Journal of Information, Law and Technology

Internet File-sharing and the Liability of Intermediaries for Copyright Infringement: A Need for International Consensus

Matthew R Just

This Article is based on a revised and updated chapter from an LL.M Dissertation, submitted at the University of Warwick, September 2002. I would like to acknowledge Duncan Matthew's kind supervision and assistance during the writing of that dissertation.

This is a **refereed** article published on: 4 July 2003.

Citation: Just, M,'Internet File-Sharing and the Liability of Intermediaries for Copyright Infringement: A Need for International Consensus', 2003 (1) *The Journal of Information, Law and Technology (JILT)*. <http://elj.warwick.ac.uk/jilt/03-1/just.html>

Abstract

The recent popularity of file-sharing programs over the Internet has resulted in copyright infringement on a grand scale. Making intermediaries liable for such infringement has been seen by Copyright Industries as key to preventing infringement. However, lawsuits

have not deterred determined pirates. The Napster decision has confused this area of law and the Dutch KaZaA judgement has led to international disagreement over the liability of intermediaries. The author contends that ISPs should only be liable where they know of infringing material, are able to control it, and do not take action to prevent infringement. A general monitoring responsibility on ISPs would be counterproductive and detrimental to normal users. Instead, levies on digital material and compulsory licensing are promoted as being pragmatic methods for dealing with file sharing.

Keywords: ISP Liability, file-sharing, KaZaA, MP3, Napster, P2P

1. Introduction

The digital age poses many unique problems for law. One such problem is adapting intellectual property to meet the challenges of global computer networks. Biegal makes the point concisely: 'The nature and extent of a person's right to copy material in the online world has become for many the paradigmatic cyberspace-related inquiry'. <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> This article considers copyright in relation to Internet file-sharing programs and the liability of intermediaries.

In the first part of this article, after giving an appropriate definition to the term 'Internet', the existence of copyright infringement through the use of file-sharing programs will be analysed. The mindset of a typical Internet user will be discussed in relation to social norms and the difficulty of controlling the actions of individuals will also be considered.

The second part moves on to analyse the liability of intermediaries, in particular the liability of Internet Service Providers (ISPs), for infringement by users. The issue of MP3s and file-sharing will be employed to discuss whether giving ISPs the responsibility of policing users would be an efficient way to safeguard copyright. Issues of ISPs monitoring the actions of users and the national differences in the treatment of ISPs under law will be examined, as well as economic consequences for making ISPs responsible for the actions of their users. Judicial responses to peer-to-peer file-sharing will be critiqued to draw out these issues.

The final part examines previous international efforts at the harmonisation of Internet copyright law and makes some tentative policy suggestions at the international level on how best to discourage infringement.

2. The Existence of Copyright Infringement on the Internet

2.1 Defining the Internet

It is necessary to first define what is meant by the term 'Internet'. In the case of Reno v. ACLU, the US Supreme Court made the analogy of the Internet being both like a library and a shopping mall (a public place). <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?

action=Attachment.View&Item.Attachment.id=1
&User.context=psprYglsidPq&Item.drn=4160z1z0> However, analogies may be of little assistance because the Internet could also be likened to a telephone conversation (for private real-time chatting), a broadcaster (where video and/or audio are streamed to Internet users), or even a newspaper. How one defines the Internet depends greatly on the specific use by the user.

The term 'cyberspace' will not be used in this article as it is a rather confusing, popularised term. Some commentators regard it as synonymous with the Internet. One extreme view is that it is another place entirely, where events occur that may not always directly impact on 'real-space'. In any event, given that the Internet has a multiplicity of functions; it would be more accurate to speak of cyberspaces, rather than a single cyberspace.

A lay person's definition of the Internet would include the World Wide Web (WWW). This part of the Internet is only one protocol of many communication methods used to transfer data over networks. A dictionary definition of the Internet notes that: '[while] the web (primarily in the form of HTML and HTTP) is the best known aspect of the Internet, there are many other protocols in use, supporting applications such as electronic mail, Usenet, chat, remote login, and file transfer....'
<https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?
action=Attachment.View&Item.Attachment.id=1
&User.context=psprYglsidPq&Item.drn=4160z1z0> For the purposes of this article, the word Internet will be used in its widest sense. It is a global network of computers that includes the web, email, newsgroups, real-time chatting, and file-swapping programs. It does not include intranets because, although they pose many of the same challenges to the copyright system, it would be rare for one to have an international presence.

2.2 Nature of Global Networks and Digital Media

The digital age poses a unique challenge to copyright for many reasons. The Internet is global. This makes it multi-jurisdictional. There are no borders or boundary lines on the Internet. It is not always clear from which country information originates. It is certainly less clear which countries the requested information travels through to arrive at its destination. This is because information is broken down into packets that take the most efficient route through the networks of wires and satellites. The Internet was designed to be decentralised so that it could not be destroyed. A great amount of data exists on the Internet and is transferred every day. As Chapman notes:

> '[T]erabytes, or trillions of bytes, are circulating on the net at any given time. Trying to locate illegal or offensive data on the net would be harder than trying to isolate two paired words in all the world's telephone conversations and TV transmissions at once. And this difficulty grows every hour'.
> <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?
> action=Attachment.View&Item.Attachment.id=1
> &User.context=psprYglsidPq&Item.drn=4160z1z0>

The task for copyright holders to locate infringing material on the Internet represents a great economic burden.

