DOCTRINE AND OPINIONS

CERTAIN LEGAL PROBLEMS RELATED TO THE MAKING AVAILABLE OF LITERARY AND ARTISTIC WORKS AND OTHER PROTECTED SUBJECT MATTER THROUGH DIGITAL NETWORKS[1]

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1. Introduction

1.1 Peer to Peer File-Sharing: Technical Background

Peer to Peer (P2P) file-sharing constitutes a form of communication of contents between individual persons on the basis of digital networks by the aid of specific computer software. Among the preconditions for functioning of P2P is the possibility of digitising contents and of compressing it. Compression allows fast transmission, which makes file-sharing attractive. The so-called MP3 format,[2] with varying degrees of compression, has become the leading format in the field of music or other audio files. Other less used compression procedures are OGG Vorbis (used in particular within open source), WMA of Microsoft as well as MPEG-4 by Fraunhofer.[3] In the field of video data, compression techniques such as DivX and XviD are being used; the volume of data in video files is bigger than in audio files, and the development of the relevant compression techniques took longer and enabled file-sharing at a much later stage than in the audio field. Another pre-condition for file-sharing is the existence of fast network connections and their availability to considerable parts of the population. The relevant techniques are constantly being developed in order to allow faster communication. Whereas, for example, connections via modem or ISDN allow transmissions of 56 and 64 KBit/s respectively, the transmission speed of the more recent Digital Subscriber Line (DSL) technique is up to 8 MBit/s.[4]

In addition, file-sharing networks presuppose a protocol which allows the direct interaction between a considerable number of individual users and leads to a delimited network. A special

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2 The procedure for compression was developed in 1992 by the German Fraunhofer Institut für Integrierte Schaltungen; its full name is MPEG Audio Layer-3 Procedure, see http://www.iis.fraunhofer.de/zukunftspreis/mp3_info_d.html (accessed on Jan. 12, 2005).

3 See http://www.iis.fraunhofer.de/amm/techinf/mpeg4_soft/video.html (accessed on Jan. 12, 2005).

4 See www.teltarif.de/i/dsl.html (accessed on Jan. 12, 2005).

software enables the access to such networks. In general, P2P allows the individual users to search for particular contents in any format[5] in the storage space of any computer of any user who is connected to the network at the time the search is carried out and who has agreed to make available his or her own files to the participants of the network. The higher the number of participants offering music or other files in the network, the higher the probability to find the works searched for. Whereas certain networks such as eDonkey, WinMX and iMesh oblige the participants to make available their own files to the participating users of the network, others, such as KaZaA and Bearshare do not provide for such obligation. The specific characteristics of all file-sharing networks is the fact that the contents which is being communicated between the participants is not stored on a central server (as is the case of traditional on-demand services) but on the different computers of the participants and is available only as long as those participants are connected to the network.

In principle, three main forms of P2P file-sharing systems may be distinguished: a centralised system, a decentralised system and a so-called third generation of P2P, which combines elements of both systems.[6] Napster and other first generation P2P systems such as Audiogalaxy, and Aimster[7] were centralised systems where a central server administered all relevant data available on the connected computers. Each time a user logged onto the network, the server registered centrally and constantly data such as his or her IP address and the files made available for file-sharing. Accordingly, while the user was logged onto the network, the server provided at any moment updated information about which files were offered by which IP addresses; accordingly, it was easy to locate files with individual IP addresses. However, the transmission of data occurred through a direct connection between the participants, irrespective of the central server. Yet, if the central server was shut off, file-sharing under this system was impossible.

At a later stage and not least, given the success of copyright owners against unauthorised centralised systems such as Napster, decentralised systems which do not function on the basis of a central server, were developed – in particular the Gnutella protocol on the basis of which systems such as Bearshare, Limewire, eDonkey2000, and Direct Connect are being used today. In this case, the information about the available files is contained only in the computers of the participants themselves. A search request of a participant is transferred to those computers with which his or her computer is directly connected. From such computers, the search request may be further transmitted. If the searched file has been found, the result, including the relevant IP address, is transmitted back in the same way to the requesting participant who, thereafter, may directly connect to the relevant IP address in order to obtain the file.[8]

What might be called a third generation of P2P, such as the well-known KaZaA, Grokster and other FastTrack systems, combines the technical advantages of centralised and decentralised systems. The system of one centralised server which serves to store and constantly update the information on the currently available files is replaced by the system of so-called superpeers, where several high performance computers permanently connected to the internet administer the data. The function of such computers as superpeers is attributed by the online software dynamically, so that they do not all at the same time perform this function. This aspect remedies the fragility and the need of high network

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5 In some networks, the format is limited, as was the case of Napster where only audio files in MP3 format were available.

6 See for example the chart and short description in the report by OECD: Peer to Peer Networks in OECD Countries (section on Peer to Peer networks in Chapter 5 of the OECD Information Technology Outlook 2004), p. 3 www.oecd.org/dataoecd/55/57/32927686.pdf (accessed on Jan. 12, 2005).

7 All three systems have been shut down after complaints of the US-American RIAA.

8 Möller, Schöner tauschen III, www.heise.de/tp/deutsch/inhalt/te/8504/1.html (accessed January 14, 2005).

capacities of the decentralised systems.[9] Modified versions of the system are constantly being developed, such as the announced system eXeem which combines characteristics of KaZaA and BitTorrent.[10]

1.2 Economic Aspects

A huge number of economic data in respect of P2P activities is available, be it on a country-by-country or branch-by-branch basis, or otherwise. It is not possible to present them all in this study. References are mainly made to a recent study by the OECD[11] on the non-commercial use by P2P networks in the OECD member countries[12] of music, video and software files in the most popular networks, including FastTrack and Gnutella-based clients.[13] Among the findings are the following ones: For the first time in 2003, more video (27%) and other non-audio files (including software, documents, images) (24.3%) cumulatively have been downloaded than audio files (48.6%).[14] The higher number of downloads of video files in Europe versus the U.S.A may be due to the European preference of P2P technology which is particularly apt for sharing large files (eDonkey) versus the U.S.-American preference of FastTrack which is suitable for smaller music and software files.[15] In addition, a positive relationship has been established between the P2P use and broadband availability: In the U.S.A., 41 % of broadband connection users (against only a quarter of dial-up users) downloaded music in 2003.[16] In terms of the profile of downloaders, results differ: For example, in the U.S.A., more downloads are done by low income households and by less highly educated users, whereas in France, income does not seem to matter, and higher education makes downloads more likely.[17] 55.4 % of all users from OECD countries are from the U.S.A., against 10,2 % and 8 % from Germany and Canada respectively. Canadians count for 1,2 % P2P users as a percentage of its own total population, followed by the U.S.A. and France/Germany (0,9 and 0,6 % respectively); the average in the OECD countries is at 0,24 %.

