NEXA Center for Internet & Society

REMUNERATING CREATIVITY, FREEING KNOWLEDGE: FILE-SHARING AND EXTENDED COLLECTIVE LICENSES

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Executive Summary

P2P technologies enable dissemination of content in an efficient way, especially if compared to the traditional techiques of content transmission over the Internet (by means of server-client network protocols, such as FTP, HTTP, etc). However, such efficiency must face the limits imposed by the law. In particular, file-sharing of protected subject matter is prohibited in all those cases where a prior authorization by right holders is absent. Such authorization is almost always missing, due to the extremely high transactive costs connected with its negotiation.

This situation represents a huge market failure and restricts the freedom to access knowledge as granted by art. 27 sec. 1 of the *Universal Declaration of Human Rights*, with consequences that have a heavy negative impact on the cultural and economic development of our society.

There has been few efforts in seeking mechanisms intended to ease the meeting between supply and demand of digital content. On the contrary, much effort has, in recent years, been put into limiting such a phenomena by leverage of the dissuasive power of criminal laws, and to involve access providers (ISP) in surveillance activities. This approach is clearly in contrast with fundamental and constitutional rights, and does not represent a solution to the market failure above mentioned.

International and EU Community legislation allows for exceptions to the exclusive

1 The present work represents the expanded outcome of the conversation held during the 3rd "NEXA Wednesday" meeting, Turin (Italy), 12th November 2008 (for more information on "NEXA Wednesdays" see: http://nexa.polito.it/events). This English translation was prepared by Thomas Margoni in April 2009.

rights of reproduction and of making available to the public on-demand, provided that right holders are remunerated. This paper seeks to address the issue of file-sharing of copyrighted works, by analysing a variety of legal mechanisms and their compliance with international and European law.

Among the possible solutions that can be taken (general taxation, special purpose tax, mandatory or voluntary licenses), we suggest that a system of collective extended licenses, if properly tuned, may solve the problems connected with the current situation of P2P, benefit the affected players economically, and increase the general welfare of society through a more efficient, fair, and open dissemination of culture and knowledge.

Introduction

Digital networks enable dissemination of content in an extremely efficient way, thanks to P2P technologies (BitTorrent, Gnutella, eDonkey, etc)[2] –popularly referred to as file-sharing applications.

The purpose of copyright[3] is to foster the dissemination of culture, innovation, and social progress. However, it prohibits file-sharing of protected subject matter, except on the basis of a prior authorization by each and every right holder. Obtaining such authorizations is extremely difficult, if not impossible. Notwithstanding the fact that such a problem has been on the stage for many years, so far right holders have not organized themselves to create a global licences system to allow legal exchange of protected content[4].

This situation restricts the freedom to access knowledge as granted by art. 27 sec. 1 of the *Universal Declaration of Human Rights*[5], with consequences that are hard to quantify but ostensibly have a negative impact on the cultural and economic development of society.

Some say that right holders face insurmountable difficulties in organizing spontaneously to offer global licenses to users[6] for they find themselves in a "prisoner's

2 Exchanging digital files in peer-to-peer mode by using the potential of spontaneous collaboration and sharing of resources among users reduces the cost of dissemination of content (see Y. BENKLER, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, in *The Yale Law Journal*, 2004, 272 ss. and Y. BENKLER, *The wealth of networks: how social production transforms markets and freedom*, Yale University Press, 2006, New Haven and London, especially 83-90). The Internet is based on the end-to-end principle (see "RFC 1958 - Architectural Principles of the Internet"- http://www.ietf.org/rfc/rfc1958.txt) and thus is structurally suited to enable peer-to-peer communications.

3 The analysis deals only with copyright. Nonetheless, the same rationale holds true for the related rights, as contemplated e.g. by the Italian Copyright Act (phonogram producers rights: art. 72, cinematographic and audiovisual works and sequences of moving images producers' rights: art. 78-ter, broadcasters' rights: art. 79, performers' rights: art. 80, etc), as well as other rights that limit the dissemination of the content of digital files (such as the rules governing the circulation of "cultural goods" provided for by arts. 106 *et seq.* of the Legislative Decree 42/2004 – "Code of Cultural goods and of landscape").

4 Global license here means a license that covers a variety of typologies of works and for each typology the generality of works of that kind.

5 "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".