Digital media is unlike anything else experienced by copyright laws to date: 'digital technology is consolidating all prior media while globalising them'. <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> It is becoming increasingly easy to take a copyrighted product and reproduce it in digital form. Computer scanners can digitise pictures and text. Songs from audio CDs can be 'ripped' and stored on hard drives. Analogue video can also be captured from camcorders, videocassette recorders, or even live broadcasts.

Once material is stored in digital format, further copying results in no loss of quality. Copies can be made an infinite amount of times. They can be digitally altered and manipulated, infringing authors' moral rights. Copies also have a potentially infinite life span. Finally, copying is extremely cheap for the infringer. Once a user has the necessary hardware and Internet connection, their copying is only limited to the space available on their hard drives.

The current situation of infringement, discussed below, is likely to worsen in the short term due to the increasing speed of internet with the introduction of broadband, the ease of finding material through file-sharing programs, and the significant reduction in cost of media (both for hard drives and blank writable CD-ROMs).

2.3 Extent of Copyright Infringement

Copyright is becoming of great importance to the economies of the largest countries in the world. For example, in 2001 the U.S. earned almost $89 billion from exports from its major copyright industries (primarily the Movie and Music industries). <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> Copyright Industries are responsible for 5 per cent of the America*s GDP. <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> Therefore protecting this lucrative commodity is of vital importance. In relation to file-sharing, copyright infringement occurs primarily to the detriment of the Music Industry and Movie Industry.

2.3.1 Music

The copying of music over the Internet, in relation to MP3 and file sharing programs is perhaps the most contemporary example of the problem that this article investigates: 'Indeed, no single Internet-related dispute exemplifies the nature and extent of the current regulation debate more completely than the MP3 controversy'.

<https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

The scale of the copying of music is staggering. In January 2001 alone, 2.7 billion songs were downloaded through a file-sharing program called Napster. <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> In the same year, the value of the global music market fell by 5 per cent. The International Federation of the Phonographic Industry (IFPI) attribute this fall to Internet infringement. However, the operators of file-sharing programs blame a dip in the global economy. 10 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> It is uncertain at this point which side is correct. However it is clear that copyright infringement in music is a serious problem that the music industry has been fighting for some time. Although the music industry is succeeding in many lawsuits brought against file-sharing operators, it has yet to win the war. 11

2.3.2 Movies

The copying of movies has not been regarded as a problem until very recently. Until the introduction of high-speed Internet connections and the Divx compression standard, movies were considered too large to copy across the Internet and would take many days should anyone attempt it. 12 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>This breathing room for the Movie Industry has now ended: 'The sharing of files containing pirated movies may still be in its infancy, but 300,000-500,000 feature films are already being downloaded daily, according to Viant, a consultancy'.13 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> Copies of new movies are available on the Internet prior to their release in cinemas. For example, it has been reported that the movie 'Star Wars Episode II : Attack of the Clones' was available for download six days before its worldwide release. 14 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

It should be noted that although infringement is rife in most major industries that rely on copyright protection, the situation is reversible. Authors are still creating new content and there is no evidence that they are yet being deterred by online infringement.

2.4 Copying as a Social Norm

The mind of the average infringer will be considered to understand why current law is proving, for the most part, ineffective in deterring people from copying on the Internet.

'Once copyright works are widely distributed over the Internet, the conspiratorial interests of the pirate and the consumer blend seamlessly together'. 15 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> Average Internet users do not regard copying as a crime. It is certainly a crime without any direct victims. It is also incredibly unlikely that an individual user will be caught for her actions. With the millions of users requesting data over the Internet every day it is difficult to police the actions of those that are infringing copyright. 'To prevent illegal copying' one would have to exercise wide surveillance powers and regularly burst into people's homes and other private spaces.16 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> The Internet user is, for the most part, anonymous. However to think that the problem lies in opportunistic criminals is naive:

> '[T]he under-thirty generation has grown up being able to freely expropriate intellectual property easily and at little cost. As college students, how many of them bought most (or even some) of the software on their computer, rather than "borrowing" it from their folks or from a friend down the hall? How many of them put together a compilation tape of their favourite songs? How many of them made a cassette tape of someone else's music album? '17 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

A generation of society are used to recording programmes from television broadcasts, keeping home video libraries, copying audio cassette tapes from friends, borrowing software, even photocopies entire books (perhaps when they are unavailable elsewhere, in the case of out-of-print editions). The law has had little choice but to allow this private copying: 'A prohibition of electronic private copying in the narrow sense is impossible to police, will be breached on a massive scale, and may even render the legislator himself ridiculous'.18 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

This generation enters the Internet and is completely at home with the ethos of copying. The Napster generation did not suddenly become infringers when they obtained Internet access. For them it was a natural progression from home video taping and the private copying of audiocassette tapes. Copyright-reliant Industries have made some attempts at re-educating people in the value of copyright and why it must not be infringed. 19 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?

