology of production’:

*“Consequently, a combination of techniques is needed: a creative product is apparently required, but the creativity in the product must be the result of a human-based creative process.”*⁷⁵

To the author, such a ‘human-based’ process necessarily requires some appreciation of the environment in which the creator operates or ‘*situatedness*’⁷⁶. Once a sound recording has been realised through fixation, the digital environment in relation to a broader creative context (or culture) is of crucial importance; as Lessig puts it: “*There is a vast amount of creative work spread across the Internet. But as the law is currently crafted, this work*

⁷⁰ See Epstein, R., ‘*In Response: Defining Creativity*’, (1980) *The Behaviour Analyst* 3(2), 65.

⁷¹ Towse, R., ‘*Creativity, Copyright and the Creative Industries Paradigm*’, (2010), *KYKLOS* 63(3) 461-478, p474.

⁷² Cohen, J.E., ‘*Creativity and Culture in Copyright Theory*’, (2007) *40 UC Davis L Rev* 1151-1205, p1175.

⁷³ The specific technologies are discussed in detail in chapter 2, pp57-70.

⁷⁴ Towse, R., ‘*Creativity, Copyright and the Creative Industries Paradigm*’, (2010), *KYKLOS* 63(3) 461-478, p461.

⁷⁵ Clifford, R.D., ‘*Random Numbers, Chaos Theory, and Cogitation: a Search for the Minimal Creativity Standard in Copyright Law*’, (2004) *82 Denv U L Rev* 259-299, p272.

⁷⁶ Cohen, J.E., ‘*Creativity and Culture in Copyright Theory*’, (2007) *40 UC Davis L Rev* 1151-1205, p1178.

*is presumptively illegal.*⁷⁷ Furthermore, digital technology has substantially reduced the cost of digital creations and potentially enables greater participation by users in the creative process⁷⁸. Importantly, it has also facilitated the opportunity for collaborative creativity by removing restraints on time and space. Such collaborations may also be representative of the practice of creativity itself:

*“That’s how creativity happens. Artists collaborate over space and time ... Profound creativity requires maximum exposure to others’ works and liberal freedoms to reuse and reshape others’ material.”*⁷⁹

However, this process is still incomplete until the fixation of the work:

*“Creativity is the process or activity of deliberately concretizing insight.”*⁸⁰

Such ‘insight’ can be seen to result from the creative environment and through interacting with content itself, as well as other users⁸¹, such that no work is ever truly unique or ‘brand new’: *“Creators here and everywhere are always and at all times building on the creativity that went before and surrounds them now.”*⁸² And: *“Tomorrow’s makers will continue to use the popular culture they interact with as raw material for their own work.”*⁸³ As

⁷⁷ Lessig, L., *Free Culture: The Nature and Future of Creativity*, (2004, Penguin Books), p185.

⁷⁸ Lessig, L., *The Future of Ideas: The Fate of the Commons in a Connected World*, (2002, Vintage Books), pp8-9.

⁷⁹ Vaidhyanathan, S., *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*, (2001, New York University Press), p186.

⁸⁰ Götze, I.L., ‘On Defining Creativity’, (1981) *The Journal of Aesthetics and Art Criticism* 39(3), 297-301, p300.

⁸¹ See chapter 3, p91, pp103-103 and p117.

⁸² Lessig, L., *Free Culture: The Nature and Future of Creativity*, (2004, Penguin Books), p29. See also chapter 7, p276.

⁸³ Centre for Social Media, American University, *Recut, Reframe, Recycle: Quoting Copyrighted Material in User-generated Video*, (2008), p16. Available from: <http://www.centerforsocialmedia.org/fair-use/best-practices/online-video/recut-reframe-recycle>

Palfrey, J., Gasser, U., Simun, M., and Barnes, R.F., ‘Youth, Creativity, and Copyright in the Digital Age’, (2009) *Intl J Learning & Media* 1(2) 79-97, at p79: “New digital networked

such, the manipulation of pre-existing content figures centrally in processes of cultural participation (even in 'older' forms of creative practice)⁸⁴. This is as a result of an environment which facilitates the consumption of content and that helps to inspire and generate new works. According to Lessig: *"There is no art that doesn't reuse."*⁸⁵ Nothing is created *ex nihilo*⁸⁶, but this does not inevitably mean copyright infringement will result.

It is therefore, important to note that not every work in some way based on a pre-existing work (or works) will infringe. Making creative use of musical materials is a common and ancient feature in musical practice that pervades many, if not all, forms of music⁸⁷. During the production of a record, the producers (as well as the artists and songwriters) will often consider whether to reproduce or sample a third-party sound recording for inclusion their own record⁸⁸. This process, known as 'sampling', developed in the 1990s (although it is arguably nothing new⁸⁹) whereby an extract from one sound recording would feature in another⁹⁰. Although this is a commonplace

technologies enable users to participate in the consumption, distribution and creation of content in ways that are revolutionary for both culture and industry."

⁸⁴ Cohen, J.E., 'Creativity and Culture in Copyright Theory', (2007) 40 UC Davis L Rev 1151-1205, p1183. See also, Lessig, L., 'The Future of Ideas: The Fate of the Commons in a Connected World', (2002, Vintage Books), p8, where he states: *It makes no sense to say that that world was 'more creative' than ours."*

⁸⁵ Lessig, L., 'The Future of Ideas: The Fate of the Commons in a Connected World', (2002, Vintage Books), p250.

⁸⁶ Spence, M., 'Intellectual Property', (2007, Oxford University Press), p26.

⁸⁷ McDonagh, L.T., 'Is the creative use of musical works without a licence acceptable under copyright law?', (2012) IIC 43(4) 401-426, pp401-402. See also chapter 5, p187.

⁸⁸ Salmon, R., 'Sampling and sound recording reproduction – fair use or infringement?', (2010) Ent LR 21(5) 174-178, p174.

⁸⁹ See chapter 5, p188. See also, Salmon, R., 'Sampling and sound recording reproduction – fair use or infringement?', (2010) Ent LR 21(5) 174-178, p174.

⁹⁰ Abramston L., and Bate, S., 'To sample or not to sample?', (1997) Ent Lr 8(6) 193-196, p193.

practice⁹¹, artists rarely trouble themselves with the legal or commercial implications of such creative endeavours⁹².

From a legal perspective, there is ambiguity surrounding whether re-use of another work, through sampling, will necessarily constitute an infringement. Potential infringement may arise in a number of ways: infringement in the original sound recording (by reproducing it); breaching copyright in any underlying lyrics and/or music; and, constituting an unauthorised use of a performance of the original⁹³. It may also be possible that sampling may infringe the right to make an 'arrangement' of a musical work⁹⁴. Although 'sound recordings' are strictly defined in UK, the reproduction of a sound recording through sampling will *not* inevitably result in a finding of infringement:

*“Cases of potential copyright infringement must wrestle with two vague doctrines: the doctrine that a copyright is not infringed unless the whole or a substantial part of the work is copied ... and the doctrine that copyright does not protect ideas, but only their expression in a work...”*⁹⁵

Regardless of whether they can be considered as 'ideas' or 'expressions', stylistic elements alone are not subject to copyright protection and this dichotomy is of dubious value in relation to music⁹⁶: *“There are ... only so many rhythms in popular music and many drum and bass lines are in fact*

⁹¹ Particularly in relation to specific musical genres, for example Hip Hop. See chapter 5, p189.

⁹² Salmon, R., 'Sampling and sound recording reproduction – fair use or infringement?', (2010) Ent LR 21(5) 174-178, p174.

⁹³ Ibid, p174.

⁹⁴ S.21, CDPA.

⁹⁵ Spencer, M., and Endicott, T., 'Vagueness in the scope of copyright', (2005) LQR 121 657-680, p657.

⁹⁶ McDonagh, L.T., 'Is the creative use of musical works without a licence acceptable under copyright law?', (2012) IIC 43(4) 401-426, p409.

*themselves copies of previous works.*⁹⁷ Furthermore, the concepts of 'originality' and 'infringement' are also not static, and consequent difficulties can arise whether the creative re-use of another work constitutes infringement⁹⁸.

Assuming re-use has been undertaken without a necessary licence, infringement will only arise where what has been taken amounts to a 'substantial part' of the original recording⁹⁹; this in itself will always be a matter of degree¹⁰⁰, being more of a qualitative than quantitative assessment¹⁰¹. In the US, this exists in slightly different form as the doctrine of 'substantial similarity'¹⁰² as well as the need to bear in mind potential 'fair use' defences¹⁰³. The UK has developed an unwritten 'three second rule' whereby if three seconds or less of a work are samples, no action is customarily taken against the sampler¹⁰⁴. However: "*Whilst this may be the custom of the music industry, it is by no means clear that it is sound in law.*"¹⁰⁵ Nonetheless, legal precision in this area may not necessarily be desirable, and the apparent vagueness in the criteria for infringement may arguably be to the benefit of copyright¹⁰⁶. However this inevitably leads to ambiguity as to whether or not sampling may constitute an infringing re-use.

⁹⁷ Abramston L., and Bate, S., 'To sample or not to sample?', (1997) Ent Lr 8(6) 193-196, p194.

⁹⁸ McDonagh, L.T., 'Is the creative use of musical works without a licence acceptable under copyright law?', (2012) IIC 43(4) 401-426, p418

⁹⁹ S.16, CDPA.

¹⁰⁰ Abramston L., and Bate, S., 'To sample or not to sample?', (1997) Ent Lr 8(6) 193-196, p193

¹⁰¹ Spencer, M., and Endicott, T., 'Vagueness in the scope of copyright', (2005) LQR 121 657-680, p658.

¹⁰² Salmon, R., 'Sampling and sound recording reproduction – fair use or infringement?', (2010) Ent LR 21(5) 174-178, p174.

¹⁰³ See chapter 4, pp138-148 and chapter 5, pp180-181.

¹⁰⁴ Abramston L., and Bate, S., 'To sample or not to sample?', (1997) Ent Lr 8(6) 193-196p194

¹⁰⁵ Ibid, p194

¹⁰⁶ Spencer, M., and Endicott, T., 'Vagueness in the scope of copyright', (2005) LQR 121 657-680, p680.

Although ambiguity exists from a legal perspective, creators rely on a certain degree of flexibility in the way in which they utilise the work of others¹⁰⁷. Nonetheless, obtaining sample clearance has been a longstanding standard practice¹⁰⁸, indicating a normative understanding on the part of creators that permission is required before using or sampling from another work. From a creative and commercial point of view there appears to be an acceptance that sampling requires clearance from the relevant rightsholder so as to avoid potential infringement¹⁰⁹ and this has been a continuing practice:

“By the time courts explicitly stated that sampling requires copyright clearance, they were not imposing new rules on the music industry, but only confirming practices that the music business had been following...”¹¹⁰

Where permission to use a sample is granted, payment will usually be required¹¹¹:

“Those making records still need to clear and pay for samples ... As a business-to-business activity, sampling is a profitable enterprise for those companies sitting on valuable copyrights, and can give rise to valuable synergies for both the sampler and the sampled.”¹¹²

Although there is an understanding amongst musical creators that they are obliged to pay for copyright permission¹¹³, this is not always the case in those musical genres that pervasively utilise the sound recordings of

¹⁰⁷ Ganley, P., *‘Digital copyright and the new creative dynamics’*, (2004), IJL & IT 12(3) 282-332, p325. See also chapter 5, p188.

¹⁰⁸ Joo, T.W., *‘Remix Without Romance’*, (2011) 44(2) Conn L Rev 415-479, p428

¹⁰⁹ See chapter 5, pp191-192.

¹¹⁰ Joo, T.W., *‘Remix Without Romance’*, (2011) 44(2) Conn L Rev 415-479, p420.

¹¹¹ Salmon, R., *‘Sampling and sound recording reproduction – fair use or infringement?’*, (2010) Ent LR 21(5) 174-178, p176.

¹¹² Ibid, p175. This may also be helped by websites providing details of the samples in questions, for example, : www.whosampled.com .

¹¹³ Joo, T.W., *‘Remix Without Romance’*, (2011) 44(2) Conn L Rev 415-479, p429.

others¹¹⁴, and where the illegal nature of the ‘remixed’ content may even lie at the heart of its appeal¹¹⁵. However, normative ambiguities still exist here as evidenced by the controversy regarding the song ‘Harlem Shake’ by American producer Baauer¹¹⁶. Erupting from a viral dance craze, the song features two uncredited samples for which neither original artist (nor rightsholder) was approached for permission or received remuneration. In this instance, it appears that the success of the song was what raised this issue: *“Even if nothing is certain in the field of sampling law, the lesson ... is clear: thou can indeed steal as long as the people you’re stealing from don’t smell a payday.”*¹¹⁷

It may be said that the situation regarding infringing re-use is potentially unclear from a substantively legal perspective. This is less-so when it comes to music artists or creators where there appears to be a generally accepted norm (although not in all cases¹¹⁸) to seek permission and pay to avoid infringing use. Digital technology has created an environment where creativity can be collaborative and one where production and consumption of content are becoming strongly intertwined¹¹⁹, (although this is not to say they are now one and the same thing¹²⁰). In respect of this, it is also important to appreciate the role of the ‘user’.

¹¹⁴ See chapter 5, p189 and chapter 7, p290.

¹¹⁵ See chapter 5, p190.

¹¹⁶ See: http://www.whosampled.com/sample/view/196308/Baauer-Harlem%20Shake_Philadelphiainz-Philadelphiainz%20Moombahton%20Loops%20and%20Samples/ and, http://www.whosampled.com/sample/view/196299/Baauer-Harlem%20Shake_Plastic%20Little-Miller%20Time/

¹¹⁷ Lynskey, D., ‘*Harlem Shake: could it kill sampling?*’ (2013) The Guardian, available from: <http://www.guardian.co.uk/music/2013/mar/13/harlem-shake-internet-killing-sampling>

¹¹⁸ See chapter 5, p190 And chapter 7, p225.

¹¹⁹ Towse, R., ‘*Creativity, Copyright and the Creative Industries Paradigm*’, (2010), KYKLOS 63(3) 461-478, p462.

¹²⁰ “*Production is different from consumption.*” Lessig, L., ‘*The Future of Ideas: The Fate of the Commons in a Connected World*’, (2002, Vintage Books), p13.

2.6 Users

The process of creativity involves exposure to, and possibly the use of pre-existing content, it is a vital component in creative practice. Whilst the practice of creativity may have a commercial element (outlined above, in relation to rightsholders), the impact of digital technology has had an important effect regarding the opportunities for the creation of content on the part of individuals. A distinction may be drawn between 'passive' consumers of content, and those who may act or 'use' such content as the basis for producing new creative content. As such, one can differentiate between 'consumption' and 'production'. However, the relative parity between the costs of consumption and production facilitated by digital technology, at least at the individual user level, suggest that they now share a very close relationship: "*Digital technology has radically reduced the cost of digital creations.*"¹²¹ 'Digital' consumption is a necessary corollary of this, so that consumption and production of creative content can now take place through the same (digital) medium. It also suggests an element of choice (as to what content to 'consume') as well as a market in which to exercise those consumption choices¹²². It is also important to highlight the normative operation of users in this respect. Whilst artists may operate in line with a normative understanding that creative practice involving sampling requires conventions to be followed, users arguably operate in accordance with different normative beliefs in respect of their consumption choices¹²³ which (to an extent) may be engendered by digital technology itself as well as other factors¹²⁴. Therefore, in light of the ability of users of technology and content to (potentially) be producers, their normative behaviour must be further understood¹²⁵. As such, the terms 'users' will be adopted in this thesis as

¹²¹ Lessig, L., *The Future of Ideas: The Fate of the Commons in a Connected World*, (2002, Vintage Books), p8. See also chapter 7, pp267-268.

¹²² Which is an integral part of copyright's utilitarian foundation, see chapter 2, pp45-56. This is also discussed in chapter 3, pp104-119.

¹²³ See chapter 3, pp95-103.

¹²⁴ Ibid, pp95-126.

¹²⁵ This will involve utilising the work of Lessig and others to build a model of the factors, or 'modalities' which govern user-behaviour online. See chapter 3, pp84-130.

designating both 'active' users of content and technology, as well as more 'passive' consumptive users; since *both* require the 'use' of digital technology and of content.

3. Research

In order to address the aim of the thesis, the author will investigate and draw conclusions on the following:

- The purpose of copyright;
- Copyright and new technologies;
- Modalities of regulation;
- File-sharing of music;
- Digital Rights Management;
- Internet Service Provider liability; and,
- The role of Creative Commons.

It is crucial to understand the philosophical justification for copyright law as any modern view of copyright inevitably depends on which 'philosophy' of copyright is propounded. As will be shown in chapter two, the most appropriate foundation of copyright law, for the purposes of this thesis, is utilitarianism¹²⁶. It is within this context (and that of the content industries defined above) that this thesis will continue. The goal of copyright is to encourage content production, the fruits of which would benefit society as a whole under a utilitarian vision¹²⁷. This does have a necessary 'economic' component; focussing on benefits to the author/owner is important to encourage production¹²⁸. Chapter two¹²⁹ will also examine copyright's philosophical foundations in relation to the development of 'disruptive' digital technologies (specifically, the Internet, peer-to-peer and MP3¹³⁰) in order to

¹²⁶ See chapter 2, pp41-54.

¹²⁷ Ibid, pp41-49.

¹²⁸ Ibid, p42-44.

¹²⁹ Ibid, pp39-83.

¹³⁰ Ibid, pp57-70.

develop an understanding of the impact such technology has had on copyright law.

Despite copyright regulation operating in the digital environment, unauthorised reproduction has persisted, and it is important to articulate potential reasons for this. In chapter three¹³¹, a conceptual framework based on the work of Lawrence Lessig (and others) will be developed to shed light on the operation of users in Cyberspace; specifically which regulatory ‘forces’ may be in operation and which may guide users’ behaviour, beyond copyright law. This will involve: determining the normative understandings by which users operate; the role of the market in regulating the consumption practices of users; and, the impact digital technology has in these respects. The initiatives undertaken by rightsholders will then be examined in light of this framework.

Legal action against peer-to-peer (p2p) networks will be explored in chapter four¹³² in order to establish the status of p2p as a viable distribution mechanism for digital content. The development of ‘knowledge’ and ‘inducement’ aspects to unauthorised reproduction¹³³ will be examined in order to assess whether they are insurmountable obstacles for any p2p developer, such that this technology has now come to define how content will *not* be distributed online¹³⁴. The control of content through Digital Rights Management (DRM) (chapter five¹³⁵) has, in the past, raised potentially important tensions between the application of DRM and copyright exceptions, which permit the use of copyrighted content for certain purposes. However, current developments in streaming-based distribution may now be of greater importance. Despite previously being ‘attached’ to content, DRM may now be said to operate in conjunction with designated content distribution networks which are controlled by rightsholders; this trend will be examined in

¹³¹ See chapter 3, pp84-130.

¹³² See chapter 4, pp131-165.

¹³³ Ibid, pp133-138, and pp150-152.

¹³⁴ Ibid, p158.

¹³⁵ See chapter 5, pp166-209.

order to ascertain whether it may adversely affect users' content consumption choices.

Most recently, there have been important developments in the area of Internet Service Provider (ISP) liability (chapter six¹³⁶) with rightsholders and legislators suggesting that ISPs are liable for infringing copyrighted content which may be transmitted over their networks. Whilst laws providing ISPs with theoretical immunity still operate, there now exists a complex regulatory situation as a result of various cases relating to this strategy which will be outlined and critiqued. In addition to this, it is also necessary to highlight the changing nature of ISPs themselves through their evolution to *content* providers¹³⁷. As such, it must also be questioned whether the pre-existing immunities (contained in the European E-commerce Directive)¹³⁸, are really appropriate in the present day because ISPs' role as 'passive' suppliers of information and content is open to challenge.

As a response to the operation of copyright regulation in the digital environment, the Creative Commons (CC) movement warrants consideration in chapter seven¹³⁹ as a notable counter-point. The viability of the Creative Commons movement will be explored in order to assess if it can operate as a viable and successful enterprise, and if it can positively affect the consumption and production habits and choices of users. As it readily utilises copyright law, the interaction between CC and copyright will be examined in order to ascertain whether it can operate as a complement to, and achieve the same goals as, copyright¹⁴⁰. As well as this, there are also important practical issues which necessitate consideration¹⁴¹.

¹³⁶ See chapter 6, pp210-264.

¹³⁷ Ibid, 257-259.

¹³⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market

¹³⁹ See chapter 7, pp265-304.

¹⁴⁰ Ibid, pp281-287.

¹⁴¹ Ibid, pp291-298.

In conclusion, the constituent elements of this thesis will be synthesised in order to cement and consolidate its component arguments, thus addressing and clarifying the changing interface between copyright and regulation in relation to recorded music within the digital environment.

Chapter 2: Essential background - copyright and new technologies

Essential background - copyright and new technologies

1. Philosophy

Because copyright law has the potential to affect how we interact with creative works, it is important to assess its legitimacy; specifically, why copyright is desirable: *“Much ink has been spilled over the question of why we have copyright.”*¹ Also, because copyright (and Intellectual Property rights in general) confer a monopoly right, it has generally been thought to justify this privilege in light of its effect on society: *“Property institutions fundamentally shape a society.”*² It is essential to establish the purposes that an Intellectual Property (IP) system may serve³ and as such, it is crucial not only to understand copyright as a legal system, but also as a philosophical position, as the latter invariably influences the former. Technology has had a role to play in this instance as well; initially it was the introduction of the printing press⁴ that necessitated protection for publishers and distributors of content.

Mitchell compares copyright to a Faustian bargain struck between creators and society; creators enjoy a limited monopoly, but cannot stop others dealing fairly with their material until such times as copyright protection expires and the work *“... becomes part of the patrimony of all Mankind.”*⁵ In many ways, this is also representative of the theorem of copyright

¹ Mitchell, I.G. (QC), *‘Beyond Copyright or Interesting New Restrictions You Never Knew Existed’*, (2007), originally published as a guest Editorial in *Multimedia Und Recht*, available from: <http://www.murraystable.com/assets/files/articles/Beyond%20Copyright.pdf>. Not least in the context of doctoral theses, see Phillips, J., *“I Wouldn’t Want to Be starting from Here”, or Why isn’t Intellectual Property Research Better Than It is?’*, (2009) *The WIPO Journal* 1 138-146.

² Hettinger, E.C., *‘Justifying Intellectual Property’*, (1989), *Philosophy & Public Affairs* 18(1) 31-53, p31.

³ Spence, M., *‘Intellectual Property’*, (2007, Oxford University Press), p43.

⁴ See generally Litman J., *‘Digital Copyright’*, (2006, Prometheus Books).

⁵ Mitchell, I.G. (QC), *‘Beyond Copyright or Interesting New Restrictions You Never Knew Existed’*, (2007), originally published as a guest Editorial in *Multimedia Und Recht*, available from: <http://www.murraystable.com/assets/files/articles/Beyond%20Copyright.pdf>

justifications; that there is acceptance of the wider import to society resulting from the creation of creative goods (under utilitarian arguments), but at the same time, that an author is entitled to the fruits of their labour (under natural rights). It is crucial to understand such theories as each plays an on-going role in the expansion of copyright⁶; they will be explored further below. Following this, consideration will then turn to the specific digital technologies of the Internet, MP3 and peer-to-peer in order to examine their origins and effects on copyright regulation.

1.1 Utilitarianism

Economic theories of copyright focus on what is good for society (or the public, in general) by regarding the production of creative works as an important and valuable activity. As such, they emphasise the need to provide incentive(s) for the production, dissemination and efficient exploitation of creative works⁷. The general idea is that protection (or availability) of property rights at one level ensures that a market (and as a consequence, competition), develops at a higher level⁸. As defined by John Stuart Mill in 1863, utilitarianism holds that:

“... actions are right in proportion as they tend to promote happiness ... pleasure, and freedom from pain, are the only things desirable as ends; and that all desirable things (which are as numerous in the utilitarian as in any other scheme) are desirable either for the pleasure inherent in themselves, or as means to the promotion of pleasure and the prevention of pain.”⁹

This can provide a useful tool for deciding which characteristics of society are useful, and which are not¹⁰. As such, it may be assumed that creative

⁶ Spence, M., *‘Intellectual Property’*, (2007, Oxford University Press), p73.

⁷ Ibid, p63.

⁸ Spector, H.M., *‘An outline theory justifying intellectual and industrial property rights’*, (1989) EIPR 11(8) 270-273, p272.

⁹ Mill, J.S., *‘Utilitarianism’*, (1863), pp9-10.

¹⁰ Dibble, W., *‘Justifying intellectual property’*, (1994) Philosophy & Public Affairs 18(1) 31-52, p81.

practice and the fruits of it are beneficial to society and it thus follows that these should be both encouraged and protected. Under the principle of economic 'utility'¹¹, IP rights are justified on the basis of their contribution to social utility and welfare¹² (which may include intellectual virtues as interwoven with happiness¹³). Utilitarian theorists therefore endorse this approach in order to induce innovation and intellectual productivity¹⁴. As such, this theory is 'blind' to (changing) conceptions of authorship/ownership; it can overcome the difficulties in alternative theories by focussing more-so on the product (content) and its benefits, as opposed to the efforts of a particular creator in bringing that content to fruition.

Such a theory is primarily based on two arguments: that institutions are necessary in society; and, that people need to acquire, possess and use goods¹⁵. The utilitarian argument proceeds on the basis that people need to acquire, possess and use things in order to achieve some degree of happiness and fulfilment and in order to do this, 'security' is then needed in the form of property rights¹⁶. As a result, utilitarianism has an important 'user' element; which does not engender the same difficulties as an author-centric approach.

Involving 'incentive' arguments, the reasoning as applied to IP proceeds that such rights are necessary to maximise social utility by providing creators with rewards for creating their work. Without such security, creative works would not be produced at a socially optimum level. The 'reward' in question is copyright which provides a heavily guarded monopoly albeit for a limited

¹¹ Effectively the benefit a consumer gets from consuming one 'unit' of a product.

¹² Spinello, R.A., and Tavani, H.T., *'Intellectual Property Rights in a Networked World'*, (2005), p13.

¹³ Donner, W., *'Mill's Theory of Value'*, in West, H.R. (ed), *'The Blackwell Guide to Mill's Utilitarianism'*, (2006, Blackwell), chapter 4, pp117-139, p126.

¹⁴ Zemer, L., *'On the value of copyright theory'*, (2006) IPQ 1 55-71, p57.

¹⁵ Dibble, W., *'Justifying intellectual property'*, (1994) *Philosophy & Public Affairs* 18(1) 31-52, p81.

¹⁶ Spinello, R.A., and Tavani, H.T., *'Intellectual Property Rights in a Networked World'*, (2005, Information Science Publishing), p13.

time; this spurs innovation through recognition of exclusive rights, but is limited in scope and duration¹⁷. Therefore, parallels may be drawn between copyright and utilitarian theory in terms of a set of rules which would together maximise utility if adopted and followed by the majority of members of a society¹⁸.

The taxonomy of utilitarian arguments proceeds thus¹⁹:

- Society should adopt legal regimes or institutions if, and only if, they are expected to yield the optimisation of aggregate social welfare;
- A legal regime that provides authors with limited rights or control over their productions is expected to act as a string incentive for the creation of new works;
- Stimulating the production and creation of intellectual works contributes to the maximisation of aggregate welfare; and,
- A legal regime for protecting IP should therefore be adopted.

This reflects the fact that utilitarian arguments are consequentialist²⁰; holding that the 'good' is whatever yields the greatest net utility²¹ and the 'right' thing to do is the course of action which best promotes this goal²²:

*"All action is for the sake of some end, and rules of action, it seems natural to suppose, must take their whole character and colour from the end to which they are subservient."*²³

¹⁷ Zemer, L., 'On the value of copyright theory', (2006) IPQ 1 55-71, p57.

¹⁸ Fuchs, A.E., 'Mill's Theory of Morally Correct Action', in West, H.R. (ed), 'The Blackwell Guide to Mill's Utilitarianism', (2006, Blackwell), chapter 5, pp139-159, p145.

¹⁹ Spinello, R.A., and Tavani, H.T., 'Intellectual Property Rights in a Networked World', (2005, Information Science Publishing), p14.

²⁰ West, H.R., 'Mill's "Proof" of the Principle of Utility', in West, H.R. (ed), 'The Blackwell Guide to Mill's Utilitarianism', (2006, Blackwell), chapter 7, pp174-184, p174.

²¹ Zemer, L., 'On the value of copyright theory', (2006) IPQ 1 55-71, p58.

²² Sumner, L.W., 'Mill's Theory of Rights', in West, H.R. (ed), 'The Blackwell Guide to Mill's Utilitarianism', (2006, Blackwell), chapter 8, pp184-199, p187.

²³ Mill, J.S., 'Utilitarianism', (1863), p2.

In the present context, the action in question is to encourage the production of creative works from which society will benefit, and as a result of which, the author would receive copyright protection. Mill favoured a utilitarian justification for the social policy of establishing and enforcing a set of rights²⁴ and in this instance, the 'rights' necessary to achieve the goal of enhancing social welfare may be seen as copyright law²⁵.

The incentive structure in utilitarian arguments focuses on promoting the general societal good, not on placing the individual creator as an independent entity entitled to a right²⁶. As a result, such considerations usurp the place of the creator (as a creative individual) and treat the process of 'creativity' as an economic one, which owing to many other circumstances, it may not necessarily be²⁷. Furthermore, there is a presumption on the part of the creator that without such protection, they would not always be able to recover their initial investments and would thus refrain from creativity in the future²⁸. This highlights the questionable nature of creativity as a purely economic concern on the part of the creator (as opposed to, say, a social one)²⁹; 'happiness' or utility may be inherent in creative activity itself.³⁰ Nonetheless, viewing copyright in this way, it simply serves the pragmatic purpose of inducing creative activity³¹ and utilitarian copyright theory thus has a certain necessary 'economic' component. It should also, in theory,

²⁴ Sumner, L.W., 'Mill's Theory of Rights', in West, H.R. (ed), 'The Blackwell Guide to Mill's Utilitarianism', (2006, Blackwell), chapter 8, pp184-199, p191.

²⁵ "Mill's claim ... is that a society will do a better job of protecting the well-being of its citizens – a better job of maximising general happiness – if it puts in place a system of conventional rights, including legal rights, which are backed by sanctions." Ibid, p192.

²⁶ Zemer, L., 'On the value of copyright theory', (2006) IPQ 1 55-71, p60.

²⁷ See chapter 1, pp21-23.

²⁸ Spinello, R.A., and Tavani, H.T., 'Intellectual Property Rights in a Networked World', (2005, Information Science Publishing), p14.

²⁹ Investment in this sense, does not necessarily refer to financial investment. It can include any 'cost' to the author, such as time etc.

³⁰ See Mill, J.S., 'Utilitarianism', (1863), p10.

³¹ Spinello, R.A., and Tavani, H.T., 'Intellectual Property Rights in a Networked World', (2005, Information Science Publishing), p14.

diminish the potentially distorting effect which may result from undue focus on 'romantic' notions of authorship when conceptualising copyright law. Utilitarian arguments therefore have merit because it focuses on the users of content³². It premises subjective conduct on the part of the individual (which in this instance can be paralleled with the user) in order to maximise their individual well-being³³.

Utilitarian economic arguments presuppose the existence of a market³⁴ in order to determine the appropriate measures for the production and consumption of intellectual goods. This operates through legal commodification and protection of content through copyright which should further its utilitarian goal. This is a necessary aspect of utilitarianism, and is understandable; because copyright operates as a (limited) monopoly, there needs to be a market over which to exercise that monopoly and which would allow users to consume creative content³⁵. However, the existence of such a market necessarily implies that there is a producer and/or owner (rightsholder) in the economic sense, as distinct from a creator: *"Economists regard copyright as a trade off between the positive effects of the incentives provided to creators and commercialisers of content."*³⁶ This perhaps suggests that commercial producers work to different motivations than individual creators, who may not be as concerned with economic reward.

In order for content to be produced at a socially optimum level, there must be some mechanism in place that affords protection to content to stop it being

³² Hettinger, E.C., *'Justifying Intellectual Property'*, (1989) *Philosophy & Public Affairs* 18(1) 31-52, p48.

³³ "... it is a maximising doctrine because it requires us to always act so as to bring about as much well-being as possible." Shaw, W.H., *'Contemporary Criticisms of Utilitarianism: a Response'*, in West, H.R. (ed), *'The Blackwell Guide to Mill's Utilitarianism'*, (2006, Blackwell), chapter 9, pp201-217, p203, See also chapter 3, p87.

³⁴ Discussed further in chapter 3, pp104-119.

³⁵ *Ibid*, p104, and chapter 5, p161, p166 and p174.

³⁶ *'Digital Opportunity: A Review of Intellectual Property and Growth'*, (2011) An Independent Report by Professor Ian Hargreaves, p27, para 4.9. Available from: <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

reproduced and redistributed without limit. Copyright is this mechanism and it is argued that without it, creative works would only be produced at a very low level (or not at all) if the work was not protected in some way. The 'market' is central to this approach and any matters relating to copyright are to be addressed from the position of how well the market is to function. Presciently, this theory arguably applies strongest in the digital age. Whilst considerable 'investment' is still needed to produce (and 'commercialise') creative works³⁷, the ease with which they can be copied and distributed in digital form means that rightsholders point to such economic incentive arguments as a basis for their strengthening copyright protection. This is because the inherent problem of 'free-riding' is much more common with digital reproduction and distribution making it much easier to get a 'free ride' i.e. copying another's work without cost, and to the copier's benefit. Obviously this creates economic 'benefit' to the infringer, but represents an economic 'cost' to the creator and could threaten to cost society as a whole if they then create less because of this problem. As a result, perhaps the most important effect of adhering to this philosophy is the business practices of the creative industries it has engendered³⁸; it is the basis on which many of the arguments and courses of action that follow in this thesis have been predicated under utilitarian incentive arguments.

The problem is that such an approach then leads to the assumption that damaging the financial interests of rightsholders will *per se* discourage new content production³⁹. Any position that attempts to judge the effectiveness of copyright based on a hypothetical market can be no more than a theoretical exercise as market value is a socially created phenomenon; dependent on the activity (or lack thereof) of other producers⁴⁰. The variables that exist in the real world cannot adequately be incorporated into any cost/benefit

³⁷ See chapter 1, pp21-22

³⁸ See chapter 3, p111 and p113.

³⁹ Griffin, J.G.H., '*An historical solution to the legal challenges posed by peer-to-peer file sharing and digital rights management technology*', (2010) Comms L 15(3) 78-86, p79.

⁴⁰ Hettinger, E.C., '*Justifying Intellectual Property*', (1989) Philosophy & Public Affairs 18(1) 31-52, p38.

approach; costs and benefits cannot be gauged solely from looking at the market⁴¹. Any theory centred on the market can have the obvious advantage of being to the benefit of the industry whose market it essentially is⁴². Benefits can also have potentially disparate effects which may not even become apparent until much later⁴³. Similarly, the issue of 'cost(s)' have the semantic and cultural nature of always being perceived as being against the rightsholder. This is not always the case; they can be equally detrimental to the user or creator, whilst any corresponding benefit to the rightsholder may not be proportionate. Furthermore, the goal of content producers is to maximise the production and dissemination of content under a utilitarian model. No commercial private enterprise exists purely, or with the goal to benefit others⁴⁴, although benefits to society resulting from efficiency and competition etc. may accrue. They exist to maximise their own profit; a goal in which they can utilise copyright, but which can hardly be said to be a justification for it. Therefore, when content is created with one particular 'market' in mind, such an economic incentive argument fails as a reason to extend copyright in that work into another market⁴⁵. It could be argued that market commerciality may still provide benefits to society through enhancing productivity, but it is maintaining such *commerciality* that has driven the need for copyright protection, as opposed to enhancing the benefits from creative endeavour. This is perhaps as a result of the 'disruption' digital technology has played in the perceived enforceability of copyright law (discussed further below).

Nonetheless, a utilitarian justification of copyright law avoids an author-centric approach which may be evident in other justifications (discussed below). Early copyright law did reflect the prominence of the author; for example, the Berne Convention for the Protection of Literary and Artistic

⁴¹ See also chapter 5, pp186-187.

⁴² See chapter 1, p12.

⁴³ See chapter 3, pp105-110.

⁴⁴ For example, see the discussion of 'rightsholders' in chapter 1, p21-22.

⁴⁵ Sterk, S.E., '*Rhetoric and Reality in Copyright Law*', (1996) Michigan Law Review 94(5) 1197-1249, p1215. This is discussed more fully in chapter 4, p134, pp150-151, and p155.

Works (1886)⁴⁶ clearly reflected the role of the author: *“The works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.”*⁴⁷ However, copyright has evolved to accommodate technological developments in content fixation; namely ‘phonograms’ as enshrined in the Rome Convention (1961)⁴⁸ and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971)⁴⁹. These reflect the changes in content production whereby a work may be created by more than one individual (producers and performers), or by a commercial enterprise: *“producer of phonograms’ means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds.”*⁵⁰ ‘Producers’, or ‘undertakings’, were accordingly granted the right to authorise the reproduction of their phonograms⁵¹.

Such an approach is also reflective of the environment in which copyright operates⁵². This is especially important in the digital world where new forms of user empowerment afforded by technology have both increased the number of ‘would-be’ creators as well as providing them with the equipment to harness their efforts (individually, or in conjunction with others)⁵³. Perhaps in some cases, the technology may exert more labour than the creator; for example, many music production software programmes are available which perform tasks that would otherwise be very time-consuming or impossible in

⁴⁶ Available from: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

⁴⁷ Art.2(7), The Berne Convention.

⁴⁸ The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome 1961 (the Rome Convention), available from: http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html#P71_3633

⁴⁹ Available from: http://www.wipo.int/treaties/en/ip/phonograms/trtdocs_wo023.html

⁵⁰ Art.3(c), The Rome Convention, and art.1(c), The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.

⁵¹ Art.10, The Rome Convention.

⁵² See chapter 1, pp26-27, and chapter 3, pp88-94.

⁵³ See chapter 1, p33.

analogue format such as drum programming⁵⁴, auto tuning⁵⁵, and ProTools⁵⁶ audio production.

Nonetheless, other philosophies are available and warrant consideration, but these do not necessarily form a more appropriate basis for the purposes of this thesis.

1.2 Natural rights

The theory that someone (in this case, an author or creator) is entitled to control what they create is intuitive⁵⁷. John Locke was one of the first philosophers to comprehensively articulate justifications for property in *'The Second Treatise of Government'*, (1690)⁵⁸ which has arguably become one of the most influential property theories in legal philosophy. Despite writing at a time where copyright (and IP more generally) was not recognised, and having in mind physical property, it is logical that this theory may apply to copyright as well⁵⁹. It has arguably been utilised because the rhetorical force of his opinions translates effectively in the digital environment, and for its emphasis on personal autonomy⁶⁰. It is also not necessarily far-fetched; despite concerning 'physical' (as opposed to Intellectual) property⁶¹, his

⁵⁴ Such as Ableton Live 'Suite 8' music production software which features a 'beats made easy' tool, see: <http://www.ableton.com/suite-8>

⁵⁵ As stated on the company's website in relation to one of their products in this field: "... a bundle of three essential vocal processing plug-ins designed to make it incredibly easy to create polished, great-sounding vocal tracks." Available from: <http://www.antarestech.com/products/>

⁵⁶ According to the company's website: "Whether you're in a professional facility, home studio, or on the road, nothing gives you the quality, speed, capability, ease, and inspiration to create like Pro Tools..." Available from: <http://www.avid.com/US/products/family/pro-tools>

⁵⁷ Spence, M., *'Intellectual Property'*, (2007, Oxford University Press), p46.

⁵⁸ Available from: <http://www.constitution.org/jl/2ndtreat.htm>

⁵⁹ Spinello, R.A., and Tavani, H.T., *'Intellectual Property Rights in a Networked World'*, (2005, Information Science Publishing), p8.

⁶⁰ Sterk, S.E., *'Rhetoric and Reality in Copyright Law'*, (1996), 94 Mich L Rev 1197-1249, p1236.

⁶¹ Spector, H.M., *'An outline theory justifying intellectual and industrial property rights'*, (1989), EIPR 11(8) 270-273, p271.

notion of 'body' (that everyone has a property right in their own body) clearly also includes the mind. Furthermore, the 'mixing' of labour with an (unowned) object must extend to intellectual labour; no labour is purely physical.

Locke's account of a property right derives from the rights in the product of labour from prior rights in one's body⁶². Simply put, he states that individuals are naturally entitled to the fruits of their own labour, and it is this 'labour' which establishes the boundaries of one's property; a person 'owns' their own body and hence they own what it 'does'⁶³. Through applying labour to a resource, it can thus be said that the individual has appropriated that object; provided that labour is useful and purposeful so as to engender a property right.

A person's labour and its product(s) are inseparable and thus ownership of one can only be secured by owning the other; 'property' is the product that joins a person's body and their labour.⁶⁴. His argument for a property right is based on the assumption that labour is an inherently unpleasant and onerous process, and as such, it is only undertaken in order to reap the benefits from it, i.e. a property right. As a result, it would be unjust not to let people accrue the benefits they take such pains to procure⁶⁵; labour merits this reward through the granting of a property right. This recognises the author's intellectual labour, or the contribution their creation makes to society in general. Following this to its natural conclusion, appropriation of such property by others is unjustifiable as it inflicts harm on the 'labourer'.

In the case of creative property, an author obviously 'owns' their own labour and therefore should also be entitled to own the products resulting from the

⁶² Hettinger, E.C., '*Justifying Intellectual Property*', (1989), *Philosophy & Public Affairs* 18(1) 31-53, p37.

⁶³ *Ibid*, p37.

⁶⁴ *Ibid*, p37.

⁶⁵ Spinello, R.A., and Tavani, H.T., '*Intellectual Property Rights in a Networked World*', (2005, Information Science Publishing), p7.

exercise of such labour. As such, the Lockean inspired argument is that one's intellectual labour should entitle one to have a natural property right in the finished product of that labour. Because a property right should be awarded *per se*, it is seen as a 'natural right'.

Such a 'labour'-orientated theory is, however, problematic in a number of respects. A major one, the author posits (in relation to the topic of this thesis), are the differences between labour as applied to physical property and as applied to intellectual property. Related to this is a further issue of the appropriateness of labour for designating the boundaries of intellectual protection. There is no direct correlation between labour (as the author's effort, investment, contribution etc.) and the intangible outcome of such labour: *"Justified on this basis, primarily on this basis, the intellectual regimes would be in danger of protecting the perspiring, but not the inspired, creator."*⁶⁶ Although labour can be seen to be a physically intensive enterprise, this is not necessarily the case with creative 'labour'⁶⁷. As such, there is a fallacy between 'is' and 'ought'; the fact that someone is responsible for creating a piece of content, does not on its own justify a resultant claim to control its use⁶⁸ (or even, its distribution)⁶⁹. The motivations behind intellectual/creative labour are much more diffuse and hard to measure⁷⁰. In addition, the labour needed and invested may not necessarily be seen as onerous by the author; it is simply what 'drives' the author as a result of their (in some cases at least) innately creative nature⁷¹.

1.3 Personality

⁶⁶ Spence, M., *'Intellectual Property'*, (2007, Oxford University Press), p48.

⁶⁷ Obviously, depending on the work in question, the 'physicality' of labour can be an issue, but this is not what concerns us here.

⁶⁸ Spence, M., *'Intellectual Property'*, (2007, Oxford University Press), p47.

⁶⁹ See chapter 8, p312 and pp315-316.

⁷⁰ See chapter 1, pp22-23.

⁷¹ To be sure, this is not always necessarily the case. As authorship becomes a more commercial activity, there are extra pressures that may make the labour more unpleasant. For example, deadlines, fulfilling contract obligations etc.

Another normative justification involves the intimate relationship between property and 'personhood' as a vehicle of self-expression. This position assumes that in order to become a 'person', one needs some control over the resources in one's environment in order to bring about such a manifestation. This is premised on the assumption that the allocation of entitlements and control over resources in the external environment (in the form of property) is necessary for the development of 'personality'⁷². Again, providing adequate justifications for property suggests it could be extended to confer IP rights as well⁷³. It offers protection for the creator by affording them some control over the intangibles in which they have invested⁷⁴ them self.

Within this scheme, property rights are more important for their existence than for their substantive content⁷⁵. However, one wonders whether this is really appropriate anymore owing to the importance of copyright's substantive provisions (and related provisions) which have arguably grown over the past number of decades (and which are discussed later in this chapter). The core insight of 'personality theory' is the notion of 'embodied will'; the relationships we have with the objects that give our lives meaning and value. Because property is about relations and not objects, the precise contours of legal doctrine are unimportant so long as property law enables people to engage in relations⁷⁶. It is these relationships that justify ownership⁷⁷. As applied to IP then, humans freely externalise their will in intellectual products, thus creating property to which they are entitled to, as a

⁷² Zemer, L., 'On the value of copyright theory', (2006) IPQ 1 55-71, pp63-64.

⁷³ Spinello, R.A., and Tavani, H.T., 'Intellectual Property Rights in a Networked World', (2005, Information Science Publishing), pp10-11.

⁷⁴ Spence, M., 'Intellectual Property', (2007, Oxford University Press), p50.

⁷⁵ Sterk, S.E., 'Rhetoric and Reality in Copyright Law', (1996) Michigan Law Review 94(5) 1197-1249, p1241.

⁷⁶ Ibid, p1241.

⁷⁷ Spinello, R.A., and Tavani, H.T., 'Intellectual Property Rights in a Networked World', (2005, Information Science Publishing), p12.

manifestation of their personality⁷⁸. This theory does, however, avoid the pitfalls of Locke's arguments by side-stepping the requirement of labour and imbues copyright theory with a more personable view that the very nature of an author is vested in the works he creates. It is also perhaps more amenable to the nature of creativity and associated 'romantic'⁷⁹ notions of 'authorship', but these are misconceived according to the author, at least in today's world.

It may be concluded that neither 'labour' nor 'personhood' are necessarily appropriate means through which to value intellectual creations; their applicability is not clear where the total value of an intellectual creation is not attributable to the labour, or personality, of one individual⁸⁰. The 'romantic nature' of authorship stemmed from the 18th century when authorship became associated with the exalting of individual effort⁸¹ in the literary Romantic Movement where the author was seen as a central and important figure⁸². However, it is by no means clear whether the total value of an intellectual creation is entirely attributable to the labour of one individual, as reflected in the development of copyright to encompass new content production techniques and formats (discussed above). Content may now be considered as social products that have been influenced by, and/or, are based on pre-existing creations in which the original author may not necessarily have invested as high a degree of labour: '*... intellectual products*

⁷⁸ Spinello, R.A., and Tavani, H.T., *'Intellectual Property Rights in a Networked World'*, (2005, Information Science Publishing), p12.

⁷⁹ See Burkitt, D., *'Copyrighting culture – the history and cultural specificity of the Western model of copyright'*, (2001) IPQ 2 146-186, p153. See also chapter 1, p22, and chapter 5, p181.

⁸⁰ See chapter 1, pp22-23. And chapter 5, pp190-191.

⁸¹ Diakopoulos, N., Luther, K., Medynsky, Y., and Essa, I., *'The Evolution of Authorship in a Remix Society'*, (2007) ACM, p133, available from: <http://hcc.kurtluther.com/pdf/p133-diakopoulos.pdf>

⁸² Jaszi, P., *'Toward a Theory of Copyright: The Metamorphoses of 'Authorship''*, (1991) Duke Law Journal 2 455-502, p455. See also chapter 5, pp190-191.

are fundamentally social products.⁸³ In addition, the value of the product may be perceived differently by different users, and also, because of the fact that equal labour does not always generate equal results⁸⁴. As such, the author's labour can be very subjective in its apprehension. In addition, what is meant by 'personality' (or 'embodiment') is unclear, and the associated claim that content will always be a vehicle of 'self-actualisation' will not always be the case⁸⁵. This reflects the changing nature of authorship such that a more accurate perception is that authorship is less about the 'person' and more about the 'task' of making choices and selections of content elements as determined by the medium of expression⁸⁶. The 'tasks' may more aptly be described as acts of 'creation' as opposed to 'authorship' and it is in this sense that the term 'creators' will be used in the remainder of this thesis.

2. Horrible histories⁸⁷

It is unnecessary for the current purposes to delve back into copyright's ancient and pre-digital history⁸⁸. Therefore, the 'history' of more recent 'disruption' to copyright law resulting from the development of digital technologies will be examined. This will invariably necessitate looking at the specific technologies in question.

⁸³ Hettinger, E.C., *Justifying Intellectual Property*, (1989) *Philosophy & Public Affairs* 18(1) 31-52, p38.

⁸⁴ Sterk, S.E., *Rhetoric and Reality in Copyright Law*, (1996) *Michigan Law Review* 94(5) 1197-1249, p1236.

⁸⁵ Spence, M., *Intellectual Property*, (2007, Oxford University Press), p51.

⁸⁶ Diakopoulos, N., Luther, K., Medynsky, Y., and Essa, I., *The Evolution of Authorship in a Remix Society*, (2007) ACM, p133, available from: <http://hcc.kurtluther.com/pdf/p133-diakopoulos.pdf>

⁸⁷ "Splattered with blood, battles, gore and glory..." Figuratively speaking, see: <http://www.bbc.co.uk/cbbc/shows/horrible-histories>

⁸⁸ See generally, Philips, J., "*I Wouldn't Want to Be Starting from Here*", or *Why Isn't Intellectual Property Research Better Than It Is?*, (2009) *The WIPO Journal* 1 138-146, on why/whether this topic is even necessary in research pieces in the field of copyright law.

Copyright (and IP as a legal system) has essentially resulted in commodification of creative content. By relating the essential intangible nature of IP to the idea of physical property, through the requirement of 'fixation'⁸⁹, copyright allowed for the ascribing of commodified 'value' to creative endeavour. It is this which represents a fundamental conflict of values: "... on the one hand, a common patrimony which should be free, and, on the other hand, private property which can be immensely valuable to its owner."⁹⁰ It may be of financial value to the rightsholder as distinct from its creator or even the user; for whom value may be more disparate in nature⁹¹. The cause of this commoditisation was not initially the law itself, but the advent of technology in the form of Guttenberg's printing press⁹², which necessitated protection for publishers and distributors of content. Copyright has continued to be linked to technology: "*Copyright is inherently technological, since the things it addresses ... are inherently technological.*"⁹³ To some degree, copyright may be said to be technology-specific; at least it was technology that engendered the initial copyright system⁹⁴ and has been a driving force behind many of the developments in copyright law since⁹⁵. However, the problem of copying, or to put it in copyright terms, 'reproduction', is not a phenomenon that is purely restricted to the digital

⁸⁹ For example, s.3(2) of the Copyright Designs and Patents Act (CDPA), 1988.

⁹⁰ Mitchell, I.G. (QC), 'Case law report - Back to the Future: *Hinton v Donaldson, Wood and Meurose (Court of Session, Scotland, 28th July, 1773)*', (2009) International Free and Open Source Software Law Review 1(2) 111-122, p112.

⁹¹ See the discussion of 'value' in chapter 3, pp106-110.

⁹² Mitchell, I.G. (QC), 'Case law report - Back to the Future: *Hinton v Donaldson, Wood and Meurose (Court of Session, Scotland, 28th July, 1773)*', (2009) International Free and Open Source Software Law Review 1(2) 111-122, pp113-114.

⁹³ Doctorow, C., '*Content*', (2008, Tachyon Publications), p15.

⁹⁴ Bettig, R.V., '*Copyrighting Culture: The Political Economy of Intellectual Property*', (2006, Westview Press), pp15-28.

⁹⁵ See below, pp76-78. See also Mills, M.L., '*New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change*', (1989) 65 Chi-Kent L Rev 307-339, p310.

age⁹⁶; whenever a new technology has challenged copyright, copyright law has been changed⁹⁷. In the past, there was a certain stable pattern of control over physically-orientated content⁹⁸, but by the late 1980s, there was talk of a ‘crisis’⁹⁹ due to improving content reproduction technology. The potential problem from increased audio reproduction technologies started to become apparent along with the growth of private copying¹⁰⁰ at this time. According to one scholar writing at the time, private copying “... represents a monstrous misappropriation of the copyrights of composers, authors, producers and performers.”¹⁰¹ Technological and political change has produced an expansion in intellectual and service-based economies (compared to traditional industrial and product-based economies) and has altered the landscape considerably¹⁰². The continuing commentary of the early to mid-nineties reflected a dispute over whether copyright could adjust to the rapid pace of technological change¹⁰³. It was initially thought that as an environment free from boundaries, the online world, or ‘Cyberspace’¹⁰⁴,

⁹⁶ “The interaction between law and technology is not a new subject.” Guadamuz, A.G., ‘Attack of the Killer Acronyms: The Future of Information Technology Law’, (2004), 18 International Review of Law Computers & Technology 3 411-424, p412.

⁹⁷ Doctorow, C., ‘Content’, (2008, Tachyon Publications), p20.

⁹⁸ Benkler, Y., ‘Net Regulation: Taking Stock and Looking Forward’, (2000) 71 Colorado Law Rev 1203-1262, p1258.

⁹⁹ As described by Davies, G., ‘A technical solution to private copying: the case of the digital audio tape’, (1987) EIPR 9(6) 155-158, p158.

¹⁰⁰ Ibid, p155. See also, Fleischmann, E., ‘The Impact of Digital Technology on Copyright Law’, (1988) 70 Journal of the Patent & Trademark Office Society 5-26.

¹⁰¹ Davies, G., ‘A technical solution to private copying: the case of the digital audio tape’, (1987) EIPR 9(6) 155-158, p155.

¹⁰² Webber, D., ‘Intellectual property: challenges for the future’, (2005) EIPR 27(10) 345-348, p346.

¹⁰³ Litman, J., ‘Copyright Legislation and Technological Change’, (1989), 68 Or L Rev 275-361, p276.

¹⁰⁴ The term ‘cyberspace’ was coined by the author William Gibson in his 1982 work ‘Burning Chrome’ and popularised by the same author in 1984 in his novel entitled, ‘Neuromancer’. Here, it was defined as: “A consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts. ... A graphic representation of data abstracted from banks of every computer in

would be free from any regulation or control¹⁰⁵. Moreover, any attempts at control would necessarily fail:

“The realisation that there exists a virtual space or cyberspace and the discussion of what goes on inside that space excited a number of people from the very beginning.”¹⁰⁶

However, in the early nineties, there appeared to be a growing acceptance that the digitisation of content must, and would, lead to changes in the law¹⁰⁷. Until then at least, the problem was seen as more theoretical than something which was of real concern¹⁰⁸. Nonetheless:

“At this stage, it is easier to point to the challenges and difficulties rather than the solutions; but it is already clear that digitisation and new technologies must lead, eventually, to changes in the law and in commercial practice.”¹⁰⁹

These perceived challenges arose as a result of three distinct, but interrelated technological developments: the Internet; peer-to-peer (p2p) networks; and, the MP3 content format. The development and subsequent effects of these technologies will now be examined as they have had an important effect on copyright regulation.

2.1 The Internet

the human system. Unthinkable complexity. Lines of light ranged in the nonspace of the mind, clusters and constellations of data. Like city lights, receding.”

¹⁰⁵ See generally, Barlow, J.P., ‘*The Economy of Ideas*’, (1994) *Wired* 2.03, available from: <http://www.wired.com/wired/archive/2.03/economy.ideas.html>

¹⁰⁶ Cannataci, J.A. and Mifsud-Bonnici, J.P., ‘*Weaving the Mesh: Finding Remedies in Cyberspace*’, (2007) *International Review of Law, Computers & Technology* 21(1) 59-78, p59.

¹⁰⁷ Higham, N., ‘*The new challenges of digitisation*’, (1993) *EIPR* 15(10) 355-359, p355.

¹⁰⁸ Litman, J., ‘*Digital Copyright*’, (2006, Prometheus Books), p30.

¹⁰⁹ Higham, N., ‘*The new challenges of digitisation*’, (1993) *EIPR* 15(10) 355-359, p359.

One of the biggest problems posed to copyright has been the development of the Internet; perhaps the most revolutionary social development since the printing press¹¹⁰ and is now part of the "... *the fabric of our lives.*"¹¹¹

Therefore it will be relevant to look at its development to see how it has become such a major tool of copyright infringement.

There are largely two competing schools of thought on the development of the Internet as we now recognise it. The first was as a product born of Cold War paranoia and the need to have in place an effective communications network that could withstand nuclear attack. Work was begun by engineers at the Research and Development (RAND) Institute in America to develop a decentralised communications system that had no single centre of vulnerability. This involved the principle of 'distributed communications' which evolved into 'packet switching' whereby messages would be broken up into smaller chunks (packets) and sent across the network to their destination where they would be reassembled. The technique had the advantage over a regular communications network because if one communication node is damaged, the information would automatically route around it. The first incarnation of the Internet was known as 'ARPANET' due to the involvement of the Advanced Research Projects Agency (ARPA) and was the main source of what ultimately became the Internet.

Despite being designed as a resource-sharing tool, its use was redefined through the advent of electronic mail (email). This new application came to dominate the network and was highly significant; it engaged and encouraged people in a new form of human communication. In this sense, (and representing the second school of thought on the matter), the Internet is largely a result of work undertaken in academia; largely as a result of work carried out by the US National Science Foundation who built a high speed

¹¹⁰ Litman, J., *Digital Copyright*, (2006, Prometheus Books), p12.

¹¹¹ Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society*, (2001, Oxford University Press), p1.

'backbone' network to connect regional and local area networks to the defence network¹¹².

In 1980, ARPANET was converted to the TCP/IP protocol (Transfer Control Protocol/Internet Protocol). This is a universal protocol that is still used today, and allowed ARPANET to accommodate other networks that had been developed without difficulty. The TCP/IP protocol effectively makes the network transparent to users and allows the Internet to function as a single united network¹¹³. In 1989, ARPANET officially became known as the 'Internet', having evolved into a fully fledged operational network consisting of over 100,000 connected computers. At first, the Internet was primarily a tool for the research and academic communities and was limited to transmitting only text; any commercial activities were banned by respective Acceptable Use Policies (AUPs): *"Significantly, it was from these beginnings that the culture of the Internet – which has important implications for intellectual property protection – gained its character."*¹¹⁴

The development of the World Wide Web (WWW) and the accompanying release of Web 'browsers' provided the graphical interface which have made the Internet so appealing for ordinary individuals to navigate and use; transforming the Internet into a, *"... ubiquitous and multi-functional medium."*¹¹⁵ Before this, the Internet's interface was much more difficult to use as it was primarily command driven. The advent of the Web made it much more user friendly by substituting commands for icons and mouse

¹¹² Jones, L., 'An artist's entry into cyberspace: intellectual property on the Internet', (2000) EIPR 22(2) 79-92, p80. See also 'Forty years of the internet: how the world changed forever', (2009) The Guardian, citing the involvement of academics from UCLA and Stanford and the Interface Message Processor in 1969 (IMP), available from:

<http://www.guardian.co.uk/technology/2009/oct/23/internet-40-history-arpamet>

¹¹³ Spinello, R.A., 'Regulating Cyberspace: The Policies and Technologies of Control', (2002, Quorum Books), p29.

¹¹⁴ Jones, L., 'An artist's entry into cyberspace: intellectual property on the Internet', (2000) EIPR 22(2) 79-92, p81. See also chapter 3, pp119-126.

¹¹⁵ Jones, L., 'An artist's entry into cyberspace: intellectual property on the Internet', (2000) EIPR 22(2) 79-92, p81.

clicks. It was created by an engineer named Tim Berners-Lee at the European Organisation for Nuclear Research (CERN). Indeed, it is arguable that the events surrounding the development of the WWW were key in both inducing and supporting the libertarian Internet ideal as Berners-Lee provided the coding for free online. With the Web came the Hypertext Markup Language (HTML) standard. This supports a system whereby tags are attached to a word or phrase that links it to another document located somewhere else on the Internet. Importantly, from a copyright perspective, documents created by HTML can be in multimedia format and can include pictures, sound and video. Along with this, the development of Internet browsers enabled users to effortlessly explore the Web¹¹⁶ and content on it.

The distinctive feature of the Internet was its 'openness' in terms of its technological architecture¹¹⁷ and its social/institutional organisation¹¹⁸. More specifically, it is useful to highlight some of the features of the Internet that make it such a potentially problematic area (for law¹¹⁹) to govern¹²⁰. The Internet is 'asynchronous'. With communication over the Internet, there is no need for coordination between the sender and recipient of a message; through email, such communications can be stored and accessed at anytime by the user. It also permits 'many-to-many' communications; operating on a global scale, it allows communication between users around the world. It also allows for interaction between users by providing them with the ability to 'speak back' instantly. As a distributed network, the Internet relies on packet-based technology and a naturally decentralised environment. It gives

¹¹⁶ "They are highly versatile navigational tools that enable users to access, display and print documents; they also give users the ability to link to other documents at any location on the Web." Spinello, R.A., *Regulating Cyberspace: The Policies and Technologies of Control*, (2002, Quorum Books), p28.

¹¹⁷ See chapter 3, pp119-126.

¹¹⁸ Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society*, (2001, Oxford University Press), p26.

¹¹⁹ This is also discussed more fully in chapter 3, in terms of other regulatory 'influences', pp85-130.

¹²⁰ Spinello, R.A., *Regulating Cyberspace: The Policies and Technologies of Control*, (2002, Quorum Books), p30.

users more control over the flow of information and makes it more difficult to locate and obstruct information¹²¹. Additionally, the Internet is highly scalable and allows for a much more flexible expansion or contraction of users. Arguably, its most important feature (and its main strength¹²²) is its open architecture. It is designed to maximise interoperability, and to be independent of software programmes, hardware platforms and other technologies. This:

“... is its greatest virtue since it encourages greater participation in the form of new technologies and applications that help shape and reshape the entire network.”¹²³

Another important design aspect of the Internet is the principle of ‘end-to-end’ which has been latent in its design for many years¹²⁴. This architectural principle was envisaged in the early eighties and described the process whereby:

“The function in question can completely and correctly be implemented only with the knowledge and help of the application standing at the endpoints of the communication system.”¹²⁵

This premises that the ‘intelligence’ in a network should be located at its ‘ends’; where users put information and applications onto the network¹²⁶.

¹²¹ “The Net interprets censorship as damage and routes around it.” Boyle, J., ‘Foucault in Cyberspace: Surveillance, Sovereignty and Hard-Wired Censors’, p1, available from: <http://www.law.duke.edu/boylesite/foucault.htm>

¹²² Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society*, (2001, Oxford University Press), p27.

¹²³ Spinello, R.A., *Regulating Cyberspace: The Policies and Technologies of Control*, (2002, Quorum Books), p30.

¹²⁴ Lemley, M.A., and Lessig, L., *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, (2001) 48 UCLA L Rev 925-972, p930.

¹²⁵ Salzter, J.H., Reed, D.P., and Clark, D., *End-To-End Arguments in System Design*, (1984) ACM Transactions on Computer Systems 2(4) 277-288, p278.

Central to this is the place of users, whom history has shown to be the key producers of technology, through adaption and transformation in accordance with their values¹²⁷. This trend therefore allows for “... *the creation of information spaces that are at the core of the online community phenomenon.*”¹²⁸ However, due to the technological restraints of the physical infrastructure, it was not yet feasible to utilise it to send large files; this was greatly facilitated by the developments of new content compression formats, notably MP3 technology.

2.2 MP3

MP3 is a content compression format and has had a crucial impact on (musical) content:

*“MP3 has revolutionised the way we listen to music, introducing music to the Internet and giving rise to issues that were never previously associated with music.”*¹²⁹

MP3 stands for ‘Moving¹³⁰ Picture Experts Group-Layer 3’, and was developed by engineers at the Fraunhofer Gesellschaft in Germany in 1987¹³¹. However, its origins can be traced as far back as the late 1970s (and much like the development of the Internet) to the world of academia;

¹²⁶ Lemley, M.A., and Lessig, L., ‘*The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*’, (2001) 48 UCLA L Rev 925-972, p930.

¹²⁷ Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society*, (2001, Oxford University Press), p28.

¹²⁸ Brousseau, E., and Curien, N. (eds), ‘*Internet and Digital Economics: Principles, Methods and Applications*’, (2007, Cambridge), p36. See also chapter 3, pp98-103, and p121.

¹²⁹ Brindley, S., ‘*The rise of MP3 and how it stands today*’, (2003), available from: <http://mms.ecs.soton.ac.uk/2007/papers/58.pdf>

¹³⁰ There appears to be some difference of opinion between whether their title is ‘Motion’, or, ‘Moving’. At any rate, both terms effectively mean the same thing, but the author will adhere to the term ‘Moving’ as stated on the organisation’s website:

http://mpeg.chiariglione.org/who_we_are.htm

¹³¹ Alexander, P.J., ‘*Peer-to-Peer File-sharing: The Case of the Music Recording Industry*’, (2002) Review of Industrial Organisation 20(2) 151-161, p153.

namely a group of PhD students at the University of Erlangen-Nurnberg¹³². The idea of compressing an audio file to produce a high-quality, low bitrate audio format was first pursued there by Professor Dieter Seitzer¹³³ as a tangent of a research project designed to improve the speed and efficiency of speech telephony; it was decided that it would be 'interesting' to try and send audio files over the network as well¹³⁴.

It was a doctoral student, Karlheinz Brandenburg, under Seitzer's supervision, who exploited the hearing properties of the human ear to develop basic principles for audio coding¹³⁵. To make the format work, the researchers¹³⁶ had to engage in an already-existing area of science, known as 'psychoacoustics'. Psychoacoustics describes the relationship between the sound field presented to the listener, and what they actually hear¹³⁷, i.e. it relates to how the brain perceives sound, and more importantly in this context, what sound(s) the brain leaves out¹³⁸. According to Knopper, "For a

¹³² Knopper, S., *'Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age'* (2009, Simon & Schuster), pp115-116.

¹³³ Brindley, S., *'The rise of MP3 and how it stands today'*, (2003), available from: <http://mms.ecs.soton.ac.uk/2007/papers/58.pdf>. It was apparently even denied a patent, such was the advanced nature of the technology, see Knopper, S., *'Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age'* (2009, Simon & Schuster), p116.

¹³⁴ Knopper, S., *'Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age'* (2009, Simon & Schuster), p116.

¹³⁵ Brindley, S., *'The rise of MP3 and how it stands today'*, (2003), available from: <http://mms.ecs.soton.ac.uk/2007/papers/58.pdf>

¹³⁶ From the university as well as Bell Laboratories and Philips Electronics, as well as several others, see Knopper, S., *'Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age'* (2009, Simon & Schuster), p116.

¹³⁷ Gerzon, M., *'Surround-sound psychoacoustics'*, (1974) available from: http://www.audiosignal.co.uk/Resources/Surround_sound_psychoacoustics_A4.pdf
"The MP3 codec is a form of perceptual coding and as such, is based on the principles of psychoacoustics." Brindley, S., *'The rise of MP3 and how it stands today'*, (2003), available from: <http://mms.ecs.soton.ac.uk/2007/papers/58.pdf>

¹³⁸ Knopper, S., *'Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age'* (2009, Simon & Schuster), p116.

*long time, nobody had any idea that this obscure German research project would turn into anything more than an obscure German research project.*¹³⁹

The University formed a partnership with the Fraunhofer Institute for Integrated Circuits (with European funding) in 1987 when Brandenburg finished constructing an audio algorithm. Fraunhofer saw this as exhibiting many characteristics of an audio codec they required, and which they subsequently developed resulting in 'ASPEC' (Adaptive Spectral Perceptual Entropy Coding)¹⁴⁰. By 1991, they had successfully completed their work resulting in a suitable compression format and an open standard player for computers, and submitted it to the 'International Organisation for Standardisation'¹⁴¹. It was assigned specifically to the Moving Picture Experts Group (MPEG) which deals in the standards for digital multimedia formats¹⁴². In total, fourteen different groups submitted their technologies to the MPEG¹⁴³ which perhaps reflects just how many different actors there were in MP3's development. MPEG merged four of the proposals and created the standard known initially as 'ISO-MPEG-1 Audio Layer 3'¹⁴⁴, hence 'MPEG 3' and most commonly, 'MP3':

"The aim of the MP3 algorithm is to make the compression as efficient as possible and to reconstruct the audio data so that it sounds identical to

¹³⁹ Knopper, S., *'Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age'* (2009, Simon & Schuster), p117.

¹⁴⁰ Brindley, S., *'The rise of MP3 and how it stands today'*, (2003), available from: <http://mms.ecs.soton.ac.uk/2007/papers/58.pdf>

¹⁴¹ Based in Geneva, Switzerland, see: <http://www.iso.org/iso/home.html>

¹⁴² *"The Moving Picture Experts Group (MPEG) is a working group of ISO/IEC in charge of the development of international standards for compression, decompression, processing, and coded representation of moving pictures, audio and their combination."* See: http://mpeg.chiariglione.org/who_we_are.htm

¹⁴³ Knopper, S., *'Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age'* (2009, Simon & Schuster), p118. It is at this point where differing claims to ownership ensue; many companies earned patents from their participation in the process.

¹⁴⁴ *Ibid*, p118.

*the original audio data after compression, at least to the human ear anyway.*¹⁴⁵

It is an audio compression format that reduces files up to 1/20 of their original size with minimal loss of quality. This is achieved in two ways¹⁴⁶:

- Passing the resulting samples through high and low band filters; and,
- Discrete sampling of continuous sound waves.

