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File Sharing

NOTE

Abstract

'File sharing' has become generally accepted on the Internet. Users share files for downloading music, films, games, software etc. In this note, we have a closer look at the definition of file sharing, the legal and policy-based context as well as enforcement issues. The economic and cultural impact, too, is dealt with briefly. The conclusions and recommendations promote a cautious approach.

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AUTHOR

Prof. Dr Nico van Eijk
Institute for Information Law (IViR, University of Amsterdam)

RESPONSIBLE ADMINISTRATOR

Roberta PANIZZA
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: roberta.panizza@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:
poldep-citizens@europarl.europa.eu

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CONTENTS

| | |
|--|-----------|
| Contents | 3 |
| List of abbreviations | 4 |
| 1. Introduction | 5 |
| 2. What is file sharing? | 6 |
| 3. Legal and policy context of file sharing | 8 |
| 3.1. Downloading | 8 |
| 3.2. Uploading | 9 |
| 3.3. European context | 10 |
| 4. Enforcement instruments and procedures | 11 |
| 4.1. Civil law | 11 |
| 4.2. Criminal law | 11 |
| 4.3. Administrative law | 12 |
| 5. Recent developments | 13 |
| 5.1. European framework | 13 |
| 5.2. Graduated response systems | 14 |
| 6. Economic and cultural impact | 17 |
| 7. Conclusions and recommendations | 20 |
| References | 22 |

LIST OF ABBREVIATIONS

| | |
|-------------|--|
| DMCA | Digital Millennium Copyright Act |
| DPI | Deep Packet Inspection |
| GAO | United States Government Accountability Office |
| ISP | Internet Service Provider |
| P2P | Peer-to-Peer |
| RIAA | Recording Industry Association of America |

1. INTRODUCTION

From various studies it has become apparent that file sharing is a widely spread phenomenon. Virtually every Internet user uses the Internet to collect information. Music, films, games, and other digital information are downloaded on a large scale. In this short note, the emphasis is mainly on developments regarding music and film.

First, it is explained what file sharing is understood to mean and how file sharing relates to other forms of information distribution through the Internet. This brings us to a second restriction: the Internet. Other forms of distribution, such as sharing files on physical carriers, are beyond the scope of the study. Additionally, the end-user's perspective is at the centre stage (the business-to-business or professional market make use of clearly different dynamics).

Next, the legal and policy-related aspects of file sharing are discussed. In the legal analysis, attention is paid to the relationship between copyright and file sharing. The legal conceptualization is relevant, because of the fact for instance, that the question whether downloading is legal or illegal, depends on the legal framework in place. Several trends in case law will be briefly touched upon.

Developments that have taken place on a European level and regulations that have recently come into effect in France and the United Kingdom are described. Where experience has been gained with these developments, this experience will be interpreted. For the purpose of reference, the situation in the United States is also considered.

In a separate section, an indication of the economic and cultural impact is provided, particularly of the general welfare aspects and the question as to how file sharing plays a part in the diversity of the assortment offered.

In the conclusions and recommendations, the role of regulations and enforcement is dealt with in further detail. A careful assessment of interests should be the point of departure, and a balance is to be found between static and dynamic effects.

This brief was partly derived from and based on recent research in which the author of this note was involved. The first study¹ under consideration is 'Economic and cultural effects of file sharing on music, film and games', which was commissioned by three Dutch Ministries and is regarded as one of the first studies in which the file sharing phenomenon is put in a wider perspective. A second study² under consideration was performed by order of the Research and Documentation Centre of the Dutch Ministry of Security and Justice (WODC) on duties of care on the Internet, more specifically from the perspective of Internet service providers. In this note, we can only touch on some parts of the study. The source material is included in the bibliography.

¹ TNO/SEO/IViR, *Ups and downs. Economic and cultural effects of file sharing on music, film and games* 2009. http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorized_translation.pdf

² IViR/Liebniz, *Moving towards Balance: a study into the duties of care on the Internet*, 2010, http://www.ivir.nl/publicaties/vaneijk/Moving_Towards_Balance.pdf

2. WHAT IS FILE SHARING?

Files can be shared via the Internet in many ways. As indicated in the introduction, sharing files physically (burning music and films to CDs or DVDs, distribution via USB sticks) and in other ways than via the Internet is beyond the scope of this note.

One of the ways in which users share files is by attaching a file to their e-mail, which is then sent to other people. They can share files via their social network site (e.g. Facebook).

In addition, there are two dominant techniques for file sharing: peer-to-peer and Usenet-related forms of sharing.

