

COPYRIGHT ENFORCEMENT IN THE NETWORKED SOCIETY

GUIDING PRINCIPLES FOR PROTECTING COPYRIGHT



EXECUTIVE SUMMARY

The presence of file sharing is seen by some as empirical evidence of the wide spread lack of respect of the right to “fair” remuneration for use of copyright or that file sharing is proof that the “right” to be remunerated still continues to be challenged. However this view fails to recognize or adequately distinguish that file-sharing is a symptom of online copyright infringement - it is not the root cause. The root cause of the problem is the inadequate availability of lawful, timely, affordable, competitively priced and wide-ranging choice of digital content offerings. This is fundamentally a market supply failure. This supply failure is a result of:

- Limited availability of lawful digital content
- Technology specificity of copyright licensing potentially hindering innovation
- Unreasonable transaction costs making digital content relatively more expensive.

The global networked communications infrastructure is the largest human project ever constructed. This human project is widely recognized to have transformed economies and societies both advanced and developing. Ongoing transformational societal benefits are expected as the networked society or digital society emerges. The networked communications infrastructure and the use of networked applications will continue to decisively shape the digital competitiveness of nations.

A one-sided approach which enforces copyright at the expense of all other stakeholders and the digital competitiveness of nations is not the cure for the problem nor a treatment of the symptoms. Economic history has already taught us well that a monocausal explanation of complex processes and hence one-sided solutions will not work.

Any future copyright enforcement policy should be developed from a clear and evidence-based approach. An approach that carefully balances the incentives and rewards provided to economic rights holders against fundamental rights of privacy, self-expression, due process and the user rights embodied in copyright law to protect access, learning, critique, and reuse.

Future enforcement policies should be proportional and flexible recognizing that historical rates of copyright infringement and the decline in physical sales, may also be a reflection of market conditions, various forms of access barriers, failed strategy and increased competition from; lawful digital distribution services, other platforms (such as Music in TV and Gaming) and live performances – all legitimately displacing physical sales.

This paper suggests that, adequate enforcement measures are certainly part of a solution to a well functioning lawful digital market. However, enforcement alone can never solve the root cause of unlawful file-sharing, since it utterly fails to address supply-side market barriers. Focus on enforcement measures alone continues to leave out a legitimate but un-served market demand, susceptible to unlawful alternatives. A competitive and consumer friendly digital content market and an appropriate legal framework to enable easy lawful access to digital content are essential preconditions for the creation of a culture of lawful, rather than unlawful, consumption.

BACKGROUND

“Governing copyright in the networked society is equal to regulation of a nation’s digital competitiveness”

Some technological advancements not only develop and grow economies but also lead to structural changes in production, distribution, communication and consumption in the society. The capacity for structural change in the most advantageous direction is a highly valuable societal skill in order to reach development, and then to be able to preserve and increase the gains as the context and opportunities change.¹ Transformational change will, due to its nature, involve some conflict. Mastering this process is a key national strategic capability as it will shape the competitiveness of nations and industries. It will define the capacity and ability of an economy and its actors to shift economic activities and hence output to higher productivity activities that in turn can generate higher levels of real economic growth.²

The networked communications infrastructure surrounding us today is the largest construction project in human history.³ Over the last two decades, the transformative impact this human project has had across society emphasizes the essential role of policy and regulation to support stakeholders to act as socio-economic change agents.

This networked communications infrastructure has been found to increase productivity of economies and hence is a key source of sustainable economic growth, job creation, new business creation and expansion of the tax base. Some important effects⁴ confirmed by academic research are:

- For every 10 percentage points increase in broadband penetration the isolated economic effect on GDP growth is around 1% of GDP. Estimates vary between 0.5% - 2%.
- For every 1000 additional broadband users, around 80 jobs are created. Estimates vary between around 20 jobs and 130 jobs per 1000 new broadband users.
- Doubling the broadband speed for an economy increases GDP by 0.3% point.
- Adoption of ICT technology is a driver of multifactor productivity growth. This includes the impact of intangible investments such as organizational changes, new distribution, production process and other new methods of doing business.

- Improvements in human capital. ICT can manage simple and tedious tasks for high skilled labor, it creates the opportunity for labor to move to higher skilled activities and improve productivity.
- Societal transformation led by ICT is not just the tale of the prosperous states doing better. Most developing countries view the increased use of ICT as a critical tool in their efforts to eradicate poverty, enhance human development, and achieve UN Millennium Development Goals.

Digitization is a product created by the ICT led revolution⁵ and the digital age is a fact of life of the 21st Century - actually it is the first Digital Century! Digitization is today omnipresent in all aspects of our lives; communication, information, collaboration, professional media (such as film, TV, radio, music, press) but also in retail banking, e-commerce, remote-working and health to mention a few.