6 See W. PAGE, K. MCMAHON, D. TOUVE, *Shadow pricing P2P's: economic impact, in Economic Insight*, MCPS-PRS Alliance, 12 of 30.10.08 (for an article reporting its content see A. ORLOWSKY, *A new economics of P2P file sharing*, in *The Register*, 30.10.08,

dilemma"-like situation: they are not able to negotiate any agreement and consequently not only do they renounce to revenues of the potential market, but they also force users into a suboptimal situation.

In recent years, while the number of peer-to-peer users has been rising rapidly, there has been no effort in seeking mechanisms intended to ease the meeting between supply and demand of digital content. On the contrary, much effort has been put into limiting such a phenomena by leverage of the dissuasive power of criminal laws[7].

Finally, facing the evident unsuitability of such an approach that pays too high social and implementation costs, the tendency has been to move sanctions from the criminal into the administrative, and to involve access providers (ISP) in surveillance activities[8].

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http://www.theregister.co.uk/2008/10/30/shadow_pricing_p2p/).

7 In Italy, art. 171, sec. 1, lett. a-*bis*, of the Copyright Act as introduced by the Act 43/2005 ("Conversion into law, with modifications, of the law decree 31 January 2005, n. 7, introducing urgent dispositions for university and research, for cultural goods and activities, for the accomplishment of great strategic public works, for the mobility of civil servants, and for the simplification of the fulfilment of stamp duty and franchise taxes. Act of indemnity of the effects of art. 4 sec. 1 of the Law Decree of 29 November 2004, n. 280"), charges with criminal sanctions "anyone, who unlawfully, for any purpose and in any form […] makes available to the public, by putting in a system of telecommunication networks, through any kind of connections, a protected subject matter or part thereof". Even harsher penalties are set forth by art. 171-*ter* sec. 2 lett. a-*bis* of the Copyright Act, concerning persons who carry out the same activity for profit. The Act 43/2005 has been enacted to partially amend norms already introduced by the Act 128/04 ("Conversion into Law, with modifications, of the law-decree of 22 March of 2004, n. 72, enacting measures to contrast the telecommunication based abusive diffusion of audiovisual material, and to support cinematographic and entertainment activities): the first legislative intervention that introduces in Italy criminal sanctions for file-sharing activities.

In Europe, the original proposed Directive 2004/48/CE on the respect of intellectual property rights envisioned criminal sanctions for file-sharing, which were removed from the final draft.

The European Directive proposal on criminal sanctions for the protection of intellectual property rights (COM/2006/0168 final – COD 2005/0127), not yet approved, provides for criminal sanctions in cases of infringement on international scale for commercial purposes of copyright, and thus applies also to acts of file-sharing of protected content.

8 The most prominent example of such normative model is the French bill "*loi favorisant la diffusion et la protection de la création sur Internet*", also known as "*Création et Internet*", that after a long and tormented legislative history has finally been enacted by the French Parliament on May 13th, 2009. It creates a "gradual replay" mechanism to punish those users that exchange protected works, and constitutes the result of recommendations elaborated by the "*Olivennes*" report, titled "*Sur la lutte contre le téléchargement illicite*". The Act also institutes an administrative independent Authority (HADOPI) to which the right holders could address their claims of (supposed) copyright infringement. The Authority, by investigating the log files stored by the service providers (ISP), would communicate to users the danger of being sanctioned. In case of reiteration the HADOPI could apply sanctions including the disconnection

This approach is, however, structurally inadequate: on the one side, it is clearly in contrast with fundamental and constitutional rights,[9] whereas on the other it does not represent a solution to the market failure above mentioned.

It is therefore mandatory to rethink the legal framework of file-sharing of protected subject matter, in order to restore to legality the huge potential of freedom, and social, cultural and economic development offered by digital networks.[10]

The terms of the question

Ultimately, the problem is linked to the exclusive nature of copyright. In order to share files, it is necessary to obtain the authorization to perform at least two separate activities:
a) reproduction of works;[11]

form Internet. Shortly after final enactment, the Act has been brought to the attention of the Constitutional Court, which on the 10th of June 2009 issued the Decision n° 2009-580 DC (http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2009/decisions-par-date/2009/2009-580-dc/decision-n-2009-580-dc-du-10-juin-2009.42666.html) stating, *inter alia*, that the right to Internet access is a fundamental right and that the sanctions provided by the "*Création et Internet*" law violated the French Constitution.