The first stage involves feeding the input through known as a 'Hybrid Filterbank' where the input signal is split into its constituent frequency bands and sub-bands. Conducted in parallel, a psychoacoustic model is used which removes the acoustically 'relevant' parts of the audio (the frequencies which can be heard by the human ear – between 20Hz and 20kHz). This determines which frequencies need to be rendered most accurately, or dropped completely.

Following this, the analogue amplitude values are digitally converted and then encoded using Huffman encoding¹⁴⁷ (a description of which is available on the website/blog of the namesake's nephew, Ken Huffman¹⁴⁸). Roughly speaking, this is a compression method (or algorithm) based on the frequency of occurrence of a data item and using a short sequence of 'bits' for representing common items (for example, a repetitive hi-hat drum rhythm in a song¹⁴⁹). This process involves allocating the data to the available number of 'bits' which make up the 'bitrate' which is then an indicator of

¹⁴⁵ Brindley, S., *'The rise of MP3 and how it stands today'*, (2003), available from: <http://mms.ecs.soton.ac.uk/2007/papers/58.pdf>

¹⁴⁶ Alexander, P.J., *'Peer-to-Peer File-sharing: The Case of the Music Recording Industry'*, (2002) Review of Industrial Organisation 20(2) 151-161, p153.

¹⁴⁷ Brindley, S., *'The rise of MP3 and how it stands today'*, (2003), available from: <http://mms.ecs.soton.ac.uk/2007/papers/58.pdf>

¹⁴⁸ See: <http://www.huffmancoding.com/my-family/my-uncle/huffman-algorithm>

¹⁴⁹ For example (or perhaps the antithesis), see the great Buddy Rich in action: <http://www.youtube.com/watch?v=hOAI-g-9L-c>

audio quality; the higher the bitrate, the better the quality: “*My uncle’s algorithm makes the world a smaller place.*”¹⁵⁰

In 1993, the description of the MP3 format was published¹⁵¹ and work soon began on developing playback engines. Since 1998, companies have been buying rights to develop and sell codecs and decoders for the format with the most popular player being ‘Winamp’ which was released in 1999¹⁵² and was free. Much like the Web, the development of user-empowering technology was made freely accessible to them, with profound impact¹⁵³. However, the broader technological (and ultimately legal) impact in this instance was to arise in conjunction with the operation of peer-to-peer networks and the Internet as a distribution mechanism for MP3 files.

2.3 Peer-to-peer

P2p is a form of distributed computer architecture designed for the sharing of computer resources by direct exchange rather than requiring intermediary support¹⁵⁴ and which aims to aggregate large numbers of computers which may join and leave the network frequently¹⁵⁵. P2p technology is one of the key methods of supporting the expanded use of digital media and

¹⁵⁰ See: <http://www.huffmancoding.com/my-uncle/huffman-algorithm>

¹⁵¹ Rychlicki, T., ‘*Infringement of Music Copyrights in Computer Networks – A Case Study of the MP3 Warez Scene*’, (2006) CTLR 12(3) 78-83, p80.

¹⁵² Ibid, p80. Winamp was designed by Justin Frankel, a 19 year old from Arizona, see Knopper, S., ‘*Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age*’ (2009, Simon & Schuster), p119.

¹⁵³ See chapter 3, pp121-126.

¹⁵⁴ Androutsellis-Theotokis, S., and Spinellis, D., ‘*A Survey of Peer-to-peer Content Distribution Technologies*’, (2004) ACM Computing Surveys 36(4) 335-371, p335.

¹⁵⁵ Ripeanu, M., Foster, I., and Iamnitchi, A., ‘*Mapping the Gnutella Network: Properties of Large-Scale Peer-to-Peer Systems and Implications for System Design*’, (2002) IEEE Internet Computing 6(1) 50-57. Available from: <http://people.cs.uchicago.edu/~matei/PAPERS/ic.pdf>, p1

dramatically improves the quality as well as efficiency of digital media distribution¹⁵⁶.

It facilitates rapid access to digital content by large groups of individual users. With distributed computing networks, many separate computers can function collectively together thus enhancing the efficiency of computer resource use¹⁵⁷. Such systems threaten the integrity of copyright by fostering decentralisation of content control¹⁵⁸. They have the effect of empowering users but, at the same time, making rights management much more difficult.

At their most basic level, peer-to-peer systems create an environment where the content of one computer is, in effect, accessible to all other computers on the network¹⁵⁹ and all nodes are completely equivalent in terms of functionality¹⁶⁰. However, beyond this, there is little further agreement as to what is, or is not, p2p¹⁶¹. It has been suggested that a reason for this is how such networks are externally perceived in terms of providing direct interaction between computers¹⁶². The author believes this is of consequence to the public and content industries' perception of p2p, not so much in terms of distinguishing between the architectures which are employed, but in terms of the *use* which is made of them¹⁶³.

¹⁵⁶ Matsuura, J.H., *'Managing Intellectual Assets in the Digital Age'*, (2003, Artech House), p111.

¹⁵⁷ Ibid, p111.

¹⁵⁸ Ibid, p111.

¹⁵⁹ Ibid, p112.

¹⁶⁰ Androutsellis-Theotokis, S., and Spinellis, D., *'A Survey of Peer-to-peer Content Distribution Technologies'*, (2004) ACM Computing Surveys 36(4) 335-371, p336.

¹⁶¹ Ibid, p336.

¹⁶² Ibid, p337.

¹⁶³ This is discussed further in chapter 4 in relation to the legal action against peer-to-peer networks, pp149-151.

However, p2p has two defining characteristics¹⁶⁴:

- The sharing of computer resources by direct exchange; and
- Their ability to treat instability and variable connectivity as the norm (fault tolerance).

This would seem to remove Napster (considered later in this thesis¹⁶⁵) from the definition as it did not operate exclusively by direct exchange. However, the 'history' of p2p does fall into three distinct 'generations'¹⁶⁶. The first generation operated via a central file list where the user sent a search enquiry to this central server. The server then sent back a list of which peers that had the requested file and facilitated the connection and download. Second generation networks ditched the central server in favour of electing nodes on the network that had higher capacities as indexing nodes, with lower capacity ones branching off them. This allowed for a network with much greater capacity. The third and latest generation peer-to-peer networks are those with anonymity features and encryption built in, or so-called 'darknets'¹⁶⁷. However, these have not reached mass usage as they

¹⁶⁴ Androutsellis-Theotokis, S., and Spinellis, D., 'A Survey of Peer-to-peer Content Distribution Technologies', (2004) ACM Computing Surveys 36(4) 335-371, p337. They also provide the following definition at p37: "*Peer-to-peer systems are distributed systems consisting of interconnected nodes able to selforganize into network topologies with the purpose of sharing resources such as content, CPU cycles, storage and bandwidth, capable of adapting to failures and accommodating transient populations of nodes while maintaining acceptable connectivity and performance, without requiring the intermediation or support of a global centralized server or authority.*"

¹⁶⁵ See chapter 4, pp133-148.

¹⁶⁶ These are further explained in the context of the lawsuits against p2p operators in chapter 4, pp131-165. Androutsellis-Theotokis and Spinellis define this somewhat differently into 'Purely', 'Partially', and 'Hybrid' decentralised architectures, see Androutsellis-Theotokis, S., and Spinellis, D., 'A Survey of Peer-to-peer Content Distribution Technologies', (2004) ACM Computing Surveys 36(4) 335-371, p343. In addition, Lundbald identifies five generations of p2p network: The 'Napster generation', the 'Gnutella generation', the 'Direct Connect-generation', the 'Freenet generation' and the 'Bittorrent generation'. See Lundbald, N., *Noise tactics in the copyright wars*, (2006) International Review of Law, Computers & Technology 20(3) 311-321, pp314-315.

¹⁶⁷ For example, 'Freenet', see: <http://freenetproject.org/whatis.html>

have a greater overhead cost involved in sending files that multiplies bandwidth.

P2p technology has a range of applications¹⁶⁸, but arguably its most important in the context of this thesis is that of content distribution, also referred to as 'file-sharing'. Under this concept however, several different technologies are lumped together¹⁶⁹. This is a content distribution system which creates a distributed storage medium allowing for the publishing, searching and retrieval of files by members of the network¹⁷⁰ and in general terms, is the practice of making files available to other users over the Internet and smaller networks via p2p. Most p2p file sharing applications share the following goals of being able to operate in a dynamic network, performance and scalability, reliability and anonymity¹⁷¹. This operation of p2p as a content distribution system relies on a network of peer computers and connections between them; the network is formed on top of, and independently from, the underlying physical IP (Internet Protocol) network and may be referred to as an 'overlay' network¹⁷². As a result, they build a

This issue is interestingly discussed by Andy Beckett in, *'The dark side of the internet'*, (2009) The Guardian, available from:

<http://www.guardian.co.uk/technology/2009/nov/26/dark-side-internet-freenet?>

¹⁶⁸ For example, communication and collaboration, distributed computation, Internet service support and database systems. See Androutsellis-Theotokis, S., and Spinellis, D., 'A Survey of Peer-to-peer Content Distribution Technologies', (2004) ACM Computing Surveys 36(4) 335-371, pp338-339.

¹⁶⁹ Lundbald, N., *Noise tactics in the copyright wars*, (2006) International Review of Law, Computers & Technology 20(3) 311-321, p314.

¹⁷⁰ Androutsellis-Theotokis, S., and Spinellis, D., 'A Survey of Peer-to-peer Content Distribution Technologies', (2004) ACM Computing Surveys 36(4) 335-371, p339.

¹⁷¹ Ripeanu, M., Foster, I., and Iamnitchi, A., *'Mapping the Gnutella Network: Properties of Large-Scale Peer-to-Peer Systems and Implications for System Design'*, (2002) IEEE Internet Computing 6(1) 50-57, p3. Available from:

<http://people.cs.uchicago.edu/~matei/PAPERS/ic.pdf>,

¹⁷² Androutsellis-Theotokis, S., and Spinellis, D., 'A Survey of Peer-to-peer Content Distribution Technologies', (2004) ACM Computing Surveys 36(4) 335-371, p343.

virtual network at the application level with its own 'routing' mechanisms¹⁷³ which are dependent on the 'generation' of the network.

P2p architectures have a number of benefits; they afford the ability to function, scale and self-organise in the presence of an increasing or decreasing number of computers/users aka 'peers' or nodes, with little or no overhead administration costs¹⁷⁴. Furthermore, they create a resilient and redundant network; enable real-time collaborative work with remote partners¹⁷⁵; they are efficient (spreading resources), and consumer-orientated, as well as being economical and cost-effective¹⁷⁶. Two main factors have been identified as being responsible for the expansive growth of such systems: firstly, the low cost and high availability of computing and storage devices, and secondly, increased network connectivity¹⁷⁷.

2.4 The 'Holy Trinity'

Most broadly in the area of information and communications technology, changes were underway¹⁷⁸. The 'buzzword' of the era was arguably

¹⁷³ Ripeanu, M., Foster, I., and Iamnitchi, A., *'Mapping the Gnutella Network: Properties of Large-Scale Peer-to-Peer Systems and Implications for System Design'*, (2002) IEEE Internet Computing 6(1) 50-57, p1. Available from:

<http://people.cs.uchicago.edu/~matei/PAPERS/ic.pdf>

¹⁷⁴ Reder, M.E.K., *'P2P File-Sharing: What the Supreme Court has an opportunity to Consider'*, (2005) BC Intellectual Property & Technology Forum No. 032901, p9. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1095451

¹⁷⁵ See for example, the cover version of *'Club Can't Handle Me'* by the artist Flo Rida ft. David Guetta by two prominent YouTube musicians; Tyler Ward and Cobus Potgeiter: <http://www.youtube.com/user/deedlebag#p/u/14/uFqgvInamLo>. See also chapter 1, p24.

¹⁷⁶ Androutsellis-Theotokis, S., and Spinellis, D., *'A Survey of Peer-to-peer Content Distribution Technologies'*, (2004) ACM Computing Surveys 36(4) 335-371, p336.

¹⁷⁷ Ripeanu, M., Foster, I., and Iamnitchi, A., *'Mapping the Gnutella Network: Properties of Large-Scale Peer-to-Peer Systems and Implications for System Design'*, (2002) IEEE Internet Computing 6(1) 50-57, p1. Available from:

<http://people.cs.uchicago.edu/~matei/PAPERS/ic.pdf>

¹⁷⁸ Leonard, P.G., *'New communications technologies and the music industry'*, (1991), Ent LR 2(3) 73-78, p73.

‘convergence’; described at the time as a blurring between the distinct areas of broadcasting, radio communications and telecommunications¹⁷⁹.

Furthermore, between the storage of data, the manipulation of data and the transmission of data was noted¹⁸⁰, with the effect of merging traditional media and their existing platforms¹⁸¹. As such, convergence has taken place at an ever more localised way; from industry sectors, to delivery methods, and to the content itself; the availability of which is crucial to a healthy creative environment.

The spread of digital technology caused many to fear for the continued viability of copyright law and marked a sea-change in attitudes towards content itself, and the measures in place designed to protect it: *“The balance between protection and availability has to change in order to enter into the digital age.”*¹⁸² The author would argue that the balance between protection and availability had already changed as the digital age commenced; primarily with regard to the availability of content which became much more widespread. It was this supposed ‘mis-balance’ that then proceeded to be addressed in the digital age through regulation.

To the author, the term ‘convergence’ has further resonance in the early digital environment with the independent, yet (chronologically at least) related developments of three ‘technologies’, namely’ the Internet, MP3 and peer-to-peer. From a copyright-enforcement perspective, the benefits of such technological systems seemed to go unappreciated. Nonetheless, there has always been a consistent pattern of copyright being applied to the

¹⁷⁹ Leonard, P.G., ‘New communications technologies and the music industry’, (1991), Ent LR 2(3) 73-78, p73.

¹⁸⁰ Christie, A., ‘Reconceptualising copyright in the digital era’, (1995), EIPR 17(11) 522-530, pp522-523.

¹⁸¹ Perlmutter, S., ‘Convergence and the future of copyright’, (2001), EIPR 23(2) 111-117, p111.

¹⁸² Frame, R., ‘The protection and exploitation of Intellectual property rights on the Internet: the way forward for the music industry’, (1999) IPQ 4 443-470, p469.

digital environment, as opposed to ‘aspects’ of the digital environment being applied to copyright. The author asserts that the former relationship is what has engendered the particular tensions between copyright and technology. Copyright law has arguably had difficulty accommodating technological change throughout its history¹⁸³ which is perhaps endemic of the problem; copyright has always necessarily been applied retrospectively to advances in technology (the technology advances first and the law then has to ‘catch-up’ with it). However, in the digital age, the most problematic aspect for rightsholder is to manage distribution so as to prevent users from distributing content widely and freely to others¹⁸⁴. This is because for the author, digital technology has led to a convergence of content into a single digital form¹⁸⁵ available through a unified digital platform (the Internet). In response to this, regulation was chosen and as such could be said to have converged around this issue also.

However, any previous technological development that had allegedly posed a problem for copyright law (or more aptly, rightsholders) has been confined to the analogue world that still had an element of ‘property’ about it (tangibles such as cassettes and videotapes etc.). However, digitisation removed the last vestiges of physical property from the equation. Digitisation refers to the translation of information into a digital form:

“Once digitised, all information is basically the same, so that it is readily capable of being carried on any digital transmission system. Digitised

¹⁸³ Litman, J., ‘Copyright Legislation and Technological Change’, (1989), 68 Or L Rev 275-361, p277.

¹⁸⁴ Webber, D., ‘Intellectual property: challenges for the future’, (2005) EIPR 27(10) 345-348, p346.

¹⁸⁵ See Higham N., ‘The new challenges of digitisation’, (1993) EIPR 15(10) 355-359, p355, Mallam, P., ‘Copyright and the information superhighway: some future challenges’, (1995) Ent LR 6(6) 234-237, p235, and, Samulelson, P., quoted in Stokes, S., ‘Digital Copyright: Law and Practice (Second Edition)’, (2005, Hart Publishing), p9.

*information is also more easily stored or copied. Of particular importance to copyright ... digitised information can be easily manipulated.*¹⁸⁶

This has a number of results:

- *Ease*
Digital facilitates replication, transmission and multiple use¹⁸⁷;
- *Equivalence*¹⁸⁸
All types of 'work necessarily become the same (i.e. sequences of binary code)¹⁸⁹ and are thus equivalent; and,
- *Plasticity*¹⁹⁰
Information may be merged, manipulated and used much more easily¹⁹¹.

This has also led to a loss of 'centrality' in terms of not requiring a specified supplier of content; and to a lesser extent, the de-materialisation of content¹⁹². To the author, these also represent opportunities. The ease of replication and manipulation of digital content may serve to foster creativity in terms of the 'mechanics' of it i.e., providing the opportunity to be creative in the first place, actually creating something, and also distributing it. However, the loss of 'centrality' aspect is an important legacy in terms of its effect

¹⁸⁶ Mallam, P., 'Copyright and the information superhighway: some future challenges', (1995) Ent LR 6(6) 234-237, p235. Perhaps Barlow sums it up best: "Digital technology is detaching information from the physical plane, where property law of all sorts has always found definition." See Barlow, J.P., 'The Economy of Ideas', (1994) Wired 2.03, available from: <http://www.wired.com/wired/archive/2.03/economy.ideas.html>. This is also recognised by Reidenberg: "The works can be manipulated, changed, or retransmitted by the recipient..." See Reidenberg, J.R., 'Lex Informatica: The Formulation of Information Policy Rules Through Technology', (1998) Texas Law Review 76(3) 553-594, p566.

¹⁸⁷ Samuelson, P., quoted in Stokes, S., 'Digital Copyright: Law and Practice (Second Edition)', (2005, Hart Publishing), p9.

¹⁸⁸ Ibid, p9.

¹⁸⁹ Higham N., 'The new challenges of digitisation', (1993) EIPR 15(10) 355-359, p355.

¹⁹⁰ Samuelson, P., quoted in Stokes, S., 'Digital Copyright: Law and Practice (Second Edition)', (2005, Hart Publishing), p9.

¹⁹¹ Higham N., 'The new challenges of digitisation', (1993) EIPR 15(10) 355-359, p355.

¹⁹² Ibid, p355.

today which has perhaps resulted in a fundamental change in notions of ownership and 'property'¹⁹³. It is now clear that the design of technologies and associated architectures is an important aspect in the study of digital copyright as a legal system¹⁹⁴. Such 'disruption' to copyright law is primarily due to the development of three inter-related technologies considered above; the Internet, MP3 and peer-to-peer: "*Technology that disrupts copyright does so because it simplifies and cheapens creation, reproduction and distribution.*"¹⁹⁵ Although there are these three distinct technologies involved in 'digital', they have all helped to bring about the same result; convergence of content into a single digital form which may theoretically be available from a single (combined) digital platform.

Instead of copyright being under 'threat' from one specific technology, it could arguably be seen as under threat from three separate (albeit interrelated) technologies in the digital era. However, this can again be distilled down into its core component; the digitisation of content and consequent removal of physical technological barriers marked the digital revolution as being different from any preceding it. This also had a necessarily social complexion¹⁹⁶:

*"The wonderful thing about technology is that people end up doing with it something different from what was originally intended. It is this serendipity that underlies creativity in society..."*¹⁹⁷

However, far from being perceived as 'wonderful' by regulators, it seemingly proved problematic. The fundamental problem is that electronic copying is a

¹⁹³ Mallam, P., 'Copyright and the information superhighway: some future challenges', (1995) Ent LR 6(6) 234-237, p236.

¹⁹⁴ Lundbald, N., *Noise tactics in the copyright wars*, (2006) International Review of Law, Computers & Technology 20(3) 311-321, p312. See also chapter 3, pp119-126.

¹⁹⁵ Doctorow, C., *Content*, (2008, Tachyon Publications), p21.

¹⁹⁶ As can creative practice, see chapter 1, p27.

¹⁹⁷ Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society*, (2001, OUP), p195.

major threat to copyright holders' two main exclusive rights of reproduction and distribution, and even the position of the content industries themselves: *"The Internet was making them obsolete."*¹⁹⁸ The importance of reproduction cannot be overstated; the existence of copies stands for independence: *"Copies free the user from limits of place and time. They also free him from the right owner's control..."*¹⁹⁹ This is especially apt today with, for example, portable MP3 player technology²⁰⁰. In addition: *"With advancing technology, new means of creating intellectual property have been matched by new delivery and copying systems."*²⁰¹ It was realised that such advances result in an extension of ways in which copyright may be utilised, which in turn requires a flexible and adaptive copyright system: *"... which directs attention to the economic benefit derived by the disseminator and user of the copyright material."*²⁰² Digital technology poses a number of problems to copyright through the digitisation of copyright works, their existence as digital products and the growth of networks²⁰³, as well as the resultant growth of online communities²⁰⁴.

Specifically, the three 'technologies' outlined above have combined (or converged) not to alter copyright itself, but to alter its application in the digital era. It has not been the rise of production technologies, but the rise in *delivery* technologies that have created problems for a technology specific

¹⁹⁸ Kot, G., *'Ripped: How the Wired Generation Revolutionised Music'*, (2009, Scribner), p1.

¹⁹⁹ Spoor, J.H., *'The Copyright Approach to Copying on the Internet: (Over)Stretching the Reproduction Right?'* in Hugenholtz, P.B., (ed) *'The Future of Copyright in a Digital Environment'*, (1995, Kluwer Law International), p76.

²⁰⁰ See for example, the US case of RIAA v. Diamond Multimedia Systems Inc., No. 98-56727 (1999).

²⁰¹ Leonard, P.G., *'New communications technologies and the music industry'*, (1991) Ent LR 2(3) 73-78, p73.

²⁰² Ibid, p73.

²⁰³ Stokes, S., *'Digital Copyright: Law and Practice (Second Edition)'*, (2005, Hart Publishing), p9.

²⁰⁴ See chapter 3, pp98-103.

copyright system²⁰⁵. However, recognition of these at the start of the nineties did not engender any immediate concern²⁰⁶. However, from this point onwards, there did appear to be a growing acceptance that digitisation must and would lead to changes in the law²⁰⁷; with emphasis shifting to the primacy of protecting and maintaining IP rights online²⁰⁸.

3. Regulation

Copyright protection itself turns creative works into saleable and marketable commodities for the purposes of the law. By requiring fixation²⁰⁹ and providing protection, copyright turns creation into property i.e. the commodification necessary for copyright to achieve its utilitarian end:

*“The fundamental goal of copyright, to provide incentives for the creation and dissemination of works of authorship continues to be important to the furtherance of knowledge and culture, no matter what the technology of the day.”*²¹⁰

As such, it is necessary for copyright to operate in the digital environment in order to realise this end. However, digitising property raised potential questions over the ‘integrity’²¹¹ of copyright works where their value and form threatened to become meaningless. To the author, digital ‘expression’ of content does have value; just because content has changed in its medium, that does not mean that the value of the content itself decreases and it is

²⁰⁵ Leonard, P.G., ‘New communications technologies and the music industry’, (1991) Ent LR 2(3) 73-78, p76.

²⁰⁶ See generally Leonard, P.G., ‘New communications technologies and the music industry’, (1991) Ent LR 2(3) 73-78.

²⁰⁷ Higham N., ‘The new challenges of digitisation’, (1993) EIPR 15(10) 355-359, p355.

²⁰⁸ Self, L.C., and Dixon A.N., ‘Copyright protection for the information superhighway’, (1994) EIPR 16(11) 465-472, p465.

²⁰⁹ See chapter 1, pp24-25.

²¹⁰ Perlmutter, S., ‘Convergence and the future of copyright’, (2001) EIPR 32(2) 111-117, p113.

²¹¹ Mallam, P., ‘Copyright and the information superhighway: some future challenges’, (1995) Ent LR 6(6) 234-237, p237.

unfair to describe the digital form as having no value either²¹². The low costs involved in the digital process is necessarily a result of technological advances²¹³ which have served to minimise digital costs to a fraction that can barely be measured, let alone ascribed a monetary 'value'. Likewise, digital content can also have value (not necessarily financial, but at least in the utilitarian sense) in its 'plasticity'; the fact that it may more easily be manipulated or changed, which can lead to the generation of new content.

Copyright is a law deeply rooted in the print environment which relied on the characteristics of the medium to delineate the boundaries between producers and users²¹⁴. Confronted with a new set of facts and old legal issues, the question is whether copyright has been stretched to breaking point, or whether it can be effectively 'translated' for the digital environment²¹⁵. Far from ceasing to be relevant²¹⁶, as a result of digitisation copyright now has an important role to play in the creation, upload, transmission, access and use of content²¹⁷:

²¹² See the discussion of 'Free' in chapter 3, pp105-110.

²¹³ This can be attributed to 'Moore's Law', (not so-much a 'law', but more a rule of thumb) named after Intel's co-founder, Gordon E. Moore who spotted the emerging trend whereby semiconductor chips roughly double the number of transistors they can hold every 18 months. See Anderson C., *Free: The Future of a Radical Price*, (2009, Random House), pp 13 and 77. See also Hutter, M., *Efficiency, viability and the new rules of the Internet*, (2001) EJM & E 11(1) 5-22, pp5-6.

²¹⁴ Benkler, Y., *Net Regulation: Taking Stock and Looking Forward*, (2000) 71 Colorado Law Rev 4 1203-1262, pp1242-1243.

²¹⁵ Jones, L., *An artist's entry into cyberspace: intellectual property on the Internet*, (2000) EIPR 22(2) 79-92, p91.

²¹⁶ As espoused by early Internet Libertarians, see Barlow, J.P., *The Economy of Ideas* (1994) Wired 2.03, available from:
<http://www.wired.com/wired/archive/2.03/economy.ideas.html>

²¹⁷ Self, L.C., and Dixon A.N., *Copyright protection for the information superhighway*, (1994) EIPR 16(11) 465-472, pp466-467.

*“The issue that regulation must resolve is whether the destabilisation will result in a more tightly controlled, a more freely flowing, or a more-or-less similarly controlled environment.”*²¹⁸

Furthermore, the argument that copyright was even *more* applicable than previously; because of the ‘blurring’ of roles digital technology engendered: *“Peer-to-peer file sharing had turned consumers into distributors. CD burners had turned them into manufacturers.”*²¹⁹ The regulatory reaction which set in could be seen ‘interventionist’, ‘regulatory’, or even, ‘expansionist’, but the essential claim is that the Internet is too important *not* to regulate²²⁰.

3.1 WIPO Treaties

In 1989, the governing body of WIPO decided to deal with the impact of computers and networks on copyright²²¹; the first milestone was reached in 1996 with the negotiation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In contrast to the more prolonged period of negotiations over previous international IP treaties, these may more aptly be described as being ‘fast-tracked’²²². However, it should be noted that the increased regulation is not necessarily confined to

²¹⁸ Benkler, Y., ‘*Net Regulation: Taking Stock and Looking Forward*’, (2000) 71 Colorado Law Rev 4 1203-1262, p1243.

²¹⁹ Kot, G., ‘*Ripped: How the Wired Generation Revolutionised Music*’, (2009, Scribner), p1.

²²⁰ Litan, R.E., ‘*Law and policy in the age of the Internet*’, (2001) Duke Law Journal 50 1045-1085, p1056.

²²¹ Hutter, M., ‘*Efficiency, viability and the new rules of the Internet*’, (2001) E.J.L. & E 11(1) 5-22, p14.

²²² Jones, L., ‘*An artist’s entry into cyberspace: intellectual property on the Internet*’, (2000) EIPR 22(2) 79-92, p79. See generally Ficsor, M., ‘*Towards a Global Solution*’, and, Hugenholtz, P.B., ‘*Adapting Copyright to the Information Superhighway*’, in Hugenholtz, P.B. (ed), ‘*The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium*’, (1995, Kluwer Law International) 111-137, pp113-121 and at p119: “*The most important activity of WIPO in this field, however, relates to the clarification of the existing international copyright and neighbouring rights norms and the establishment of possible new norms in response to the challenges of digital technology...*”

copyright or even IP law: *“Across all fields of law there is a clear trend for legislation and regulation to become increasingly detailed.”*²²³ As such, copyright law is no different in this respect, but serves as a clear example of this phenomenon. Primarily, the WCT updated the pre-existing international copyright conventions to address the developments in digital technology, as the ‘Agreed Statements concerning the WIPO Copyright Treaty’²²⁴ states:

*“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.”*²²⁵

Similarly, with regard to the WPPT:

*“The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.”*²²⁶

²²³ Or ‘accelerated’, see Ficsor, M., ‘Copyright for the Digital Era: The WIPO Internet Treaties’, (1997) Columbia-VLA Journal of Law & Arts 21(3-4) 197-223, p199. Although interesting, how increased copyright regulation sits among this more general trend in the law is beyond the scope of this research.

²²⁴ Available from: <http://www.wipo.int/treaties/en/ip/wct/statements.html>

²²⁵ Agreed Statements concerning the WIPO Copyright Treaty, adopted by the Diplomatic Conference on December 20, 1996, concerning art.1(4), available from: <http://www.wipo.int/treaties/en/ip/wct/statements.html>

²²⁶ Agreed Statements concerning WIPO Performances and Phonograms Treaty adopted by the Diplomatic Conference on December 20, 1996, concerning arts.7, 11 and 16, available from: <http://www.wipo.int/treaties/en/ip/wppt/statements.html>

The WCT also went some way to combining the fragmented rights of the Berne Convention (articles 1, 11 *bis*, 11 *ter*, and 14²²⁷) by combining them into a single right of communication under article 8. This assumes a greater importance when one remembers that from 1994, the Trade Related Aspects of Intellectual Property Rights (TRIPS) was also in force obliging all World Trade Organisation (WTO) members to instigate certain IP protection. Whilst this could arguably have been seen as purely solidifying ‘current’ IP rights, the WIPO Treaties could arguably be viewed as extending them into the digital era:

“While the TRIPS Agreement was pursued to protect existing intellectual property rights, the WIPO Treaty of 1996 related more directly to the impact of the Internet on the future of copyright.”²²⁸

Such laws form a cluster of regulation attempting to establish the terms of control over information flows resulting from a shake-up of the technological parameters that defined the boundaries of control in the pre-Internet era²²⁹. The legal response could be viewed as a process of ‘consolidating’ copyright rules to apply to the digital era; however, they maintain a narrow focus on the control a rightsholder can exercise, at the expense of the benefits digital technologies provide:

“The narrow focus on threats to copyright owners’ control of their works can lose sight of the potential value, to authors as well as to reader, of

²²⁷ The Establishment of a Union (art.1), Broadcasting and Related Rights (art.11*bis*), Certain Rights in Literary Works (art.11*ter*), and, Cinematographic and Related Rights (art.14), available from:

http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

²²⁸ Hutter, M., ‘Efficiency, viability and the new rules of the Internet’, (2001) E.J.L. & E. 11(1) 5-22, p15.

²²⁹ Benkler, Y., ‘Net Regulation: Taking Stock and Looking Forward’, (2000) 71 Colorado Law Rev 4 1203-1262, pp1237-1238.

*a digital network permitting high-speed transmission of a variety of material with few constraints.*²³⁰

Whilst the foundations of copyright law have been outlined above as being utilitarian-based, this period of copyright development has little to do with the traditional goals of benefitting society:

*“In stabilising control over digital information goods, the regulatory response has been fairly consistent, and it has consistently been on the side of expanding the powers of the owners to control the use of their products.”*²³¹

As a result, the era of digital technology has affected both sides of the utilitarian justification for copyright which was established at the beginning of this chapter. Such technology could be said to be the ultimate embodiment of ‘benefitting society’, but this impacts on the balance between this and encouraging production. As a result, the warning signs of what was to follow, and what will be outlined in the remainder of this thesis, are evident from this period (even though it took a further five years for them to be tested²³²). This is of further importance when one realises that the WIPO system is one of ‘guided’ development to assist national legislatures in the development of national responses to the challenge of digital technology²³³; therefore these warning signs are of crucial importance as they laid the groundwork for much of what was to follow.

4. Conclusion

Ultimately, it has been suggested that network rules and policies themselves should guide regulatory policy options, but this does not particularly relate to

²³⁰ Litman, J., *Digital Copyright*, (2006, Prometheus), p108.

²³¹ Benkler, Y., *Net Regulation: Taking Stock and Looking Forward*, (2000) 71 Colorado Law Rev 4 1203-1262, p1254.

²³² See chapter 4, in relation to the Napster litigation, pp133-148.

²³³ Jones, L., *An artist’s entry into cyberspace: intellectual property on the Internet*, (2000) EIPR 22(2) 79-92, p91.

the issue of content²³⁴. The (then) 'new' WIPO rules did no more than reaffirm copyright as existing and applying in the digital environment, but over-emphasis on the information policies and practices as they exist online has almost threatened to disturb copyright as a legal mechanism through emphasising 'reward' (through control) over 'creativity'. This is despite the fact that the challenges posed by digital technology were not necessarily anything 'new':

*"The copyright and other intellectual property issues implicated by the information infrastructure are ... not fundamentally different from those already faced by authors and rightholders in the pre-networked world..."*²³⁵

Nonetheless, law has the capacity to parry many of the challenges of the Internet²³⁶ and copyright still applies in the digital environment, perhaps more than ever. As such, so does regulation: *"The new technical possibilities brought about by the Internet make it even easier for governments to cooperate in the enforcement of their common rules."*²³⁷ Therefore, we can view convergence as occurring over content (including distribution) *and* also over regulation. However, the two do not sit comfortably with each other. The consolidation and application of regulation can have a negative effect on creative environment as defined in the introduction²³⁸ and which digital technology can benefit:

"That network can both encourage creation and dissemination by reducing the costs associated with it, and can enhance the value of material

²³⁴ Described as 'Lex Informatica', see generally Reidenberg, J.R., 'Lex Informatica: The Formulation of Information Policy Rules Through Technology', (1998) Texas Law Review 76(3) 553-594.

²³⁵ Self, L.C., and Dixon A.N., 'Copyright protection for the information superhighway', (1994) EIPR 16(11) 465-472, p468.

²³⁶ Engel, C., 'The Role of Law in the Governance of the Internet', (2006), International Review of Law Computers & Technology 20(1) 201-216, p211.

²³⁷ Ibid, p207.

²³⁸ See the discussion of the creative environment in chapter 1, pp25-33.

made available over the network because of the ease with which it can be linked²³⁹ to other valuable material.²⁴⁰

Simply stating that technology and regulation are at odds with each other does not fully address the issue. Copyright commodifies content, and it is therefore copyright that would logically apply when something affects that commodification. However, it is suggested that the argument should be phrased the opposite way around; copyright should *not* be applied to technology, rather the possibilities engendered by digital technology should be applied to copyright itself²⁴¹. Understanding the issue in this way would remove at least some of the tensions inherent in this relationship by applying patterns in the digital environment to copyright law²⁴². What is clear is that the digital revolution was seen to warrant increased regulation and that regulation should theoretically apply in the digital world as it does in the physical. Nonetheless, regulation cannot be solely applied to technology, it must also be applied to society, and users who have their own specific set of values and whose behaviour may be guided by different factors. As a result, the analysis will now move on to consider in more detail the effect regulation has (or has not) had on users.

²³⁹ As with the Hypertext Transfer Protocol (HTTP) described above.

²⁴⁰ Litman, J., *Digital Copyright*, (2006, Prometheus), p108.

²⁴¹ *"If our goal is to write rules that individual members of the public will comply with, we need to begin by asking what the universe looks like from their vantage point."* Litman, J., *Digital Copyright*, (2006, Prometheus), p179.

²⁴² Such 'patterns' are discussed in chapter 3, pp85-130.

Chapter 3: Modalities of Regulation

Modalities of Regulation

1. Introduction

Consumption habits regarding digital content, specifically recorded music, continue to demonstrate the persistence of copyright infringement; indicating an important disjunct between the existence (and operation) of copyright and its influence. As part of such an evaluation, questions regarding why people engage in such behaviour should reflect factors readily appreciable to users and therefore recognise the digital environment in which they operate.

Central to the understanding of regulation of the Internet, and in this context, regulation of behaviour, is 'Code' by Lawrence Lessig¹ in which he attempted to extend 'traditional' models of regulatory analysis into Cyberspace². His work also has relevance more generally in relation social regulation³. A 'Lessigan' approach has merit as it addresses issues surrounding legal control with regard to the regulation of users who may be influenced by factors beyond copyright law. Although (or perhaps because) he is widely considered the leader of the copyright reform movement⁴, Lessig himself attracts criticism: "*Like many other I.P. Reformers, Lessig is routinely denounced as a communist.*"⁵ As his work deals with both Internet regulation⁶ and its consequences⁷ a 'Lessigan' model may be formulated to address those factors which may impact upon user decisions to engage in unauthorised downloading of digital music..

¹ Lessig, L., 'Code (Version 2.0)', (2006, Basic Books).

² Murray, A.D., 'Regulating the Post-Regulatory Cyber-State', in Brownsword R., and Yeung, K. (eds) 'Regulating Technologies', (2008, Hart), 287-316. Available from: http://works.bepress.com/andrew_murray/7

³ Lessig, L., 'The Regulation of Social Meaning', (1995) The University of Chicago Law Review 62(3) 943-1045.

⁴ Hunter, D., 'Culture War', (2005) 83 Texas Law Review 1105-1136, p1114.

⁵ Hunter, D., 'Marxist-Lessigism', Legal Affairs, available from: http://msl1.mit.edu/furdlog/docs/2004-12_legalaffairs_marxist_lessigism.pdf

⁶ See generally, Lessig, L., 'Code (Version 2.0)', (2006, Basic Books).

⁷ Lessig, L., 'The Future of Ideas: The Fate of the Commons in a Connected World', (2002, First Vintage Books Edition), and, 'Free Culture: The Nature and Future of Creativity', (2004, Penguin Books).

There are many regulatory mechanisms in operation in the digital environment which may carry with them their own forms of regulatory influence, or 'social power', which warrant consideration⁸. A 'Lessigian' approach deals with real-world factors which may be more perceptible to users as a form of regulation or governance⁹. Lessig's central idea is that 'code', i.e. the instructions embedded in the hardware and software of Cyberspace, is the main regulator of this environment; or its *architecture*¹⁰. However, this is insufficient on its own: "*Which way societies will go does not certainly depend on the code itself, but on the ability of societies and their institutions to impose, resist, and modify the code.*"¹¹ As such, four main factors which govern regulation in the 'real world' may be extracted: law, norms (social constraints), the market¹², and architecture (i.e. what Lessig refers to as 'code'¹³). Before the digital era, they could be seen as all effectively being in balance with each other¹⁴, but they are also interdependent:

*"Technologies can undermine norms and laws; they can also support them. Some constraints make others possible; others make some impossible. Constraints work together, though they function differently and the effect of each is distinct."*¹⁵

At first glance, this may not seem to provide any further explanation of the behaviour of users. However, further examination of these modalities in this

⁸ Bowrey, K., *'Law & Internet Cultures'*, 2005, Cambridge), p169.

⁹ Ibid, p169: "... *the more diffuse expressions of identity and social power should not be so readily ignored.*"

¹⁰ Lessig, L., *'Code (Version 2.0)'*, (2006, Basic Books), p121

¹¹ Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society'*, (2001, OUP), p183.

¹² Ibid, pp122-123.

¹³ Lessig, L., *'Code (Version 2.0)'*, (2006, Basic Books), p81. This is also discussed in chapter 5 regarding Digital Rights Management (DRM), pp171-172, and chapter 6 on ISP liability, pp243-244.

¹⁴ Lessig, L., *'Free Culture: The Nature of Creativity'*, (2004, Penguin Books), p125.

¹⁵ Lessig, L., *'Code (Version 2.0)'*, (2006, Basic Books), p124.

chapter reveals a practical applicability in relation to the regulation surrounding users' consumption practices¹⁶. Nonetheless, it must also be borne in mind that they also have objective and subjective perspectives¹⁷; each modality has a subjective and an objective aspect¹⁸. A subjective approach, by the very definition of the term, is dependent on how users perceive them and can only be speculated upon. An objective view can provide clarity as to how these modalities act and interact; however their specific applications and effects can only be gauged subjectively. Lessig posits that subjective constraints may operate before one acts in the first place¹⁹. Their subjective nature is important; a Lessigian model has the further advantage of perspective based on the fact that Lessig also thinks about 'what' (i.e. the 'thing') is regulated²⁰ and the fact that as well as regulation, enablement may also be considered²¹. As such, it is crucial to appreciate the nature of the 'thing' that is regulated.

The author's development of a Lessigian model of Internet regulation and associated behavioural aspects will now be outlined. It is important to highlight that this model is specifically formulated to relate to recorded music, as a form of digital content²², in light of the technologies discussed in the previous chapter²³. It will begin by outlining the characteristics of the 'things' which are subject to regulation i.e. the user and digital music content. However, copyright (as the legal modality) only operates to link the user and

¹⁶ As identified by Bowrey: *"What has been missing from discussion so far is a consideration of how this legal control over production and distribution fits with the consumption practices that support the development of new digital products and services."* Bowrey, K., *'Law & Internet Cultures'*, 2005, Cambridge), pp139-140.

¹⁷ Lessig, L., *'Code (Version 2.0)'*, (2006, Basic Books), p344.

¹⁸ *Ibid*, p344.

¹⁹ *Ibid*, p344.

²⁰ *Ibid*, p121.

²¹ *Ibid*, p122.

²² Where the term 'content' is thus used, it will therefore correspond to recorded music available in digital form.

²³ See chapter 2, pp54-75

digital content. Therefore, a wider exploration is necessary and attention will then turn to the modalities of norms, the market and architecture.

2. The Law

The law operates in relation to copyrighted content, but it also affects users. Any consideration of behavioural aspects of illegal digital copyright infringement must therefore focus on the individual who is compelled to act in such a way. Theoretically, control is the fundamental premise of regulation²⁴ and in a perfect society, the mere existence of laws would be sufficient to ensure adherence to them²⁵. However, there is obviously a disjunct between the existence (and operation) of the law and its influence as illegal copyright infringement persists: “... *unintended consequences are central to any understanding of the process of regulation.*”²⁶ The continuation of unauthorised digital copyright infringement (as an ‘unintended consequence’) suggests that any legal component is minimal. Instead, the most that could perhaps be said is only that: “...*the opportunity to stick it to the Man appealed to some downloaders.*”²⁷ This perhaps relates to a perceived lack of fairness (both substantive, and arguably, procedural) and mistrust on the part of the public²⁸ implying some sort of moral²⁹ or ethical³⁰ dimension³¹. Although this

²⁴ Murray, A.D., ‘*Symbiotic Regulation*’, (2008) 26 J Marshall J Computer & Info L 207-228, p225.

²⁵ Ouma, M.N., ‘*Optimal Enforcement of Music Copyright in Sub-Saharan Africa: Reality or Myth?*’, (2006) Journal of World Intellectual Property 9(5) 592-627, p593.

²⁶ Lessig, L., ‘*The Regulation of Social Meaning*’, (1995) The University of Chicago Law Review 62(3) 943-1045, p957.

²⁷ Kot, G., ‘*Ripped: How the Wired Generation Revolutionised Music*’, (2009, Scribner), p46. See also chapter 5, p190.

²⁸ Jensen, C., ‘*The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*’, (2003) Stanford Law Review 56(2) 531-570, p541.

²⁹ Hill, C.W.L., ‘*Digital piracy: Causes, consequences, and strategic responses*’, (2007) Asia Pacific J Management 24(9) 9-25, p13.

³⁰ “*Downloading is an ethically confused activity.*” ‘*Copycats? Digital Consumers in the Online Age*’, (2009) A CIBER report for the Strategic Advisory Board for Intellectual Property Policy, p3, available from: <http://www.ipo.gov.uk/pro-ipresearch/ipresearch-policy/ipresearch-policy-attitude.htm>

may imply that users who illegally download music suffer from low levels of 'moral development'³², this is to do them a disservice³³. The author has grown up in such a culture (having also engaged in such practice) and having posed similar questions to students, would argue that there is more to this issue than such theories suggest. Such considerations are nonetheless valid; especially in evaluating the fact that appealing to users' 'morality' (to stop illegal downloading) may be perceived as a form of hypocrisy³⁴. However, moral or ethical considerations also do not correspond to copyright's philosophical foundation: "*Copyright isn't an ethical proposition, it's a utilitarian one.*"³⁵

Because copyright is a utilitarian instrument with a necessary user element³⁶, it is necessary to look at the behaviour of users³⁷, in terms of other regulatory (as opposed to 'ethical') influences. However, there has to be some appreciation that not all regulators regulate, and not all 'regulatees' are merely actors to be regulated³⁸. It must also be borne in mind from the

³¹ Gopal, R.D., Sanders, L.G., Bhattacharjee, S., Agrawal, M., and Wagner, S.C., 'A Behavioural Model of Digital Music Piracy', (2004), p10. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=527344

³² Assuming they would aware of what 'moral development' is. This explained in Hill, C.W.L., 'Digital piracy: Causes, consequences, and strategic responses', (2007) Asia Pacific J Management 24(9) 9-25.

³³ As Bowrey states further: "*Fans have a common-sense of appreciation of commodity cycles and an understanding of the control that music consortiums exercise globally over artists and their music.*" Bowrey, K., 'Law & Internet Cultures', 2005, Cambridge), pp160-161.

³⁴ Lantagne, S.S., 'The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack' (2004) Harv J L & Tech 18(1) 269-293, p280.

³⁵ Doctorow, C., 'Content', (2008, Tachyon Publications), pp20-21. See chapter 2, pp41-49.

³⁶ See chapter 2, p42, and p45.

³⁷ Hill, C.W.L., 'Digital piracy: Causes, consequences, and strategic responses', (2007) Asia Pacific J Management 24(9) 9-25, p10.

³⁸ Murray, A.D., 'Regulating the Post-Regulatory Cyber-State', in Brownsword R., and Yeung, K. (eds) 'Regulating Technologies', (2008, Hart), 287-316. Available from: http://works.bepress.com/andrew_murray/7

outset that although these factors may regulate in a preventative way, they may also function to ‘encourage’ behaviour. Lessig states:

*“We pretend that the public matters ... but really only take the public into account as an object of legal regulation – as really little more than slaves to structures determined elsewhere.”*³⁹

When referring to the ‘thing’ that is being regulated; he talks about a ‘dot’⁴⁰. In reality there is not one ‘dot’, but two; identified below as being the user and the content (in this instance, the ‘content’ referred to is recorded music existing in digital form⁴¹), with copyright as the legal modality operating as an axis between them:



Furthermore, they may be active as Murray postulates: *“What happens if we change the dot’s role from passive receiver to active transmitter?”*⁴² This suggests that what is regulated is much more active than Lessig believed. Firstly, users are obviously ‘active’ on the Internet with their actions being governed by a variety of subjective, individual choices and preferences (the specifics of which it is not necessary to examine): *“... the collection of understandings or expectations shared by some group at a particular time*

³⁹ Bowrey, K., *‘Law & Internet Cultures’*, (2005, Cambridge), p141.

⁴⁰ Lessig, L., *‘Code (Version 2.0)’*, (2006, Basic Books), p122.

⁴¹ As per the scope of this thesis, see chapter 1, pp10-11 See also the description of the MP3 format in chapter 2, pp62-66

⁴² Murray, A.D., *‘Symbiotic Regulation’*, (2008) 26 J Marshall J Computer & Info L 207-228, p215. This leads to the problem of ‘regulatory arbitrage’ where subjects of regulation have sufficient mobility that they can choose to be regulated by one regime rather than another. See Murray, A.D., and Scott, C., *‘Controlling the New Media: Hybrid Responses to New Forms of Power’*, (2002) MLR 65(4) 491-516, p494.

*and place.*⁴³ Secondly, content may also be active in the sense that it can exert a certain ‘pull’, ‘influence’, or ‘desire’ to users to consume or act upon. The digital environment facilitates this ‘pull’ by making it easier for content to ‘transmit’ its value and by making it much easier for content to be acted upon.

The consensus is that regulators design regulatory systems⁴⁴. Assuming that the basis of copyright law is utilitarian, it is (in theory) ‘designed’ to benefit society through promoting the creation and dissemination of new works⁴⁵. Therefore, some interaction with the material copyright law protects (in this instance, content) is necessary to achieve this end⁴⁶. Although copyright applies to ‘works’ (i.e. content⁴⁷), it also applies to those who may deal with such works (including by-proxy) without authorisation⁴⁸. Therefore, it is possible to view copyright as an ‘axis’ which links and operates between users and content.

From the perspective of copyright and intellectual property, emphasis on the legal modality is needed when the other modalities leave property, or content, vulnerable⁴⁹. Lessig states: *“To say that law plays a role is not to say that it always plays a positive role. The law can muck up norms as well as improve them...”*⁵⁰ There is a mistaken presumption that the only form of power that counts is power conceived in formal and bureaucratic forms⁵¹, however, it is necessary to consider what other ‘forces’ may be in operation. As an illustrative metaphor, Newton’s Third Law of Motion states: *“To every action*

⁴³ Lessig, L., *‘The Regulation of Social Meaning’*, (1995) The University of Chicago Law Review 62(3) 943-1045, p958.

⁴⁴ Murray, A.D., *‘Regulating the Post-Regulatory Cyber-State’*, in Brownsword R., and Yeung, K. (eds) *‘Regulating Technologies’*, (2008, Hart), 287-316. Available from: http://works.bepress.com/andrew_murray/7

⁴⁵ See chapter 2, pp41-49

⁴⁶ See chapter 1, pp27-28.

⁴⁷ Ibid, pp17-21.

⁴⁸ S.16(2), Copyright, Designs and Patents Act (CDPA), 1988.

⁴⁹ Lessig, L., *‘Code (Version 2.0)’*, (2006, Basic Books), p171. See also chapter 2, pp70-75.

⁵⁰ Ibid, p129.

⁵¹ Bowrey, K., *‘Law & Internet Cultures’*, 2005, Cambridge), p168.

*there is always opposed an equal reaction: for the mutual actions of two bodies upon each other are always equal, and directed to contrary parts.*⁵²

Whilst this is not strictly the case in this instance, Newton recognised that it is impossible to have a single force⁵³ in operation. This applies just as much to extraneous forces which may be in effect in the digital environment.

The behaviour of users and participants on the Internet, like that of citizens in the offline world, is regulated by a plurality of rules (or forces); some coming from states and others coming from a wide variety of private groups⁵⁴.

However, in the digital environment: *“These movements lead to a disintegration of connective threads which bind individuals together as a social body in Realspace.”*⁵⁵ However, whilst this may be true in terms of proximity, it is not necessarily so in terms of ideology and behaviour. The only ‘constant’ in this scenario is that of copyright law; this is unchanging insofar as it exists and will not cease to be; the author does not make the argument that copyright law should be abolished, however, it is necessary to examine what other factors can come into play in this context.

The digital environment is never limited to just two individual points⁵⁶; Murray recognises that it is a ‘polycentric’⁵⁷ environment. The Internet is a vast communications system of assimilated networks with multiple interconnected

⁵² Available from: <http://physics.info/newton-third/>

⁵³ Shipman, J.T., Wilson J.D., and Todd, A., *‘An Introduction to Physical Science’*, (2007, Cengage Learning), p56.

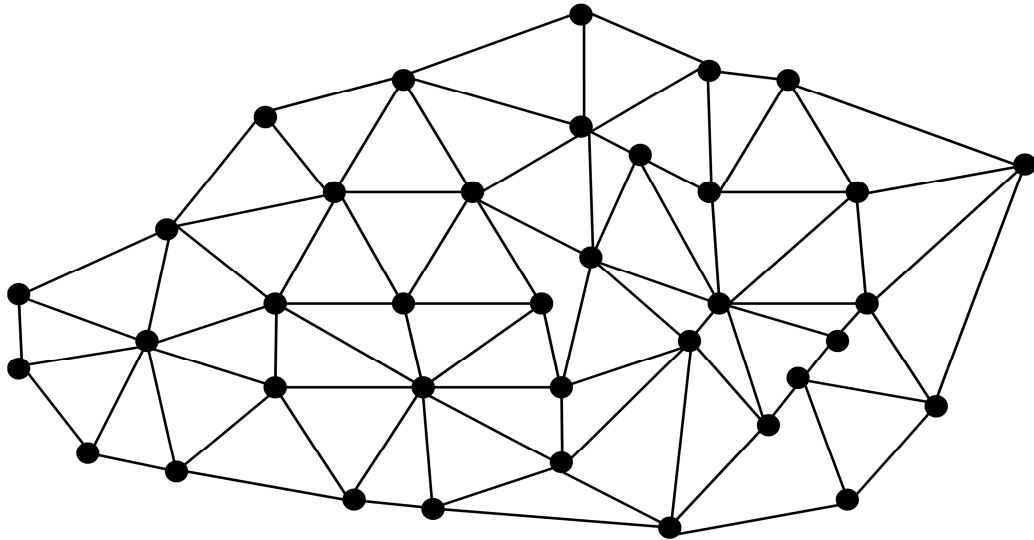
⁵⁴ Cannataci, J., and Mifsud-Bonnici, J.P., *Weaving the Mesh: Finding Remedies in Cyberspace’*, (2007) *International Review of Law Computers & Technology* 21(1) 59-78, p65. See also the discussion of the Creative Commons movement in chapter 7, pp265-305.

⁵⁵ Murray, A.D., *‘Internet Regulation’*, in Levi-Faur, D. (ed), *‘Handbook on Regulation’*, (2011, Edward Elgar). Available from: http://works.bepress.com/andrew_murray/4

⁵⁶ See, for example, Paul Baran’s distributed communications network diagram, available from: <http://www.rand.org/about/history/baran.html>

⁵⁷ Murray, A.D., *‘Regulating the Post-Regulatory Cyber-State’*, in Brownsword R., and Yeung, K. (eds) *‘Regulating Technologies’*, (2008, Hart), 287-316. Available from: http://works.bepress.com/andrew_murray/7

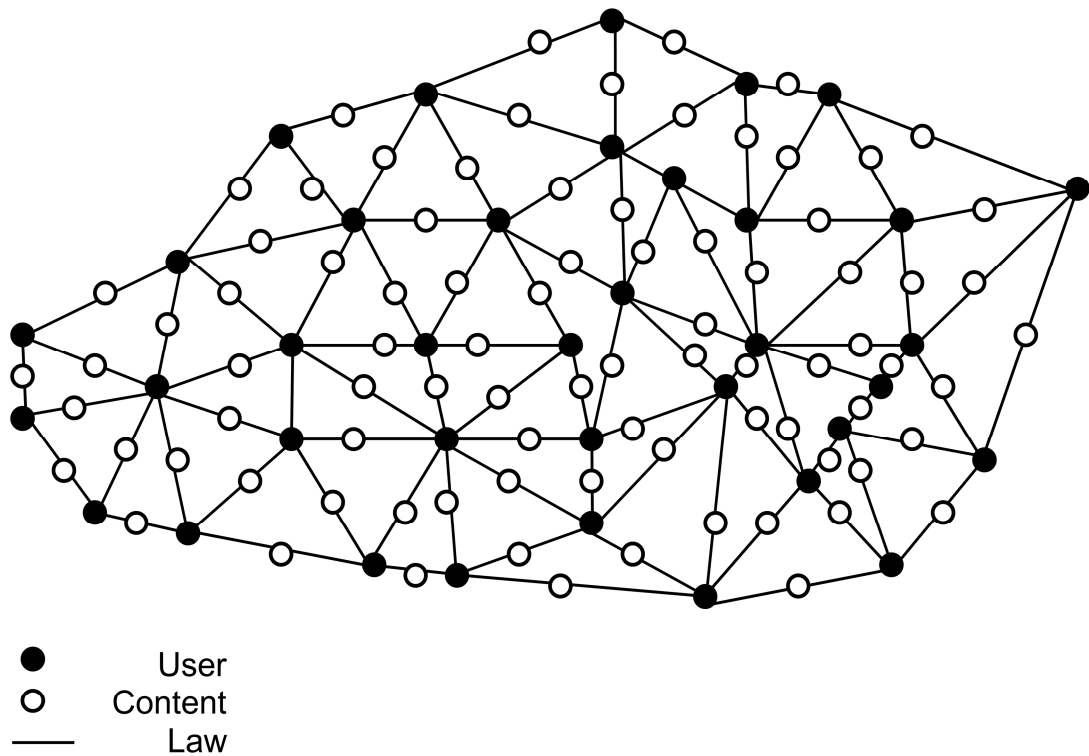
users⁵⁸. Therefore, the above diagram is overly simplified as applying in the digital environment; the Internet is a vast communications system of assimilated networks with multiple users as illustrated below (on a vastly simplified and reduced scale) where the dots represent interconnected users:



As well as multiple users, there are also multiple pieces of digital content available⁵⁹, which can be presented thus:

⁵⁸ See chapter 2, pp57-62.

⁵⁹ At a broad level, it is irrelevant in the present context to discern between different types of content, for example categories of works or even whether they are protected or in the public domain. Their only unifying feature is that they are digital in format, see chapter 2, p72 and chapter 7, p279 and p290. Nonetheless, the proceeding examination will focus on the impact of the 'modalities' in relation to digital music.



This now presents a seemingly complex situation, but is merely the legal axis of copyright multiplied as it may apply on a network. Copyright law (as the 'legal' modality) is the link between the user and content. Having explained the role and operation of the legal modality in this instance, it is now necessary to explain and apply Lessig's other modalities as they may operate to disrupt this relationship in the context of digital music. The 'effect' of these modalities will be presented as 'blades' extending along the axis between the user and content. These blades are designed to be variable in light of their subjective appreciation referred to above and as such, their influence may vary depending on the influence each has on the individual user⁶⁰. In contrast to the way they were originally presented by Lessig (as four modalities regulating upon the 'dot'⁶¹), their conception as blades has been designed to demonstrate that as well as having the effect to discourage behaviour, they may also act to *encourage* behaviour; in this case, the illegal downloading of digital music.

⁶⁰ I.e. they may be of varying thickness.

⁶¹ Lessig, L., 'Code (Version 2.0)', (2006, Basic Books), p122.

3. Norms

The law sets the rules and norms and the norms by which society should adhere to⁶². However, within Cyberspace there are different types of communities (as there are in the physical world) who have different cultures that intersect with regulation⁶³. Just as social norms can reinforce legal rules, legal rules can also reinforce social norms, however, this feedback loop can be short-circuited if social norms diverge widely from legal rules; this often occurs when legislation (or indeed, a ruling) changes a legal rule without directly affecting the underlying norms of conduct⁶⁴. 'Norms' constrain through the stigma a community imposes⁶⁵ and can also be regarded as 'reputational cost'⁶⁶. This reflects how failure to comply with social conventions can increase the 'cost' of violating legal rules as well as failing to comply with standard norms of behaviour:

“Consequently, the disapproval, ostracism, or guilt that arises from failure to comply with conventional standards of conduct can supplement or even completely replace the threat of punishment as a means of ensuring that these rules are obeyed.”⁶⁷

⁶² Ouma, M.N., 'Optimal Enforcement of Music Copyright in Sub-Saharan Africa: Reality or Myth?', (2006) *Journal of World Intellectual Property* 9(5) 592-627, p592.

⁶³ Bowrey, K., *Law & Internet Cultures*, (2005, Cambridge University Press), p14.

⁶⁴ Jensen, C., *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, (2003) *Stanford Law Review* 56(3) 531-570, p563. This was perhaps the case in Napster which is discussed in chapter 4, pp133-148 and p159. In contrast, the Creative Commons (CC) movement discussed in chapter 7 could be seen as an attempt to regulate the use of conduct in accordance with perceived norms in the digital environment, see pp268-269, and p274.

⁶⁵ Lessig, L., *Code (Version 2.0)*, (2006, Basic Books), p124.

⁶⁶ Oksanen, V., and Valimaki, M., *Theory of Deterrence and Individual Behaviour – Can Lawsuits Control File Sharing on the Internet?*, (2007) *Review of Law and Economics* 3(3) 693-714, p705.

⁶⁷ Jensen, C., *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, (2003) *Stanford Law Review* 56(3) 531-570, p535.

Lessig defines these as normative constraints imposed by members of a community⁶⁸: “A norm governs socially salient behavior (sic), deviation from which makes you socially abnormal.”⁶⁹ Norms exist in Cyberspace as much as they do in the real world; however, their origins and forms are different. Norms in the physical world generally state that the law should be obeyed because it is the *law* and because of the stigma that may result from conviction. Although this may be true in other aspects of life, this norm appears to have bypassed copyright in relation to the digital environment and in relation to digital music content. This may be for several reasons. Copyright has always been somewhat ‘ethereal’ in nature by granting protection to original expressions⁷⁰ that in this case, can exist apart from the material object in which it may otherwise be embodied. In addition, intellectual property is non-rivalous as opposed to traditional forms of property. Enjoyment of a copyrighted work by one user in no way impairs the utility another user may receive. Furthermore, norms exist differently in the digital environment because they are different; online norms are a product of the development of the Internet⁷¹. Norms are also rooted in the relevant cultural values of their associated ‘community’, as Castells states:

*“... social movements in the Information Age are essentially mobilized around cultural values. The struggle to change the codes of meaning in the institutions and practice of society is the essential struggle in the process of social change...”*⁷²

To this extent, they may be considered as a corollary of ‘architecture’ (discussed further below) as they were engendered from the development of the Internet and associated digital technology. However, the two may now be seen as more distinct due to the time-span that now exists between the

⁶⁸ Lessig, L., ‘Code (Version 2.0)’, (2006, Basic Books), p340.

⁶⁹ Ibid, p340.

⁷⁰ See chapter 1, pp24-25.

⁷¹ See chapter 2, pp57-62.

⁷² Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society*, (2001, OUP), p140.

initial development of digital technology from the mid-nineties to today. It could hardly be said that those who now engage in illegal copyright infringement do so as a direct result of the culture that developed from the emergence of the Internet and the Web; they are simply too young. Nonetheless, the gap between law and social practices among people appear to reinforce each other and can establish a pattern of unlawful behaviour⁷³.

In order to increase copyright compliance, the interaction between litigation, norms and deterrence is important; however, norm-effects may cancel out deterrence effects if anti-copyright norms are bolstered at an equal rate⁷⁴, such that there may strong social norms *in favour* of infringement⁷⁵ and thus operating to encourage infringement. This is also likely to, “... *increase the fallout between copynorms in action and copyright law in the books.*”⁷⁶ If anything, the early trend could be described as an ‘anti-copyright norm’⁷⁷. “*Given that norms are hard to dislodge, imposing laws that are perceived as unjust or illegitimate might strengthen the underlying opposition against those laws.*”⁷⁸ This is further complicated when one considers the ‘community aspect’ to the normative modality.

⁷³ Palfrey, J., Gasser, U., Simun, M., and Barnes, R.F., ‘*Youth, Creativity, and Copyright in the Digital Age*’, (2009) *Intl J Learning & Media* 1(2) 79-97, p87.

⁷⁴ Depoorter B., and Vanneste, S., ‘*Norms and Enforcement: The Case Against Copyright Litigation*’, (2006), 84 *Oregon Law Review* 1127-1180, p1143.

⁷⁵ Hill, C.W.L., ‘*Digital piracy: Causes, consequences, and strategic responses*’, (2007) *Asia Pacific J Management* 24(9) 9-25, citing studies by Cohen and Cornwell (1989), Glass and Wood (1996), Oz, (1990), and, Soloman and O’Brian (1990).

⁷⁶ Depoorter B., and Vanneste, S., ‘*Norms and Enforcement: The Case Against Copyright Litigation*’, (2006), 84 *Oregon Law Review* 1127-1180, p1161.

⁷⁷ Jensen, C., ‘*The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*’, (2003) *Stanford Law Review* 56(3) 531-570, p561.

⁷⁸ Depoorter B., and Vanneste, S., ‘*Norms and Enforcement: The Case Against Copyright Litigation*’, (2006), 84 *Oregon Law Review* 1127-1180, p1140.

3.1 Community

As mentioned above, norms could be closely related to the issue of online communities, but what makes such communities different in the present context is the fact that they do not require geographical proximity and they are mediated by technology⁷⁹. It may be accurate to describe norms and community as two separate concepts because norms operate within a community context, but one cannot function without the other⁸⁰. Such communities are aimed at building and sharing resources⁸¹ and this requires a degree of normative behaviour. Norms cannot exist without a 'community' to develop and enforce them, and at the same time, communities are (initially) built from users with similar interests and by implication, who exhibit similar normative behaviour. Such communities have developed from the ethos inherent in the development of the Internet⁸². This fostered the development of an important aspect of the digital environment; 'online communities', which may be defined as: "... *endogenous, spontaneous and informal 'economic institutions' generating a new model of inter-individual interaction...*"⁸³ Such communities necessarily contain their own normative meanings: "... *the semiotic content attached to various actions, or inactions, or statutes, with a particular context ... its contingency (depends) on a particular society or group, or community within which social meanings occur.*"⁸⁴

⁷⁹ Brousseau, E., and Curien, N. (eds), *Internet and Digital Economics: Principles, Methods and Applications*, (2007, Cambridge), p36.

⁸⁰ For example, the CC movement operates on a normative understanding built by shared values between two separate, but related communities; artists (or creators) and users. See chapter 7, pp267-268, and p283.

⁸¹ Brousseau, E., and Curien, N. (eds), *Internet and Digital Economics: Principles, Methods and Applications*, (2007, Cambridge), p36.

⁸² See chapter 2, pp57-62.

⁸³ Brousseau, E., and Curien, N. (eds), *Internet and Digital Economics: Principles, Methods and Applications*, (2007, Cambridge), p27.

⁸⁴ Lessig, L., *The Regulation of Social Meaning*, (1995) The University of Chicago Law Review 62(3) 943-1045, pp951-952. See also chapter 5, p192 and chapter 7, p274 and pp281-282.

This community development could perhaps be seen as a result of the need of the Internet's culture to write its own history⁸⁵; necessarily involving the very culture inherent in its development: "... *communication of values, mobilization around meaning, become fundamental. Cultural movements ... are built around communication systems...*"⁸⁶ Such communication systems and the 'stories' behind them are essential to the creation of a community and its identity, and which influence how the power of such communities is exercised⁸⁷; in this context, the Internet (and digital architecture) is the organisational foundation of this structure⁸⁸.

It is also important to appreciate how such communities may exercise control or at least perform some sort of 'regulatory' function. Communities generate their own practices and in order to operate in such a community, new members must behave in accordance with the relevant norms. In this sense, they can be seen as mutually reinforcing and consequently, hard to change. Nonetheless, what makes norms different from the other modalities is that they are imposed by a community, not a state, and therefore, have a different mechanism and source of sanction⁸⁹: "*There is a social end, and deviation from supporting that end is individually sanctioned.*"⁹⁰ Furthermore, each community is fed by its own sense of history, experience and attitude⁹¹. The idea of 'community' is very important regarding the actions of users in Cyberspace:

⁸⁵ Bowery, K., *'Law & Internet Cultures'*, (2005, Cambridge), p15.

⁸⁶ Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society'*, (2001, OUP), p140.

⁸⁷ Bowery, K., *'Law & Internet Cultures'*, (2005, Cambridge), pp15-16.

⁸⁸ Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society'*, (2001, OUP), p49.

⁸⁹ Lessig, L., *'Code (Version 2.0)'*, (2006), p341.

⁹⁰ Lessig, L., *'The Regulation of Social Meaning'*, (1995) The University of Chicago Law Review 62(3) 943-1045, p996.

⁹¹ Bowrey, K., *'Law & Internet Cultures'*, (2005, Cambridge University Press), p16. This is arguably one of the driving features behind the CC movement, see chapter 7, p267.

“... it should be noted that p2p file-sharing networks have become indispensable components of numerous pan-global virtual communities ... for members of these burgeoning online communities, file-sharing is less a convenient vehicle for anonymous and selfish gain, and more an altogether novel forum for the formation and maintenance of music-based relationships.”⁹²

Although social norms exist in the community in which one lives, they nonetheless guide one's actions accordingly and are part of the benefits and costs associated with individual action⁹³. However, norms in such online communities are different:

“These communities have standards and norms which are designed to reflect the aims and objectives of that community, and are quite distinct from the community values the member recognises in their everyday (offline) life.”⁹⁴

The community basis thus constitutes the normative understanding of its members:

“... they are reconstructed when contexts of understanding change; but contexts change when collections of individuals change, and hence the problem of social meaning making is how to get these groups to change.”⁹⁵

These norms conflict with the conventional business model of the music industry based on copyright law, but conform within the file-sharing

⁹² Danay, R., ‘Copyright vs. Free Expression: The Case of Peer-to-Peer File-Sharing of Music in the United Kingdom’, (2005-2006) 8 Yale J L & Tech 32-62, p48.

⁹³ Lessig, L., ‘The Regulation of Social Meaning’, (1995) The University of Chicago Law Review 62(3) 943-1045, p1001.

⁹⁴ Murray, A.D., ‘Symbiotic Regulation’, (2008) 26 J Marshall J Computer & Info L 207-228, p221.