When we look at peer-to-peer first, it should be noted that 1999 was a crucial year for the content industry, and for the music sector in particular. It was the year in which Napster became active and the first peer-to-peer (P2P) networks appeared. With Napster, consumers could share music via the Internet on a large scale, so that comprehensive music catalogues came within their reach. The users could consult these centrally kept catalogues and download files. Since those days, peer-to-peer has undergone a huge development. Catalogues no longer need to be kept centrally, and in the newest forms of peer-to-peer files can be searched and retrieved almost without any form of database being involved. Nowadays, the BitTorrent protocol is the basis for many programs (so-called BitTorrent clients like uTorrent and Vuze) used by end-users for retrieving and sharing files.

The strength and weakness of peer-to-peer is the fact that every user contributes to the network. Users download files, but they also supply files and thus provide an opportunity for downloading music, films etc. Most users are not aware of this. Sharing, however, is not an automatism. In some cases, the programs used have the option of deactivating or blocking the uploading function. In other cases, the amount of the downloaded material and the downloading speed depend on the extent to which the user makes files available himself. The value of peer-to-peer for end-users partly depends on a) network size (allowing many files to be available) and b) web sites or forums containing references to downloadable files.

With Usenet, actually also a form of peer-to-peer, files are placed into news groups on decentralized servers, from where they can be retrieved by the news group participants. An important difference with the forms of peer-to-peer described earlier is the fact that the user does not need to be active in supplying files. Sticking to downloading exclusively is not only possible, it is the chief form of use.

A third form of file sharing takes place through specialized hosting companies and is gaining popularity. These parties make storage capacity available under commercial conditions and provide access to the hosted information at a charge. A copy of a film is placed on the servers of RapidShare, FileSonic, FileServe or Hotfile for instance, after which users with an account to these hosting providers (that cost between 5 and 10 euros per month) can download the film. The respective files are often saved under a cryptic name. Web sites inventorying the files and thus unlocking them, therefore play an important role.

The forms of file sharing described are primarily used for downloading files. The underlying technology, however, can also be used for streaming information. Audio, video or text

somewhere on the Internet (on the PCs of individual users or stored with a hosting provider) can be played on peripheral equipment, similar to services such as video-on-demand or Catch-Up TV. Streaming of live events (soccer matches) or existing radio/TV channels, comparable with traditional broadcasting distribution, is also possible. With streaming storing the information consumed is not necessary (but can be optional).

Peer-to-peer technology is essential for the simultaneous distribution of content across the Internet. By optimum use of the network, congestion can be reduced or prevented, and content can be provided on a large scale. In this context, we refer to the Tribler project (www.tribler.org) that is partly supported by the European Union and in which peer-to-peer technology is developed. Large broadcasting organizations seeking an effective technology for distributing their video content, have shown interest in the project.

3. LEGAL AND POLICY CONTEXT OF FILE SHARING

In the chapters 3-5, the legal context of file sharing under current law is sketched, and the relevant national and European policy developments are discussed. A summarized outline (an in-depth analysis is not intended) is given of the position of downloading and uploading and the associated enforcement frameworks. Finally, three developments representing the major file sharing trends are looked at more closely.

3.1. Downloading

Downloading copyright-protected digital content can be qualified as a copyright-relevant reproduction. Essentially, every form of downloading (from P2P networks, from web sites etc.) involves copying. In principle, the copyright owner's prior permission is required for copying protected content. The copyright owner can grant permission by means of a licence (for instance in the form of a contract entered into with the user or by using alternative licence types, such as Creative Commons licences) or by means of an implicit licence (providing downloadable content on a web site, for instance). Whether content is provided at a charge or not is not indicative of whether the respective content is provided with the copyright owner's permission. P2P networks are increasingly used by unknown as well as known claimants for the promotion of their work or to become better-known. Sites like YouTube are also used more and more to serve this purpose. With certain forms of viral marketing, content is initially offered for downloading free of charge, but when the user wants to play the music again for instance, he will have to pay.

In some cases, no permission is required, as the material concerned is not (or no longer) copyright-protected. It is also possible that downloading is rendered permissible by a copyright exception. The best-known and most relevant exception in this respect is the copy for private use, also called the 'private copying exception'. For the consumer this means that he can be allowed to download content from P2P networks, web sites and social networks (Facebook, Hyves, etc.). Both non-economic and economic arguments are used for this private copying exception. Non-economic arguments include the protection of the user's privacy, the encouragement of participating in intellectual life and the stimulation of creativity and freedom of speech. The economic arguments include the high costs and practical obstacles due to which the enforcement of the prohibition of copying for the consumer's private use are said to be infeasible. Another argument is the need to achieve a balance between the copyright aims (encouraging creativity, innovation and wide distribution) and the pros and cons (restricting the possibility for a third party to use existing creations) versus encouraging authors and manufacturers.