Property rights and Intellectual Property Rights (IPR) in particular are of course fundamental in both high-tech industries such as ICT (semiconductor, software, network equipment, devices and design) as well as in creative industries (audiovisual, music, books, etc). There are a number of fundamental but quite complex attributes⁶ associated with intellectual property rights shaping and constraining the perception, behavior and actions of all involved stakeholders. The complexity grows even further since such property rights are not absolute but rather relative rights both within their own legal construct (such as the copyright) as well as relative to other prevailing status (civil, criminal and administrative) in a particular jurisdiction.⁷ This complexity impacts again on the perception, behavior and actions of stakeholders in question.

However, the focus of one particular property right, copyright, in the public debate has been far too long largely defined by two diametrically opposed absolutes, unable to constructively deal with the relative nature of copyright. At one side of the extreme, we may call it “*simplified copyright absolutism*”, calls have been made not only to further strengthen the rights of economic rights holders but to upwardly revise copyright enforcement. This view has significantly shaped the public debate in the mainstream media. Consequently, the starting point of the enforcement debate has been the singular interest of the absolute rights of the economic rights holder (including collective rights management organizations).

For a number of reasons, it is a bit ironic that this “*absolute*” approach, in the public debate is frequently referring to the credo of “fair” remuneration:

- The first and most obvious contradiction is the relative or subjective nature of the word “fair” in itself.⁸ Some argue that economic rights holders’ view of the concept of “fair value” is the maximum freedom to use their exclusive/monopolistic rights without limitations, and thus extract a maximum rent. In other words, in their view there is nothing relative about the concept of “fair”.
- Secondly, “fair” to whom? Much too often the rhetoric of copyright absolutism deliberately mentions the creator, without recognizing the simple fact that most commercial arrangements today regulate creators’ rewards contractually. That is, the relation between creators and the economic rights holders (whose business it is to commercially maximize the creative endeavor) is regulated in a contract or an employment agreement and not by copyright (the latter establishes creators’ right to be remunerated, but not necessarily “fairly”).⁹

Whose right then to “fair” remuneration is the rhetoric focusing on ~ qui bono? It is the private and singular interest of economic rights holders. Of course, and rightly so, economic rights holders need to recoup all of their input costs and make a “fair” margin to be expected to continue to invest in new exploitations of creative endeavors. And as already noted the input cost of creativity is regulated by a contractual arrangement. So the immediate beneficiary of the rhetoric of copyright absolutism is not the creator but the economic rights holder. Under the presumption that the economic rights holder will make a just call in setting a “fair” price¹⁰ on various creative inputs.

- Thirdly, the concept of “fair” remuneration, based on a monopoly rent target, today excludes consumers¹¹ and the price points and the range of choices that are offered to them. It also excludes; the wider considerations of market efficiency, considerations of increased costs including the cost to intermediaries to enforce third parties (economic rights holders) property rights; and considerations of the prospect of growing the lawful digital content market.

- Fourthly, on the diametrically opposite side of the copyright absolutism version of the world, we may call it “*Communism 2.0*” or just simply “*Piracy*”, the fundamental remuneration “right” for creative endeavors has been challenged. In other words the most extreme version of this view does not even deal with the concept of “fair” remuneration but principally challenges the fundamental “right” to be remunerated per se and maintains that citizens have an unrestricted right to access creative endeavors. It is however comforting that today the “right” to remuneration for creative input is accepted by almost all stakeholders and even better that this right should NOT be challenged.

The ongoing presence of file sharing is cited by some as empirical evidence that there is a wide spread lack of respect of the right to “fair” remuneration. Also that file sharing is proof that the “right” to be remunerated still continues to be challenged. Hence, the calls for further strengthening of copyright enforcement to protect the singular interest of economic rights holders. However this view fails to recognize or to adequately distinguish that file-sharing is a symptom of a problem. The root cause of the problem is the inadequate availability (supply) of lawful, timely, affordable, competitively priced and wide-ranging choice of digital content offerings, which is a fundamental market supply failure. This supply failure is a result of; a) limited availability of lawful digital content, b) technology specificity of copyright licensing potentially hindering innovation and c) unreasonable transaction costs making digital content in some cases more expensive.

Most agree that adequate enforcement measures are certainly part of a solution to unlawful file sharing and hence a well functioning lawful digital market. However, the market supply failure can never be solved by enforcement alone, since it utterly fails to address supply-side barriers to a properly functioning lawful digital market. Focus on enforcement measures alone continues to leave out a legitimate but un-served market demand, susceptible to unlawful alternatives.