When comparing the evolution of P2P users in the OECD member countries from 2002 to 2003 as a share of global P2P users, the shares have grown fastest in France, Germany, Japan and Italy, while those in the U.S.A., and much less also of Belgium, the UK and others, have decreased; this strong growth in Europe versus the U.S.A. is explained by the fact that P2P uses became popular later in Europe than in the U.S.A.[18]

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9 Möller (fn. 8).

10 Borland, A New Hope for BitTorrent?, Jan. 5, 2005, http://news.com.com/A+new+hope+for+bitTorrent/2100-1032_3-5512230.html (access on January 12, 2005)

11 See above, fn. 6. Unfortunately, data have not been available regarding developing countries in general.

12 Currently, the OECD has 30 Member Countries: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, UK, and the U.S.A., see www.oecd.org.

13 See the OECD study (fn 6), p. 3.

14 See the study (fn. 6), p. 8; the data for 2002 were 62,5 % (audio), 25,2 % (video) and 12,3 % (other).

15 Over 35 % in Germany, 32 % in Italy and 26,1 % in France but only 12 % in the USA, see the study (fn. 6), p. 4.

16 At the same time, the availability of content may have encouraged dial-up users to upgrade their internet connection, see the study (fn. 6), p. 10.

17 See the study (fn. 6), p. 11.

18 See the OECD Study (fn. 6), p. 7; the appendix (p. 13) shows rates of around 4,5 % and 2 % growth in France and Germany respectively, versus around 7 % and 0,4 % decrease in the U.S.A.

The number of simultaneous users of any particular FastTrack file sharing network increased on a global basis from September 2002 to September 2003 by roughly 1.5 million, to reach more than 5.5 million in October 2003 and to drop back to around 4.5 million thereafter. This decrease has been attributed to an increase in law suits against individual P2P users as well as to a success of newly arisen commercial music downloading services such as Apple's iTunes.[19] However, P2P activity in general may have not diminished but made an effort to hide so that only a more accurate measurement method is prone to discover the actual amount of P2P traffic.[20] Indeed, the number of simultaneous users in all P2P networks has increased to nearly 10 million in April 2004 which is explained by a possible migration from FastTrack networks to those which are monitored by the music industry less frequently.[21]

Another question discussed in the context of unauthorised P2P uses is their possible economic impact on sales of (in particular) music CDs. The decrease of sales of CDs in recent years[22] is attributed by the music industry mainly, but not exclusively, to the increase of downloads from P2P networks.[23] Indeed, the number of German users who bought less CDs due to file-sharing was double the number of those who discovered new music in file-sharing systems and thereby were stimulated to buy the music on CD.[24] However, according to a study regarding the U.S.A., file sharing has only a limited effect on record sales which would be statistically indistinguishable from zero, and downloading could account for the loss in sales of, at most, 2 million CDs a year.[25] The study was criticised among others in its methods by IFPI.[26] Other reasons for the decrease of CD sales have been

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and Belgium respectively; for the development from 2003 to 2004, a similar survey shows an increase of share in Canada and France at the peak of 4,5 % and 4,4 % respectively versus a decrease of 23,53 % in the U.S.A., see p. 7 of the study.

19 See the study (fn. 6), p. 4, and the study by researchers from the University of California at Riverside and the Cooperated Association for Internet Data Analyses: Karagiannis/Broido/Brownlee/claffy/Faloutsos, "Is P2P Dying or Just Hiding?", www.caida.org/outreach/papers/2004/p2p-dying, p. 1 (accessed Jan. 12, 2005).

20 This argument is developed by Karagiannis/Broido/Brownlee/claffy/Faloutsos (fn. 19). However, as one unanswered question on this study, as mentioned in Dean, Song-Swap Networks Still Humming www.wired.com/news, Oct. 25, 2004 (accessed Jan. 12, 2004) is how researchers accounted for interdiction which is used by music companies to fill up the P2P queues with traffic.

21 See the OECD study (fn. 6). p. 4.

22 For example, in Germany the decrease of turn-over was 19% for 2003, see www.ifpi.org/site-content/statistics/worldsales.html (accessed on Jan. 12, 2005). Global sales of recorded music fell 7.6 % in value in 2003, and from 38 billion $ in 1998 to just over 30 billion $ in 2003 (see IFPI, www.ifpi.org/site-content/statistics/worldsales.html (accessed on Jan. 12, 2005); NN, Global Attack on Music File Sharing Meets Resistance in Courts, Research, World E-commerce and IP Report 2004, issue 4, p.17).

23 See IFPI, www.ifpi.org/site-content/statistics/worldsales.html (accessed on Jan. 12, 2005) and Gebhart, Legale Musikangebote unterstützen – illegale Angebote bekämpfen, MMR 2004, p. 281, 282, who indicates more than 600 million downloads from illegal offers in Germany in 2003, see also NN, Presse, Phonowirtschaft büßte 2003 insgesamt 19,8% Umsatz ein, www.ifpi.de.

24 Gebhart (fn. 23), p. 282, referring, among others, to the German study "Brenner-Studie" of the Gesellschaft für Konsumforschung (Society for Research on Consumption) of February 2003, www.ifpi.de/news/279/index.htm; a Europe-based study by Forrester Research in August 2004 found that 10% downloaders bought more, and 36% less music (see IFPI, Digital Music Report 2005, www.ifpi.org/site-content/library/digital-music-report-2005.pdf, p. 18, 19).

25 See the study made at the Harvard Business School/UNC at Chapel Hill in 2004 by Oberholzer/Koleman/Strumpf, "The Effect of File-Sharing on Record Sales" – An Empirical Analysis, www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

26 NN (fn. 24), p.17.

indicated, such as insufficient quality and diversity of new productions and therefore less attractivity of the contents, too high prices of CDs, etc.[27] To conclude, the effect of file-sharing on CD sales remains controversial. It should be stated, at the same time, that the question of potential harm for the sales of copies is irrelevant for the legal analysis and for the justification of protection.