Making multiple copies for a third party or friends is not considered private use, as laid down in the various national Copyright Acts. Especially with respect to BitTorrent-like programs it has been argued that downloading is not performed for private use exclusively. After all, the content is offered to a third party after or during downloading on the basis of

the specific properties of the software used. On the other hand, it is argued that private use is still the major reason why users download the content and that the user does not primarily have the intention to share the content with a third party. The fact remains, however, that a user who offers content to a third party performs an unlawful act of making available to the public. This example indicates that in practice the legal distinction between reproduction and making available cannot always be applied: with several P2P programs downloading and uploading are automatically interrelated, depriving the user of the option to confine himself to downloading exclusively (if he is aware of this choice in the first place).

Another requirement in the context of the private copying exception is the absence of any direct or indirect commercial aim. It is stated, though, that anyone who downloads content from the Internet without payment, saves the costs of buying a copy, which yields a commercial benefit. It is not a condition for the private use restriction that the maker of the copy has bought the original. Neither can it be assumed that the maker of the copy would have bought the original if copying had not been allowed (compare this with borrowing a CD, for instance).

A private-copy exemption implies that a fair compensation system needs to be put in place (as is required by article 5(2)(b) of the Info Soc Directive 2001/29EC). Examples of compensatory systems introduced in Member States include levies on blank carriers (CDs, DVDs) or on equipment that is suitable for playing audio or video files (computers, MP3 players).³ In the discussion about private copies, the question is often asked if it is relevant whether or not private copies are from an (evidently) illegal source. A source can be illegal, if the content copied is distributed without the copyright owner's consent or if the file from which the content is downloaded has been created without the copyright owner's consent. Arguments for such restriction are based on the fact that an illegal activity is at the bottom of making the copy. Against such requirement it is argued that in general it is difficult for the user to determine if the source is illegal, that it is difficult to maintain the distinction and that it can have an adverse effect on the amount of the levy on home copies to be paid to the copyright owner.

3.2. Uploading

File sharing normally can be qualified as an act of communication to the public, because copyright protected works are made available to the public. However, with the popular BitTorrent protocols, for instance, this may not always be easy to establish in practice.. What makes BitTorrent protocols different from other file sharing programs, is that the users remain (more or less) anonymous and that the files are split into parts that are offered across all users participating in exchanging files at a certain moment. In other words, peers often do not offer an entire file but only small parts of it. The argument has been made that since no substantial part of a work can be recognized in these small fragments, this is not a restricted act. The relevance of this discussion is however limited, for in principle the copyright owner's permission will be required for making the aggregate parts available to the public.

³ Hugenholtz, P.B., L. Guibault, S. van Geffen, *The future of levies in a digital environment*, final report, Institute for Information Law, Amsterdam, 2003 (<http://www.ivir.nl/publications/other/DRM&levies-report.pdf>)

Can users be held responsible for automated processes? With the file sharing programs, users mostly do not have the option to confine themselves to downloading only; the content is made available to third parties automatically. Nevertheless, it should be assumed that the user makes the material available and in so doing commits an infringement of the author's or claimant's copyright. Whether the user did this intentionally is not relevant for the question as to whether or not the upload was legal.

In the context of social networks, file sharing is said to be limited to a closed group, which would imply that no communication to the public is involved. However, it is hard to maintain that in the event of social networks – with users who have dozens or even hundreds of 'friends' – the group is limited to the extent that this exception can be appealed to.

3.3. European context

The file sharing issue with respect to copyright law is largely determined by the Info Soc Directive. The Directive allows Member States to provide for a private copy exemption as long as a fair compensation system has been put into place. It does not however deal with the issue whether private copies should be made from a legal source. As a consequence relevant rules differ per Member State. While certain Member States do not have a private copying exception at all (e.g. the United Kingdom), others prohibit downloading from an evidently illegal source (e.g. Germany) or have a private copying regime in which the legal/illegal origin of the downloaded material is materially irrelevant (e.g. the Netherlands). Comprehensive information on the private copying exception and about the situation in the Member States can be found in the background document on the 'fair compensation for acts of private copying'-consultation⁴ and as part of the study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.⁵

⁴ European Commission, *Background document 'Fair Compensation for acts of private copying'*, 2008, http://ec.europa.eu/internal_market/copyright/docs/levy_reform/background_en.pdf