⁹⁵ Lessig, L., ‘The Regulation of Social Meaning’, (1995) The University of Chicago Law Review 62(3) 943-1045, p993.

community⁹⁶ and in this sense may operate to promote the unauthorised downloading of content. Many individuals also operate from a normative basis that such technology is wealth-maximising and that copyright law is biased in favour of the creative industries: “*Such norms are in conflict with the conventional business model of copyright law, but these norms, of course, conform within a file-sharing sub-culture.*”⁹⁷ As such, they provide an explanation for the fact that despite the possible costs of file-sharing and the incentive to ‘free-ride’ on peer-to-peer (p2p) networks, many users store their files in a shared folder. This may also be partly explained by the technology itself (which also related to the architectural modality, explained below). In this instance, the benefits from ‘sharing’ content on p2p networks arise from increased performance and reduced download times⁹⁸. Here file-sharing is not seen as wrong, in fact it is the norm and it compels others to add to the network by sharing their own files. Furthermore, as opposed to having a negative effect resulting from community sanctions, it may have a *positive* effect with the community operating to encourage and support such behaviour. This is because, aside from governing behaviour, there may also be the conception that the practice of file-sharing itself is rooted in the ‘mutual benefit’ or satisfaction of such behaviour; through community, mutual aid and support (as well as improved efficiency⁹⁹):

*“The self-reinforcing qualities of that aid would, in turn, prompt others to give equally to you ... It would take the arrival of virtual worlds for us to finally see larger economies built in mutual benefit actually work.”*¹⁰⁰

⁹⁶ Depoorter B., and Vanneste, S., ‘*Norms and Enforcement: The Case Against Copyright Litigation*’, (2006), 84 Oregon Law Review 1127-1180, p1141.

⁹⁷ Depoorter B., and Vanneste, S., ‘*Norms and Enforcement: The Case Against Copyright Litigation*’, (2006), 84 Oregon Law Review 1127-1180, p1141.

⁹⁸ See for example Feldman, M., Law, K., Chuang, J., and Stoica, I., ‘*Quantifying Disincentives in Peer-to-Peer Networks*’, (2003), available from: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.163.3331&rep=rep1&type=pdf>. See also chapter 2, pp66-70.

⁹⁹ Chapter 2, pp69-70.

¹⁰⁰ Anderson, C., ‘*Free: The Future of a Radical Price*’, (2009, Random House), p40.

Therefore norms can potentially operate to compel users to act in a certain way; in this case illegally downloading music content. It is difficult to envisage sanctions being imposed by a 'community' as the activity in question is more removed from active participation in the ongoing 'life' of an online community; for example, as may be the case in online role-playing games (known as 'massively multiplayer online role-playing games', or MMORPGs¹⁰¹). As such, there may be less imposition of social sanctions as there are less proximate relationships between the parties involved. This is further heightened by the increasingly remote nature of p2p technology¹⁰² itself and also the ability to download content from file-hosting services¹⁰³ where there is even less direct interaction between users. As such, the issue of norms is intrinsically linked with that of architecture, discussed further below.

Furthermore, the social aspect of norms can serve to enhance creativity and play a dual-role in the creative process functioning as both users and as immediate cultural environments for users¹⁰⁴ (in combination with the forums established by architecture):

"Social groups also can consciously seek to channel creative practice in a variety of ways and for a variety of reasons. Along with validating institutions, social groups play important roles in determining both conceptions of artistic and intellectual merit and conceptions of the appropriate social domains of creative practice."¹⁰⁵

¹⁰¹ A portal for such games can be found at: <http://www.mmorpg.com/>

¹⁰² See chapter 2, on the different 'generations' of p2p networks (p68) and their subsequent operation in chapter 4, pp131-165.

¹⁰³ For example, see generally, MarkMonitor, '*Traffic Report: Online Piracy and Counterfeiting*', (2011), available from:

https://www.markmonitor.com/download/report/MarkMonitor_-_Traffic_Report_110111.pdf

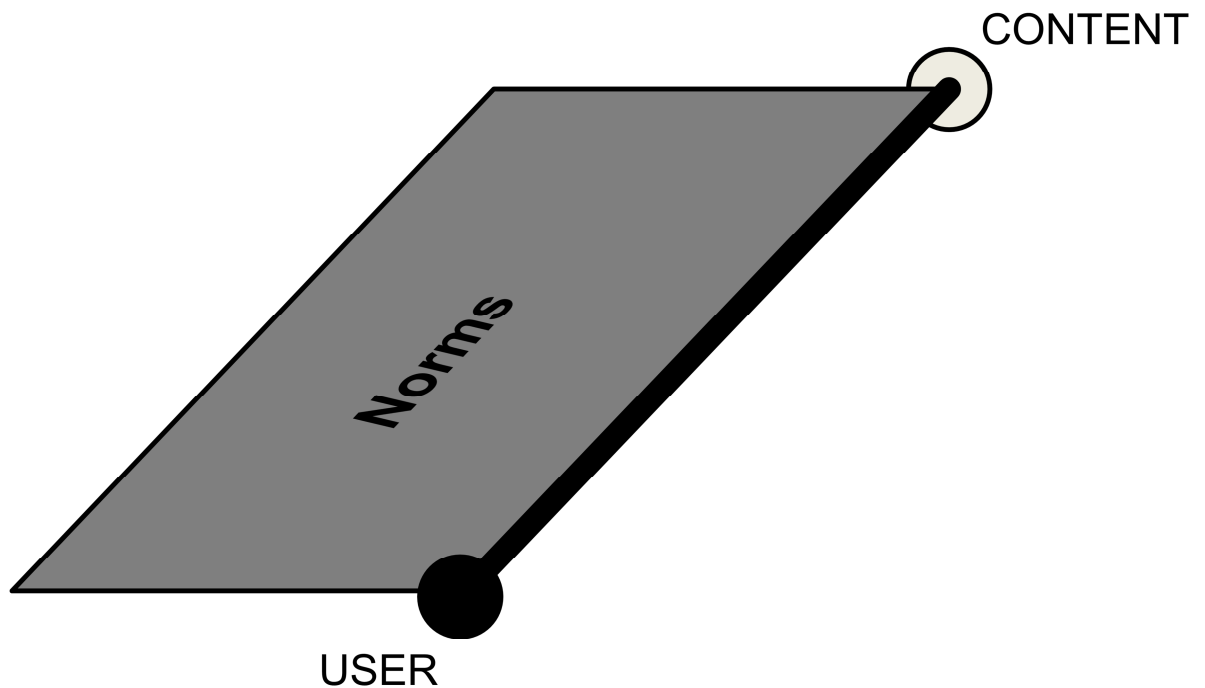
¹⁰⁴ Cohen, J.E., '*Creativity and Culture in Copyright Theory*', (2007) 40 UC Davis L Rev 1151-1205, p1188. The issue of the 'creative environment' is very important in the context of this thesis, see chapter 1, pp25-28 and pp33-34.

¹⁰⁵ Cohen, J.E., '*Creativity and Culture in Copyright Theory*', (2007) 40 UC Davis L Rev 1151-1205, p1188.

Social meaning of copyright infringement may, in the past, have been resistant to change¹⁰⁶, or 'sticky'¹⁰⁷. Changing them in their community context thus requires:

"... a collective effort, which in turn requires the construction of an array of selective incentives, sufficient to overcome the selective incentives that act to support the status quo structure of social meaning."¹⁰⁸

Again, this can be added through the positive conception of the user who is being regulated; the dot is part of a community of dots¹⁰⁹. In conclusion, the normative modality may be factored into the initial diagram as a 'blade' which runs parallel to the legal axis between users and content:



¹⁰⁶ Jensen, C., *'The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms'*, (2003) *Stanford Law Review* 56(3) 531-570, p560.

¹⁰⁷ *Ibid*, p563.

¹⁰⁸ Lessig, L., *'The Regulation of Social Meaning'*, (1995) *The University of Chicago Law Review* 62(3) 943-1045, p1000. See also chapter 7 on CC, pp265-305 as an example of this 'effort' in practice.

¹⁰⁹ Murray, A.D., *'Symbiotic Regulation'*, (2008) *26 J Marshall J Computer & Info L* 207-228, pp222-224.

4. Markets

Consumers' sense of identity (in the community context discussed above) is also dependent on their consumption choices¹¹⁰ thus implicating markets¹¹¹ as highly applicable. The market constrains through scarcity and price¹¹²; pricing structures constrain access¹¹³, and thus consumption. Again, this is related to the modalities of law and norms; market transactions do not exist outside of these boundaries¹¹⁴:

*"The constraints of the market exist because of an elaborate background of law and norms defining what is buyable and sellable, as well as rules of property and contract for how things may be bought and sold."*¹¹⁵

However, it may seem that market is inapplicable to the digital environment as law and norms operate (or do not operate) to seemingly remove market constraints¹¹⁶. Whilst the architectural modality has also extended the potential market, it may also have caused a breakdown in traditional market controls¹¹⁷: *"... as both the market and architecture relax the regulation of copyright, norms pile on."*¹¹⁸ Again, this may have the effect of driving users to view market constraints as an incentive to infringe.

¹¹⁰ Bowrey, K., *'Law & Internet Cultures'*, 2005, Cambridge), p142.

¹¹¹ Lessig, L., *'Code (Version 2.0)'*, (2006, Basic Books), p124. See also chapter 2, p45.

¹¹² Ibid, p341.

¹¹³ Ibid, p124.

¹¹⁴ Lessig, L., *'Code (Version 2.0)'*, (2006, Basic Books), p341.

¹¹⁵ Ibid, p341. See also, Towse, R., *'Creativity, Incentive, and Reward : An Economic Analysis of Copyright and Culture in the Information Age'*, (2001, Elgar), p126: *"Property rights must clearly be defined and enforceable for markets to work."*

¹¹⁶ However, the operation of the CC movement through its associated intermediaries does suggest that a market (of sorts) is possible. See chapter 7, pp291-298.

¹¹⁷ Murray, A.D., *'Internet Regulation'*, in Levi-Faur, D. (ed), *'Handbook on Regulation'*, (2011, Edward Elgar). Available from: http://works.bepress.com/andrew_murray/4

¹¹⁸ Lessig, L., *'Free Culture: The Nature of Creativity'*, (2004, Penguin Books), p125.

4.1 'Free'

It is necessary to consider why infringement is so high in the case of digital, as opposed to physical, goods¹¹⁹. In the past, before digitisation, it was claimed that home taping would 'kill' music and the hesitation of the industry to embrace new technology, and thus new markets, was not surprising¹²⁰. Nevertheless, to a certain degree the music industry accepted a limited 'gift economy' of private use as beyond their realm of control¹²¹. Digitisation has changed this:

*"Digitisation removed the quality/copy trade-off, by allowing generational copies to be for all intents and purposes exact copies of the original digital artefact. This disrupted the grey area of de facto accepted illegal copying by reducing the utility costs incurred by the non-authorized user. Now, copies were as good as original, the monopoly on high quality reproduction was removed from authorized distribution channels."*¹²²

Enjoyment of protected content in no way deprives someone else from the same experience and as such, infringement could be seen as a victimless crime¹²³; serving to reinforce the psychological as well as social distinctions between copyright and real property rights¹²⁴. The effect of this on the market is also reflected in the grey literature claiming that 'free' is the most

¹¹⁹ Hill, C.W.L., 'Digital piracy: Causes, consequences, and strategic responses', (2007) Asia Pacific J Management 24(9) 9-25, p11.

¹²⁰ Kot, G., 'Ripped: How the Wired Generation Revolutionised Music', (2009, Scribner), p29.

¹²¹ May, C., 'Digital rights management and the breakdown of social norms', (2003) First Monday 11(3), available from: http://firstmonday.org/issues/issue8_11/may/index.html

¹²² Ibid. See also Anderson, C., 'The Longer Long Tail (Updated and Expanded Edition)', (2009, Random House) p5: "This shattering of the mainstream into a zillion different cultural shards is something that upsets traditional media and entertainment no end." The effect of digital technology in this respect was discussed in chapter 1, p27, and chapter 2, pp72-73.

¹²³ Jensen, C., 'The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms', (2003) Stanford Law Review 56(3) 531-570, p540.

¹²⁴ Ibid, p543.

common reason why digital copyright infringement takes place¹²⁵. However, 'price' makes the user think about choice:

*"If you charge a price, any price, we are forced to ask ourselves if we really want to open our wallets. But if the price is zero, that flag never goes up and the decision just got easier."*¹²⁶

'That decision' could thus easily be a decision to infringe. It may be possible that 'free' sharing is a norm in itself, or at least 'normal' practice¹²⁷ due to architectural considerations discussed below. Just because content is 'free' does not mean that a market cannot form, or that a market does not exist, as Anderson in his exploration of 'Free'¹²⁸, states:

*"'De-monetization' is traumatic for those affected. But pull back and you can see that the value is not so much lost as re-distributed in ways that aren't always measured in dollars and cents."*¹²⁹

However, the current operation of the market is at-odds with any early (and now outdated) cyber-libertarian conception whereby there would be a market free of regulation in which users would be able to operate in a way that best suited them¹³⁰. This view has been greatly challenged by Lessig (and

¹²⁵ See generally, 'Changing attitudes and behaviour in the 'non-Internet' digital world and their implications for intellectual property', (2010) commissioned by the Strategic Advisory Board for Intellectual Property (SABIP) and carried out by BOP Consulting, p32, available from: <http://www.ipo.gov.uk/ipresearch-attitudes-201001.pdf>. Although the author still questions the value of 'official' reports (see chapter 1, p12), they do serve an illustrative purpose here.

¹²⁶ Anderson, C., 'Free: The Future of a radical Price', (2009, Random House), p59.

¹²⁷ Palfrey, J., Gasser, U., Simun, M., and Barnes, R.F., 'Youth, Creativity, and Copyright in the Digital Age', (2009) Intl J Learning & Media 1(2) 79-97, p88.

¹²⁸ Anderson, C., 'Free: The Future of a radical Price', (2009, Random House).

¹²⁹ Ibid, p127. For example in the context of CC, such 'value' may be redistributed through the collaborative and acknowledged creation of new content, see chapter 7, pp269-270.

¹³⁰ Murray, A.D., 'Symbiotic Regulation', (2008) 26 J Marshall J Computer & Info L 207-228, p212.

others). In this instance, the pre-existing operation of the Law, and subsequent enforcement of it, have served to negate a free (cyber-libertarian) market as an option to influence behaviour.

According to Anderson: *“Somewhere in the transition from atoms to bits, a phenomenon that we thought we understood was transformed. ‘Free’ became Free.”*¹³¹ It is important to bear in mind that feelings about ‘free’ are relative and not absolute¹³²; for Lessig, ‘free’ translates as the freedom or ‘liberty’ to use a resource (or content)¹³³, but it can also constitute ‘freedom’ from the physical medium¹³⁴. However, the issue of free use is paramount: *“... whenever one says a resource is ‘free’, most believe that a price is being quoted – free, that is in zero cost. But ‘free’ has a much more fundamental meaning...”*¹³⁵ The ability to engage and interact with the resource can also constitute value¹³⁶ through simply being in possession of it in order to do so. It has been stated that *“... the idea of loving a song and not owning it in some way doesn’t yet make sense.”*¹³⁷ Although this is not a ‘legal’ statement (and although ‘ownership’ is a legal concept in copyright law¹³⁸), it is one which resonates strongly with the author as it asserts the

¹³¹ Anderson, C., *Free: The Future of a Radical Price*, (2009, Random House), p4.

¹³² Ibid, p56.

¹³³ Lessig, L., *The Future of Ideas: the Fate of the Commons in a Connected World*, (2001, Vintage Books), p12. See also the philosophy of the GNU Project: <http://www.gnu.org/philosophy/philosophy.html>. This is also discussed in chapter 7, p253-254.

¹³⁴ Gensollen, M., *Information goods and online communities*, in Brousseau, E., and Curien, N. (eds), *Internet and Digital Economics: Principles, Methods and Applications*, (2007, Cambridge), chapter 5, pp173-201, p178.

¹³⁵ Lessig, L., *The Future of Ideas: The Fate of the Commons in a Connected World*, (2002, Vintage Books), p12.

¹³⁶ See chapter 1, p33, chapter 2, p73 and chapter 5, p206. See also chapter 7 on CC, pp272-274 where this is a reality so long as the original author is attributed,

¹³⁷ *A journey into sound: All the record shops I have loved and lost*, (2011) The Guardian, available from:

<http://www.guardian.co.uk/music/musicblog/2011/apr/15/record-store-day-shops>

See also chapter 5, pp206-207.

¹³⁸ For example, in the UK under s.11 Copyright, Designs and Patents Act (CDPA), 1988.

importance of 'value' to the consumer, but a 'value' which extends beyond monetary or financial terms. The author suggests that the fact that something is 'free' may constitute value in itself; either in terms of welfare or *possession*.

The digital environment can be said to be one of 'abundance' which reduces (financial) cost: "*Where abundance drives the cost of something to the floor, value shifts to adjacent levels...*"¹³⁹ This may not be captured by financial indicators. A realistic analysis of the welfare effects of downloading requires information of the distribution of value among (legal) buyers and (illegal) downloaders¹⁴⁰ which may be handicapped by the likelihood of 'truth'¹⁴¹ in relation to admitting to an unlawful activity on the part of downloaders. It is also problematic due to the nature of the content itself and how it is 'experienced'¹⁴²:

*"Because music is an experience good, the ex ante valuation determining purchase is not the same as the ex post valuation, which becomes known only after purchase."*¹⁴³

Therefore, although the user may 'value' a particular piece of content (and may also appreciate the work and effort that went into its production), they may not necessarily place any value on the *distribution* of that content, as

¹³⁹ Anderson, C., *Free: The Future of a radical Price*, (2009, Random House), p52.

¹⁴⁰ Rob, R., and Waldfogel, J., *Pirates of the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, (2006) 49 Journal of Law and Economics 29-62, p38.

¹⁴¹ Liebowitz, S.J., *File-Sharing: Creative Destruction or just Plain Destruction?*, (2004), 49 Journal of Law and Economics 1 1-28, p6.

¹⁴² There are signs that such 'experience', or 'consumption', may also be changing, see chapter 5, pp195-198 and p202.

¹⁴³ Rob, R., and Waldfogel, J., *Pirates of the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, (2006) 49 Journal of Law and Economics 29-62, p38. From the musicologist's perspective, this could be seen to be as a result of the nature of music itself as 'fleeting' and 'escaping', see generally Rahmatian, A., *Music and creativity as perceived by copyright law*, (2005) IPQ 3 267-293.

opposed to the *creation* of that content. This can also correspond with normative modality relating to 'attitudes': "... *the file-trading generation's innate understanding of digital economics helps usher in the conclusion that ... payment for that transfer should also be zero.*"¹⁴⁴ Conversely and perhaps more recently, downloading content for 'free' could be seen as reward for the time it takes to actually find the content nowadays since p2p is no-longer as prevalent, and even when it was, content was blocked/removed or the network was flooded by corrupted copies released by the industry¹⁴⁵.

This is in contrast to the general consensus that the Internet would lower consumers' search costs and thus intensify price competition¹⁴⁶. If users view downloading content freely as commensurate with the relative lack of time it takes to locate the content in the first place¹⁴⁷, this implicates an 'equity' theory of social exchange and justice which describes an individual's search for fairness and equity in social exchanges:

*"An equitable exchange is one in which distributive justice is seen to exist, that is, when the individual perceives that participants in an exchange are receiving outcomes commensurate with their inputs."*¹⁴⁸

Such action on the part of the industries would also have a negative effect; undercutting compliance with copyright law. Therefore, the operation of the

¹⁴⁴ Anderson, C., *'Free: The Future of a Radical Price'*, (2009, Random House), p224.

¹⁴⁵ 'The more effort I have to put in, the less I should have to pay.' For example, the practice of 'p2p bombing', as practiced by Madonna. See OutLaw, *'The war against p2p'*, (2003), available from: <http://www.out-law.com/page-335>.

¹⁴⁶ Janssen, M.C.W., Moraga-Gonzalez, J.L., and Wildenbeest, M.R., *'Consumer search and pricing behaviour in Internet markets'*, in Brousseau, E., and Curien, N. (eds), *'Internet and Digital Economics: Principles, Methods and Applications'*, (2007, Cambridge), chapter 16, pp460-484, p460.

¹⁴⁷ Compared with, say, taking the time to go to, and browse, a shop. This is also despite the relatively time-consuming nature of the exercise in the 'early days', when broadband was not prevalent and Internet speeds were much slower.

¹⁴⁸ Hill, C.W.L., *'Digital piracy: Causes, consequences, and strategic responses'*, (2007) Asia Pacific J Management 24(9) 9-25, p12.

market modality in this sense may operate in such a way as to drive users to infringe. Given the fact that norms are hard to dislodge, imposing such laws may strengthen the underlying opposition against those laws¹⁴⁹, and also those associated with such laws (including bands and musicians¹⁵⁰). This is to the extent that private ordering has tended to result in a balance¹⁵¹ of rights and obligations more favourable to the rightsholder that may otherwise be the case under default copyright law¹⁵².

4.2 Market Concentration

The market modality has another dimension in terms of potentially causing users to leave the market, or rather, the 'traditional' distribution market. The operation of the law and (pre-existing) market did not operate to the benefit of the user:

“Through the breach rushed a new generation of bands and fans empowered by personal computers and broadband Internet connections. Willy-nilly they forged a new world of music distribution that seized control from once all-powerful music and radio conglomerates.”¹⁵³

¹⁴⁹ Depoorter B., and Vanneste, S., *'Norms and Enforcement: The Case Against Copyright Litigation'*, (2006), 84 Oregon Law Review 1127-1180, p1140.

¹⁵⁰ The best example of this is probably the band Metallica and their drummer, Lars Ulrich. They became figureheads for the legal action in Napster and felt a palpable backlash. See generally, Kot, G., *'Ripped: How the Wired Generation Revolutionised Music'*, (2009, Scribner), pp25-41.

¹⁵¹ Webber, D., *'Intellectual property: challenges for the future'*, (2005) 27(1) EIPR 345-346, p345: *"Intellectual property law is based on a fundamental principle of balance – the balance between the interests and needs of the public and those of creators. This extrapolates to a balance between consumers versus innovator; public rights versus property rights; socialism versus capitalism."*

¹⁵² Dinwoodie, G.B., *'Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring'*, (2004) Journal of Institutional and Theoretical Economics 160 161-180, p168. See also chapter 7 where the Creative Commons movement is examined as a 'reactive' form of private ordering, pp265-305.

¹⁵³ Kot, G., *'Ripped: How the Wired Generation Revolutionized Music'*, (2009, Scribner), p2.

This can be looked at in terms of exposing users and consumers to different types of musical content (including musical styles and genres): *“Knowledge about art adds to consumption capital, and increases in consumption are subject to increasing returns.”*¹⁵⁴ This can then empower users, arguably to the extent that the changes brought about by technology should theoretically induce entry into the market. Digital technology, with particular regard to the beginnings of Napster, evidences this: *“The new firms were often product innovators, and their products became popular with consumers.”*¹⁵⁵ However, this is counter to the way in which the content industries’ market structure developed; specifically in terms of distribution, with substantial increases in music industry concentration from the 1950s until the present-day¹⁵⁶: *“Consolidation was the era’s trendiest business strategy.”*¹⁵⁷

This may be related to the concentration of content production and distribution outlets: *“This narrowing has an effect on what is produced. The product of such large and concentrated networks is increasingly homogenous. Increasingly safe. Increasingly sterile.”*¹⁵⁸ The music industry is focussing on fewer acts and taking on fewer risks¹⁵⁹, in contrast to the opportunities for markets to develop¹⁶⁰. Instead, the opportunity for

¹⁵⁴ Crain, M.W., and Tollison, R.D., ‘Consumer Choice and the Popular Music Industry: A test of the Superstar Theory’, (2002) *Empirica* 29 1-9, p1.

¹⁵⁵ Alexander, P.J., ‘New Technology and Market Structure: Evidence from the Music Recording Industry’, (1994) 18 *Journal of Cultural Economics* 113-123, p114. This was also solidified as a result of the legal action against peer-to-peer (p2p) networks, discussed in chapter 4, pp131-165.

¹⁵⁶ Alexander, P.J., ‘New Technology and Market Structure: Evidence from the Music Recording Industry’, (1994) 18 *Journal of Cultural Economics* 113-123, p120.

¹⁵⁷ Kot, G., ‘*Ripped: How the Wired Generation Revolutionized Music*’, (2009, Scribner), p6.

¹⁵⁸ Lessig, L., ‘*Free Culture: The Nature and Future of Creativity*’, (2004, Penguin Books), p166.

¹⁵⁹ Harrison, A., ‘*Music: The Business*’, (2008, Virgin Books), p49.

¹⁶⁰ “For everybody else, this was an opportunity for more music to flourish in more places than ever.” Kot, G., ‘*Ripped: How the Wired Generation Revolutionised Music*’, (2009, Scribner), p2.

'dissent'¹⁶¹ or to seek out new markets was weakened; compounded further by the legal modality which has expanded and been enforced to govern the digital environment, notably in the realm of p2p¹⁶². Despite the alluring usability p2p (arguably) being negated¹⁶³ by the launch of legal music services such as iTunes, the issue of 'value' is still disputed¹⁶⁴. Attempts to reflect this have been undertaken by the market, for example with the launch of the 'Spotify' music streaming service¹⁶⁵ which operates on a 'freemium' pricing structure¹⁶⁶. However, even this has its limitations, as evidenced by their decision to reduce the amount of free music its users can listen to¹⁶⁷.

Such market concentration has again been evident recently with the launch of Apple's 'iCloud'¹⁶⁸ which integrates the iTunes music service and allows remote storage and access of content¹⁶⁹. Google¹⁷⁰ and Amazon¹⁷¹ also offer similar services, however, Apple's attempt is notable as it is the only one of the formats with industry backing¹⁷². This serves to demonstrate the increasing constriction of 'approved' content outlets and rightsholders' control

¹⁶¹ Lessig, L., *Free Culture: The Nature and Future of Creativity*, (2004, Penguin Books), p169.

¹⁶² See chapter 3, pp131-165.

¹⁶³ Lantagne, S.S., *The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack* (2004) Harv J L & Tech 18(1) 269-293, p288.

¹⁶⁴ For example, the pricing changes introduced by Apple for its iTunes store in 2009. See: <http://www.apple.com/pr/library/2009/01/06Changes-Coming-to-the-iTunes-Store.html>

¹⁶⁵ "Spotify is a new way to listen to music." See: <http://www.spotify.com/uk/>, and, <http://www.spotify.com/uk/about/what/>. This is also discussed in chapter 5, p196.

¹⁶⁶ 'Spotify Set to Take America by Storm', (2009) Wired, available from: <http://www.wired.com/epicenter/2009/07/spotify-set-to-take-america-by-storm/>

¹⁶⁷ 'Spotify cuts back on free music', (2011) BBC News, available from: <http://www.bbc.co.uk/news/technology-13078302>

¹⁶⁸ "... the cloud the way it should be..." See: <http://www.apple.com/uk/icloud/>

¹⁶⁹ See: <http://www.apple.com/uk/icloud/features/>. See also the discussion in chapter 5 on Apple's integrated technology, pp200-201.

¹⁷⁰ Music Beta by Google, see: <http://music.google.com/about/>

¹⁷¹ Amazon Cloud Drive, see: <https://www.amazon.com/clouddrive/learnmore>

¹⁷² 'Google Music stumbles at launch', (2011) BBC News, available from: <http://www.bbc.co.uk/news/technology-13350345>

over new content distribution models which began with the ruling in Napster¹⁷³. To an extent¹⁷⁴, this negated any opportunity for price competition to develop and a market to develop accordingly along these lines¹⁷⁵. Rather than facilitating this, ‘free’ eliminated any such possibility:

*“The problem with Free is that it eliminates all the price discrimination texture in the marketplace. Rather than a range of products at different prices, it tends to be winner-take-all.”*¹⁷⁶

Successful legal outcomes against p2p operators thus allowed the pre-established content industries to re-unify their business model, and negate an opportunity for other actors to participate¹⁷⁷. In this instance market concentration persisted; the legal action in this area resulted *from* ‘free’, rather than embracing the phenomenon itself¹⁷⁸. This was perhaps misguided:

*“... unauthorised reproduction is a natural consequence of the institutional setting and generates the peculiar dynamics of a market based on a double push to diffusion and exclusions. It is possible to assert that copyright and piracy are closely connected and probably inseparable.”*¹⁷⁹

¹⁷³ Discussed in chapter 4, pp133-148.

¹⁷⁴ Although there are various subscription and pricing options now offered by services such as Spotify and iTunes.

¹⁷⁵ See generally, Anderson, C., *Free: The Future of a Radical Price*, (2009, Random House), p133.

¹⁷⁶ Ibid, p133 quoting Google CEO Eric Schmidt: *“Traditionally, markets are segmented by price, making room for the high-end, the middle, and the low-end producers ... The problem with Free is that it eliminates all the price discrimination texture in the marketplace. Rather than a range of products at different prices, it tends to be winner-take-all.”* This may however be countered by the potential possibilities afforded by Digital Rights Management (DRM) to offer more varied and tailored services, see chapter 5, pp184-185.

¹⁷⁷ See chapter 4, pp156-165.

¹⁷⁸ However, CC is notable as an initiative that does embrace ‘free’ (in terms of financial cost), but with stipulations regarding attribution and derivatives. See chapter 7, p269.

¹⁷⁹ Silva, F., and Ramello, G.B., *Sound Recording Market: the Ambiguous Case of Copyright and Piracy*, (2000) ICC 9(3) 415-442, p438.

The effect of this is to negate what the Internet has created or enabled; *new markets*¹⁸⁰:

*“the revolutionary moment never arrived for the music industry; the accumulated advantages of an industry with more than a century of gate-keeping predictably held sway over the potentially destabilizing effects of Internet distribution.”*¹⁸¹

Furthermore, in contrast with the pre-operation of a market system, copyright law was used to protect the history of music industry consolidation and preserve market concentration: *“This tends to limit the extent of competition in the industry, and possibly reduces the diversity and variety of product offerings.”*¹⁸² At this point, such arguments relating to the regulation (by the law) of markets could be inverted; that markets require some regulation in order to function, but only a minimal amount¹⁸³. Theoretically, the impact of digital technology should promote greater competition in the relevant industry, provided the technologies are non-exclusionary¹⁸⁴. Although copyright itself already acts in a (limited) exclusionary way, it was the *exclusion* of new technology through the application of copyright law that consolidated market concentration; for example, in relation to peer-to-peer (p2p) technology

¹⁸⁰ See generally, Kot, G., *Ripped: How the Wired Generation Revolutionised Music*, (2009, Scribner), pp6-8. However, there may be signs that this is changing in light of streaming-based distribution and consumption business models, see chapter 5, pp194-204. This may also be seen in relation to CC-licensed content, see chapter 7, pp29-294.

¹⁸¹ Burkhardt, P., *Loose Integration in the Popular Music Industry*, (2005) *Popular Music and Society* 28(4) 489-500, p489.

¹⁸² Alexander, P.J., *New Technology and Market Structure: Evidence from the Music Recording Industry*, (1994) 18 *Journal of Cultural Economics* 113-123, p121.
See also Alexander, P.J., *Entropy and Popular Culture: Product Diversity in the Popular Music Recording Industry*, (1996) *American Sociological Review* 61(1) 171-174, p174:
“Thus, when industry concentration is very high ... product diversity is reduced.”

¹⁸³ A market is necessary for copyright to achieve its utilitarian end, see chapter 2, pp45-46.
See also chapter 1 regarding users' consumption, pp33-34.

¹⁸⁴ Alexander, P.J., *New Technology and Market Structure: Evidence from the Music Recording Industry*, (1994) 18 *Journal of Cultural Economics* 113-123, p122.

where digital music distribution came to be concentrated in the hands of rightsholders following legal action against Napster and its successors¹⁸⁵. This ensured the continuation of an old, and ill-fitting, market structure to the digital environment which contradicts wider economic and market theory:

*“Looking beyond popular music, a positive relationship between competition and innovation has been found in a wide range of fields ... it is most likely to hold in regulation-free market situations where demand is elastic, barriers to entry are low, and research and development costs are not high.”*¹⁸⁶

Although there is a market on the Internet for music with fewer gatekeepers to creativity than ever before¹⁸⁷, over-regulation from the legal modality can have a negative effect on the market itself¹⁸⁸. This increased regulation has arguably been beneficial to the market by undermining the ability of other interests to operate (such as Napster¹⁸⁹) and allowing its continuing operation, but consequently, has been detrimental to users¹⁹⁰:

¹⁸⁵ See chapter 4, p159 and p164.

¹⁸⁶ Peterson, R.A., and Berger, D.G., *Measuring Industry Concentration, Diversity, and Innovation in Popular Music*, (1996) American Sociological review 61(1), 175-178, p178.

¹⁸⁷ Doctorow, C., *Content*, (2008, Tachyon Publications), p79. However, these ‘gatekeepers’ are powerful, for example Apple (discussed in chapter 5, pp189-191). There are signs this may be changing further as a result of developments in ISPs becoming content providers, see chapter 6, pp243-246.

¹⁸⁸ See Lessig, L., *Free Culture: The Nature and Future of Creativity*, (2004, Penguin Books), p188.

¹⁸⁹ See chapter 4, pp133-148.

¹⁹⁰ Such detriment could arguably be seen as much in terms of quality as quantity of even diversity: *“In the late nineties, the acts dominating the charts were marketing triumphs more than creative ones: Britney Spears, ‘N Sync, the Backstreet Boys, Ricky Martin, and Will Smith.”* Kot, G., *Ripped: How the Wired Generation Revolutionised Music*, (2009, Scribner), p9. Although in this company, Will Smith is ok.

“... the balance between stimulating production and allowing public use of information is being lost, as information is commodified and increasingly geared towards high -paying markets”.¹⁹¹

This has seemingly created a ‘closed’ market¹⁹² in terms of distribution, industry consolidation, technological change and legal adjustments which have all acted to reinforce the pre-existing model¹⁹³. At this point, there are now two ways of looking at this situation. Firstly, the availability of high-quality content (although in the non-qualitative sense) has increased through such outlets mentioned above. This could arguably be said to lower the ‘opportunity cost’ to users of trying to find similar content illegally and for free which would arguably require much more time¹⁹⁴. However conversely, it could be said to increase such costs through depriving the user of choices of outlet(s)¹⁹⁵ and contrastingly; financial costs as well. There is the broader idea that as the digital ‘marketplace’ expanded, there was actually a proliferation of entertainment content competing for consumer attention (and money) such as the DVD and videogame industries: *“Both these industries were exploding creatively. The same could not be said of the mainstream music industry...”*¹⁹⁶ Therefore, the wider content market may not necessarily be an inhibiting factor in terms of choice and variety (outside of the music market), but perhaps the actual business practices in this industry may have had more of an effect by ignoring new content consumption patterns of users: *“The industry’s efforts to rein in consumers were exacerbated by the lack of viable alternative to the rogue file-sharing services.”*¹⁹⁷ P2p arguably facilitated the process of ‘discovery’¹⁹⁸ to users

¹⁹¹ Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society*, (2001, OUP), p182.

¹⁹² See generally Anderson, C., *Free: The Future of a Radical Price*, (2009, Random House), p217.

¹⁹³ Burkhart, P., *‘Loose Integration in the Popular Music Industry’*, (2005) *Popular Music and Society* 28(4) 489-500, p490.

¹⁹⁴ The author can relate to this argument.

¹⁹⁵ See chapter 5, p203 and chapter 6, pp263-264.

¹⁹⁶ Kot, G., *‘Ripped: How the Wired Generation Revolutionised Music’*, (2009, Scribner), p47.

¹⁹⁷ *Ibid*, p47.

and enabled a shift in consumer tastes away from the traditional offerings¹⁹⁹ from the established industry: “*Culture has shifted from following the crowd up to the top of the charts to finding your own style and exploring far out beyond the broadcast mainstream...*”²⁰⁰

This can also relate to the empowerment afforded by digital technology to discuss and critique content (in addition to consuming it). Along with the architectural modality as well as the community aspect of the normative modality, digital technology allows for powerful information gathering and collective processing which can form a new information infrastructure²⁰¹. ‘Niche’, non-mainstream musical genres and content can now be opened up to a wider audience through online music press, journalism, blogs etc.:

“... the Internet’s ability to lower the costs for artists to reach their audiences and for audiences to find artists suddenly renders possible more variety in music than ever before.”²⁰²

As well as enabling artists, it has also enabled users to become creators and distributors of musical content²⁰³, and also has allowed them to be creators

¹⁹⁸ Anderson, C., *The Longer Long Tail (Updated and Expanded Edition)*, (2009, Random House), p34.

¹⁹⁹ “By the end of the nineties, the major labels had become a high-priced speciality business addicted to blockbusters. It was a fatally flawed system...” Kot, G., *Ripped: How the Wired Generation Revolutionised Music*, (2009, Scribner), p192. See also Bowrey, K., *Law & Internet Cultures*, 2005, Cambridge), p158: “With an emphasis on hits discovering new talent, celebrity, appropriating different cultural styles and reworking of old genres pop music is especially affected by a short shelf-life.”

²⁰⁰ Anderson, C., *The Longer Long Tail (Updated and Expanded Edition)*, (2009, Random House), p37 and see generally, pp27-41.

²⁰¹ Gensollen, M., *Information goods and online communities*, in Brousseau, E., and Curien, N. (eds), *Internet and Digital Economics: Principles, Methods and Applications*, (2007, Cambridge), chapter 5, pp173-201, p177.

²⁰² Doctorow, C., *Content*, (2008, Tachyon Publications), p78.

²⁰³ See chapter 1, pp33-34.

and distributors of 'tastes'²⁰⁴; playing the same market role as 'word of mouth' and 'enlightening' consumption²⁰⁵. This also invokes the community aspect mentioned above: "*Virtual communities ... became new economic tools enhancing consumers' power.*"²⁰⁶ However, the music industry had no reason to shift its market activities as it had previously been enjoying an unrivalled period of prosperity²⁰⁷: "*By the end of the nineties, the major labels had become a high-priced speciality business addicted to blockbusters. It was a fatally flawed system...*"²⁰⁸ This was based, to a certain extent, on the more 'primitive' means of distributing and consuming content. However, it was also based on copyright as a pre-existing factor allowing for the initial commodification of such content²⁰⁹. The operation of copyright in this has not changed, but pre-existing models of content production, dissemination and consumption may no longer be appropriate: "*Cultural change, and the diversity of global demand, make it increasingly difficult to resort to standardized, mass production to satisfy the market.*"²¹⁰ At this juncture, the regulatory modality of the market ceases to be related to law, and moves into business practice. However, this dimension may amplify this modality in the current context as well as complementing a normative modality to move

²⁰⁴ See generally Kot, G., *Ripped: How the Wired Generation Revolutionised Music*, (2009, Scribner), chapter 9, *Everyone's a Critic*, pp112-132.

²⁰⁵ Gensollen, M., *Information goods and online communities*, in Brousseau, E., and Curien, N. (eds), *Internet and Digital Economics: Principles, Methods and Applications*, (2007, Cambridge), chapter 5, pp173-201, pp183-184.

²⁰⁶ Flichy, P., *Discourse on the New Economy – passing fad or mobilizing ideology?*, in Brousseau, E., and Curien, N. (eds), *Internet and Digital Economics: Principles, Methods and Applications*, (2007), Cambridge), chapter 3, pp114-142, p126.

²⁰⁷ Anderson, C., *The Longer Long Tail (Updated and Expanded Edition)*, (2009, Random House), p28.

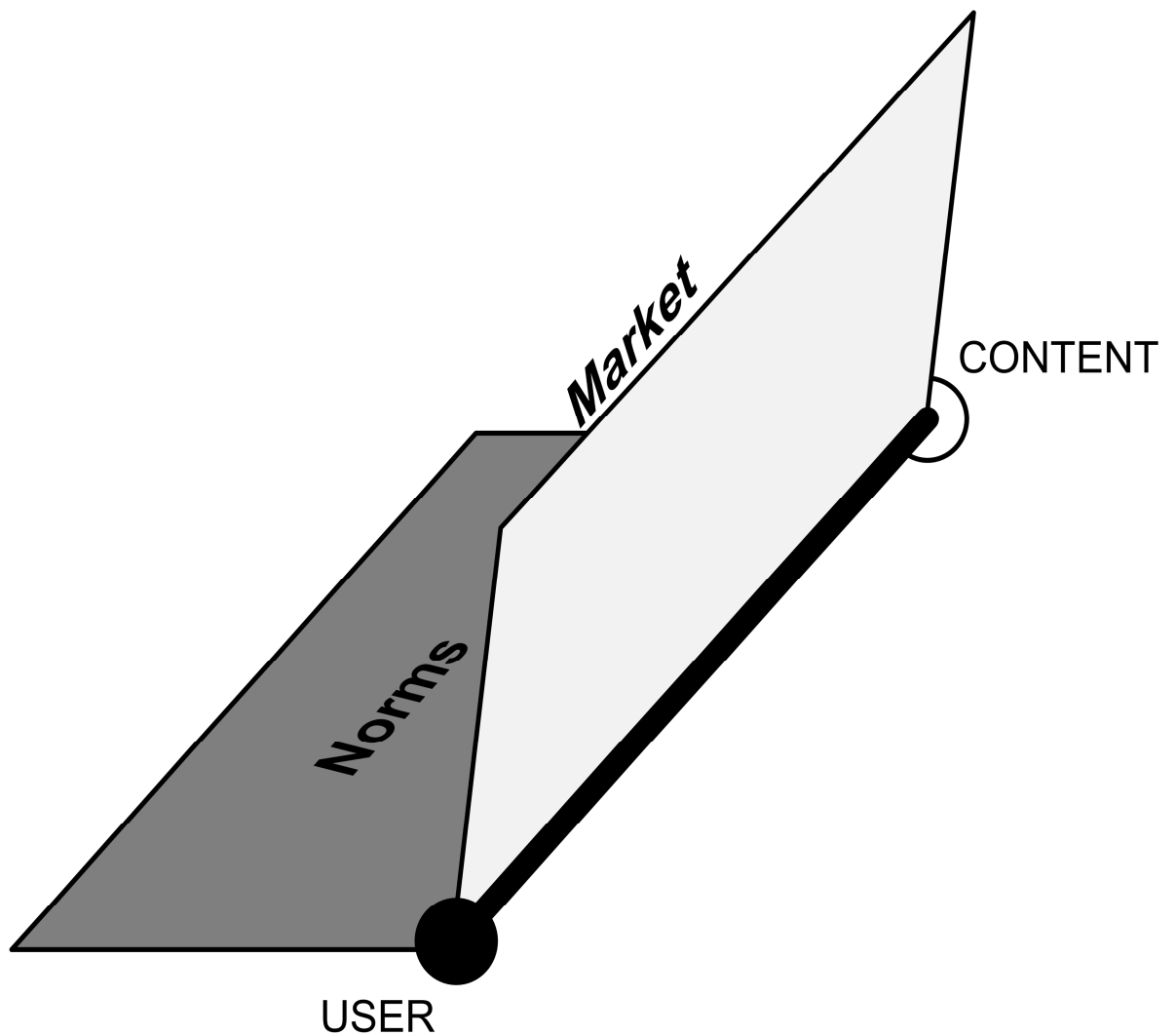
²⁰⁸ Kot, G., *Ripped: How the Wired Generation Revolutionised Music*, (2009, Scribner), p192.

²⁰⁹ Which could be further 're-commodified' through re-releases: "*The notion of finding new ways to sell the same music (...) to consumers was the bedrock of the compact-disc boom years of the late eighties and the nineties.*" Ibid, pp194-195.

²¹⁰ Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society*, (2001, OUP), p77.

away from the pre-existing market which potentially results in unauthorised copyright infringement to satisfy the users' musical tastes etc.

The operation of the market modality may now be represented as a second blade on the diagram:



5. Architecture

The modality of 'architecture' represents the physical burdens in existence, or as Lessig puts it vaguely: "... *the way the world is, of the ways specific aspects of it are.*"²¹¹ He relates this to norms and the operation of

²¹¹ Lessig, L., 'Code (Version 2.0)', (2006, Basic Books), p341.

architecture in real-space²¹², and in the current context, which may also be manifested online through digital architecture²¹³. Nonetheless, there is a relationship between these two modalities; if architecture is ‘the way the world is’ then this must necessarily invoke norms as they way people are within that ‘world’²¹⁴. This is perhaps also the vaguest modality under Lessig’s model. Theoretically, such architectural constraints may serve to limit the functioning of norms as Lessig believes them to be ‘self-executing’²¹⁵, but in terms to the communal aspect of norms as discussed above, there may be little restraining execution in this respect with architecture facilitating the enablement and execution of such norms discussed above.

Regulatory models may be said to be based on the common foundation that regulatory designs are based on active choices by regulators who operate within a settled environment and have the opportunity to consider policy decisions. This can correspond to the architectural modality as ‘the way things are’, but also represents a fundamental divergence between the way things are in the physical world (the world within which copyright traditionally operated) and the way they are in the digital world. The regulatory approach embodied in, for example, the WIPO Treaties²¹⁶ did not necessarily misjudge the digital environment, but perhaps more-so, they misjudged the way in which those rules (and hence the legal modality) would operate. This is perhaps understandable as regardless of hindsight: “... *Cyberspace does not*

²¹² Ibid, pp341-342.

²¹³ See the specific technologies of the Internet, MP3 and peer-to-peer discussed in chapter 2, pp57-75.

²¹⁴ This seems to becoming increasingly apparent in light of DRM and streaming-based content consumption where there is perhaps evidence of a new norm emerging, or evolving, in relation to this. See chapter 5, p202 and pp206-207.

²¹⁵ Lessig, L., ‘*Code (Version 2.0)*’, (2006, Basic Books), p342. See also chapter 5, p174.

²¹⁶ See chapter 2, pp78-83.

*exist in a separate state.*²¹⁷ Nonetheless, explaining architecture within its digital context is arguably more realistic and appropriate.

5.1 Digital Architecture

The regulation exercised by 'real world' constraints does not necessarily operate to the same extent in the digital environment. Instead, the author believes that architecture may more appropriately represent the specifics of digital technology²¹⁸: "*Communications technologies are clearly one of the current forms of social and cultural regulation.*"²¹⁹ Part of the regulatory complexity in this context has resulted from the attitudes of the participants involved, notably that of users, but also because of the network architecture itself. The growth of the Internet arguably rests primarily upon its design principles²²⁰ (notably its openness and the end-to-end principle mentioned below) and its history has been shaped by communities; initially surrounding ARPANET²²¹ and then from university computer-science departments in the form of Usenet²²².

"The organisational structure of these communities works with rules that emerge on the level of mutual agreements ... such agreements may

²¹⁷ Murray, A.D., 'Regulating the Post-Regulatory Cyber-State', in Brownsword R., and Yeung, K. (eds), 'Regulating Technologies', (2008, Hart), 287-316. Available from: http://works.bepress.com/andrew_murray/7

²¹⁸ For example, regarding the MP3 audio compression standard: "*These achievements set the stage for music file-sharing.*" Lantagne, S.S., 'The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack' (2004) Harv J L & Tech 18(1) 269-293, p271.

²¹⁹ Bowrey, K., 'Law & Internet Cultures', 2005, Cambridge), p141.

²²⁰ Lemley, M.A., and Lessig, L., 'The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era', (2001) 48 UCLA L Rev 925-972, p930.

²²¹ See chapter 2, pp58.

²²² Hutter, M., 'Efficiency, viability and the new rules of the Internet', (2001) European Journal of Law and Economics 11(1) 5-22, p10. The Usenet system has much more recently been thrust into the realm of digital copyright infringement through providing the architecture of the Newzbin sites which have been found to facilitate copyright infringement. See chapter 6, pp247-254.

*resemble the terms of an explicit convention, but they may also resemble a regime of binding obligations, sanctioned by expulsion.*²²³

Such ‘conventions’ or ‘regime’ building may not necessarily constitute ‘architecture’ in itself, but hints at the development of architectural rules governing user behaviour. The emergence of the Web which reflected a deeper policy rule at the heart of the network itself: “... *information policy rules located deep within the architecture of networks, such as those built into the transmission protocols, will have greater force...*”²²⁴ Below this level, there also operated more informal ‘rules’ which have been labelled as ‘Netiquette’ which have an informative character, presume voluntary self-constraint based on technical insight²²⁵ and may correspond with norms discussed above. As such, the ‘rules’ or ‘laws’ of the Internet and how they apply to copyright could initially be said to be self-regulating.

Specifically, at the heart of the Internet’s architecture is the operation of the TCP/IP protocol which embodies two key concepts: open architecture and connectivity²²⁶. This allowed for interoperability of networks and also the applications which can run on the Internet as a unified network. Along with the end-to-end (e2e) principle which premises that the ‘intelligence’ in a network should be located at its ‘ends’; where users put information and applications onto the network²²⁷. This also relates to the normative modality as it was not just the architecture itself which is important, but the promotion

²²³ Hutter, M., ‘*Efficiency, viability and the new rules of the Internet*’, (2001) European Journal of Law and Economics 11(1) 5-22, p10.

²²⁴ Reidenberg, J.R., ‘*Lex Informatica: The Formulation of Information Policy Rules Through Technology*’, (1998) Texas Law Review 76(3) 553-594, p582.

²²⁵ Hutter, M., ‘*Efficiency, viability and the new rules of the Internet*’, (2001) European Journal of Law and Economics 11(1) 5-22, p11.

²²⁶ Murray, A.D., ‘*Symbiotic Regulation*’, (2008) 26 J Marshall J Computer & Info L 207-228, p209. See also chapter 2, pp61-62.

²²⁷ Lemley, M.A., and Lessig, L., ‘*The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*’, (2001) 48 UCLA L Rev 925-972, p930. See also Salzman, J.H., Reed, D.P., and Clark, D., ‘*End-To-End Arguments in System Design*’, (1984) ACM Transactions on Computer Systems 2(4) 277-288, p278. See also chapter 2, p61.

of communities and culture associated with the use of the technology²²⁸:
“*Networks are increasingly being seen as a key modality of social and economic coordination.*”²²⁹ As such, there is an important degree of ‘feedback’ between this modality and the modality of norms in the community context.

Technical and cultural interoperability therefore have an important impact on the environment in which copyright operates²³⁰, and therefore the digital creative environment:

“... *the copyright regime faces the challenges presented by peer-to-peer file sharing networks and other manifestations of the online community’s endemic disregard for copyright protections.*”²³¹

However, instead of assuming an ‘endemic disregard’, it is more accurate to view the scenario such that it is simply not possible to suppress the social meaning of the digital architecture that is part of content consumption²³² and which may thus actively influence users to illegally download music. This also relates to the normative modality described above which has been resistant to change. As such:

“... *because of that it is hard for any player in the information economy, no matter how large or well connected to law-making bodies, to simply compartmentalise that depth of experience and seek to smother unwelcome parts of it by old legal stories about creativity and the evils of piracy...*”²³³

²²⁸ Bowrey, K., ‘*Law & Internet Cultures*’, (2005, Cambridge University Press), p2.

²²⁹ Kallinikos, J., ‘*ICT, Organizations and Networks*’, in Mansell, R., Avgerou, C., Quah, D., and Silverstone, R. (eds), ‘*The Oxford Handbook of Information and Communication Technologies*’, (2007, Oxford), chapter 11, pp273-293, p273.

²³⁰ Sherman, B., and Bently, L., ‘*Cultures of copying: digital sampling and copyright law*’, (2002) Ent LR 3(5) 158-163, p158. See also chapter 1, pp25-28.

²³¹ Jensen, C., ‘*The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*’, (2003) Stanford Law Review 56(3) 531-570, p533.

²³² Bowrey, K., ‘*Law & Internet Cultures*’, (2005, Cambridge), p161.

²³³ Ibid, p163.

Perversely, this modality could have been most effectively utilised in the more 'primitive' first-generation of p2p technology embodied by Napster²³⁴: *"It would be the major labels' last, best chance to harness digital distribution under a centralized (sic) server."*²³⁵ The architecture of Napster involved a 'gatekeeper' who could be utilised, but the record companies were not ready to replace these services with equally compelling alternatives and the public was not willing to wait²³⁶. Furthermore, in the absence of an architectural alternative from the industry which offered such usability, file-sharers had no reason to break from their practice²³⁷: *"... there isn't a single authorized music service that can compete with the original Napster."*²³⁸ As it is, the architecture has developed from this to more remote systems²³⁹ which now makes such an opportunity impossible.

The Internet's 'conscience' traditionally lies with its end users (evident from the end-to-end principle); it has no inherent 'consciousness' itself and was not designed to²⁴⁰. Whatever conscience may reside with users can arguably be traced back (to an extent) to the early days of the Internet and the Web where 'hacker'²⁴¹ culture was prevalent. As such, the digital architecture perhaps initially engendered the normative modality through its process of development. Ultimately, the nature of digital architecture has impacted on its very features with regard to copies themselves: *"Uses that*

²³⁴ See chapter 2, p68, and chapter 4, p133, p135, and p156-257.

²³⁵ Kot, G., *'Ripped: How the Wired Generation Revolutionised Music'*, (2009, Scribner), p37.

²³⁶ Doctorow, C., *'Content'*, (2008, Tachyon Publications), pp46-47.

²³⁷ Lantagne, S., *'The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack'* (2004) *Harv J L & Tech* 18(1) 269-293, p274.

²³⁸ Doctorow, C., *'Content'*, (2008, Tachyon Publications), p48.

²³⁹ See the discussion of second generation o2o systems in chapter 2, p68 And chapter 4, pp148-155 and p160.

²⁴⁰ See chapter 2, p61.

²⁴¹ The term is presented here to mean experimentation and research, as opposed to its more 'loaded' (and in the author's view, unfairly bandied about) use of describing cynical and illegal criminal activity. See Castells, M., *The Internet Galaxy: Reflections on the Internet, Business and Society'*, (2001, OUP), p41.

*before were un-regulated are now presumptively regulated.*²⁴² This then relates to the law as a means of regulation: *“The technology expands the scope of effective control, because the technology builds a copy into every transaction.”*²⁴³ As a result, this has disturbed the previously settled norms that existed between private rights and public use²⁴⁴ creating a so-called ‘blowback’ effect:

*“The desire to enact monopoly controls has led content users to become more cynical about perceived profiteering by content providers, and hence the rhetoric of responsible consumption has started to crumble. Both these problems represent a breakdown in social norms which have previously underpinned the recognition, use and acceptance of IPRs.”*²⁴⁵

This modality can be seen to bring the debate full-circle; it is the architectural modality that the legal modality has, to an extent, tried to regulate (in addition to user behaviour). In addition, the regulatory effect of the law (specifically copyright) has been diminished by the digital architecture²⁴⁶. Put another way, law has operated to regulate the very cause of its diminished effect; digital architecture. Architecture may have been influential with regard to the normative modality as this was initially specific to the development of digital technology itself (although now perhaps less-so). Furthermore, the consumer expectations it has fostered make it harder for them to accept any anti-piracy message²⁴⁷: *“The Internet isn’t going to get harder to use. Better confront this challenge head on, turn it into an opportunity, than to rail against the future.”*²⁴⁸ These can then be seen as important factors when

²⁴² Lessig, L., *Free Culture: The Nature and Future of Creativity*, (2004, Penguin Books), p143.

²⁴³ Ibid, p146.

²⁴⁴ May, C., *Digital rights management and the breakdown of social norms*, (2003) First Monday 11(3), available from: http://firstmonday.org/issues/issue8_11/may/index.html

²⁴⁵ Ibid.

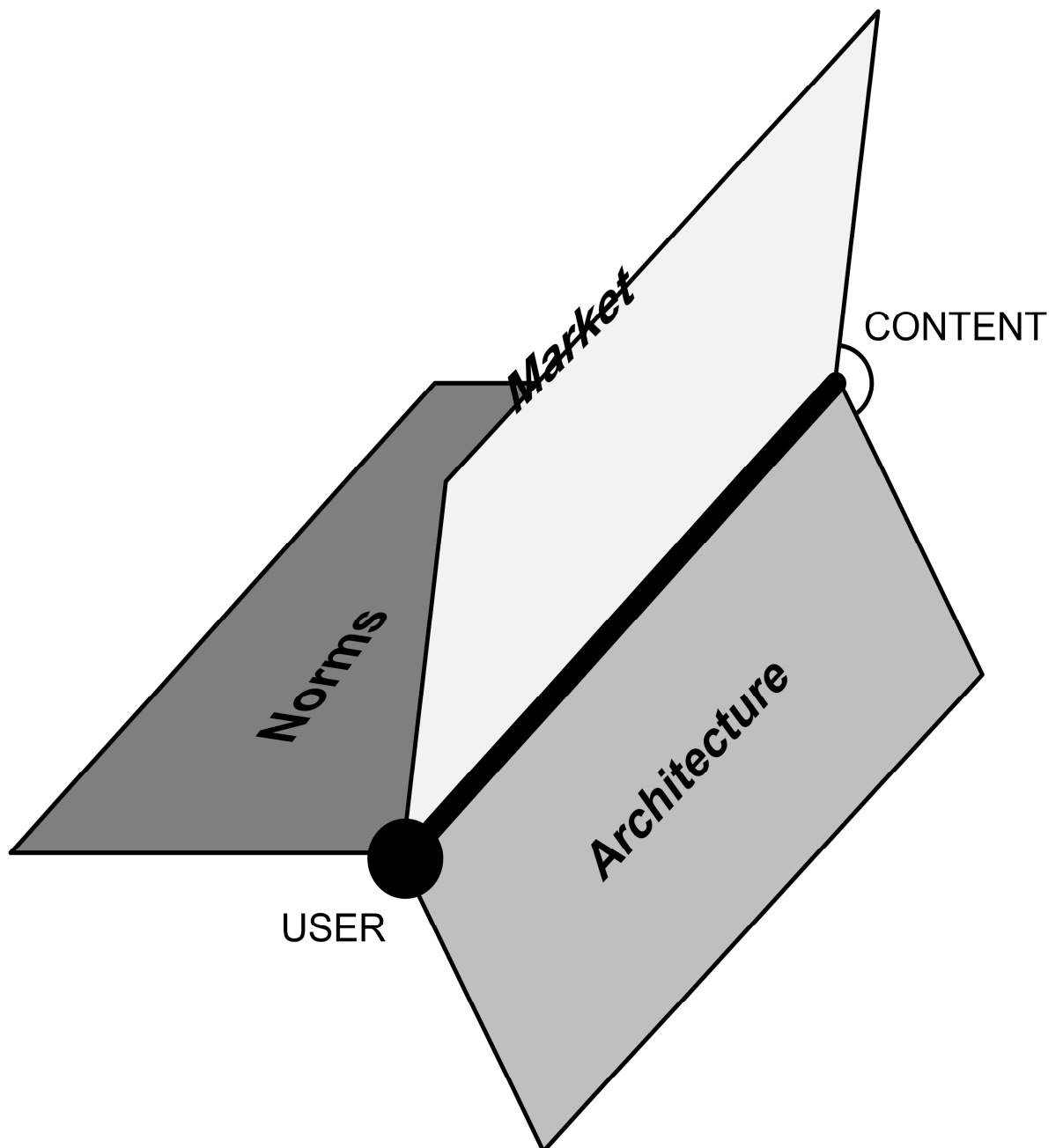
²⁴⁶ Lessig, L., *Free Culture: The Nature and Future of Creativity*, (2004, Penguin Books), p19.

²⁴⁷ Bowrey, K., *Law & Internet Cultures*, 2005, Cambridge), p144.

²⁴⁸ Doctorow, C., *Content*, (2008, Tachyon Publications), p137.

looking at the modality of the market; normative behaviour and digital technology could arguably have created a market for 'free' content; efforts resulting in the convergence of market outlets for digital content could thus be seen to further re-enforce both movement away from such outlets and normative perceptions of them.

Finally, the architectural modality represents the last blade on the diagram:



6. Conclusion

It is clear that the modalities (presented as blades) in the author's 'Lessigan' model both re-enforce each other, but have also been made to work at cross-purposes to each other. Aside from the legal modality (i.e. copyright), the author asserts that the other variable forces in existence have more of an impact on user behaviour, and any discussion of digital regulation must appreciate this; not only to understand how to regulate effectively, but also to understand why existing regulation may be ineffective. Although each blade is presented of equal strength (thickness) in the above diagram, this will not necessarily be the case as their strength will be specific to individual users owing to each modality's varying subjective influence.²⁴⁹

It is not the point of this chapter to articulate a theory of effective regulation, but to compose a scheme that reflects the complexities of such an issue specifically in the context of digital music content. It is too simplistic to view the problems allegedly created by digital technology on a one-dimensional axis between the user and the content. This axis represents the law and as such, can never be discounted as it will always be in existence; it is therefore a *constant*. It will never exclusively exist between two 'isolated' points on an axis as it must correspond to a realistic conception of the environment in which it functions. This environment is the Internet so it may effectively be 'mapped' over the networked structure of the Internet. Each variable (norms, market, and architecture) operates along its own specific 'blade' which is determined by the relevant propensity of each individual user. Therefore, some may operate more in accordance with one variable more than they do with regard to another.

This Lessigan model does not provide a single 'reason' for such behaviour. However, the applicability of these modalities does provide valuable information as to the factors which may *govern* such behaviour; either

²⁴⁹ For example as they may affect the author; the market modality would be of greatest strength and those of norms and architecture comparatively weaker. Thus, the market blade would be the strongest and the blades representing norms and architecture would be smaller.

directly or more subtly. The consumer and copyrighted content do not operate in a vacuum²⁵⁰. Initially, it can be said that both are 'active'; the individual's actions may be shaped through community participation and influenced by the market modality, and the community context of the user also links via the architectural modality to content. Although this relationship is technically mediated by copyrighted law, the architectural modality facilitates the two-way nature of this relationship. Digital architecture allows for interaction between consumer and content (through architectural distribution systems) which can be heightened through experience enhancing communities. As such, this may help overcome the limitations of the market modality through opening up new means of discovery and consumption.

However, they have also been deployed to work at cross-purposes to teach other. Norms in Cyberspace grew primarily from the development of its architecture; with the operation of law and the market arguably (although temporarily) ignored. Along with the features of the Internet considered above (e2e etc.), this created a positive norm (as opposed to a 'preventative', negative one). This is further facilitated by architecture which has removed significant cost barriers to content and is completed by the market which it has also helped create; that of 'free' content. Because of the actions of rightsholders the opportunity for resultant services to develop and provide the easiest way for the public to get what they want was negated; services like the original Napster; easy, well-designed, and functional²⁵¹. The architecture has had an effect through its realisation in the market such that by the mid-2000s: *"The generation now coming of age has grown used to the*

²⁵⁰ "... where regulators vie for regulatory acceptance they do not act in a regulatory vacuum, any action by one member of the regulatory matrix has an effect on the actions of the others." See Murray, A.D., 'Regulating the Post-Regulatory Cyber-State', in Brownsword R., and Yeung, K. (eds), 'Regulating Technologies', (2008, Hart), 287-316. Available from: http://works.bepress.com/andrew_murray/7

²⁵¹ Doctorow, C., 'Content', (2008, Tachyon Publications), p49.

*idea that everything accessed on the Internet is free.*²⁵² What consumers don't want are managed services with limited rights; the demand signal won't go away²⁵³. The modality of the market is consequently limited; hindered by the fact that it fails to see 'free' as a value in itself; despite the fact that norms could be said to be resistant, or at minimum, unrestrictive of unauthorised downloading activity.

Ultimately, regulation became converged and reinforced²⁵⁴ at the expense of these other modalities; it was this choice that has affected copyright enforcement ever since. This seems strange; the specific problems digital technology posed (generally put, the removal of 'physical' restrictions on copying) were already recognised²⁵⁵, but the 'traditional' means of regulation and enforcement were chosen as a means to overcome these (for want of a better phrase) non-traditional problems. Whilst initially, legal regulation through copyright was worthwhile as it maintained the utilitarian aspect of benefitting society, the regulation since has failed to represent this and has not had the desired effect of controlling behaviour. This has not been helped by a 'slow' market which the law has initially served to create, but latterly closed-off. This is in response to the modality of the digital architecture which threatened to affect the extent of the market²⁵⁶ however, the legal modality has stepped in to prevent this to a degree. Along with a convergence in the legal modality through the WIPO Copyright, and Performance and Phonograms Treaties²⁵⁷ there has been a perceptible shift within the market in terms of an increasing convergence of content platforms; however, the law had already negated the opportunity for any independent

²⁵² Lantagne, S.S., *The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack* (2004) Harv J L & Tech 18(1) 269-293, p291.

²⁵³ Doctorow, C., *Content*, (2008, Tachyon Publications), p50. However, there are signs this may be changing in relation to the developments on streaming-based distribution and consumption, see chapter 5 pp206-207.

²⁵⁴ See chapter 2, pp76-83.

²⁵⁵ Ibid, pp56-57 and pp70-75.

²⁵⁶ Lessig, L., *The Future of Ideas: The Fate of the Commons in a Connected World*, (2002, Vintage Books), p114.

²⁵⁷ See chapter 2, pp76-83.

market to develop: “... publishers have us over a barrel, controlling the narrow and vital channels for making works available...”²⁵⁸ This was sealed as a result of the Napster case²⁵⁹:

*“It was the turning point in the file-sharing wars, the moment when the recording industry walked away from a compromise that could’ve turned their adversarial relationship with millions of music downloaders into a lucrative revenue stream.”*²⁶⁰

If the business model cannot survive the emergence of a general-purpose tool, then another business model is needed: *“There’s one thing that every new art business model had in common: it embraced the medium it lived in.”*²⁶¹

This chapter has sought to build a conceptual framework from which to proceed with analysing regulation in the digital environment. This has been done by critiquing, modifying and applying Lessig’s model of modalities as they have strength in that they deal with factors which are perceptible to users. The modality of the ‘law’ can be discounted to a certain extent; it has been concluded that its operation is a constant, but nonetheless has an impact on the other modalities discussed. The modality of norms has also been explained and is a necessary component to consider. In this instance, it has been concluded that they function at minimum in a de-regulatory way. Although norms may also have an impact on the other modalities, the author asserts that the modalities of market and architecture are the most dominant in the digital environment.

²⁵⁸ Doctorow, C., *‘Content’*, (2008, Tachyon Publications), p69.

²⁵⁹ A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (2000). Discussed further in chapter 4, pp133-148.

²⁶⁰ Kot, G., *‘Ripped: How the Wired Generation Revolutionised Music’*, (2009, Scribner), p36.

²⁶¹ Doctorow, C., *‘Content’*, (2008, Tachyon Publications), p17.

Chapter 4: Napster and peer-to-peer

Napster and peer-to-peer

1. Introduction

It is a little over ten years since the litigation involving the Napster peer-to-peer (p2p) file-sharing network and the Recording Industry Association of America (RIAA). As such, a timely analysis of the case (and those following the decision, most recently The Pirate Bay) is warranted to examine both the legal impact of the rulings: “*The case is viewed as a landmark decision on copyright in cyberspace, and is seen as defining how music...will be distributed online.*”¹ However, it has not defined how music *will* be distributed, rather, how it will *not* be distributed. Furthermore, the cases involving Napster and its successors have changed how copyright law is applied with regard to p2p networks. Napster was the original and most notorious file-sharing service², but despite its demise, it was still seen as a dirty word in the music industry³. Fundamentally, the Napster litigation exists within an environment underpinned by a broader power struggle, where vested interests have long fought for control⁴. In the music distribution market, the record industry had previously enjoyed an effective monopoly and control over the release of content. However, p2p changed this by empowering users and jeopardising the incumbents’ position; copyright law was the weapon chosen to regain control. Arguably, legal action against p2p networks formed the first part of the jigsaw in the enforcement of copyright in the digital era.

¹ Lee, C., ‘*A&M Records (and others) v Napster: Time for Napster to Face the Legal Music?*’, (2000) 4 Newcastle Law Review 136-152, p136.

² James, S., ‘*The times they are a-changin’: copyright theft, music distribution and keeping the pirates at bay*’, (2008) Ent LR 19(5) 106-108, p106.

³ Stokes, A., and Rudkin-Binks, J., ‘*Online music – P2P aftershocks*’, (2003) Ent LR 14(6) 127-131, p127.

⁴ Segkar, A., ‘*The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique*’, (2002) 9 Auckland University Law Review 806-849, p811. See also chapter 8, pp306-310.

“Like Hector and Achilles, the entertainment industry and file sharers have locked horns in an encounter from which the former at least may emerge having had major reconstructive surgery.”⁵

As it is not always possible to identify and prosecute direct infringers appropriately, a policy choice was made to pursue actions against those not directly connected to infringement, but who nevertheless have some power to prevent such conduct⁶. However, such a course of action may have the effect of deterring other legitimate, non-infringing activities (for example, time-shifting), as well as negating p2p as a viable content distribution mechanism. Napster is also significant as representing the first incarnation of p2p technology⁷ as it functioned via a central server. Successive cases, whilst essentially dealing with the same scenario of online file-sharing, have differed in that the technology in question differed from this architecture. As a result, it is also important to examine the Grokster and The Pirate Bay cases as they utilised more developed and de-centralised network structures. This chapter will critique these cases in chronological order to determine how copyright evolved with Napster onwards and how it currently stands today; specifically the development of ‘*knowledge*’ and ‘*inducement*’ aspects. It is argued that these are effectively insurmountable obstacles for any p2p developer and that the virtues of p2p technology⁸ have been lost.

2. Napster

Beginning with Napster, computer file-sharing software has created a unique obstacle for the recording industry in preventing copyright infringement⁹. As

⁵ Nasir, C., *‘Taming the beast of file-sharing - legal and technological solutions to the problem of copyright infringement over the internet: Part 1’*, (2005) Ent LR16(3) 50-55, p50.

⁶ Segkar, A., *‘The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique’*, (2002) 9 Auckland UL Rev 806-849, p837.

⁷ See chapter 2, pp68.

⁸ Ibid, p69-70.

⁹ Hall, H.S., *‘The Day the Music Died: The Supreme Court’s Reversal of MGM Studios, Inc. V. Grokster and its Impact on Secondary Liability for Copyright Infringement’*, (2006) 35 Journal of Law & Education 387-394, p387.