2. Copyright Issues at Stake

2.1 Subject Matter

It goes without saying that any author's work which is protected as such under copyright/authors' rights constitutes protected subject matter irrespective of the (analogue or digital) environment in which it is exploited. The same is true for any subject matter protected under neighbouring rights, such as performances by performing artists, phonograms and films for which phonogram and film producers are protected, etc., up to databases which are protected by a *sui generis* right in a number of countries. However, the question of which uses are covered by the protection is regulated by the provisions on the rights of the relevant right owners.

2.2 Rights Involved in File-Sharing

From a legal point of view, three different acts must be distinguished, even if they occur in one economic context: firstly, the upload of a copy on a computer; secondly, the making available thereof to other file-sharers and, thirdly, the download of a copy by a user of the file-sharing system.

Firstly, a precondition for the functioning of file-sharing systems is the availability of files in at least some of the participating computers. In other words, the file containing protected subject matter must be copied in the computer, which is typically done on its hard drive. This act undoubtedly constitutes an act of reproduction which is principally covered by the exclusive right of reproduction of authors and neighbouring right owners according to the existing international law and, consequently, the complying national law. In particular, the definition of the reproduction right under Art. 9 (1) of the Berne Convention ("reproduction... in any manner or form") is broad enough to also cover forms of electronic reproduction, as has been clarified in the Agreed Statement to Art. 1 (4) of the WIPO Copyright Treaty (WCT) according to which the reproduction right fully applies in the digital environment and, in particular, the electronic storage constitutes a form of reproduction; the same has been provided in the Agreed Statements concerning Arts. 7 and 11 of the WIPO Performances and Phonograms Treaty (WPPT) in respect of performances and phonograms. Even apart from these clarifications, there is no doubt today that electronic storage on a hard drive constitutes reproduction in the meaning of copyright and neighbouring rights law.

Secondly, under many P2P-systems, such a copy is consequently offered to other users of the file-sharing network as long as the offerer is connected to the internet. This act constitutes a so-called act of “making available” covered by an exclusive right under Art. 8 WCT and Arts. 10 and 14 WPPT of authors, performers and phonogram producers respectively. This right is worded as follows (under Art. 8 of the WCT): “[…] the exclusive right of authorizing [...] the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”. This right meanwhile has been implemented in 50 and 47 Contracting Parties to the WCT and WPPT respectively, and beyond.[28] In many countries which have not implemented these provisions, such an act of making available may nevertheless already be included in the law. This is particularly true for countries of the continental European system which follow the

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[27] See for example Freiwald, *Die private Vervielfältigung im digitalen Kontext am Beispiel des Filesharing*, Baden-Baden 2004, p. 37 et seq. with further references.

[28] See the list of Contracting Parties to the WCT and WPPT at www.wipo.int, under Treaties and Contracting Parties (accessed on January 13, 2005).

authors' rights tradition which, as a principle, often grant a very broad right of exploitation to authors, naming particular uses such as reproduction or distribution only as examples thereof.[29]

Users might doubt that P2P offers are acts of making available "to the public". However, the notion of "public" typically excludes only family members and close personal friends or acquaintances or others not far beyond such circles. Under the WIPO Treaties, "public" should not be interpreted too narrowly, in order to secure a meaningful protection.[30] Regularly, even transmissions to users of intranets of, for ex., entire schools or companies are considered to be made to the "public". There is no doubt that the millions of simultaneous users of P2P networks who do not even know each others and are all the more far from having, among each others, personal relationships, constitute the "public" under copyright law. Accordingly, even under the narrowest possible notion of "public" under existing laws, P2P offers for download by other users are addressed to "the public".[31]

Another question is whether the condition that members of the public may access music and the like "at times chosen individually" is fulfilled. One might have doubts because the user of a file-sharing system does not constantly make available works from his or her computer to the other participants but only while he or she is connected to the network, so that it may seem that the other users cannot have access at any time chosen. However, the making available right does not presuppose any constant offer; it does not require that the work is offered 24 hours seven days a week. The condition of accessibility "at times chosen individually" only means that, within the duration of the offer, users must be able to access works and other subject matter at the time individually chosen.[32]

Thirdly, the download by the second user onto his or her own computer constitutes a form of reproduction and is therefore covered in principle by the exclusive right of reproduction.[33]

2.3 Limitations and Exceptions

Limitations and exceptions will be considered separately for the three acts dealt with under point 2.2 here above: the initial reproduction in the computer of the offering user, the act of making available the files, and the download by another user of the system. Since international copyright and neighbouring rights law only provides for the outer limits of permissible limitations and exceptions, and the national laws differ to quite some extent in this regard, this analysis can only be quite abstract and state certain examples. In principle, the reproduction right may be limited in a number of cases, such as for research purposes, administrative use, reporting on current events, etc. The limitation which is most likely to apply or which at least requires an analysis in the context of P2P uses is the limitation for private use that exists in many national laws. Where a user makes a reproduction on his hard disk with a view to offering it thereafter in the framework of a file-sharing network, the reproduction is certainly not (or at least not only) made for private reproduction. However, where the reproduction was initially made on the computer memory for private purposes and is only later used for the purpose of making it available to other users, the question is whether the initial reproduction remains privileged as a private one and only the making available would need authorisation, or whether the reproduction changes its character and is no longer privileged at the time it is used (at least also) for other than private purposes. This may be controversial in detail under the different

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29 This is for example the case in Germany where the broad right of "communication to the public" was interpreted, before explicit implementation, by the majority of legal doctrine and also, in part, by case law, as covering the making available. Freiwald (fn. 30), p. 132 et seq.

30 See, for ex., Reinbothe & von Lewinski, *The WIPO Treaties 1996*, London 2002, Art. 8 WCT note 21, referring also to the requirement of "effective protection" under Recital 1of the Preamble).

31 See, for ex., Reinbothe & von Lewinski (fn. 30), Art. 8 WCT note 21, referring to the internet.

32 See also, for ex., Reinbothe & von Lewinski (fn. 30), Art. 8 WCT note 20 (in particular fn. 43).

33 For questions of electronic reproduction see above, in the context of the copy made by the first user.

national laws.[34] Other privileged purposes are less evident; for example, the regular user of a music, video or software file-sharing system will probably not have made the copies of -usually entertaining- contents for purposes of his or her own research. In addition, the same problem of a later use which is no longer for own research purposes would occur, as in the case of private use.