⁵ IViR, *Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society : Final Report*, 2007, http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study_en.pdf; Queen Mary, *Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Part II: The Implementation of Directive 2001/29/EC in the Member States*, 2007, http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf

4. ENFORCEMENT INSTRUMENTS AND PROCEDURES

Normally, both civil-law and criminal-law instruments and procedures are available for copyright enforcement and for acting against unlawful acts such as illegal forms of file sharing. Several studies⁶ by the Legal Sub-group of the European Observatory on Counterfeiting and Piracy provide a more extensive overview of the situation in individual Member States. Another report on online copyright enforcement and data protection was commissioned by the European Commission.⁷

4.1. Civil law

In civil law, specific regulations (mostly found in copyright legislation) and general regulations of a civil or procedural nature (including tort law) are used for enforcement purposes and as such also mentioned in the Directive on the enforcement of intellectual property rights (Directive 2004/48/EC). Various instruments are available, including injunctive relief (also in the event of imminent infringements), damages, seizure, destruction or claiming ownership of infringing material and production resources, and demanding infringer details (name, place, address etc.) from intermediaries (such as ISPs). It is also possible to effect surrender of profit, which applies particularly to parties committing an infringement for business or professional reasons. In addition, servers on which material is stored may be confiscated, or 'torrent sites' (i.e. websites that point to illegal files available for downloading) can be forced to close (e.g. the Mininova-case in the Netherlands)⁸.

In Europe, the deployment of civil-law enforcement instruments against individual users is not common practice, but individual users are called to account all the same. For example, in October 2010, a German adolescent aged 16 was fined to paying damages for file sharing two songs in 2006. The damages awarded were €15 per song.⁹

When imposing means of enforcement, it is at the discretion of the court to weigh the defendant's interests (such as privacy and freedom of speech) and the claimant's interests.

4.2. Criminal law

Special provisions in criminal law are focused on enforcing copyright law, or criminal-law provisions are included in copyright legislation. As a rule, making available protected works through file sharing is covered by these provisions. However, in the description of the offense it is in general the criterion of intent that needs to be met. The offence is considered intentional if there is a will to perform certain prohibited acts. It remains to be

⁶ *Damages in Intellectual Property Right Corrective Measures in Intellectual Property Rights and Evidence and Right of Information in Intellectual Property Rights*. These studies can be found at the website of the Observatory: http://ec.europa.eu/internal_market/iprenforcement/observatory/index_en.htm

⁷ Hunton & Williams, *Study on Online Copyright Enforcement and Dataprotection in Selected Member States*, 2009, http://ec.europa.eu/internal_market/iprenforcement/docs/study-online-enforcement_en.pdf

⁸ District Court Utrecht d.d. 26 August 2009 (www.rechtspraak.nl/ljn.asp?ljn=BJ6008).

⁹ Hamburg Regional Court d.d. 8 October 2010, case 308 O 710/09 (<http://openjur.de/u/59561.html>).

seen if the intentional nature can be proven in all cases of file sharing. As mentioned earlier, the software can be used for both downloading and uploading, often without the user being aware of this. It should be noted that criminal laws normally provide for further-reaching enforcement possibilities with respect to those who commit an infringement for professional or business reasons.

As far as could be ascertained, the deployment of criminal-law enforcement instruments against individual users of file sharing hardly occurs in Europe, if at all. The argument that criminal law is regarded as the ultimate remedy, is essential. Punitive intervention against professional or business use is fairly exceptional. A recent example/exception is the Swedish Pirate Bay case, which resulted in criminal convictions.¹⁰

4.3. Administrative law

A third option is enforcement by means of administrative procedures. The government imposes measures (such as warnings) and possibly administrative penalties. An example of an administrative approach is laid down in the French HADOPI law (see section 5.2 below).

¹⁰ Stockholm District Court, 17 April 2009. Non authorized translation: <http://www.ifpi.org/content/library/Pirate-Bay-verdict-English-translation.pdf>. The decision was largely confirmed by the court of appeal on 26 November 2010 (http://www.theregister.co.uk/2010/11/26/pirate_bay_appeal_verdict/).

5. RECENT DEVELOPMENTS

From a policy perspective, file sharing regulation has come in for more and more attention. Describing all developments is beyond the scope of this note. Here, only the three most important developments are outlined: a) the new European regulatory framework for the communication sector, b) the introduction of graduated response regulation in France as well as in the United Kingdom and c) the intermediaries' role and that of the Internet service providers in particular.

5.1. European framework

When the European Regulatory Framework for the communications sector was being amended, due attention was paid to the file sharing issue, which resulted in several important principles now incorporated in Article 1.3a of the Framework Directive¹¹:

Measures taken by Member States regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.