action=Attachment.View&Item.Attachment.id=1
&User.context=psprYglsidPq&Item.drn=4160z1z0> However these efforts are contradictory to other Industry practices such as the alleged monopolies in Audio CD sales where Albums are being sold at an unnecessarily high price. 20
<https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?
action=Attachment.View&Item.Attachment.id=1
&User.context=psprYglsidPq&Item.drn=4160z1z0> If the general public believe that they are not paying a fair price for the goods they are buying it is not surprising that they turned to other, cheaper, means of obtaining what they wanted. On this reasoning it would be appropriate for other industries to reduce their prices so as to draw back consumers. However, one reason given for the high prices of CDs and computer software is that pirated copies, which reduce revenue, force producers to maintain high prices or even increase them. It is clear, therefore, that an alternative solution is necessary to break this deadlock.

2.5 Summary

File-sharing represents a major challenge to copyright laws. A huge amount of infringement takes place every day. Infringers often do not believe their actions are wrong. It is submitted that this has led to a social norm of copying. The burden of finding all the individual users that infringe is too heavy for even the wealthy American Industries to bear. Instead, the responsibility must shift from the copyright holder to those that allow infringement to take place. The next part looks at the responsibility of intermediaries, particularly ISPs, in preventing infringement by Internet users.

3. Liability of Intermediaries for Copyright Infringement

3.1 Introduction to Intermediaries

As Jack Valenti states, ‘copyright law is only as good as its enforcement’. 21
<https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?
action=Attachment.View&Item.Attachment.id=1
&User.context=psprYglsidPq&Item.drn=4160z1z0> Part two discusses enforcement through making ISPs liable for the actions of their users: ‘Since the ISPs can immediately and directly let a person in or remove a person from the online world, they have been viewed by many as an important focal point of control. Debates regarding the legal responsibility of ISPs thus continue unabated’. 22
<https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?
action=Attachment.View&Item.Attachment.id=1
&User.context=psprYglsidPq&Item.drn=4160z1z0> First an appropriate definition of ISP will be constructed. Statutes dealing with the liability of intermediaries and prior case law will be analysed. The Napster ruling is the most important and controversial decision in this area and will be considered in detail. 23
<https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?
action=Attachment.View&Item.Attachment.id=1
&User.context=psprYglsidPq&Item.drn=4160z1z0> Finally, an investigation of the

aftermath created by Napster decision from economic and legal perspectives will be conducted.

3.2 Definition of an ISP

An ISP, or Internet Service Provider, can mean a company that might be performing any of a multitude of services over the Internet. Traditional ISPs provide connection to the Internet and usually offer users email and newsgroup access. Others offer web space for users to create their own home pages. Bulletin Board operators could also be regarded as an ISP. ISPs could also include telecommunications infrastructure such as Cisco and local telephone companies. All ISPs also act as passive nodes as packets of information are sent through them. It would be pointless to make ISPs liable for infringing information when they are only performing a passive function as they would not easily have the ability to monitor all data.

Other, more specialised, functions of ISPs include those that provide connectivity software employing a central server such as file-sharing programs or Internet Messenger services. Software that does not require a central server can be described as pure peer-to-peer networking or decentralised. It is these newer functions of ISPs that are most problematic for copyright holders.

A computer scientist would define an ISP as: '<company, networking> (ISP) A company which provides other companies or individuals with access to, or presence on, the Internet. Most ISPs are also Internet Access Providers'. 24 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> This definition is rather vague. Statutes defining ISPs have had to balance the need to be specific, to catch all current service providers whatever service they are providing, and yet general enough to allow for future development the ISPs' roles.

The Digital Millennium Copyright Act 1998 has two definitions for ISPs. The first definition in s.512(k)(1)(A) is for transitory communications only is narrow to only include passive nodes and telecommunication infrastructure that have no real link to the user. 25 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> The second definition in the DMCA identifies a 'Service provider' as 'a provider of online services or network access, or the operator of facilities therefore'. 26 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> This broad definition catches all activity on the Internet where companies are providing some sort to service to users or where they are providing a direct connection. Some commentators have noted that the definition may also include intranets. 27 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1

&User.context=psprYglsidPq&Item.drn=4160z1z0> However, intranets are purposefully left out of the analysis as they do not transcend borders in the way that the Internet does.

The E-Commerce Directive provides a similarly broad definition: a 'service provider' is 'any natural or legal person providing an information society service'. 28 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>-29 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> A wide definition of ISP will be adopted in this article to allow for many different types of service that could be provided. However, it should be noted that there is a danger of using one very broad definition; all ISPs, whatever function they are providing are treated the same under the law. It may be as the role of ISPs becomes clearer that a single definition and a single regulatory code will be unsuitable. However this point requires research beyond the scope of the topic in hand.

3.3 Statutes Relating to Intermediaries

There are no international treaties that indicate any position on the liability of intermediaries. Both the WIPO Copyright Treaty and the Performances and Phonograms Treaty make no mention of the subject; perhaps because the need for such liability was not as impending then as it is today.