Secondly, the making-available right can be subject to limitations and exceptions, such as, the use for educational or similar purposes. However, in practice, users of the so far prevailing file-sharing systems regularly want to listen to music or watch movies for their entertainment rather than for (school or other) education or research. Therefore, such limitations will regularly not apply to the currently existing P2P networks.

The question of limitations and exceptions may be more difficult to assess regarding the third act mentioned above, i.e. the download by a user from another computer within the file-sharing system. Such acts of reproduction are usually done for private use and may therefore be covered by a limitation.[35] However, where the user envisages at the same time to make available the downloaded copy for access by the other users of the file-sharing network, or is even obliged to do so under a particular system,[36] the user may not even rely on the private use limitation, since one of the purposes of the download would be the making available of the copy to the public. Yet, even if a file-sharing network does not require the immediate making available of the obtained copy to the users of the network, and even if the user does not do so voluntarily, another question is being discussed under national laws in the context of private reproduction: the question whether or not the copy from which the download was made must itself have been a legal copy in order to result in the application of a limitation for the purposes of private use.[37] This issue was controversial for example in Germany before a clarifying amendment to the law was introduced, which, however, was still not clear enough so that the most recent proposal to amend the German Copyright Act specifies that the limitation for private purposes does not apply where an obviously illegally made copy or a copy obviously made available illegally was used for the private copy.[38] Under this proposal, users of P2P networks which operate without the right holders' consent would clearly infringe the reproduction right when downloading a file from the network. To conclude, the upload copy and the making files available in P2P networks will usually not be covered by a limitation or exception under national laws, while the download may be so where national law allows to apply private/personal use exemptions to such downloads.

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34 For Germany see a discussion of the problem in particular in Freiwald (fn. 30), p. 135-141.

35 See for ex. the German study "Brennerstudie 2002" according to which in Feb. 2003, 94,7 % of users downloaded music for their own personal use, 56,5 % in addition also for friends, relatives and colleagues, 58,2 % for other members of the household, and only 10,5 % for other persons (www.ifpi.de/news/279/brennerstudie.pdf, foil 22); Hungarian Report for ALAI Study Days 2004 on liability of Internet intermediaries, pt. 3.5; see the Canadian case BMG Canada Inc. v. John Doe, Federal Court [2004] F.C. 488 holding that the plaintiffs failed to make a *prima facie* case of infringement, since the personal use exemption (Sec. 80 (1)(a) CA) could exonerate downloaders; see also similarly the case TONO et al. v. Bruvik (Norwegian Court of Appeals as referred to in the Norwegian Report for ALAI Study Days 2004 on liability of Internet intermediaries), par. 2.4 and 3.6.

36 See above, 1.1 in the text after fn.5.

37 Another question may be whether the "possession" of the file or, rather, the possibility to download the file has been obtained illegally, such as in the case of the reproduction of a stolen copy. Since the "possessor" of the file, the other user within the network, principally agrees to the download by other users, this would not be an issue in the case of file-sharing; see for the German law Freiwald (fn. 30), p. 147, 148.

38 Draft bill (Referentenentwurf) of 27 Sept. 2004, § 53 (1); p. 52 et seq.

2.4 Liability Beyond the Primary Infringer

Where authorisation for the acts of reproduction and making available has not been given by the relevant right holders, and no limitation or exception applies, the user who makes the copy, makes it available to the participants of the network and the user who downloads the file are primary infringers and liable to the general sanctions provided under national law. Given the problems of pursuing individual users of file-sharing networks,[39] the question of the liability of other actors in this context becomes relevant. In particular, the providers of the software for the file-sharing system might be liable for secondary infringement of authors' rights and neighbouring rights. Liability rules are subject to national law and therefore, again, cannot be dealt with in this short study comprehensively. Only some examples may be given.

US law knows secondary liability only on the basis of case law, whereas conditions for immunity of service providers have been introduced into the US copyright law by the Digital Millennium Copyright Act 1998 (DMCA). According to well-established case law, secondary liability may occur as contributory liability and vicarious liability. Contributory infringement so far has been recognised by the US courts when the defendant has knowledge of the infringement and somehow facilitates it.[40] Vicarious liability in copyright has been widely held to exist if the defendant had the right and ability to supervise the primarily infringing activity and had a financial interest therein. In the context of P2P cases, new questions arise; for example, as to contributory liability, whether the knowledge must refer to specific infringements and exist before they take place, and whether the service provider may make himself wilfully blind to such knowledge; as regards vicarious liability, questions on the degree of supervision enjoyed by the service provider and on the direct source of the financial benefit arise.[41] The provisions on immunity from copyright liability for service providers[42] are too detailed to be analysed or even only described at this place. Their application to P2P cases so far has resulted in defeats of the first generation networks Napster and Aimster, and in a victory of the third generation network Grokster.[43] One of the main factual differences between Napster/Aimster and Grokster, having an impact at the legal level, was the fact that Napster and Aimster functioned on the basis of a central server that included the relevant information for users concerning the available content and therefore were able to control the system, whereas there is no central server allowing such control in the Grokster system.[44]

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39 See in more detail hereunder, point 3.

40 Parness, "Overview of the Problem of Infringement: The Transition from Traditional Piracy to the Liability of Internet Intermediaries, *and Beyond"*, Talk at the ALAI Conference, Mexico, June 8, 2004, to be published in the proceedings; see also www.hiplaw.com, p. 4, 5.

41 Parness (fn. 40).

42 17 USC § 512(a) et seq.; the immunity for internet intermediaries from liability for speech-based civil offences introduced in the Communications Decency Act of 1996 does not apply to intellectual property (47 USC § 230(e)(2)) but has been otherwise expanded broadly in its application. It applies in state courts (as opposed to federal courts where intellectual property is being dealt with) and has already been applied to exempt the on-line auction service eBay from liability regarding the sale of unauthorised music recordings, since the claim was made in a state court on the basis of counterfeiting (see Parness (fn. 40), pp. 10, 11).

43 See the cases regarding Napster, A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000) and 239 F. 3d 1004 (9th Cir. 2001) (the case did not go on to a trial from the summary proceedings); Aimster Copyright Litig., 252 F. Supp. 2d 634 (N.D. Ill. 2002), as confirmed by the Court of Appeals, 334 F. 3d 643 (7th Cir. 2003); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003), confirmed by Court of Appeals, 380 F. 3d 1154 (9th Cir. 2004).