Lessig states: “Napster is an ‘ah-ha’ technology: you don’t quite get its significance until you use it.”¹⁰ Whilst it may be a happy ‘ah-ha’ for users who discovered it (the author included), it was perhaps more of an ‘uh-oh’ for the music industry. In December 1999, legal proceedings were instigated against Napster by the four major record labels and Napster was charged with ‘vicarious and ‘contributory’ copyright infringement; that it *knowingly* facilitated infringement by its users.

The District Court granted a preliminary injunction enjoining Napster: “... *from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs’ copyrighted musical compositions and sound recordings.*”¹¹ Napster accordingly appealed and the case was heard before the Court of Appeals for the Ninth Circuit¹² who affirmed in part, reversed in part and remanded the decision of the District Court. The Court agreed that Napster users infringed at least the rights of reproduction and distribution of the copyright holders; the uploading of file names to the search index for other users to copy infringed the distribution rights and the downloading of files containing protected material infringed the reproduction right¹³. In each of the matters, the Circuit Court upheld the reasoning and points of law of the lower court.

2.1 Infringement

The Napster case is relatively uncontroversial in terms of the application of the basic elements of direct and contributory infringement to the facts. The plaintiffs were adjudged to have established a primary *facie* case of direct copyright infringement; the evidence produced showed that virtually all of

¹⁰ Lessig, L., *The Future of Ideas: The Fate of the Commons in a Networked World*, (2002, Vintage Books), p130. Or rather, ‘used’ it.

¹¹ A&M Records Inc. (and others) v. Napster Inc., No. C-99-5183 MHP No. 00-0074.

¹² A&M Records Inc. (and others) v. Napster Inc., 239 F.3d 1004 (9th Cir. 2001). Henceforth, Napster.

¹³ Akester, P., ‘Copyright and the P2P challenge’, (2005) EIPR 27(3) 106-112, p106.

Napster's users engaged in unauthorised downloading or uploading of copyrighted music¹⁴.

Although copyright law in the US is based on a statutory regime, both contributory and vicarious infringement have been developed through common law¹⁵. Contributory infringement has three aspects¹⁶: an infringing activity; knowledge by the alleged contributor; and, the inducement of infringement by the alleged contributor. The existence of actual infringing activity by a third party was not disputed whilst both 'constructive' and 'actual knowledge on the part of Napster was evident¹⁷. The requirement of actual inducement/material contribution was found to be apparent as Napster (supposedly) actively strived to create such an environment for infringement to occur; this was exemplified through the nature of the programme itself¹⁸. Nowadays, Napster is classed as a 'first generation' p2p network; meaning that it operated via a central server that indexed users mp3 files and facilitated connections between them¹⁹. Although the central server was at the heart of Napster's operation, it was also the heart of its downfall. The Ninth Circuit recognised the fact that the system was limited by the fact that Napster did not have access to users' computers and instructed the District Court to take this into account when framing the revised injunction²⁰. As

¹⁴ Napster, 911.

¹⁵ Glasebrook, S.D., "*Sharing's only fun when it's not your stuff*": *Napster.com pushes the envelope of indirect copyright infringement*', (2000) 69 University of Missouri-Kansas City Law Review 811-843, pp818-819. The doctrine of contributory liability traces its roots back to tort law whilst the origins of vicarious infringement can be traced back to the employment law concept of *respondeat superior* ('let the master answer'), see p825.

¹⁶ See generally, Glasebrook, S.D., "*Sharing's only fun when it's not your stuff*": *Napster.com pushes the envelope of indirect copyright infringement*', (2000) 69 University of Missouri-Kansas City Law Review 811-843, pp819-825.

¹⁷ Segkar, A., '*The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique*', (2002) 9 Auckland UL Rev 806-849, p833.

¹⁸ For example, the programme effectively supervised connection to facilitate the transfer of content.

¹⁹ See chapter 2, p68.

²⁰ Napster, 1027 and Segkar, A., '*The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique*', (2002) 9 Auckland UL Rev 806-849, p838.

such, Napster could only be liable to contributory infringement if it received reasonable knowledge of specific infringing files, knew (or ought to have known) these were available, and failed to prevent their distribution²¹. It was thus found insufficient that infringing files were available and Napster failed to remove them without actual notice²². However, this has been countered recently by the District Court in the case of *Viacom v. YouTube (Google)*²³. Knowledge of a prevalence of copyright infringement is insufficient; to let knowledge of a generalised practice impose responsibility on service providers to discover which files infringe copyright contravenes the structure and operation of the Digital Millennium Copyright Act²⁴.

The case highlights that liability for contributory infringement exists if one engages in personal conduct that encourages or assists copyright infringement²⁵. Essentially, the case rested on proving that Napster knew about its users sharing copyrighted music; thus it could easily be shown that they were hardly an innocent middleman like Sony was in the Betamax case²⁶. However, it must be questioned just how 'innocent' Sony were. Their advertising slogan at the time, '*Watch whatever whenever*²⁷', was blatantly a public proclamation from which it was not hard to imply the technology's application to copyright infringement. Similarly, Apple's '*Rip. Mix. Burn*²⁸', publicity material could be viewed in the same way. However this was not the case with Napster. In contrast, they had apparently been

²¹ Napster, 918.

²² Ibid, 918. .

²³ *Viacom International Inc. v. YouTube Inc.*, No. 07 Civ. 2103 (2010).

²⁴ Ibid.

²⁵ Lee, C., '*P2P Technology on Trial Again: the Grokster and StreamCast Cases*', (2002) 13 *Journal of Information Science* 107-121, pp111-112.

²⁶ *Sony Corp. Of America v. Universal City Studios Inc.*, 464 US 417 (1984). Knopper, S., '*Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age*', (2009, Simon & Schuster), pp136-137.

²⁷ See: <http://www.retroist.com/2010/04/22/watch-whatever-whenever-with-the-sony-betamax/>

²⁸ See: <http://www.techradar.com/news/computing/apple/how-apple-became-bigger-than-the-beatles-924488>

very careful not to make any public statements suggesting the potential use of the technology for copyright infringement²⁹. During the discovery phase of the proceedings, the RIAA asked for internal Napster documents, one of which was an email from Sean Parker (Napster's co-founder) to Shawn Fanning explicitly using the phrase *'pirated music'*³⁰. As such, the District Court had the evidence to rule that Napster had the requisite knowledge and material contribution necessary for contributory infringement³¹.

For the purposes of vicarious infringement³², the party accused must have the ability to supervise/control the infringing activity and they must derive a financial benefit from the infringement. Napster intentionally distanced themselves from their users by not requiring any 'registration' in order to download the software, not having any tracking information on users and not tracking uploading/downloading patterns³³. Nonetheless, the element of 'control' arose from Napster's 'terms of service' which allowed them to terminate a member's use of the service and also their ability to block users. As such they were held liable for vicarious infringement by failing to utilise this ability positively; to patrol and prevent access as necessary on their network through their central search index³⁴. Finally, it was held that although Napster generated no revenue at the time, it had a direct financial

²⁹ See Knopper, S., *'Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age'*, (2009, Simon & Schuster), p131, where Ted Cohen, a former applicant for the CEO position at Napster at the time, describes whiteboards in the company's office stating that its service should be referred to in terms of fair use in order to deflect accusations of piracy.

³⁰ Knopper, S., *'Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age'*, (2009, Simon & Schuster), p137

³¹ Napster 918.

³² Glasebrook, S.D., *"Sharing's only fun when it's not your stuff": Napster.com pushes the envelope of indirect copyright infringement'*, (2000) 69 University of Missouri-Kansas City Law Review 811-843, pp825-826.

³³ Glasebrook, S.D., *"Sharing's only fun when it's not your stuff": Napster.com pushes the envelope of indirect copyright infringement'*, (2000) 69 University of Missouri-Kansas City Law Review 811-843, p822.

³⁴ Napster, 1028.

interest in the infringing activity to the point that its arguments about legitimate uses seemed disingenuous:

*“The ability to download myriad popular music files without payment seems to constitute the glittering object that attracts Napster’s financially-valuable user base.”*³⁵

As a result, the claim for vicarious infringement succeeded despite the fact that Napster’s owners had done all they reasonably could without completely disabling the network³⁶. Napster was offering a service to its users which theoretically gave them control over what infringements were taking place and which the courts ultimately viewed as amounting to failure to exercise such control³⁷.

2.2 Fair Use

Napster’s defence sought to expand the fair use doctrine³⁸, under the Betamax ruling³⁹, that users were not infringing because they were making personal, non-commercial copies of songs. A finding of fair use constitutes a defence to the copyright liability of the direct infringer, and furthermore for Napster, would constitute a defence for contributory infringement and vicarious liability as these require the existence of direct copyright infringement⁴⁰. As such, the defence of fair use was critical in the case. The Fair Use Doctrine under US law, consists of four factors: purpose and

³⁵ Judge Patel in Napster, 922.

³⁶ Nasir, C., *Taming the beast of file-sharing - legal and technological solutions to the problem of copyright infringement over the internet: Part 2*, (2005) Ent LR 16(4) 82-88, p83.

³⁷ Ibid, p83.

³⁸ Napster, 900

³⁹ Sony Corp. Of America v. Universal City Studios Inc., 464 US 417 (1984). Henceforth, Sony.

⁴⁰ Chapman, S.D., *Pushing the Limits of Copyright Law and Upping the Ante in the Digital World: The Strange Case of A&M Records, Inc. v. Napster, Inc.*, (2000-2001) 89 Kentucky Law Journal 793-834, p812.

character of the use; nature of the use; portion used; and, the effect on the market⁴¹.

Because its users were engaged in the uploading and downloading of content that they would normally have to buy, and because this was done with Napster's assistance, the 'purpose and character' of the 'use' was held not to be private and therefore commercial⁴².

*"The substantial or commercially significant use of the service was, and continues to be, the unauthorised downloading and uploading of popular music, most of which is copyrighted."*⁴³

This appears to be conflating a commercial use of content with the supposed 'commerciality' of the Napster enterprise mentioned above. However, both were matters of speculation. The Court found precedent⁴⁴ for its conclusion that repeated and exploitative copying of works can constitute commercial use, even in the absence of direct economic benefit, and without offering the copies for sale⁴⁵. Until Napster itself started earning revenue from its service, it would technically not meet the element of 'commerciality', although they did eventually plan to monetise their service⁴⁶. Nonetheless, in such a period of time a substantial amount of infringement could occur; as such, the interests of rightsholders were protected⁴⁷. Furthermore, the Court found there to be commercial use as sending a file cannot be said to be personal

⁴¹ Title 17 US Code, s107. See also chapter 5, pp180-181.

⁴² Napster, 912-913.

⁴³ Judge Patel, *ibid*.

⁴⁴ *Worldwide Church of God v. Philadelphia Church of God* 227 F.3d 1110 (9th Cir.2000), and , *Sega Enterprises Ltd v. MAPHIA* 948 F. Supp. 923 USPQ 2d (BNA) 1705 (N.D. Cal. 1996).

⁴⁵ Segkar, A., 'The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique', (2002) 9 Auckland UL Rev 806-849, p825.

⁴⁶ Napster, 903

⁴⁷ Segkar, A., 'The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique', (2002) 9 Auckland UL Rev 806-849,, p836.

use when it is sent to an anonymous user⁴⁸. This seems to be adjudging 'commercial use' by defining that it is *not* personal use, and therefore if it is not personal, it *must* be commercial. The Appeals Court explained that direct economic advantage is not required to demonstrate a commercial use; instead, a repeated and exploitative copying of protected works (even if they are not offered for sale) may constitute a commercial use⁴⁹.

Whilst there is support for this reasoning⁵⁰, to the author it seems as though 'commerciality' was defined by what it is not. Napster was a free service and its users did not pay for music tracks, therefore it appears that this term was decided negatively; the recording industry was not losing money at the expense of Napster users gaining money. There was no correspondence between revenue lost (from the industry) and revenue 'gained' (by users), except perhaps a financial loss for the former and a welfare gain for the latter⁵¹.

It has been argued that it is distinctly different from the situation in the Betamax case where the recorded programme was not concurrently available to millions of other users⁵². However, the recorded program had the potential to be distributed to others, although on a much reduced scale due to purely physical constraints⁵³. Users did also not necessarily have to make content available and could function on the network by only downloading ('recording'); thus making purely private use of the content itself. In addition, both technologies were limited to the extent that the Betamax recorder could only record broadcasts, while the Napster

⁴⁸ Napster, 912.

⁴⁹ Akester, P., 'Copyright and the P2P challenge', (2005) EIPR 27(3) 106-112, p107

⁵⁰ See Chapman, S.D., *Pushing the Limits of Copyright Law and Upping the Ante in the Digital World: The Strange Case of A&M Records, Inc. v. Napster, Inc.*, (2000) 89 Kentucky Law Journal 793-834, p813.

⁵¹ Perhaps in terms of 'possessing' a piece of content, see chapter 3, pp107-108.

⁵² See Segkar, A., 'The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique', (2002) 9 Auckland UL Rev 806-849, p825.

⁵³ Furthered by the fact that the Betamax technology was not widely used.

programme was only capable of sharing mp3s. Whilst this may restrict the applicability of 'significant non-infringing uses', the logic still persists that both technologies still shared the characteristic of being limited in what they could perform and as such, may have more in common with each other than would be first apparent.

The need to derive financial benefit was more difficult to establish and arguably speculative⁵⁴. It was deemed that despite the current lack of revenue for Napster, its future revenues were dependent on increasing its 'customer' base, which in turn, was drawn by the availability of copyrighted music⁵⁵. This interpretation gave effect to the wider policy purpose of the doctrine; if current benefit alone were examined, substantial copyright infringement would occur before liability could accrue on the party facilitating it⁵⁶. This arguably became a self-fulfilling prophecy; the immediate effect of the proceedings was to generate enormous publicity for Napster and increase its number of users from 50,000 to 150,000 in the space of one month⁵⁷. By July 2000, its user-base numbered almost 20 million⁵⁸.

The 'nature' and 'portion used' factors are relatively straightforward; musical works were copied in their entirety by users⁵⁹. The nature of the use was judged to be for entertainment purposes⁶⁰ and because it was undisputed that the downloading of mp3 files constituted copying the entirety of the work, the 'portion used' factor did also not lend itself to finding fair use⁶¹.

⁵⁴ Segkar, A., 'The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique', (2002) 9 Auckland UL Rev 806-849, p836.

⁵⁵ Napster, 902 and 921.

⁵⁶ Segkar, A., 'The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique', (2002) 9 Auckland UL Rev 806-849, , p836.

⁵⁷ Knopper, S., 'Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age', (2009, Simon & Schuster), p134.

⁵⁸ Ibid, p135.

⁵⁹ Napster, 913.

⁶⁰ Ibid, 913.

⁶¹ Ibid, 913.

Finally, with regard to the effect on the market, it was found that Napster allegedly reduced CD sales and raised barriers to entry into the digital music market, which was deemed to have an adverse effect on the market for copyrighted music⁶². The judge's analysis focused on evidential considerations and excluded evidence from Napster that use of its service led to increased purchases of CDs by its users⁶³. Even if considered correct information and admitted, Napster would still not have had a valid argument as a matter of Law; past cases have clearly illustrated that even if the defendant's conduct in an emerging market increases sales in a current market of the plaintiff's, it does not deprive the plaintiff of the right to develop the new market and profit accordingly⁶⁴. In this instance, the plaintiffs were found to be particularly vulnerable to direct competition from Napster⁶⁵. This suggests that the copyright holder has the exclusive right to enter new markets, even when a 'developer' has stolen a march on them; something that the music industry has been traditionally reluctant to do⁶⁶.

Concluding that Napster's users were not 'fair users' is arguably unobjectionable from an economic perspective⁶⁷:

"Judge Patel's rejection of a general fair use exception for Napster simply makes sense. Napster and its users are engaged in a commercial

⁶² Napster, 913.

⁶³ Ibid, 913.

⁶⁴ Segkar, A., 'The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique', (2002) 9 Auckland UL Rev 806-849, p824. Specifically the cases of: LA Times v. Free Republic, 2000 US Dist LEXIS 5669, 54 USPQ 2d (BNA) 1453 (CD Cal 2000), and UMG Recordings Inc. v. Mp3.com, 92 F.Supp.2d 249 (2000).

⁶⁵ Napster, 910.

⁶⁶ See Knopper, S., 'Appetite for Self-Destruction: the Spectacular Crash of the Record Industry in the Digital Age', (2009, Simon & Schuster), chapter 1, describing the reluctance of the music to introduce the CD format in the 1980s, as well as how long it took them to offer music online. This has arguably been the case with musicians as well, see chapter 5, p203.

⁶⁷ Einhorn, M., 'Copyright, Prevention, and Rational Governance', (2001) 24 Columbia-VLA Journal of Law and Arts 449-462, p454.

*activity that involves copying of protected material and ultimately has an adverse effect in the record companies' market.*⁶⁸

However, this economic focus is one-sided. Equally valid is the user standpoint⁶⁹ from which a lowering of transaction costs would be beneficial for user-welfare as fair use can lower transaction costs. Furthermore, these statements imply an unfair correlation between the action of users in downloading music files and the purely criminal (and commercial) enterprise of piracy.

2.2.1 Sampling

Napster primarily identified two further specific fair uses, these were: sampling and space-shifting⁷⁰. Ultimately, because users 'sampled' the entirety of the work, could permanently keep it, and because of the adverse economic effect mentioned above, sampling was held not to constitute a fair use in this context⁷¹; the resulting enhancement of sales from unauthorised use should not deprive the rightsholder of the right to licence the material⁷². At this point, a distinction should be drawn between individual songs and albums to understand the nuances of this argument⁷³. Both can be categorised as 'works' under copyright, however, downloading an album track could be viewed as effectively 'sampling' the album itself which users

⁶⁸ Chapman, S.D., *'Pushing the Limits of Copyright Law and Upping the Ante in the Digital World: The Strange Case of A&M Records, Inc. v. Napster, Inc.'*, (2000-2001) 89 Kentucky Law Journal 793-834, p813. Although he acknowledges that the recording industry may not suffer economic harm from file-sharing.

⁶⁹ Which is, or should be, the focus of copyright law. See chapter 2, p36 and pp42-43.

⁷⁰ Napster, 913.

⁷¹ Ibid, 913-915.

⁷² Akester, P., *'Copyright and the P2P challenge'*, (2005) EIPR 27(3) 106-112, p106.

⁷³ Obviously this also depends, to an extent, on the genre of music in question. In contemporary genres, individual songs can stand as independent works on their own, regardless of any context in which they may exist as being part of an album. However, this is not the case with classical pieces which are typically composed to exist within the broader 'framework' of, for example, a symphony. However, this is not of immediate concern to the argument here.

could then purchase legitimately. This could also be stretched to artists who have a back-catalogue of albums. Although it is pushing the argument, given that the 'entirety' of an album would be copied, the logic could still be inferred that the user is sampling an artist as opposed to just an album. As such, they are then equally capable of legally purchasing the rest of the work by the artist in question.

However, arguing that its users were merely sampling the work (in any sense) was a difficult proposition for Napster to make⁷⁴. 'Samples' distributed by record companies were, and are, tightly controlled; however in this case, users obtained permanent high quality copies of a whole song and their use was deemed commercial⁷⁵. Additionally, as a matter of fact, the Ninth Circuit found that the more sampling users download, the less likely they are to purchase the music legitimately⁷⁶ thus negating Napster's argument that users were sampling merely to 'trial' a work before purchasing⁷⁷. Nevertheless, one must ask whether this really constitutes a difference to 'home taping' and whether it is that different to copying songs from the radio. Record companies tightly control the release of music to radio prior to general (commercial) release, yet users had the ability to record these from broadcast onto cassette tape. However, the manufacturers of such recording equipment were not held liable for secondary infringement under UK law⁷⁸; they merely provided the power to copy. Similarly, many songs available through Napster's p2p service were, at the time, of a lower quality (bitrate) than those which are available today. However, this is at best a secondary concern. Disparity between bitrates is no more than

⁷⁴ Segkar, A., *'The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique'*, (2002) 9 Auckland UL Rev 806-849, p826.

⁷⁵ Napster, 914.

⁷⁶ Ibid, 910.

⁷⁷ Segkar, A., *'The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique'*, (2002) 9 Auckland UL Rev 806-849, p 826.

⁷⁸ CBS Songs Ltd. v. Amstrad plc. [1988] AC 1013.

minimal and it is only recently that iTunes upgraded its bitrate⁷⁹. If there was, however, a greater difference, it could be possible, although unlikely, that parallels could be drawn; there is no reason why individuals would not legitimately purchase music they have 'sampled' for a more pleasurable listening experience. However, such a conclusion seems, at best, optimistic. The truth is that 'digital' simply trumps 'analogue'.

2.2.2 Space-shifting

This is perhaps the more controversial aspect of the rejection of the fair use defence⁸⁰. Napster was differentiated from the similar cases⁸¹ where the work(s) in question in these cases were only exposed to the original users (although there was nothing to stop the exposure of the work extending beyond the individual in either of those cases).

The reasoning behind this denial was less 'convincing'⁸². Although the Supreme Court in Sony failed to provide clear definitions, it did offer (perhaps more usefully) a principled account of the need for the doctrine and the role it should play in future copyright cases⁸³. They held it was necessary to protect the public's right to engage in areas of commerce that were substantially unrelated to infringement whilst at the same time expressly recognising that liability of manufacturers may be necessary to give adequate protection to copyright holders⁸⁴. 'Space-shifting' was expressly

⁷⁹ 'Apple, labels both win with DRM-free iTunes, tiered pricing', (2009) Ars Technica, available from: <http://arstechnica.com/apple/news/2009/01/apple-labels-both-win-with-drm-free-itunes-tiered-pricing.ars>

⁸⁰ Segkar, A., 'The Napster Decision – New Technology Betamax VCRs and Music: A Copyright Critique', (2002) 9 Auckland UL Rev 806-849, p827.

⁸¹ Sony, and RIAA v. Diamond Multimedia Systems Inc., 180 F.3d 1072 (9th Cir. 1999),

⁸² Chapman, S.D., 'Pushing the Limits of Copyright Law and Upping the Ante in the Digital World: The Strange Case of A&M Records, Inc. v. Napster, Inc.', (2000) 89 Kentucky Law Journal 793-834, p814.

⁸³ Dogan, S.L., 'Is Napster a VCR? The Implications of Sony for Napster and Other Internet Technologies', (2001) 52 Hastings Law Journal 939-960, p 945.

⁸⁴ Sony, 442 and *ibid*.

analogised to the process of 'format-shifting'⁸⁵ and as such, the process of space-shifting should have constituted a fair use⁸⁶. However, the analogy of space-shifting can only be taken so far. After the Mp3.com case⁸⁷, there arguably has to be some degree of proximity (between user and content) of the 'shifting'. Because the court in Sony found that the Betamax recorder could be used to record programs that were not protected by copyright, it was entitled to a fair use defence⁸⁸. Nevertheless, the same argument can easily be applied to music; with files capable of being shared that are no longer in copyright protection or in which the author has chosen to share voluntarily⁸⁹. The decision in Diamond⁹⁰ further demonstrates that the courts will interpret statutory grant narrowly if they perceive copyright owners are trying to stop technology⁹¹. Judge Patel attempted to dispel this argument by claiming that the Ninth Circuit was applying a provision of the Audio Home Recording Act (AHRA)⁹² which is inapplicable in this case; therefore the analysis of space-shifting was irrelevant⁹³. However, the application of the time-shifting analogy is not limited to the AHRA; properly applied, it indicates

⁸⁵ Napster, 915-916. See the case of RIAA v. Diamond Multimedia Systems Inc., 3d 1072 (9th Cir. 1999).

⁸⁶ Chapman, S.D., *'Pushing the Limits of Copyright Law and Upping the Ante in the Digital World: The Strange Case of A&M Records, Inc. v. Napster, Inc.'*, (2000-2001) 89 Kentucky Law Journal 793-834, p814.

⁸⁷ UMG Recording Inc. v. MP3.com Inc., 92 F. Supp 2d 349 (SDNY 2000).

⁸⁸ Glasebrook, S.D., *"Sharing's only fun when it's not your stuff": Napster.com pushes the envelope of indirect copyright infringement'*, (2000) 69 University of Missouri-Kansas City Law Review 811-843, p831.

⁸⁹ For example, under a Creative Commons licence, discussed in chapter 7, pp270-274.

⁹⁰ RIAA v. Diamond Multimedia Systems Inc., 180 F.3d 1072 (9th Cir. 1999)

⁹¹ Ginsburg, J.C., *"The exclusive right to their writings": Copyright and control in the digital age'*, (2002) 54 Maine Law Review 195-215, p209.

⁹² US Audio Home Recording Act, 106 Stat. 4237 (1992), to amend title 17, United States Code, to implement a royalty payment system and a serial copy management system for digital audio recording, to prohibit certain copyright infringement actions, and for other purposes.

⁹³ Napster, 915 and Chapman, S.D., *'Pushing the Limits of Copyright Law and Upping the Ante in the Digital World: The Strange Case of A&M Records, Inc. v. Napster, Inc.'*, (2000-2001) 89 Kentucky Law Journal 793-834, pp814-815.

that space-shifting of mp3s is the sort of non-infringing commercial use envisaged by Sony⁹⁴.

Since Sony, the courts have struggled to define how much non-infringing use counts as 'substantial'⁹⁵. Judge Patel attempted to support her finding on the basis that space-shifting accounted for a de minimis portion of Napster use⁹⁶. This was upheld on the basis that the methods of 'shifting' in previous cases did not simultaneously involve distribution of the material to the general public, only to the original user⁹⁷. Unlike Sony, Napster maintained an ongoing relationship with them and played a continuing role in their infringement⁹⁸. It was concluded that because Napster could exercise control over the use of its service, this was enough to render the Betamax defence inapplicable⁹⁹. Because Sony only involved a one-time product sale, it did not address a core issue presented in Napster¹⁰⁰: whether such defence applies to a defendant whose continuing relationship with the direct infringer(s) gives it at least the theoretical ability to prevent acts of infringement as they occur¹⁰¹. As a related point, this now reflects the current importance of networks for digital content distribution¹⁰². In Sony, the company did not own or control the (broadcast) network from which content

⁹⁴ Chapman, S.D., *'Pushing the Limits of Copyright Law and Upping the Ante in the Digital World: The Strange Case of A&M Records, Inc. v. Napster, Inc.'*, (2000-2001) 89 Kentucky Law Journal 793-834, p815.

⁹⁵ Parcher, T.A., *'The Fact and Fiction of Grokster and Sony: Using Factual Comparisons to Uncover the Legal Rule'*, (2006) 54(2) University of California, Los Angeles Law Review 509-546, pp510-511.

⁹⁶ Napster, 916. A conclusion that was based on the application of 'common-sense' at 905.

⁹⁷ Akester, P., *'Copyright and the P2P challenge'*, (2005) EIPR 27(3) 106-112, p106.

Although it is interesting to note it is now integrated with digital television services.

⁹⁸ Napster, 917.

⁹⁹ Ibid, 917.

¹⁰⁰ Dogan, S.L., *'Is Napster a VCR? The Implications of Sony for Napster and Other Internet Technologies'*, (2001) 52 Hastings Law Journal 939-960, p949, emphasising that Sony had no post-sale relationship with customers and was not involved in supplying content.

¹⁰¹ Ibid, p949.

¹⁰² See chapter 5, pp194-204.

could be recorded, however, there was a much closer relationship in Napster.

The court's focus on knowledge seems to suggest that parties must do everything within their power to eliminate known infringement on their system¹⁰³ which fails to accomplish the ultimate goal stated by the Supreme Court in Sony: to protect consumers' ability to make non-infringing uses of technology, whilst at the same time preserving copyright incentives¹⁰⁴.

3. Grokster

The decision in the MGM v Grokster¹⁰⁵ engendered a particular interest as one of the first decisions to examine the liability of a p2p service in the wake of Napster and is now the seminal case on p2p in the United States¹⁰⁶.

The RIAA and Motion Picture Association of America (MPAA) brought a case against Grokster and StreamCast claiming that they should be liable for facilitating copyright infringement committed by users of their p2p software¹⁰⁷. The critical question was whether Grokster and StreamCast did anything (besides distributing software) to actively facilitate infringing activity, or whether they could do anything to stop such infringing activity¹⁰⁸.

¹⁰³ Dogan, S.L., *'Is Napster a VCR? The Implications of Sony for Napster and Other Internet Technologies'*, (2001) 52 Hastings Law Journal 939-960, p952.

¹⁰⁴ Ibid, p952.

¹⁰⁵ Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd., 545 US 913 (2005) (Supreme Court). Henceforth, Grokster.

¹⁰⁶ Schlesinger, M., *'Legal Issues in Peer-to-Peer File Sharing, Focusing on the Making Available Right'*, in Strowel, A (ed), *'Peer-to-Peer File Sharing and Secondary Liability in Copyright Law'*, (2009, Elgar) 43-70, p63.

¹⁰⁷ Grokster, 920-921.

¹⁰⁸ Stokes, A., and Rudkin-Binks, J., *'Online music – P2P aftershocks'*, (2003) Ent LR 14(6) 127-131, p128.

3.1 Supreme Court decision

As in Napster, evidence of primary infringement was easily deduced (and also conceded by the defendants¹⁰⁹) and thus the issue of 'knowledge' had to be similarly considered. Although it was accepted by the court that at least some users were engaged in direct infringement of the plaintiffs' content, it was initially held that liability for contributory infringement only accrues where a defendant has 'actual', and not merely 'constructive', knowledge of the infringement at a time when the defendant materially contributes to that infringement¹¹⁰.

Here, the analyses of the Napster and Grokster courts diverged. Grokster had successfully argued previously that they must have actual knowledge of infringement at a time when they can use that knowledge to stop the particular infringement¹¹¹. There was no actual knowledge because of the lack of a central server or index function; this meant that Grokster had no way of knowing whether specific files were being exchanged, at least of the moment of exchange itself¹¹². The Court concluded that actual – not constructive – knowledge was required at the time at which Grokster materially contributes to the infringement in question¹¹³ and as Grokster only had knowledge of infringements *after* they occurred, it did not have the requisite knowledge when it would have been able to take action¹¹⁴. The fact that they could communicate with users of their software and provide updates was judged to have no bearing on whether they facilitated or enabled the exchange of copyrighted materials¹¹⁵. Regarding the issue of material contribution, the Circuit Court held that Grokster did not have the

¹⁰⁹ Grokster, 923.

¹¹⁰ Ibid, 927-928.

¹¹¹ Stokes, A., and Rudkin-Binks, J., 'Online music – P2P aftershocks', (2003) Ent LR 14(6) 127-131, p128.

¹¹² Nasir, C., *Taming the beast of file-sharing - legal and technological solutions to the problem of copyright infringement over the internet: Part 2*, (2005) Ent LR 16(4) 82-88, p83.

¹¹³ Grokster, 927-928

¹¹⁴ Ibid, 927-928.

¹¹⁵ Stokes, A., and Rudkin-Binks, J., 'Online music – P2P aftershocks', (2003) Ent LR 14(6) 127-131, p128.

same 'control' over the network as Napster, and as such, did not provide the 'site and facilities' for the alleged infringements¹¹⁶. Crucially, the Court distinguished the Napster case on the basis that neither Grokster nor StreamCast operated a centralised file-sharing network and as such, even if they were to shut down their websites (where users could download their p2p programme), users could still continue to trade files¹¹⁷ (unlike the situation in Napster). The functioning of Grokster's website was not connected to the functioning of their p2p software. The lack of knowledge (based on the absence of an ongoing relationship) precluded liability¹¹⁸.

The Supreme Court unanimously held that the Ninth Circuit had misapplied the Sony standard¹¹⁹; specifically that they failed to appreciate that such a standard is irrelevant when the defendant is actively inducing infringement¹²⁰. The Supreme Court reversed the Ninth Circuit's grant of summary judgement for the defendants, clearly indicating that technology entrepreneurs could be held liable for actively inducing acts of infringement by users¹²¹.

3.2 Inducement

To combat the challenge to secondary liability that p2p technology presented, the Supreme Court devised a new theory; that of *inducement*¹²². They established that the circumstances in Grokster differed from those of Sony (previously, the only occasion when Supreme Court had considered

¹¹⁶ Grokster, 928 .

¹¹⁷ Stokes, A., and Rudkin-Binks, J., 'Online music – P2P aftershocks', (2003) Ent LR 14(6) 127-131, p128.

¹¹⁸ Nasir, C., *Taming the beast of file-sharing - legal and technological solutions to the problem of copyright infringement over the internet: Part 2*, (2005) Ent LR 16(4) 82-88, p83.

¹¹⁹ Grokster 933.

¹²⁰ Ibid, 934

¹²¹ Ibid, 930 and 936-937.

¹²² Haque, H., 'Decentralised P2P technology: Can the unruly be ruled?', (2009) International Review of Law, Computers & Technology 23(1-2) 123-129, p129, and which is derived from US patent law, see Daly, M. 'Life after Grokster: Analysis of US and European Approaches to File-sharing', (2007) EIPR 29(8) 319-324, p320.

contributory liability¹²³). The lower courts misapplied Sony in ruling that mere theoretical non-infringing use was sufficient to exonerate the provider¹²⁴ where there is evidence of intent and/or actions directed at promoting infringement¹²⁵.

The Court set out three elements probative of such intent to induce infringement¹²⁶:

- The defendant promoted the infringing enabling virtues of its device;
- The defendant failed to filter out infringing uses; and,
- The defendant's business plan depended on a high volume of infringement.

In this instance, all three elements were evident, amounting to a clear intention to foster infringement¹²⁷. Firstly they advertised their services as being similar to those offered by Napster to capture Napster users after its demise¹²⁸ and even the name 'Grokster' appeared to be derived from 'Napster'¹²⁹. As a matter of evidence, it was found that they had attempted to divert search queries for Napster to its own website¹³⁰. There was also an absence of filtering in place to reduce the amount of infringing activity; a fact which helped the Court adduce 'facilitation'¹³¹. Finally, it was found that the

¹²³ Daly, M. 'Life after Grokster: Analysis of US and European Approaches to File-sharing', (2007) EIPR 29(8) 319-324, p320.

¹²⁴ Grokster, 934.

¹²⁵ Ibid, 936-937.

¹²⁶ Ginsburg, J.C., 'Copyright Control v Compensation: the Prospects for Exclusive Rights After Grokster and Kazaa', in in Strowel, A (ed), 'Peer-to-Peer File Sharing and Secondary Liability in Copyright Law', (2009, Elgar) 110-123, p114.

¹²⁷ Ginsburg, J.C., 'Copyright Control v Compensation: the Prospects for Exclusive Rights After Grokster and Kazaa', in in Strowel, A (ed), 'Peer-to-Peer File Sharing and Secondary Liability in Copyright Law', (2009, Elgar) 110-123, p114, and Grokster, 2782.

¹²⁸ Grokster, 939.

¹²⁹ Ibid, 925..

¹³⁰ Ibid, 925.

¹³¹ Ibid, 939.

plaintiffs derived revenue from selling advertising¹³² leading the Court to conclude that, “*The unlawful objective is unmistakable.*”¹³³ In its analysis, the Court used the term ‘distribution’ regardless of the fact that the system did not involve anything more than users opening up their folders for sharing, that is, ‘making available’ files for onward distribution¹³⁴. Furthermore, it was noted that there is no need to prove any causative link between the inducement and any acts of copyright infringement¹³⁵.

Having ruled that bad intent, if proved, was sufficient to find liability for induced infringements, the Court declined to analyse what the standard for contributory infringement would be when intent to foster infringement cannot be shown¹³⁶, apart from indicating that none of the three criteria would be sufficient on its own¹³⁷.

As has been shown, the Napster and Grokster cases drastically extended the scope of copyright liability. More recently, file-sharing has come to the fore again following the much reported Pirate Bay case. However, this case differed from those above for several reasons. Apart from the obvious jurisdictional distinction, the furore surrounding it was arguably much more political due to the site’s links with the Swedish anti-copyright party, ‘Piratbyrå’. Nevertheless, the case is worth examining in light of the principles which have been developed above.

¹³² Grokster, 939-940.

¹³³ Ibid, 940.

¹³⁴ Schlesinger, M., ‘*Legal Issues in Peer-to-Peer File Sharing, Focusing on the Making Available Right*’, in Strowel, A (ed), ‘*Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*’, (2009, Elgar) 43-70, p64. See also chapter 2, p60-61, and p64 (relating to increased network efficiency), and chapter 3, p93-94 (as part of the culture associated with such practice).

¹³⁵ Daly, M. ‘*Life after Grokster: Analysis of US and European Approaches to File-sharing*’, (2007) EIPR 29(8) 319-324, p320.

¹³⁶ Ginsburg, J.C., ‘*Copyright Control v Compensation: the Prospects for Exclusive Rights After Grokster and Kazaa*’, in Strowel, A (ed), ‘*Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*’, (2009, Elgar) 110-123, pp114-115.

¹³⁷ Ibid, p115, and Grokster, 940.

4. The Pirate Bay

The Pirate Bay decision in 2009 warrants consideration as it can be seen to be a natural development of the Grokster ruling and because the technology involved in the case represents a further development from the first generation p2p network utilised by Napster. The Pirate Bay utilises torrent technology and the website operates as a torrent-indexing and tracking site; as such it does not 'host' any material itself, acting instead (effectively) as search engine for torrent files enabling users to download them from other host locations¹³⁸. In contrast to Napster and Grokster, who essentially began as private and to an extent, social operations, The Pirate Bay originally started in 2003 by the Swedish anti-copyright organisation 'Piratbyrån' but has operated as a private entity since 2004¹³⁹.

Formal proceedings were instigated in January 2008 with prosecutors alleging the defendants were involved in contributory copyright infringement¹⁴⁰. Despite the fact the case was based on Swedish law, certain parallels are evident between it and the US law, notably 'acts of complicity' which may be aligned with contributory infringement. The applicable statutory framework concerned how The Pirate Bay assisted in 'making available copyrighted works'¹⁴¹. In April 2009, the District Court of Stockholm rendered its judgement in the Pirate Bay case and as against its founders¹⁴². The central legal question in the case was whether someone

¹³⁸ Wistam, H., and Andersson, T., *'The Pirate Bay trial (Case Comment)'*, (2009) CLR 15(6) 129-130, p129.

¹³⁹ See: <http://tpb.fl.ax/nph-tpb.cgi/00/687474702s7468657069726174656261792r73652s61626s7574>. Ironically, during the writing of this thesis, access to this site was blocked by the author's ISP (BT). The involvement of BT in relation to other websites relating to unauthorised copyright infringement is discussed in chapter 6, pp247-254.

¹⁴⁰ Manner, M., Siniketo, T., and Pollard, U., *'The Pirate Bay ruling – when the fun and games end'*, (2009) Ent LR 20(6) 197-205, p197.

¹⁴¹ Carrier, M.A., *'The Pirate Bay, Grokster, and Google'*, (2010) 15 JIPR 7-18, p9.

¹⁴² Wistam, H., and Andersson, T., *'The Pirate Bay trial (Case Comment)'*, (2009) CLR 15(6) 129-130, p129.

can be found guilty of contributing to an offence that they are unaware of¹⁴³. In order for someone to be liable for contribution under Swedish Copyright law, a principle offence must exist¹⁴⁴.

4.1 Principle Offence

The Pirate Bay was deemed to have satisfied the condition of 'making available' since users could effectively access the work whenever they wanted¹⁴⁵ providing that it has an effect on the rightsholders' exploitation of their works in that country¹⁴⁶.

This seems to have been applied rather expansively by the Court, the fact that the website did not host files specifically meant that The Pirate Bay did not directly infringe copyright, nor did it make such works available for others to infringe¹⁴⁷. This was effectively done by the torrent technology.

4.2 Complicity

The Court went on to consider specific acts of complicity¹⁴⁸. As with Grokster, the issue of 'intent' was important; specifically it was found that the defendants had the requisite intent for liability even if they did know the specific file(s) involved. The case for contributory infringement was primarily founded on three grounds¹⁴⁹:

- Offering a database that was linked to a catalogue of torrent files pointing to infringing content;
- Enabling users to search and download the torrent files; and,

¹⁴³ Manner, M., Siniketo, T., and Pollard, U., *'The Pirate Bay ruling – when the fun and games end'*, (2009) Ent LR 20(6) 197-205, p199.

¹⁴⁴ Ibid, p200.

¹⁴⁵ Carrier, M.A., *'The Pirate Bay, Grokster, and Google'*, (2010) 15 JIPR 7-18, p9.

¹⁴⁶ Wistam, H., and Andersson, T., *'The Pirate Bay trial (Case Comment)'*, (2009) CTRLR 15(6) 129-130, p129.

¹⁴⁷ Carrier, M.A., *'The Pirate Bay, Grokster, and Google'*, (2010) 15 JIPR 7-18, p10.

¹⁴⁸ Ibid, p9.

¹⁴⁹ Manner, M., Siniketo, T., and Pollard, U., *'The Pirate Bay ruling – when the fun and games end'*, (2009) Ent LR 20(6) 197-205, p198.

- Offering a tracker functionality through which users could contact each other.

It was decided that The Pirate Bay satisfied these grounds as it facilitated and consequently aided and abetted infringement¹⁵⁰. Furthermore, the charges also stated that the majority of files found through The Pirate Bay contained unlicensed copyrighted works and that the service was funded by advertising revenue; thus fulfilling the prerequisites for commercial exploitation¹⁵¹. Under Swedish law, liability may attach to each person involved in the offence if they are acting collectively and as such, the Court concluded that the four defendants were thus collectively liable¹⁵². However, the Court did not clarify the necessary relationship between the activity and the infringement, nor did they elaborate on the particular features of The Pirate Bay's activity that led to liability¹⁵³.

It appears then, that once again (as with Napster), it was found that because of the user-friendly nature of the programme and its administration/tracker facility, The Pirate Bay had itself participated in infringement¹⁵⁴. The Court concluded that it was not necessary for the defendants to have knowledge of each infringing act, but that it was sufficient that they knew copyrighted material was being shared¹⁵⁵. As they did nothing to prevent such illegal activity, they were adjudged to have been 'wilful' in contributing to infringement; underscoring the lack of nuanced analysis on the link between conduct and liability. Nonetheless, the defendants certainly could not be said to have helped their cause through their aggressive responses to

¹⁵⁰ Carrier, M.A., *'The Pirate Bay, Grokster, and Google'*, (2010) 15 JIPR 7-18, p9.

¹⁵¹ Manner, M., Siniketo, T., and Pollard, U., *'The Pirate Bay ruling – when the fun and games end'*, pp198-199.

¹⁵² Carrier, M.A., *'The Pirate Bay, Grokster, and Google'*, (2010) 15 JIPR 7-18, p9.

¹⁵³ *Ibid*, p11.

¹⁵⁴ Wistam, H., and Andersson, T., *'The Pirate Bay trial (Case Comment)'*, (2009) CTRLR 15(6) 129-130, p130.

¹⁵⁵ On the basis of evidence produced in the case, this was clear much like in Napster. *Ibid*, p130. See also chapter 6 pp251-252.

rightsholders. In addition to not disposing the Court to a considerate attitude to the defendants, the letters they had received from rightsholders clearly demonstrated the existence of infringing material that they refused to take steps to address¹⁵⁶.

5. 'If it looks like a duck...'

The digital era has so far seen an expansion of secondary liability in two main ways¹⁵⁷. Firstly, producers and suppliers of technology that has both infringing and non-infringing uses have increasingly been held liable for infringements committed by their users¹⁵⁸. Secondly, the directness of the financial interest in infringing activity required before a defendant is held vicariously liable has been significantly loosened. The convergence of digital technology¹⁵⁹, the Internet and a significant body of case law contributed, at the time, to a rather confused legal situation. Furthermore, the important 'social' aspect¹⁶⁰ to file-sharing added to this uncertainty¹⁶¹.

Ultimately, the Napster decision hinged on a number of key-facts that were entirely specific to the circumstances which could perhaps be more accurately described as sheer bad luck. The infamous email certainly did not help Napster's cause and made it much harder for them to appear victimised, at least in the eyes of the music industry. Nevertheless, whether or not the same conclusion could have been drawn without this aspect is unclear; although it was somewhat of a 'smoking gun', that is not to say that 'knowledge' would not have been inferred without it.

¹⁵⁶ Carrier, M.A., *'The Pirate Bay, Grokster, and Google'*, (2010) 15 JIPR 7-18, p12.

¹⁵⁷ See generally, Lemley, M.A., and Reese, R.A., *'Reducing Digital Copyright Infringement without Restricting Innovation'*, (2004) 56(6) Stanford Law Review 1345-1434.

¹⁵⁸ See chapter 6, p251-252.

¹⁵⁹ See chapter 2, p72.

¹⁶⁰ See chapter 3, p100.

¹⁶¹ Larusson, H.K., *Uncertainty in the scope of copyright: the case of illegal file-sharing in the UK*, (2009) EIPR 31(3) 124-134, p124.

With regard to having 'control' over the network for vicarious infringement, they were again held liable due to the architecture of the programme; their central server proved sufficient to demonstrate their ability to exercise control over the network. However, this was largely dictated by the technology at the time. While digital technology was growing, the associated infrastructure to support it was still catching up. Furthermore, while the technology behind p2p was not new, it was the first that was widely distributed, used and *useable*. As such, it proved rather a test-bed for copyright law before the architecture involved was surpassed by second generation and torrent services. However, this 'test-bed' developed from the prevailing attitude of the industry:

"At first, the music industry tried to ignore Napster. The future was bearing down, and the industry's first instinct was to stand and fight for an older, safer, more profitable, and more easily controlled way of life."¹⁶²

Arguably, there is little wrong with the Courts' interpretation of the fair use factors. However, as Napster did not actually make any revenue from its service, there are question marks over the issue of commerciality with the term being applied negatively; seemingly shifting the burden of proof on to the defendant to show that they *were not* deriving financial benefit rather than having the prosecution prove that they *were*. The specific fair use defence of 'sampling' was also difficult to overcome. Whilst Napster may have had a point in claiming that its users were more likely to purchase music legitimately, that it (at a stretch) may have stimulated the music market, it is difficult to extend the term to cover, basically, entire songs.

Problems do arise, however, with the fair use defence of space-shifting. The judicial reasoning on this point may have been suspect; it is arguably at this juncture where the interests of rightsholders were favoured at the expense of users. The author asserts that whilst the outcome of the case may have

¹⁶² Kot, G., *'Ripped: How the Wired Generation Revolutionized Music'*, (2009, Scribner), p26. See also chapter 3, pp110-119.

been legally valid, the lasting effect of it has been to take with one hand what was given with the other; the Betamax defence has been surpassed by the extension of the burden of 'knowledge', and furthermore, 'inducement' as discussed in the Grokster case. Perhaps more so, the ruling has vested in the industry the power to engage in commerce at the expense of entrepreneurial individuals or groups who may possess more vision and can act more quickly in the marketplace.

However, the courts must ensure that copyright incentives are only compromised to accommodate a valid competing goal¹⁶³. Independent markets should be protected with no affirmative obligation on rightsholders to create technology markets. Whilst Napster itself may have been judged to have been facilitating copyright infringement, the underlying technology of p2p is not exclusive to this effect; in carrying out this analysis, the technology in question must be considered as a whole¹⁶⁴. The difficulty, however, lies in embodying this in a legal rule, if indeed it even can be. Perhaps it is a job, to use a familiar phrase, 'for Congress, (or Parliament), decide'¹⁶⁵.

In many ways, one could argue that p2p networks have been 'marked' as inherently bad tools of copyright infringement¹⁶⁶. Rather than inquiring into the raw amount of non-infringing uses, the question should be asked as to whether any injunction would interfere with users' access to a product or service for which a market would likely have developed in the absence of infringement¹⁶⁷.

¹⁶³ Dogan, S.L., 'Is Napster a VCR? The Implications of Sony for Napster and Other Internet Technologies', (2001) 52 Hastings LJ 939-960, p956.

¹⁶⁴ Ibid, p957.

¹⁶⁵ As suggested by the Supreme Court in Sony, 464.

¹⁶⁶ Hausmann, F.G., 'Protecting Intellectual Property in the Digital Age', in Crews, W., and Thierer, A., (eds), 'Copyfights: The Future of Intellectual Property in the Information Age', (2002), p211.

¹⁶⁷ Dogan, S.L., 'Is Napster a VCR? The Implications of Sony for Napster and Other Internet Technologies', (2001) 52 Hastings LJ 939-960, p956.

Despite Napster's best efforts, it is clear that those involved clearly knew that the company's very existence was based on digital copyright infringement. Nevertheless, Napster marked a profound change in the balance of power between the music industry and consumers. Whilst the advent of the CD introduced greater convenience and sound quality for the listener, Napster changed the dynamics of distribution and cost.

How much control rightsholders may exercise over their content turns on the scope of copyright protection, particularly with respect to new markets created by technology¹⁶⁸. The approach adopted in Napster has enhanced the ability of copyright owners to wield significant measures through the courts. However, it should not be assumed that when technology creates a new market, the copyright owner ought to control it¹⁶⁹:

*"...an injunction might close off the market at a time when more information could reasonably have been expected. It might render a technology capable of legal and beneficial services inoperable in its entirety."*¹⁷⁰

To some extent, the hyperbole surrounding Napster has displaced measured reflection about the real user interests at stake, especially with the strong psychological advantage Napster had with the public. Under the rightsholder control view, so long as the new technological means of dissemination comes within the general scope of the statutory grant, copyright holders should continue to exercise their exclusive rights¹⁷¹. It is perhaps this aspect that seems to have been Napster's legacy. Instead, a better practical strategy may have been to engage the parties in some form of practical co-

¹⁶⁸ Ginsburg, J.C., *"The exclusive right to their writings": Copyright and control in the digital age*, (2002) 54 Me L Rev 195-215, pp196-197.

¹⁶⁹ Ibid, p197.

¹⁷⁰ Einhorn, M., *'Copyright, Prevention, and Rational Governance'*, (2001) 24 Colum-VLA JL & Arts 449-462, p457.

¹⁷¹ Ginsburg, J.C., *"The exclusive right to their writings": Copyright and control in the digital age*, (2002) 54 Me L Rev 195-215, p199.

operation (although efforts were underway behind the scenes by Napster to engage the music industry, this was not helped by four record companies, all with different management and executive personnel). Whilst any co-operation would have created formidable hurdles¹⁷²:

*“...any chosen tactic – even if limited in scope – would allow more information to be drawn into the process, thereby enabling in the end a more reasonable, if not more efficient, adaptation of technology to market needs.”*¹⁷³

Instead, the result has been a long-lasting cultural revolution that has outlived the technological revolution embodied by Napster: *“... it made the need to run to a record store to buy an album seem like a quaint twentieth-century tradition.”*¹⁷⁴ Arguably now, the choice is not between being paid more or being paid less, but between being paid less and not being paid at all¹⁷⁵. Furthermore, creators and rightsholders do not entirely enjoy an exclusive right to exploit their works, but only narrowly defined and uneasily tolerated opportunities to extract compensation, which should not hamper the progress of technology¹⁷⁶.

However, in the absence of specific statutory guidance, the courts' approach to 'dual-use' technologies has necessarily been empirical, depending on the

¹⁷² For example, finding agreement between the record companies on participation, revenue shares and technology to help with implementation. At the time, DRM was viewed as an essential part of such a process and it is perhaps even more important now, see chapter 5, pp194-204.

¹⁷³ Einhorn, M.A., *'Copyright, Prevention, and Rational Governance'*, (2000-2001) 24 Colum-VLA JL & Arts 449-462, p462.

¹⁷⁴ Kot, G., *'Ripped: How the Wired Generation Revolutionised Music'*, (2009, Scribner), p25

¹⁷⁵ Ginsburg, J.C., *“The exclusive right to their writings”: Copyright and control in the digital age'*, (2002) 54 Me L Rev 195-215, p200.

¹⁷⁶ Ibid, p200. See also chapter 2, pp42-43.

application of existing copyright rules and which produce results that are governed by the nature of the disputes before them¹⁷⁷.

As the technology continued to evolve further, the matter was by no means settled. Whereas the architecture of the Napster and Grokster systems were different, the experience of using both was largely similar¹⁷⁸. However, Grokster allowed for the transfer of media files of all types¹⁷⁹. This could be seen as enlarging the scope for a finding infringement since it effectively allowed more material to be shared and downloaded, but could also allow for more non-infringing material to be shared, and implies the possibility that some files may have emanated from, or have been created by, the user with the intention that they be distributed and shared.

Initially, it could be argued that Grokster had learned from Napster's 'mistake' (or perhaps more accurately, the limitations or liabilities of Napster's architecture)¹⁸⁰ to overcome the problems faced by Napster; the lower court Grokster decisions demonstrate: "... *that the more decentralised systems ... are legitimate, in contrast to their more centralised predecessors.*"¹⁸¹

However, Grokster could not emerge from Napster's shadow¹⁸². Suing intermediaries/facilitators fundamentally differs from suing counterfeiters;

¹⁷⁷ Wadhwa, A., 'Overcoming the challenges posted by technology to traditional copyright law: from Betamax to Grokster', (2007) JIPLP 7(2) 487-491, p487.

¹⁷⁸ Corwin, D., 'Contributory copyright liability in Napster versus Grokster: a distinction without a difference', (2004) 24 Loy LA Ent L Rev 605-618, p608.

¹⁷⁹ Ibid, p608.

¹⁸⁰ Meisel, J.B., 'Entry into the Market for Online Distribution of Digital Content: Economic and Legal Ramifications', (2008) Scripted, Vol. 5, Issue 1. 50-69, p55.

¹⁸¹ Nasir, C., 'Taming the beast of file-sharing - legal and technological solutions to the problem of copyright infringement over the internet: Part 2', (2005) Ent LR 16(4) 82-88, p80, and Meisel, J.B., 'Entry into the Market for Online Distribution of Digital Content: Economic and Legal Ramifications', (2008) Scripted, Vol. 5, Issue 1. 50-69, p69.

¹⁸² Although according to Cary Sherman of the RIAA, "Shawn Fanning was genuinely a kid with a great idea ... The second generation of peer-to-peer operators were definitely in this for the money...." Quoted in S Knopper, 'Appetite for Self-Destruction: the Spectacular

such cases do not, and cannot, address specific conduct by particular end-users¹⁸³. As such, all p2p users were effectively tarred by the same brush. As such, the courts face an unpleasant choice; to either ban unquestionably lawful conduct in order to get at the infringing conduct, or let the infringing conduct remain in order to protect the legal uses¹⁸⁴.

Whilst it may be hard not to side with the *Grokster* decision that p2p operators would be held liable because they have done 'something wrong'¹⁸⁵, the result is that the knowledge requirement has been replaced with intention¹⁸⁶. Furthermore, it is unfortunate that the Court chose to discuss the important detail of system 'design' in a short paragraph and footnote, demonstrating an inappropriate balance between the issues at stake in such a case¹⁸⁷. The inducement rule in *Grokster* premises liability of purposeful, culpable expression and conduct¹⁸⁸ and thus, in theory, should do nothing to discourage 'lawful' innovation¹⁸⁹ and the Court talked about the 'tension' between creative pursuits and technological innovation¹⁹⁰.

Crash of the Record Industry in the Digital Age, (2009, Simon & Schuster), p193. In contrast, the other and perhaps more common perception among the music industry was: "Fanning, in their eyes, was a thief, pure and simple." Kot, G., *Ripped: How the Wired Generation Revolutionised Music*, (2009, Scribner), p28.

¹⁸³ Lemley, M.A., and Reese, R.A., *'Reducing Digital Copyright Infringement without Restricting Innovation'*, (2004) 56(6) *Stanford Law Review* 1345-1434, p1379.

¹⁸⁴ *Ibid*, p1380.

¹⁸⁵ Wadhwa, A., *'Overcoming the challenges posted by technology to traditional copyright law: from Betamax to Grokster'*, (2007) *JILPL* 7(2) 487-491, p490.

¹⁸⁶ Daly, M. *'Life after Grokster: Analysis of US and European Approaches to File-sharing'*, (2007) *EIPR* 29(8) 319-324, p320.

¹⁸⁷ Ganley, P., *'Surviving Grokster: innovation and the future of peer-to-peer'*, (2006), *EIPR* 28(1) 15-25, p18.

¹⁸⁸ *Grokster*, 937.

¹⁸⁹ Daly, M. *'Life after Grokster: Analysis of US and European Approaches to File-sharing'*, (2007) *EIPR* 29(8) 319-324, p320. The court 'sensibly' limited the ambit of the active inducement doctrine to steer it away from everyday commercial activities focusing specifically on 'purposeful, culpable expression and conduct', Ganley, P., *'Surviving Grokster: innovation and the future of peer-to-peer'*, (2006) *EIPR* 28(1) 15-25, p17.

¹⁹⁰ *Grokster*, 928-929.

However, they concluded that the previous judgements in favour of Grokster gave too much weight to the latter of these concerns¹⁹¹. On the other hand, it now seems from the judgement that simply having 'bad intent' is enough to prove liability; although easily proved in Napster, 'bad intent' appears inextricably linked with p2p and the onus is on the p2p organisation to *disprove* it.

It should be remembered that when Sony invented its Betamax recorder, there was nothing preceding it to suggest that it was 'lawful' innovation. It could be suggested that because they were an established technology company, they were incapable of inducing unlawful conduct by virtue of their reputation¹⁹². They were also permitted weeks of testimony to demonstrate how the Betamax would not harm the industry allowing the Supreme Court to fully understand the issue. However, the Betamax recorder existed in a world of 'atoms' and not 'bits'; the phases of product design and the inherent checks and balances within the structure of legitimate business help ensure that companies will engage in legitimate revenue avenues: "*Sony was a vindication of this thought process.*"¹⁹³ The Supreme Court carefully differentiated Sony to leave its principle intact, but with the introduction of the 'inducement' criteria that effectively replicated the notorious email from Napster.

It appears that any easy to use programme is also capable of fulfilling the requirement of 'promoting infringement' simply by being efficient and user-friendly¹⁹⁴. As such, any potential developers risk being stuck between a

¹⁹¹ Grokster, 933.

¹⁹² See Lessig, L., *The Future of Ideas: The Fate of the Commons in a Connected World* (2002, Vintage Books), pp194-196.

¹⁹³ Ganley, P., *'Surviving Grokster: innovation and the future of peer-to-peer'*, (2006) EIPR 28(1) 15-25, p22. In contrast, a p2p programme is just a simple protocol that sits in top of the physical and logical architecture created by others. The fact the p2p, for Ganley, is nothing more than an idea that can be put into practice and replicated with ease is what makes it so dangerous.

¹⁹⁴ See chapter 3, p124.

rock and a hard place; Napster concentrated power to engage in new (or potential) digital markets in the hands of the rightsholders, whilst both Napster and Grokster have the effect that anyone who wishes to design such a system risks being guilty of contributory infringement by doing what any entrepreneur would do: that is design a user-friendly system. With the effect that risk being caught in a vicious symbiotic circle; the programme will not be successful unless it is well designed and if it well designed, then it risks being viewed as promoting infringement. Whilst not being the victim of circumstance to the same degree as Napster, Grokster still fell victim to the p2p hangover and served to strengthening copyright's armoury for rightsholders.

The issue of 'inducement' was important in The Pirate Bay case as it was in Grokster, but was much more evident here due to the conduct of the defendants. Again, personal circumstances may have played a crucial factor in the decision; the founders were actively involved in a *political* campaign to encourage copyright infringement¹⁹⁵.

It appears that 'knowledge' and 'inducement' are inextricably linked when it comes to p2p. The introduction of the 'inducement' factor further pushes the issue of infringement onto the user. Whereas the requirement of 'knowledge' places the onus on the defendant, the requirement of inducement would seem to involve the user (if they are effectively being 'induced' to infringe), but it rests with the defendant as well. One may think it is a standard that can only be judged from the standpoint of those who may be 'induced', and perhaps a user standpoint would be advisable in cases such as these. However, it would be unlikely that anyone would say (or at least admit) that they were 'induced', as obviously this incriminates the user¹⁹⁶. However, users could hardly be judged to have been 'induced' to infringe copyright through their use of p2p technology; their conduct is a result of the sub-

¹⁹⁵ As stated by Wistam, H., and Andersson, T., '*The Pirate Bay trial (Case Comment)*', (2009) CTLR 15(6) 129-130, p129.

¹⁹⁶ See chapter 3, p108.

culture specific to the Internet (and which can be traced back to the development of the Internet¹⁹⁷) that 'sharing' is perceived as a fruitful and worthwhile exercise. As it is then, we are left in the curious position of the defendant being judged by a standard they may never have considered, nor had reason to consider.

The concept of 'specific knowledge' implies that any sort of notion that copyright infringement is taking place appears to be sufficient. Arguably, creating a p2p programme would alone imply the knowledge requirement, despite the fact that the technology would still have legitimate uses. The requirement of knowledge thus necessarily implies inducement; however, whilst implying some sort of active conduct on the part of a defendant, this is also not the case. The argument has already been made that simply trying to create and user-friendly programme could potentially be enough to satisfy inducement. Nevertheless, it also becomes harder to reconcile with the increasingly 'remote' nature of p2p technology (from central server, through to torrent incarnations). As such, the line between merely being a search engine and 'inducer' of copyright infringement threatens to become blurred¹⁹⁸. It is an unfortunate fact of modern life that such efficient mechanisms are used to disseminate illegal, rather than legal, copies, but by shutting down p2p networks to solve the problem of infringement forces us, in many cases, to rely on a less-efficient mechanism for disseminating digital content.

¹⁹⁷ See chapter 2, pp57-62, chapter 3, pp98-101 and pp121-126.

¹⁹⁸ See chapter 6, p261.

Chapter 5: Digital Rights Management

Digital Rights Management

1. Introduction

Recent controversies¹ highlight that the issue of Digital Rights Management (DRM) has not gone away. In the past, DRM has always been closely associated with content to which it has been attached², but developments in digital technology and content distribution necessitate a reconsideration of the operation and potential impact of DRM on users in relation to evolving, streaming-based methods of content dissemination. It can be argued that DRM is no longer as closely intertwined with the content it is designed to protect. In the past, prior technological advances had facilitated and promoted the acquisition of physical copies of works; now, every act of perception or of materialisation of digital content can be controlled via DRM so as to condition both user experience and consumption. Significantly, the current operation of DRM highlights the emerging possibility of 'remote' content management resulting from arbitrary negotiations and decisions made by the relevant rightsholder(s). As such, DRM can be viewed as a separate mechanism, or a latent technology that can be effectively 'switched-on' by rightsholders following the sale of content to users. As a result, there

¹ Admittedly, these do not all involve music. See, *'Amazon Kindle users surprised by "Big Brother" move'*, (2009) The Guardian, available from: <http://www.guardian.co.uk/technology/2009/jul/17/amazon-kindle-1984>, *'Ofcom knocks back BBC DRM plans'*, (2009) BBC News, available from: <http://news.bbc.co.uk/1/hi/technology/8352241.stm>, and, *'Microsoft cutting off up to 1m gamers with modified Xbox 360 controls'*, (2009) The Guardian, available from: <http://www.guardian.co.uk/technology/2009/nov/11/xbox-modded-consoles-live-cut-microsoft> It is worth noting that the modification of Xboxes may also serve the purpose of facilitating 'cheating' in online gaming. As such, the blocking of chipped consoles helps maintain the network by ensuring that the gaming environment is fair for all players. However, this raises other issues such as whether the practice of cheating would cause complaints from other users and the 'social etiquette' associated with virtual gaming communities (as also mentioned in chapter 3, p102 and p122). Although interesting, they are beyond the scope of this chapter.

² For example, the aggressive 'XCP' and 'MediaMax' software released on albums by Sony-BMG. See generally, Fox, M.A., *'Another nail in the coffin for copy-protection technologies? Sony BMG's XCP and MediaMax debacle'*, (2006) Ent LR 17(7) 214-218.

has been a key shift from protecting content itself to an application of DRM on distribution networks. Such developments may result in expanding barriers to content consumption which will be (and is) increasingly channelled through digital networks³. DRM measures have always carried the risk that they may be circumvented (despite the illegality of such practices); users could 'crack' the DRM protection on content and enjoy unrestricted use. With the application of DRM now, greater control rests with the rightsholder who can permit unrestricted use, but who also has the power to subsequently restrict it⁴. This is especially important given the amount of content that is now streamed and/or which is dependent on a network (controlled by the rightsholder) for distribution and consumption.

This chapter will proceed by outlining the legal basis and development of DRM, and seek to provide a definition that encompasses its necessary features. The restriction of content to users, in particular, has raised important tensions and debate between the application of DRM and the exceptions under copyright law which enable users to make use of copyrighted content for certain purposes, and serve to facilitate the dissemination of information and ideas that arise from interacting with copyrighted works; the role of DRM in this context will thus be analysed. It is not necessarily the case that DRM is prejudicial to creative practice; instead, it is the position of users (as would-be creators) which may be adversely affected in light of the emerging trend in streaming-based, and DRM-supported content dissemination.

2. Legal background

The content industries have the power to insulate themselves against competitive pressures which may otherwise act to force change in their

³ Corraera, C.M., *'Fair use in the Digital Era'*, (2002) IIC 33(5) 561-678, p585.

⁴ This could presumably have the somewhat absurd effect of DRM circumvention now motivating users to protect their use privileges from DRM, as opposed breaking DRM measures; users would seek to 'protect' rather than 'circumvent'. The act of circumvention is useless if one has already been deprived of content.

strategies and business models⁵. Although they have had the benefit of favourable court findings to help ‘insulate’ them to an extent⁶, they have also now come to rely on ‘self-help’ measures through DRM. As soon as technology had been envisaged to enhance the effective exercise of copyright, it was feared that similar technology might be used to defeat such technological protection, and that legal protection was additionally required: *“In other words, the fence had to be electrified: acts of disabling the technical barriers had to be punished.”*⁷ The degree of control and power digital technology gives a user, especially a skilled user, should not be underestimated⁸, so although DRM systems are privately created, they have an important ‘subsidy’⁹ through their legal protection, or ‘paracopyright’¹⁰.

The first attempt to conclude an international agreement in response to the perceived challenges of digital technology¹¹ was made by the World Intellectual Property Organisation (WIPO) and led to the adoption of two treaties, which amongst other things¹², established a common basis for DRM protection¹³: The WIPO Copyright Treaty (WCT)¹⁴ and the WIPO Performances and Phonograms Treaty (WPPT)¹⁵. The Treaties established, for the first time, that technological measures used by rightsholders to protect

⁵ Kemp, B., *‘Copyright’s Digital Reformulation’*, (2002-2003) 5 Yale J L & Tech 141-153, p142.

⁶ See the outcome of the cases against peer-to-peer networks discussed in chapter 4, pp131-165.

⁷ Dusollier, *‘Technology as an imperative for regulating copyright: from the public exploitation to the private use of the work’*, (2005) EIPR 27(6) 201-204, p202.

⁸ Boone, M.S., *‘The Past, Present, and Future of Computing and its Impact on Digital Rights Management’*, (2008) Mich St L Rev 413-434, p423.

⁹ Lessig, L., *‘Code (Version 2.0)’*, (2006, Basic Books), p117.

¹⁰ See generally, Ballabh, A., *‘Paracopyright’*, (2008) EIPR 30(4) 138-144.

¹¹ See chapter 2, pp72-74.

¹² Ibid, pp76-81.

¹³ Barczewski, M., *‘International framework for legal protection of digital rights management systems’*, (2005) EIPR 27(5) 165-169, p165.

¹⁴ WIPO Copyright Treaty (WCT), adopted in Geneva on December 20, 1996.

¹⁵ WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on December 20, 1996.

their works enjoy an independent protection¹⁶. They contain provisions concerning the protection of rights management information¹⁷ and importantly, provisions on the protection of technological measures¹⁸ themselves; namely that:

“Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”¹⁹

This was implemented in the US through the Digital Millennium Copyright Act 1998 (DMCA)²⁰. The anti-circumvention measures therein render the circumvention of DRMcontrols an independent wrong, thus converting copyright into an absolute form of protection²¹. Similarly in Europe, through the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive)²², the act of circumventing such a measure has become a legal wrong in itself, aside from actual

¹⁶ Braun, N., *‘Interface between the protection of technological measures and the exercise of exceptions to copyright and related rights: comparing the situation in the United States and the European Community’*, (2003) EIPR 25(11) 496-503, p496.

¹⁷ Arts.12 and 19 of the WCT and WPPT, respectively.

¹⁸ Specifically, arts.11-12 WCT and arts.18-19 WPPT. See Barczewski, M., *‘International framework for legal protection of digital rights management systems’*, (2005) EIPR (27)5 165-169, p165.

¹⁹ Art.1 WCT, Obligations concerning Technological measures. This is also dealt with in art.18, WPPT specifically in relation to phonograms.

²⁰ s.1201, Digital Millennium Copyright Act, 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, 112 Stat. 2860 (1998).

²¹ Corra, C.M., *‘Fair use in the Digital Era’*, (2002) IIC 33(5) 561-678, p582.

²² Art.6 Directive 2001/29 of the European Parliament and of the Council of May 22, 2002 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. Henceforth, the InfoSoc Directive.

copyright infringement²³. Indeed, when the idea that ‘the answer to the machine is (in) the machine’ was proposed in 1995²⁴ by Charles Clark, legal advisor to the International Publishers Copyright Council, it is questionable if such protections were envisaged.