Any of these measures regarding end-users' access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed.

Essential aspects of the rule of law are confirmed and made explicit in a context that file sharing is part of. Comparable approaches are also part of current and recent case law. In this context, the well-known Promusicae case¹² (in which making user data available in civil proceedings was the issue) can be referred to, where the court argued that Member States

¹¹ Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws ("Citizens' Rights" Directive).

¹² Court of Justice of the European Union, d.d. 29 January 2008, Promusicae v Telefonica, C-275/06.

must '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' and to interpret their national laws 'not only 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.'

The subject of fundamental rights and proportionality is also included in the consultation about the application and possible modification of the Intellectual Property Rights Enforcement Directive (IPRED)¹³. The consultation document and the underlying commission staff working document are criticized: despite references to the Promusicae case, the documents give the impression that more importance should be attached to the enforcement of intellectual property rights.¹⁴

5.2. Graduated response systems

In addition to the earlier-mentioned remedies in civil and criminal law, two Member States, the United Kingdom and France, have introduced so-called 'graduated response systems'. In France, the adoption of the legislation that has become known as HADOPI (*Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet*), has come into effect and is now being put into practice. In the United Kingdom, the Digital Economy Act was adopted. The core of the proposals includes the introduction of measures against individual users who do not take sufficient precautions or who are involved in illegal activities, including prohibited activities as part of file sharing. In the United Kingdom, the Digital Economy Act imposes obligations on Internet service providers to forward notifications of rightful claimants to alleged infringers actively. The providers also need to keep lists of end-users who have been the subject of such notifications. In addition, they need to make these lists with identifiable data available to rightful claimants to help detect repeated infringements by end-users. The Internet user's identity is not to be disclosed by means of these lists. If forwarding the notifications does not result in putting an end to the infringements, Internet service providers can be obliged to impose technical restrictions on the use of Internet connections.

Under the French HADOPI law, Internet access providers are held to inform their subscribers about existing security mechanisms to help them fulfil their obligation to monitor the use of their Internet access. Internet access providers must propose to their subscribers at least one efficient technical means from a list drawn up by the newly created HADOPI Agency. If a subscriber does not comply with the duty of surveillance, the Committee for the Protection of Rights (*Commission de Protection des Droits*) – one of the two components of the HADOPI Agency – can ask Internet access providers to send a first warning e-mail to their subscribers, followed by a second one six months later to ask them

¹³ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

¹⁴ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights*, COOM(2010) 779 final, Brussels, 22/12/2010; Commission Staff Working Document, *Analysis of the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the Member States*, SEC(2010) 1589 final, Brussels, 22/12/2010. An earlier resolution of the European Parliament received similar criticism (Resolution of 22 September 2010 on enforcement of intellectual property rights in the internal market (2009/2178(INI), A7-0175/2010).

to comply with their obligations. In case of copyright infringement or gross negligence with respect to the breach of the duty of surveillance, the court can impose a penalty on the subscriber consisting of a suspension of his Internet subscription for a limited period of time. Once the court decision becomes enforceable, the penalty will be notified to the HADOPI Agency and then transmitted to the Internet access provider. Within two weeks after the notification, the Internet access provider will either cut off the Internet access to the subscriber or will be fined himself.

Both systems are still in an implementation phase or have not yet produced any relevant results. A closer look¹⁵ at the French situation reveals that by the end of 2010 the new Agency had made 100,000 requests to ISPs for providing identity details; some 70,000 requests had been sent to users. The Agency aims at sending 2,000 messages to users per day. It intends to send a second warning in 2011 in addition to the first warning. Any concrete procedures have not been initiated yet. Furthermore, HADOPI focuses on informing the public and creating a platform for further discussion.

In the context of a study into the intermediaries' role¹⁶, interviews with various stakeholders were conducted in France, in which many doubts were expressed concerning the HADOPI legislation. The respondents believed that such stringent legislation might lead to the development and use of encryption technology for the distribution of copyright-protected material which could then be used for sharing illegal content. Some emphasized that Internet service providers should not be put in the position to monitor Internet traffic or to contribute to punitive measures against end-users. There was also much doubt about the capacity of Internet service providers and of the judicial authorities to support the active approach of copyright protection prescribed by the HADOPI legislation. Investigating authorities also questioned the proportionality of the measures and pointed to the relationship with other investigating authorities with respect to cybercrime. Some parties pleaded for considering the Internet a universal service, incompatible with measures taken by Internet service providers.