44 See for a detailed analysis of these cases in particular Parness (fn. 40), p. 19-25.

The European Community E-commerce Directive lays down provisions on the immunity of service providers in a horizontal way, beyond copyright or other intellectual property laws.[45] Although these provisions are much less detailed than those of the DMCA, this study can only state in general terms that the provisions on mere conduit and caching are very similar to § 512(a) and (b) DMCA and the provision on hosting is somewhat stricter than § 512(c) DMCA. In Europe, the first case against KaZaA was held by the Dutch Supreme Court in favour of KaZaA which is a third generation network.[46] However, this decision is of minor importance, since the claim of the right owners was simply that KaZaA should adapt its software so as to avoid any copyright infringement by its users. The first instance dismissed the claim, considering that such adaptation was practically impossible. The right owners claimed before the Supreme Court that their claim should have been interpreted so as to prohibit the distribution of the KaZaA program, if its adaptation were not possible. The Supreme Court decided only that the court of first instance did not have the right to interpret the claim so broadly, but it did not decide on copyright infringement nor on liability.[47]

2.5 Jurisdiction and Applicable Law

Given the instant world-wide availability of contents through P2P networks, the question of jurisdiction of courts and applicable law arises, all the more where networks have established their headquarters outside countries where a majority of right owners is based. In particular, Sharman Networks argued before court not to be subject to US American law.[48] However, US American courts so far have decided to be competent on the basis of the required "minimal contact", which was affirmed on the argument that the KaZaA software has been used by Californian citizens.[49] Also, the copyright ownership by American societies with headquarters in California was referred to. An analysis of all issues involved in international jurisdiction and applicable law would go far beyond the scope of this study which can limit its remarks only to the importance of the topic.[50]

3. Practical Problems and Strategies of Enforcement

The industry, whose rights have been infringed through the use of file-sharing networks, first enforced their rights in the regular way, by means of court proceedings against the first unauthorised file sharing network, Napster. Although the industry was successful in that case, mirror sites and other networks arose immediately. In addition, decentralised systems were developed against which the industry so far had no success in court,[51] though in fact, the music industry secured the takedown of 60 900 infringing websites, 447 unauthorised P2P-servers and 1.6 bio. infringing music files in 102 countries in 2004.[52] Nevertheless, in order to better enforce its rights, the industry was left to the politically delicate approach of suing individual users of file-sharing networks. In this context, one problem has been to find out the identity of the users which is necessary in order to raise a complaint.

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45 Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 in Respect of Certain Legal Aspects of Services of the Information Society, and in Particular of the Electronic Commerce in the Internal Market, O.J. EC L 178/1 of 17 July 2000; see in particular Sec. 4.

46 See Supreme Court (Hoge Raad) of 19 December 2003, no. C02/186HR; LJN: AN7253, see http://www.rechtspraak.nl.

47 See also the comment by Hugenholtz, Over KaZaA is nog niets beslist, NRC Handelsblad, 22 December 2003, and www.ivir.nl/publicaties/hugenholtz/nrc-kazaa.html.

48 The headquarters of Grokster are in Nevis (West Indies), iMesh in Israel, KaZaA in Amsterdam and its holding company Sharman Networks in Australia and the Pacific island of Vanuatu.

49 See Metro-Goldwyn-Mayer Studios In. et al. v. Grokster Ltd. et al., 243 F. Supp. 2d 1073, 1087.

50 See on applicable law in particular Lucas, “Applicable law in cross-border cases of copyright infringement in the digital environment”. Study commissioned by UNESCO for the Thirteenth Session of the Committee of the Universal Copyright Convention as revised in 1971.

51 See above, 1.1. and 2.4 (fn. 42).

52 See the Digital Music Report (fn 24), p. 21.

Where the internet service providers do not agree to provide such information, the music industry is forced to raise a complaint for delivery of information on the identity of the relevant users against the internet service provider. Such complaint was won by the Recording Industry Association of America at the district court level[53] while the Court of Appeals revoked the decision.[54] The Supreme Court has refused to hear the dispute over whether internet providers can be forced to identify users of illegal file-sharing networks.[55]

In European countries, the legal situation differs: Art. 15(2) EC Directive on the Electronic Commerce[56] leaves to the Member States the decision of introducing or not an obligation of service providers to communicate to the competent authorities at their request the information needed to identify the contractual users of their services. Some (for ex. Spain, Ireland, Luxemburg) have not made use of such possibility, others have done so (for ex. Austria, Belgium, Italy and Portugal), and Germany has limited it to criminal proceedings.[57] German industry has started criminal proceedings against unknown persons (what would be "John Doe" complaints in the USA) so that the Attorney General will obtain the relevant information from the service providers. Thereafter, the plaintiffs in parallel raise civil law complaints against the individual users.[58]

Once the data on the identity of the users have been obtained either voluntarily or through court proceedings, the industry usually has tried to quickly settle the cases in order to at least cover the costs and try to achieve a deterring effect (that is controversial in itself) on users. For example, in 2003, the RIAA brought around 5500 actions and settled 504 thereof, usually for a few thousand dollars each.[59]

In addition to court proceedings, other strategies have been chosen by the relevant industries.[60] For example, mass e-mails to companies and universities were sent in Germany to raise the awareness that participation by employees and students in illegal file-sharing networks are acts of infringement against the Copyright Act and that such uses bring risks of viruses, spyware and costs for resources of the system.[61] The RIAA announced to companies and universities that it would raise complaints against them on the grounds of secondary liability for copyright infringement if employees or students would use the internal high speed networks for downloading of protected music.[62] In addition, the German industry has been sending more than 30.000 so-called instant messages (up to May 2004) to providers of file-sharing services in order to make it clear to them that they have been discovered and cannot hide in anonymity.[63] Other measures have included technical ones, such as the insertion of bogus decoy files which would disturb the well-functioning of the file-sharing networks; in the

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53 RIAA v. Verizon Internet Services, Inc., 240 F. Supp. 2d 24 (D.D.C, 2003); the legal basis was 17 U.S.C. § 512(h).

54 US Court of Appeals, District of Columbia, 19 December 2003, no. 03-7015, RIAA, Inc. v. Verizon, Inc.

55 http://news.findlaw.com, 12 October 2004.