BRIEF COPYRIGHT ENFORCEMENT HISTORY

Over the last two decades, there has been very significant pressure to strengthen copyright laws in the digital environment by providing cheaper enforcement mechanisms and more severe penalties for infringement. Given the scale and disperse nature of online copyright infringement, economic rights holders have struggled to enforce their rights directly against end users.

The great challenge, for economic rights holders, has been to attempt to shift the social norms that support infringement through a combination of education campaigns, high profile and highly punitive enforcement actions and mass suits against end users. These actions have been very unpopular and highly ineffective, turning users against economic rights holders and helping to legitimize a counterculture - where infringing copyright is a way to express defiance of institutional authority. In response, economic rights holders have stepped back from direct enforcement. They have sought to further decentralize enforcement mechanisms by pursuing requirements that ISPs take an active role in overseeing the activities of their users.

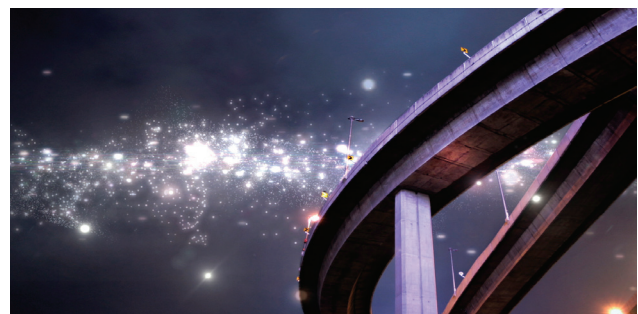
The first component of this decentralized approach typically involves relying on intermediaries to positively discourage users from copyright infringement by; supporting public education, the distribution of information regarding the importance of respect for copyright; and passing on infringement notices to ensure that end users are aware that their actions can be monitored and that they can potentially face serious consequences for online infringement. The second component, which has started to emerge in a number of jurisdictions worldwide, seeks to make actual enforcement more routine by requiring ISPs to impose service restrictions and/or other penalties on users repeatedly accused of online copyright infringement.

These enforcement measures, called graduated response or 'three-strike' schemes, shift the burden of enforcing copyright away from judicial proceedings to the intermediaries who provide consumer internet access. By lowering economic rights holders' enforcement costs and making penalties more routine, graduated response schemes are designed to drive a fundamental shift in social norms against online file sharing. Distributed enforcement is particularly appealing to economic rights holders not only because it avoids the high costs of end-user litigation, but also because it can avoid the opprobrium of individual users and the adverse publicity that mass litigation has brought.

Various forms of graduated response schemes are beginning to develop around the world. South Korea and France have already introduced formal graduated response schemes and the United Kingdom and New Zealand have passed legislation that enables enforcement measures to be mandated in the near future. In Ireland, a recent copyright suit against a major ISP has resulted in the development of a private scheme that will require Irish ISPs to disconnect alleged repeat infringers. Most recently, several of the largest US ISPs have entered into private agreements with economic rights holders to institute a system that, while it does not explicitly require termination of alleged repeat infringers, includes issuing warnings to users and requiring users who receive multiple warnings to undergo mandatory education programs or have their internet speeds temporarily slowed.

The absence of adequate and attractive lawful digital services, the perceived lack of harm of copyright infringement (sometimes considered a "victimless offense") and to some extent the lack of any real threat of enforcement, has jointly supported the spread of online infringement amongst end users. By offering the "carrot" of positively positioning copyright as supporting artists with the "stick" of convincing end users that their internet access is under surveillance and that copyright infringement routinely results in the imposition of serious penalties, economic rights holders hope that graduated response schemes can finally effect a substantial shift in rates of infringement online. Unfortunately, economic rights holders have so far not sufficiently focused on the creation of appealing and lawful digital services.¹²

Whether this strategy, without a wide spread presence of adequate lawful digital alternatives, is likely to be effective in the long term is unknown at this stage, but as policy makers and industry groups continue to face pressure to decentralize the task of copyright enforcement, several key principles should be borne in mind.



KEY PRINCIPLES – A DELICATE BALANCING ACT

Copyright enforcement policy in the digital age has by the “*absolute view*” been framed in terms of response to a growing crisis of infringement. Economic rights holders point to the decline of physical sales and enormous rates of alleged infringement, as a perceived threat to intellectual property profitability, in order to justify a significant expansion in copyright strength and duration and also to support the need for further decentralization of liability and responsibility to online intermediaries. The identification of crisis supports measures designed to affect a fundamental shift in behavior, which could otherwise be seen as paying too little heed to the interests of end users.¹³

Any future copyright enforcement policy should ideally be developed from a clear evidence-based approach. An approach that carefully balances the incentives and rewards provided to economic rights holders against fundamental rights of privacy, self-expression, due process and the user rights embodied in copyright law to protect access, learning, critique, and reuse. In this context, future policy should also be proportional and flexible recognizing that historical rate of copyright infringement and the decline in physical sales may also be a reflection of market conditions. That being various forms of access barriers, failed strategy and increased competition from lawful digital distribution services displacing physical sales, increased competition from other platforms (such as music in TV and Gaming) and increased competition from live performances displacing physical sales.