5.3. Intermediaries – the role of Internet service providers

A special element in the graduate response models is the involvement of intermediaries – especially Internet service providers and among this group the Internet access providers in particular. It is not the first time that the value chain between uploader and downloader (information provider and information user) is considered when the file sharing issue is under scrutiny. As described above, intermediaries are taken to account with respect to enforcement. Under certain circumstances, Internet access providers are held to provide their users' address details, and hosting organizations are summoned to remove content from their servers, or servers are confiscated. Providers of torrent information are to remove this information, or they are forced to suspend their activities.

A special element of the graduate response models is the fact that they oblige Internet access providers in particular to collaborate actively in investigating (making address

¹⁵ Slides presented at 'Conference de presse, Mercredi 12 Janvier 2011-11 Heures: Point d'étape de fin d'année 2010; Deuxième recommandation', <http://www.hadopi.fr/download/sites/default/files/page/pdf/DP-20110112.pdf>.

¹⁶ IViR/Leibniz, Moving towards Balance: a study into the duties of care on the Internet, 2010, http://www.ivir.nl/publications/vaneijk/Moving_Towards_Balance.pdf

details available in other ways than by court decision) and enforcement (such as blocking Internet access).

5.4. The US perspective

'Woman Must Pay \$1.5 Million for Sharing MP3s.' This headline towards the end of last year was about Jammie Thomas-Rasset, a single mom, who had been sued by the RIAA (Recording Industry Association of America) for file sharing music through the file sharing program Kazaa. The amount came to \$62,500 per shared song. The case dates back to 2006¹⁷.

Meanwhile, the market parties in the US have become more restrained in acting against individual users, which is likely caused by the publicity-related consequences and the limited effectiveness. Enforcement is primarily focused on deploying the available resources by virtue of existing regulations. In addition, the provisions of the Digital Millennium Copyright Act (DMCA) play a role as well. These regulations, from which the provisions of the European E-Commerce Directive have been more or less derived, offer a safe harbour regime for service providers like Internet service and hosting providers. If infringing material is removed after it has been brought to the provider's attention ('notice and take down'), the provider will not be held liable.

¹⁷<http://arstechnica.com/tech-policy/news/2010/11/42-german-p2p-fine-stark-contrast-to-seven-figure-us-judgments.ars>.

6. ECONOMIC AND CULTURAL IMPACT

Identifying the economic effects of file sharing is not a straight-forward matter. Are only the short-term (static) effects considered or are the longer-term (dynamic) effects the object of study? Is a specific sector or are parts of it (audio versus the record industry, video, games) used as a point of departure, or is the emphasis rather on the more general welfare effects?

It is clear that traditional assumptions about possible effects are increasingly becoming food for debate. Figures supplied by stakeholders are supplemented with the results of more detailed investigation. The assertion that 'a CD copied is a CD less sold' appears to be untenable. Last year, the United States Government Accountability Office (GAO) published a widely discussed study into the effects of counterfeit and pirated goods.¹⁸ The GAO stated that 'widely cited estimates of economic losses resulting from counterfeiting cannot be substantiated due to the absence of underlying studies' and 'Each method has limitations, and most experts observed that it is difficult, if not impossible, to quantify the economy-wide impacts. Nonetheless, research in specific industries suggests that the problem is sizeable (...).'

In various studies, several positive, neutral and negative aspects of file sharing are mentioned (see table). The positive effects include the sampling effect (users have the opportunity to become acquainted with a wide assortment of music, films etc.). The substitution effect is in the negative category (users download instead of buy).

The Dutch report on file sharing is an attempt to show the impact of file sharing by means of analysis of literature search and investigation among users.¹⁹ Later studies yielded comparable results.²⁰ File sharing and downloading appear to be a widespread practice, especially with respect to music but also more and more where video is concerned. Whereas file sharing is more widely spread among younger users, it is quite significant among users of up to 50 years old. Those who share files can hardly or not indicate which technology they use, or they are not aware that they do not only download but also upload files as the case arises. When asked about the difference between paid and unpaid downloads, no substantial difference was perceived with respect to terms of ease of use, availability or quality. There is a relationship between those who download and those who buy.