56 See the Directive (fn. 45).

57 See Guibault, « Vous qui téléchargez des oeuvres de l'Internet, pourrait-on savoir qui vous êtes? », Revue du droit des technologies de l'information no. 18/2004, p. 9 et seq., 24 et seq. with further references. The High Court of London ordered ISP's to identify music downloaders, see Wardell, British Court Orders ID's of Downloaders, http://news.findlaw.com of 15 Oct. 2004.

58 Gebhart (fn. 23), p. 282.

59 Wardell, Music Industry Group Launches Piracy Suits, http://use.findlaw.com, October 7, 2004; see also for other countries the Digital Music Report (fn 24), p. 21.

60 See an overview on campaign for legal services, etc., in the Digital Music Report (fn. 24), p. 20.

61 Gebhart (fn. 23), p. 282.

62 Gumpp, Die Beurteilung von, "Musik-Tauschbörsen", im Internet nach US-amerikanischem Urheberrecht, GRUR Int. 2003, p. 991, 1001.

63 Gebhart (fn. 23), p. 282.

meantime, certain networks have become immune against such files.[64] Similarly, so-called dummy files, which only pretend to contain a particular film but indeed contain only trash, have been inserted into video file-sharing systems; in the field of audio file-sharing, files, which only repeat a short part of the music pretended to be entirely recorded in the file, have been inserted. Virus attacks and the insertion of spyware also have been reported.[65] Also, the parallel approach has been taken to offer improved legal on-demand services such as Apple's iTunes or the German "PhonoLine".[66]

4. Perspectives and Discussed Legislative Models in Respect of Peer to Peer Networks

Given the fact that the procurement of protected works and other protected subject matter without the authorisation of the right holders in P2P file-sharing networks regularly constitutes an infringement of copyright and neighbouring rights, but the enforcement of rights and diverse strategies to diminish such illegal uses so far have not been sufficiently successful, different models to cope with these problems are being experimented or considered, both at a practical as well as at a legislative level.

4.1 Business Models

Firstly, from a practical perspective, new business models are continuously being developed. Legal online services have grown worldwide.[67] Yet, it will be a trial and error process which the industry has to go through in order to find the best solution. In the essence, legal, authorised on-line distribution would have to be sufficiently attractive to customers in order to make them switch from illegal P2P networks to authorised purchase of music and other files. Indeed, "it is still unclear what a successful business model for selling music on-line will look like"[68] – in particular, whether it will be a pay-per-use or subscription-based service.[69] So far, Apple seems to have found the best solution among the legal on-line distributors of music, at least in the U.S.A. where it has achieved 70 % of the legal market.[70] The advantages of its "iTunes"-store are better quality than in illegal file-sharing networks, lack of viruses and spyware, unlimited possibility to listen to the downloaded music, possibility of burning it on CD and mobile MP3 players as well as transfer to up to five computers in the own network, availability of individual songs as opposed to collections thereof compared to CDs, and the low price of EUR 0,99 (in Europe) per song.[71] At the same time, it is criticised that the catalogue offered is still limited (not least due to the need of rights clearance which may take quite

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64 This is true for example for BitTorrent, see Svensson, Popular File-Sharing Site Shut Down, http://use.findlaw.com, December 20, 2004.

65 See for example Freiwald (fn. 31) p. 33.

66 See in more detail 4.1. Already 1997, the first such legal, commercial on-demand service was developed by the German Federal Association of the Phonographic Commerce in cooperation with the German Telecom; the project was called "Music on-demand". However, when Napster began its illegal activities in 1999, the paying legal service did not have any chances to survive. Today, there are around 15 legal on-demand services in Germany, however with so-far little economic impact, see Gebhart (fn. 23), p. 281.

67 See the Digital Music Report (fn 24), pp. 4 – 7, mentioning outside Europe and the USA, in particular the Asia-Pacific region, but also South Africa and Brazil/Latin America where first legal services started in 2004; see also data on the main legal services on pp. 18 – 19.

68 "NN, Music's Brighter Future", The Economist, October 30, 2004, p. 91, 93.

69 See the Digital Music Report (fn 24), p. 7.

70 Interview with Steve Jobs, Süddeutsche Zeitung, 17.6.2004.

71 Schrader, Hits aus Bits, Süddeutsche Zeitung, 18.6.2004, p. 13.

some time)[72] and that the recording device iPod only works with iTunes but not with other on-line music stores.

It is not yet clear whether monthly subscription services in return for unlimited streaming of music which includes recommendations for new artists, such as Real Networks' Rhapsody will be more successful in the end.[73] Also, experiences still need to be made with the amount of digital rights management technology and technical protection measures that will be accepted by consumers. New perspectives are expected by record companies when the iPod or similar devices will become one with the mobile phone. The success of the mobile ringtone market and the fact that users already now can hold their phones up to the sound from a broadcast, identify a sound and later buy the recording, nourishes such expectations.[74]

One of the most recent approaches on the verge of being put into place is the so-called snocap service. The idea was developed by Sean Fanning, the founder of the first file-sharing network Napster, and is based on file-sharing technology and cooperation with the right holders. Indeed, other attempts of cooperation between existing file-sharing systems and the music industry for legal on-line distribution have been made earlier, such as in 2004: The network eDonkey approached the four majors in order to explore possibilities to legally sell music on this network and, at the same time, to allow right holders to offer their recordings for free in order to get promoted.[75] Snocap was officially announced at the beginning of December 2004 to start in 2005. Snocap has been presented to include the following features:[76] It aims at combining the advantages of authorised on-line music stores (which are legal but have limited content and number of users) with the advantages of unauthorised services (that have a high volume of content and high number of users but are illegal). Under the snocap system, right owners license their rights for on-line distribution in multiple on-line retail locations and are able to determine the terms of use, including the prices for each title through a digital rights management system. Based on the Mashboxx file-sharing platform, snocap promises to enable right owners to "identify each song by its acoustic properties or 'fingerprint' and then wrap each tune in a set of licensing rules, determined in advance by the artist or label."[77] For example, the right owner could license the user to listen to the song for free once or for a certain number of days before purchase. Once right holders have registered their music and got rights management information in snocap's database, they can, according to snocap, use snocap's copyright management interface for the management of on-line distribution within multiple on-line retail locations and networks. So far, Universal Music has concluded an agreement with snocap regarding its 150.000-song catalogue.[78] Snocap advertises that file-sharing networks and on-line retailers connected to snocap do not need to individually negotiate licenses with right owners but can access the catalogue once the right owner has registered the music in the snocap database, against the duty to make wholesale payments to the right holders. A filtering software is supposed to recognise illegal files in the P2P networks and to allow right owners to include them in their catalogue for sale. It is not clear from the available information whether this system will in the end eliminate all unauthorised content from the relevant networks and, if so, whether existing illegal P2P networks will suffer from such "competition" or would even agree

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72 Interview with Steve Jobs, Süddeutsche Zeitung, 17.6.2004.