EVIDENCE BASED POLICY

Empirical data on the impact of copyright infringement over the last two decades is deeply contested. While infringement is certainly widespread, there is a lack of clear evidence detailing the extent of the impact that file sharing has on

revenue and on the incentives that copyright provides for creators and publishers.¹⁴ Further more, there is a clear need to understand the cause of unlawful consumption.

A WIPO¹⁵ report identified that content access barriers often result in the personal consumption needs of viewers being unmet. As a result, viewers try to circumvent or bypass these barriers in an attempt to satisfy their entertainment requirements. The report identified the following access barriers:

- Consumer and industry barriers
- Content exclusivity and lack of sufficient competition
- Policy and regulatory barriers
- Unavailability (deliberate) of content (e.g. windowing or territoriality)
- Content regulation.

In other words the private “free-rider” motive is by far not the only reason why unlawful file sharing is widespread. There is also a need to gather *objective*¹⁶ data on the size, scale, motivations and effects of counterfeiting, piracy and unlawful file sharing in order to achieve an evidence-based policy approach. Empowering an existing or creating a new independent agency with clear focus on observing developments and collecting data in this field is an important and right step in an evidence based policy approach.

Prior to the introduction of any new, or any reform of enforcement measures, a wide reaching (including all stakeholders) and independent economic analysis of the impact of unlawful file sharing, as well as a regulatory impact analysis of proposed measures must be carried out in a transparently managed and open consultation process.¹⁷

BROADBAND ACCESS – A VERSATILE ENABLER OF A RICH SET OF COMMUNICATION SERVICES AND APPLICATIONS

Broadband access can be provided by a number of different wired access technologies such as; copper, cable, fibre and power line as well as wireless access technologies such as; Wi-Fi, 2G/EDGE, 3G/HSPA and LTE. Broadband access can be used to enable access to both non-IP based networks (X-25, Frame Relay and ATM) as well as IP based networks. The latter group, may typically use the TCP/IP transport layer protocol, which is the most commonly known Internet protocol and is also regarded as the foundation of the Internet. TCP/IP is used by many

of the Internet’s most popular applications including; world wide web browsing (HTTP) but also blogs, chats and social media; to send/receive email (SMTP); file transfer (FTP); secure communication using a public key (SSH); some streaming media applications and peer-to-peer file sharing. Other IP but not TCP transport protocol based applications (e.g. using UDP) such as VoIP and Video are also very popular end user Internet applications that rely on IP base networking enabled by broadband access.

RAISING THE AWARENESS OF THE IMPORTANCE OF IPR

Educational and awareness raising campaigns, including those for young people, on the value intellectual property should be encouraged and promoted by all stakeholders. However, education campaigns may realistically succeed, especially with young generations, when coupled with consumer friendly, wide ranging, timely available lawful content offerings at affordable prices and conditions. In other words, education about appropriate user behaviour, on one side and enforcement measures, on the other, are certainly part of the solution, but they are not enough. More lawful offers must be developed and these need to be as easy to access and as diverse, as content currently accessible through unlawful means. A competitive content market and an appropriate lawful framework enabling easy lawful access to content are therefore essential preconditions to the creation of a culture of legal, rather than unlawful consumption.

BALANCING THE INTERESTS OF INNOVATORS AND INTERMEDIARIES

As technologies and business models continue to develop, limitations of intermediary liability through safe harbor regimes and explicit defenses play an extremely important role in enabling innovation. While placing increased liability and responsibility for copyright infringement on intermediaries can assist in making enforcement more efficient, such moves must always be considered in light of the impact on the intermediaries and investments in new innovations. An expanding digital economy depends on the continued investments in broadband access, networked infrastructure, software, applications and on-line services. Policy makers should continue to ensure a level of certainty (investment confidence) through well balanced limitations of liability for intermediaries.¹⁸

THE APOCALYPTIC ADVANCES OF TECHNOLOGY IN CREATIVE INDUSTRY

From the enactment of the Statute of Anne by the British Parliament in 1710, the first copyright law in the world to the ACTA negotiations, the evolution of copyright law has been a closed negotiation process of privileges, resulting in special interest legislation. While seeking to protect the rights of those who have invested in the production of creative works, this process has had the consequence under every revision of creating or attempting to erect, entry barriers for outsiders to the existing industry, barriers that have proved harmful to emergent industry sectors.¹⁹

The nature of these “outsiders” has changed over time. The phonogram, the cinematograph, broadcast television and radio, the compact cassette, the compact disc, cable and satellite broadcasting transmission and the digital downloading of MP3 music files are all innovations that share a common history – all were perceived as threats to then incumbents that might disrupt status quo copyright privileges.