¹⁸ United States Government Accountability Office (GAO), *Intellectual Property, Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, April 2010, <http://www.gao.gov/new.items/d10423.pdf>

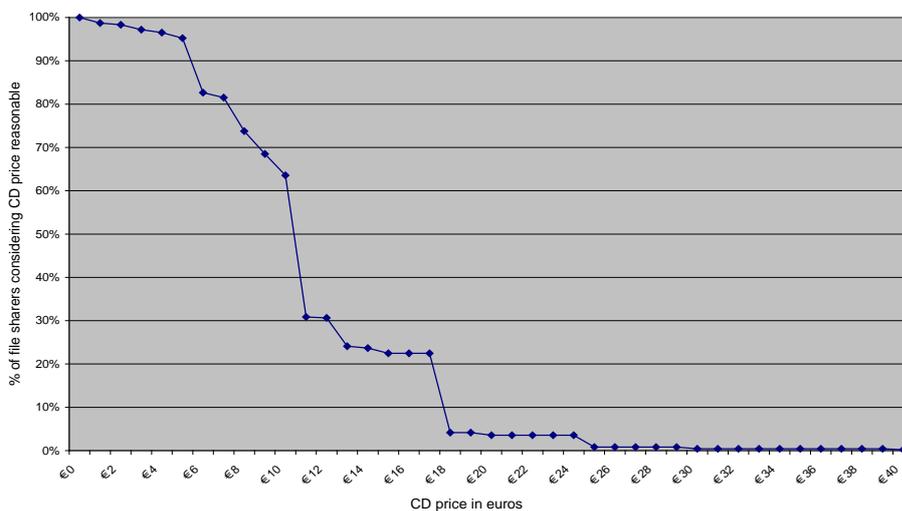
¹⁹ TNO/SEO/IViR, *Ups and downs. Economic and cultural effects of file sharing on music, film and games 2009*, http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorized_translation.pdf

²⁰ I.e. Rapport au Ministre de la Culture et de la Communication, *Creation et Internet*, 2010, <http://www.culture.gouv.fr/mcc/Espace-Presse/Dossiers-de-presse/Rapport-Creation-et-Internet> and Joe Karaganis (ed.), *Media Piracy in Emerging Economies*, 2011, <http://piracy.ssrc.org/>

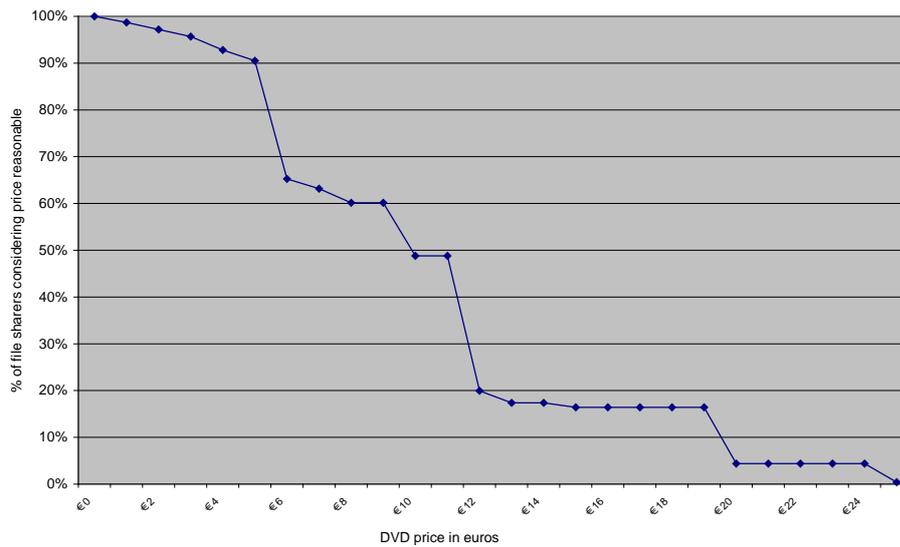
| Possible effects of file sharing on the purchase of CDs, films, games and related products |
|---|
| Positive |
| - File sharing introduces consumers to music, films and games (and to artists and genres), thus creating demand. This is known as the sampling effect |
| - File sharing allows consumers to pool their demand, resulting in increased demand. |
| - File sharing enhances willingness to pay and demand for concerts and related products (complementary demand). |
| - File sharing enhances the popularity of products, boosting demand driven by a lack of purchasing power (network effect) |
| Neutral |
| - File sharing meets the demand of consumers who are not, or not sufficiently willing to pay and subsequently are not served whose demand is not met by the manufacturer. |
| - Files sharing meets a demand for products that are not offered by manufacturers (e.g. film files for iPods) |
| Negative |
| - File sharing substitutes for the purchase of music, DVDs or games or cinema visits (substitution). |
| - File sharing results in the deferred purchase of music, DVDs or games, at a lower price than the price at launch. |
| - Sampling results in sales displacement as a result of fewer bad buys. |

Downloaders are clearly buyers, and they buy more than non-downloaders. This is explained by the sampling effect (through file sharing the user has become acquainted with the available assortment) and the fact that the downloaders are the more active users. The respondents are certainly prepared to pay for music or video and believe that €8 for a CD and €5 for a DVD are reasonable prices.