73 NN (fn. 64), p. 93.

74 NN (fn. 64), p. 93; the Digital Music Report (fn. 24), pp. 8 – 9 and 12, mentioning Asia (Japan, South Korea) as the leader.

75 NN (fn. 64), p. 93. Indeed, the London-based music management group IE Music successfully promoted the musician Sweet Chap by putting his songs on KaZaA, see p. 91.

76 See www.snocap.com.

77 Grundner, Sean Fannings snocap P2P Music services secures Universal 150 k catalogue, November 16, 2004, www.ehomeupgrade.com/entry/327/sean_fanning_snocap (accessed on January 7, 2005).

78 Grundner (fn. 72).

to participate in the system by getting legalised. It has been presumed that snocap would be used mainly by smaller P2P networks such as Mashboxx or iMesh of Israel which has obliged itself to no longer offer unauthorised content.[79] The president of eDonkey has expressed reluctance to snocap because, among others, the agreement to start filtering content could make the recording industry argue that file-sharing services can control the illegal transmission of music in file-sharing networks.[80] The future has to show also in respect to the snocap venture whether it will be a working model, safeguarding right owners' rights on the on-line distribution market and satisfying the interests of users and retailers alike.

4.2 Discussed Legislative Models

Since users got used to the free availability of content on P2P networks and continue to infringe copyright and neighbouring rights, while benefiting from factual and legal problems of enforcement,[81] and since legal on-line services offered since 1997[82] have not been able to displace the illegal networks yet, a number of proposals have been expressed in academic literature and by different stakeholders in particular to legalise the ongoing P2P file-sharing by different forms of legal licenses combined with statutory remuneration rights, or even to abolish copyright in the digital network environment. Whether or not this "log jam"[83] between continuous infringement and difficulties of enforcement and, therefore, difficulties to offer competitive legal services, is a sufficient justification for such proposals, may be put into question.

Apart from this question, if one aims at protecting works and subject matter of neighbouring rights while enabling wide-spread file-sharing, the following basic legislative approaches are conceivable (irrespective of their compatibility with international law): a legal license with or without a statutory remuneration right, voluntary collective administration of the relevant exclusive rights, mandatory collective administration thereof, the application of the Scandinavian model of extended collective licensing, or even a combination of some of such proposals. The proposals expressed so far differ in detail and cannot be comprehensively presented here. Only the following brief comments shall be made regarding some individual proposals:

Firstly, those who propose that P2P uses should be free from exclusive rights and remuneration rights of copyright holders[84], argue among others that copyright protection should not be extended to the personal free use zones and should not cover non-commercial uses. Apart from the fact that their position would go against the prevailing international law and national law in most countries,[85] this argument is not convincing since at least the copying and making available of files to the public (i.e. the other participants of the network) is not a private or personal act but addressed to the public; insofar it is comparable to the distribution of hard copies to the public which is also covered by an exclusive right, even if copies are given away for free. One may even argue that P2P use is commercial (depending on the definition) since it saves the users from paying for the contents. Apart from that, the commercial or non-commercial nature of the use is in principle irrelevant. Copyright protection is justified where any important kind of use takes place. The argument that copyright *de facto* operates primarily to protect distributors rather than creators refers to a problem which should be

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79 See www.heise.de/newsticker/meldung/print/53256 with reference to www.heise.de/newsticker/meldung/49281 (November 15, 2004) (accessed January 13, 2005).

80 Grundner (fn. 72).

81 See point 3. here above.

82 Gebhart (fn. 23), p. 281.

83 See Netanel, "Impose a Non-Commercial Use Levy to All Free Peer to Peer File-Sharing", Harvard Journal of Law & Technology, vol. 17, December 2003, p. 20.

84 In particular Raymond Ku, Jessica Litman, Glynn Lunnay and Marc Nadel; see their views and arguments as described and summarised by Netanel (fn. 78), p. 74-77.

85 See above, 2.2.

solved by strengthening the position of creators rather than by expropriating their rights. Proposals to give authors economic incentives from audience-tipping and the like would leave the author in a position of a beggar and could never be a full substitution for the acknowledgment of protection in respect of such mass uses such as the P2P ones, which constitute an essential way of use of works and therefore touch upon the core contents of copyright protection.

Secondly, those who propose legal licenses in combination with a payment to the right holders vary in their approaches. One of them proposes a remuneration (called a "tax") imposed on digital media devices and internet access services for the use of works in the framework of commercial and non-commercial services. Right owners would have to register their works with the (US) Copyright Office which would then use data from an employed metering technique in respect of the frequency of uses in order to distribute royalties to the right holders. The ultimate aim of the proposal is to replace exclusive rights with a "governmentally administered reward system".[86] Another proposal limits the legal license and the levy to non-commercial P2P uses, but extends it to the creation of derivative works (such as remixes) for non-commercial purposes. It is different from the first proposal also in that it is compulsory and does not allow to opt out by not registering the works. The levy would be imposed on commercial providers of consumer products and services whose value is "substantially enhanced" by P2P file-sharing.[87] Yet another proposal is again voluntary in that the right owners could opt out of the legal license (that would prescribe terms and conditions of the licence) by encoding the files accordingly. Also, the levy or license fee would be paid directly to the creators and not necessarily to the holders of the copyright.[88] These proposals which have been originated in the U.S.A. follow to some extent, with variations, the systems of statutory remuneration rights, administered by collecting societies which have since long been established and functioning in most European countries in respect of, for example, reprography, private copying on blank tapes etc, or other similar uses.