*1906: Advent of the music recording industry threat; i.e. gramophones (today CD-players and DVD-players), players pianos and talking machines. The technologies threaten to negate the value of sheet music and the future of creativity; Composer John Phillip Sousa to the US Congress: “...these machines are going to ruin the artistic development of music....the vocal chord will be eliminated by process of evolution, as was the tail of a man when he came from the ape”.*²⁰

*1920: Advent of the FM radio industry threat: “recording industry fears the new medium that would provide close substitutes to buying records”.*²¹

*1960: Advent of the cable-TV industry threat: Broadcasting industry (terrestrial TV) complained that CATV operators neither need nor deserve a free ride at the expense of copyright owners and the activities of “CATV operators constitute a clear moral wrong”. In 1975, the Film Industry describes cable industry as a “huge parasite that is feeding and fattening itself off local television stations and copyright owners”.*²²

*1980: Advent of home recording industry– the VCR threat; Stanley M. Gortikov, president of the Recording Industry Association of America (RIAA), explained in hearings before a House committee on 14 April 1982, “I’m scared, and so is my industry. Changing technology today is threatening to destroy the value of our copyrights and the vitality of the music industry. Our nemesis is home taping.”*²³

A retrospective glance at key events in the media industry over the past 100 years shows a persistent pattern, technology gives, and technology takes away, but it seldom takes everything away. Technological advances create new products and segments of the creative industry, fuel increases in usage and spending on media products, but at the same time erode existing markets, segments and business models. The fact that the media industry owes its existence to technological advance and that technology is a permanently moving carpet under its feet, is surprisingly seldom acknowledged by the creative industry itself.²⁴

QUALITY OF ALLEGATIONS OF INFRINGEMENT

There is great variance in the accuracy and trustworthiness of automated systems that are employed by rights holders to monitor the sharing of copyright works via the Internet. These systems collect IP addresses apparently involved in the actual exchanges of files over the Internet and store them together with a date/time stamp. Because the quality of providers of infringement notices varies significantly, policy makers should take steps to ensure that, as far as possible, allegations of infringement are reliable and made in good faith. Such a principle both supports the basic rights of individuals against unsubstantiated allegations and increases the likelihood that infringement notices will be taken seriously and effect a long term change in consumer behavior.

While infringement notices can be used to identify alleged individual infringers on a particular ISP's network, ISPs lack an ability to reliably verify the veracity of allegations against their users. Respect for the presumption of innocence requires that, in any notice-only, elevated notice regime or graduated response scheme where ISPs are expected to take action in response to infringement notices, sufficient measures are in place to ensure that notices are generated according to a reliable, transparent, and accountable process and presented by the rightful owner of the IPR (or his representative). There is also a need for some form of redress in case of erroneous or abusive use of notifications

ISP OBLIGATIONS - SANCTIONS

There is a serious and important difference between requiring intermediaries to pass allegations of infringement on to end users and requiring intermediaries to take action to impose sanctions on their users for apparent infringement. Any sanctions should remain the prerogative of the courts. Only due legal processes can ensure that allegations are properly evaluated, defenses adequately considered and proportional punishments imposed. In bypassing established judicial proceedings, distributed enforcement of copyright runs the risk of bypassing the safeguards that have been established to ensure that copyright law is enforced in a way that is both regular and equitable.²⁵

While ISPs and other intermediaries have a legitimate interest in regulating behavior and content on their networks on a voluntary basis (such as clearly illegal, harmful or obscene content), intermediaries should give consideration

to principles of due process, the presumption of innocence and the interests of individuals to communicate and seek information. ISPs and other intermediaries should be responsive in removing or disabling access to illegal content when required to do so by judicial authorities, but principles of intermediary liability should not encourage ISPs to enforce private rights in order to avoid liability. In cases where intermediaries are required to administer takedown schemes, legitimate provisions should be put in place to ensure that the scheme is regular, proportional, and provides a simple and accessible means of appeal for users adversely affected.

COURT OF JUSTICE OF THE EUROPEAN UNION – SCARLET VS. SABAM

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. Advocate General considers that the installation of that filtering and blocking system is a restriction on the right to respect for the privacy of communications and the right to protection of personal data, both of which are rights protected under the Charter of Fundamental Rights. By the same token, the deployment of such a system would restrict freedom of information, which is also protected by the Charter of Fundamental Rights.²⁶

ISP OBLIGATIONS - DISCLOSURE OF IP ADDRESS

The principle that the messages passing over a telecommunications network and information regarding the use of the network by users is strictly confidential is well established. Any action that results in the identification of details of subscribers upon allegations of infringement must recognise this important principle and maintain respect for privacy rights and the presumption of innocence. As such, disclosure should only occur following a judicial order. An order authorising disclosure or preliminary discovery should be limited to circumstances where the rights holder can show a strong prima facie case and specific acts of alleged infringement.