3. Definition

Clarke’s vision involved some sort of ‘closed circuit’ system with the development of relevant architecture²⁵ and as such, the origins of DRM implicate the architectural modality²⁶ as a factor of user regulation. In this sense, it can be seen as an evolution from the law trying to control digital architecture²⁷, to architecture *itself* (albeit with a legal basis) as being deployed *against* architecture. Such control comes from the code²⁸ to ultimately create a system of identification, monitoring, control, and compensation²⁹ which requires reinforcement by ‘controlling legislation’³⁰. Clarke’s idea represented not so much computers’ abilities to block copying,

²³ Foged, T., ‘US v EU anti circumvention legislation: preserving the public’s privileges in the digital age?’, (2002) EIPR 24(11) 525-542, p525.

²⁴ Charles Clarke, quoted in Goldstein, P., ‘Copyright’s Highway: From Gutenberg to the Celestial Jukebox (Revised Edition)’ (2003), pp165-170. For a full version of Charles Clarke’s position, see Clarke, C., ‘The Answer to the Machine is in the Machine’, in Hugenholtz, P.B., (ed), ‘The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium’, (1995, Kluwer Law International) 139-145. This phrase has been shortened with the passage of time from ‘the answer to the machine is in the machine’, to ‘the answer to the machine is the machine’. It is not apparent when this occurred, but the content of both versions of the message is the same.

²⁵ Clarke, C., ‘The Answer to the Machine is in the Machine’, in Hugenholtz, P.B., (ed), ‘The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium’, (1995, Kluwer Law International), pp139-145, p139.

²⁶ See chapter 3, pp119-126.

²⁷ See chapter 3, pp121-126. This was the case in the actions against p2p networks as discussed in chapter 4, pp131-165.

²⁸ Lessig, L., ‘Free Culture: The Nature and Future of Creativity’, (2004, Penguin Books), p151.

²⁹ Clarke, C., ‘The Answer to the Machine is in the Machine’, in Hugenholtz, P.B., (ed), ‘The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium’, (1995, Kluwer Law International), pp139-145, p140.

³⁰ Ibid, p144.

as their capacity to connect authors and users³¹. From this somewhat humble and even noble beginning, the issue has grown and been clouded by the fear of rightsholders that they would ultimately pay the price for putting copyrighted works online. The perceived lack of copyright's enforceability³² in the online world is probably the reason why rightsholders began to act in ways which suggest they do not trust copyright laws and as a result, have turned to such private ordering measures³³ as a form of 'front-end' protection³⁴. DRM was therefore a sign that the content industries were becoming adept at presenting the digital environment as a threat³⁵.

The origins of DRM may be traced back to 1976³⁶ and the Sony Betamax³⁷ case. Here, it was argued that Sony should build in sensors in their video recorders that would detect special broadcast signals to prevent recording, and therefore, could be seen as an early DRM solution (although not 'digital' as such). During the 1980s, software vendors also experimented with copy protection technologies, but eventually abandoned the idea³⁸, and in the early 90s, the US Audio Home Recording Act of 1992³⁹ provided for a serial copy management system⁴⁰ in all digital audio recording devices that allowed first generation copies only⁴¹.

³¹ Goldstein, P., *'Copyright's Highway: From Gutenberg to the Celestial Jukebox (Revised Edition)'* (2003), p184.

³² See chapter 2, pp70-75.

³³ Foged, T., *'US v EU anti circumvention legislation: preserving the public's privileges in the digital age?'*, (2002) EIPR 24(11) 525-542, p525.

³⁴ Parchomovsky, G., and Weiser, P.J., *'Beyond Fair Use'*, (2011) 96 Cornell L Rev 91-138, p98.

³⁵ Hesmondhalgh, D., *'The Cultural Industries (Second Edition)'*, (2007, SAGE Publications), p151.

³⁶ Stromdale, C., *'The problems with DRM'*, (2006) Ent LR 17(1) 1-6, p1.

³⁷ Sony Corp. of America v. Universal City Studios Inc., 464 US 417 (1984).

³⁸ Kretschmer, M., *'Digital copyright: the end of an era'*, (2003) EIPR 25(8) 333-341, p335.

³⁹ US Audio Home Recording Act, 106 Stat. 4237 (1992), to amend title 17, United States Code, to implement a royalty payment system and a serial copy management system for digital audio recording, to prohibit certain copyright infringement actions, and for other purposes.

⁴⁰ As the author and his supervisor both remember from the 'era' of the Minidisc.

DRM measures demand the technical ‘incapacitation’ of users who may (or wish to) infringe copyright through privately constructed⁴² usage terms. However, the features and operation of a DRM system depend on the particular context in which it operates. Although its specific components vary from system to system, it is broadly designed to provide a secure distribution platform for digital content. There is a general consensus that DRM is a generic term referring to a number of different restrictive measures employed by rightsholders to restrict unauthorised use, or copying of, content⁴³. DRM involves the use of technology to control digital content, as Felten puts it: “*All various types of DRM systems operate by restraining a work with some kind of technological lockbox...*”⁴⁴ The most commonly deployed measure is encryption⁴⁵, but DRM may also include the use of metadata and watermarking or fingerprinting⁴⁶. These methods are bespoke and vary greatly between systems⁴⁷. DRM systems must also offer a means to identify and manage content in addition to providing a secure distribution

⁴¹ Kretschmer, M., ‘*Digital copyright: the end of an era*’, (2003) EIPR 25(8) 333-341, p335. See also, Knopper, S., ‘*Appetite for Self-Destruction: The Spectacular Crash of the Record Industry in the Digital Age*’, (2009, Simon & Schuster), ‘*Big Music’s Big Mistakes, Part 6: The Secure Digital Music Initiative*’, pp150-157.

⁴² Kemp, B., ‘*Copyright’s Digital Reformulation*’, (2002-2003) 5 Yale J L & Tech 141-153, p146.

⁴³ See for example, Angelopoulos, C.J., ‘*Modern intellectual property legislation: warm for reform*’, (2008) Ent LR 19(2) 35-40, p36 and Bechtold, S., ‘*Digital Rights Management in the United States and Europe*’, (2004) 52 American Journal of Comparative Law 323-382, p331

⁴⁴ Felten, E. W., ‘*A Skeptical View of DRM and Fair Use*’, Communications of the ACM, April 2003/Vol 46, No. 4, p57.

⁴⁵ Herman, B.D., ‘*Breaking and Entering My Own Computer: The Contest of Copyright Metaphors*’, (2008) Communication Law and Policy 13(2) 231-274, p231.

⁴⁶ For these and others, see for example Bechtold, S., ‘*Digital Rights Management in the United States and Europe*’, (2004) 52 American Journal of Comparative Law 323-382, pp326-331, and Dusollier, S., ‘*Electrifying the fence: the legal protection of technological measures for protecting copyright*’, (1999) EIPR 21(6) 285-297, pp285-286.

⁴⁷ Hanbidge, N., ‘*DRM: can it deliver?*’ (2001) Ent LR 12(5) 138-140, p138.

platform⁴⁸. Ultimately however, these elements can be distilled down to a set of trusted 'rules' attached to a digital file. Crucial to any system is the ability to make the use of digital content dependent upon authorisation, and to express the terms of condition and use in a computer interpretable way⁴⁹.

DRM may also involve Technical Protection Measures (TPMs). TPMs are the specific technological tools designed to serve the same purpose⁵⁰ and have the advantage of being self-executing, or independently enforcing⁵¹. Operating through TPMs, DRM will mainly come into play at the last stage of the value chain i.e. before delivery to the commercial user or consumer⁵². Rights Management Information (RMI), which are forms of digital identification and description varying in complexity⁵³, may also be involved. DRM is not necessarily synonymous with TPMs as it can also involve usage contracts, technology licence agreements and anti-circumvention legislation⁵⁴. It can, however, be seen as encompassing intertwining technologies, including TPMs, as well as a of mixture technical and legal mechanisms that control the use of digital content⁵⁵. DRM technologies may be a misnomer and may not really be about the management of digital

⁴⁸ Bechtold, S., *'Digital Rights Management in the United States and Europe'*, (2004) 52 American Journal of Comparative Law 323-382, p327.

⁴⁹ Ganley, P., *'Access to the Individual: Digital Rights Management Systems and the Intersection of Informational and Decisional Privacy Interests'*, (2002) International Journal of Law and Information Technology, Vol. 10, 241, available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=876905#

⁵⁰ Angelopoulous, C.J., *'Modern intellectual property legislation: warm for reform'*, (2008) Ent LR 19(2) 35-40, p36.

⁵¹ Kemp, B., *'Copyright's Digital Reformulation'*, (2002-2003) 5 Yale J L & Tech 141-153, p144.

⁵² Koempel, F., *'Digital rights management'*, (2005) CTRLR 11(8) 239-242, p239.

⁵³ Ibid, p240. These are also not necessarily embedded within the work, but may be stored elsewhere in the form of metadata.

⁵⁴ Ottolia, A., *'Preserving users' rights in DRM: dealing with "juridical particularism" in the information society'*, (2004) IIC 35(5) 491-521, p496.

⁵⁵ Chang, Y-L., *'Does Lessig's criticism of digital rights management target one technology that the information industries desire more than they can actually provide?'*, (2005) 19 International Review of Law, Computers & Technology 3 235 -252, p242.

'rights' at all; rather they are about the management of certain 'permissions'⁵⁶. They may more aptly be described as 'code as code'⁵⁷, or 'digital restrictions management' given their use by rightsholders to restrict user rights⁵⁸. Their primary purpose is that of control; mapping the physical property restrictions into the digital world.

Some broad features can, however, be identified. The restrictions are effected through 'code'⁵⁹. To the author, DRM can be said to be a mixture of technical and legal measures; *both* of which constitute the code⁶⁰. It is applied to digital content, and it is applied for the purposes of controlling that content. The legal code forms the basis for such an approach and also provides protection for the technical code. This, in turn, protects and controls its designated content. As a result, the author proposes the following definition:

DRM is technical code, backed up by legal code, for the purposes of identifying, distributing and protecting digital content and that works by acting as a constraint against unauthorised uses of such content.

The development of DRM and the additional scope of protection for DRM measures have engendered much debate. Because DRM may operate to regulate content usage and may not be circumvented, it has been argued that it may impact on copyright exceptions:

⁵⁶ Samuelson, P., 'Digital Rights Management {and, or, vs.} the Law', available from: <http://people.ischool.berkeley.edu/~pam/papers/acm%20on%20drm.pdf>

⁵⁷ See chapter 3, p86.

⁵⁸ Samuelson, P., 'Digital Rights Management {and, or, vs.} the Law', available from: <http://people.ischool.berkeley.edu/~pam/papers/acm%20on%20drm.pdf>. See also, Lessig, L., 'Code Version 2.0', (2006) p116 on DRM: "This restriction is effected through code ... It is thus a classic example of code being deployed to restore control..."

⁵⁹ Lessig, L., 'Code (Version 2.0)', (2006, Basic Books), p116.

⁶⁰ As distinct from the purely technical instructions embedded in software or hardware suggested by Lessig, see Lessig, L., 'Code Version 2.0', (2006, Basic Books), p121.

*“Armed with technological measures and anti-circumvention laws, the right holder is now entitled to prevent the users from making fair use of copyrighted works.”*⁶¹

Such exceptions, or defences, to copyright infringement will now be examined in light of DRM.

4. Traditional fences, traditional problems

Copyright law (both past and present) is founded on the fundamental principle that adverse economic incentives are created if unrestricted copying of intellectual products is permitted⁶². If adverse incentives exist, society will not have as much creative innovation as it wishes to encourage⁶³; copyright aims to solve this through the allocation of certain exclusive rights. How broad one views the various exceptions and defences to infringement is typically related to how broad one believes the copyright monopoly has become with the expansion of copyrights over the years⁶⁴. For those who hold that the monopoly is too broad, it is important to have an even broader framework of defences and exceptions; while for those who believe that the copyright monopoly is not broad enough, it should be narrower. Nonetheless, *both* the exclusive rights and corresponding exceptions reflect the benefits to society of creative works. As already established, the foundation of copyright is utilitarian (with a necessary user-focus)⁶⁵; therefore, the emphasis of copyright law is (or should be) on the benefits

⁶¹ Dusollier, *‘Technology as an imperative for regulating copyright: from the public exploitation to the private use of the work’*, (2005) EIPR 27(6) 201-204, p203.

⁶² Anderson, M.G., and Brown, P.F., *‘The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law’*, (1993) 24 Loy U Chi LJ 143-177, p158. See also chapter 2, p46.

⁶³ Anderson, M.G., and Brown, P.F., *‘The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law’*, (1993) 24 Loy U Chi LJ 143-177, pp158-159.

⁶⁴ Loren, L.P., *‘Redefining the market failure approach to fair use in an era of copyright permission systems’*, (1997) 5 J Intell Prop L 8-58, p25.

⁶⁵ See chapter 2, p42 and p45.

derived by the public from creative content, and reward to copyright owners is a secondary, although necessary, consideration⁶⁶.

4.1 DRM and copyright exceptions

Copyright exceptions should be viewed as a rational and integral part of copyright law which are necessary to realise the objectives of that law⁶⁷ and minimise welfare losses that may arise from the strategic behaviour of rightsholders⁶⁸. They allow the use of copyrighted work for certain purposes, recognising that new works may be based on pre-existing works which may still be under copyright protection⁶⁹. It is a vital arbiter between two competing interests: potential uses deemed fair (but which may ultimately lead to fewer works being created through reducing incentives); and, enabling such users' ability to use and transform existing content⁷⁰. The initial framework concerning exceptions to the right of reproduction can be found in article 9 of the Berne Convention for the Protection of Literary and Artistic Works (1886)⁷¹. This states 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 a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."⁷²

Thus all signatories to the Convention (the UK and US included) are bound to ensure that their respective exceptions or defences must adhere to this

⁶⁶ Anderson, M.G., and Brown, P.F., *'The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law'*, (1993) 24 Loy U Chi LJ 143-177, p158.

⁶⁷ Leval, P.N., *'Toward a Fair Use Standard'*, (1989-1990) 103 Harv L Rev 1105-1136, p1107.

⁶⁸ Depoorter, B., and Parisi, F., *'Fair use and copyright protection: a price theory explanation'*, (2002) International Review of Law and Economics 21 453-473, p453.

⁶⁹ See chapter 1, pp27-33.

⁷⁰ Lunney Jr., G.S., *'Fair Use and Market Failure: Sony Revisited'*, (2002) 82 B U L Rev 975-1030, p977.

⁷¹ Available from: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P94_13732

⁷² Art.9(2) of the Berne Convention For the Protection of Literary and Artistic Works, 1886

obligation. These 'special cases' were further extended by article 10 of the WIPO Copyright Treaty (WCT)⁷³ and article 16 of the WIPO Performances and Phonograms Treaty (WPPT)⁷⁴, and at the European level, were implemented through the European Directive on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) which provides a list of permissible 'exceptions and limitations' to copyright protection under article 5. Despite these international treaties governing both DRM and copyright exceptions, it is important to understand the relative fluidity of the legal frameworks regarding copyright exceptions and why this may be problematic.

The UK equivalent is known as the doctrine of Fair Dealing as set out in Chapter III of the Copyright, Designs and Patents Act (CDPA) 1988. Following the InfoSoc Directive, this contains a list of certain 'permitted acts' which may be done in relation to copyright works⁷⁵. Although the doctrine itself is not defined, factors the court may take into consideration when deciding whether a use (or 'dealing') is fair have been determined through case law. These may include, *inter alia*, whether the (original) work has been made available to the public⁷⁶; how the work was obtained⁷⁷; the amount taken⁷⁸; the use made of the work (for example, if it was transformative)⁷⁹; the 'motive' behind⁸⁰, and consequences of, the dealing⁸¹; and, whether the purpose of the dealing could have been achieved by alternative means⁸². Furthermore, sufficient acknowledgement of the original work is also required in certain instances⁸³. In most cases, these factors will

⁷³ Limitations and Exceptions.

⁷⁴ Right of Making Available of Fixed Performances.

⁷⁵ S.28, Copyright, Designs and Patents Act (CDPA), 1988. Henceforth, CDPA.

⁷⁶ Hyde Park Residence v. Yelland [2000] EMLR 636.

⁷⁷ Beloff v. Pressdram [1973] 1 All ER 241.

⁷⁸ Hubbard v. Vosper [1972] 1 All ER 1023.

⁷⁹ Newspaper Licensing Agency v. Marks & Spencer plc [1999] EMLR 369.

⁸⁰ Hyde Park Residence v. Yelland [2000] EMLR 636.

⁸¹ Hubbard v. Vosper [1972] 1 All ER 1023.

⁸² Newspaper Licensing Agency v. Marks & Spencer plc [1999] EMLR 369.

⁸³ ss.29-30, CDPA.

be combined and weighed up together and like the situation in the US (discussed below), whether or not a particular act falls within the meaning of 'fair dealing' depends very much on the circumstances of the case.

In the context of this thesis, it is also questionable whether the UK framework (operating within the European system of specific exceptions) is suitable for the digital age⁸⁴. This has been subject to recent independent review⁸⁵ in which it was noted that the 'patchwork' approach of specific permitted acts has been problematic' particularly in terms of user-expectations:

*"... we have in recent years witnessed a growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people. Digital technology has enabled use and reuse of material by private individuals in ways that they do not feel are wrong."*⁸⁶

The US approach is different from its equivalent European counterpart. The American Fair Use doctrine has played an important role in promoting the dissemination of creative content⁸⁷ and its origins were developed from the UK law⁸⁸. It is codified in chapter 1, s107 of the Copyright Law⁸⁹ which provides four factors to be considered in cases otherwise amounting to infringement: the 'purpose and character' of the use (including any commercial aspects); the 'nature' of the copyright work; the 'portion used' (concerning amount and substantiality); and, the 'effect' of such use on the

⁸⁴ *Digital Opportunity: A Review of Intellectual Property and Growth*, (2011) An Independent Report by Professor Ian Hargreaves, p41. Available from: <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

⁸⁵ *Ibid*, p41.

⁸⁶ *Digital Opportunity: A Review of Intellectual Property and Growth*, (2011) An Independent Report by Professor Ian Hargreaves, p43. Available from: <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

⁸⁷ Corraera, C.M., *Fair use in the Digital Era*, (2002) IIC 33(5) 561-678, p585.

⁸⁸ Loren, L.P., *Redefining the market failure approach to fair use in an era of copyright permission systems*, (1997) 5 J Intell Prop L 1 8-58, p15.

⁸⁹ Copyright law of the United States of America and Related Laws Contained in Title 17 of the United States Code.

market or value of the copyrighted work⁹⁰. Despite this, its statutory formulation and relevant case law have not particularly defined its contours or objectives⁹¹. The general guidelines provided in US law and the lack of a complete, precise list of exempted acts have, in the past, provided a flexible approach to adopting new solutions in response to the development of new technologies⁹². According to Leval, It should be viewed as a rational and integral part of copyright law which is necessary to realise the objectives of that law⁹³, again with an important user-element⁹⁴: “*The doctrine of fair use limits the scope of the copyright monopoly in furtherance of its utilitarian objective.*”⁹⁵

It is important to note the conceptual differences between the UK position of fair dealing (and its European equivalents), and the US position of fair use. Fair dealing may be aptly described as *permitted acts* in relation to a copyrighted work where it is used in defined circumstances. In contrast, fair use is capable of having a much more ‘blanket’ application and can potentially apply in any circumstance; as such, it can be viewed as either an *exception or defence*⁹⁶. In the context of this chapter, the terminology used will reflect the broader idea of copyright exceptions and the purpose they serve in facilitating the creation of new works (as opposed to any specific fair use, or fair dealing regime).

⁹⁰ S.107(1)-(4), *ibid.* These are also considered in chapter 4 on Napster and p2p technology as this was the central defence to their activities, pp130-135.

⁹¹ Leval, P.N., ‘*Toward a Fair Use Standard*’, (1989-1990) 103 Harv L Rev 1105-1136, p1105.

⁹² Correra, C.M., ‘*Fair use in the Digital Era*’, (2002) IIC 33(5) 561-678, p575.

⁹³ Leval, P.N., ‘*Toward a Fair Use Standard*’, (1989-1990) 103 Harv L Rev 1105-1136, p1107.

⁹⁴ See chapter 2, p42 and p45.

⁹⁵ Leval, P.N., ‘*Toward a Fair Use Standard*’, (1989-1990) 103 Harv L Rev 1105-1136, p1110.

⁹⁶ The difference in perspective depends upon whether it is understood as an affirmative right and therefore integral to copyright law, or not. See Davis, M., ‘*From pirates to patriots: fair use for digital media*’, (2002) IEEE Multimedia 9(4) 4-7, pp5-6.

The lack of a coherent framework of copyright exceptions poses problems for DRM of a technical nature. Despite the fact that the doctrine has been realised in legislation, several aspects of it are problematic from a DRM-perspective⁹⁷. The doctrine is very fluid and it is important to remember the potentially wide-range of activities that depend on fair use for legitimacy. As such, it has often been described as a ‘safety valve’⁹⁸ that serves a crucial role in limiting the reach of what would otherwise be an intolerably expansive grant of rights to copyright holders. Its ambiguity is a major problem for code writers; in the US: “*The legal definition of fair use is, by definition, maddeningly vague.*”⁹⁹ There were and are few, if any, rules as to what is ‘allowed’¹⁰⁰; thus the operation of DRM in relation to a deliberately¹⁰¹ fluid and vague area of copyright law may be problematic.

In order to preserve copyright exceptions, DRM systems would need to accommodate for unauthorised uses of copyrighted works, but the fluidity of the doctrine means that these cannot be defined with precision. As much as the exceptions themselves may be regarded as fluid, accommodating the potential variety of ‘uses’ may therefore be difficult. In practical terms, an approximate algorithm would have to be used that operates with crude proxies, but, “*Approximation is ... crucial to ‘streamline’ legal norms.*”¹⁰² The difficulties in approximating DRM with uses, and thus potential copyright

⁹⁷ von Lohmann, F., ‘*Fair Use and Digital Rights Management: Preliminary Thoughts on the (Irreconcilable?) Tension between Them*’, p1, available from:

http://w2.eff.org/IP/DRM/fair_use_and_drm.html

⁹⁸ Ibid, p2.

⁹⁹ Felten, E. W., ‘*A Skeptical View of DRM and Fair Use*’, Communications of the ACM, April 2003/Vol 46, No. 4, p58. Although more fully codified in UK law, courts have applied the doctrine expansively suggesting that more types of activities may be covered by the exceptions than their wordings suggest.

¹⁰⁰ Kemp, B., ‘*Copyright’s Digital Reformulation*’, (2002-2003) 5 Yale J L & Tech 141-153, p148.

¹⁰¹ Grynberg, M., ‘*Property is a Two-Way Street: Personal Copyright Use and Implied Authorization*’, (2010) 79 Fordham L Rev 435-498, p450.

¹⁰² Favale, M., ‘*Approximation and DRM: can digital locks respect copyright exceptions?*’, (2011) IJL & IT 19(4) 306-323, p322. Norms are discussed in chapter 3, pp95-103.

exceptions, are represented *a priori* by the identification of such exceptions¹⁰³. It would make errors in both directions i.e. allowing some uses the law would forbid and forbidding some the law would allow¹⁰⁴. As such, difficulty lies in expressing the variables that may arise in each case in Rights Expression Language (REL, the computer code expressing the rights that exist over a piece of content used by DRM technologies). This poses a challenge:

*“Perhaps the most challenging issue yet to resolve in the field of policy expression languages is the tension that arises naturally when attempting to represent liability-based systems such as copyright law through explicit expressions of rights or permissions.”*¹⁰⁵

From a technological perspective, there is no precise algorithm for deciding whether a use is fair or not: *“To a computer scientist such imprecision is a bug; to lawyers, it is a feature since it allows judges to take into account the unique circumstances of each case.”*¹⁰⁶

Despite this apparent issue, it is not necessarily the case that DRM will be detrimental to copyright exceptions. DRM may actually be necessary in order to function as an important supplement to copyright exceptions by facilitating the availability of content and consequent use, ‘options’. A modern and pragmatic copyright regime needs to regulate access¹⁰⁷ and through the operation of DRM in this respect, the ability of content owners to offer and regulate a the distribution and consumption of their works may lead

¹⁰³ Ibid, p315

¹⁰⁴ Felten, E. W., ‘A Skeptical View of DRM and Fair Use’, Communications of the ACM, April 2003/Vol 46, No. 4, pp58-59.

¹⁰⁵ LaMacchia, B.A., ‘Key Challenges in DRM: An Industry Perspective’, (2002) available from: <http://www.farcaster.com/papers/drm2002/drm2002.pdf>

¹⁰⁶ Felten, E. W., ‘A Skeptical View of DRM and Fair Use’, Communications of the ACM, April 2003/Vol 46, No. 4, p58.

¹⁰⁷ Lucchi, N., ‘The supremacy of techno-governance: privatization of digital content and consumer protection in the globalized information society’, (2007) IJL & IT 15(2) 192-225, p211.

to a greater number of specialised options and a wider range of consumer choices¹⁰⁸. Access has always been a barrier to consumption, but this is inherent in copyright itself. As established in chapter 2, copyright operates to commodify content and allows a market to form for such content¹⁰⁹, but in this sense, it is the market which operates to govern access¹¹⁰ through determining availability, price and ultimately, consumption. DRM further implicates the importance of the market as a regulatory modality¹¹¹ as opposed to an independent access right in itself¹¹². It is ideal because it allows the market to be ‘encapsulated’ as one single entity¹¹³ so as to be able to tailor, more closely, availability and demand¹¹⁴:

*“TPMs do not in themselves prevent the public from enjoying its rights. On the contrary, thanks to enhanced functionalities, if correctly fine tuned, they can produce multiple advantages.”*¹¹⁵

¹⁰⁸ Einhorn, M.A., and Rosenblatt, B., ‘Peer-to-Peer Networking and Digital Rights Management – How Market Tools Can Solve Copyright Problems’, (2005), Cato Institute Policy Analysis No. 534, p3.

¹⁰⁹ Chapter 2, pp45-46.

¹¹⁰ Chapter 3, p104.

¹¹¹ See chapter 3, pp104-126.

¹¹² It has been argued that DRM could arguably be regarded as a form of ‘merged control’ because the technologies involved simultaneously qualify as an access and a copy control such that it has created a new exclusive right for the rightsholders; namely an ‘access’ right, see Foged, T., ‘US v EU anti circumvention legislation: preserving the public’s privileges in the digital age?’, (2002) EIPR 24(11) 525-542, p526. See also Ginsburg, J.C., ‘From Having Copies to Experiencing Works: the Development of an Access Right in US Copyright Law’, available from:

http://papers.ssrn.com/paper.taf?abstract_id=222493

However, the author does not make the argument that such limitations and exceptions inevitably carry with them an entitlement to access as a necessary precondition.

¹¹³ Griffin, J.G.H., ‘The changing nature of authorship: why copyright law must focus on the increased role of technology’, (2005) IPQ 2 135-154, p145.

¹¹⁴ Ganley, P., ‘Digital copyright and the new creative dynamics’, (2004), IJL & IT 12(3) 282-332, p289.

¹¹⁵ Ibid, p308.

In this sense, DRM may also operate as an adjunct to the operation of the market as a form of regulation in the digital environment¹¹⁶. Copyright regulates access through permitting the commodification of content¹¹⁷, thus allowing a market to form and operate¹¹⁸. It is this market which regulates consumption¹¹⁹ and in this sense, DRM may operate as an adjunct to the market. DRM provides the ability to design different services and offers producers the ability to price discriminate with regard to buyer tastes and potentially enable greater revenue recovery¹²⁰. With DRM, the rightsholder may make a range of choices that directly affect the availability of their content; the more it appears available for use (without restrictions) the more reasonable the users' belief that they may interact with it¹²¹. This also contributed towards the development of users' normative behaviour¹²² towards unauthorised copyright infringement, engendered by digital technology¹²³ and the freely¹²⁴ available content through associated peer-to-peer services¹²⁵. Any privileges rightsholders adopt should in theory compete with one another in the marketplace (such that the market will no longer be for content, but the 'best' form of DRM content), and that a new use 'equilibrium' will assert itself through a process of experimentation¹²⁶, and presumably competition. Conversely, any non-DRM alternative may

¹¹⁶ See chapter 3, p104-126.

¹¹⁷ See chapter 1, pp24-25 and chapter 2, p45.

¹¹⁸ See chapter 2, pp45-46.

¹¹⁹ See chapter 3, p104.

¹²⁰ Einhorn, M.A., and Rosenblatt, B., '*Peer-to-Peer Networking and Digital Rights Management – How Market Tools Can Solve Copyright Problems*', (2005), Cato Institute Policy Analysis No. 534, p3.

¹²¹ Grynberg, M., '*Property is a Two-Way Street: Personal Copyright Use and Implied Authorization*', (2010) 79 Fordham L Rev 435-498, p481.

¹²² See chapter 3, p95-103.

¹²³ See chapter 2, pp57-75 and chapter 3, p119-126.

¹²⁴ See chapter 3, p105-110.

¹²⁵ Discussed in chapter 2, pp66-70 and chapter 4, pp131-165.

¹²⁶ Parchomovsky, G., and Weiser, P.J., '*Beyond Fair Use*', (2010) 96 Cornell Law Review 91-138, p127.

have negative consequences. Enforcing copyright in the digital environment without DRM requires unbearable transaction costs¹²⁷.

As such, it is far from clear-cut that DRM and copyright exceptions are incompatible. DRM technologies can, in theory, operate to reduce transaction costs (for rightsholders) and hence ward-off market failure in this sense¹²⁸, and which exceptions to copyright may otherwise be left to rectify¹²⁹. It represents an attempt by rightsholders to ‘internalise’ benefits resulting from market transactions involving digital content, as it allows for more effective fencing of content so as to address some of the market failure that results from creative digital works¹³⁰. However, even this approach is not without its issues. The central problem with a market failure approach (from an economic perspective) is that it does not adequately account for the fact that copyrighted works are public and not private goods¹³¹. Although copyright operates to commodify content¹³², digital technologies have largely removed any related reproduction and distribution costs¹³³. As such, the widespread availability of copyrighted content available online for free has led the creative industries to present the message that they ‘can’t compete with free’¹³⁴. However, even with DRM-free content, consumers still face social and technical transaction costs in exchanging content¹³⁵. A market-

¹²⁷ Favale, M., ‘*Approximation and DRM: can digital locks respect copyright exceptions?*’, (2011) IJL & IT 19(4) 306-323, p310.

¹²⁸ Lunney Jr., G.S., ‘*Fair Use and Market Failure: Sony Revisited*’, (2002) 82 B U L Rev 975-1030, p991.

¹²⁹ Gordon, W.J., ‘*Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessor*’, (1982) 82 Columbia Law Review 8 1600–1657, p1627.

¹³⁰ Cohen, J.E., ‘*Lochner in Cyberspace: the new economic orthodoxy of “rights management”*’, (1998) 97 Mich L Rev 462, p9, available from:

<http://www.law.georgetown.edu/faculty/jec/lochner.pdf>

¹³¹ Lunney Jr., G.S., ‘*Fair Use and Market Failure: Sony Revisited*’, (2002) 82 B U L Rev 975-1030, p993.

¹³² See chapter 2, p45.

¹³³ See chapter 1, p33, and chapter 2, pp72-74.

¹³⁴ See the discussion of ‘free’ in chapter 3, pp105-110.

¹³⁵ Lewis, S.R., ‘*How much is stronger DRM worth?*’, 2nd Annual Workshop on Economics and Information Security, 29th May 2003, available from:

based analysis, including the role of copyright exceptions, is not necessarily easy as these potentially allow users to bypass the market¹³⁶. However, despite attempts to internalise as much benefit as possible from transactions, it is important to remember that benefits to users cannot be judged purely from looking at the market:

“The choice between more flexible access policies and digitally metered, fully-commodified usage rights is not a simple choice between market failure and (by implication) market success.”¹³⁷

Any approach that focuses exclusively on market failure overlooks the changing economics of creation and distribution resulting from digital technology¹³⁸ and the low costs of digital content whose ‘value’ might be realised in other non-financial ways¹³⁹. Although it may be argued that DRM may be incapable of accommodating a nuanced approach to copyright exceptions, that does not mean that copyright exceptions themselves necessarily correspond to, and facilitate, creativity on the part of creators.

5. Remix?

Artists such as Louis Armstrong, Elvis Presley, the Beatles, the Rolling Stones, Led Zeppelin, and, er, Barry Manilow have all borrowed to some extent¹⁴⁰. There is an issue between ‘inspiration’ and infringement in the

www.cpppe.umd.edu/rhsmith3/papers/Final_session1_lewis.pdf. For example, the costs of forming the social networks necessary to support the exchange of content, the time spent searching for, and downloading quality content, and the usage of technical bandwidth quotas implemented by many ISPs.

¹³⁶ Depoorter, B., and Parisi, F., ‘Fair use and copyright protection: a price theory explanation’, (2002) *International Review of Law and Economics* 21 453-473, p455.

¹³⁷ Cohen, J.E., ‘Lochner in Cyberspace: the new economic orthodoxy of “rights management”’, (1998) 97 *Mich L Rev* 462, p91, available from: <http://www.law.georgetown.edu/faculty/jec/lochner.pdf>,

¹³⁸ Ku, R.S.R., ‘Consumers and Creative Destruction: Fair Use Beyond Market Failure’, (2003) 18 *Berkley Tech L J* 539-574, p543. See also chapter 1, p27-28.

¹³⁹ See chapter 2, pp76-77, chapter 3, pp107-108 and chapter 7, p269.

¹⁴⁰ Arewa, O.B., ‘From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context’, (2006) 84 *NC L Rev* 547-645, pp615-618.

creation of new content, and it is arguably in this pocket that copyright exceptions sit. However, they cannot accommodate creative sampling and remixing practice¹⁴¹, and have been deemed not to apply¹⁴² to such new and emerging creative practice(s):

*“Something has happened in human creativity which copyright law never foresaw and was never written to accommodate – the fragmentary reuse of others’ art to make new art.”*¹⁴³

Creators rely on a certain degree of flexibility in the way in which they use pre-existing copyrighted works¹⁴⁴, but borrowing and changing existing music (as an integral aspect to music production) are not necessarily seen as legitimate methods of creation¹⁴⁵.

*“... defining sampling as theft or appropriation immediately indicates, prior to any discussion, that something illegal, illegitimate or at best, inappropriate has occurred.”*¹⁴⁶

Musical ‘borrowing’ is a pervasive aspect of musical creation in all genres (and periods)¹⁴⁷, but not every copy leads to the creation of a new work¹⁴⁸. With the operation (and protection) of DRMs, and its intersection with

¹⁴¹ Negativland, ‘Two Relationships to a Cultural Public Domain’, (2003) 66 Law & Contemp Probs 239-262, p257. See also chapter 1, p28-33.

¹⁴² Grand Upright Music Ltd. v. Warner Bros Records Inc., 780 F Supp 182 (SDNY 1991).

¹⁴³ Negativland, ‘Two Relationships to a Cultural Public Domain’, (2003) 66 Law & Contemp Probs 239-262, p256.

¹⁴⁴ Ganley, P., ‘Digital copyright and the new creative dynamics’, (2004), IJL & IT 12(3) 282-332, p325.

¹⁴⁵ Arewa, O.B., ‘From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context’, (2006) 84 NC L Rev 547-645, p608. See also chapter 1, p32

¹⁴⁶ Arewa, O.B., ‘From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context’, (2006) 84 NC L Rev 547-645, p581.

¹⁴⁷ Ibid, p547. See also chapter 1, p28-30.

¹⁴⁸ Geiger, C., ‘Copyright and free access to information: for a fair balance of interests in a globalised world’, (2006) EIPR 28(7) 366-373, p371.

copyright exceptions, care must be taken to not mistake present (perceived) realities for permanent ones¹⁴⁹. The rightsholders' control over copying and derivative works did not prevent the development of appropriation-based musical content¹⁵⁰; the natural human approach to our own culture was to participate in it by consuming, participating, and adding to it¹⁵¹. Creative forces are unpredictable and cannot be modelled *ex ante*¹⁵² so it is not necessarily the case that copyright (and its exceptions) have been, or ever will be, able to accommodate such practices in light of the opportunities afforded by digital technology¹⁵³: "*The ageing guidelines for determining fair use do not yet accommodate, or even acknowledge, the modern tendency to create new work out of old.*"¹⁵⁴ For example, in the context of hip-hop (as well as other musical genres such as 'plunderphonics'¹⁵⁵), the production practices of incorporating copyrighted recordings into new works by sampling¹⁵⁶ essentially collide with copyright assumptions¹⁵⁷; especially regarding derivative works which the rightsholder may control. Furthermore, CD manufacturers had signed anti-piracy agreements with record labels in

¹⁴⁹ Boone, M.S., '*The Past, Present, and Future of Computing and its Impact on Digital Rights Management*', (2008) Mich St L Rev 413-434, p427.

¹⁵⁰ Joo, T.W., '*Remix Without Romance*', (2011) 44(2) Conn L Rev 415-479, p427.

¹⁵¹ Negativland, '*Two Relationships to a Cultural Public Domain*', (2003) 66 Law & Contemp Probs 239-262, p242. See also chapter 1, pp27-28 and chapter 3, p102.

¹⁵² Ganley, P., '*Digital copyright and the new creative dynamics*', (2004), IJL & IT 12(3) 282-332, p296.

¹⁵³ See chapter 1, pp27-28 and chapter 2, pp72-73.

¹⁵⁴ Negativland, '*Two Relationships to a Cultural Public Domain*', (2003) 66 Law & Contemp Probs 239-262, p258. See also chapter 1, pp26-27.

¹⁵⁵ Oswald, J., '*Plunderphonics, or Audio Piracy as a Compositional Prerogative*', (1985), available from: <http://www.plunderphonics.com/xhtml/xplunder.html>. This is also mentioned in chapter 7 on Creative Commons, p273. See also Kot, G., '*Ripped: How the Wired Generation Revolutionized Music*', (2009, Scribner), chapter 12, '*GirlTalk's Illegal Art*', pp161-173 on the issue of this musical genre and the dynamic between infringement and creativity.

¹⁵⁶ Joo, T.W., '*Remix Without Romance*', (2011) 44(2) Conn L Rev 415-479, p419. See also chapter 1, pp28-29.

¹⁵⁷ Arewa, O.B., '*From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*', (2006) 84 NC L Rev 547-645, p562. See also chapter 1, p29 and p32.

return for their business¹⁵⁸, thus rendering production and distribution of such content illegal, aside from the creation of such content in the first place. Any exception-based defence may therefore only come into play once infringement has been ascertained, and may arguably not fit well with musical copyright¹⁵⁹. Decisions of infringement in such instances typically focus on melody, ignoring other issues (and creative decisions) such as rhythm, harmonics, linguistic word-play and the overall musical aesthetic¹⁶⁰: *“The creative process has lost all benefit of the doubt...”*¹⁶¹ Nonetheless, the ‘conflict’ between sampling music production and copyright ignores the actual history of interaction between law and ‘remixing’¹⁶² which suggests that both can accommodate each other¹⁶³; and there is nothing to suggest that such creative practices will stop: *“We’ve continued to work in this way because we like the sound of it. We like the results. We get inspired by what we find out there, it’s simply fun to do...”*¹⁶⁴. In fact, the ‘illegal’ nature of it may even constitute a significant part of its appeal to users: *“... there’s nothing the file-sharing community likes better than something illicit”*¹⁶⁵

Views of musical composition as individualistic and autonomous fail to take adequate note of the centrality of borrowing in the creative processes of many composers throughout music history¹⁶⁶ (although this in itself may be

¹⁵⁸ Kot, G., *‘Ripped: How the Wired Generation Revolutionized Music’*, (2009, Scribner), p168.

¹⁵⁹ Arewa, O.B., *‘From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context’*, (2006) 84 NC L Rev 547-645, p577.

¹⁶⁰ Ibid, p577 and pp625-626. These may be determined in relation to whether or not they constitute a ‘substantial part’ of the original work, see chapter 1, p30.

¹⁶¹ Negativland, *‘Two Relationships to a Cultural Public Domain’*, (2003) 66 Law & Contemp Probs 239-262, p257.

¹⁶² Also described as ‘recoding’, see generally Joo, T.W., *‘Remix Without Romance’*, (2011) 44(2) Conn L Rev 415-479,.

¹⁶³ Joo, T.W., *‘Remix Without Romance’*, (2011) 44(2) Conn L Rev 415-479, p423.

¹⁶⁴ Negativland, *‘Two Relationships to a Cultural Public Domain’*, (2003) 66 Law & Contemp Probs 239-262, p240.

¹⁶⁵ Kot, G., *‘Ripped: How the Wired Generation Revolutionized Music’*, (2009, Scribner), p170. See also chapter 1 p32 and chapter 3, p88.

¹⁶⁶ See chapter 1, pp28-29.

regarded as a 'compositional prerogative'¹⁶⁷). Such conceptions arguably stem from 'Romantic'¹⁶⁸ and natural rights theories¹⁶⁹ of authorship¹⁷⁰, which: *"...fail to recognize the use of existing works for new creations can be an important source of innovation."*¹⁷¹ This also fails to appreciate the role technological advances play in changing the nature of authorship¹⁷². Content production, and creativity may now be seen as much more social and collaborative products¹⁷³ (or at least have the potential to be as a result of digital technology). DRM, however, encapsulates the values of the romantic author at the expense of newer 'authorial' conceptions based on, and resulting from, digital technology¹⁷⁴. As a result of this, content threatens to become completely unavailable to any succeeding artist's use without payment and permission¹⁷⁵ although payment and permission are established industry norms¹⁷⁶. However, that still does not mean that DRM may prejudice transformative use(s). By their very nature, such uses often require prolonged exposure and rights of 'extraction', but which may be able

¹⁶⁷ Oswald, J., *'Plunderphonics, or Audio Piracy as a Compositional Prerogative'*, (1985), available from: <http://www.plunderphonics.com/xhtml/xplunder.html>

¹⁶⁸ Griffin, J.G.H., *'The changing nature of authorship: why copyright law must focus on the increased role of technology'*, (2005) IPQ 2 135-154, p140. See also chapter 1, p23 and chapter 2, p53.

¹⁶⁹ See chapter 2, pp49-51.

¹⁷⁰ Arewa, O.B., *'From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context'*, (2006) 84 NC L Rev 547-645, p585.

¹⁷¹ Ibid, p585. See also chapter 1, pp25-28.

¹⁷² Griffin, J.G.H., *'The changing nature of authorship: why copyright law must focus on the increased role of technology'*, (2005) IPQ 2 135-154, p135 and p138. See also chapter 1, p27 and chapter 2, p73.

¹⁷³ See chapter 1, p27..

¹⁷⁴ Griffin, J.G.H., *'The changing nature of authorship: why copyright law must focus on the increased role of technology'*, (2005) IPQ 2 135-154, p141. See also chapter1, p27 and pp33-34, and chapter 2, p73

¹⁷⁵ Negativland, *'Two Relationships to a Cultural Public Domain'*, (2003) 66 Law & Contemp Probs 239-262, p255. As is generally accepted practice, see chapter 1, ppp31-32.

¹⁷⁶ M., *'Efficiency, viability and the new rules of the Internet'*, (2001) European Journal of Law and Economics 11(1) 5-22

to accommodated through DRM-control and any associated payment¹⁷⁷; such willingness has clearly been evident previously:

*“... the hip-hop community, from its earliest days, generally understood and respected the obligation to obtain and pay for permission to use samples in commercial recordings”*¹⁷⁸.

Copyright exceptions initially developed in an analogue world¹⁷⁹ and as technology frees content from physical restraints¹⁸⁰, man-made constraints (i.e. ‘code’¹⁸¹) may help inspire artists to make new kinds of meanings through new techniques¹⁸² and forms of creativity. As such, this represents a valuable addition to the ‘community’ aspect of the normative modality¹⁸³:

*“Technical limits have historically presented obstacles for artists to overcome, resulting in innovations.”*¹⁸⁴ This change could arguably result from further, or higher, levels of transformative use such that DRM technology is capable of reflecting these new relationships and may consequently facilitate new business models¹⁸⁵: *“... DRM appears to be at the foundation of whatever business models will actually succeed in the digital age.”*¹⁸⁶

¹⁷⁷ Ganley, P., ‘Digital copyright and the new creative dynamics’, (2004), IJL & IT 12(3) 282-332, p295.

¹⁷⁸ Joo, T.W., ‘Remix Without Romance’, (2011) 44(2) Conn L Rev 415-479, p422.

¹⁷⁹ Grynberg, M., ‘Property is a Two-Way Street: Personal Copyright Use and Implied Authorization’, (2010) 79 Fordham L Rev 435-498, p101.

¹⁸⁰ See the description of the mp3 format in chapter 2, pp62-66, and also p72.

¹⁸¹ See generally, Lessig, L., ‘Code (Version 2.0)’, (2006, Basic Books).

¹⁸² Joo, T.W., ‘Remix Without Romance’, (2011) 44(2) Conn L Rev 415-479, p457.

¹⁸³ See chapter 3, p95-103.

¹⁸⁴ Joo, T.W., ‘Remix Without Romance’, (2011) 44(2) Conn L Rev 415-479, p457.

¹⁸⁵ Chang, Y.L., ‘Does Lessig’s Criticism of Digital Rights Management Target One technology That the Information Industries Desire More Than They can Actually Provide?’, (2005) International Review of Computers 19(3) 235-252, p238.

¹⁸⁶ Sobel, L.S., ‘DRM as an Enabler of Business Models: ISPs as Digital Retailers’, (2003) 16 Berkeley Tech L J 667-696, p66.

DRM is seen as an important mechanism for protecting copyrights in a free market¹⁸⁷ and may even serve to uphold copyright exceptions in the digital environment¹⁸⁸. In such instances, this relationship would result from negotiations between owners and users, preliminary to any litigation¹⁸⁹, therefore suggesting that any unauthorised uses that rely on an exception-based defence are unlikely to succeed in such a context (as being an option of last resort, outside of pre-negotiated outcomes). Although many modern personal uses are not the sort that was traditionally the concern of copyright law¹⁹⁰, technology can change users' relationship to content in ways that can make a profit¹⁹¹. Similarly, the law is full of flexible, context-specific application¹⁹² and the same is arguably true of DRM: "*Legal scholars' insistence that law is determinative of cultural participation is an example of thinking like a lawyer, not like an artist.*"¹⁹³ As such, it may be concluded that copyright exceptions do not especially facilitate creative practice on behalf of creators. However that does not necessarily mean that DRM does, can, or will, either; but equally that does not mean that it will *not*. Nonetheless, the author believes that the most important aspect in any consideration of DRM comes from the user-perspective¹⁹⁴; especially when one recalls that digital technology has enabled users to become creators¹⁹⁵ and when one

¹⁸⁷ Einhorn, M.A., and Rosenblatt, B., '*Peer-to-Peer Networking and Digital Rights Management – How Market Tools Can Solve Copyright Problems*', (2005), Cato Institute Policy Analysis No. 534, p2.

¹⁸⁸ See generally, Burk, D.L., and Cohen, J.E., '*Fair Use Infrastructure for Rights Management Systems*', (2001) Harvard Journal of Law and Technology 15(1) 41-84.

¹⁸⁹ Dusollier, S., '*Exceptions and technological measures in the European Copyright Directive of 2001 – an empty promise*', (2003) IIC 34(1) 62-75, p70.

¹⁹⁰ Grynberg, M., '*Property is a Two-Way Street: Personal Copyright Use and Implied Authorization*', (2010) 79 Fordham L Rev 435-498, p449.

¹⁹¹ Lemley, M.A., '*Is the Sky Falling on the Content Industries?*', (2011) 9 J Telecomm & High Tech L 125-136, p133.

¹⁹² Joo, T.W., '*Remix Without Romance*', (2011) 44(2) Conn L Rev 415-479, p455

¹⁹³ Ibid, p443.

¹⁹⁴ As does copyright law, see chapter 2, p42 and p45.

¹⁹⁵ See chapter 1, pp33-34 and chapter 2, pp72-74.

appreciates more recent developments in content dissemination, which will now be analysed.

6. Better business models?

As stated, technology can, and has, altered users' relationships with content¹⁹⁶. It has also been responsible for helping develop strong normative behaviour on the part of users towards their consumption of digital content¹⁹⁷. This is continuing; the author believes we are in the midst of a important shift in the provision and consumption of digital content. Today's Internet is arguably mostly concerned with connecting people *with* content¹⁹⁸ and in this respect, it is perhaps inevitable that DRM remains an integral component of content provision. Users are now more 'detached' from content consumption; in the past, DRM has always been closely associated with copy-based content to which it has been attached¹⁹⁹ and ultimately consumed. It can now be argued that DRM is no longer as closely intertwined with the content it is designed to protect. In the past, prior technological advances had facilitated and promoted the acquisition of physical copies of works²⁰⁰ and in digital form²⁰¹, but this is changing with the move towards streaming-based distribution and consumption. Now, every act of perception or of materialisation of a digital copy can be controlled by the rightsholder who can thus condition how a user apprehends and

¹⁹⁶ Which was traditionally mediated by copyright, see chapter 3, p90. See also chapter 1, p28 and p33, and chapter 2, p72-74.

¹⁹⁷ See chapter 3, p121-126

¹⁹⁸ Kurose, J., '*Content-Centric Networking*', (2012) *Communications of the ACM* 55(1) 116.

¹⁹⁹ For example, the aggressive 'XCP' and 'MediaMax' software released on albums by Sony-BMG. See generally, Fox, M.A., '*Another nail in the coffin for copy-protection technologies? Sony BMG's XCP and MediaMax debacle*', (2006) *Ent LR* 17(7) 214-218.

²⁰⁰ Ginsburg, J.C., '*From Having Copies to Experiencing Works: the Development of an Access Right in US Copyright Law*', p1, available from: http://papers.ssrn.com/paper.taf?abstract_id=222493

²⁰¹ See also chapter 2, pp62-70 and chapter 3, p85.

consumes content²⁰². Although copyright mediates the relationship between the user and content²⁰³, DRM also operates in this way; such that it has shifted the primary metaphor from one of copy control, to control of the ability to distribute, and use content²⁰⁴. This has been as a result in the evolution of digital content provision and DRM via a 'streaming-based' model: *"Evolve or die."*²⁰⁵

6.1 Streaming

Such recent developments in DRM may be seen as being aimed at the architectural elements of the Internet that are concerned with the efficient transport of content²⁰⁶, but the Internet was (arguably) never designed as a commercially structured medium for selling digital data²⁰⁷. As much as DRM may operate as a form of architectural regulation²⁰⁸, architectural distribution mechanisms are also developing beyond pre-existing per-to-peer architecture²⁰⁹. It was stated in 1995 that the delivery on demand will be the

²⁰² Ginsburg, J.C., *'From Having Copies to Experiencing Works: the Development of an Access Right in US Copyright Law'*, p1, available from:

http://papers.ssrn.com/paper.taf?abstract_id=222493, p2. See also, Dusollier, S., *'Electrifying the fence: the legal protection of technological measures for protecting copyright'*, (1999) EIPR 21(6) 285-297, p291: *"The protection of technical measures controlling access to works might lead to a new right to copyright holders, i.e. the right to control access to works."*

²⁰³ See chapter 3, p90. See also Grynberg, M., *'Property is a Two-Way Street: Personal Copyright Use and Implied Authorization'*, (2010) 79 Fordham L Rev 435-498, p437: *"When we venture online, we know that copyright law limits our freedom."*

²⁰⁴ Bates, B.J., *'Commentary: Value and Digital Rights Management – A Social Economics Approach'*, (2008) Journal of Media Economics 21(1) 53-77, p56.

²⁰⁵ Ganley, P., *'Digital copyright and the new creative dynamics'*, (2004), IJL & IT 12(3) 282-332, p287.

²⁰⁶ Heverly, R.A., *'Breaking the Internet: International Efforts to Play the Middle Against the Ends – A Way Forward'*, (2011) Georgetown Journal of International Law 44 1083-1121, p1086. See also chapter 2, p60-61 and chapter 3, p122

²⁰⁷ Negativland, *'Two Relationships to a Cultural Public Domain'*, (2003) 66 Law & Contemp Probs 239-262, p246. See also chapter 2 chronicling the history of the Internet, pp57-62.

²⁰⁸ As mentioned above, and see chapter 3, pp121-126.

²⁰⁹ See chapter 2, pp66-70;

preferred communication pattern on the Internet²¹⁰. Such 'transport' of content now takes place via content streaming, and downloading has become less necessary²¹¹. Perhaps the best-known musical streaming service is Spotify, launched in 2008, which although offering a priced download service²¹², operates primarily as an on-demand service: *"...because the music plays live, there's no need to wait for downloads and no big dent in your hard drive."*²¹³

Content is distributed using streaming technology in a way that does not permit downloading²¹⁴. In this scenario, content is (somewhat ironically) stored on a central server²¹⁵ from where a transmission is initiated at the request of a user²¹⁶. This raises potential tensions between the conduit and hosting status of the ISP responsible for providing the streaming²¹⁷. Content streaming has the advantages of efficiency (through compression), leaving no trace of the compressed content (unless permitted by the rightsholder) and the ability of control (to access streamed content, the user will have to return to the rightsholder's website)²¹⁸.

²¹⁰ Hugenholtz, P.B., *'Adapting Copyright to the Information Superhighway'*, in Hugenholtz, P.B., (ed), *'The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium'*, (1995, Kluwer Law International), pp81-102, p91.

²¹¹ Borghi, M., *'Chasing copyright infringement in the streaming landscape'*, (2011) IIC 42(3) 316-343, p317.

²¹² See: <http://www.spotify.com/uk/about/downloads/>

²¹³ See: <http://www.spotify.com/uk/about/what/>

²¹⁴ Stokes, S., *'Digital Copyright: Law and Practice (Third Edition)'*, (2009, Hart Publishing), p157.

²¹⁵ Similar to the digital architecture of Napster. See chapter 2, p68, chapter 3, p124, and chapter 4, p133.

²¹⁶ Borghi, M., *'Chasing copyright infringement in the streaming landscape'*, (2011) IIC 42(3) 316-343, p319.

²¹⁷ This issue is discussed more fully in chapter 6 on ISP liability, pp255-257.

²¹⁸ Stokes, S., *'Digital Copyright: Law and Practice (Third Edition)'*, (2009, Hart Publishing), p157.

Once the process of streaming has 'begun', it is a continuous process of transmission²¹⁹, but which nonetheless involves a degree of copying (or 'buffering'²²⁰) to facilitate the smooth receipt and playing of the user's chosen content. Although this is essentially an act of temporary storage, it is not an act of 'reproduction' in legal terms; nowhere is a 'copy' of the content stored or any part of it retrievable by users²²¹. From a copyright perspective, this implicates the right of 'communication'²²² such that this right is infringed when a copyrighted piece of content is made available to the public 'by any means'²²³. For such a communication to take place, it is sufficient that the work is made available to the public (which is clearly satisfied in the case of the Internet and the variety of means in which this may occur²²⁴), and that it can be accessed at the user's preference²²⁵. However crucially, the InfoSoc Directive does *not* oblige rightsholders (or Member States) to take measures to safeguard copyright exceptions for such on-demand services as article 6(4) states:

*"The provisions ... shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them."*²²⁶

²¹⁹ Borghi, M., 'Chasing copyright infringement in the streaming landscape', (2011) IIC 42(3) 316-343, p327.

²²⁰ Preloading data into a reserved area of memory (known as the buffer); so that in the present context, a certain amount of content (or advance supply) is downloaded before it is played. See: http://www.pcmag.com/encyclopedia_term/0,1233,t=buffering&i=39024,00.asp

²²¹ Borghi, M., 'Chasing copyright infringement in the streaming landscape', (2011) IIC 42(3) 316-343, p328.

²²² S.20, CDPA, and, art.3 InfoSoc Directive.

²²³ Ibid.

²²⁴ For example, via HTML protocols or p2p networks discussed in chapter 2, pp59-60, and pp66-70 respectively.

²²⁵ Art.8, WCT.

²²⁶ Art.6(4), InfoSoc Directive.

The requirement of 'contractual terms' may do nothing to overcome this, given the easiness of embedding a click-wrap licence in digital products²²⁷ and by implication, services. The wording of this article also closely parallels the definitional parameters of an 'Information Society Service' under the European Technical Standards Directive²²⁸ and by implication, an Internet Service Provider (as reference is made to this provision)²²⁹. Offering content would operate as an incentive for potential users to subscribe to an ISP's service²³⁰ and DRM (as a safeguard against unauthorised uses) theoretically makes it possible for ISPs to operate in this way. This adds a potentially troublesome dimension to the changing nature of content distribution and consumption; the shift to streaming-based dissemination and development of ISPs as content providers (discussed more fully in the following chapter²³¹) may result in the increasing redundancy of copyright exceptions with little or no chance (at least no duty) for them to be implemented. Rightsholders retain absolute discretion in DRM design such that users may have to rely upon their (potential) benevolence to perform perfectly legal actions²³². The implications for users in this context will now be examined.

6.2 *The position of users*

Content available in physical copies cannot communicate with its 'originator' (the rightsholder) after it has been distributed in the market; therefore, usage rules or policies are (or should be, in theory) governed by the outcome of negotiations between user(s) and rightsholder(s)²³³, although this is difficult:

²²⁷ Dusollier, S., *'Exceptions and technological measures in the European Copyright Directive of 2001 – an empty promise'*, (2003) IIC 34(1) 62-75, p75.

²²⁸ Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services, art.1(2).

²²⁹ The definition of an ISP is more fully discussed in chapter 6, pp215-216.

²³⁰ Sobel, L.S., *'DRM as an Enabler of Business Models: ISPs as Digital Retailers'*, (2003) 16 Berkeley Tech L J 667-696.

²³¹ See chapter 6, pp257-260.

²³² Ganley, P., *'Digital copyright and the new creative dynamics'*, (2004), IJL & IT 12(3) 282-332, p229.

²³³ Favale, M., *'Approximation and DRM: can digital locks respect copyright exceptions?'*, (2011) IJL & IT 19(4) 306-323, p312.

*“The sheer number of sovereigns and private parties holding stakes in the game means that at some point and in some way these stakeholders will attempt to influence ‘their part’ of the Internet.”*²³⁴

The application and consequent ‘influence’ of DRM on content networks may deprive users of the ability to consume creative content, or alternatively, the opportunity to engage with it on their own terms. Such measures threaten to amount to a ‘digital lockup’ of content and networks as a result of arbitrary decisions made by rightsholders and potentially, service providers. There is no reason to think that giving rightsholders greater control over the dissemination and use of their works in the digital environment will result in greater benefit to the public²³⁵; users are interested in the content that gives them greater levels of freedom²³⁶ and digital technology has helped to create strong norms along these lines²³⁷. In addition to providing opportunities to potentially use content in flexible ways, user privileges afforded by copyright exceptions (statutory, or negotiated) play an important role in potentially allowing content to be creatively used by others²³⁸ in transformative ways. However, creativity and cultural participation can reach accommodation with copyright (and presumably DRM thereunder), and even benefit from it²³⁹: *“... internet goods offer the possibility to interact with user and therefore they can diversify usage rules among consumers.”*²⁴⁰ Again though, such usage rules should in theory result from a bargaining process in which users are

²³⁴ Heverly, R.A., *‘Breaking the Internet: International Efforts to Play the Middle Against the Ends – A Way Forward’*, (2011) *Georgetown Journal of International Law* 44 1083-1121, p1115. See also chapter 8, pp317-319.

²³⁵ Corraera, C.M., *‘Fair use in the Digital Era’*, (2002) *IIC* 33(5) 561-678, p585.

²³⁶ Grynberg, M., *‘Property is a Two-Way Street: Personal Copyright Use and Implied Authorization’*, (2010) *79 Fordham L Rev* 435-498, p132.

²³⁷ See chapter 3, pp121-126.

²³⁸ Grynberg, M., *‘Property is a Two-Way Street: Personal Copyright Use and Implied Authorization’*, (2010) *79 Fordham L Rev* 435-498, p120.

²³⁹ Joo, T.W., *‘Remix Without Romance’*, (2011) *44(2) Conn L Rev* 415-479, p418.

²⁴⁰ Favale, M., *‘Approximation and DRM: can digital locks respect copyright exceptions?’*, (2011) *IJL & IT* 19(4) 306-323, p312.

involved. This has *not* been the case; with unilateral, or bilateral decisions (by, or between, rightsholders) made regarding content distribution. This was the case in previous efforts of enacting DRM, such as the 'Secure Digital Music Initiative' (SDMI) as a standard encryption format for music files. Although this ultimately ended without agreement due to the conflicting interests of those involved in 2002²⁴¹, that did not mean that the issue faded:

*"Meanwhile, unbeknownst to most of the panel members, another group of smart, hi-tech business people was watching the proceedings very, very carefully. It was Apple Computer... (who) decided they could do a far better job."*²⁴²

Apple has arguably become an important digital gatekeeper for the content industries²⁴³; through transforming itself from a technology-based company, to an entertainment-based one²⁴⁴. Steve Jobs himself came to play a major role in shaping the strategy of rightsholders²⁴⁵, although ironically, he did not favour a subscription based distribution model, which is why there is no such model that works on an iPod²⁴⁶. Apple's proprietary 'FairPlay' DRM system benefitted them much more than the labels as it locked consumers into Apple products²⁴⁷. This 'lock-in' creates an Apple 'ecosystem' that essentially ties

²⁴¹ Knopper, S., *'Appetite for Self-Destruction: The Spectacular Crash of the Record Industry in the Digital Age'*, (2009, Simon & Schuster), pp150-157.

²⁴² Ibid p156.

²⁴³ *'Why DRM's best friend might just be Apple Inc.'*, (2007) Arstechnica, available from: <http://www.917wy.com/old/content/2007/01/8595.ars>. See also chapter 3, p112, and pp114-116.

²⁴⁴ Sharpe, N.F., and Olufunmilayo, A.B., *'Is Apple Playing Fair? Navigating the iPod FairPlay DRM Controversy'*, (2007) 5 Nw J of Tech and & Intell Prop 332-350, p332.

²⁴⁵ Kot, G., *'Ripped: How the Wired Generation Revolutionized Music'*, (2009, Scribner), p203.

²⁴⁶ Knopper, S., *'Appetite for Self-Destruction: The Spectacular Crash of the Record Industry in the Digital Age'*, (2009, Simon & Schuster), p238.

²⁴⁷ Ibid, p232.

its product range together for commercial transactions²⁴⁸ (driven by the iPod²⁴⁹) such that that they could be said to be mutually reinforcing²⁵⁰ and help foster a 'positive' norm²⁵¹ towards Apple products. Nonetheless in 2006, the record label EMI decided to drop DRM in stark contrast to the accepted belief among the rest of the music industry (although this led only to a minor upturn in sales)²⁵².

*“Then a weird thing happened, the rest of the major labels joined EMI in doing the same thing they swore they would never do. Steve Jobs was responsible for their decision.”*²⁵³

However, DRM itself has evolved from this. The interconnected nature of Apple's products and services is an important part of their business strategy²⁵⁴, as well as the rigidity of their business practice: *“Apple is a stalwart on its pricing scheme.”*²⁵⁵ This interconnected nature between products and content (even if the content is DRM-free) therefore highlights the importance of rightsholder-controlled digital distribution networks²⁵⁶. By maximising their return by internalising transaction costs through DRM, external costs are created for consumers; for example, potentially having to find alternative sources of output at the risk of legal, technical and financial

²⁴⁸ 'Why DRM's best friend might just be Apple Inc.', (2007) Arstechnica, available from: <http://www.917wy.com/old/content/2007/01/8595.ars>

²⁴⁹ Sharpe, N.F., and Olufunmilayo, A.B., 'Is Apple Playing Fair? Navigating the iPod FairPlay DRM Controversy', (2007) 5 Nw J of Tech and & Intell Prop 332-350, pp333-334.

²⁵⁰ For example, increasing iPod sales. See Kot, G., 'Ripped: How the Wired Generation Revolutionized Music', (2009, Scribner), p202-203.

²⁵¹ See chapter 3, p94

²⁵² Knopper, S., 'Appetite for Self-Destruction: The Spectacular Crash of the Record Industry in the Digital Age', (2009, Simon & Schuster), p231.

²⁵³ Ibid, p232.

²⁵⁴ Sharpe, N.F., and Olufunmilayo, A.B., 'Is Apple Playing Fair? Navigating the iPod FairPlay DRM Controversy', (2007) 5 Nw J of Tech and & Intell Prop 332-350, p340.

²⁵⁵ Anderson, N., 'Why DRM's best friend might just be Apple Inc.', (2007) Arstechnica, available from: <http://www.917wy.com/old/content/2007/01/8595.ars>

²⁵⁶ As paralleled by Amazon and Microsoft in the preceding examples mentioned at the beginning of this chapter.

recriminations, should those sources be illegal²⁵⁷. Ironically, this has already been proven to be the case following the introduction of DRM-free music available on the Apple iTunes service in 2007²⁵⁸. Here, DRM-free music was introduced for download at a cost of 20 pence more per track than DRM-protected music. In addition, customers could upgrade their DRM-protected tracks for 20 pence each²⁵⁹. Most recently, the iTunes 'Match' cloud music service offered to replicate all music stored on users' computers (regardless of source and legality) with better quality alternatives so that it could be accessed and listened to on all devices²⁶⁰; at a subscription cost of £21.99 GBP a year²⁶¹.

Furthermore, sites such as YouTube and Spotify have contributed to 'distracting' users from downloading content; familiarising them with on-demand streaming instead²⁶² which has now become a major standard in the online distribution of digital works; allowing the user to consume the content in 'real time'²⁶³. As such, this suggests that the normative conduct of users is also being channelled into specific distribution and consumption channels. Despite an agreed compromise between the major record labels and iTunes regarding copy-protection and pricing in 2009, rightsholders were looking for other business opportunities²⁶⁴: "*Better business models are the Holy Grail of*

²⁵⁷ For example, the 'graduated response' initiatives, see chapter 6, p212.

²⁵⁸ Where EMI's entire digital catalogue (about 5 million songs) was made available for purchase on iTunes, '*Apple Unveils Higher Quality DRM-Free Music on the iTunes Store*', (2007), see: http://www.apple.com/uk/pr/library/2007/04/020407_emihighqualitydrmfree.html

²⁵⁹ Ibid. Although the DRM-free tracks were of a higher quality (bitrate), this, perhaps tenuously, suggests the value of DRM to be 20 pence in this instance.

²⁶⁰ See: <http://www.apple.com/uk/itunes/itunes-match/?cid=mc-features-uk-g-icd-imc-itunesmatch> See also, '*Apple launches iTunes Match in UK*', (2011) The Guardian, available from: <http://www.guardian.co.uk/technology/2011/dec/16/apple-itunes-match-uk>

²⁶¹ See: <http://www.apple.com/uk/itunes/itunes-match/?cid=mc-features-uk-g-icd-imc-itunesmatch>

²⁶² Borghi, M., '*Chasing copyright infringement in the streaming landscape*', (2011) IIC 42(3) 316-343, p317.

²⁶³ Ibid, p317.

²⁶⁴ Kot, G., '*Ripped: How the Wired Generation Revolutionized Music*', (2009, Scribner), p207.

*the digital age.*²⁶⁵ This was helped (or not helped) by the reluctance of artists to act independently; when the traditional music industry business model started to falter in the late nineties, even artists were reluctant to assume their own responsibilities for distributing and marketing their content²⁶⁶.

As a result, this could ultimately have the effect that users are deprived of the ability to consume to content which requires proprietary hardware and/or a subscription fee. Theoretically, they have the power and option to seek out those services and products (in this case, content) that best correspond to their own needs²⁶⁷, but as previously discussed, these 'needs' may not correspond with those of rightsholders²⁶⁸ and the market operates to limit and regulate this choice of 'service'²⁶⁹: "... *to be an active market player, the sovereign (user) must have choice.*"²⁷⁰ This choice now appears to be exclusively between legal streaming services, with p2p services no longer being a viable, and legal, alternative choice²⁷¹. In this sense, DRM relieves users of the ability to choose between content and perhaps even content providers. Therefore, it presents them with a stark choice of breaking the law ('take it or leave it'²⁷²), pure unavailability of service/content, negotiating a complex and expensive licensing process, or lobbying the service provider

²⁶⁵ Sobel, L.S., '*DRM as an Enabler of Business Models: ISPs as Digital Retailers*', (2003) 16 Berkeley Tech L J 667-696, p667.

²⁶⁶ Kot, G., '*Ripped: How the Wired Generation Revolutionized Music*', (2009, Scribner), pp192-193. In contrast, see chapter 7, pp304-305.

²⁶⁷ Helberger, N., and Hugenholtz P.B., '*No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law*', (2007) 22 Berkley Tech LJ 1061-1098, p1080.

²⁶⁸ See chapter 3, p97 and p101.

²⁶⁹ See chapter 3, pp112-113.

²⁷⁰ Helberger, N., and Hugenholtz P.B., '*No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law*', (2007) 22 Berkley Tech LJ 1061-1098, p1081.

²⁷¹ Following the outcome of the p2p cases discussed in chapter 4, pp131-165.

²⁷² Ganley, P., '*Digital copyright and the new creative dynamics*', (2004), IJL & IT 12(3) 282-332, p294.

for a better (or improved) product²⁷³, which legally, it may be under no affirmative duty to provide.