In the United States, the statute relating to liability of ISPs for copyright infringement of third parties is the DMCA. The DMCA was enacted partly in response to the two WIPO treaties. However, the national legislation goes much further. It establishes four 'safe-harbours' where an innocent ISP may escape liability. These are transitory communications (passive nodes); system caching (temporary files created for the benefit of users only for as long as necessary); storage of information on systems or networks at direction of users (web space provided by ISPs); and information location tools (such as search engines linking to infringing material). 30 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>- 33 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> As judges in the Netcom case (see below) note: '[I]t does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet'. 34 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

A similar regulatory framework is being created in the European Union with the E-

Commerce Directive. Its creation was partly due to the influence of the WIPO treaties and partly in response to a German case when a managing director of an ISP was sentenced to prison for pornography unknowingly held on its servers. 35 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> This perverse decision was reversed on appeal. However, it drew attention to the need for clear guidelines on the liability of ISPs, especially when they do not have knowledge of the infringing material.

Under the E-Commerce Directive protection from liability may be sought where the ISP was a mere conduit; caching; or hosting. 36 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>-38 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> The procedures whereby right-holders inform ISPs of infringing material is likely to be similar to the 'Cease and Desist' notices used in the U.S. DMCA. 39 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

Australia has also created new law to deal with intermediaries. 40 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> The test is whether an ISP had the power to prevent infringement; the nature of any relationship between the ISP and infringer; and whether the ISP took reasonable steps to prevent infringement. 41 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> Singapore and India have also created similar duties for ISPs. 42 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> For ISPs in these countries, the challenge will be to monitor content and decide whether it is infringing copyright: 'The biggest single stumbling block was perceived to be the difficulty of imposing upon ISPs etc the task of deciding whether some content on their service is illegal or not'. 43 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

ISPs are effectively becoming both judge and jury on Internet content. It is quite possible that this will lead to a protectionist attitude where ISPs remove or block content if they are uncertain as to the legality of copyright. This would have devastating implications for users, especially those who operate sites that criticise companies and, for example, display modified pictures on their websites.

3.4 Case law relating to Intermediaries

There is a growing body of case law relating to ISP liability. The majority of these cases have occurred in the USA. Cases can be divided into three categories: where the courts have held the ISP committed direct infringement; where the ISP has contributed to the infringement of another; and where the ISP is liable for vicarious infringement.

3.4.1 Direct Infringement

In the case of Frena, the defendant owned a Bulletin Board Service. 44 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> Pictures from Playboy magazine were uploaded to the site and stored on the defendant's server. Although Frena may have been unaware that the pictures were a breach of copyright, the court found him guilty of primary infringement (a strict liability offence, and therefore avoiding the knowledge requirement). This was the first reported case that dealt with copyright infringement by a service provider. Were the case to come before the courts today, Frena may well have argued that he should be not liable because of third safe harbour of the DMCA. However, if it could be proved that he had actual knowledge and benefited from the infringement (e.g. through subscription fees) the harbour would not be available.

3.4.2 Contributory Infringement

In the case of contributory infringement an ISP must cause or contribute to the infringing activity or must know or have reason to know about the primary wrongdoer's infringing conduct. 45 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> A similar offence of secondary infringement exists in UK law. 46 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

In the Netcom case the court held that a service provider could be liable as a contributory infringer if it knew or ought to have known that infringement was taking place on its system, and if simple steps to prevent this were not taken. However, Netcom argued that it was a passive conduit. The case was settled before a full trial could take place.

3.4.3 Vicarious Infringement

This common law tort derives from employer liability and also from the liability of nightclub owners where bands performed without being warned not to play copyrighted music without a license, and the nightclub owners financially benefited from the infringement. 47

<https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> Vicarious infringement requires two elements to be present. 48 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> The ISP must have had the right and ability to supervise the misappropriation of the copyrighted work. Due to the technology, this will be true in most cases involving ISPs unless they agree with a user otherwise. Secondly, the ISP must have had a direct financial interest in the exploitation of the copyrighted material. A direct interest may be more difficult to prove in most cases. The argument was raised in the Netcom case but the court found no direct financial benefit from the infringement, i.e. the number of subscribers did not increase due to the presence of infringing material.

3.5 MP3s and File sharing

To fully appreciate the phenomenon of file-sharing and the Napster ruling it is necessary first to make some remarks about the technology of MP3.

3.5.1 Definition of MP3 technology

In layperson's terms, an MP3 file is an audio file that has been compressed to a tenth of its original size, without any noticeable reduction in quality. 49 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>- 50 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> This technology is free for anyone to use and requires merely a computer with a CD-Rom drive and an audio CD to make MP3s from. 51 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

3.5.2 MP3 Hardware

In the case of Diamond Multimedia, the music industry argued that the sale of MP3 players (similar to walkmans) was tantamount to authorising infringement. 52 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> However the court extended the Betamax ruling on time-shifting to create a fair use defence of space-shifting. 53 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?

action=Attachment.View&Item.Attachment.id=1
&User.context=psprYglsidPq&Item.drn=4160z1z0> This is where a user can legitimately change the medium that the music is carried on e.g. from CD to cassette tape, or CD to MP3. The Rio player was also held as not being a digital recording device under the Audio Home Recording Act (and so escaping tax).