ISP OBLIGATIONS -BLOCKING ACCESS TO ONLINE RESOURCES

In some jurisdictions, courts have required intermediaries to impose measures to restrict access of their subscribers to certain websites or other online resources. Before such technical approaches are imposed in response to copyright infringement, careful consideration should be given to:

- the efficacy of blocking, given the ease with which content is mirrored and technical blocks are easily circumvented;
- the risk of over blocking, particularly since blocking of an IP address increasingly restricts access to legitimate content hosted by that provider and by others sharing a virtual host; and
- the impact of blocking and other technical measures on the ISP and on the speed, cost and efficiency of the ISP's network.

Given the relatively minor²⁷ effort required to circumvent blocking and filtering measures and hence the relatively minor benefit that can be gained for economic rights holders through blocking, it is suggested that blocking in fact does not provide an attractive or useful tool to combat online copyright infringement.

ISP OBLIGATIONS - DISCONNECTION

The severity of disconnection as a punitive response to copyright infringement suggests that while it may be an appropriate penalty for widespread commercial-scale infringement, it is unlikely to provide a reasonably proportionate penalty in cases of consumer-level infringement. The international community has not yet come to agreement on whether suspension of internet access for proven repeat infringers of copyright is a legitimate and proportionate response. As more states consider graduated response schemes, this is likely to continue to be the most important consideration in determining whether a graduated response scheme is a desirable public policy response to copyright infringement. Given the increasing importance of internet access across all facets of daily life, however, this is likely to be a deeply contested issue for the foreseeable future. A large part of the puzzle may involve a more complex consideration of whether graduated response schemes are likely to be effective and whether there are other options that policy makers and economic rights holders could pursue that could effectively limit copyright infringement or economic harm without placing so much emphasis on the punishment of infringers.

Two substantial issues further complicate imposing disconnection of consumer Internet access as a penalty for copyright infringement. The first is the inherent collateral damage; disconnection of a home, SME office or large organization (corporate or public) Internet connection applies to all members of the premise, not just the 'repeat infringer'. The second is the potential concerning effect on legitimate but borderline expressive use of copyright material. Because ISPs are not in the position to be able to assess the validity of claims of fair use or exceptions, there is a substantial risk that legitimate reuses of copyright content may be incorrectly punished. The severity of the penalty also means that individual creators are more likely to be dissuaded from engaging in fair uses of copyright material when either an innocent mistake, either on the user's or the ISP's behalf, could lead to disconnection.

STATUTORY MEASURES, INDUSTRY CODES AND CONTRACTUAL AGREEMENTS – CAN WE HAVE IT ALL AND ALL AT ONCE?

Some “anti-piracy” organizations and rights holders argue for “anti-piracy” measures to be included in industry-wide codes of conduct or voluntary schemes. In parallel, many of these organizations advocate for further upward revisions of copyright enforcement measures. Frequently, “anti-piracy” measures are also raised as part of bilateral contractual negotiations between rights holders and ISPs. It seems however, that such bilateral agreements between rights holders and ISPs are yet not commonplace. Again, ISPs are constrained both by privacy legislation and by general principles protecting communications from intervention by private players - as well as by competition mechanisms. Legislation, along with lacking information regarding contractual agreements, puts constraints on industry organizations engaged in creating industry-wide codes of conduct. Likewise, to that extent ISPs signing contractual commitments against unlawful file-sharing receive contractual advantages from rights holders, incentives to sign off industry-wide codes of conduct diminish.

ACCESS LEVY - COMPENSATING UNLAWFUL FILE SHARING – PECUNIA NON OLET²⁸

In some jurisdictions the idea of a general levy to be placed on Internet connections as a way of funding artists or somehow “compensate” them for unlawful downloads has been put forward. An access-levy is a tax on subscribers and is a poor mirror image of the levy system used in some jurisdictions on physical goods. An access-levy suffers from the following moral hazard failings; it would also target those who don't download unlawfully, it justifies unlawful behaviour of those who download unlawfully, destroys any chance of creating lawful ways of consuming content, and is very unlikely to accurately compensate artists in the right way.²⁹



CONCLUSIONS – A BALANCED APPROACH TO COPYRIGHT ENFORCEMENT IN THE NETWORKED SOCIETY

With all the elements described above in the mix and competition for control of the regulatory paradigm between economic rights holders and intermediaries the questions arise, “What should be the guiding principle? What are the alternatives?”