7. Conclusion

Disputes over DRM are not necessarily determinative of creativity, but rather of the allocation of the proceeds from production²⁷⁴ and *distribution*, but both are not necessarily served by financial indicators²⁷⁵. There is an interesting dichotomy that copyright over-enforcement may discourage creativity by increasing cost to the user, but this is, in effect, the same argument behind the traditional economic defence of strong copyright (that economic reward is necessary to incentivise and safeguard creativity)²⁷⁶. 'Profitability' alone does not necessarily provide incentive for such innovation²⁷⁷, just as copyright (and its exceptions) may not facilitate it either. DRM may operate on both sides of this argument; as being able to supplement copyright exceptions, or restricting them, just as it may serve to accommodate (or not) new forms of creativity.

The crucial role of DRM now is in the emergence of new business models and related evolution of streaming-based content dissemination. It can now be argued that content providers are also becoming service providers²⁷⁸ (and even hardware manufacturers as in the case of Apple). It therefore appears that networks and associated content are converging²⁷⁹ such that rightsholders now have the ability, through DRM, to control the networks on which their content is available, or through which they provide it. DRM affords rightsholders much greater control, especially given the increasing tendency for content to be streamed or delivered over a network which they

²⁷³ As suggested by Steve Jobs in *Thoughts on music*, (2007), available from:

<http://www.apple.com/hotnews/thoughtsonmusic/>

²⁷⁴ Joo, T.W., *Remix Without Romance*, (2011) 44(2) Conn L Rev 415-479, p446.

²⁷⁵ See chapter 2, pp46-47 and chapter 3, p106

²⁷⁶ Joo, T.W., *Remix Without Romance*, (2011) 44(2) Conn L Rev 415-479, p444.

²⁷⁷ *Ibid*, p444.

²⁷⁸ See chapter 6, p259.

²⁷⁹ See chapter 2, p71-72 and p82.

control²⁸⁰. Copyright does not protect against the threat digital technology poses to the business model of the content industries²⁸¹, but DRM, under the auspices of copyright, does appear to operate in this way: acting as an architectural support to the market; as a form of regulatory architecture in itself; and, facilitating a potential shift in the normative behaviour of users regarding content consumption.

Broad interpretations of copyright law i.e. now including DRM, endanger interactions with content²⁸². Consumption of digital content involves the ability to perceive that content²⁸³ implicating some sort of performance or display of the content which in most instances, would not infringe copyright²⁸⁴. DRM has in the past been criticised for limiting the usability of content, failing to be able to distinguish between fair and unfair copying, and for (potentially) being perpetual²⁸⁵. Now however, it may also operate as an 'omnipresent connectivity'²⁸⁶ and is an inescapable necessity²⁸⁷. Digital networks can therefore be designed to mirror the traditional industry market norms²⁸⁸ and re-establish the market practices and market regulation that

²⁸⁰ This will be discussed further in the context of ISPs in the following chapter, chapter 6, pp210-264.

²⁸¹ Ku, R.R.K., '*Consumers and Creative Destruction: Fair Use Beyond Market Failure*', (2003) 18 Berkley Tech L J 539-574, p566. See also chapter 2, p74 and chapter 3, pp110-111

²⁸² Grynberg, M., '*Property is a Two-Way Street: Personal Copyright Use and Implied Authorization*', (2010) 79 Fordham L Rev 435-498, p449.

²⁸³ Reese, R.A., '*Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*', (2003) 16 Berkeley Tech L J 619-666, p633.

²⁸⁴ Ibid, p634.

²⁸⁵ Marshall, L., '*Infringers*', in Frith, S., and Marshall, L., (eds), '*Music and Copyright (Second Edition)*', (2004, Edinburgh University Press), chapter 11, pp189-207, p202.

²⁸⁶ Boone, M.S., '*The Past, Present, and Future of Computing and its Impact on Digital Rights Management*', (2008) Mich St L Rev 413-434, p429.

²⁸⁷ Sobel, L.S., '*DRM as an Enabler of Business Models: ISPs as Digital Retailers*', (2003) 16 Berkeley Tech L J 667-696, p669.

²⁸⁸ Ganley, P., '*Digital copyright and the new creative dynamics*', (2004) IJL & IT 12(3) 282-332, pp290-291. See chapter 3, p111.

were threatened by digital technology²⁸⁹. Such a content-centric network focuses on what a user wants with increasing concentration on the delivery of content²⁹⁰. A successful network may increase the available choices to the user, but conversely, restrict interoperability²⁹¹, such that user choices are limited amongst network providers and their proffered content. Such choices may interfere with the 'value' of a piece of content²⁹² as the value attached to it arises as a result of its utility through consumption²⁹³: "*People want to be engaged with their content ... They want to engage in an ongoing relationship...*"²⁹⁴ The permission to use copyrighted content comes from the user's ownership of the tool they use for the interaction²⁹⁵ as well as the fact that they may be in possession of the necessary tools for 'breaking' DRM protection²⁹⁶. However, the development of streaming-based and DRM-supported content distribution changes this power-balance; DRM may operate against this by affecting users' perceptions of their rights²⁹⁷, changing their normative behaviour, as well as, and in relation to, the underlying architecture of digital content consumption: "*Nowhere is this transformation more apparent than among young people who have grown up*

²⁸⁹ See chapter 3, p116.

²⁹⁰ Kurose, J., 'Content-Centric Networking', (2012) Communications of the ACM 55(1) p116.

²⁹¹ Sharpe, N.F., and Olufunmilayo, A.B., 'Is Apple Playing Fair? Navigating the iPod FairPlay DRM Controversy', (2007) 5 Nw J of Tech and & Intell Prop 332-350, p341.

²⁹² See the discussion of 'value' in chapter 2, pp76-77 and chapter 3, pp107-108.

²⁹³ Bates, B.J., 'Commentary: Value and Digital Rights Management – A Social Economics Approach', (2008) Journal of Media Economics 21(1) 53-77, p62. This can perhaps come from the value of 'possession', see chapter 3, pp107-108.

²⁹⁴ Lemley, M.A., 'Is the Sky Falling on the Content Industries?', (2011) 9 J Telecomm & High Tech L 125-136, p134.

²⁹⁵ Grynberg, M., 'Property is a Two-Way Street: Personal Copyright Use and Implied Authorization', (2010) 79 Fordham L Rev 435-498, p479.

²⁹⁶ Chang, Y.L., 'Does Lessig's Criticism of Digital Rights Management Target One technology That the Information Industries Desire More Than They can Actually Provide?', (2005) International Review of Computers 19(3) 235-252, p237.

²⁹⁷ Angelopoulos, C.J., 'Modern intellectual property legislation: warm for reform', (2008) Ent LR 19(2) 35-40, p37.

*in a digital world and, in some cases, cannot relate to the physical objects of the past.*²⁹⁸

Arguably, the user should be the central focus²⁹⁹; as they are now have central importance in the digital copyright landscape and are reflected in the utilitarian foundation of copyright³⁰⁰. However:

*“From the exploitation of the work, its diffusion to the public as a whole, the copyright has shifted to the control of a business model, aided by technology, of the distribution of copyrighted works to individuals.”*³⁰¹

There has been a failing of copyright policy regarding DRM in this respect by focussing on the producer-side of the market, to ensure the full appropriation of market value³⁰². This ignores the users and their resulting creative potential³⁰³ (facilitated by digital technology³⁰⁴). Evaluation of such content markets (and content itself) should therefore not be governed by the expectations of rightsholders, but the legitimate expectation of users³⁰⁵. Such expectations (or norms³⁰⁶) may not entirely be legitimate, as resulting previously from an ultimately illegal service³⁰⁷. On the other hand, they may

²⁹⁸ Greengard, S., *‘Digitally Possessed’*, (2012) *Communications of the ACM* 55(5) 14-16, p14.

²⁹⁹ See Helberger, N., and Hugenholtz P.B., *‘No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law’*, (2007) 22 *Berkley Tech LJ* 1061-1098, p1080.

³⁰⁰ See chapter 2, pp41-49.

³⁰¹ Dusollier, S., *‘Technology as an imperative for regulating copyright: from the public exploitation to the private use of the work’*, (2005) *EIPR* 27(6) 201-204, p203.

³⁰² Bates, B.J., *‘Commentary: Value and Digital Rights Management – A Social Economics Approach’*, (2008) *Journal of Media Economics* 21(1) 53-77, p63.

³⁰³ See chapter 1, pp33-34.

³⁰⁴ Chapter 2, pp73-74.

³⁰⁵ Helberger, N., and Hugenholtz P.B., *‘No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law’*, (2007) 22 *Berkley Tech LJ* 1061-1098, p1093. Digital architecture fostered norms in this way, see chapter 3, pp121-126.

³⁰⁶ See chapter 3, pp95-103.

³⁰⁷ For example, Napster as discussed in chapter 4, pp133-148 and chapter 3, p128.

be legitimate in the sense of deriving from the beneficial architectural features of digital technology³⁰⁸ for both the consumption and creation of content.

The expectations of users may, however, be subject to change. DRM makes it possible for Information Society Service Providers (ISSPs)³⁰⁹, those who broadly provide Internet access and services, to also act as content providers³¹⁰. The development of such DRM-centric networks threatens to alter the Internet's architecture into an 'element', "... *that can be used as a counter to the ends that it connects.*"³¹¹ Policy should be based on maximising user benefits broadly³¹², in line with copyright's utilitarian foundation³¹³, but channelling production and ultimately, output, through such prescribed, DRM-enhanced, and ISP-centred distribution channels runs counter to this:

*"Rather than harnessing the structural significance of network technology, the law attempts to reinstate analogue-world barriers and instead of pushing the interests of creators and users, intermediaries tighten their grip."*³¹⁴

However, internalising benefits to rightsholders can have the effect of creating negative externalities (the harm to others caused by the activities of

³⁰⁸ See chapter 1, pp33-34, and chapter 2, pp72-73.

³⁰⁹ See chapter 6 on ISP liability for further detail on this definition, p215.

³¹⁰ Sobel, L.S., 'DRM as an Enabler of Business Models: ISPs as Digital Retailers', (2003) 16 Berkeley Tech L J 667-696, pp668-669.

³¹¹ Heverly, R.A., 'Breaking the Internet: International Efforts to Play the Middle Against the Ends – A Way Forward', (2011) Georgetown Journal of International Law 44 1083-1121, p1083.

³¹² Bates, B.J., 'Commentary: Value and Digital Rights Management – A Social Economics Approach', (2008) Journal of Media Economics 21(1) 53-77, p73.

³¹³ See chapter 2, pp41-49.

³¹⁴ Ganley, P., 'Digital copyright and the new creative dynamics', (2004), IJL & IT 12(3) 282-332, p332.

another³¹⁵) for users; thus failing the market. These costs may also affect the ability of creators and users to extract ancillary value from the distribution and use of their work³¹⁶ if it is tied to a specific distribution network. Arguably, the trend could be described as being an internalisation of networks which could be seen as having no further benefits to rightsholders; as use of networks is dependent on having (or wanting) content in the first place. Copyright commodifies this content and subsequently operates to link the user with the content³¹⁷ (which architecture facilitates³¹⁸). However, there is no economic justification for going beyond such internalisation since revenue has already been gleaned from consumers who have purchased the relevant subscription, content and associated hardware. There is no further economic or creative benefit to be had from using DRM to either exclude users from, or tie them into, a network service that they are dependent on in order to engage with, consume, and/or *create* new content.

³¹⁵ Harrison, J.L., 'A Positive Externalities Approach to Copyright Law: Theory and Application', (2005) *Journal of Intellectual Property Law* 13(1) 1-60, p5.

³¹⁶ Bates, B.J., 'Commentary: Value and Digital Rights Management – A Social Economics Approach', (2008) *Journal of Media Economics* 21(1) 53-77, p66.

³¹⁷ See the axis presented in chapter 3, p90.

³¹⁸ *Ibid*, p84 and pp117-118.

Chapter 6: ISP Liability

ISP Liability

1. Introduction

Despite legal action against peer-to-peer (p2p) networks¹ and the application of Digital Rights Management (DRM)², further developments are underway to maintain rightsholders' privileges in the digital environment. Latterly, this has developed through initiatives requiring Internet Service Providers (ISPs) to assume a more active role in ensuring that infringing content is not transmitted across their networks, and to adopt counter-measures against users where this is the case. However, the existing legal framework in most jurisdictions is not completely adequate to deal with new and evolving file sharing methods³ and the question remains as to how far copyright liability should extend beyond direct infringers⁴. The legal response to digital copyright infringement in the context of ISPs is perhaps less coherent than the approaches taken in response to p2p software in the sense that various legal responses in this context are rooted in individual jurisdictions. Nonetheless, the argument in favour of such an approach claims that the risk of copyright infringement is a natural by-product of Internet service⁵ and as such, ISPs should be involved in tackling the problem of unauthorised copyright infringement. European case law and legislation have not yielded a consistent approach to the problem; ISPs face as many legal regimes as there are Member States⁶.

¹ See chapter 4, pp131-165.

² See chapter 5, pp166-209.

³ Nwogugu, M., '*Economics of digital content: new digital content control and P2P control systems/methods*', (2008) *Computer and Telecommunications Law Review* 14(6) 140-149, p149.

⁴ Lichtman, D., and Landes, W., '*Indirect Liability for Copyright Infringement: An Economic Perspective*', (2003) *Harvard Journal of Law & Technology* 16(2) 395-410, p396.

⁵ Yen, A.C., '*Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*', (2000) *The Georgetown Law Journal* 88 1-15, pp3-4.

⁶ Julia-Barcelo, R., '*On-line intermediary liability issues: comparing EU and US legal frameworks*', (2000) *EIPR* 22(3) 105-119, p106.

However, the signs are that pre-existing ISP ‘immunity’ is unlikely to survive for much longer⁷; specifically with the development of both a ‘graduated response’ mechanism to deal with digital copyright infringement and developments in content provision. ‘Graduated response’ refers to a means of copyright enforcement that relies on a form of co-operation with Internet access providers that goes beyond the traditional ‘notice and take-down’ and, “... implies an educational notification mechanism for alleged online infringers before more stringent measures can be imposed.”⁸ It marks a change from the previous methods of copyright enforcement whereby action has been taken unilaterally by rightsholders and as Strowel notes: “... is another word for improved ISP co-operation.”⁹ Such a response implies and necessitates the involvement of an extra entity; online intermediaries.

“The contours of the ‘graduated response’ system are not yet clear, in part because of its varying versions, but this institutional system is clearly different from the existing law enforcement mechanisms.”¹⁰

From a legislative perspective in Europe, the main issue seems to be between national legislation, forcing ISPs to be responsible for enforcement, and various principles of EU law, including Fundamental Rights. These intersections are troubling, as they largely depend on the facts (and European Court of Justice terms of reference) of the various cases; such that there is little uniform approach to the issue. In this chapter, the broad legal framework will be explained before the relevant decisions in Belgium, Spain, Ireland, France, and the UK will be critiqued. It will be suggested that recent developments here potentially pose the biggest threat to *both* users and the ISPs themselves. This is as result of the loosening of the ‘knowledge’

⁷ See generally, Clark, B., ‘Illegal downloads: sharing out online liability: sharing files, sharing risks’, (2007) JIPLP 2(6) 402-418.

⁸ Strowel, A., ‘Internet Piracy as a Wake-up Call for Copyright Law Makers – Is the “Graduated Response” a Good Reply?’, (2009) The WIPO Journal 1 75-86, p77.

⁹ Ibid, p77.

¹⁰ Ibid, p79.

requirement for infringement and a counter-intuitive interpretation of the prohibition on traffic monitoring by ISPs.

2. Legal principles

The position of ISPs is governed by a variety of laws and the international and national levels, and is the product of legal instruments across the Intellectual Property and Information Technology law spectrum. Article 8 of the WIPO Copyright Treaty (WCT), provides the basis restricting the unauthorised communication of copyright works¹¹.

At the European level, the ISPs are subject to three main Directives (which have also featured in the relevant case law). Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society¹² (the InfoSoc Directive) provides that Member States shall provide the exclusive right of authorisation to rightsholders in terms of reproduction¹³, communication¹⁴ and distribution¹⁵. It also provides for sanctions and effective remedies to be available to rightsholders which are to be: “... *effective, proportionate and dissuasive*.”¹⁶ It also notes the role of intermediaries in the digital environment, and their potential role in acting against infringement: “... *the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end.*”¹⁷ As such, Member States are obliged to ensure that rightsholders may be

¹¹ Art.8 WIPO Copyright Treaty (WCT),1996. As replicated in arts.10 and 14 of the WIPO Performances and Phonograms Treaty (WPPT), 1996, which provides protection for performers and producers respectively.

¹² Directive 2001/29 of the European Parliament and of the Council of May 22, 2002 on the harmonisation of certain aspects of copyright and related rights in the information society. Henceforth, the InfoSoc Directive.

¹³ Art. 2, InfoSoc Directive.

¹⁴ Art. 3, *ibid*.

¹⁵ Art. 4, *ibid*.

¹⁶ Art. 8, *ibid*.

¹⁷ Recital 59, *ibid*.

able to apply for an injunction against intermediaries where this is the case¹⁸. Directive 2004/48/EC on the enforcement of intellectual property rights¹⁹ (the Enforcement Directive) further concerns the measures, procedure and remedies necessary to ensure the enforcement of IP rights²⁰. Such measures must also be effective, proportionate and dissuasive²¹, but in addition, they must be fair, equitable, and not unnecessarily complicated or costly²². Importantly, it provides that a judicial authority may, on request, issue an interlocutory injunction to prevent infringement by a third party using the services of an intermediary²³. Specifically in relation to ISPs, measures were enacted to govern the liability for infringing activity through Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the E-commerce Directive) which was proposed in 1998 and was adopted by the Council of Ministers, becoming law in May 2000²⁴. The European Union decided to preempt the possibility of diverse national approaches through the adoption of the E-commerce Directive, as recital 59 states:

“Despite the global nature of electronic communications, coordination of national regulatory measures at European Union level is necessary in order to avoid fragmentation of the internal market, and for the establishment of an appropriate European regulatory framework; such coordination should also contribute to the establishment of a common and strong negotiating position in international forums.”

¹⁸ Art. 8(3), InfoSoc Directive.

¹⁹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. Henceforth, the Enforcement Directive.

²⁰ Art. 1, Enforcement Directive.

²¹ Art. 3(2), *ibid.*

²² Art. 3(1), *ibid.*

²³ Art. 9(1)(a), *ibid.*

²⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market. Henceforth, the E-commerce Directive.

The motivation behind the E-commerce Directive is to develop information society services, and to ensure legal certainty and consumer confidence²⁵. The European definition of an ISP is rather nebulous, requiring reference to two distinct concepts; a 'service provider/established service provider' and an 'information service'. The former is defined under article 2 of the E-commerce Directive as: "... *any natural or legal person providing an information society service...*" And furthermore as:

"... a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider..."

Consequently, an 'information service' is defined as: "*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.*"²⁶

In light of the foregoing, a distinction needs to be made between those who offer 'information services' and those who operate as conduits. Therefore, the author will use the term 'Information Society Service Provider' (ISSP) for those undertakings who broadly provide Internet access and services, and 'ISP' specifically where they are acting conduits through whom information

²⁵ Baistrocchi, P.A., '*Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce*', (2002) 19 Santa Clara Computer & High Tech LJ 110-130, p112.

²⁶ Directive 98/34/EC on laying down a procedure for the provision of information in the field of technical standards and regulation and of rules on Information Society Services (the Technical Standards Directive), art.1(2). Further definition is provided thereunder: '*at a distance*' means that the service is provided without the parties being simultaneously Present; '*by electronic means*' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means; and '*at the individual request of a recipient of Services*' means that the service is provided through the transmission of data on individual request.

(or content) is transmitted or communicated. For example, BT²⁷ may be regarded as an ISSP, and services such as 'Blogger'²⁸ may be described as an ISP. The E-commerce Directive does not establish a general liability regime applicable to ISPs, but a system of specific liability exceptions²⁹. The defences for ISPs are outlined in articles 12 to 15 of the Directive. Article 12(1) provides a "Mere conduit" defence which states that:

"Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;*
- (b) does not select the receiver of the transmission; and*
- (c) does not select or modify the information contained in the transmission."*

Article 13 provides for a "Caching" defence, under 13(1):

"... Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

- (a) the provider does not modify the information;*
- (b) the provider complies with conditions on access to the information;*

²⁷ <http://www.bt.com/>

²⁸ <http://www.blogger.com>

²⁹ Baistrocchi, P.A., 'Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce', (2002) 19 Santa Clara Computer & High Tech LJ 110-130, p117.

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.”

Article 14 then provides for a “*Hosting*” defence as 14(1) states:

“... Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”

These can be summarised thus:

- The ‘*mere conduit defence*’ where there is no liability where an ISP does not initiate the transmission, select the recipient or select or modify the information;

- The ‘*caching defence*’ where is no liability for the automatic, intermediate and temporary storage of information for the sole purpose of more efficient onward transmission; and
- The ‘*hosting defence*’ where there is no liability for storing information at the request of another if an ISP does not have actual knowledge that the activity is unlawful, and if it has knowledge, acts to remove or disable access to the information.

The liability exclusions and limitations will apply no matter what theory of infringement is used by the plaintiff³⁰. This is further complemented by the fact that ISPs are prevented from any general obligation to monitor the traffic flowing across their networks under article 15(1):

“Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”

This has enabled ISPs in Europe to enjoy a relatively comfortable existence through assumed immunity under the E-commerce Directive and a widespread belief that broadly, they have little or no control or knowledge³¹ over the materials accessed through their service:

“Until recently, the position of ISPs in Europe has been relatively comfortable, enjoying a degree of immunity from liability due to the Electronic Commerce Directive and a widespread belief that ISPs have little or no knowledge or control over materials hosted or accessed by users of their services.”³²

³⁰ Julia-Barcelo, R., ‘*On-line intermediary liability issues: comparing EU and US legal frameworks*’, (2000) EIPR 22(3) 105-119, p109.

³¹ In contrast to the Napster p2p file-sharing network, see chapter 4, p134-138.

³² Clark, B., ‘*Illegal downloads: sharing out online liability: sharing files, sharing risks*’, (2007) JIPLP 2(6) 402-418, p415.

Both the definition of an ISP and the defences available to them may also be analogous to the end-to-end (e2e) principle lying at the heart of the Internet's architecture by premising the role of the user (i.e. the 'end'-point on the network); their control over the flow of information; and, the passivity of the network on which the user operates³³. However, there has been an emerging and consistent trend across Europe suggesting that ISPs will be required to actively engage in tackling digital copyright infringement. Whilst such a trend may be evident, the preciseness and consistency of such an approach is variable. These will now be explored across the jurisdictions of Belgium, Ireland, Spain and France as well as recent European Court of Justice (ECJ) rulings in the area, as the most developed (but by no means consistent) approaches to the relevant issues.

This is a complex area as the cases that will be analysed involve a variety of legislation as well as Human Rights issues. These may be presented in the following table (overleaf):

³³ See chapter 2, p81 and chapter 3, p122.

Country	Issue(s)	E-commerce Directive	Other directives	Human Rights issues	ECJ
Belgium	Filtering	Arts.12 and 15	InfoSoc Directive (2001/29) Enforcement Directive (2004/48)	Convention, arts.8 and 10 Charter, arts.8, 11, and 16	Yes
Ireland	Graduated response and blocking (injunctive relief)	Art.12	InfoSoc Directive (2001/29)	N/A	No
Spain	Disclosure of personal data	Art.15	InfoSoc Directive (2001/29) Enforcement Directive (2004/48) Personal Data Directive (95/46) Privacy and e-communication s Directive (2002/58)	Charter, arts.17 and 47	Yes

France	Graduated response	N/A	N/A	Constitutional rights of property, communication, expression, presumption of innocence and procedure	No
UK	Graduated response, filtering, blocking (injunctive relief)	Arts.3(2), 12, and 15	Technical Standards Directive (98/34) Privacy and e-communication s Directive (2002/58) Authorisation Directive (2002/20)	Charter, arts. 7, 8, 11 and 52	No

3. European approaches

3.1 Belgium

The case of *Société Belge des Auteurs, Compositeurs et Editeurs (SABAM) v. Scarlet*³⁴ is interesting to note for two reasons; firstly, it necessitated

³⁴ *Société Belge des Auteurs, Compositeurs et Editeurs (SABAM) v. SA Tiscali (Scarlet)* District Court of Brussels, No. 04/8975/A, Decision of 29 June 2007. A translation of the judgement (which the author has used) is available by Mady, F., Bourrouilhou, J., and

consideration of the relevant sections of the E-commerce Directive (mentioned above), and secondly, it concerned the applicability of technical measures to restrict digital copyright infringement. As such, it may be differentiated as the only completed case involving such measures. The appropriateness of technical solutions was not discussed in great detail, and the fact that other initiatives across Europe (notably in France and Ireland, discussed below) do not involve such measures arguably amounts to tacit acceptance that they would be ineffective.

SABAM commenced proceedings for injunctive relief against Scarlet (formerly Tiscali) to prevent the unlawful file sharing of content to which they held the rights³⁵. Specifically, it sought the applicability of filtering software (specifically 'Audible Magic') to Scarlet's network in order to prevent such occurrences³⁶. Aside from issues of effectiveness and cost of such measures, the case also considered how any imposition would affect Scarlet's position in relation to the 'safe-harbour' provisions of the E-commerce Directive. Specifically: that the imposition of technical measures would impose a general monitoring obligation; that it would (consequently) lead to a loss of 'mere conduit' status; and, that it would violate the fundamental rights to privacy, confidentiality of correspondence and freedom of expression³⁷.

The Court held that article 15 of the E-commerce Directive was of no relevance for the present purposes and did not concern matters relating to injunctive relief³⁸. As a result, it was ruled that the prohibition on monitoring should not preclude the development and operation of technical measures to monitor network traffic³⁹. Such technical measures were also held to be

Hughes, J., in 25 *Cardozo Arts & Entertainment Law Journal CAELJ Translation Series #001* (2008) 1279-1292. All subsequent references will refer to this source, henceforth, SABAM.

³⁵ SABAM, p1282.

³⁶ *Ibid*, p1284.

³⁷ *Ibid*, p1287.

³⁸ *Ibid*, p1288.

³⁹ *Ibid*, p1288.

purely 'technical instruments' that would require no monitoring by Scarlet because they operated automatically without the need for any active conduct on Scarlet's part⁴⁰. The Court also seemed to adopt a negative interpretation of these provisions in stating that if it was the case that Scarlet would lose its exemption, it would not necessarily follow that it would be found liable; which would then necessarily involve a different trial⁴¹. Put differently, the Court decided that immunity under the Directive only protects ISPs from the content of transmissions and not from findings of copyright infringement or an order aimed at ending them⁴². It appears that the Court skilfully avoided the crux of the issue by divesting itself of responsibility through interpreting the provisions so as to focus on liability and the characteristics of the technologies in question. It could be suggested that the District Court was simply avoiding any more detailed or nuanced analysis, but as with the decisions in Ireland (discussed below), it seems that the Court is bound by the terms of its reference; potential liability issues were not at stake here.

The Belgian ruling seems to go against the no monitoring obligation in article 15 of the E-commerce Directive. However, the court appeared to circumvent this through viewing the technology in question as purely an automatic measure; thus that the ISP would not play an active role in filtering. It appears that the issue revolved around the interpretation of the word 'monitor'. Quite a narrow definition appears to have been adopted in SABAM where it seems to be taken to mean that the ISP must actively be involved in policing traffic on its network. However, it could be argued that any measure imposed on a network to filter traffic amounts to 'monitoring' as it implies a presence on the network and an analysis of the transmissions that pass through it. Furthermore, the Court seemed to accept that any 'automatic' technical response negates any arguments over the E-commerce Directive, but no measure can ever be purely and entirely automated. Further

⁴⁰ SABAM, pp1288-1289.

⁴¹ Ibid, p1289.

⁴² Couneson, G., *'Belgium: intellectual property – copyright (Case Comment)'*, CTLR 2008, 14(3), N62-62.

proposed legislation has since been tabled in Belgium⁴³, demonstrating the increasing tendency to more formally govern this area.

3.2 Ireland

Ireland has also seen cases brought concerning the issue of ISP liability. Arguably, these cases are of much more jurisdictional significance to the UK as Copyright law in Ireland (currently governed by the Copyright and Related Rights Act, 2000⁴⁴) is largely similar to that in the UK as the Irish Intellectual Property system developed from that of the UK following independence in 1921⁴⁵. Both are also subject to the duties imposed by membership of the European Union and are bound by the same law considered above.

In July 2009, the Irish High Court delivered its verdict in the case of EMI Records (Ireland) v. Eircom⁴⁶ concerning the application by EMI to require Eircom to block access to The Pirate Bay website⁴⁷. The judgement is curious in the first place as it relates to the private settlement between the parties regarding this application, and it was agreed that Eircom would not oppose EMI's application. The precise details of the settlement have remained private and therefore, there is only a limited opportunity to examine the merits of the action. Eircom may have been influenced into the settlement by the SABAM decision⁴⁸, but the 'judgement' was based exclusively on EMI's argument⁴⁹, and as such bears a distinct one-sidedness. Nevertheless, there is acceptance of the innocent, or perhaps 'conduit' status of Eircom in the matter under s.40(4) of the Copyright and related Rights Act,

⁴³ Szafran, E., and Klaeser, T., *'Belgium: legislation – copyright – proposed bills – internet regulation'*, (2010) Computer and Telecommunications Law Review 16(5) N111-N113.

⁴⁴ Available from: <http://www.irishstatutebook.ie/2000/en/act/pub/0028/index.html>

⁴⁵ See generally, http://www.patentsoffice.ie/en/student_copyright.aspx

⁴⁶ EMI Records (Ireland) Ltd v. Eircom PLC (2009) IEHC 411. Henceforth Eircom I.

⁴⁷ Discussed in relation to p2p liability in chapter 4, pp152-155.

⁴⁸ Nagle, E., *"To every cow its calf, to every book its copy" – copyright and illegal downloading after EMI (Ireland) Ltd and Others v Eircom Ltd'*, (2010) Entertainment Law Review 21(6) 209-214, p213.

⁴⁹ Eircom I, as Charleton J. admitted in his opening.

2000⁵⁰. However, Charleton J. interpreted this provision as providing a wider entitlement to the copyright holder; allowing the provider of ‘facilities’ enabling copyright infringement to be guilty of infringement where they failed to remove the infringing material upon notification of it⁵¹:

*“I interpret that, at the moment, as saying that the pipe or channel (i.e. the electronic pipe or channel in this case) down which the copyright infringing material is going can be the subject of injunctive relief under s. 40(4)”*⁵²

Another notable feature of the ruling is the rhetoric that Carleton J. employed in his delivery which confirms the high regard afforded to creator’s rights (at least in Ireland) and the emphasis on the ‘protective’ function of copyright (as opposed to the ‘incentivisation’ of innovation⁵³). Also interesting is the emphasis placed by the Judge in relation to the conduct of the proprietors of The Pirate Bay torrent service⁵⁴; aside from the fact that this case took place in a different jurisdiction, the ‘technology’ is also different and operates in an entirely dissimilar context. Comparing the conduct of legitimate business enterprise with that of a more cynical nature (at least as far as the individuals involved were concerned⁵⁵) underscores a lack of balanced analysis, differentiating between organisations/undertakings and users. It also reflects court opinion (at least as far as Charleton J. is concerned) supporting the views regularly expressed by rightsholders which is both one-sided and not necessarily truly accurate⁵⁶.

⁵⁰ Concerning the ‘making available’ right.

⁵¹ Eircom I, as was apparently the fact in this case.

⁵² Eircom I.

⁵³ Nagle, E., *“To every cow its calf, to every book its copy” – copyright and illegal downloading after EMI (Ireland) Ltd and Others v Eircom Ltd*, (2010) Ent LR 21(6) 209-214, p214. See also chapter 4, pp162-163, where similar arguments are more fully asserted by the author.

⁵⁴ See chapter 4, pp152-155.

⁵⁵ See chapter 4, p155.

⁵⁶ See chapter 1, p12, and chapter 2, pp46-47.

Another judgement was issued in April 2010⁵⁷ as a result of the agreement by Eircom to adopt a graduated ‘three-strikes’ policy, and was again delivered by Charleton J. The primary operation of this seems to involve third party operators who are engaged with identifying illegal downloaders and who are hired by the rightsholders to identify specific infringements⁵⁸. Such information is then passed on to Eircom who are obliged to write to the subscriber (allegedly) involved, warning them that their Internet connection will be cut-off unless they cease such behaviour⁵⁹. In addition, to prevent the burden from resting exclusively with Eircom, EMI agreed to initiate similar proceedings against other ISPs in the country⁶⁰.

One of these was taken by EMI against UPC Communications⁶¹, and again, was heard in the High Court before Charleton J. The issues raised were in relation to the various ‘technical solutions’ for an injunction⁶². In contrast to the two Eircom judgements, the decision here is much longer and more lucid; because UPC contested. As a matter of evidence, it was established that copyright was being infringed on UPC’s network and UPC’s evidence as to its unawareness in the matter was not accepted⁶³. Ironically, a similar evidential matter (or more aptly in this case a *lack* thereof) arose here as it did in the Napster case; specifically in relation to the infamous email referring to ‘pirated’ music⁶⁴. Charleton J. stated:

⁵⁷ EMI Records and others v. Eircom Ltd (2010) IEHC 108. Henceforth, Eircom II.

⁵⁸ Specifically mentioned was DtecNet, Eircom II, para. 9.

⁵⁹ The details of this procedure and how ‘graduated’ this response may be were elaborated on at Eircom II, para. 13.

⁶⁰ Ibid, para.10

⁶¹ EMI Records Ltd and others v. UPC Communications Ireland Ltd (2010) IEHC 377. Henceforth, UPC.

⁶² UPC, para. 1.

⁶³ Ibid, para. 18.

⁶⁴ As discussed in chapter 4, pp136-137.

“It is clear that they have an economic and moral obligation to address the problem ... Relevant correspondence from within UPC is profoundly disturbing as to the reality of their approach.”⁶⁵

The specific role of third parties in detecting online infringement was considered⁶⁶ and their operation judged to be legitimate, highly accurate and not subject to any degree of substantial error⁶⁷. In addition, technological responses to such activity by the user (use of proxy IP addresses and encryption) were not considered to be widespread or significant enough at the time to negate the operations of these data collectors. Therefore detection operations were regarded as appropriate⁶⁸. Worryingly, notification and termination were also considered appropriate without any specific consideration as to why. Detection, notification and termination are separate processes, each having (or at least which should have) its own procedures. This seems especially at odds with the preceding paragraphs which talk about the reluctance to impose such termination measures.

However, the case turned on the legislative measures in force regarding the applicability of the granting of an injunction⁶⁹. On the basis of (thankfully) stated and (reasonably) considered evidence, it was rightly concluded that cutting off access to computers holding copyrighted material does not remove the actual infringing material itself; it merely stops the ‘transit’ of such content⁷⁰. In addition, the technological measures considered above do not operate to remove such material⁷¹. It was concluded that the national legislative provisions insist upon *removal* of infringing content, and not

⁶⁵ UPC, para. 20.

⁶⁶ Ibid, paras 34-37 and specifically referring to DtecNet as was the case in the Eircom judgements. Further forms of technological measures were also discussed, specifically, a global file registry and ‘CopySense’, both of which were deemed viable. See UPC, paras 38-49.

⁶⁷ Ibid, para. 34.

⁶⁸ Ibid, para. 37

⁶⁹ Ibid, paras. 83 and 87.

⁷⁰ UPC was used as such a ‘transit’. Ibid, para. 100

⁷¹ Ibid, para. 100.

blocking, which is: “... *simply not possible in the context of a transient communication.*”⁷² It was found that there was an absence of provisions enabling the blocking or interrupting of Internet access in Irish law⁷³. The prime reason for this was that in other jurisdictions, legislative provisions expressly require a Court order in relation to (potential) disconnection and there is no comparable measure in Irish law⁷⁴. Through this, the critical importance of Internet access was also implicitly recognised. As such, the blocking of Internet access/communications can, and was, distinguished from removal (of infringing content) mechanisms⁷⁵.

EMI’s application against UPC was defeated on legal (or more aptly, the lack of legal) grounds, but that is not to say the Court was being sympathetic to UPC, or any other ISP for that matter. This was based partly on the less than satisfactory conduct by UPC and the fact that Charleton J. explicitly stated that he would have granted injunctive relief had it been available⁷⁶. Tellingly though, the judge was mindful of the ruling he gave in the first Eircom decision stating that: “*I regret that my previous judgment in the matter was wrong.*”⁷⁷ This could be seen as a rather hollow victory for UPC and (at least) Irish ISPs in general; they were not obliged to impose measures *not* because they had won their case on a point of law (or favourable interpretation of such law), but because there was no provision in the national law to permit it in the first place. Unsurprisingly, this was not to last; although there was acceptance by Charleton J. that Irish law on the matter

⁷² UPC, para. 100.

⁷³ The situation under the Digital Economy Act (DEA) in the UK, HADOPI in France, the Scarlet case in Belgium and the provisions of the Digital Millennium Copyright Act (DMCA) in the United States were all examined. *Ibid*, paras 119-130.

⁷⁴ UPC, paras. 130-131.

⁷⁵ *Ibid*, para. 132.

⁷⁶ “*I would regard it as both educative and helpful to block Pirate Bay were I enabled by the relevant legislation to do so.*” *Ibid*, para. 134.

⁷⁷ *Ibid*, para 137. Although for the author, the phrase ‘*Je ne regrette rien*’ springs to mind: <http://www.youtube.com/watch?v=fFtGfyruroU>

lags behind the rest of Europe, this was not going to last forever⁷⁸. As it was, we were left in the position that in Ireland at least, there was no legislative scope for rendering ISPs liable for copyright infringement. This was seemingly a surprise to the legislature who believed they had fulfilled their obligations under the Copyright Directive to ensure the availability of injunctive relief for rightsholders.⁷⁹ Rumours persisted that the Irish government planned to bring in a statutory instrument to fill the gap perceived by Charleton J. in this case⁸⁰. According to the Minister of State for Research and Innovation, Sean Sherlock (TD), this was on the advice of the Attorney-General's Office to ensure compliance with the European Copyright Directive in allowing for such an injunction⁸¹. The Statutory Instrument was signed in March 2012⁸² after a short period of media scrutiny and an emergency debate in Dáil⁸³ (the lower house of the Irish Parliament); it allows a copyright owner to apply to the High Court for an injunction against an intermediary. The statutory instrument mentions an 'intermediary' against whom an injunction may be made, as one to whom article 8(3) of the InfoSoc Directive applies⁸⁴, but provides no guidance beyond this. It also states that the Court should have due regard to users who may be affected by such a measure. However, the emphasis on the goal of such a response (to reduce digital copyright infringement) threatens to overshadow the other

⁷⁸ UPC, para. 128: "... Ireland is not yet fully in compliance with its obligations under European law."

⁷⁹ "However, this was not Mr Justice Charleton's view." According to Minister Sherlock in his opening speech for the Dail debate in relation to the proposed Statutory Instrument on Copyright, available from: <http://www.djei.ie.press/2012/20120131c.htm>

⁸⁰ 'Backdoor legislation is no way to tackle thorny issue of copyright', (2011) The Irish Times (subscription required), available from: <http://www.irishtimes.com/newspaper/finance/2011/0311/1224291884145.html>

⁸¹ See: <http://www.djei.ie.press/2012/20120131c.htm>

⁸² S.I. No. 59 of 2012 *European Union (Copyright and Related Rights) Regulations 2012*. Available from: http://www.patentsoffice.ie/en/legislation_rules.aspx

⁸³ McCallig, D., 'Copyright Injunctions Law Introduced', (2012) *Iris* 2012-4:1/31, available from: <http://merlin.obs.coe.int/newsletter.php?year=2012&issue=4>

⁸⁴ S.I. No. 59 of 2012 *European Union (Copyright and Related Rights) Regulations 2012*, Explanatory note, p4, available from: http://www.patentsoffice.ie/en/legislation_rules.aspx

equally legitimate interests of the user; little attention was paid to the interest of those who might have their Internet connection terminated⁸⁵.

3.3 Spain

In Spain, the issue came before the European Court of Justice (ECJ) regarding the applicable European Directives⁸⁶ and Human Rights obligations in the case of *Productores de Música de España SAU (Promusicae) v. Telefónica de España SAU (Telefónica)*⁸⁷. The issue was whether an ISP could be forced to pass on confidential information about illegal file-sharers on its network to an industry body. This case differed slightly in nature as the main issue at stake was the disclosure of personal data of those engaged in illegal file-sharing in the context of data protection, and was brought under civil as opposed to criminal law. The case concerned the balancing between the European fundamental rights to 'property'⁸⁸ and an 'effective remedy'⁸⁹ (as enshrined in the European Charter of Fundamental Rights⁹⁰), with that of data protection contained in a number of directives broadly relating to the 'information society' and intellectual property rights. Interestingly, the right to intellectual property is slightly ambiguously worded in the Charter, as it states simply, "*Intellectual property shall be protected.*"⁹¹ In contrast, more 'physical' property ('possessions') seem to be more concretely protected⁹². Nonetheless, the need to analyse how these competing goals of the law in this area warrant consideration as to how the policy objectives of data protection and copyright protection (across the

⁸⁵ Train, T., "*Three Strikes*" settlement between EMI and Eircom approved by Irish court', (2010) *JIPLP* 5(9) 625-627, p626.

⁸⁶ Deemed to be Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

⁸⁷ *Productores de Música de España SAU (Promusicae) v. Telefónica de España SAU*, Case C-257/06.

⁸⁸ Art.17, Charter of Fundamental Rights of the European Union (2000/C 264/01).

⁸⁹ Art.47, *ibid.*

⁹⁰ Charter of Fundamental Rights of the European Union (2000/C 264/01).

⁹¹ Art.17(2), *ibid.*

⁹² Art 17(1), *ibid.*

relevant directives) sit within this framework of copyright as a fundamental right⁹³.

In sum, the European Court deemed the reference to ask if (then) Community law must be interpreted as requiring Member States to lay down an obligation to communicate personal data (in the context of civil proceedings) in order to ensure the effective protection of copyright⁹⁴. Despite accepting that the purposes of the directives mentioned were to ensure, in particular, the protection of copyright⁹⁵, other provisions of the directives at issue⁹⁶ led to the conclusion that such protection cannot affect the requirements of the protection of personal data. In short, there were no legislative provisions within the Directives that, in the Court's opinion, provided for an obligation on Member States to lay down an obligation to provide personal information⁹⁷.

With regard to the issue of Fundamental Rights under articles 17 and 47 of the Charter (the right to property, including Intellectual Property, and, the right to an effective remedy, respectively), the Court proceeded to consider whether such a lack of obligation would amount to an infringement of these rights⁹⁸. As a result, there is a conflict between the fundamental rights of rightsholders, and the fundamental rights of users thus raising the question of the need to reconcile the requirements of the protection of different fundamental rights⁹⁹. Advocate General Kokott¹⁰⁰ further recognised the conflict thus:

⁹³ As approved in *Padawan SL v. Sociedad General de Autores y Editores de España (SGAE) and others*, Case C-467/08.

⁹⁴ *Productores de Música de España SAU (Promusicae) v. Telefónica de España SAU*, Case C-257/06, para. 41. Henceforth, *Promusicae*.

⁹⁵ *Promusicae*, para. 57.

⁹⁶ Namely art.1(5)(b) of the E-commerce Directive, art.9 of the of the InfoSoc Directive, and art.8(3)(3) of the Enforcement Directive.

⁹⁷ *Promusicae*, paras. 57-59.

⁹⁸ *Ibid*, para. 61.

⁹⁹ *Ibid*, para. 65.

*“The communication of personal data to a third party, whatever the subsequent use of the information thus communicated, therefore constitutes an infringement of the right of the person concerned to respect for private life and consequently an interference within the meaning of Article 8 of the ECHR.”*¹⁰¹

The protection of the rights and freedoms of others cannot justify the communication of personal traffic data¹⁰². This also relates to the European Court of Human Rights case law on the issue; where such data may be implicated under article 8 of the European Convention on Human Rights, on the right to respect for private and family life¹⁰³. Any wider interpretation than that currently contained through the applicable Directives would render the protection of personal data meaningless with regard to unauthorised use of communications systems¹⁰⁴. If this was the case, then it would be necessary to store and intensively process all network communication with regard to content: *“The citizen ‘under the eye of Big Brother’ would thus be a reality.”*¹⁰⁵ As a result, unauthorised use of an electronic communications system does not include its use broadly for unauthorised purposes, only use contrary to the system itself¹⁰⁶. Whilst this approach focuses on the applicability of personal data disclosure in civil cases, it is unclear that the situation would be the same in criminal proceedings which by their very nature are more serious. This question, however, was left for another time, since the data protection Directives do not apply to criminal offences¹⁰⁷. The

¹⁰⁰ *Productores de Música de España SAU (Promusicae) v. Telefónica de España SAU*, Case C-257/06, Opinion of Advocate General Kokott, para. 48. Henceforth, Kokott.

¹⁰¹ Kokott, para. 52.

¹⁰² *Ibid*, para. 89.

¹⁰³ See generally the European Court of Human Rights (Research Division, *‘Internet: case-law of the European Court of Human Rights’*, (2011), available from: http://www.echr.coe.int/NR/rdonlyres/E3B11782-7E42-418B-AC04-A29BEDC0400F/0/RAPPORT_RECHERCHE_Internet_Freedom_Expression_EN.pdf

¹⁰⁴ Kokott, para. 97.

¹⁰⁵ *Ibid*, para. 97.

¹⁰⁶ *Ibid*, para. 98.

¹⁰⁷ *Ibid*, para. 127.

ECJ recognises data privacy and copyright as fundamental rights and requires a balance to be struck between them¹⁰⁸. Member States must themselves strike an appropriate balance between the obligation to disclose or withhold such information. In effect, by recognising that personal data *may* be available for rights holders for civil suits of copyright infringement, the balance may have tipped more in favour of rightsholders than perhaps the EU had intended. The ECJ thus, in this instance, seemed quite content to keep out of the argument and leave it to the national legislatures to decide, so long as the various fundamental rights are balanced in accordance with EU law.

Despite recognising the importance of copyright as a matter of public interest¹⁰⁹, Advocate General Kokott (tellingly) stated that:

“...(it is) not certain that private file sharing, in particular when it takes place without any intention to make a profit, threatens the protection of copyright sufficiently seriously to justify recourse to this exception.”¹¹⁰

The Court recognised that Member States must be careful to rely on an interpretation of the directives which allows a fair balance to be struck between various fundamental rights¹¹¹. In conclusion, the Court came to the decision that none of the directives required the Member States to lay down any obligation to communicate personal data in order to ensure the protection of copyright in civil proceedings¹¹². Nevertheless, they did state a proviso whereby Member States should interpret them so as to allow a fair balance to be struck between competing fundamental rights in a way consistent with the general principles of Community (Union) law¹¹³. The

¹⁰⁸ As approved in *Commission of the European Communities v. The Bavarian Lager Co Ltd.*, Case 2-28/08.

¹⁰⁹ Kokott, para. 105.

¹¹⁰ *Ibid*, para. 106.

¹¹¹ *Promusicae*, para. 68.

¹¹² *Ibid*, para. 70.

¹¹³ *Ibid*, para. 70.

ruling can be welcomed in terms of the ECJ confirming that no obligation to disclose personal data exists, although this has been tempered by the more recent decision in the case of *Bonnier Audio*¹¹⁴. Here, it was held that the disclosure of personal data of infringers is *not* precluded where such an order of disclosure is based on evidence, and is proportionate and necessary¹¹⁵. However, this does not mean that data retention for enforcing IP rights is now required; it is only possible in certain limited circumstances¹¹⁶. However, *Promusicae* has ultimately brought little clarification¹¹⁷. There does not appear to be a 'blanket' exemption as it requires national courts to resolve any issue on this matter before them in the context of balancing fundamental rights which could require such disclosure (depending on the facts of a given case). In such instances, the flip-side of the Court's ruling that no obligation exists may come to be relevant; that such an obligation is *not* necessarily precluded¹¹⁸. ISPs may not be forced to reveal the identities of subscribers unless the infringement is on a scale that constitutes a criminal offence¹¹⁹. The ECJ decided that it cannot be derived from European legislation that Member States are obliged to install a duty to disclose personal data in civil cases, but did not provide guidelines as to how a balance should be struck: *"In sum, the 'hot potato' was passed on to the Member States."*¹²⁰

¹¹⁴ *Bonnier Audio (and others) v. Perfect Communication Sweden*, Case C-461/10.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Coudert, F., and Werkers, E., *'In the aftermath of the Promusicae case: how to strike the balance?'*, (2010) *International Journal of Law & Information Technology* 18(1) 50-71, p53.

¹¹⁸ *Promusicae*, para. 54: *"The conclusion must therefore be that Directive 2002/58 does not preclude the possibility for the Member States of laying down an obligation to disclose personal data in the context of civil proceedings."*

¹¹⁹ Frabboni, M.M., *'ISPs not to disclose the identity of their users: a green light for file-sharers?'*, (2008) *Entertainment Law Review* 19(1) 19-20, p20.

¹²⁰ Coudert, F., and Werkers, E., *'In the aftermath of the Promusicae case: how to strike the balance?'*, (2010) *International Journal of Law & Information Technology* 18(1) 50-71, p51.

3.4 France

The situation is markedly different in France where it was announced in 2007 that a (then) new independent anti-piracy body was to be established following a deal between the music and movie industries, and Internet firms. Under this arrangement, ISPs monitor the activities of their users and pass on information about infringers to the new organisation. President Sarkozy described the initiative as the *'future for a civilised Internet'*¹²¹. The adoption of this system was not without its problems. The French Constitutional Court (Conseil Constitutionnel) struck down¹²² the original Hadopi Act as being in violation of two French Constitutional principles: that an individual is innocent until proven guilty (as the user would be presumed responsible for any breaches without the opportunity to prove otherwise); and, the freedom of communication which must be limited in accordance with the French right of entitlement to Intellectual Property. As such, an administrative body, i.e. Hadopi could not be vested with the right to cut-off an individual's Internet access (and violate the freedom of communication).

The French Constitutional Court issued its ruling in June 2009 on the 'constitutionality' of the proposed Hadopi law. The main reason for the referral was the allegedly improper manner in which the Parliament passed the Act¹²³. In addition, it was argued that by affording an administrative body (even an independent one) the power to impose disconnection penalties, Parliament infringed the (French) fundamental right of freedom of expression and communication¹²⁴ as well as imposing disproportionate penalties and an unfair presumption of guilt¹²⁵. Weighted against this, was the similar

¹²¹ *'France unveils anti-piracy plan'*, (2007) BBC News, available from: news.bbc.co.uk/1/hi/technology/7110024.stm

¹²² Decision 2009-580 of June 10th 2009, available from: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009_580dc.pdf. Henceforth, Constitutional Council.

¹²³ Constitutional Council, para. 2.

¹²⁴ As expressed in article 11 of the Declaration of the Rights of Man and the Citizen (1789), henceforth, the Declaration. Ibid, paras 11-12.

¹²⁵ Ibid, para. 11.

recognition of the fundamental right to property which was deemed to include Intellectual Property¹²⁶ as well as recognition that an administrative body acting within the competencies of the law is not precluded in exercising its penal powers¹²⁷.

The Court placed utmost importance on the rights of freedom of expression, but recognised Parliament's freedom to lay down rules to reconcile this with the right to property¹²⁸. However, the Court appeared to afford more importance to the rights of communication and expression as being the cornerstones of a democratic society (described as being "*precious*")¹²⁹; the potential breadth of the initial measures were deemed to infringe these rights. The Court invoked a principle that has been integral to French jurisprudence; that a person is presumed innocent until proven guilty such that it applies even if a punishment is sanctioned by a non-judicial body¹³⁰. This¹³¹ also proved decisive in this case; the relevant provisions of the Act were adjudged to have reversed the burden of proof in this instance and were deemed unconstitutional¹³².

Contrasts may be drawn with the UPC judgement in Ireland mentioned above. That case demonstrated the willingness of the Court to impose measures to limit Internet access, but not so here where such a response was ruled unconstitutional. It was further argued that such measures were disproportionate, unduly wide and may potentially lead to pre-emptive action with regard the right of users to receive information¹³³. The Court disagreed, finding that the legislative measures concerning such responses involved right and proper judicial procedures and that any decision to terminate

¹²⁶ Under articles 2 and 17 of the Declaration, Constitutional Council, para. 13.

¹²⁷ Ibid, para. 14.

¹²⁸ Constitutional Council, para. 15.

¹²⁹ Ibid, para. 15.

¹³⁰ Phillips, J., '*Three Strikes*'... and then?', (2009) JIPLP 4(8), 521 (Editorial).

¹³¹ Art.9 of the Declaration.

¹³² Constitutional Council, paras. 18-20.

¹³³ Ibid, para. 37.

Internet access was a matter solely for the judiciary (in accordance with Hadopi provisions on the matter)¹³⁴. It would not be unconstitutional where the proper judicial procedure was followed¹³⁵. Therefore, the disconnection of Internet users was implicitly deemed an acceptable response, although in this instance, purely due to the legislative grounds which accommodate it. There also appears to be a distinction between ‘active’ communication and ‘passive’ reception of information; it seems the first is a constitutional right, whilst the latter is not, despite the fact that one cannot function without the other. This is also expressly recognised in the European Convention on Human Rights under article 10(1) which explicitly mentions the right to receive ideas¹³⁶. Nonetheless, in contrast with Ireland, there was no discussion as to the necessary copyright provisions in French law which allow (or may have disallowed) such a course of action; the ruling was confined to the constitutionality of the Hadopi Law.

3.5 *The ECJ*

The issue on the legality of filtering measures was pending before the European Court of Justice in the form of a preliminary reference¹³⁷ following the SABAM case in Belgium where the Brussels Court of Appeal sought a ruling on whether the relevant directives, interpreted in light of articles 8 and 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (the rights to respect for private and family life, and of freedom of expression), permit imposing an obligation on ISPs to force them to implement filtering measures to block traffic infringing copyright law¹³⁸.

¹³⁴ Constitutional Council, para. 18.

¹³⁵ *Ibid*, para 38.

¹³⁶ Art.10(1), Convention for the Protection of Human rights and Fundamental Freedoms (as amended), Rome, 4.XI. 1950.

¹³⁷ Case C-70/10 (2010/C 113/30) Reference for a preliminary ruling from the Cour d’appel de Bruxelles (Belgium) lodged on 5 February 2010 – Scarlet Extended SA v Société Belge des auteurs, compositeurs et éditeurs (SABAM).

¹³⁸ In full:

Do Directives 2001/29 (1) and 2004/48, (2) in conjunction with Directives 95/46, (3) 2000/31 (4) and 2002/58, (5) construed in particular in the light of Articles 8 and 10 of the European

Advocate General Cruz Villalon issued his Opinion on the matter¹³⁹, stating that in order to be permissible, such a measure must comply with the conditions laid down in the Charter of Fundamental Rights of the European Union (the Charter) to govern the restriction on the exercise of rights and must be done in accordance with an appropriate legal basis. The Advocate General considered that the court order imposed by the District Court constituted a 'general obligation' which may be intended to be extended, on a permanent basis, to all other ISPs and which may have a consequent lasting effect on a wide range of individuals and organisations, irrespective of whether or not they have a contractual relationship with Scarlet. Such an order was also deemed to apply as a preventative measure; therefore, a finding of actual infringement would not first be made. Importantly, Advocate General Cruz Villalon stated that the order at issue was a '*new obligation*' through which the legal and economic responsibility for dealing with online copyright infringement would largely be delegated to the ISPs. As such, he considered that the installation of a filtering and blocking system (in principle) would be a restriction on the right to respect for the privacy of communication, the right to protection of personal data, and, freedom of information under the Charter. However, he accepted that such rights may be restricted, provided they are done so in accordance with the law ('quality of the law') and would

Convention on the Protection of Human Rights and Fundamental Freedoms, permit Member States to authorise a national court, before which substantive proceedings have been brought and on the basis merely of a statutory provision stating that: 'They [the national courts] may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right', to order an Internet Service Provider (ISP) to introduce, for all its customers, in abstracto and as a preventive measure, exclusively at the cost of that ISP and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the sharing of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at which they are sent?

¹³⁹ Court of Justice of the European Union, Press Release No. 37/11, available from: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/cp110037en.pdf>
Unfortunately, the text of the opinion is only available in French at the time of writing, therefore, an English press-release serves as the primary source in this instance.

be permissible if they were adopted on a national legal basis which was accessible, clear, and predictable; this was not the case in Belgium and there were no adequate safeguards in place. As a result:

“... the Advocate General proposes that the Court of Justice should declare that EU law precludes a national court from making an order, on the basis of the Belgian statutory provision, requiring an internet service provider to install, in respect of all its customers, in abstracto and as a preventive measure, entirely at the expense of the internet service provider and for an unlimited period, a system for filtering all electronic communications passing via its services (in particular, those involving the use of peer-to-peer software) in order to identify on its network the sharing of electronic files containing a musical, cinematographic or audio-visual work in respect of which a third party claims rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at the point at which they are sent.”¹⁴⁰

The ECJ subsequently ruled¹⁴¹ that that a contested filtering system (as it was in this case) should not be adopted as it would be in violation of EU law¹⁴². Installing such a preventative system, at the ISP's expense, and which would filter all electronic communications indiscriminately, and apply indefinitely¹⁴³ would be in violation of the general monitoring prohibition under article 15 of the E-commerce Directive¹⁴⁴. It would also appear to be in countenance to the e2e design principle by applying technical mechanisms to a network that may otherwise be neutral with the potential

¹⁴⁰ Scarlet Extended SA v Société Belge des auteurs, compositeurs et éditeurs (SABAM) Case C-70/10, Opinion of Advocate General Cruz Villalón, available from: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/cp110037en.pdf>

¹⁴¹ Scarlet Extended SA v Société Belge des auteurs, compositeurs et éditeurs (SABAM) Case C-70/10. Henceforth, Scarlet.

¹⁴² Scarlet, para. 54.

¹⁴³ Ibid, para. 29.

¹⁴⁴ Ibid, para. 40.

effect that the network itself may become less efficient¹⁴⁵. However, this ruling was specific to the framing of the question; which itself was quite precise in these terms. Although the right to Intellectual Property was acknowledged as a Fundamental Right, it was acknowledged that this was not an absolute right¹⁴⁶ and must be balanced against the protection of other fundamental rights as in *Promusicae*¹⁴⁷. In this instance, this right needed to be balanced against the right to conduct a business under article 16 of the Charter (of Fundamental Rights). The nature of the filtering in this case was deemed to infringe this right as well as being complicated and costly to implement¹⁴⁸. Aside from the nature and implementation of the system, it was also held that the effects of such a measure would adversely affect the rights of users; specifically the right of personal data protection and their freedom to receive and impart information (under articles 8 and 11 of the Charter, respectively)¹⁴⁹ as well as harming freedom of information¹⁵⁰. In conclusion, it was held that:

*“Consequently, it must be held that, in adopting the injunction requiring the ISP to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information on the other.”*¹⁵¹

This is initially encouraging in terms of providing a more definite answer on the issue, but the judgement is still bound by the facts of the original case and the reference in that it specifically concerned the imposition of blocking/filtering measures as opposed to a graduated response scheme. It

¹⁴⁵ See chapter 2, p61.

¹⁴⁶ *Scarlet*, para. 43.

¹⁴⁷ *Ibid*, para. 44.

¹⁴⁸ *Ibid*, para. 48. Which was also held to violate art.3(1) of the Enforcement Directive.

¹⁴⁹ *Ibid*, para. 50.

¹⁵⁰ *Ibid*, para. 52.

¹⁵¹ *Ibid*, para. 53.

may be questioned as to whether this opinion and subsequent ECJ ruling may really be of relevance anymore. The case began in 2004 and was heard by the District Court in 2007; the state of technology moves so quickly that any evidential matters concerning the effectiveness of such measures may now be out of date (as we are now six years later at the time of writing). Filtering measures have since been an issue in relation to the article 14 hosting defence under the E-commerce Directive. Although it was held by the ECJ that this would violate the no monitoring obligation under article 15¹⁵², it remains to be seen if and how the application of filtering measures may develop beyond its application on a network. Nonetheless, ISPs now possess the necessary traffic management capabilities which may be employed in this scenario (as opposed to relying on third-parties to implement solutions). This is also evident from the prevalence of graduated response mechanisms evident in France, Ireland, and (most likely) in the UK. The fact that ISPs now possess and operate traffic management techniques is arguably of central importance in terms of website filtering or blocking. This will be considered below in the UK context.

4. The UK

The approach in the UK has been a rather long-winded and tortuous affair that began in 2006 and has been subject to a number of consultations and reports, which finally culminated in the Digital Economy Act (DEA) passed in 2010. However, even the passing and content of this act was the subject of much controversy¹⁵³ and was arguably prey to the lobbying interests¹⁵⁴ of the affected parties, as Lord Puttnam stated during the debating stage:

“Many of us in this House have come in having just had our ears bashed-either by the record industry or some other aspect of special

¹⁵² Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV, Case C-360/10.

¹⁵³ Farrand, B., ‘*The Digital Economy Act 2010: A Cause for Celebration, or a Cause for Concern?*’, (2010) EIPR 32(10) 536-541, p536.

¹⁵⁴ See chapter 8, pp316-319.

*pleading ... The lobbying process that has gone into this Bill has been quite destructive and has done none of us very much help at all.*¹⁵⁵

Before it was even passed as an Act of Parliament, the Digital Economy Act (DEA) engendered a lot of controversy in its incarnation as a Bill. The origins of the Act can be traced back to the Digital Britain Report¹⁵⁶, and before then, The Gower's Review on Intellectual Property¹⁵⁷ (as marking the first in a series of reports on Intellectual Property Law in the UK). One of the central features of the Act was to implement strict measures to combat digital copyright infringement; specifically (again), a 'graduated response' to the problem. In contrast to the approach in France, but similar to Ireland, the 'response' involves ISPs being informed of infringing activity. They would also be required to send out notices to their subscribers who have committed infringements. Rightsholders would then be able to obtain a court order and potentially sue¹⁵⁸ those infringers. Notably, this only involves the ISPs and rightsholders, as opposed to an independent body (Hadopi in France), and ultimately carries a less severe sanction (with a limited right of appeal), as opposed to Internet suspension (France) or termination (Ireland).

In addition to proposing a graduated response, the DEA affords the Secretary of State wide-ranging powers in this area; notably in relation to

¹⁵⁵ Lord Puttnam, House of Lords Debate, 1st March 2010, c1285 Hansard. In full: *"I gather I am allowed to stand by way of explanation. My point is that as a House-and I certainly speak for myself-we have been subjected to an extraordinary degree of lobbying. The problem is that we have had no opportunity to look at that lobbying in a sensible and interrogative way and decide which of it is valid and reasonable and which is pure hyperbole. That is what has been missing. Many of us in this House have come in having just had our ears bashed-either by the record industry or some other aspect of special pleading. The House has not been protected with a proper interrogative process by which we, as Members of the House, can come to this Chamber fully cognisant of the things we have looked at and believe we can advance on. The lobbying process that has gone into this Bill has been quite destructive and has done none of us very much help at all."* See also chapter 8, pp316-319.

¹⁵⁶ Farrand, B., *'The Digital Economy Act 2010: A Cause for Celebration, or a Cause for Concern?'*, (2010) EIPR 32(10) 536-541, p537.

¹⁵⁷ *'The Gowers Review of Intellectual Property'* (2006), available from: <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>

¹⁵⁸ Although this still remains unclear and is dependent on the regulatory code.

website blocking¹⁵⁹. The Bill received Royal Assent on the 12th April 2010 and entered into force on June 12th that year. However, it engendered resentment amongst ISPs, and following a legal challenge by BT and TalkTalk, a judicial review of the Act was granted pending a full review to be undertaken¹⁶⁰.

4.1 Judicial Review

On the 20th April 2011, the High Court issued its decision on the judicial review¹⁶¹ brought by the ISPs BT and TalkTalk. The Court concluded that the initial obligations contained in the DEA are not legally enforceable against any individual (or ISP) and thus do not have the necessary 'legal effect' required from settled European case law¹⁶². This is because the obligations are expressly dependent on the regulatory Code to be developed and without this, they are not yet sufficiently clarified to be enforceable; the actual content of the obligations is to be defined in the Code¹⁶³: *"Without the Code, the initial obligations simply beat the air in legal terms."*¹⁶⁴ Moreover, the Court insinuated what any such Code must contain infringement reports, infringement lists etc., and may presumably open the door for lobbying by the content industry upon whom ISPs appear increasingly reliant (discussed further below), and as alluded to in the judgement¹⁶⁵. The author is reminded of the work of Lawrence Lessig in 'Code'¹⁶⁶ (referred to elsewhere

¹⁵⁹ S.17, Digital Economy Act (DEA), 2010.

¹⁶⁰ 'Net providers get Digital Economy Act judicial review', (2010) BBC News, available from: <http://www.bbc.co.uk/news/technology-11724760>

¹⁶¹ The Queen on the Application of British Telecommunications PLC and TalkTalk Telecom Group PLC v. The Secretary of State for Business, Innovation and Skills [2011] EWHC 1021 (henceforth, BT).

¹⁶² BT, para. 84.

¹⁶³ Ibid, para. 84.

¹⁶⁴ Ibid, para. 84.

¹⁶⁵ Ibid, para. 252, quoting the evidence filed by the Department for Business, Innovation and Skills (BIS): *"However, those ISPs with significant content interests have not demurred at the estimates provided in their responses to Government consultations."*

¹⁶⁶ Lessig, L., 'Code (Version 2.0)', (2006, Basic Books), p81.

in this thesis¹⁶⁷). Specifically, ‘code as code’; law can be ‘code’ and ‘code’ can be law. This is perhaps further confirmed in a statement in the judgement: “*It is the Code that in strict legal terms will constitute the technical regulation.*”¹⁶⁸

The High Court¹⁶⁹ stated that: “*For the present purposes, the role of the ISP under the DEA is essentially passive.*”¹⁷⁰ However, this largely leaves a void at the centre of the entire operation of the DEA. One may take heart from the fact that ISPs are not obliged to monitor under the DEA, but this still leaves the question as to who will? As a consequence of this statement, there must be some undertaking that will be active. As there may not be an independent body involved (such as Hadopi) this suggests that perhaps rightsholders may engage themselves (or through another agency). Alternatively, the ISP themselves may be involved through the (presumably) passive accumulation of data. Similarly, everything else is presumably to be governed by the aforementioned Code; the lack of which effectively enabled the Court to assert the validity of the Act as the grounds for opposition were unfounded, essentially because the real ‘flesh’ of the Act has still to be formulated. This begs the ancillary question of how and why Parliament chose to pass an Act that essentially left the substantive provisions to be filled in by ISPs themselves. There also seemed to be deference to the ‘insight’ afforded to Parliament by the lengthy consultation process¹⁷¹ as well as the practical deference relating to the sheer volume of evidence on this issue¹⁷². However, this fails to take into account neither the lobbying power of the content industries (including the controversial circumstances of the

¹⁶⁷ See chapter 3, p86 and chapter 5, pp175-176.

¹⁶⁸ BT, para. 88.

¹⁶⁹ Although leave was granted to appeal the High Court decision, the Court of Appeal ultimately upheld the ruling: *BT and TalkTalk v. Secretary of State for Culture, Olympics, Media and Sport (and others)* [2011] EWHC 1021. This judgement was delivered after the cut-off point for the writing of this thesis. As a result, the focus is on the High Court ruling.

¹⁷⁰ BT, para. 116.

¹⁷¹ BT, para. 212.

¹⁷² *Ibid*, para. 213.

DEA's birth nor the lack of Parliamentary scrutiny resulting from the 'wash up' phase.

In contrast to much of the rest of Europe, the UK has no formal Constitution which grants and protects individual rights (unlike France and those considered in *Promusicae*). As such, there is potentially little opportunity to balance competing interests here (individual rights v. copyright):

*"In the digital age, there is a need for progressive judicial perspectives which give adequate consideration to the increasing importance of the Internet. The plight of copyright owners, although real, cannot continue to eclipse the rights of Internet users..."*¹⁷³

This is something which the High Court paid only limited attention to, stating that this case was *not* one which involved a human right or fundamental freedom¹⁷⁴; instead, this was something Parliament had a wide margin of discretion over¹⁷⁵. Furthermore, there was a notable reluctance to accept any European aspect to the decision; it was concluded that the questions of EU law raised by the case resulted in clear answers and the Court did "... *not believe that any useful purpose would be served by my making a (preliminary) reference.*"¹⁷⁶ The author would argue that in fact, a preliminary reference should have been made, not least because similar matters have been with regard to the situations in Spain and Belgium. Furthermore, the decision by the High Court runs contrary to the opinion of the Advocate General in the SABAM case who proposed that the ECJ should declare that EU law precludes a national court from requiring ISPs to implement filtering measures. As such, a reference to the ECJ may be seen as necessary as there are matters of EU law requiring interpretation in order for the UK Court to pass judgement. These would seemingly not be covered under the 'Acte

¹⁷³ Train, T., *"Three Strikes" settlement between EMI and Eircom approved by Irish court*, (2010) JIPLP 5(9) 625-627, p627.

¹⁷⁴ BT, para. 215.

¹⁷⁵ Ibid, para. 218.

¹⁷⁶ Ibid, para. 264, under an article 257 Preliminary Reference procedure.