3.5.3 Napster

The Napster case brings together issues of contributory infringement, vicarious infringement, the DMCA safe harbours, and fair use defences such as those in Diamond Multimedia.

Napster provided a free file-sharing program that allowed users to share MP3 files. The users registered anonymously and therefore finding individual infringers would have been particularly difficult. The Napster program worked by creating a list of all music shared and matching that music with Internet addresses of particular users. A user could search for a particular song or an artists name and be presented with hundreds of songs matching the search criteria on computers around the world. The Napster server held a centralised list but did not store any MP3 files on its servers. When users initiated a download from other computers, the MP3s did not travel through the Napster server to reach its destination. Therefore, Napster had no direct contact with any potentially infringing material.

Action was brought against the company and the courts had to consider to what extent an ISP should be liable when it enables its customers to swap unauthorised digital copies of copyrighted music. Napster argued that its users were engaging in fair use because they were sampling, space-shifting, and some artists (particularly new ones) were allowing free distribution of recordings. Also Napster argued that it was saved from liability as it fell under one of the safe harbours of the DMCA, being an information location tool. 54 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?
action=Attachment.View&Item.Attachment.id=1
&User.context=psprYglsidPq&Item.drn=4160z1z0>

The Court of Appeals found Napster liable for both contributory and vicarious infringement. It found that Napster had actual knowledge of infringement and contributed to that infringement. Also it was able to control actions of users (by blocking them) and gained a financial benefit from the infringement. The financial benefit did not come from users as it was a free service. However Napster did attract around $15 million in investment and was building a large customer base that could have been moved to a subscription service.

Sampling was found to never be a valid fair use as this was a highly regulated practice in the music industry. Also users were able to download entire albums. The court noted that sampling constitutes a commercial use even if the music traded is eventually purchased by the user. The Diamond Multimedia precedent of space-shifting was distinguished. In the former case, only the original owner was exposed to the transferred music. However, in Napster any one could acquire the music. Also it was held to be not personal use as the

users were anonymous.

The issue of the safe harbour defence was left for trial but the court hinted that the balance tipped in favour of the Plaintiffs. This is a landmark ruling and was intended to be a clear signal to file-sharers that their activities were infringing on copyright holders' interests. However, this signal has not translated into a decline of sharing as the following illustrates.

3.6 Economic Consequences of the Napster Ruling

As Biegal correctly points out, forcing ISPs to take action against infringers may simply mean that they move their infringing activities, rather than stopping them: 'If an ISP terminates a user's account for violating the rules, nothing prevents the person from then signing up with another company'. 55 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> The Napster service has ceased due to the litigation but many more new file-sharing programs have become available. It could be argued that the Napster litigation actually created negative advertising (from the copyright holder's point of view) as it alerted people that music was freely available on the Internet. There is strong evidence that the Napster litigation has had little impact on infringement. Users have simply moved to other ISPs (and other file-sharing software). Also for those that do not have Internet access, there is evidence that MP3 pirates are putting albums back onto CDs to share with their friends. For example, a recent Eminem CD was rated as the second most played CD on the Internet, according to Gracenote, an online database that identifies CDs played by users. This may seem unremarkable, but this rating came a week before the CD was even released. 56 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> This means that someone obtained a pre-release copy of the album, made it available on the Internet and then others download the MP3s, decompressing the music files and creating conventional audio CDs to sell.

File-sharing programs have also become more sophisticated since Napster, making infringement more harmful for copyright holders. Peer-to-peer file-sharing now does not require a central server in the way that Napster did. Instead powerful computers on the network are given the status of super-nodes and act as servers for that area. Many servers are automatically created and so infringement is more difficult to detect and almost impossible to control.

Also, the more recent file-sharing programs are now capable of sharing multiple file formats, and not just MP3 audio files. These programs can allow the sharing of video files, computer software, pornography, and electronic books. This means that for copyright holders the situation can only get worse in the short term.

It would be simplistic to regard the Napster litigation as a failure though. Copyright holders* rights were strongly enforced to the detriment of users. Also some see the

litigation against file-sharing companies as a way for the music industry to buy into the market. 57 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> Bertelsmann, for example, dropped suit against Napster in exchange for a number of shares and access to the technology. 58 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> This may be in reaction to those who think file-sharing could make the middle-men, the record producers, obsolete by putting artists in direct contact with end users and removing transaction costs. 59 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> However it is unlikely that the role of the producer will be completely removed as they have an important role in advertising and marketing new products. Only established artists would realistically be able to sell music directly to their fans (e.g. as David Bowie has recently done).

3.7 Legal Consequences of the Napster Ruling

3.7.1 International Disagreement over ISP liability

In the Dutch case of KaZaA, the Amsterdam Court of Appeals, in contrast to the decision in Napster, found in favour of the intermediary:

'Insofar as there are any acts contrary to copyright law, this is being performed by the users of the computer program, and not by KaZaA. Providing the means to publish and reproduce copyrighted works is itself not an act of publication and reproducing. It is not the case, or, at least, this cannot be assumed, that KaZaA's computer program is used exclusively to download copyrighted works. KaZaA providing the disputed computer program cannot be considered unlawful'. 60 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>-61 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

Although the KaZaA file-sharing program was quite similar to Napster, the Dutch court distinguished the U.S. precedent and implicitly followed the earlier Betamax ruling, holding that the owners of KaZaA were not liable for contributory or vicarious infringement. The KaZaA program, being decentralised, was not dependent on any involvement from the company. Also, KaZaA users could share all kinds of files, not just music, increasing legitimate uses of the program.