As noted, the development of copyright law has predominantly been to strengthen the rights of economic rights holders by expanding the time-span and scope of the exclusive rights, increasing penalties for infringement, and reducing their private costs of enforcement. Rather than continuously expanding copyright, enforcement and increase deterrence which may be ideal from an absolutistic copyright perspective, Ericsson believes that future reforms should be:

- Fact based
- Balanced - include all relevant stakeholders
- Focus on end user demand
- Respect the right to privacy and freedom of communication
- Support continued innovation in new technology and services
- Promote growth of lawful digital services and market efficiency
- Respect the relative nature of property rights such as copyright.

Already today, the global networked communications infrastructure is the largest human project ever constructed. This human project is widely recognized to have transformed economies and societies both advanced and developing. Ongoing transformational societal benefits are expected as the networked society or digital society emerges. The networked communications infrastructure and the use of networked applications will decisively continue to shape the digital competitiveness of nations. Hence, a one sided approach to enforce copyright at the expense of all other stake holders and at the expense of digital competitiveness of nations is NOT the answer. Economic history³⁰ has already taught us that a monocausal explanation of complex processes and hence one-sided solutions will not work. In Ericsson’s view the following observations suggest the immediate way forward:

- Continued educational efforts are still required to foster a positive culture of respect for copyright and to encourage responsible choices by individual users not to infringe copyright.

- The reasonable expectations of users need to be accommodated. Consider for example the way the law has accommodated the infringement of copyright that takes place by time shifting television programs and format shifting music files. In some jurisdictions express amendments to copyright legislation have been introduced legalizing making of copies for personal use in this context; by creating exceptions to the exclusive right or through application of the “fair use” doctrine. However, adherence to this principle is not to suggest that it is inevitable that users will make and share works - in an infringing manner - without restriction or even that doing so may one day be legalized.
- Timely availability of lawful, competitive and wide ranging choices of affordable content offerings is the simplest and most effective means of reducing copyright infringement.
- Intermediaries are not opposed to copyright or enforcement of copyright. This is even more the case as networks improve and best effort carriage services become more of a commodity. In response, carriers and service providers have developed an increased interest in content services as a means of service differentiating.
- Copyright is a private commercial interest of the rights holder, to the extent that action to discourage or prevent copyright infringement is necessary, the rights holder is the primary and often the sole beneficiary. Accordingly, it was recently recognized in a leading case in this area³¹ that it is appropriate for the rights holder to cover the costs of the action and also bare any associated risks.
- To the extent that enforcement action of rights takes place, relying on the evidence provided by a rights holder, the rights holder should take responsibility for the consequences of the action including indemnifying the ISP against any costs or losses it might suffer.
- Most definitely avoid outsourcing, say to ISPs of private property enforcement. Any sanctions should remain the prerogative of the courts. Only due legal processes can ensure that allegations are properly evaluated, defences adequately considered, and proportional punishments imposed.