Such legal licenses combined with statutory remuneration rights or levies/"taxes" may look attractive because they take away the burden of enforcing exclusive rights (which has not even been very successful so far), while providing a compensation to right holders, in particular to creators and performers who might benefit – at least where such remuneration rights are administered by Continental European style collecting societies - even better from such uses than from exclusive rights which they often have to sign away without comparable remuneration. However, not least given the economic importance of P2P uses, such legal license would hardly, if at all, comply with the three-step-test under international copyright and neighbouring rights' law which has been laid down in Art. 9(2) of the Berne Convention regarding the author's reproduction right, Art. 13 of the TRIPs Agreement regarding authors' rights in general, and Arts. 10 of the WCT and 16 of the WPPT regarding the rights of authors, performers and phonogram producers.[89] Also, recent experiences with

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86 W. Fisher III, "An Alternative Compensation System", http://olin.stanford.edu/FISHER%20SPRING%202004.pdf (accessed January 13. 2005), in particular Ch. 6, p. 5.

87 Netanel (fn. 78).

88 Litman, Sharing and Stealing (November 23, 2003); see the abstract and paper (in particular pp. 33 – 42, 35 and 37) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=472141 (accessed on January 13, 2005).

89 The three-step-test (in the version of Art. 9 (1) of the Berne Convention) reads: "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." See for a detailed analysis on compatibility with the three-step-test Peukert, "International Copyright Law and Proposals for Non-Voluntary Licenses Regarding P2P File-Sharing" (presentation at ATRIP conference July 2004 in Utrecht, to be published in the Conference proceedings).

private copying regimes in particular in Europe have shown that it is often not easy to enforce the remuneration against those who are liable to pay.[90]

Alternatively, voluntary collective licensing of the exclusive rights has been proposed.[91] This model is already practised to some extent, in particular in European countries. However, the experience has been that, in particular, major publishers are not ready to entrust the management of their rights of making available to the collecting societies, or only on the basis of a mandate which can be revoked easily, and the producers of phonograms and films prefer not to entrust their rights to collecting societies but to continuously try to enforce their rights individually. Such model is useful if at least the majority of repertoire is entrusted to collecting societies. If this were the case, it would certainly constitute a model in compliance with international law with the advantage of allowing legal uses against the payment of an equitable remuneration. A different model would remedy the just mentioned deficiency, namely the potential lack of willingness to entrust rights to the collecting society. This model would be the mandatory collective administration of the relevant exclusive rights. It had already been established in Hungary, but the law was recently amended so as to loosen the mandatory character of collective administration. Such a model would also be in compliance with international law[92] since right owners would keep their exclusive rights, and it could legalise P2P uses by easy-to-handle blanket licenses. However, industry might prefer to try to individually manage rights in order to best benefit from the market.

Finally, the model of the so-called extended collective license has been proposed in respect of the upload copy and the act of making available to the public, in combination with a legal license and statutory remuneration right in respect of the downloading which would be considered a private copy.[93] One might even consider, under a different proposal, to apply an extended collective license to the download copy, in particular where it is not considered as a private copy permitted by law. Extended collective licenses as applied since long in the field of copyright and neighbouring rights in Scandinavian countries are collective licenses (granted by collecting societies) which are extended in their effects by law to individual right owners who have not entrusted their rights to the collecting society[94] According to the above proposal by ADAMI, the law would have to entitle the organisations of right holders and those of consumers to conclude a contract on such a license. A financial condition for the authorisation would be the payment of the statutory remuneration for the downloads by the users which would be incorporated in the monthly subscription fee to be paid by users to the access providers; it would be fixed by a commission which already has been established in France in respect of the remuneration for private copy.[95] This model would have the advantage of being in compliance

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90 For further arguments against such systems see Peukert (fn. 88), p. 6; he proposes a so-called "bipolar" system which would allow the right owner to choose between the exclusive right and, on condition of registration, a levy system (manuscript "A bipolar copyright system for the digital network environment", not yet submitted).

91 www.eff.org/share/?f=legal.html and www.eff.org/share/compensation.php; von Lohmann, "Don't Sue the Customers", IP Law & Business, December 2004, p. 24, 25.

92 See von Lewinski, "Mandatory Collective Administration of Exclusive Rights" – A Case Study on Its Compatibility with International and EC Copyright Law, UNESCO e-Copyright Bulletin, January-March 2004, p. 1 et seq.

93 Proposal by the French performers' organisation ADAMI, see La lettre de l'ADAMI, November 2004, no. 53, p. 6,7; see also www.adami.fr/portail/index.php, then: Lettre de l'ADAMI; see also Actu ADAMI, 2004, p.1.

94 See Karnell, "Extended Collective License Systems, Provisions, Agreements and Clauses – A Nordic Copyright Invention with an International Future?", in: NN, Essays in honor of George Koumantos, Athens 2004, p. 391 et seq.

95 See Art. L. 311-5. of the French Intellectual Property Code.

with international law,[96] leaving the exclusive rights to right owners and regularly allowing P2P uses against payment.

5. Conclusions

P2P file sharing and, mostly downloading from such networks regularly infringe copyright and neighbouring rights on a global basis. The enforcement of rights so far has been difficult, though not impossible. Given this difficulty and the fact that users got used to free and gratuitous (though illegal) access to nearly unlimited files of music, films and other content, has led to a number of proposals by interest groups and academics to change existing laws. Those proposals which opt for a legal licence with or without compensation of any kind (be it called a statutory remuneration right, a levy, tax or other) would arguably be in conflict with the three-step test laid down in all of the most important copyright and neighbouring rights treaties and should therefore not be followed – apart from the fact that they may be difficult to realise in practice, given the needed procedures and technology to administer the remuneration systems, and that such solutions do not guarantee the actual payment of the remuneration. The proposed voluntary collective management complies with international law but, though being available already now, has not been chosen by certain (powerful) groups of right owners. However, mandatory collective licensing and extended collective licences would not infringe international law and should seriously be considered as options that are worthwhile to be explored, even if they have been opposed by major right owners and though they may be of limited use if introduced only in some countries. Yet, since there does not seem to be the one and only ideal or easily workable solution among legislative models, and given the rapidity of factual developments, it may be wise in any case to observe developments in the near future. Indeed, the music industry has expressed hope – based on the latest figures - that more and improved legal services will develop and, in combination with raised awareness of users and their increasing wish to act legally, become sufficiently attractive to users so as to partially displace and finally marginalise illegal P2P systems.

[96] Karnell (fn 93), pp. 396, 398 with further specifications.