It is likely that this case would not have been successful in the US. Other decentralised P2P operators are coming before American courts and it will be interesting to see how the Courts deal with this foreign decision.

Although the ruling is a success for Internet users, the real threat for copyright holders is that ISPs will move offshore to escape US protectionist laws. Without a harmonisation on ISP liability, ISPs will be able to hide their servers in data-havens in the same way money launders filter money through private tax-havens.

3.7.2 Napster Ambiguity for ISPs in the USA

Even for those ISPs that remain in the US, the responsibilities put on them are obscured by the Napster ruling. The ruling has major implications for employers, cyber cafe owners, educational institutions, and web space providers. 62 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> However, the Court addressed none of these scenarios. It is contended that the real danger of the protectionist attitude present in Napster, due to a zealous court wanting to clamp down on file-sharing, will result in other ISPs being held to the same high standard and their users losing fair use defences. 63 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> This may be why a broad definition of ISP detracts from the function that individual ISPs provide. Therefore, it will be necessary for courts to carefully consider the facts of each case before them and not rely too heavily on precedent where the previous ISP was performing a substantially different service.

The Napster ruling raises one final difficulty. It is unclear the extent to which ISPs should police their systems: '[I]t seems somewhat ambiguous whether Napster had a duty to police its system only after it received notice that infringing materials exists on its system, or whether Napster had an ongoing duty to patrol its system for infringing materials'. 64 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> The ruling gave no appreciation to potential privacy concerns of users. The question remains whether ISPs should police their servers when they receive notice that infringing material may be present, or alternatively, that ISPs should aggressively seek out infringing material without actual knowledge of specific infringement. As mentioned earlier the latter policing function results in ISPs becoming judge and jury of all content. The situation is clearer in Europe as Article 15 of the E-Commerce Directive explicitly states that ISPs should not be under an obligation to monitor user content. It is submitted that this is preferable as the purpose of an ISP is not to act as an 'Internet Police Officer' but to provide a service to users.

3.8 Summary

There is currently no international consensus on ISP liability. National laws have enacted intermediary liability laws but these are not uniform in effect. It becomes difficult to make ISPs control their users when the ISPs can change the location of their servers to escape liability in more liberal countries. It has been shown that the major litigation

against ISPs has not deterred users from infringing copyright. Further, it has been suggested that ISPs may not be best placed to make judgements over content. Therefore, coherent action at an international level maybe required. The final part analyses what might be accomplished by the international community to deter infringement through file sharing.

4. Tentative Suggestions for the International Community

4.1 Introduction

This final part considers what can be achieved in terms of regulation at an international level. Previous initiatives to harmonise copyright will be analysed. This area is complicated by disparate copyright regimes and therefore the author offers only tentative suggestions as to what can be achieved internationally in the short term. Pragmatic suggestions are made as to the appropriate level of responsibility that should be given to an intermediary and also some solutions for file sharing are proposed.

4.2 Previous International Attempts at Harmonisation

There is a clear need for international consensus on the law relating to the Internet. MacQueen notes that due to the 'global nature of the Internet's purely national responses to the copyright problems... are inadequate' and 'a convergent approach is required'. 65 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> It is obvious that due to the nature of the Internet ignoring boundaries, national law and territorial sovereignty are incapable of meeting the demands of this new technology. 66 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> However, it will be shown that international efforts to date have been, at best, inadequate to meet these demands.

The TRIPs agreement resulted in no consensus in the area of copyright and technology. Maskus states: 'Thorny issues surrounding copyright protection for electronic commerce were not addressed explicitly in TRIPs, requiring the negotiation in 1996 of the Copyright Treaty and the Performance and Phonograms Treaty under the auspices of WIPO'. 67 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>-68 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

Unfortunately the twin WIPO treaties failed to directly legislate on issues relating to the Internet. This comes as no surprise though; regional agreements involving countries with more common ground have faired little better. The EU Copyright Directive in its full title aims to harmonise 'certain aspects of copyright and related rights in the information

society'. One commentator has noted the achievement of the EU Member States in not being able to harmonise anything: '[The Directive] singularly avoids any harmonisation: the Member States are completely free to adopt any exceptions from the list given by the Directive. Thus, the state of law(s) can be exactly the same before and after the supposed harmonisation'. 69 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> One recent example can be used to demonstrate the differences in copyright law that remain, even after the minimum standards set by TRIPs and the efforts made in the WIPO Copyright Treaty. The Case of Yahoo involved the enforcement of a foreign judgment. 70 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> A French court ordered the website Yahoo to prevent sales of Nazi-related memorabilia in its auction rooms as it violated French laws. However, a Californian Court in a declaratory judgment stated that Yahoo did not have to comply with the order and that the order violated the First Amendment. 71 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> This demonstrates the disparity that still exists and is probably just one of many cases that will reach courts relating to multinational e-commerce.