Clair' Doctrine¹⁷⁷; despite what the Court concluded, the author would assert that the answer is *not* obvious on the basis of the foregoing European decisions on the matter.

Nonetheless, it does demonstrate that 'technical measures' have moved beyond mere filtering and now stand for traffic management techniques, bandwidth throttling etc.. Whilst these measures may not necessarily affect the user control residing at the end-points in the network under e2e, their existence and operation arguably affords the possibility for more intrusive measures to be introduced which may undermine these elements of the Internet's architecture under the auspices of combating unauthorised copyright infringement. Specifically, its open architecture and associated independence from software programmes and hardware platforms¹⁷⁸ threaten to be undermined by necessary technical measures in operation and such monitoring systems as may be introduced in this area. As mentioned above, the e2e network architecture and central place of the user¹⁷⁹ may also be overridden.

In truth, the legal basis for rendering ISPs liable for copyright infringement and for a graduated response mechanism remains unclear; in part due to the relatively recent nature of this initiative (and associated lack of coherent case law), and also due to the complexities of the various legal measures that may be involved. At the very least, it must rest on some form of national legislation, which it now does in France, Ireland, and to a lesser extent, in the UK (the details of which still need to be fleshed out in terms of the regulatory code). It may however, be hoped that the drafting of the Code will be influenced by the ruling of the ECJ against filtering measures.

¹⁷⁷ Srl CILFIT v. Ministry of Health Case 238/81.

¹⁷⁸ See chapter 2, pp60-61.

¹⁷⁹ Ibid, p61.

4.2 Beyond graduated response? Newzbin(z)

As much as the operation of ISPs regarding unauthorised copyright infringement has yet to be worked out under the DEA, this has not stopped the content industries from pursuing individual actions through the courts in the UK. This has been most apparent in the Newzbin cases¹⁸⁰ and has potentially much more serious ramifications. These cases involved the operation of websites operating via 'Usenet' (a distributed early Internet message board system¹⁸¹) which was alleged to contain infringing content. Although Newzbin I shut down, a similar version (Newzbin 2) re-surfaced shortly thereafter and was subject to similar proceedings; ultimately an injunction was sought under section 97A of the Copyright, Designs and Patents Act¹⁸². This section was implemented by the Copyright and Related Rights Regulations (2003) and states that a Court has the power to grant an injunction against a service provider where the service provider has actual knowledge that their service is being used to infringe copyright.

Interestingly, the judge in the second case made reference to Charleton J's 'eloquent description' in the UPC case (above) about the scale and nature of the problem of unauthorised copyright infringement¹⁸³. The nature and tone of these judgements has already been questioned, and it is unfortunate that they re-surfaced in this instance. Despite referencing the Hargreaves Report¹⁸⁴ where it was noted that the statistical evidence of such activity is open to question, it was still accepted that there was "fairly good" evidence of wrongdoing¹⁸⁵. Despite the claim that the service was 'content agnostic'¹⁸⁶,

¹⁸⁰ Twentieth Century Fox Film Corporation (and Others) v. Newzbin Limited [2010] EWHC 608 (henceforth, Newzbin I), and Twentieth Century Fox Film Corporation (and Others) v. British Telecommunications PLC [2011] EWHC 1981. Henceforth, Newzbin II.

¹⁸¹ For a more detailed overview of the systems operation, see Newzbin I, paras. 5-51.

¹⁸² S.97A, Copyright, Designs and Patents Act (CDPA), 1988.

¹⁸³ Newzbin II, para. 19.

¹⁸⁴ *Digital Opportunity: A Review of Intellectual Property and Growth. An Independent Report by Professor Ian Hargreaves*, (2011), pp18-19, available from: <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

¹⁸⁵ Newzbin II, para. 22.

¹⁸⁶ Newzbin I, para. 54.

it was found that ‘binary’ content (that is, content beyond mere text) was treated differently in that the user interface was primarily directed towards such (infringing) content¹⁸⁷. Furthermore, the defendant, on cross-examination, revealed enough to evidence knowledge of infringement¹⁸⁸. Evidence was rejected in both cases that only minimal content on both sites was non-infringing¹⁸⁹, and that shutting down the service would only have a minor effect on lawful uses¹⁹⁰. In fact, the available content was deemed to be ‘commercial’¹⁹¹; a term which had not surfaced at any time previously in the judgement, and a term which was not defined in the present context¹⁹².

In the *Newzbin I* case, it had to be decided if the system, and its operation, amounted to ‘authorisation’ for the purposes of infringement. Reference was made to the seminal *Amstrad*¹⁹³ case which determined this very issue¹⁹⁴ (and may be seen as analogous to the US *Betamax* case, discussed earlier in this thesis¹⁹⁵). Specifically, *Newzbin* was charged with authorising infringement by its members, procuring, encouraging and entering into a common design with its members to infringe, and, communicating the claimants’ copyrighted works to the public¹⁹⁶.

In *Amstrad*, it was held that the production and distribution of high-speed audio cassette recording equipment did *not* amount to a grant of authorisation to infringe copyright as the user could not reasonably deduce that *Amstrad* purported to possess the authority to grant permission to copy¹⁹⁷. However, in the present context, the facts of the case were

¹⁸⁷ *Newzbin I*, para. 60.

¹⁸⁸ *Ibid*, paras. 65-78.

¹⁸⁹ *Ibid*, para. 46.

¹⁹⁰ *Newzbin II*, para. 186.

¹⁹¹ *Newzbin I*, para. 101.

¹⁹² See chapter 4, 139-140.

¹⁹³ *CBS Songs Ltd v. Amstrad Consumer Electronics Plc* [1988] UKHL 15.

¹⁹⁴ *Newzbin I*, para. 90

¹⁹⁵ See chapter 4, p128, p130, p132, p137, and p139.

¹⁹⁶ *Newzbin I*, para. 83.

¹⁹⁷ *Ibid*, para. 88.

interpreted to mean that the relationship between operators and users, the functionality of the site, and the nature of the available content amounted to a grant of authorisation¹⁹⁸. Despite the somewhat archaic nature of the underlying architecture, the operation of Newzbin was considered to be ‘sophisticated’¹⁹⁹ and extended beyond mere indexing or categorisation of content²⁰⁰. Furthermore, the operation of the service led to an infringing copy of commercial content being made²⁰¹; there was an absence of filtering measures in place and the ‘terms and conditions’ of their service were deemed to be no more than ‘window-dressing’²⁰². These findings also led the Court to determine that the defendants were liable for participating in a common design so as to procure infringement²⁰³. The operation of the service was also held to be active, with the defendants deemed to have intervened in a material and sophisticated way to make copyrighted content available²⁰⁴.

As a result, the pre-existing *Amstrad* authority²⁰⁵ on the matter has now been overridden; such that *Newzbin I*: “... *purports to possess the authority to grant any required permission...*”²⁰⁶ These factors are comparable to similar issues argued regarding p2p networks²⁰⁷; such that now, creating an easy to use system may count as ‘authorising’ copyright infringement, beyond merely ‘encouraging’ it. Indeed, the term ‘inducement’ also appeared in this judgement²⁰⁸ in a similar context to the *Grokster* decision discussed in chapter 4²⁰⁹. Furthermore, the operation of the Newzbin services could

¹⁹⁸ *Newzbin I*, para. 90.

¹⁹⁹ *Ibid*, para.98

²⁰⁰ *Ibid*, para.99

²⁰¹ *Ibid*, paras. 100-101.

²⁰² *Ibid*, paras. 42, 45 and 101.

²⁰³ *Ibid*, para. 112

²⁰⁴ *Ibid*. para. 125.

²⁰⁵ *Ibid*, paras. 98-102.

²⁰⁶ *Ibid*, para. 102.

²⁰⁷ See chapter 4, p135, p137, and p147.

²⁰⁸ *Newzbin I*, para. 110.

²⁰⁹ See chapter 4, p148-152.

hardly be said to be as 'user-friendly' as the p2p networks discussed earlier in this thesis²¹⁰. Ultimately, because specific instances of infringement had not been recorded²¹¹ and 'Premium' members of the service paid a weekly subscription fee²¹² it was deemed sufficient to overrule Amstrad²¹³.

However, this reflects the very nature of the Internet and digital technology; it would be practicably prohibitive (for example, because of financial reasons and scale) to be able to identify each and every act of copyright infringement committed by an individual user. The mere fact that users may simply be connected, in general terms, to the Internet i.e. they are online, and have some sort of loose 'relationship' with the services (likewise, the 'service' may be said to have a relationship with the user) they choose, seems to operate as a minimal evidential hurdle needed to suggest 'authorisation' by the service provider for the purposes of copyright infringement. Similarly, any 'relationship' may be ongoing by virtue of an Internet connection and access.

The Newzbin II case centred more on the liability (and therefore responsibility) of BT (as an ISSP) to implement measures to block access to the site through an injunction under s.97A of the CDPA²¹⁴. Again it was found that the majority of content on Newzbin II was protected by copyright²¹⁵ and that the defendants in this instance had made plans to avoid enforcement undertaken by rightsholders²¹⁶.

The ECJ judgement in the Scarlet case was differentiated as in the present instance, the relevant blocking technology was already operated by BT for other (arguably more legitimate) purposes and was therefore eminently more

²¹⁰ See chapter 3, p124, and chapter 4, p157 and p163.

²¹¹ Newzbin I, para. 97.

²¹² Ibid, para. 98.

²¹³ Ibid, para. 110.

²¹⁴ Newzbin II, para. 1.

²¹⁵ Ibid, para. 55.

²¹⁶ Ibid, para. 55. This may also be paralleled with the more 'cynical' of successive p2p operators post-Napster, see chapter 4, pp148-155.

feasible²¹⁷. This is important, as it was this distinction which may differentiate this case in light of the ECJ's judgement in Scarlet discussed above.

It seemed to be decided that because BT is the UK's biggest Internet provider²¹⁸, most of Newzbin I's users were probably BT subscribers and are now members of Newzbin II²¹⁹. Crucially, it was decided that although Newzbin II was used for infringing purposes, BT, as an ISSP, was *also* implicated as a service used for such infringement; and therefore, *both* were used to infringe²²⁰, however the Court's wording on this point is unclear stating that: "... *it does not necessarily follow that the subscriber is not using BT's service to infringe.*"²²¹. Again, questionable reference was made to Charleton J on this issue in that this decision is consistent with the approach in UPC regarding p2p users²²². Although the logic in involving ISPs to act against copyright infringement is understandable (such infringements being a by-product of Internet service), it is quite another thing to implicate them as operating within the same arena as undertakings dedicated to copyright infringement²²³. Nonetheless, the nature of the infringing act and its relationship to the service were found to be the same as in Newzbin I such that as well as users using BT's services to infringe, the operators of Newzbin II were too²²⁴.

'Actual knowledge' of infringing activity was also found to be evident²²⁵ (on the part of Newzbin II), without actually being able to point to any specific

²¹⁷ Newzbin II, para. 177.

²¹⁸ Newzbin II, para.59.

²¹⁹ Ibid, para. 61.

²²⁰ "*The subscriber may be using both services to infringe*". Ibid, para. 100.

²²¹ Ibid, para. 100.

²²² Ibid, para. 108.

²²³ The author is reminded of the 'foot massage' scene from the movie '*Pulp Fiction*', available here: <http://www.youtube.com/watch?v=uWAPzkm3W10>

²²⁴ Newzbin II, para.113.

²²⁵ Ibid, para. 157.

acts of infringement²²⁶. It was decided that this term should not be interpreted too strictly²²⁷: *“One can know that someone is infringing copyright without knowing who that person is or even being able to find out who that person is.”*²²⁸ The absurdity of this statement is obvious; knowledge appears to have been extrapolated to a blanket application which exists online. This could perhaps have been as a result of the operators of its previous incarnation failing to keep adequate records, or as a culmination of this, the cross-examination of the defendant and treatment of content from the Newzbin I case. Ultimately, ‘actual knowledge’ followed from the fact that BT knew that the operators of Newzbin II infringed copyright on a large scale and that the users of Newzbin II included BT subscribers²²⁹.

The extension of this concept may be based as much on personal, or contextual, factors than on anything else which was evident here in light of the steps the operators had put in place to protect themselves from action by rightsholders²³⁰. A similar argument was made in relation to the Napster and Pirate Bay cases²³¹, but in those instances, there was perhaps more justification for doing so; on the part of the email referring to ‘pirated music’²³² in Napster, and the anti-copyright campaign and politics that served as the background to the Pirate Bay²³³.

BT contended that the order sought by the rightsholders was contrary to article 15 of the E-commerce Directive, which prohibits any such general obligation to monitor Internet traffic²³⁴. Although it was accepted that the

²²⁶ Newzbin II, para. 148.

²²⁷ Ibid, para. 145.

²²⁸ Ibid, para. 147. This is not the first time such a phrase has appeared in this thesis; see chapter 1, p23.

²²⁹ Newzbin II, para. 157.

²³⁰ In this instance, locating their servers and domain name registration outside of the UK. Ibid, para.58.

²³¹ See chapter 4, pp136-137, p155, p158, and p164.

²³² Ibid, pp136-137.

²³³ Ibid, p155.

²³⁴ Newzbin II, para. 161.

order sought required BT to monitor traffic, it was submitted that this would not involve monitoring the specific information transmitted and that it did not involve a general obligation, but rather a *specific* (and limited) one²³⁵. The Court made this distinction between acts of ‘general’ monitoring and acts of ‘specific’ monitoring, but in an arguably counter-intuitive way. BT was not being ordered to monitor the specific information being transmitted across its network in an ‘active’ way (such that may be precluded under article 15)²³⁶; instead, it was being asked to perform a more general and automated monitoring, not anything more ‘active’²³⁷. Confusingly, it was stated: “*To the extent that this amounts to monitoring, it is specific rather than general.*”²³⁸ Presumably it was deemed ‘specific’ in light of the purpose it was designed to achieve (i.e. disrupting traffic to Newzbin II²³⁹) rather than ‘targeted’ towards any particular user(s) or organisations. The reasoning of the Court suggests that they interpreted article 15 to preclude only active and specific (or detailed) monitoring of traffic such that the article reads: ‘*No general obligation to monitor specifically*’. The author asserts that this is wrong and that the article should be interpreted as precluding any monitoring whatsoever, at any level. In fact, it could be argued that the Court interpreted this the wrong way around. From the wording of the article itself, it could be suggested that it is intended that general monitoring is precluded *apart* from in specific (and presumably more justified) instances. Regardless, it appears that there are now different ‘shades’ of monitoring that have been read into the E-commerce Directive. Assuming there to be different shades of monitoring, there may thus also be different shades of interference that may occur in light of the e2e principle.

At the time of writing, the impact of these judgements in light of the ECJ’s ruling in SABAM remains to be seen. In the Newzbin II case, the Court suggested that rightsholders would not undertake future actions in the same

²³⁵ Newzbin II, para.161.

²³⁶ Ibid, para. 162.

²³⁷ Ibid, para. 162.

²³⁸ Ibid, para.162.

²³⁹ Ibid, para. 162.

vein 'lightly'²⁴⁰; however, the outcome of these cases would presumably make it much easier for rightsholders to pursue such a course of action. In addition, whilst the ECJ judgement precludes website filtering and blocking, there may be enough to separate it from the current situation in the Newzbin judgements. It was perhaps not so much that blocking/filtering is unlawful *per se*; but, that the specific mechanism in the SABAM case was unlawful. BT operates a different system which already works to filter certain other types of material.

Simply put, the outcome of these cases is twofold: there can be 'knowledge' without knowledge, and, there can be 'monitoring' without monitoring. The point was made in a previous chapter that the line between being an enterprise dedicated to copyright infringement and mere search engine threatens to become blurred²⁴¹; so it is now with ISPs.

When one considers the legislative definition of an ISP (mentioned above) as providing a service at the request of a user; the extension, or loosening, of actual knowledge suggests that an ISP must now be responsible for the requests of its own users or subscribers regardless of the ultimate source they choose to access content. This is also in contrast to the Internet's user element which has been central in its origin, development, and culture²⁴². Whilst this 'responsibility' is theoretically possible from the technical standpoint of being able to identify those requests transmitted across the network (despite the arguments under e2e, mentioned above), it also suggests that they need to, or should, know what the user *wants* to request on the basis that BT was implicated in servicing unauthorised infringement. Again, this presents the user, and therefore their ISP, with a stark choice of utilising legitimate content channels or simply infringing copyright and accruing liability²⁴³.

²⁴⁰ Newzbin II, para. 189.

²⁴¹ See chapter 4, p165.

²⁴² See chapter 2, p59 and chapter 3, pp121-126.

²⁴³ The same argument was made in relation to Digital Rights Management (DRM), see chapter 5, pp203-204.

5. Conclusion

5.1 ISPs and the law

Traditionally, ISPs have been under very little affirmative duty to monitor transmissions on their networks and a balance can be seen here in protecting the rights of their users in terms of privacy etc. from the European cases discussed above. This has now changed, and as such, the position of ISPs is now unclear as evidenced by varying stances on the issue across Europe. The courts do not appear to understand the importance of intermediaries to a vibrant Internet²⁴⁴: *“Internet intermediaries need safe harbours.”*²⁴⁵ They provide socially desirable services furthered by the network effects created by its function²⁴⁶:

*“If an obligation is to be imposed in ISPs to actively seek copyright infringements or to use filtering techniques, it not only brings into question their exoneration from liability, but it also endangers the free circulation of services, the freedom of expression and information, and users’ right to privacy.”*²⁴⁷

It is interesting to note that the definitions of an ISP above, whilst effectively sharing the same features (‘service’, ‘communication’ and ‘at individual request’), do not include any reference to digital content; merely a ‘communication service’. Although the issue of unauthorised copyright infringement is clear in the wider regulatory framework outlined in this chapter, it is less-so regarding ‘conduits’; instead, the focus here is on the ‘connection’. As such, these judgements in relation to article 12 of the E-commerce Directive should be made with reference to the article’s substance

²⁴⁴ Lemley, M. A., *‘Rationalizing ISP Safe Harbours’*, (2007) J Telecomm & High Tech L 101-119, p119.

²⁴⁵ Ibid, p119.

²⁴⁶ Schruers, M., *‘The History and Economics of ISP Liability for Third Party Content’*, (2002) Virginia Law Review, 88(1) 205-264, p255.

²⁴⁷ Coudert, F., and Werkers, E., *‘In the aftermath of the Promusicae case: how to strike the balance?’*, (2010) International Journal of Law & Information Technology 18(1) 50-71, p71.

i.e. initiating, selecting and modifying, as opposed to the 'contents' of *what* is actually transmitted in the 'communication'.

As shown above, in Belgium, Spain and the UK there has been resistance to any form of control over their networks or attempts to obtain the details of users engaged in illegal file-sharing activity. The focus was more so on copyright law in Belgium and although the court ruled that imposing filtering software did not amount to 'monitoring', the decision still seems to conflict with article 12 which grants immunity to ISPs as 'mere conduits'. Surely one would think that if they are not under a duty to monitor, they classify as conduits because it would suggest that they are merely passive actors allowing traffic to stream over their network. This has forced ISPs into defining their role, but the Internet Service Providers Association (ISPA) stated that Net firms could not be classified as anything other than 'mere conduits' under the E-commerce Directive and thus are not responsible for the contents of the traffic being transmitted across their network²⁴⁸. In addition, they stated that ISPs were explicitly prohibited from inspecting the contents of data packets unless forced to do so by a warrant²⁴⁹. The Internet Service Providers Association of Ireland (ISPAI) has also spoken out vehemently against such policies²⁵⁰.

Furthermore, it seems as though ISPs are defined such that they play no active role in the provision of the service and the emphasis is, in fact, on the user who engages in activity: "... *at the individual request of a recipient...*" (the Technical Standards Directive). Therefore, legal responsibility rests with

²⁴⁸ 'Net firms reject monitoring role', (2008) BBC News, available from: <http://news.bbc.co.uk/1/hi/technology/7246403.stm>

²⁴⁹ Ibid. Presumably under s.5 of the Regulation of Investigatory Powers Act, 2000. On this issue, see generally, Benjamin, V.O., 'Interception of internet communications and the right to privacy: an evaluation of some provisions of the Regulation of Investigatory Powers Act against the jurisprudence of the European Court of Human Rights', (2007) EHRLR 6 637-648.

²⁵⁰ McIntyre, T.J., 'Can ISPs be required to block file-sharing?', (2007) available from: <http://www.tjmcintyre.com/2007/07/can-isps-be-required-to-block-file.html>

the subscriber²⁵¹ which is further, and perhaps more indirectly, supported by the architecture of Internet and its design principles²⁵². Regardless of the capacity in which ISPs now seem to be conducting themselves, it could be argued that their very definition(s) imply that any infringing material is the sole responsibility of the users; it is they who have the 'control', not the ISP. However, the outcome of the Newzbin cases appears to have cast this assertion into doubt. The dichotomy appears to lie with the fact that once users upload content, liability implicates the hosting (under article 14 of the E-commerce Directive), and not the user himself (regardless of what the relevant ISP Acceptable Use Policy may state). However, when it comes to the downloading of content, responsibility appears to lie exclusively with the user, but an ISP may now theoretically be involved as the service provider through which the user accesses infringing material as a 'conduit' under article 12. Furthermore, an ISSP may be ultimately responsible for the activities of both the user and another ISP which stands in sharp contrast to the ideologies and origins of the Internet itself. However the reality of ISSPs themselves in relation to content provision warrants consideration in order to further understand this.

5.2 ISSPs and content

As it is then, ISSPs appear to be an obvious²⁵³ target in tackling unauthorised copyright infringement as they form the preceding link in the chain (between content and user): *"Many in the music industry cannot see why ISPs cannot simply ... take the first step of notifying the individual behind*

²⁵¹ Yen, A.C., *'Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment'*, (2000) *The Georgetown Law Journal* 88 1-15, p4.

²⁵² See chapter 2, pp60-61 and chapter 3, p122.

²⁵³ According to Paul McGuinness, manager of U2: *"I Think the failure of ISPs to engage in the fight against piracy, to date, has been the single biggest failure in the digital music market."* IFPI Digital Music Report, 2008, p22, available from: <http://www.ifpi.org/content/library/DMR2008-quotes.pdf>

*that account that their activities are unlawful.*²⁵⁴ To an extent, this may seem logical; if ISSPs are actively promoting the virtues of their own service (mainly connection speed and data allowance), then they should concurrently engage in a more active role to prevent the ‘benefits’ of their service being used to infringe copyright. This then differentiates them from other organisations such as Sony and Apple²⁵⁵, who although arguably promoting the infringing virtues of their devices²⁵⁶, have no further control over any content which the technology is used to ‘appropriate’. In contrast, ISPs have enormous powers of control²⁵⁷ and some form of ‘monitoring’ is not necessarily anything new:

*“Reactive monitoring is a reality in the ISP industry. ISPs respond to content-based complaints as a matter of good business practice for the purpose of maintaining customer goodwill and satisfaction.”*²⁵⁸

However, this must now also include the goodwill of the content industries; directing private complaints to ISSPs may theoretically provide an expeditious way to protect their rights²⁵⁹. This is because it is clear that the Internet does not necessarily provide a particularly secure environment for

²⁵⁴ Massey, R., *‘Independent service providers or industry’s secret police? The role of ISPs in relation to users infringing copyright’*, (2008) Entertainment Law Review 19(7) 160-162, p161.

²⁵⁵ In the context of personal computing technology and a one-time product sale, *not* in relation to the provision of content itself. Similar arguments were discussed in chapter 4, p147 in relation to the Sony Betamax, and chapter in relation to Apple’s iPod (although their products are now much more interconnected), see chapter 5, pp200-201.

²⁵⁶ See chapter 4, pp136-137.

²⁵⁷ Coudert, F., and Werkers, E., *‘In the aftermath of the Promusicae case: how to strike the balance?’*, (2010) International Journal of Law & Information Technology 18(1) 50-71, p71.

²⁵⁸ Schruers, M., *‘The History and Economics of ISP Liability for Third Party Content’*, (2002) Virginia Law Review, 88(1) 205-264, p261.

²⁵⁹ Julia-Barcelo, R., and Koelman K.J., *‘Intermediary Liability in the E-commerce Directive: So Far So Good, but it’s Not Enough’*, (2000) Computer Law & Security report 16(4) 231-239, p233.

copyrighted works²⁶⁰, but in this respect, content industries should presumably endeavour to provide content within secure channels²⁶¹ i.e. through the ISPs themselves as Internet distribution of content can now form a significant proportion of sales²⁶²:

*“The Internet ... offers content providers commercial opportunities that depend in close control over the access, duplication, and distribution of their works in the Internet.”*²⁶³

There has appeared to be at least a degree of co-operation between ISSPs and the industry as evidenced by the ‘Memorandum of Understanding’; agreed by the ISSPs and the British Phonographic Industry in 2008²⁶⁴. A similar memorandum has also now also in effect in the US²⁶⁵. Despite the Judicial Review brought by BT and TalkTalk, this is indicative of how closely ISSPs and the entertainment industry have become aligned. ISSPs have become dependent on the industry in order to be able to offer exclusive content to their customers. For the author, the term and definition ‘Internet Service Provider’ now seems outmoded; and the issues addressed in this chapter correspond more to liability for ISSPs regarding the activities of users and other ISPs. ISSPs are now increasingly *content providers*²⁶⁶

²⁶⁰ Julia-Barcelo, R., ‘*Liability for on-line intermediaries: a European perspective*’, (1998) EIPR 20(12) 453-463, p462. See also chapter 2, pp71-75.

²⁶¹ See chapter 5, pp204-205.

²⁶² Clark, B., ‘*Illegal downloads: sharing out online liability: sharing files, sharing risks*’, (2007) JIPLP 2(6) 402-418, p402.

²⁶³ Yen, A.C., ‘*Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*’, (2000) The Georgetown Law Journal 88 1-15, p2.

²⁶⁴ ‘*Illegal downloaders to get warning letter n government clampdown*’, (2008) The Guardian, available from: <http://www.guardian.co.uk/media/2008/jul/24/digitalmedia.piracy>

²⁶⁵ Axhamn, A., ‘*US Memorandum of Understanding on fight against online piracy*’, (2011), available from: <http://kluwercopyrightblog.com/2011/08/22/us-memorandum-of-understanding-on-fight-against-online-piracy/>

²⁶⁶ As opposed to purely ‘intermediaries’, see Julia-Barcelo, R., ‘*Liability for on-line intermediaries: a European perspective*’, (1998) EIPR 20(12) 453-463, p454, and Baistrocchi,

rather than just merely access providers and there is nothing in the definition of such 'information services' that precludes these developments. For example, Amazon now offers streaming movie rental through acquiring 'LoveFilm'²⁶⁷ as well as its standalone MP3 music download service²⁶⁸. Whilst this may be of benefit in terms of offering users legitimate content, it nonetheless calls into question the pre-existing safe harbour provisions in that ISPs and ISSPs are now much more active in the content market. As such, it may be said that they are losing immunity as a result of this shift and also as a result of the legal measures covered above, but at the same time, taking on more responsibility in providing content. There is little in the E-commerce Directive to apply to such a shift in roles and the responsibilities that go with it; it offers, but does not particularly elucidate on either notification or private codes of conduct solutions²⁶⁹.

Beyond this, things get complicated²⁷⁰. "... signs of structural change are appearing in the way in which issues of online liability and immunity are addressed..."²⁷¹ European regimes have been evolving²⁷², and continue to

P.A., 'Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce', (2002) 19 Santa Clara Computer & High Tech LJ 110-130, p116.

²⁶⁷ 'Amazon acquires Lovefilm for £200 million', (2011) Financial Times (subscription required), available from: <http://www.ft.com/cms/s/0/9aa7315e-2482-11e0-8c0e-00144feab49a.html>

²⁶⁸ This is replicated in other media sectors; for example News Corporation own a variety of broadcasting services and film production companies under the 'Fox' banner, as well as print holdings (for example, the Wall Street Journal), see: <http://www.newscorp.com/>. The Walt Disney Company also has television, radio, music, production, and publishing companies, see: <http://thewaltdisneycompany.com/>

²⁶⁹ Julia-Barcelo, R., and Koelman K.J., 'Intermediary Liability in the E-commerce Directive: So Far So Good, but it's Not Enough', (2000) Computer Law & Security report 16(4) 231-239, p237.

²⁷⁰ Massey, R., 'Independent service providers or industry's secret police? The role of ISPs in relation to users infringing copyright', (2008) Entertainment Law Review 19(7) 160-162, p161.

²⁷¹ Clark, B., 'Illegal downloads: sharing out online liability: sharing files, sharing risks', (2007) JIPLP 2(6) 402-418, p403.

do so. Through the pre-existing European legislation, there appears to be a balance that has been struck between providing ISPs with a predictable legal framework in which to conduct their business whilst still ensuring copyright protection for rightsholders. The author believes that the legislation is not in itself problematic, although given the variety of law implicated in this area and the variation in factual scenarios, it is difficult to identify a coherent approach. Currently, the problems arise more from this variation, and consequent variation in judicial opinions on the matter. This could perhaps be overcome by introducing a more exact, or precise, definition and distinction between an ISP and an ISSP. This would overcome the problem suggested at the end of chapter 4 (that the distinction between an 'inducer' of infringement, and a search engine threatens to become blurred²⁷³) as applied in the current context. That is, the line between a 'mere conduit' and an ISP involved in copyright infringement, and an ISSP providing Internet access, is becoming indistinct. This is a real potential threat in the UK following the Newzbin cases. Alternatively, this could be done through more nuanced judicial analysis of the operation of the ISP, or ISSP itself. This is crucial because without judicial guidance, an ISP only has such information as is put before it:

*"In short, even though the host service provider's servers might contain patently infringing material, the provider is not likely to have any knowledge of such material."*²⁷⁴

This is a good example of where it may be prohibitively expensive to distinguish legal from illegal activity²⁷⁵ due to the practical problems such as use of encryption, firewalls, and taking out new subscriptions with alternative

²⁷² Schruers, M., 'The History and Economics of ISP Liability for Third Party Content', (2002) Virginia Law Review, 88(1) 205-264, pp226-227.

²⁷³ See chapter 4, p165.

²⁷⁴ Julia-Barcelo, R., 'On-line intermediary liability issues: comparing EU and US legal frameworks', (2000) EIPR 22(3) 105-119, p111.

²⁷⁵ Lichtman, D., and Landes, W., 'Indirect Liability for Copyright Infringement: An Economic Perspective', (2003) Harvard Journal of Law & Technology 16(2) 395-410, p404.

providers²⁷⁶ which may hamper the implementation of systems that would monitor traffic flows²⁷⁷: “*The feasibility of disconnecting a person from the internet, and any attempt to police and enforce such a ban, smacks of the futile.*”²⁷⁸ Because monitoring carries cost, it is possible that ISPs may perform this task at sub-optimal levels²⁷⁹ and may prove a prohibitive financial burden on ISPs; European providers are mainly small or medium-sized enterprises²⁸⁰. Furthermore, there are a large number of operators who would be forced to implement such measures evidenced by the membership list of the Internet Service Provider Association (ISPA) which lists 135 ISP ‘organisations’ as members²⁸¹. These range from ‘Corporate’ entities, to ‘Large’, ‘Medium’ and ‘Small’ operators. As such, any potential liability would undoubtedly have an effect on the business operations of most (if not all) these ISPs; either forcing them to comply (which raises cost issues, especially for smaller enterprises) or in a way that would adversely affect their business since they do not all possess their own independent communications network (i.e. physical infrastructure). It is also worth noting that such membership (and potential liability) is not purely restricted to subscription services; members of the UK ISPA also include UK subsidiaries of companies such as Google, Microsoft and eBay. This would suggest that the definition of an ISP is all-encompassing and any-blanket regulation on liability could have far-reaching consequences for operators who do not fall within such a ‘traditional’ category. As such, liability regimes undermine the

²⁷⁶ Clark, B., ‘*Illegal downloads: sharing out online liability: sharing files, sharing risks*’, (2007) *JiPLP* 2(6) 402-418, p416.

²⁷⁷ Coudert, F., and Werkers, E., ‘*In the aftermath of the Promusicae case: how to strike the balance?*’, (2010) *International Journal of Law & Information Technology* 18(1) 50-71, p67.

²⁷⁸ Phillips, J., ‘*Three Strikes’... and then?*’, (2009) *JiPLP* 4(8), 521 (Editorial).

²⁷⁹ Schruers, M., ‘*The History and Economics of ISP Liability for Third Party Content*’, (2002) *Virginia Law Review*, 88(1) 205-264, p260.

²⁸⁰ Julia-Barcelo, R., ‘*Liability for on-line intermediaries: a European perspective*’, (1998) *EIPR* 20(12) 453-463, p462.

²⁸¹ See: <http://www.ispa.org.uk/members/>

positive attributes of the Internet by producing a reductive effect of online freedoms and diminishing network effects²⁸².

*“If they were to be obliged to screen, monitor, filter or in any other way interfere with content passing through their systems, the consequences would be considerable.”*²⁸³

In the UK, users are potentially left isolated; there is no legislative mechanism in the UK preventing their actions from being watched, and their traditional allies in terms of Net censorship are now the very organisations that threaten their online freedom through potentially becoming the enforcers of online copyright infringement. Although the public may not specifically be involved in the issue, they may still result in bearing the costs²⁸⁴. The main actors affected by any such measures will be Internet users, and the ‘community’ itself²⁸⁵. Any measure threatening access control and disconnection (even if only temporary) threatens to close off outlets for individual creativity and reflects a disproportionate balance between these two avenues; legitimate uses in relation to access to content must be clearly separated from consumption²⁸⁶. A legal system that permits (and may thus encourage) ISPs to indiscriminately eliminate potentially infringing material upon notification will unduly threaten the virtues of the digital environment²⁸⁷.

²⁸² Schruers, M., *‘The History and Economics of ISP Liability for Third Party Content’*, (2002) Virginia Law Review, 88(1) 205-264, p264.

²⁸³ Coudert, F., and Werkers, E., *‘In the aftermath of the Promusicae case: how to strike the balance?’*, (2010) International Journal of Law & Information Technology 18(1) 50-71, p71.

²⁸⁴ Schruers, M., *‘The History and Economics of ISP Liability for Third Party Content’*, (2002) Virginia Law Review, 88(1) 205-264, p232.

²⁸⁵ Julia-Barcelo, R., *‘Liability for on-line intermediaries: a European perspective’*, (1998) EIPR 20(12) 453-463, p462.

²⁸⁶ Geiger, C., *‘The future of copyright in Europe: striking a fair balance between protection and access to information’*, (2010) IPQ 1 1-14, p9.

²⁸⁷ Julia-Barcelo, R., and Koelman K.J., *‘Intermediary Liability in the E-commerce Directive: So Far So Good, but it’s Not Enough’*, (2000) Computer Law & Security report 16(4) 231-239, p234.

As much as users may be left isolated, it is also likely that ISPs are left to operate within a very narrow margin of error. As much as users may face a stark choice between infringing copyright or operating through legitimate content outlets²⁸⁸, ISPs in the UK may find themselves in a similar position with regard to providing users with access to infringing sites, thus facing liability as infringement can now involve use of their own service.

²⁸⁸ See chapter 3, pp116-117., and chapter 5, pp203-204.

Chapter 7: Creative Commons

Creative Commons

1. Introduction

The actions chronicled in this thesis thus far have largely been undertaken at the behest of rightsholders in order to safeguard their rights in the digital age¹. From a creator and user perspective, the loss of faith in copyright law, and its enforcement has led to a significant reappraisal of the role of private law in the digital environment². One initiative which warrants consideration in this case, is 'Creative Commons' (CC) which stands as a positive³ counterpoint, to the preceding expansionist nature of copyright law. Its premise is to relocate power from rightsholders to creators, who are afforded options to govern how their works may be used and re-used. In this sense, it may serve to facilitate the creation and maintenance of through utilising the positive possibilities afforded by digital technology. Like copyright law itself, it contains an important user-element as it allows users the opportunity to engage with and use content (although with conditions attached). This is important; as was stated at the beginning of this thesis, creative practice is generated by and through exposure to other content, and the availability of content is crucial in maintaining a healthy creative environment⁴. This chapter will examine whether CC can benefit the availability of creative content in relation to its 'compatibility' with copyright law and its suitability to the content it purports to govern. Crucially, in order to undertake such an examination, it is necessary to look beyond purely 'legal' sources on the issue and consider wider aspects relating to musical genres, the music industry and artist-led initiatives in promoting their work.

It appears unlikely that CC will ultimately prove to be successful. Crucially, the concept of a commons may not be appropriate in the digital environment.; ascribing the 'commons' title to what in reality is an assorted, diverse and

¹ See chapter 2, pp72-75.

² Bowery, K., *'Law & Internet Cultures'*, (2005, Cambridge), p164.

³ Corbett, S., *'Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?'*, (2011) MLR 74(4) 503-531, p515.

⁴ See chapter 1, pp26-28.

disparate collection of content implicates the necessity of control which the CC licences build upon through its basis on copyright law and author-centric focus. The author believes that this puts it into competition with copyright law in that it may serve to undermine copyright's utilitarian vision. The fact that it is based on the successful free software model and that it has a notable following does not ensure that it will have a beneficial effect on creativity in the digital environment due to the differences between software and sound recordings, as well as the difference in normative behaviour amongst their respective users. The difference between Open Source Software (OSS) and the existing content governed by CC licences do not necessarily lend themselves to being applicable inputs to all types of creative works. Crucially, the author believes that the 'amateur' context in which the movement primarily operates suggests that a market-based revenue model is impossible to develop and therefore, any resulting market-based regulation will also be negligible. This is because although CC-licensed works are available from a number of intermediary outlets, there does not appear to be any guarantee that CC licensed content is capable of having a greater role as creative inputs, is sufficiently 'protected', or is even recognised.

2. The Creative Commons movement

The movement was inspired by what was perceived as a threat to culture as a result of the influence of copyright law on creativity⁵. The movement is two-pronged; it consists of the organisation itself and the licences it offers. Both broadly operate in tandem to promote the message of the movement, and the use of CC licence tools in furtherance of this message. The CC organisation is a non-profit, US-based establishment which operates as a licensing platform to promote the free use of creative works; both in terms of cost and freedom of use (to a degree)⁶. It was founded in 2001 by James Boyle, Michael Carroll, Lawrence Lessig, Hal Abelson, Eric Saltzman and Eric Eldred⁷ who sought an alternative to the traditional copyright system. To

⁵ Corbett, S., 'Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?', (2011) MLR 74(4) 503-531, p507.

⁶ See chapter 3, p107.

⁷ See: <http://wiki.creativecommons.org/History>

an extent, the CC movement is to be admired as being a *positive* response to digital copyright infringement by removing restrictions on reproduction and distribution at the source, thus appreciating the normative expectations of users in relation to digital technology⁸. In contrast, copyright policy has largely been *negative* (or restrictive) in its response⁹ and its practice. As a counter-point to this, the Creative Commons: “... *develops, supports, and stewards legal and technical infrastructure that maximises digital creativity, sharing, and innovation.*”¹⁰

Hostility to copyright has a long and ‘honourable’ history¹¹, but the CC strategy does not aim to create a public domain¹² in the legal sense of a regime free of any exclusive property rights; crucially, its normative framework still relies on an existing property regime. Rather, it assumes it is possible to replace existing content production and distribution practices¹³ with the ultimate objective of placing creative works into resources that will make them available to the public¹⁴: “*Underlying the project is also a desire to promote alternatives to a one-way, passive consumption of commercialized culture.*”¹⁵ As such, it arguably aims to create and promote an alternative market for the production and consumption digital content¹⁶ in

⁸ See chapter 3, p121-126.

⁹ Kriskis, M., and Petrauskas, R., ‘*Lessig’s implications for intellectual property law and beyond them*’, (2005) *International Review of Law, Computers & Technology* 19(3) 305-316, p309.

¹⁰ See: <http://creativecommons.org/about>

¹¹ Gordon, W.J., ‘*An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*’, (1989) 41 *Stanford Law Review* 1343-1460, p1344.

¹² Dusollier, S., ‘*The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*’, *Journal of Law & the Arts* 271-293, p278.

¹³ Elkin-Koren, N., ‘*What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*’, (2005) 74 *Fordham Law Review* 375-422, p377.

¹⁴ Dusollier, S., ‘*The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*’, *Journal of Law & the Arts* 271-293, p272.

¹⁵ Goss, A.K., ‘*Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project*’, (2007) 82 *Chi-Kent L Rev* 963-996, p977.

¹⁶ In contrast to the market discussed in chapter 3, pp104-119

line with norms and the possibilities afforded by digital architecture¹⁷. Although it began in the US, it is now a global movement¹⁸. CC perceives the current copyright regime as a major obstacle for creative activity, and that copyright regulation perhaps applies ‘too well’¹⁹: “*For years, copyright has been a nagging restraint on all forms of popular reuse concepts.*”²⁰

The origins and inspirations of the CC movement can be seen in the development of the GNU operating system and associated General Public Licence (GPL), and the later Open Source Software (OSS) initiatives²¹. The idea was that there should be a public commons of computer software and that it should be ‘free’ in terms of access (as opposed to cost²²) such that the resulting language of the CC licences thus share important characteristics with the GPL and other open source licences²³. Importantly, the issue of ‘free’ does not bear its financial meaning here: “*Free in this context usually means that users are free to use, modify and continue to share the software.*”²⁴ CC stands against broad copyright regulation and enforcement

¹⁷ See chapter 1, pp33-34 and chapter 2, p73.

¹⁸ It has a global affiliate network, see: http://wiki.creativecommons.org/CC_Affiliate_Network

¹⁹ Lemley, M.A., ‘*Dealing with Overlapping Copyrights on the Internet*’, (1997) U Dayton L Rev 547-585, p549.

²⁰ Negativland, ‘*Two Relationships to a Cultural Public Domain*’, (2003) 66 Law & Contemporary Problems 239-262, p262. Although this is not necessarily always the case regarding the production of music, see chapter 1, pp28-32 and chapter 5, pp191-192.

²¹ Dusollier, S., ‘*The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*’, Journal of Law & the Arts 271-293, p274.

²² For further discussion on the issue of ‘free’, see chapter 3, pp105-110.

²³ Loren, L.P., ‘*Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*’, (2007) 14 Geo Mason L Rev 271-328, p286.

²⁴ Dusollier, S., ‘*The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*’, Journal of Law & the Arts 271-293, p274. See also the discussion of ‘free’ in chapter 3, pp105-1010.

by offering specific licensing tools applicable to all fields of creative works and freely accessible and available for anyone to use²⁵:

*“The main purpose of Creative Commons parallels that of the free software movement which seeks to use copyright to authorise, rather than inhibit, copying, distribution, modification and re-use of software and other copyrighted works.”*²⁶

The OSS Movement and GPLs are widely considered successful by proponents of a Creative Commons-style system²⁷. Open Source is governed by the GPL and it is this licence that forms the basis for any resulting innovation, development and uptake. Such a basis has theoretical promise; the free software movement perhaps best reflects a peer-production and commons-based aspect to creation, and its functional success forces observers to take seriously such an approach as a form of production²⁸.

2.1 Operation

The overall strategy of the movement can be described as twin-track: a legal component consisting of the licensing model; and, a symbolic component promoting the philosophies of sharing and contribution²⁹. The CC movement has popularised copyright scepticism by developing alternative licences for creators³⁰. In any field of endeavour some acts may be privileged, some

²⁵ Loren, L.P., ‘*Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*’, (2007) 14 Geo Mason L Rev 271-328, p273.

²⁶ Dusollier, S., ‘*The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*’, Journal of Law & the Arts 271-293, p274.

²⁷ See, for example, Benkler Y., and Nissenbaum, H., ‘*Commons-based Peer production and Virtue*’, (2006) The Journal of Political Philosophy 14(4) 394-419.

²⁸ Benkler Y., and Nissenbaum, H., ‘*Commons-based Peer production and Virtue*’, (2006) The Journal of Political Philosophy 14(4) 394-419, p395.

²⁹ Dusollier, S., ‘*The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*’, Journal of Law & the Arts 271-293, p272.

³⁰ Litman, J., ‘*Digital Copyright*’, (2006, Prometheus Books), p200.

forbidden, and some required³¹. In this case, a CC licence applies in addition to, and on top of an existing copyright, and gives the author the ability to dictate how others may exercise the author's copyright rights³²: "*The licenses facilitate innovation, speech, and the distribution of rights to make, access, and remake culture.*"³³ When using the CC systems, the rightsholder has two decisions to make; the first is whether to allow commercial as well as non-commercial uses, and second, whether to allow derivative works to be created based on the original work. Once this decision is made and a licence chosen, the work and the licence attached to it are inseparable³⁴.

These decisions can be combined in various ways (along with the necessary and non-optional attribution component) so as to result in the availability of six different CC licences³⁵. The licences are expressed in three different 'layers'³⁶: the 'legal code'; a deed; and, the Rights Expression Language (REL)³⁷. The legal code is the full legal text of the rights that exist regarding the work (lawyer-readable code), the deed explains the licence in terms of information the public needs to know (human-readable code), and the REL describes the key licence elements that apply to a work to enable discovery through CC-enabled search engines (machine readable code)³⁸. Though it is

³¹ Gordon, W.J., '*An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*', (1989) 41 Stanford Law Review 1343-1460, p1399.

³² See: <http://creativecommons.org/licenses/>

³³ Chander, A., and Sunder, M., '*The Romance of the Public Domain*', (2004) 92 California Law Review 1331-1374, p1362.

³⁴ Corbett, S., '*Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?*', (2011) MLR 74(4) 503-531, p526.

³⁵ See: <http://creativecommons.org/licenses/>

³⁶ Ibid.

³⁷ Also mentioned in relation to Digital Rights Management (DRM), see chapter 5, pp182-183.

³⁸ "*Searching for open content is an important function enabled by our approach.*" See: <http://creativecommons.org/licenses/>

essentially 'private'³⁹ in nature (as opposed to the public rationale of copyright): *"It promises to allow the individuals and communities to figure out, on their own, a way to bypass the increasingly protectionist global intellectual property regime."*⁴⁰ Furthermore, it endeavours to lower the costs associated with copyright in terms of producing new works; the 'permissions process' can be cumbersome and expensive⁴¹; therefore, these private actors have attempted to create a type of 'modularised' contract that rightsholders can use to pre-authorise use(s) of their content⁴². The 'fulcrum' of this position is the creator's control over content use through the CC licensing structure, conveying a formal expression of legal identity⁴³ which allows them to extract agreements on reproduction⁴⁴. Broadly speaking, the key elements of the CC licences are Attribution (contained in all licences), NonCommercial, ShareAlike, and NoDerivatives. It is important to note that all the non-commercial licences contain a special provision for file-sharing (as this is deemed a commercial activity⁴⁵), which is permitted, provided this is no monetary compensation⁴⁶. All the licences also terminate automatically if a

³⁹ Goss, A.K., 'Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project', (2007) 82 Chi-Kent L Rev 963-996, p982: *"Creative Commons is an attempt to modularize private negotiation around statutory law in order decrease the transaction costs associated with encouraging re-use and free use."*

⁴⁰ Elkin-Koren, N., 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons', (2005) 74 Fordham Law Review 375-422, p376.

⁴¹ See chapter 1, p31.

⁴² Goss, A.K., 'Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project', (2007) 82 Chi-Kent L Rev 963-996, pp963-964.

⁴³ Bowrey, K., 'Law & Internet Cultures', (2005, Cambridge), p169.

⁴⁴ Gordon, W.J., 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory', (1989) 41 Stanford Law Review 1343-1460, p1418.

⁴⁵ As the Court in Napster found, see chapter 4, pp139-140.

⁴⁶ CC website FAQ, see: http://wiki.creativecommons.org/Frequently_Asked_Questions. Peer-to-peer technology is seen by CC as a powerful distribution tool and the trading of works online is not defined as commercial use under the CC documents provided it is not done for monetary gain.

work is used contrary to the specified licence terms⁴⁷. They also do not prejudice any limitations to copyright law, and can also operate for ‘analogue’ (or offline) works⁴⁸. The six available licences are:

Attribution	Lets others distribute, modify, and build upon the work (including commercially) as long as they credit the author for the original creation.
Attribution Share Alike	As above, as long as they credit the original author and licence their new creations under identical terms.
Attribution No Derivatives	Allows for commercial and non-commercial re-distribution of a work provided it is credited to the author and not modified.
Attribution Non-Commercial	Lets other distribute, modify and build upon the work although only for non-commercial purposes. Any new works created must also acknowledge the author and be non-commercial, although they do not need to be licensed on the same terms.
Attribution Non-Commercial Share Alike	Also allows other to modify and build upon the work non-commercially as long as the author is credited and new works licensed under identical terms.

⁴⁷ See the legal code for Attribution-NonCommercial (s.4.b), Attribution-NonCommercial-NoDerivs (section 4.b), and Attribution-NonCommercial-ShareAlike (s.4.c). All available from: <http://creativecommons.org/licenses/>

⁴⁸ Corbett, S., ‘Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?’, (2011) MLR 74(4) 503-531, pp509-513.

Attribution Non-Commercial No Derivatives	This is the most restrictive licence only allowing re-distribution with credit to the original author.
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The aim of these licences is (broadly) to authorise the use of copyrighted works for purposes that would constitute infringement under traditional copyright law⁴⁹. By authorising through a CC licence, use of such a work succeeds where the operation of copyright may fail⁵⁰: *“It is already quite clear that copyright law prevents the unauthorized transmission of copyrighted material over the Internet; the problem is that it does so in a haphazard way.”*⁵¹ Furthermore, it has the added advantage of being drafted with the digital medium (of distribution) in mind⁵² which may, in theory, assist with the development of positive normative behaviour as such digital architecture has been instrumental in shaping user norms in the past⁵³.

3. Incompatibility

The fact that CC operates with copyright law is perhaps its most workable aspect, as it does not require any restructuring of copyright law itself and is unlikely to prejudice the interests served by the existing regime⁵⁴. As such, its foundation on copyright is arguably necessary⁵⁵. However, there is a

⁴⁹ Dusollier, S., *‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright’*, Journal of Law & the Arts 271-293, p271.

⁵⁰ See Loren, L.P., *‘The Changing Nature of Derivative Works in the Face of New Technologies’*, (2000) 4 The Journal of Small & Emerging Business Law 57-94, pp88-90.

⁵¹ Lemley, M.A., *‘Dealing with Overlapping Copyrights on the Internet’*, (1997) U Dayton L Rev 547-585, p583.

⁵² Ibid, p574 and at p573: *“Ordinarily, the problems of adapting to an unanticipated medium can be taken care of by careful drafting of the license (sic) agreement.”* See also chapter 2, pp82-83 where the opposite was asserted in relation to the WIPO Treaties.

⁵³ See chapter 3, pp121-126

⁵⁴ Goss, A.K., *‘Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project’*, (2007) 82 Chi-Kent L Rev 963-996, p992.

⁵⁵ Polk Wagner, R., *‘Information Wants to Be Free: Intellectual Property and the Mythologies of Control’*, (2003) Columbia Law review 103(4) 995-1034, p1024.

legal incompatibility between a conceptual view of a 'commons' and the digital environment. As well as this, there is incompatibility between CC and copyright itself, and also incompatibility between CC licensed content and that governed by similar licence mechanisms.

As a system, it is widely held that a 'commons' is by definition tragic (such that it will be depleted and not maintained) and therefore: "*Private property saves lives.*"⁵⁶ Private property is efficiency's answer to the 'tragedy of the commons' and two macro-level perspectives are generally identifiable: one focusing on private ownership of information in models drawn from property theory (as may be paralleled with Locke's Labour Theory⁵⁷, which in the current context is inappropriate⁵⁸); and, the other focussing on common ownership⁵⁹. These debates are based on the notion that common and private uses of information are inherently and primarily conflicting⁶⁰.

However, with the rise of digital technology, the debates about property have moved from land to information⁶¹. The introduction of the CC system reflects the changes in the concentration and subsequent decentralisation of information (and content) production⁶² that digital technology facilitates⁶³. Nonetheless, the production and distribution of music in digital form still functions in accordance with the operation of rightsholders⁶⁴ who have utilised copyright to preserve their pre-existing market operation⁶⁵ CC could also be seen as a response, not just to digital technology, but also to the

⁵⁶ Boyle, J., '*Second Enclosure*', (2003) 66 Law & Contemp Probs 33-74, p36.

⁵⁷ See chapter 2, pp49-51.

⁵⁸ Ibid, p48 and p51.

⁵⁹ Heverly, R., '*Information Semicommons*', (2003) 18 Berkeley Technology Law Journal 1127-1189, p1143.

⁶⁰ Ibid, p1143.

⁶¹ Chander, A., and Sunder, M., '*The Romance of the Public Domain*', (2004) 92 California Law Review 1331-1374, p1333.

⁶² See Benkler, Y., '*The Commons as a Neglected factor of Information Policy*', p24, available from: <http://www.benkler.org/commons.pdf>

⁶³ See chapter 1, pp33-34 and chapter 2, pp73-74.

⁶⁴ See chapter 1, p21-22.

⁶⁵ See chapter 3 pp110-119, as discussed further in chapters 4, 5 and 6.

effect it has had on copyright law⁶⁶ which has been expansively applied by rightsholders to secure their rights in the digital environment⁶⁷. It also reflects the creative reality that all creative content is based (to varying extents) on pre-existing content: *"It is impossible to divest oneself of that to which one has been exposed."*⁶⁸ However, digital technology has raised the stakes:

*"With the power to create and distribute creative works on a large scale, and the impetus to use copyrighted building blocks that are at hand, comes the spectre of copyright infringement."*⁶⁹

This implicates content inputs which can be used without being subject to control⁷⁰: *"The most evident conflict created ... is the copyright problem inherent in creating 'new' works."*⁷¹ Although there is ambiguity when it comes to instances of potential infringing re-use, it is not always the case that copyright poses a problem in creating new works⁷². CC and copyright systems are therefore co-existent insofar as CC is entirely dependent on copyright⁷³, but the licensing component of CC could also be seen to be in

⁶⁶ See generally, Litman, J., *'Reforming Information Law in Copyright's Image'*, (1997) 22 U Dayton L Rev 587-619. See also chapter 2, p74. However, the same argument could be made with regard to prevalence of licences in general.

⁶⁷ See chapters 4, 5 and 6.

⁶⁸ Madison, M.J., Frischmann, B.M., and Strandburg, K.J., *'Constructing Commons in the Cultural Environment'*, Legal Studies research paper Series, Working paper No. 2008-26, University of Pittsburgh, p672. See also chapter 1, pp25-27.

⁶⁹ Van Houweling, M.S., *'Distributive Values in Copyright'*, (2005) Texas Law Review 83(6) 1536-1579, p1563.

⁷⁰ Benkler, Y., *'The Commons as a Neglected factor of Information Policy'*, p28, available from: <http://www.benkler.org/commons.pdf>

⁷¹ Hunter, D., and Lastowka, F.G., *'Amateur-To-Amateur'*, (2004) 46 William and Mary Law Review 951-1030, p985.

⁷² See chapter 1, pp26-32 and chapter 5, pp191-193.

⁷³ Elkin-Koren, N., *'Exploring the Creative Commons: A Skeptical View of a Worthy Pursuit'*, (2006), p1. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885466
See also Loren, L.P., *'Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright'*, (2007) 14 Geo Mason

competition with copyright itself as both are concerned with the prohibition or exclusion of specified uses⁷⁴. Such conflict is undesirable⁷⁵. However, it is difficult to separate CC (or any notion of a 'commons') from its natural and cultural background because cultural activity is always related to (in this case) the digital environment⁷⁶, and is therefore grounded in the Lessigian framework established in chapter three⁷⁷, where norms, the market and architecture all have subjective and varying roles to play in regulating user behaviour. As such, it is questionable whether the idea of a 'commons' is necessary. This incompatibility will therefore be explored; first in light of the conception of a 'commons', then in terms of copyright itself, and finally in relation to content.

3.1 Commons incompatibility

Most CC licences seek to place works in a 'commons'⁷⁸; a term that has come to be used increasingly over the last number of years to refer to wellsprings of creation that are outside of, or different from the world of intellectual property⁷⁹. In essence, the idea of a 'commons' refers to a situation where access to, and use of, a given resource is organised on a non-exclusionary basis. In contrast to public and private property, and reduced to its conceptual minimum, it entails a situation where no specific

L Rev 271-328, p275: *"The Creative Commons tools are an innovative attempt to create a category of creative works which essentially are governed by a different set of copyright rules."*

⁷⁴ Gordon, W.J., *'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory'*, (1989) 41 *Stanford Law Review* 1343-1460, p1368 talking about the differences between tangible and intangible products in this respect. 'Use' can be defined as: "... the right to refuse other the privilege of using the work in specified ways." p1390.

⁷⁵ The 'undesirability' of conflicting systems is a point made in the context of DRM by Kriskis, M., and Petrauskas, R., *'Lessig's implications for intellectual property law and beyond them'*, (2005) *International Review of Law, Computers & Technology* 19(3) 305-316, p310.

⁷⁶ See chapter 1, pp25-27.

⁷⁷ See chapter 3, p126.

⁷⁸ Corbett, S., *'Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?'*, (2011) *MLR* 74(4) 503-531, p518.

⁷⁹ Boyle, J., *'Second Enclosure'*, (2003) 66 *Law & Contemp Probs* 33-74, p62.

individual or entity is recognised under the law as having a right to exclude others from access to and use of a given resource⁸⁰. Society's move to the information economy and a low cost communications environment has allowed this non-market production to play an increasingly important role in cultural production⁸¹. As such, this reflects the 'natural intellectual (or creative) environment' that the basic idea of a 'commons' suggests:

*"... the natural intellectual environment consists of a vast pool of open intellectual resources within which and with which we experience life and engage in a wide variety of activities and practices."*⁸²

CC necessarily involves an assertion of control by the author (through a chosen licence), but the legal device by which a commons is created is analytically different from how property rights are created⁸³. Regarding the former; the legal construct is a declaration of abstention, whilst the latter requires a declaration of intervention⁸⁴. Some 'control' of the commons⁸⁵ (in line with copyright's proprietary nature) also contrasts with an 'abstentionist' vision⁸⁶ necessary for a commons to operate. CC gets around this in a rather clumsy (although perhaps necessary) way: *"... Creative Commons first asserts the copyright in the work that the licence then aims to regulate."*⁸⁷ As

⁸⁰ Cahir, J., *'The withering away of property: the rise of the internet information commons'*, (2004) OJLS 24(4) 619-641, p621.

⁸¹ See generally, Benkler, Y., *'Freedom in the Commons: Toward a Political Economy of Information'*, (2003) 52(6) Duke Law Journal 1245-1276.

⁸² Madison, M.J., Frischmann, B.M., and Strandburg, K.J., *'Constructing Commons in the Cultural Environment'*, Legal Studies research paper Series, Working paper No. 2008-26, University of Pittsburgh, p686. See also chapter 1, pp25-27 and chapter 2, pp54-75.

⁸³ Benkler, Y., *'The Commons as a Neglected factor of Information Policy'*, p23, available from: <http://www.benkler.org/commons.pdf>

⁸⁴ Ibid, p23.

⁸⁵ As discussed in Lessig, L., *'The Future of Ideas: The Fate of the Commons in a Networked World'*, (2002, Vintage Books), pp85-99.

⁸⁶ Benkler, Y., *'The Commons as a Neglected factor of Information Policy'*, p2, available from: <http://www.benkler.org/commons.pdf>

⁸⁷ Dusollier, S., *'The Master's Tools v. The Master's House: Creative Commons v. Copyright'*, Journal of Law & the Arts 271-293, p283.

such, it is important that CC is based on copyright, as behind every privilege is a right which enables the privilege to be granted⁸⁸; control is necessary, because without it, you cannot surrender parts of it. This leads to a paradox whereby any commons can expand even as proprietary content is created⁸⁹. Nonetheless, framing the movement in terms of a 'commons' therefore presupposes some form of control, which is realised through licensing, and in the case of CC; six licensing variations on control.

Relating a 'commons' to the sphere of landed property is unhelpful; any 'tragedy of the commons' is negated by the realities of digital reproduction: "*An information commons is possible because information is nonrival, and is an input and an output of its own production process.*"⁹⁰ Therefore, such a 'commons' could theoretically exist in the form of any available digital content, whether copyrighted or not⁹¹. This may arguably be negated by recent developments in Digital Rights Management as exclusionary technologies and a consequent evolution of streaming-based content distribution and consumption⁹². However, whilst this can affect the individual users, it does not affect the non-rivalrous nature of digital content itself. A great deal of infringement occurs every day⁹³ which suggests that even digital copyrighted content can form part of the aforementioned 'natural environment' where it can be seen as 'natural practice':

⁸⁸ Gordon, W.J., *'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory'*, (1989) 41 Stanford Law Review 1343-1460, p1398.

⁸⁹ Polk Wagner, R., *'Information Wants to Be Free: Intellectual Property and the Mythologies of Control'*, (2003) Columbia Law review 103(4) 995-1034, p1002.

⁹⁰ Benkler, Y., *'The Commons as a Neglected factor of Information Policy'*; p21, available from: <http://www.benkler.org/commons.pdf>

⁹¹ See chapter 3, pp93-94.

⁹² See chapter 5, pp193-204.

⁹³ Polk Wagner, R., *'Information Wants to Be Free: Intellectual Property and the Mythologies of Control'*, (2003) Columbia Law review 103(4) 995-1034, p1010. See also Hunter, D., and Lastowka, F.G., *'Amateur-To-Amateur'*, (2004) 46 William and Mary Law Review 951-1030, p964: "*Indeed, most of us infringe copyright laws as a matter of course in our information-saturated society.*"

“The human environment ... is a media-saturated realm of copyright-protected information in the form of texts, images and sounds, which invariably become part of our cultural vocabulary.”⁹⁴

Because of this, the author maintains that any reference to commons theory as grounded in the area of landed property is both unnecessary and irrelevant; it does not reflect the nature of the digital environment and copyright’s utilitarian justification⁹⁵.

It is in this ‘commons’ reality that the traditional economics of copyright fades away in that the scarcity of cultural goods is not actually as scarce as may be perceived. The author asserts that it is possible to regard the commons as any digital content that is available to the user (from a variety of sources on the Internet). As such, the issue in the digital environment is one of distribution⁹⁶ and *not* authorisation; which is the focus of CC⁹⁷. Whether or not the content is under copyright protection is irrelevant so long as it is available. Because CC applies only to self-prescribed works (as opposed to copyright’s automatic protection), this suggests that CC-licensed content can only operate in competition to non-CC licensed content that is protected ‘only’ by copyright. Therefore, CC may arguably be trying to re-establish such scarcity through establishing a specific body of CC-licensed content which presents a choice between CC-licensed content with relevant permissions, and purely copyrighted content where such permissions are not necessarily expressly granted. This is similar to the arguments regarding market choice discussed in light of the market modality⁹⁸ and those made in light of DRM⁹⁹; that users are being forced to choose between different (legitimate) sources

⁹⁴ Hunter, D., and Lastowka, F.G., ‘*Amateur-To-Amateur*’, (2004) 46 William and Mary Law Review 951-1030, p985. See also chapter 3, p94.

⁹⁵ See chapter 2, pp41-49.

⁹⁶ See chapter 2, p74, chapter 4, p159 and chapter 5, pp173-174.

⁹⁷ As stated by Dusollier, see Dusollier, S., ‘*The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*’, Journal of Law & the Arts 271-293, p271.

⁹⁸ See chapter 3, p106.

⁹⁹ See chapter 5, p203-204.

and providers of content. In this case however, the choice is between available digital copyrighted content (regardless of legality) or CC-licensed content.

As such, CC 'aggregators' are especially important in providing access to such content. If it is accessible, then it can add to the pool of resources (including the public domain and 'ideas') that users can engage with and use as the genesis for new works. It could even be argued that because content is so easily available online, the boundaries between the commons and protected content have blurred to the point of indivisibility: "*All popular music ... essentially, if not legally, exists in a public domain.*"¹⁰⁰ CC operates to de-lineate and re-establish these boundaries.

3.2 Copyright incompatibility

The CC movement supposes a close relationship between creators and users (to the point of indistinction¹⁰¹). By placing creators and users in closer ideological proximity, this should foster a positive norm of take-up and adherence to the licence agreement; the fact that the licence comes 'attached' with the content it governs (and by implication, the creator) should provide more appreciability and closer (social) proximity is likely to make reciprocity more likely to influence behaviour¹⁰². Therefore, it could potentially operate to develop normative user behaviour in a way that copyright, and its enforcement, does not¹⁰³. However, the impact of digital architecture on user norms related to content itself, rather than the relationship between creator and user. Therefore, the utilisation of digital architecture by CC, and consequent operation of the licences directed

¹⁰⁰ Oswald, J., *Plunderphonics, or Audio Piracy as a Compositional Prerogative*, (1985), available from: <http://www.plunderphonics.com/xhtmll/xplunder.html>

¹⁰¹ See chapter 1, pp33-34.

¹⁰² Schultz, M.F., *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, (2006) 21 Berkeley Technology Law Journal 651-728, p716.

¹⁰³ See chapter 3, p97 and p103.

towards this relationship, was arguably never a feature in users' normative behaviour in the first place.

The situation is also much more complicated than that perceived by CC¹⁰⁴. Copyright offers its own perplexities¹⁰⁵ so the fact that CC as an alternative 'endeavour' has emerged is not surprising¹⁰⁶. However, CC does nothing to necessarily remove these 'perplexities', and may add to them through extending the creator's control. Despite the structures inherent in copyright law, copying often happens without attribution¹⁰⁷. Therefore, because CC also advocates the use of content¹⁰⁸ with attribution, this adds a further complexity, and the necessity of attribution represents a further extension of control impacting on users' liberty¹⁰⁹. Copyright's requirements for attribution are much more limited¹¹⁰. This CC complexity may also affect third parties who did not take part in the initial bargain¹¹¹: "*virtually all entitlements necessarily involve a lack of consent on the part of some persons affected.*"¹¹² As a result, such licences can often fail to take into account the public interests that in the case of copyright (should) go beyond the interests

¹⁰⁴ See the modalities diagram in chapter 3, p126.

¹⁰⁵ Lange, D., 'Recognizing the Public Domain', (1981) *Law and Contemporary Problems* 44(4) 147-178, p157.

¹⁰⁶ Litman, J., 'Reforming Information Law in Copyright's Image', (1997) 22 *U Dayton L Rev* 587-619, p618.

¹⁰⁷ Bartow, A., 'Copyrights and Creative Copying', (2004) 1 *U Ottawa L & Tech J* 76-104, p91.

¹⁰⁸ Goss, A.K., 'Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project', (2007) 82 *Chi-Kent L Rev* 963-996, p983.

¹⁰⁹ Gordon, W.J., 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory', (1989) 41 *Stanford Law Review* 1343-1460, p1421.

¹¹⁰ For example in the UK, only arising in cases of Fair Dealing or where Moral Rights may be an issue under ss.28-30, ss.77-64, respectively, under the Copyright, Designs and Patents Act (CDPA), 1988.

¹¹¹ Elkin-Koren, N., 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons', (2005) 74 *Fordham Law Review* 375-422, p416.

¹¹² Gordon, W.J., 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory', (1989) 41 *Stanford Law Review* 1343-1460, p1428.

of the immediate contracting parties¹¹³: “Rarely can we be sure that our perception of a particular interest is more like an approximation of someone else’s perception of the same interest.”¹¹⁴ As established in chapter 3, normative behaviour of users is complicated; involving and depending on many other factors, all of which are *subjective* to the user¹¹⁵. Therefore, focussing on users’ normative behaviour in light of architecture may be beneficial, but only up to a point as users’ normative behaviour is also determined by other factors.

There appears to be a dichotomy between the ideology and practice of the movement; it is based on the premise of relocating power in the hands of the creators, but at the same time aims to be grounded in the expectations of users¹¹⁶ (in terms of allowing the re-use of content); it both purports to reduce control by actually extending it. This can be seen through the operation of their licensing system, which although built upon copyright subverts its use in such a way as to change its meaning¹¹⁷. The CC licensing arrangements very much focus on the creator (i.e. re-establishing the primacy of the ‘author’¹¹⁸) of the work as also being the owner of the work as is the case with copyright law itself; the author of a work is treated as being its first owner¹¹⁹. However, CC’s emphasis on authorship may have a

¹¹³ Elkin-Koren, N., “Exploring the Creative Commons: A Skeptical View of a Worthy Pursuit”, (2006), p16. Available from:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885466

¹¹⁴ Lange, D., ‘Recognizing the Public Domain’, (1981) *Law and Contemporary Problems* 44(4) 147-178, p15.

¹¹⁵ See chapter 3, p87.

¹¹⁶ Dusollier, S., ‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright’, *Journal of Law & the Arts* 271-293, p288.

¹¹⁷ Elkin-Koren, N., “Exploring the Creative Commons: A Skeptical View of a Worthy Pursuit”, (2006), p1. Available from:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885466. Similarities may also be seen with the ‘copyleft’ dimension to the GNU GPL, see Stallman, R., ‘What is Copyleft?’, available from: <http://www.gnu.org/copyleft/>, and, ‘Copyleft: Pragmatic Idealism’, available from: <http://www.gnu.org/philosophy/pragmatic.html>

¹¹⁸ See chapter 2, p42.