9 Right of privacy, of access to knowledge and of information; see, besides the Decision of the French Constitutional Court mentioned in note 8, the decision of the Italian Privacy and Data Protection Authority of 28 of February 2008 in the so called Peppermint Case - http://www.garanteprivacy.it/garante/doc.jsp?ID=1495246- where it was established that private entities cannot perform systematic monitoring activities with the scope of identifying those users who exchange music file or games on the Internet, as well as the decision of the European Court of Justice of 29 January 2008 C-275/06 *Productores de Música de España (Promusicae) / Telefónica de España SAU* that reads:"Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality", see http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&num-aff=C-275/06&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100 .

10 See J.A. POUWELSE, P. GARBACKI, D.H.J. EPEMA, H.J. SIPS, *Pirates and Samaritans: a decade of measurements on peer production and their implications for net neutrality and copyright*, in *Telecommunications Policy*, 2008, 701 ss. See also W.W. FISHER III, *Promises to keep. Technology, law, and the future of entertainment*, Stanford University Press, Stanford, 2004.

11 The right of reproduction consists in the multiplication in copies in any form, thus including digital ones, of the work and is harmonized in all European countries. For instance, in Italy, the right of reproduction is provided for by art. 13 Copyright Act, and accordingly with art. 12 sec. 2 of the same Act, is one of authors' exclusive rights. It must be borne in mind that there are norms that permit the reproduction of the work

b) to make available to the public in such a way that members of the public may access works from a place and at a time individually chosen by them.[12]

International[13] and EU Community[14] legislation allows for exceptions to the exclusive rights of reproduction and of making available to the public in a way that members of the public can access works from a time and a space individually chosen, provided that right holders are remunerated.

Possible solutions

Theoretically, there are three ways that can meet the need to legimitize access and dissemination of copyrighted content, while granting remuneration to the right holder:

a) General taxation

Government remunerates right holders with resources gathered by general taxation.[15]

b) Special purpose tax

It implies the creation of a specific tax, aimed to remunerate right holders for the legitimized activities.[16]

c) Licence

Rights may also be managed by collective management bodies by providing a license that authorizes file-sharing. Such a license, in principle, may consist in:

- a mandatory licence;[17]

without the authorization from right holders. For example, art. 71-*sexies* authorizes *the private reproduction of sound recordings and audiovisuals on any device, if performed by a natural person for pure personal use, provided there is no profit or any direct or indirect commercial scope*.

12 Art. 16 Italian Copyright Act states that the making available to the public in such a way that members of the public may access works from a place and a time individually chosen by them, is a form of public communication, and according to art. 12 sec. 2 same Act, represents an exclusive right of the author.

13 With particular regard, the Trade Related Aspect of Intellectual Property Rights (the TRIPs agreement) art. 13, the Berne Convention arts. 9.2 11.2, and the World Copyright Treaty (WCT) signed under the auspices of the WIPO, arts. 8 and 10 (and see also the agreed statements n.9 regarding art. 8 and n. 10 regarding art. 10).

14 Particularly the European Directive CE of 22-05-2001 n. 2001/29 *on the harmonization of certain aspects of copyright and related rights in the information society* (Directive 2001/29/CE), see footnote 19.

15 For example, such has been the chosen path, *i.e.* applying a general taxation system, in the case of the remuneration of the right holders for the loan by public libraries and state record-archives (see art. 2 sec. 132 of the 286/2006 Act).

16 For instance, in the case of file-sharing, a legislative intervention could subordinate users' Internet access to a fee, by identifying the ISP as the withholding agent, and earmark the corresponding amount for the right holder.

17 Through a mandatory license system, the collective negotiation is imposed by law. In such a case the exclusive right looses its exclusive nature and becomes a right of remuneration. Downgrading an

- a collective extended license.

Collective extended licenses are based on a mechanism whereby collective management bodies (sufficiently representatives of right holders, such as S.I.A.E., the Italian collecting society) manage, on behalf of the right holders, the licenses for their works. Collective management bodies negotiate the license with users' associations that represent potential licensees, so that the negotiated license is open for acceptance by the latter. The license extends *ex lege* to works belonging to right holders not members of the collective management body participating to the agreement. Nonetheless, this normative technique does not impact on the exclusive nature of the right: right holders have the option not to authorize the application of the license to their works, and thus to opt-out.

Right holders not associated with those collective management bodies that manage royalties deriving from such a framework may claim the compensation corresponding to the use of their works within a specified amount of time.[18]

Collective extended licenses

In relation to these proposed solutions, the question is: may a European Union (EU) country adopt legislation enabling legal file-sharing by resorting to one (or more) of the above mentioned techniques? To answer this question it is necessary to test the legitimacy of the legislative technique against international and EU law.