To reach the goal of international regulation of the Internet one must be realistic and look at specific problems that can be remedied in the short term. Shapiro notes that '[s]ome legal scholars even have asserted that cyberspace should have its own law and legal institutions, and have questioned whether state-based governments should have jurisdiction over online activity'. 72 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> This may well be true and is a bold objective for the long-term. However it is currently more of a moot point; nations are, at present, unlikely to relinquish sovereignty to an international 'Internet police force Therefore, pragmatic reform options are proposed.

4.3 Tentative Suggestions for Reform

Possibilities for reform will now be outlined in relation to liability of intermediaries generally; the unique problem of file-sharing; and how social norms of pirates might be changed. It should be noted that technological measures against infringement will not be considered as this subject is beyond the scope of the present article, especially in it's relation to the notion of fair use.

4.3.1 Deciding appropriate liability for Intermediaries

Countries should come to an understanding on the liability that should be placed on Internet Intermediaries, particularly ISPs. A degree of copyright enforcement can be

achieved by holding ISPs liable for the actions of their users. Siffard, for example, notes that ISPs are better targets for law suits as they will typically have deeper pockets than individual users. 73 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> A pragmatic approach would be to only hold intermediaries responsible for infringing content where they were made aware of the content, were able to control the content, and failed to act promptly. Evidence of this approach can already be found in the American DMCA and the European E-Commerce Directive. The issue of an appropriate definition for ISPs needs to be considered because a wide definition may not reflect the true services provided by the multitude of providers in existence.

In addition, when considering ISP responsibility, the level that they should monitor their users should be discussed. This monitoring function was left in flux after the ambiguous ruling in Napster. However, a clear statement of responsibilities and duties is crucial, not just for traditional ISPs, but also for employers, educational institutions, and cyber cafe owners among others.

If ISPs are given the responsibility to act as judge and jury over content then the likelihood is that they will err on the side of caution and remove all material that might be infringing. This would lead to many fair uses of copyrighted material being denied. ISPs should not be made to actively monitor their users or content their users upload. Instead a more pragmatic approach should be adopted. The international community should follow the lead of Europe with the E-Commerce Directive where ISPs do not have a general obligation to monitor. They should only act when they have notice of clearly infringing content. Also, an element of good faith on the part of the ISP should be included so that they can contact copyright holders if they accidentally discover possibly infringing content.

It is particularly important to obtain wide support for an ISP-related agreement as countries that did not sign up would become data havens for ISPs allowing infringing content. Wide support might be achieved by the agreement encouraging ISPs to take initiative and regulate themselves. Such independent regulatory bodies exist across Europe. The Irish ISP Code of Practice states:

> ‘Members of ISPAI must observe their legal obligations to remove illegal content, when informed by organs of the State or as otherwise required by law. It should not, however, be the responsibility of a Member to determine the legality or sustainability or to filter or otherwise restrict reception of or access to content material save where such action is taken following an identified breach (or anticipated breach) of the Code’. 74 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

It is submitted that by including ISPs in deciding their level of responsibility and engaging them in the issue of copyright infringement, they will more receptive to their

duties on the Internet and have a better understanding of the appropriate law.

4.3.2 Combating P2P File-Sharing

Peer-to-Peer file sharing programs represent a unique problem to regulators. Currently, dozens of such programs exist where anonymous users swap millions of files per day, often infringing copyright. However, it would be unwise to have a blanket prohibition against them as some file-sharing programs have substantial non-infringing uses, as shown in the KaZaA judgement. A blanket prohibition would also be unenforceable. Evidence for this can be found by considering the situation after a preliminary injunction had been taken against KaZaA and the program had been removed from the official website. Even though official distribution had ceased the network continued to function unaffected. This was due to the completely decentralised nature of pure peer-to-peer file-sharing: a central server is not required for operation of the network. Any computer on the network is capable of acting as a super node and this process is automatically. The decentralised nature also makes it extremely difficult for any P2P creator to effectively monitor or control the content or actions of its users.

In America lawsuits against P2P operators have only resulted in many more appearing. For example, when Napster was sued replacements appeared that were potentially even more of a threat to copyright than the original had been. However, the situation is not without hope. Two possible regulatory options are proposed.

The first option is the idea of levies. These are already common on the continent. The theory is that if infringement cannot be controlled, government can take money from the infringers before they infringe by taxing blank digital media, particularly CDs and hard drives. The Canadian Private Copying Collective has recently submitted such a proposal to the Copyright Board of Canada of placing a tariff of $21/gigabyte on the purchase of hard drives. 75 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> If levies were used they would have to be equal throughout the contracting states to avoid market inequality. One drawback with levies is that they could impede the development and uptake of new technology by making them financially prohibitive. Other issues include creating a body to act as a collecting agency, how it should apportion revenue and, most importantly, to whom. Money could be distributed dependant on popularity of music artist for example. Alternatively a fund could be set up to research more successful technological protection schemes. If an international levy system were to be supported, there would need to be an exemption for developing countries, especially for the purchase of hard drives, which are essential to the operation of modern computers.