What music sharers find a reasonable price for a much-wanted CD



What film sharers find a reasonable price for a much-wanted DVD



According to the conclusions of the study, file sharing/downloading has positive direct welfare effects for the Dutch market. As to the dynamic effects, the sale of CDs and DVDs has decreased sharply, but this is not due to file sharing alone. Since the introduction of file sharing, the DVD market has shown strong growth, and in several countries cinema visits are still on the rise. The figures further indicate that the overall entertainment industry is fairly stable in terms of turnover, which is indicative of competition and substitution in the sector. Money no longer spent on CDs is spent on visits to concerts, cinemas or other products (merchandizing) or games. The shifts occurring in business models are most clearly discernible in music (a shift from revenue from CD sales to concerts and sponsoring, for instance, and the emerging so-called 360-degree contracts integrating several forms of exploitation, as well as the emergence of services like Spotify). File sharing and services like YouTube have made it easier for new artists to become known and enter the market.

7. CONCLUSIONS AND RECOMMENDATIONS

The pressure on the classic business model for the exploitation of copyright-protected work is caused to a larger extent by digitization and such phenomena as file sharing. The link with a physical carrier has decreased considerably and has been replaced by exploitation as a service (downloading, digital distribution/streaming). This is definitively the case with music. In other markets, the picture is more varied (in the games market, for instance, turnover is still high for games on physical carriers).

However, the analysis of the Dutch file sharing study shows 'that the short-term and long-term welfare effects of file sharing are strongly positive, given that it is practised by consumers who lack purchasing power. To the extent that file sharing results in a decline in sales (substitution), we see a transfer of welfare from operators/producers to consumers (demand driven by lack of purchasing power) with no net welfare effect.' In short, file sharing should be rated at its true value.

Therefore, it is very important that additional – independent – studies are conducted into developments in the entertainment industry and in this context into the effects of file sharing. Eventually, the focus should be on the overall welfare effects. This does not mean that short-term effects are not worth any attention, but friction issues must be rated at their true value to prevent their role from becoming disproportionate.

Promoting innovation and developing new business models is of great importance for the music industry in particular, where the effects of file sharing are most clearly noticeable. Digital availability should meet demand, and legal supply should distinguish itself from illegal supply in terms of availability and quality. Another important element is affordability. The study has shown that a price that is too high and inconsistent with the value attached to the product by the user, encourages unlawful distribution and purchasing. In the European Digital Agenda, which points out that the digital sale of online music in the US is four times higher than in Europe, the issue of new business models, availability and affordability is endorsed.

Although one could wonder if file sharing is not predominantly an economic/business problem, the question remains whether adjustment of the legal framework is necessary for file sharing. Although there are considerable differences within the European Union with respect to defining the framework for file sharing, national legislation seems to provide substantial and sufficient means in civil and criminal law to act, especially where business-related and large-scale activities in the context of providing copyright-protected work are concerned. This is what investigation and enforcement should concentrate on. Too easily, it is suggested that the current enforcement instruments are inadequate, and more measures are called for – including measures that reach too far.

The intermediary's role in file sharing requires a sufficiently considered approach. It is too easy to call Internet access providers a bottleneck and hold them responsible in the context of enforcement and investigation. Besides general proportionality issues with respect to measures like the use of deep packet inspection (DPI) and filtering, the intermediary's role in the value chain between information provider and information user is often ignored in this kind of approach. Ignoring the value chain can lead to disproportional risk avoiding behaviour and can thwart innovation.

Putting end-users in a criminal perspective and acting against them is – under the present circumstances - not very useful. File sharing is there to stay. Studies have indicated that there is a most substantial problem in the relationship between demand and supply ('don't sue, but seduce'). Additionally, the relationship between file sharing and the damage incurred is unclear. Most of all, however, we should make sure that the fundamental freedoms and demands with regard to proportionality and enforceability are not compromised (see the previous comments about article 1.3a of the Framework Directive and the description of graduate response). In this context, criminal law can only serve as the ultimate remedy.

Research²¹ has made it apparent that users know very little about file sharing. This unfamiliarity is a factor for possibly unlawful downloading as well as for the technologies and software used.

²¹ TNO/SEO/IViR, Ups and downs. *Economic and cultural effects of file sharing on music, film and games* 2009, p.80, http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorized_translation.pdf and Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet, Hadopi, biens culturels et usages d'internet: pratiques et perceptions des internautes français, 2011, P. 38-44, <http://www.hadopi.fr/download/hadopiTO.pdf>

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