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- ³ Cowhey and Aronson, *Transforming Global Information and Communication Market, the Political Economy of Innovation*, 2009.
- ⁴ The literature is enormous for some prominent examples see; *Wired For Innovation – How IT is Reshaping the Economy*, Brynjolfsson and Saunders; MIT 2010. *The Economics of the Digital Society*, Soete and Wheel, 2005. *The Rise of the Network Society*, Second Edition, Castells 2010. Boston Consulting Group, *Socio-economic impact of allocating 700 MHz band to mobile in Asia Pacific*, 2010, EPC/Copenhagen Economics – *The Economic Impact of a European Digital Single Market*, 2010. ADL, *Socioeconomic impact of broadband network investments*, 2010. See also <http://www.ericsson.com/news/1550083> Ericsson Press Release: "New study quantifies the impact of broadband speed on GDP"
- ⁵ To read more about digitalization and ICT technology advancements, see for example: *Competing for the Future- how digital innovations are changing the World*, Henry Kressel, 2007.
- ⁶ Such as: a] Definition of private property (tangible, intangible) b] Allocation of resources and hence associated rights such as reproduction right, c] Determination of use, d] Scope of exclusivity, e] Delegation/transferability of exclusive rights, f] Limitations to exclusivity, g] Protection such as enforcement of contracts, exclusive rights, and limitations to state/regulatory expropriation.
- ⁷ Recognizing that in some jurisdictions such as France, copyright is seen as a natural right only limited by time and hence much less relative in nature.
- ⁸ Recognizing that the term "fair" is part of the international copyright-legislation terminology of law and has genuine meaning in different situations as the concept of "fair" remuneration is not always interpreted nor applied in absolutistic terms, such as the "Fair remuneration" requests from those that accept limitations/exceptions to the exclusive rights, to be compensated fairly where the limitation/exception prevents the creation of a commercial market. Also the issue of collective licensing is slightly different: it is based on the principle that if music, images, etc. contribute to the success of another commercial venture, they should be treated as any other input and be "fairly" remunerated. It is not absolutists, but rather the application of normal business principles.
- ⁹ Recognizing that some countries especially in Europe and contrarily to the US, does not allow the bulk transfer of all of the economic rights to a producer, thus guaranteeing that the author will have access to an independent cash flow usually managed by a collective rights management organizations.
- ¹⁰ One needs to also consider; is the "fair" price to creators set by an efficient and competitive market, or do we just accept that we do not come as equals to most markets and hence accept that profit maximizing oligopoly is "fair" enough? After all, the top 10% of authors receive 60-70% of the total income of the sector (Source: SABIP).
- ¹¹ BEUC IPR Strategy 2011: "The consumer is not mentioned at all in copyright legislation".
- ¹² Currah, Andrew (2007) 'Hollywood, the Internet and the World: A Geography of Disruptive Innovation', *Industry & Innovation*, 14: 4, 359 – 384. See also IFPI Digital Music Report 2011 page 12, concluded that of Global total revenues; only 1% of Film, 2% of Book and 4% of Newspaper total global revenues were generated digitally.
- ¹³ Julie E Cohen, "Pervasively Distributed Copyright Enforcement" (2006) 95 *Georgetown Law Journal* 1.
- ¹⁴ GOA United States Government Accountability Office, Report to Congressional Committees, *Intellectual Property*, April 2010. See also: Harvard Business Review *File-Sharing and Copyright*, Felix Oberholzer-Gee and Koleman Strumpf, May 2009.
- ¹⁵ WIPO, *SCCR/20/2 REV, Study on the Socioeconomic Dimension of the Unauthorized Use of Signals – Part II: Unauthorized Access To Broadcast Content – Cause And Effects: A Global Overview*, June 2010.
- ¹⁶ *Digital Opportunity*, a review of intellectual property and growth, Ian Hargreaves, May 2011 UK.
- ¹⁷ The reference list is extensive, some examples see: OECD, *Regulating Policies in OECD Countries*, 2002. OECD, *Improving the quality of government regulation OECD 1995*, OECD Regulatory Reform OECD 1997, OECD Regulatory Impact Analysis, OECD 1997.
- ¹⁸ See also, OECD Communiqué: *On Principles for Internet Policy-Making*, 28-29 June Paris.
- ¹⁹ *Digital Copyright*, Professor Jessica Litman, 2006, Prometheus Books.
- ²⁰ Arguments before the US Commission on Patents of the S & H.R., *Conjointly on the Bills S 6330 and H.R. 19, 853 to Amend and Consolidate the Acts Respecting Copyright 1906*.
- ²¹ Harvard Business Review *File-Sharing and Copyright*, Felix Oberholzer-Gee and Koleman Strumpf, May 2009
- ²² Tim Wu "Copyright's Communication Policy" 1043 *Mich. L. Rev.* 278, 313 (2004)
- ²³ Harvard Business Review *File-Sharing and Copyright*, Felix Oberholzer-Gee and Koleman Strumpf, May 2009
- ²⁴ *The Internet and the Mass Media*, Kung, Picard, Towse, 2008
- ²⁵ See further Nicolas Suzor and Brian Fitzgerald, "The legitimacy of graduated response schemes in copyright law" (2011) 34(1) *University of New South Wales Law Journal* 1.
- ²⁶ *Courte of Justice of the European Union*, Press Release No 37/11, Luxembourg, 14 April 2011.
- ²⁷ OFCOM, *site blocking to reduce online copyright infringements*, page 5: "For all blocking methods circumvention by site operators and internet users is technically possible and would be relatively straightforward by determined users".
- ²⁸ Already the Romans had a saying: Money does not smell.
- ²⁹ Source: Professor Martin Kretschmer, ESRC Fellowship at the UK Intellectual Property Office, *Independant Report, "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe* <http://www.cippm.org.uk/publications/comparative-study-of-copyright-levies-in-europe.html> and Younison.eu artists receive less than 0,001 cent in levies.
- ³⁰ *The Wealth and Poverty of Nations, why some are so rich and some so poor*, David S. Landes, 1998.
- ³¹ *Roadshow Films Pty Ltd v iiNet Limited (includes summary) (No. 3) [2010] FCA 24* (4 February 2010) Federal Court of Appeal, Australia; *Roadshow Films Pty Limited v iiNet Limited [2011] FCAFC 23, [210]* (Emmett J) (24 February 2011) Federal Court of Appeal Full Court, Australia.

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