¹¹⁹ S.11, Copyright, Designs and Patents Act (CDPA), 1988.

similar effect to what rightsholders have previously endeavoured to do through utilising arguments on authorship to improve their position¹²⁰; the operation of the CC licensing system extends control over content in much the same fashion. In order to 'live up' to copyright's utilitarian basis, the solution should be to provide more choice, instead of more burdens¹²¹ for the user. In such circumstances, CC may be seen as an extension of power into the digital realm where once this may have been seen as 'free'¹²² from control, as engendered by digital technology. Therefore, CC labours under a misunderstanding of copyright's utilitarian foundations, and effectively contradicts them:

*"It could be argued that the Creative Commons story, whilst told in anticipation of causing real social effect, is also the public performance of a different tune to legislators and courts alike – raising the profile of a different legal story about copyright creators and users."*¹²³

This may then have a subsequent impact on copyright's utilitarian goal. However, despite the attribution referring to 'authorship' (as distinct from ownership), through historical copyright practice, ownership has been dominant, to the extent that it is necessary to benefit copyright's utilitarian premise¹²⁴. The focus on authorship also negates what has been made possible by digital technology; aside from the 'author': "... *the Internet itself is a technology of production.*"¹²⁵ Creative production can nonetheless involve high initial costs¹²⁶ which have traditionally been mediated through capital¹²⁷;

¹²⁰ See Deazley, R., *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)*, (2004, Hart), pp191-212.

¹²¹ Goss, A.K., *Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project*, (2007) 82 Chi-Kent L Rev 963-996, p996.

¹²² Bowrey, K., *Law & Internet Cultures*, (2005, Cambridge), p166.

¹²³ *Ibid*, p165.

¹²⁴ See chapter 2, p48.

¹²⁵ Hunter, D., and Lastowka, F.G., *Amateur-To-Amateur*, (2004) 46 William and Mary Law Review 951-1030, p1001. See also chapter 1, p26-27 and chapter 2, p72.

¹²⁶ Goss, A.K., *Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project*, (2007) 82 Chi-Kent L Rev 963-996, p974. See also chapter 1, p.p21-22.

implicating a broader economic structure at an 'industrial' level, but also at an individual level¹²⁸. As such, CC presents a very narrow view of authorship as being someone who will always (and always has to under CC) permit the use/re-use of their work without remuneration: "*This ethos of sharing suggests that the economic model put in place by the Creative Commons licenses is one of gratuity.*"¹²⁹ As a result, it is questionable whether creators would then have sufficient incentives to produce new works in a system that mandates non-commercial use¹³⁰. It is crucial to note that 'profit' (in the financial sense) is not something that is important in this context as users are not always financially motivated or interested in paying for information that others create¹³¹ (in which case, CC may be more closely aligned with copyright's moral rights¹³²). Likewise, CC is not a mechanism to facilitate such profit, other than the 'value' that comes from attribution. This may be the most important thing above all else¹³³ for creators; in which case CC may be of benefit: "*Copyright's processes are relevant primarily to centralized copyright industries ... For amateurs, however, it isn't clear that copyright law*

¹²⁷ Hunter, D., and Lastowka, F.G., '*Amateur-To-Amateur*', (2004) 46 William and Mary Law Review 951-1030, p979.

¹²⁸ Van Houweling, M.S., '*Distributive Values in Copyright*', (2005) Texas Law Review 83(6) 1536-1579, p1540.

¹²⁹ Dusollier, S., '*The Master's Tools v. The Master's House: Creative Commons v. Copyright*', Journal of Law & the Arts 271-293.

¹³⁰ Gordon, W.J., '*An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*', (1989) 41 Stanford Law Review 1343-1460, p1409.

¹³¹ Hunter, D., and Lastowka, F.G., '*Amateur-To-Amateur*', (2004) 46 William and Mary Law Review 951-1030, p956.

¹³² See Corbett, S., '*Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?*', (2011) MLR 74(4) 503-531, pp520-522.

¹³³ Flichy, P., '*Discourse on the New Economy – passing fad or mobilizing ideology?*', in Brousseau, E., and Curien, N. (eds), '*Internet and Digital Economics: Principles, Methods and Applications*', (2007, Cambridge), chapter 3, pp114-142, p119. See chapter 2, pp76-77 and the discussion of possession as 'value' in chapter 3, pp107-108..

*is very important at all.*¹³⁴ But this is not necessarily true from the users' perspective where 'value may take a different form'¹³⁵.

A transition from recognition to commercial exploitation would be problematic: "Once an audience for an individual's work develops, the question of compensation becomes more fraught."¹³⁶ Such an 'amateur' context may be to the movement's detriment as creators would be unlikely to devote themselves fully to 'authorship' if they cannot profit from the value that others place in their work¹³⁷. On the premise that CC is developed from copyright, the author does not believe it will do anything to further creativity beyond copyright. CC does not prohibit reuse and therefore, potentially prevents a market developing for that work because copying is not a right that the author can to exclude others from doing. Copyright brings greater entitlement and as a result, it is questionable whether authors would have sufficient incentives to produce new works in a system that provides licences for non-commercial use¹³⁸ in a way that would inhibit the utilitarian goal of copyright. CC is therefore not a mechanism to facilitate the necessary market for copyrighted content¹³⁹. As such, this lack of a viable market alternative suggests that this modality of regulation could not operate to regulate user behaviour positively *towards* CC. Instead, users may still operate in accordance with the market modality presented in chapter 3¹⁴⁰ which may override any CC market and resultant norms it may create.

This brings the argument full-circle; although there are mechanisms to facilitate audience-building; the only mechanism by which to receive

¹³⁴ Hunter, D., and Lastowka, F.G., 'Amateur-To-Amateur', (2004) 46 William and Mary Law Review 951-1030, p1026.

¹³⁵ See chapter 2, pp76-77 and chapter 3, pp107-108.

¹³⁶ Zimmermann D.L., 'Authorship Without Ownership: Reconsidering Incentives in a Digital Age', (2003) DePaul Law Review 1121-1170, p1145.

¹³⁷ Ibid, p1137.

¹³⁸ Gordon, W.J., 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory', (1989) 41 Stanford Law Review 1343-1460, p1409.

¹³⁹ See chapter 2, p45.

¹⁴⁰ See chapter 3, pp104-119.

'compensation' is the pre-existing copyright structure. As CC lacks a commercial dimension, copyright may be preferable¹⁴¹ as it can allow for increased exploitation which can subsequently increase value¹⁴².

3.3 Content incompatibility

The CC licence platform is based on experience from the Open Source movement which offers a range of software licences as well as licences for other types of content under the control¹⁴³ of the GPL. This stipulates that any copies, even if modified, must carry the same licence (or 'viral'). Although both movements necessitate control¹⁴⁴, CC offers a choice of different licence options considered suitable instruments for promoting sharing and reuse¹⁴⁵: *"It is exactly this diversity of licensing options that makes Creative Commons's licensing scheme less effective."*¹⁴⁶ Furthermore, the political nature of the movement and the variety of licensing options, may lead to diverse motivations (and consequent normative behaviours) among those who utilise them¹⁴⁷, thereby providing less cohesion to CC in comparison to that of the GPL. The GPL demonstrates an egalitarian ideology: *"Because the GPL regulates derivations ... the inevitable improvements on Linux must also be shared according to the free access*

¹⁴¹ Gordon, W.J., *'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory'*, (1989) 41 Stanford Law Review 1343-1460, p1419.

¹⁴² As it did with software, Flichy, P., *Discourse on the New Economy – passing fad or mobilizing ideology?*, in Brousseau, E., and Curien, N. (eds), *'Internet and Digital Economics: Principles, Methods and Applications'*, (2007, Cambridge), chapter 3, pp114-142, p120.

¹⁴³ Dusollier, S., *'The Master's Tools v. The Master's House: Creative Commons v. Copyright'*, Journal of Law & the Arts 271-293, p275.

¹⁴⁴ Polk Wagner, R., *'Information Wants to Be Free: Intellectual Property and the Mythologies of Control'*, (2003) Columbia Law review 103(4) 995-1034, p1029.

¹⁴⁵ Elkin-Koren, N., *'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons'*, (2005) 74 Fordham Law Review 375-422, p392.

¹⁴⁶ Ibid, p392.

¹⁴⁷ Dusollier, S., *'The Master's Tools v. The Master's House: Creative Commons v. Copyright'*, Journal of Law & the Arts 271-293, p279.

*principle of the original.*¹⁴⁸ However, the nature of this type of content is different and the normative behaviour of its users is different; acting to contribute and develop in the case of software, as opposed to a more passive consumption of digital music content¹⁴⁹. There is nothing to suggest that such a model of production would work elsewhere: *“As powerful as peer production can be, it is unlikely to be the best model for the music industry.”*¹⁵⁰ This may be because of issues surrounding revenue development and revenue sharing; currently, this environment is still ‘professionally’ focussed (this is discussed further below).

CC seeks to address the needs of a wide and diverse group of authors and producers; in comparison with the free software movement: *“The GPL’s provisions reflect a shared definition of free software that was intensively negotiated by the community. Creative Commons still lacks such consensus.”*¹⁵¹ The ‘consensus’ in this context appears to be that of authors which may be paralleled to the ‘consensus’ on the part of rightsholders, with the normative behaviour of users seemingly unappreciated. As such, the consensus of users appears to be ‘assumed’, with most CC users having played no part in the development of the licences¹⁵². Software is also its own medium¹⁵³ with its own social ‘protocols’. Although no-one ‘owns’ a free software project¹⁵⁴, the same cannot be said of CC-licensed content due to

¹⁴⁸ Chander, A., and Sunder, M., *‘The Romance of the Public Domain’*, (2004) 92 California Law Review 1331-1374, p1360.

¹⁴⁹ See chapter 1, p33.

¹⁵⁰ Schultz, M.F., *‘Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law’*, (2006) 21 Berkeley Technology Law Journal 651-728, p727.

¹⁵¹ Elkin-Koren, N., *‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’*, (2005) 74 Fordham Law Review 375-422, p420.

¹⁵² Corbett, S., *‘Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?’*, (2011) MLR 74(4) 503-531, p505.

¹⁵³ Goss, A.K., *‘Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project’*, (2007) 82 Chi-Kent L Rev 963-996, p984.

¹⁵⁴ Benkler Y., and Nissenbaum, H., *‘Commons-based Peer production and Virtue’*, (2006) The Journal of Political Philosophy 14(4) 394-419, p396.

the common feature of 'attribution' in all the available licences¹⁵⁵ through its emphasis on authorship (and control). As such, there are also important differences between the end-user communities of both projects¹⁵⁶.

Whilst on the face of it the number of 'famous'¹⁵⁷ CC endorsements may seem promising, on closer inspection it is not necessarily the artists/groups that use such licences, but *what* is actually CC licensed which is important; the stimulative response of content to creative practice is as a result of the information or the content itself¹⁵⁸. This is important because despite its development from the free software movement (which could also be seen to be niche), it is important to differentiate between the production methods and outcomes of the two movements. In the case of free software:

*"... where content is created by one or two individual creators, it is evident that decentralization of all content functions leads to a much greater proliferation of expressive content."*¹⁵⁹

Flickr and Wikipedia are two large undertakings who employ CC licences, with over 100 million licensed images on Flickr¹⁶⁰ and Wikipedia having over four million articles in English¹⁶¹. However, when one looks more closely at

¹⁵⁵ Regardless of the licence chosen, the work always requires attribution when disseminated. See Dusollier, S., *'The Master's Tools v. The Master's House: Creative Commons v. Copyright'*, Journal of Law & the Arts 271-293, p275.

¹⁵⁶ Corbett, S., *'Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?'*, (2011) MLR 74(4) 503-531, p505.

¹⁵⁷ For example, The White House, film director Ridley Scott, musicians Trent Reznor (Nine Inch Nails) and Gwen Stefani, the broadcaster Al Jazeera, and the Wikipedia and Flickr websites.

¹⁵⁸ Polk Wagner, R., *'Information Wants to Be Free: Intellectual Property and the Mythologies of Control'*, (2003) Columbia Law review 103(4) 995-1034, p1008.

¹⁵⁹ Hunter, D., and Lastowka, F.G., *'Amateur-To-Amateur'*, (2004) 46 William and Mary Law Review 951-1030, p1016.

¹⁶⁰ See: <http://creativecommons.org/weblog/entry/20870>

¹⁶¹ See: <http://en.wikipedia.org/wiki/Wikipedia>, and, http://en.wikipedia.org/wiki/English_Wikipedia. Wikipedia adopted CC Attribution-ShareAlike licences in 2009. A full list of organisations that employ CC licences can be found at: http://wiki.creativecommons.org/Content_Directories

the materials that are available on these (and other) sites, they function as a pool of content or perhaps more accurately 'resources'¹⁶² i.e. reference materials/information¹⁶³ that can be accessed and used. This may explain why the sciences, libraries and academia are most interested the licensing scheme¹⁶⁴, as opposed to the content industries discussed in this thesis. This may be because the model of 'freeware' (embodying ambition, freedom, and mobilisation) is well known in terms of software, and is the same as the model of production in science and academic work¹⁶⁵.

Theoretically, the only content without restrictive re-productive control would be those works which are already CC licensed, or are works that are in the public domain. As such, this represents either a narrow or out-dated body of content which can serve as 'inputs' as part of the creative process. The developments in digital technology which were discussed in chapter two¹⁶⁶ have opened up a vast array of inputs i.e. all content available in digital form¹⁶⁷, and on the basis of this argument, such content *cannot* therefore serve as inputs. Despite premising copyright as a 'hurdle' to creativity, this is also not necessarily the case; there is nothing to suggest that creators will not create purely because of copyright, for example the practice of 'Plunderphonics': "... *an umbrella term for any music made completely out of existing audio recordings, including copyrighted material, and then altered in some way to create a new composition.*"¹⁶⁸ Furthermore, mechanisms do

¹⁶² Arguably less-so with Flickr as those photographs that are hosted serve as content in their own right and cannot necessarily be 'built upon'.

¹⁶³ 'Information' referring to a piece of data. See generally, 'Heverly, R., *Information Semicommons*', (2003) 18 Berkeley Technology Law Journal 1127-1189.

¹⁶⁴ Bowrey, K., *Law & Internet Cultures*, (2005, Cambridge), p167.

¹⁶⁵ Flichy, P., *Discourse on the New Economy – passing fad or mobilizing ideology?*, in Brousseau, E., and Curien, N. (eds), *Internet and Digital Economics: Principles, Methods and Applications*, (2007, Cambridge), chapter 3, pp114-142, p118.

¹⁶⁶ See chapter 2, pp57-75.

¹⁶⁷ See also chapter 3, p94.

¹⁶⁸ Kot, G., *Ripped: How the Wired Generation Revolutionised Music*, (Scribner, 2009), p164. See also Oswald, J., *Plunderphonics, or Audio Piracy as a Compositional*

exist under copyright law that allow pre-existing copyrighted content to be utilised in the creation of new music¹⁶⁹.

4. Intermediaries

Copyrights and CC rights do not just operate as incentives, they may also operate to organise the way already-produced works are rationed and coordinated¹⁷⁰ through the regulatory modality of the market¹⁷¹:

“Instead of a unitary system called copyright governing our information practices, we are witnessing the emergence of a distributed, messy agglomeration of opportunities in content creation, production, distribution, and so on.”¹⁷²

This may then facilitate potential market competition¹⁷³; between content which may be substitutable: *“... the addition of intellectual goods into the marketplace will increase the potential for meaningful competition between near substitutes.”¹⁷⁴* Nonetheless, in the ‘amateur’ context in which CC appears to operate, such users are not acting in accord with the economic component of copyright law as an incentive for production¹⁷⁵ and this again highlights the ideological inconsistency that CC depends on copyright, but not the fundamental utilitarian justification for it:

Prerogative, (1985), available from: <http://www.plunderphonics.com/xhtml/xplunder.html>.

See also chapter 1, pp28-32 and chapter 5, p189-190.

¹⁶⁹ See chapter 1, pp28-32 and chapter 5, p189-190.

¹⁷⁰ Gordon, W.J., *‘An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory’*, (1989) 41 *Stanford Law Review* 1343-1460, p1393, and see generally pp1388-1393.

¹⁷¹ See chapter 3, pp104-119.

¹⁷² Hunter, D., and Lastowka, F.G., *‘Amateur-To-Amateur’*, (2004) 46 *William and Mary Law Review* 951-1030, p1029.

¹⁷³ See chapter 2, p45, chapter 3, p109, pp112-114, and chapter 5, p185.

¹⁷⁴ Polk Wagner, R., *‘Information Wants to Be Free: Intellectual Property and the Mythologies of Control’*, (2003) *Columbia Law review* 103(4) 995-1034, p1028.

¹⁷⁵ Hunter, D., and Lastowka, F.G., *‘Amateur-To-Amateur’*, (2004) 46 *William and Mary Law Review* 951-1030, p956.

*“... copyright encourages productive behaviour by giving creators a share in the benefits they generate ... The more revenues the author can expect, the more she is likely to invest time, effort, or money in creating new works.”*¹⁷⁶

It should not be assumed that pre-digital copyright law was ‘wrong’, but perhaps that it was ill-equipped¹⁷⁷ to deal with digital distribution:

*“Copyright would address such issues badly, because they are for the most part alien to copyright’s rationale. The copyright system leaves most distributional issues to the marketplace.”*¹⁷⁸

At a more practical level, any perceived ineffectiveness resulting from the variety of CC licences suggests that this has not necessarily been an impediment, and the uptake in use of the format (although it is still niche) suggests that such arguments are limited:

*“The rapid adoption of Creative Commons licences by individual copyright owners and by a variety of new intermediaries demonstrates the utility of standardized (sic) understandings ... this utility has been derived primarily from the simplicity of the human-readable Commons Deeds and associated icons...”*¹⁷⁹

Although there are problems faced by CC, that does not mean that it cannot be of benefit. As a result of offering different possibilities from copyright, the

¹⁷⁶ Gordon, W.J., ‘An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory’, (1989) 41 Stanford Law Review 1343-1460, p1387.

¹⁷⁷ See chapter 2, p75.

¹⁷⁸ Litman, J., ‘Reforming Information Law in Copyright’s Image’, (1997) 22 U Dayton L Rev 587-619, p618.

¹⁷⁹ Carroll, M.W., ‘Creative Commons and the New Intermediaries’, (2006) Mich St L Rev 45-65, p59, and see Dusollier, S., ‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright’, Journal of Law & the Arts 271-293, p281, describing the use of such ‘logos’ as conveying the relevant information and being ‘recognisable’.

licence options can act as a 'disintermediating' force because they enable end-to-end transactions of content¹⁸⁰, but also as a 'reintermediating' force by allowing new services and communities to form around such content¹⁸¹. CC licences may have the possibility of acting as intermediaries themselves or enabling new intermediaries¹⁸². One such intermediary is the 'Free Music Archive'¹⁸³ (FMA). A search on the FMA music website first and foremost reveals a massive array of musical genres¹⁸⁴, many of which would arguably not be classed as 'mainstream'. Instead, these can be seen as 'niche' genres which although they may not have universal appeal in themselves, may combine to form a sizeable portion a music market when taken together. However, related to this is the problem of 'choice'. It has been argued that the process of creation involves an element of choice¹⁸⁵ on the part of the author which is an investment decision¹⁸⁶. Digital technology has 'decentralised' the influence of the content industries in 'taste-making'¹⁸⁷; decisions of choice must then fall to the user (with or without other

¹⁸⁰ As may be paralleled to end-to-end principle, see chapter 2, p61.

¹⁸¹ Carroll, M.W., *'Creative Commons and the New Intermediaries'*, (2006) Mich St L Rev 45-65, p47.

¹⁸² Ibid, p49.

¹⁸³ See: <http://freemusicarchive.org/>

¹⁸⁴ Specifically: Blues, Classical, Country, Electronic, Experimental, Folk, Hip-Hop, International, Jazz, Novelty, Old-Time/historic, Pop, Rock, Soul-R&B and Spoken. Each of these have their own sub-genres of which there is not enough space to list fully. For example, the sub-genres of 'Rock' are: Garage, Surf, Goth, Indie-Rock, Industrial, Krautrock, Lo-Fi, Loud-Rock, Noise-Rock, Sludge, Metal, Black-Metal, Death-Metal, New Wave, Post-Rock, Space-Rock, Progressive, Psych-Rock, Punk, Electro-Punk, Hardcore, Thrash, No Wave, Post-Punk, Power Pop, Rock Opera and Shoegaze. Nonetheless, this may just be a proliferation of tags, or labelling mechanism; the author's iTunes library currently lists a frankly ridiculous 124 'genres'.

¹⁸⁵ See chapter 1, p33, and Hunter, D., and Lastowka, F.G., *'Amateur-To-Amateur'*, (2004) 46 William and Mary Law Review 951-1030, p989: "*One might suggest that creation itself is a form of selection. Every process of creating new work actually involves the intentional or accidental selection ... from a palette of options.*"

¹⁸⁶ Hunter, D., and Lastowka, F.G., *'Amateur-To-Amateur'*, (2004) 46 William and Mary Law Review 951-1030, p993.

¹⁸⁷ See chapter 3, on the process of 'discovery', p108-109.

guidance¹⁸⁸). This presents the practical problem of decision when one is presented with a variety of options. Although this may be considered a good thing, it forces the user into a degree of introspection which does not always come naturally¹⁸⁹. Furthermore, information about that choice is now necessary¹⁹⁰ to help the user, but it does not exist in this context.

4.1 Revenue

Obviously, the fact that works are CC licensed demonstrates that the creators concerned are not (at least initially) concerned with earning revenue from their endeavours. However, it could be argued that CC has *no* business model and is currently dependent on expanding its user-base, which may be, at least for the time-being, more important¹⁹¹; build up an audience and then figure out how to make them pay. Nevertheless, the problem remains that the audience may not even be aware of the licensing scheme¹⁹² or even concerned with a 'business model'.

*“... that the vision of authors ‘finding’ their audience without the intervention of outside tastemakers to vet their work is a romantic ideal that even the Internet cannot realise.”*¹⁹³

¹⁸⁸ See chapter 3, pp117-118.

¹⁸⁹ Anderson, C., *The Longer Long Tail (Updated and Expanded Edition)*, (2009, Random House), p171.

¹⁹⁰ *Ibid*, p174.

¹⁹¹ As suggested by Joi Ito, a member of the CC Board of Directors. Although not speaking about CC directly, Ito has stated that attracting users, attention and distribution is key to building up a successful Internet enterprise. His comments were made in relation to his investment in Twitter, although he prefaced them by stating that he was not authorised to speak on behalf of the Twitter company. See, *‘Want to live like Commons people?’* (2009) The Guardian, available from: <http://www.guardian.co.uk/technology/2009/sep/23/joi-ito-creative-commons-twitter>. This has also been the case with Spotify: *“Now it’s only about growing and growing and growing...”*, Spotify’s founder Daniel Eck quoted in, *‘Spotify boss Daniel Ek sets out future plans’*, (2010) BBC News, available from: <http://news.bbc.co.uk/1/hi/entertainment/8478599.stm>

¹⁹² As mentioned in the example featuring the Prodigy, below.

¹⁹³ Zimmerman D.L., *‘Authorship Without Ownership: Reconsidering Incentives in a Digital Age’*, (2003) DePaul Law Review 1121-1170, p1169.

To overcome this problem, more 'refined' and centralised intermediaries may be advisable (for example, Internet Service Providers or Information Society Service Providers¹⁹⁴), and which are already in existence online, for example, Google and Amazon who perform algorithmic filtering measures providing a much more reliable predictor of preferences¹⁹⁵: "*These technologies and services sift through a vast array of choices to present you with the ones that are most right for you.*"¹⁹⁶ Such aggregators are not necessarily the owners of the content, but through their market power¹⁹⁷ they have been rendered 'in charge' of it. As such, they may be regarded as 'stewards' who provide access to, and streaming of¹⁹⁸, content to end-users. Perhaps absurdly¹⁹⁹, it is then these actors which are responsible for gleaning revenue for their aggregation services. As well as this, there are more de-centralised, niche and user-based intermediaries who can also have influence beyond the purely 'technical'²⁰⁰: "*The new tastemakers are simply people whose opinions are respected.*"²⁰¹ These may also be defined (to an extent) as 'professional' and 'amateur' (or recreational)²⁰² services respectively, despite the fact that they can theoretically have the same effect.

At this juncture, revenue and popularity of content diverge to a certain extent, as do the centralised and de-centralised filtering measures regarding the

¹⁹⁴ See chapter 6, p215.

¹⁹⁵ Hunter, D., and Lastowka, F.G., '*Amateur-To-Amateur*', (2004) 46 William and Mary Law Review 951-1030, p997.

¹⁹⁶ Anderson, C., '*The Longer Long Tail (Updated and Expanded Edition)*', (2009, Random House), p108.

¹⁹⁷ See chapter 3, pp110-119.

¹⁹⁸ See chapter 5, pp195-198.

¹⁹⁹ Hunter and Lastowka believe that the role of the 'selection' agent will become *less* important. See Hunter, D., and Lastowka, F.G., '*Amateur-To-Amateur*', (2004) 46 William and Mary Law Review 951-1030, p998.

²⁰⁰ See generally, Kot, G., '*Ripped: How the Wired Generation Revolutionised Music*', (Scribner, 2009), chapter 9 *Everyone's a Critic* pp112-132.

²⁰¹ Anderson, C., '*The Longer Long Tail (Updated and Expanded Edition)*', (2009, Random House), p107.

²⁰² The term is not used here to denote any issues regarding 'quality'; it simply means unpaid/non-professional.

issue of choice. The former may be said to be technical and revenue-focussed, and the latter based more on social aspects of popularity. How popular a work is will not necessarily involve a corresponding revenue gain as the content may be freely accessible. Revenue may accrue more remotely through associated advertising income, but not always from a direct 'pay to play' basis (although there are several subscription music streaming services in operation²⁰³). Nonetheless, revenue is not always directly earned from consuming and engaging with the content *itself*. Taking this as an example, the challenge is to formulate some sort of revenue model which could be applied to the digital landscape: "... *the relative lack of financial resources of open source projects is likely to place them at a significant practical disadvantage vis- à-vis large commercial operators.*"²⁰⁴ Such disparity is further evidenced by what may be called 'taste monitors' who provide a reflection of popularity of various forms of content. These operate in a more 'official' context as aggregators and measurers of commerciality through the charts system²⁰⁵. However, this supports a much more revenue-orientated model of 'taste' with chart eligibility requiring a minimum pricing threshold; for example, digital tracks must have a minimum price of £0.40 GBP as 'singles' in order to be eligible²⁰⁶. This therefore excludes a significant amount of CC-licensed music, and totally excludes CC non-commercially licensed music. Yet the place of 'hits' still remains important; both as works in their own right, and also as the inspiration for new works:

"The hit parade promenades the aural floats of pop on public display, and as curious tourists, should we not be able to take our own snapshots

²⁰³ See chapter 3, p112, and chapter 5, p196.

²⁰⁴ Polk Wagner, R., '*Information Wants to Be Free: Intellectual Property and the Mythologies of Control*', (2003) Columbia Law review 103(4) 995-1034, p1031.

²⁰⁵ For example in the UK, see: <http://www.theofficialcharts.com/>

²⁰⁶ '*Rules For Chart Eligibility: Singles*', (2009) The Official Charts Company pp4-5, available from: <http://c0903002.cdn.cloudfiles.rackspacecloud.com/25-official-uk-singles-chart-rules-august-2009.pdf>

*through the crowd ... rather than be restricted to the official souvenir postcards and programmes?*²⁰⁷

CC has fostered a response (of sorts) in terms of production and distribution through the intermediaries it has fostered, although there is no guarantee that CC-licensed content may be treated with any more (or less?) reverence than copyrighted content. In respective contexts of professional and amateur content provision, this can be seen in the 'Freesound'²⁰⁸ project; a collaborative database of CC licensed sounds²⁰⁹ with approximately fifty thousand files. This evidences the (worthwhile) ideological mindset of CC users in the music industry²¹⁰ in terms of creating content for use and re-use by others. These do not consist of musical works in their entirety, but merely various kinds of samples, drum loops, and other electronically produced sounds that are licensed for others to use²¹¹. One user, Nic Stage, uploaded a sample that came to be used by seminal dance group the Prodigy on their latest album '*Invaders Must Die*' (a UK number one which sold over 1 million units worldwide) and which was featured on their single 'Omen'²¹². However, problematically for the band (and arguably more so for Creative Commons) Stage was not credited as the original source. This is despite the fact the CC licences provide the public with generous rights and (should in theory) be likely to be perceived as fair and reasonable by the public that matters²¹³, or

²⁰⁷ Oswald, J., '*Plunderphonics, or Audio Piracy as a Compositional Prerogative*', (1985), available from: <http://www.plunderphonics.com/xhtml/xplunder.html>

²⁰⁸ See: <http://www.freesound.org>

²⁰⁹ See: <http://www.freesound.org/help/about/>

²¹⁰ The author uses the term 'industry' loosely, to refer to music hobbyists.

²¹¹ This has also been done commercially, with the dance producer Deadmau5 having released a sample CD-ROM entitled 'XFER' (also the name of his record label) for producers. See: <http://www.loopmasters.com/product/details/236>

²¹² See a message left on the Freesound forum by Nic Stage himself: <http://www.freesound.org/forum/legal-help-and-attribution-questions/4189/>

²¹³ Loren, L.P., '*Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*', (2007) 14 Geo Mason L Rev 271-328, p302. Therefore, they are likely to respect the rights retained.

even commercial businesses²¹⁴. On this basis, the ‘public that matters’ do not seem to include professional artists; it is debatable whether there will ever be any section of the public that ‘matters’. CC’s use currently appears to be extremely niche to the extent that its content may have such a limited exposure that it can only form a minimal basis for future works, or is more applicable to amateur-to-amateur users²¹⁵.

This has consequences for the regulation of user behaviour through the market modality. The potential difficulties for a CC-based market to develop render the impact this modality may have as minor; due to the lack of its commercial dimension, the ‘niche’ value of CC content and the self-imposed scarcity generated by the licences. Therefore, users may still operate with regard to the market and its regulatory effect already established in chapter 3²¹⁶ as this is arguably more widespread and dominant.

5. Conclusion

The argument may thus be made that CC proceeds from a faulty ideological base. It provides users with the option to “... *opt out of copyright altogether...*”²¹⁷, when in fact it is necessarily dependent on the underlying copyright regime; a fact they themselves acknowledge²¹⁸. Furthermore, it

²¹⁴ Who may engage in a commercial exploitation of the work, but in contrast, may not necessarily respect such rights. See, for example, the story of Alison Chang where a photograph of her on Flickr was used in an advertising campaign by Virgin Mobile without attribution: <http://www.smh.com.au/news/technology/virgin-sued-for-using-teens-photo/2007/09/21/1189881735928.html>. See also, Corbett, S., ‘*Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?*’, (2011) MLR 74(4) 503-531, p514.

²¹⁵ Although this is recognised as an important role of the movement. See Carroll, M.W., ‘*Creative Commons and the New Intermediaries*’, (2006) Mich St L Rev 45-65, p52. For a discussion of the ‘amateur-to-amateur’ concept, see Hunter, D., and Lastowka, F.G., ‘*Amateur-To-Amateur*’, (2004) 46 William and Mary Law Review 951-1030.

²¹⁶ See chapter 3, pp104-119.

²¹⁷ See: <http://creativecommons.org/about>

²¹⁸ See: http://wiki.creativecommons.org/FAQ#Is_Creative_Commons_against_copyright.3F

seeks to 'maximise digital creativity'²¹⁹ by using the very methods (control) that it criticises when used under copyright law. It also premises that copyright may be a handicap to creativity, but this is not necessarily the case: *"Intellectually, by emphasizing the effects of control, these critics can support intellectual property generally, yet condemn it specifically..."*²²⁰ Such criticism of copyright is not itself necessary; as was stated in chapter two, copyright has a utilitarian justification, but also includes a certain economic element²²¹ which CC does not accommodate. CC is not a mechanism to facilitate such incentive, other than the 'value' that comes from attribution: *"Once an audience for an individual's work develops, the question of compensation becomes more fraught."*²²² Although there are mechanisms to facilitate audience-building, the only mechanism by which to receive 'compensation' is the pre-existing copyright market structure. As CC lacks a commercial dimension, it is unable to be supported by this, leaving it vulnerable to misuse (including misuse by professionals) and makes it difficult to emerge from its niche status despite the availability of CC-focussed intermediaries.

The CC strategy is not as revolutionary at it may perhaps first sound. This is because it still effectively operates on the basis of copyright law, but this does *not* mean that the movement has no value. It is based on the successful operation of the GPL in the free software movement and as such, cannot be ignored. It also has the benefit of being designed with the realities of digital production and distribution in mind. As such, it can be considered a more proactive response to the problems of digital copyright law than the mere updating of copyright law²²³. Whilst CC achieves this through a variety

²¹⁹ See: <http://creativecommons.org/about>

²²⁰ Polk Wagner, R., *'Information Wants to Be Free: Intellectual Property and the Mythologies of Control'*, (2003) Columbia Law review 103(4) 995-1034, p996.

²²¹ See chapter 2, p46.

²²² Zimmermann D.L., *'Authorship Without Ownership: Reconsidering Incentives in a Digital Age'*, (2003) DePaul Law Review 1121-1170, p1145.

²²³ See chapter 2, pp76-81.

of licensing options, they do not necessarily remove the burdens the movement associates with copyright law, and potentially creates its own.

Although CC may have benefit in addressing user-norms that may be related to digital architecture, that is not to say that this will provide a viable solution on its own. By artificially aiming to create 'scarcity' through its licensing system, CC limits users (and itself) to a relatively narrow and niche body of content. Furthermore, it is questionable whether a viable market structure can develop in light of this because of the stipulated non-commercial and predominantly amateur context in which it operates.

The idea of a 'commons' is unrealistic in the digital age. Instead, any such idea must correspond to an accurate depiction of the environment in which it operates. The conception of a commons environment in this context cannot be limited by rhetoric based on notions of physical property. As such, copyrighted digital content which has been infringed must be a part of 'the commons' thus suggesting that a commons environment is, to a certain extent, redundant. Furthermore, the 'commons' CC implicates control as a necessity. Control is a fundamental aspect of the CC movement, as that control over rights is essential for them to be derogated from. However, this is not necessarily beneficial: *"In any case, the spread of intellectual property rights globally is not intrinsically a good thing, even where the license purports to be on the side of angels."*²²⁴ By changing the underlying rationale of copyright, it subverts it and can thus be seen as a competitor to copyright law. On the basis that CC resources and copyrighted resources are indistinct in their practical availability such that the prescribed non-commercial aspect to CC may result in upsetting the necessary economic stimulus to creativity under copyright's utilitarian justifications to the point of underproduction. This is perhaps a fundamental problem for the CC strategy; the fact that it operates exclusively on a non-commercial basis suggests that a market could not develop for such content. However, it does provide valuable recognition of the value of 'free' and the non-financial value that

²²⁴ Bowrey, K., *'Law & Internet Cultures'*, (2005, Cambridge), p167.

corresponds with this²²⁵. The CC movement recognises the opportunities afforded by digital technology for creation/production, and dissemination of content. It has also afforded the development of CC-themed digital intermediaries to facilitate the dissemination of content.

The non-commercial aspect of CC suggests that it is only of limited use. Theoretically, CC-licensed content is only available to serve as inputs for creative works. As such, the self-imposed architecture of CC artificially narrows the available creative resources to other CC-licensed works. As such, it also ignores that copyright does not necessarily stop the production and dissemination of 'new' works even though they are infringing²²⁶. It is important to also note the differences between the areas of software and other creative content; just because a similar scheme appears successful in the former, it does not mean it will operate in the same way with regard to the latter. Software is fundamentally different to the other types of content to which CC licenses can apply due to the CC focus on authorship; it is not necessarily 'collective' in the sense that it could be said to be so for software. Furthermore, regarding the content itself; software is its own input and output whereas other content may be one of several different inputs and result in a completely different output. As such, relying on a narrow conception of what users 'want' fails to appreciate the distinction between computer software and sound recordings, as well as the subjectivity of users' normative behaviour in relation to recorded music in digital form²²⁷.

²²⁵ See chapter 2, p76-77 and chapter 3, pp107-108.

²²⁶ See the examples of DJ Dangermouse's *Grey Album* and GirlTalk in Kot, G., *Ripped: How the Wired Generation Revolutionised Music*, (Scribner, 2009), chapters 11 and 12. However, it is questionable whether such works would infringe copyright in the first place: *"Integrated works represent novel uses of digital technology that do not involve incursions into copyright owners' legally cognizable markets..."* See Loren, L.P., *The Changing Nature of Derivative Works in the Face of New Technologies*, (2000) 4 *The Journal of Small & Emerging Business Law* 57-94, pp75-76, p93.

²²⁷ See chapter 3, p87 and pp95-103.

One must also take a practical approach when looking at the markets²²⁸ for CC-licensed work. Those organisations that utilise the licensing system are not necessarily content distribution services, but ‘reference’ services. As such, there is little (if any) distribution market for such content. It may be suggested that artists adopting such an approach, whilst making a noble statement against the constraints of copyright law, are missing the point. The pure existence of such an enterprise demonstrates the potential scale and niche value the Internet is able to provide. The Internet is able to sustain a virtually infinite demand curve and while this may plateau towards the bottom of the arc, it may extend as far as there is content to support it²²⁹. The commons in this environment (it being a mixture of public domain content and available copyrighted material) can be harnessed by the powerful aggregators in the current digital marketplace (e.g. Google, YouTube, Apple etc.) provided legislation is in place to facilitate, and not hinder, the capture of this content. Whilst copyright owners may be willing to offer content to such a commons, either openly or tacitly, legal issues and technological measures²³⁰ should not act to hinder this content²³¹. Perhaps more importantly now, similar CC measures should also not operate to constrain user access and use of such content.

CC may facilitate the growth of intermediaries providing licensed content as (financial) copyright licensing costs would not be incurred. However this

²²⁸ The market is of crucial importance, see chapter 2, p45, and chapter 3, p104. See also Dusollier, S., *The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*, *Journal of Law & the Arts* 271-293, pp292-293: “Certainly today, the market is of greater importance in copyright law because copyright law is modified increasingly to take into account the economic interests of market players and to enable the subjection of any use of a work to a market transaction.”

²²⁹ See generally, Anderson, C., *The Longer Long Tail (Updated and Expanded Edition)*, (2009, Random House).

²³⁰ This is the case in the abandonment of DRM by iTunes, started by EMI, discussed in chapter 5, p190.

²³¹ The situation is more complex where copyright owners are not necessarily the authors of a work i.e. the music/TV/film industries, and where there is potential for a conflict of interests between author and owner.

again raises the spectre of competition between copyright and CC through intermediary outlets: *“The destruction of copyright industries would be a terrible thing if and only if, they represented the sole means that creative content could be generated.”*²³² Whilst CC intermediaries may be seen as aggregators of content, the lack of market-based dissemination suggests that copyright still has primacy in this respect. That is not to say that dissemination of content under CC licences may be ineffective: *“Distributing works for free might provide artists with new opportunities, such as funding, production contracts or paid contracts to work on other projects.”*²³³ At the same time, care should be exercised: *“... there is concern that Creative Commons and other copyleft models will promote a ‘gift culture’, further devaluing creative works both in society at large and in the minds of creators themselves.”*²³⁴ Nonetheless, there is precedent in the music industry for the assumption that ‘giving something away’ can be beneficial, at least in terms of building a reputation for the artist²³⁵. However, the author asserts that it is not the CC licences that make this possible, it is the nature of digital technology itself. In this context, the controlling legalities of copyright can be forgone (and in some instances, actively discarded by the artist); and in such circumstances, a CC licence is unlikely to make much of a difference. Furthermore, ‘attribution’ is a necessary component in terms of building an audience, and this would still be the case without an attached CC licence.

However, attribution does not have to be done exclusively through CC and can be done just as easily through copyright: *“... both copyright compliance and the future health of the music industry depend on building mutually*

²³² Hunter, D., and Lastowka, F.G., ‘Amateur-To-Amateur’, (2004) 46 William and Mary Law Review 951-1030, p1018.

²³³ Dusollier, S., ‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright’, Journal of Law & the Arts 271-293, p281.

²³⁴ Goss, A.K., ‘Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project’, (2007) 82 Chi-Kent L Rev 963-996, p995.

²³⁵ See the examples of Prince, Wilco, OK, Radiohead (in a way), and Trent Reznor in Kot, G., ‘Ripped: How the Wired Generation Revolutionised Music’, (Scribner, 2009), chapters 5, 8, 19 and 20.

*beneficial relationships between musicians and their fans.*²³⁶ This does not necessarily have to happen through the CC movement; although it supposes a close relationship between creators and users²³⁷, this can also occur on the part of initiatives by the artists/creators themselves through innovative practices²³⁸ in presenting content to users²³⁹ and without such a formalised mechanism as CC licensing. It is this which may operate to provide success over the failings of CC, but in furtherance of CC's broad 'political'²⁴⁰ objective, based on the centrality of authorship: "*Copyright law is increasingly politicized because many understand the production of even innocuous cultural texts as a direct expression of power.*"²⁴¹ Therefore current copyright law and practice is *not* 'apolitical'; it has been (and still is) subject to the lobbying interests of the content industries: "*Law ... is a site for political struggle and disagreement.*"²⁴² As such, the 'political' nature of the CC movement may be its strongest virtue; serving as an important counter-point to the strategies employed by the content industries.

²³⁶ Schultz, M.F., *'Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law'*, (2006) 21 Berkeley Technology Law Journal 651-728, p657.

²³⁷ As highlighted in chapter 1, pp33-34.

²³⁸ See the example of the Grateful Dead as discussed in Schultz, M.F., *'Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law'*, (2006) 21 Berkeley Technology Law Journal 651-728.

²³⁹ Kot, G., *'Ripped: How the Wired Generation Revolutionised Music'*, (Scribner, 2009), p110. However, this may not always be the case, see chapter 5, p203.

²⁴⁰ Dusollier, S., *'The Master's Tools v. The Master's House: Creative Commons v. Copyright'*, Journal of Law & the Arts 271-293, p273: "*To be really meaningful, any political movement (and Creative Commons is one)...*"

²⁴¹ Goss, A.K., *'Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project'*, (2007) 82 Chi-Kent L Rev 963-996, p963.

²⁴² Bowrey, K., *'Law & Internet Cultures'*, (2005, Cambridge University Press), p108.

Chapter 8: Conclusion

Conclusion

This thesis has sought to address and clarify the changing interface between copyright and regulation in the digital environment in the context of recorded music, in order to explain the problems that copyright law has had in tackling the issue of unauthorised copyright infringements facilitated by digital technologies. The problem is that the reliance on copyright law in the digital environment ignores the other regulatory influences in operation and which may affect the behaviour and consumption practices of users. It sought to develop a regulatory framework so as to identify and understand these competing regulatory influences, and to analyse the effect such reliance on copyright law may have on these regulatory influences and the creative potential of the digital environment¹.

This concluding chapter is designed to cement the analyses and arguments made in the preceding chapters, bringing them together in order to assess the regulation of the digital environment, and the role of copyright within it.

The work of Lawrence Lessig has provided the foundation for the theoretical aspect of the thesis. The author has analysed the variety of regulatory influences in the digital environment² and combined them into a bespoke 'Lessigan' framework. It is clear that the work of Lessig, although important, is not on its own sufficient to understand the full spectrum and impact of regulation in the digital environment. As such, it was necessary to complement his initial work with that of other scholars in the field in order to build a more complete and detailed regulatory picture³. It is apparent that these regulatory modalities in the framework can broadly accommodate a variety of diverse factors which may influence user behaviour (regarding unauthorised copyright infringement), as well as a method through which to understand the actions of rightsholders and the subsequent effects.

¹ See chapter 1, pp10-11.

² See chapter 3, pp84-130.

³ Ibid, pp84-130.

However, the applicability of the framework depends on one of its own modalities; that of the *market*. In the context of this thesis, the market is essentially that for recorded music⁴. As a result, the ‘content’⁵ and variability of the other modalities may depend upon the type of content (and thus the market) that is being considered.

1. Research value

The author has sought to build a comprehensive picture of digital copyright law and its potential impact on the digital environment and thus, potentially, creative practice. By providing a reasoned critique of foregoing policy and practice in this area, this thesis can stand as an authoritative body of work for future developments in the area. There have been a number of Intellectual Property policy reviews conducted by the British Government during the researching and writing of the thesis⁶, and although proposals have had limited implementation, there still remains the potential for copyright law to change. It is hoped that should this be the case, the content of this thesis will form a valuable resource from which to evaluate any policy and regulatory changes in this area.

In terms of understanding mechanisms of ‘regulation’ this thesis also forms a coherent body of research that has gone beyond the purely legal in order to identify and analyse not only other regulatory factors in the digital environment, but also their substance and potential effect. Much of the back-story behind the thesis has taken place outside of the legal world, but its permutations have been felt through legal manifestations. As such, this thesis has necessitated, and benefitted from, historical, technological, sociological law and economics-based research that have helped provide context, depth, and, it is hoped, a real-world and applicable critique.

⁴ See chapter 1, p11.

⁵ No pun intended.

⁶ Chapter 1, p15.

2. Research findings

The following issues were highlighted as necessary to address⁷:

- An appropriate purpose and justification of copyright in light of digital technologies;
- The issues that digital technology has presented for rightsholders and which they have attempted to regulate through copyright.
- The complexity of the digital environment: the additional forms of regulation in the digital environment that influence user-behaviour.
- The impact that the emphasis on copyright regulation has had in relation to these other regulatory factors in the digital environment; and,
- The effect has this had on digital technology itself, the behaviour of users, and the market for digital content.

In order to provide a background context to this thesis, it was first necessary to define what has been referred to as the ‘content industries’⁸; references to rightsholders made necessarily refer to the rightsholders of such ‘content’⁹. The practice of creativity is central to the cultural, or creative industries; specifically, those industries which produce ‘content’, which is closely related to copyright. Copyright’s requirement of fixation may be said to ‘embody’ the content of the work in question¹⁰. As demonstrated in chapter one, because such works can be said to ‘embody’, or consist of, different elements, they *have* content i.e. contain content. As such, the industries which produce such works can therefore be said to be the ‘content industries’¹¹.

The focus of this thesis was specifically on recorded music (although other forms of content were considered where appropriate); therefore in chapter one, the issue of ‘creativity’ was examined as an activity copyright law serves

⁷ Chapter 1, pp11-12.

⁸ Ibid, p16-21.

⁹ Ibid, pp21-22..

¹⁰ Ibid, pp20-21.

¹¹ Ibid, p21.

to promote¹². Again, this is closely intertwined with copyright as its requirements for 'originality' and 'fixation'¹³ require some exercise of creativity; in this context, the fixation of sound recordings can be said to embody the creativity of the artist, producer, and/or remixer¹⁴. It was also demonstrated that the practice of creativity involves the use of creative inputs that can inspire and generate the creation of new content¹⁵. However, that is not to say that copyright law necessarily acts as a hindrance to such creation, and it is far from clear that every reuse of content will be infringing¹⁶. Creativity does not, however, occur in isolation; it involves pre-existing content (to varying degrees) and takes its process from the consumption and distribution in the wider environment:

"All in all, the creative act is not performed by the artist alone; the spectator brings the work in contact with the external world by deciphering its inner qualification and this adds his contribution to the creative act."¹⁷

This is facilitated by digital technology which serves to lower the costs of consumption and production by unifying the medium in which both activities can occur. This signifies a close relationship between the two in which the user plays an important role¹⁸; digital technologies have enabled users to become *creators* in their own right¹⁹.

In light of this context, the research proceeded through chapter 2 to establish an appropriate philosophical justification for copyright law in the digital age. Although there are a number of philosophical justifications for copyright,

¹² Chapter 1, p22.

¹³ Ibid, pp24-25.

¹⁴ Ibid, p25.

¹⁵ Ibid, pp25-28.

¹⁶ Ibid, pp33-34.

¹⁷ Duchamp, M., *'The Creative Act'*, Session on the Creative Act, Convention of the American Federation of Arts, Houston, Texas, April 1957. Available from: http://www.cathystone.com/Duchamp_Creative%20Act.pdf

¹⁸ Chapter 1, pp32-33.

¹⁹ See chapter 1, pp33-34 and chapter 2, pp73-74.

based on 'natural rights'²⁰ and 'personality'²¹ theories, it was established that the most appropriate basis for copyright law in the digital era is that of utilitarianism. This is because the author-centric approaches of natural rights and personality theories do not adequately accommodate the evolution of content formats and creative content production; which have been recognised in the evolution of copyright²². As demonstrated, a utilitarian conception of copyright helps overcome these difficulties; also, it contains an important user-element by focussing on the benefit to society as a whole²³, from the production, distribution and consumption of creative content. It is important to note that utilitarianism contains necessary incentives in order to induce or encourage creative practice in the first place; which is achieved through grant of copyright protection²⁴.

The impact of specific digital technologies (the Internet, MP3, and peer-to-peer) was analysed in chapter two²⁵ in order to examine the issues that digital technology has presented for rightsholders, and which they subsequently attempted to regulate through copyright. The emergence of digital technologies resulted in perceived challenges to rightsholders' exclusive rights; as convergence of content into a single digital form²⁶ marked the digital revolution as being different from any preceding it. Specifically, this was seen as a threat to rightsholders' exclusive rights of reproduction and distribution which engendered concern and a realisation that copyright law would need to be changed in order to deal with these threats²⁷. As such, it was demonstrated that copyright law itself may be said to have converged around the digital environment²⁸ as an important

²⁰ Chapter 2, pp49-51

²¹ Ibid, pp52-53.

²² Ibid, pp47-48.

²³ Ibid, p45.

²⁴ Ibid, p44.

²⁵ Ibid, pp57-70.

²⁶ Ibid, p72.

²⁷ Ibid, pp74--81.

²⁸ Ibid, p82.

regulatory mechanism so as to overcome the perceived difficulties of enforcement in the digital age.

It is clear that the digital revolution was seen to warrant increased regulation and that regulation should theoretically apply in the digital world as it does in the physical. Nonetheless, regulation cannot be solely applied to technology, it must also be applied to society, and users²⁹ who have their own specific set of values and whose behaviour may be guided by different factors. Therefore, it was necessary to appreciate and understand complexity of the digital environment and the additional forms of regulation in the digital environment that influence user-behaviour. Chapter three sought to address these issues by outlining a framework in order to understand the variety of regulatory influences that may influence users online³⁰. At this point, the work of Lawrence Lessig assumes importance in this thesis as he deals with Internet regulation and its consequences³¹. His work on 'modalities'³² can be combined with others in the field³³ to provide the author's original and expanded regulatory 'Lessigan' framework as applied to sound recordings in digital form³⁴. Assuming that copyright, as the legal modality, operates to link the user and content³⁵ (because copyright governs what the user can and cannot do with that content), the other regulatory modalities of 'norms'³⁶, the 'market'³⁷ and 'architecture'³⁸ were applied to in order to understand their regulatory influence and potential impact on the user. Although not providing a single explanation for digital copyright infringement, it does provide valuable information regarding the factors which regulate (or not) user

²⁹ Chapter 2, p83.

³⁰ Chapter 3, pp84-130.

³¹ Ibid, p85.

³² See generally, Lessig, L., *'Code (Version 2.0)'*, (2006, Basic Books).

³³ For example, Anderson, Bowery, Castells, and Murray.

³⁴ Chapter 3, p126.

³⁵ Ibid, p90.

³⁶ Ibid, pp95-103.

³⁷ Ibid, pp104-119.

³⁸ Ibid, pp119-126.

behaviour³⁹. Crucially, it also demonstrates that far from having a necessarily restrictive effect in regulating behaviour, these modalities can have a positive effect of encouraging behaviour⁴⁰. It also provides a framework through which the actions by rightsholders to enforce their copyrights online may be analysed. In light of this, it may be concluded that the architectural modality has been the focus of regulation by the law as it was the perceived cause of the law's diminished regulatory effect⁴¹. Architecture has also fostered user expectations and norms⁴², but which the market (again being subject to legal regulation) has not been allowed to accommodate. From this, it was then possible to address the impact that the emphasis on copyright regulation has had in relation to these other regulatory factors in the digital environment.

The first important instance of regulation by copyright was dealt with in chapter four which analysed the legal action against Napster and successive peer-to-peer (p2p) networks⁴³. As a result of further architectural developments, latter-day manifestations of p2p networks are now able to cope with a much wider variety of digital content. However, these developments have been shrouded by Napster's legacy. Despite architectural improvements which moved p2p beyond the reach of liability from Napster, the court in *Grokster* formulated the doctrine of 'inducement' to overcome the architectural immunity, replacing it with broader liability based on evidential matters⁴⁴. In addition to *The Pirate Bay* case, it was demonstrated that personal and circumstantial factors may also have had an impact in this area⁴⁵. It was shown that the effect of legal action here was to effectively deem p2p (as a distribution architecture) illegal by imposing more

³⁹ Chapter 3, pp127-128.

⁴⁰ *Ibid*, p94, p97, p101 and p128

⁴¹ *Ibid*, p125.

⁴² *Ibid*, pp121-126.

⁴³ Chapter 4, pp131-165.

⁴⁴ *Ibid*, p150.

⁴⁵ *Ibid*, p156 and p164.

and more stringent legal obstacles to escaping liability⁴⁶. Legal action against p2p networks had an important effect on the market (or potential) market for content available through such mechanisms. Crucially, it cemented the power of rightsholders to engage in new areas of commerce, related to their content, at the expense of private entrepreneurial actors⁴⁷ and was indicative of the emphasis rightsholders placed on the right of distribution; which had previously generated high revenue⁴⁸.

Digital Rights Management (DRM), although developing before the actions against p2p networks⁴⁹, warranted consideration in chapter five as an architectural, as opposed to legal, development deployed by rightsholders to secure the distribution of content. Arguably, DRM is 'pure' architecture (or 'code as code'⁵⁰) designed to operate in relation to digital content by controlling consumption⁵¹. It also marks an evolution of the market modality, as although it represents the continued emphasis on distribution, DRM also lies behind changing and evolving methods of distribution⁵². Importantly, the development of streaming-based content distribution⁵³, which relies on DRM, suggests that the nature of DRM is changing from a control mechanism attached to content, to a control mechanism that applies and operates arbitrarily⁵⁴ on *networks*⁵⁵. Current models of content-streaming appear to be inextricably linked to DRM, and the market appears to be developing in this way i.e. moving away from 'permanent' copy-based distribution system⁵⁶. This may also have the effect of changing pre-existing normative behaviours (highlighted in chapter three) such that they are now evolving in response to

⁴⁶ Chapter 4, pp156-165.

⁴⁷ Ibid, p164.

⁴⁸ See chapter 2, p46 and chapter 3 p111.

⁴⁹ Chapter 5, pp172-173.

⁵⁰ Ibid, pp175-176. See also chapter 3, p86.

⁵¹ Ibid, pp171-176.

⁵² Ibid, pp193-195.

⁵³ Ibid, pp195-198.

⁵⁴ Ibid, p199

⁵⁵ Ibid, p204.

⁵⁶ Ibid, p194.

these architectural developments⁵⁷. DRMs operation in relation to content distribution now presents users with a stark choice of sticking to the prescribed, or DRM-assigned market for content, or acting illegally by choosing to consume content via other means⁵⁸. In this way, DRM acts to re-enforce the market structure which was originally threatened and ultimately consolidated by action against p2p networks.

The role of Internet Service Providers (ISPs) and Information Society Service Providers (ISSPs) was also necessary to examine in chapter six⁵⁹. At a broad level, the legal regulatory picture is complex and has not been dealt with coherently across Europe⁶⁰. A variety of other legal issues have also been implicated and these have led to competing forms of legal regulation. The availability of the architectural controls that ISPs already possess for other means (such as bandwidth throttling and traffic management systems) may now be turned towards tackling digital copyright infringement⁶¹. Furthermore, the pure availability (in contrast to the suitably) of these controls seems to be regarded as sufficient for employing them as architectural constraints against infringement. It appears that they can also be implicated in, and even held responsible for, infringements committed via other ISPs⁶², with the rulings in the Newzbin cases extending knowledge *beyond* the Napster ruling⁶³. The decisions here also appear to oblige ISSPs to monitor the traffic on their networks, contrary to article 15 of the E-commerce Directive which prohibits any such responsibility⁶⁴. This has potentially related implications for the architectural design principles that lie at the heart of the Internet; notably the end-to-end (e2e) principle⁶⁵. The

⁵⁷ Chapter 5, p202 and pp206-207.

⁵⁸ Ibid, pp2-3-204.

⁵⁹ Chapter 6, pp210-264.

⁶⁰ Ibid, pp220-221.

⁶¹ Ibid, p246.

⁶² Ibid, p251.

⁶³ Ibid, pp251-252.

⁶⁴ Ibid, pp252-253.

⁶⁵ Discussed in chapter 2, p61 and chapter 3, p124.

traditional normative understandings of ISSPs, based on European E-commerce provisions regarding liability, have allowed them to enjoy a relative immunity⁶⁶. However, there are also signs that their normative operation may be changing, as evidenced by the fact that they are increasingly becoming providers of *content*, and thus rely on a degree of co-operation with rightsholders in order to provide this⁶⁷.

The Creative Commons (CC) movement warranted consideration in chapter seven⁶⁸ as a *positive* reaction against the rightsholder-led initiatives that have been predominant in the digital age, and which have been analysed across the thesis. CC appears to operate with the benefits to the digital medium in mind, and by placing authors and users in closer social proximity it should foster a positive norm of take-up and adherence to the licence agreement⁶⁹. However, CC assumes that copyright is an intrinsic hurdle in the creation of new works⁷⁰ which is not necessarily the case, despite depending on the underlying copyright system. There appears to be a dichotomy between the ideology and practice of the movement; it seeks to relocate power to authors, but is grounded in the expectations of users⁷¹, who have their own disparate motivations. Despite attempting to replicate the success of a peer-production model for software, the nature of these different types of content and the normative behaviour of their respective users are different⁷². The fact that CC operates primarily on a non-commercial basis suggests that a financially motivated market could not develop for such content; the rightsholders and CC market conceptions are diametrically opposed⁷³. Therefore, a market for CC content could not

⁶⁶ Chapter 6, p218 and p255.

⁶⁷ Ibid, p260.

⁶⁸ Chapter 7, pp265-304.

⁶⁹ Ibid, p281.

⁷⁰ Ibid, p276.

⁷¹ Ibid, p283.

⁷² Ibid, pp287-288

⁷³ Ibid, pp285-286 and p300.

emerge as an appreciable regulatory modality⁷⁴ as it is limited by virtue of its own content⁷⁵. However, CC *does* provide important recognition of the value of ‘free’, the non-financial value that corresponds with this⁷⁶, and the role of pre-existing content as creative inputs⁷⁷. For this reason the movement has merit, but only as an ideological standpoint⁷⁸. Its worth beyond this is questionable.

In conclusion, the impact of copyright regulation may be felt in a variety of ways in relation to digital technology itself, the behaviour of users, and the market for digital content. The development of digital technologies (or architecture) is the source of everything that has been examined in this thesis. This development was perceived to negatively affect the regulatory ability of copyright and therefore became the focus of copyright law. It engendered ‘updated’ copyright regulation for the digital era and was applied to render p2p architecture as unviable. It also served to legitimise DRM as an architectural mechanism to control the availability and use of content. The role of copyright regulation also threatens to override the design principles at the heart of the Internet in light of developments regarding ISP liability. Norms are, to an extent, based on the history and development of associated digital technology, it must be questioned whether the rich history of the Internet, and the ideologies and attitudes that accompanied it, can really be said to apply to the current generation of users. Norms are in a state of flux and may certainly evolve in light of the changing methods of content distribution and consumption. Content consumption is evolving; the author believes that it is becoming much more of a ‘social’ (as opposed to private) experience⁷⁹, and there is a question mark over how changes in this will influence the normative behaviour of newer generations. The market for

⁷⁴ Chapter 7, p267.

⁷⁵ Ibid, p301.

⁷⁶ Ibid, p269.

⁷⁷ Ibid, p276.

⁷⁸ Ibid, p304.

⁷⁹ For example, one can no longer log into Facebook without being confronted by what acquaintances have just listened to on Spotify. The author does not care.

digital music content appears to be increasingly consolidated along its pre-digital distribution practices, in sharp contrast to the possibilities afforded by digital technology. This has resulted in rightsholders focussing on right of distribution; which had previously generated high revenue⁸⁰, but which was impacted by digital technology. The market still appears to be developing in this way with movement away from 'permanent' copy-based distribution system. The continued emphasis on financially-driven value conforms to a market based on physical content, but which could, and should, have developed to harness digital technology. The market and architecture share a close relationship; with architecture governing the market's operation. As such, the focus by rightsholders has primarily been in relation to these two modalities; using copyright law against and/or as an adjunct to digital architecture in order to maintain the market for their content.

By viewing Internet regulation in this way, it can be seen that the convergence of copyright law has meant that all strategies to counter this trend have been tied to legal regulation, and have therefore been limited; focussing mainly on distribution. The exposition of these modalities of regulation highlights the fact that the motivations and goals of rightsholders and users may be asymmetrical. However, the role of these other regulatory factors does *not* mean that copyright is rendered insignificant, but rather that it (and thus the legal modality) should remain fluid in order to cope with changes brought about by these modalities and be of benefit to the user.

3. The Law

Lessig further realises that Law has a special role in affecting the other regulatory modalities⁸¹ (norms, market and architecture), therefore, a complete picture can only be realised by returning to, and re-considering, the operation of the legal modality as affecting the other forms of regulation considered in this thesis. What (copyright) law has regulated is not the

⁸⁰ Alexander, P.J., '*New Technology and Market Structure: Evidence from the Music Recording Industry*', (1994) 18 *Journal of Cultural Economics* 113-123, p120.

⁸¹ Lessig, L., '*Free Culture: The Nature and Future of Creativity*', (2004, Penguin Books), p123.

'pathetic dot'⁸², but primarily the architectural and related market modalities. Digital technologies are based on copying, and copyright has become a regulator of technology, or architecture; a role it was never designed to perform⁸³. As such, it was stated in 2001 that: *"The role of copyright will change. Its influence in fostering creativity will remain central to society, but will be felt in different ways."*⁸⁴

Although the relationship between copyright and technology is not new, neither is the practice of lobbying by rightsholders to advance their interests:

*"It is as American as apple pie to consider the happy life you have as an entitlement, and to look to the law to protect it if something comes along to change that happy life ... Thus, there's nothing wrong or surprising in the content industry's campaign to protect itself from the harmful consequences of a technological innovation."*⁸⁵

This initially occurred between the concepts of authorship and ownership⁸⁶, but has now moved to reproduction and more so; distribution. The development of digital technology, and copyright's response, represent a divergence between its utilitarian goal and its economic component. Initially, it could be seen that digital technology (especially the Internet) was the ultimate expression of copyright's ideological vision⁸⁷ engendering the convergence of the form and availability of content into a single digital

⁸² As Lessig envisaged the legal modality would, see Lessig, L., *'Code (Version 2.0)'*, (2006, Basic Books), p122.

⁸³ *'Digital Opportunity: A Review of Intellectual Property and Growth'*, (2011) An Independent Report by Professor Ian Hargreaves, p41, para 1.18.. Available from: <http://www.ipa.gov.uk/ipreview-finalreport.pdf>

⁸⁴ Perlmutter, S., *'Convergence and the future of copyright'*, (2001) EIPR 23(2) 111-117, p115.

⁸⁵ Lessig, L., *'Free Culture: The Nature and Future of Creativity'*, (2004, Penguin Books), pp126-127.

⁸⁶ See Deazley, R., *'On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)'*, (2004, Hart), pp191-212.

⁸⁷ See chapter 2, p81.

medium, benefitting of society. Nonetheless, the response from the content industries and policy makers was to enforce, and consequently cement their rights in the digital environment:

“Intellectual property lawyers and interest groups pushed early on to have law shore up the protections of intellectual property that cyberspace seemed certain to erase.”⁸⁸

The ‘source’ of legal consolidation were the industries that were affected in their different roles; from production and distribution, to regulation and enforcement. Clearly, the problems engendered by digital technology were global, as such any unilateral action by an individual state would be ineffective and problematic. Instead: *“The more international conflict can be standardized and the more the states agree on a solution, the more it becomes attractive to conclude an international treaty.”⁸⁹* Governments have a tendency to criminalise behaviour which they cannot otherwise control even where there is no consensus in society that certain conduct warrants sanction⁹⁰. This can be as a result of ‘politics’ rather than ‘principle’⁹¹. In the context of digital copyright, politics may have less to do with government and more to do with the impact of political organisation and lobbying on the development of copyright law⁹²: *“Gradually, the law has lost sight of its original charge: to encourage creativity, science and democracy ... The law has lost its mission...”⁹³*

⁸⁸ Lessig, L., *‘Code (Version 2.0)’*, (2006, Basic Books), p173. See also, Barlow, J.P., *‘A Declaration of the Independence of Cyberspace’*, (1996) where he states that: *“Your increasingly obsolete information industries would perpetuate themselves by proposing laws.”* Available from: <https://projects.eff.org/~barlow/Declaration-Final.html>

⁸⁹ Engel, C., *‘The Role of Law in the Governance of the Internet’*, (2006), *International Review of Law Computers & Technology* 20(1) 201-216, p207, drawing parallels with extradition.

⁹⁰ Jefferson, M., *‘Criminal Law (Ninth Edition)’*, (Pearson Longman, 2009), p11.

⁹¹ *Ibid*, p11.

⁹² Bowrey, K., *‘Who’s writing copyright’s history?’*, (1996) *EIPR* 18(6) 322-329, p323.

⁹³ Vaidhyathan, S., *‘Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity’*, (2001, New York University Press), p4.

Although copyright is an author's right, the rightsholders (or owners) in question have become increasingly large and powerful corporations who are capable of wielding significant lobbying power⁹⁴:

*“And so begins the history of the ill-fated process that corrupts and hinders copyright legislation by making it the handmaiden of professional industries, drafted behind the backs of elected officials.”*⁹⁵

This has resulted in rightsholders focussing on the right of distribution; which had previously generated high revenue⁹⁶, but which was altered by digital technology. The continued emphasis on financially-driven value conforms to a market based on physical content, but which could, and should, have developed to harness digital technology. It also highlights the relative lack of standing of creator groups⁹⁷, especially in the field of recorded music. However, *“... both copyright compliance and the future health of the music industry depend on building mutually beneficial relationships between musicians and their fans.”*⁹⁸

In this respect, the market is indispensable; through it, users and would-be creators consume and potentially create digital music content. However, it must accept value *beyond* the monetary⁹⁹ which was the emphasis in its pre-existing operation. The initial trend was one of consolidation, and

⁹⁴ See Kingston, W., *‘Intellectual property’s problems: how far is the US Constitution to blame’*, (2002) IPQ 4 315-341, p335: *“To the extent that any laws of property fail to be formulated by the authorities in terms of the public good, they will be shaped instead by those who can benefit from them.”*

⁹⁵ Lamoureux, E.L., Baron, S.L., and Stewart, C., *‘Intellectual Property Law & Interactive Media: Free for a Fee’*, (2009, Peter Lang Publishing), p38.

⁹⁶ Alexander, P.J., *‘New Technology and Market Structure: Evidence from the Music Recording Industry’*, (1994) 18 Journal of Cultural Economics 113-123, p120.

⁹⁷ Spence, M., *‘Intellectual Property’*, (2007, Oxford University Press), p74.

⁹⁸ Schultz, M.F., *‘Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law’*, (2006) 21 Berkeley Technology Law Journal 651-728, p657.

⁹⁹ See chapter 3, pp107-108.

convergence around the right of distribution such as to maintain the music industry's pre-digital business model. Despite the fact that digital technology has enabled new market opportunities, which could have been built on the back of related norms, the market still operates to restrict content to prescribed outlets and emphasises financial dependence on widespread distribution, 'hits'¹⁰⁰ and 'popularity'¹⁰¹. As such, emphasis has been on maintaining this, rather than diversifying in terms of content output and delivery. Theoretically, the importance of the market modality suggests that the issue is one to which the industry (and by implication, the market) must react. There is nothing in copyright law to stop this; just because it has been used to regulate in one way, does not mean that it cannot regulate in the opposite way. Nonetheless, regulation through copyright has taken precedence over the goal of copyright itself.

4. And finally

Copyright has been deployed as a regulatory mechanism to override the conflicting regulatory forces of norms, the market and architecture such that in the digital environment, copyright has become a byword for distribution. Copyright should *not* be exclusively about distribution, it should be about copyright. Copyright is not broken, it never was, but it needs to redress the balance between distribution and creation as a means of justifying its utilitarian vision. The necessary economic incentives should be to create, *not* to distribute. The ultimate distribution network is already in place, over and above those implemented by the content industries and the music industry in particular – that is the Internet.

¹⁰⁰ Chapter 3, p117 and chapter 7, p296.

¹⁰¹ In the UK, digital chart entry is still based on a minimum pricing threshold, *Ibid*, p296.

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Appendix

Appendix

Published work

A version of chapter 3 has been published in the Journal of Internet Law:
Scharf, N., *'Life Through a Lens: A "Lessigan" Model For Understanding Digital Copyright Infringement?'*, (2012) Journal of Internet Law 16(1) 18-34.

A version of chapter 4 has been published in the Journal of Intellectual Property Law & Practice:

Scharf, N., *'Napster's Long Shadow: Copyright and Peer-to-Peer Technology'*, (2011) JIPLP 6(11) 806-812.

A version of chapter 5 has been published in the European Journal of Law and Technology:

Scharf, N., *'Digital Rights Management and Fair Use'*, (2010) EJLT 1(2), available from: <http://ejlt.org//article/view/22>