In principle, at least as far as certain categories of works are concerned, it seems admissible to enact national legislation enabling the reproduction of protected subject matter within legitimate file-sharing activities[19].

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exclusive right into a remuneration right may not comply with EU and international law.

18 Collective extended licenses do not conflict with art. 5.2 Berne Convention (prohibiting formalities that limit the exercise of rights): even assuming that the *opt-out* communication represents a formality, which probably is not the case to begin with, it must be borne in mind that such a communication is optional and not mandatory, in absence of which right holders may still exercise their rights through the collective management bodies without any formality.

19 As a matter of fact, the European Directive 2001/29/CE, after stating at art. 2 the principle of exclusivity of the right of reproduction, at art. 5.2(b) affirms that:

Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(omissis)

b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned[.]

This exemption could be used, within the foreseen limits, in order to authorize the reproduction carried out

In turn, the enactment of a legal framework representing an exception to the exclusive right to make available to the public works in such a way that everyone can access them from a place and a time individually chosen should be tested against the provisions of Directive 2001/29/CE[20].

Accordingly, both a national rule authorizing the reproduction - not limited to specific categories of works, - and a rule that degrades the exclusive right of making available to the public in such a way that everyone can access works from a time and a space individually chosen into a mere right to remuneration, should be deemed illegitimate.

Therefore, according to the current legal framework, resort to the tools of general taxation, of a special purpose tax, and of a mandatory license would not comply with the relevant European law.

On the contrary, the option of the extended collective licenses could be taken into consideration since:

- it is already successfully in use in Nordic countries;[21]
- it does not affect the (exclusive) nature of the right since it consists of a voluntary management modality,[22] thus not degrading the exclusive right into a right of mere remuneration;

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by the use of legitimate file-sharing activities. However, it is necessary to take into consideration the limits imposed by the same Directive at art. 5.5, which reads:

The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.

20 Art. 3 of European Directive 2001/29/CE states that the right to communication to the public, including the right to make available to the public in such a way that members of the public may access them from a place and a time individually chosen by them, is an exclusive right. However, the possibility for Member States to provide for exceptions or limitations to this exclusive faculty, similar to those contemplated by art. 5.2(b) for the reproduction right, is not admitted.

21 In Nordic countries extended collective licenses are used, for example, to license broadcasting rights of literary and musical works, to authorize the re-broadcasting, the reproduction of works for educational scopes, the distribution of digitalized works by libraries, etc.

For a description of the extended collective license model in Nordic countries, see T. KOSKINEN-OLSSON, *Collective Management in the Nordic countries*, in D. Gervais (Ed.), *Collective Management of Copyright and Related Rights*, Kluwer Law International, BV, The Netherlands, 2006, 257 ss.; H. OLSSON, *The Extended Collective License as Applied in the Nordic Countries* (http://www.kopinor.org/layout/set/print/content/view/full/2090); and V. A., *Extended Collective License. The Nordic solution to complex copyright questions*, (http://www.kopinor.org/layout/set/print/content/view/full/1605).

22 See paragraph “Collective extended licenses”, *supra*.

– it represents a fair balance between the fundamental right of authors to the protection of their moral and economic interests and that of access to knowledge, which belongs to the general public;[23]

– it is identified as a possible solution to the problem of orphan works in the "*Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works*" adopted by the High Level Expert Group – Copyright Subgroup,[24] and above all

– it is explicitly contemplated by recital 18 of the Directive 2001/29/CE.[25]

Extended collective licenses seem therefore suitable to be used by a European Member State in order to legitimize the file-sharing of copyrighted content.

Conclusions

The time has come for the debate on file-sharing to drop derogatory labels such as piracy, so that it can move into solutions that allow all stakeholders to benefit, and to balance the remuneration of right holders with broad access to culture and knowledge by all. Collective extended licenses can contribute to turn file-sharing from a problem into an opportunity of social and economic growth for our countries.

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23 The necessity to strike a balance between these two principles is clearly expressed by art. 27 of the Universal Declaration of Human Rights of 1948. In fact, whilst art. 27 sec. II of the Declaration states that "*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*", the first section of the same article reads "*Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits*".

24See http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subg roup_final_report_26508-clean171.pdf

25 Recital 18 of the Directive 2001/29/CE reads: "*This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences*".

26 The license is available at http://creativecommons.org/licenses/by-sa/3.0/.