A second option proposed by commentators is that of compulsory licensing. Spoor states: ‘What is needed most are practical solutions to make copyright on the Internet effective without making it threatening or needlessly interfering; such as campus licences which allow certain user groups to access entire databases* instead of making users pay per document they actually consult’. 76

<https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0>

The idea of compulsory licenses could be used to make users pay subscription fees to access music libraries in the same way that online databases (such as WestLaw) are currently accessed, on a flat fee system. The Music Industry is already trying to introduce similar subscription systems, based on proprietary music file formats that significantly restrict user access. Instead what is suggested is that P2P operators have a compulsory licence whereby users pay a small monthly free for access to the service, with the revenue going to the artists whose work is being exploited. Lessig, among others, supports such licences: 'Congress should pass low fixed compulsory license fees for distribution of [music and entertainment] content on the Web. These fees should not be tied to reporting every usage on the Web. They should be determined the same way they are now for radio; according to a sampling that gives some idea of what music is being played'. 77 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> In fact, Napster asked the U.S. government to allow for compulsory licensing before being taken to court, but was refused.

To introduce compulsory licensing would require a major reform of international copyright law, as the Berne Convention in its current state seems to exclude such an option. 78 <https://webmail.warwick.ac.uk/servlet/webacc/psprYglsidPq/GWAP/AREF/1?action=Attachment.View&Item.Attachment.id=1&User.context=psprYglsidPq&Item.drn=4160z1z0> Such reform would have to begin by determining whether file-sharing amounted to distribution or broadcasting. It is hoped that a special exception could be added to the Berne convention to allow for compulsory licensing for digital media so that states could choose which cases warranted licensing. However, this proposal would also create further disparity and less harmony between national copyright regimes and therefore could only be a temporary measure until states could agree on a fundamental, unifying Internet treaty that would regulate the use of copyrighted materials online. It is hoped that this possibility will be considered, as it is more pragmatic than ISP monitoring and less intrusive on the technology market than levies.

5. Conclusion

Global networks and digital media represent a great challenge to copyright law. Infringement of music and movies through file-sharing programs is staggering. Legal efforts have thus far been ineffective at preventing what many view as socially acceptable. The targeting of direct infringers is difficult due to the nature of the Internet. Although targeting intermediaries could decrease infringement this must be done carefully and uniformly throughout the world to avoid safe havens for rogue servers. Globally, ISPs should only be liable for the actions of their users where they have been made aware of the infringing material and were able to control the material but failed to take action. This would follow the U.S. and European initiatives. Further, ISPs should not

have a general duty to monitor conduct because this would likely be detrimental to normal users. Support for intermediary regulation may be gained by aiding ISPs in establishing their own Codes of Practice, as occurs in parts of Europe. On the issue of file-sharing operators, it has been shown that lawsuits have proven ineffective at deterring infringement. Therefore, either a well-considered system of levies or compulsory licensing is proposed. It is hoped that in this way a compromise between Copyright Industries and Internet users might be reached.

References

1 Biegal, S. (2001) 'Beyond Our Control? Confronting the Limits of Our Legal System in the Age of Cyberspace', MIT Press: London (hereafter Biegal), at page 74.

2 521 U.S. 844 (1997).

3 Imperial College Department of Computing, 'Free Online Dictionary of Computing' <http://foldoc.doc.ic.ac.uk/foldoc/foldoc.cgi?Internet> (Last Accessed: 27/05/02) (hereafter FOLDOC).

4 Gary Chapman, 'Net Gain', The New Republic, July 31, 1995, quoted in Biegal, pp. 51-52.

5 Geller, P.E. 'Conflicts of Law in Cyberspace: International Copyright in a Digitally Networked World', in Hugenholtz P.B. (Ed.) (1996) 'The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium', Kluwer Law International: The Hague (hereafter Hugenholtz), at page 41.

6 See Valenti, J. 'Study Shows Copyright Industries as Largest Contributor to the U.S. Economy', MPAA Press Release, April 22, 2002, <http://www.mpaa.org/jack/2002/2002_04_22.htm> (Last Accessed: 21/05/02).

7 See Valenti, J. 'A Clear Present and Future Danger: The potential undoing of America's greatest export trade prize', MPAA Press Release, April 23, 2002, <http://www.mpaa.org/jack/2002/2002_04_23b.htm> (Last Accessed: 21/05/02).

8 Biegal, page xi

9 Biegal, page xii

10 See 'Does P2P help or hinder music sales?', Out Law.com News, 10/05/2002, <http://www.out-law.com/php/page.php3?page_id=doespphelporhin1021028325> (Last Accessed: 16/05/02).

11 For example, see Napster in Part 2.

12 See ‘What is Divx?’ in <http://www.divx.com/support/faq.php#1> (Last Accessed: 28/05/02).

13 ‘Napster all over again?’, The Economist, March 23, 2002, page 80.

14 ‘Star Wars: cloned on the net’, BBC News, Friday, 10 May 2002, <http://news.bbc.co.uk/hi/english/entertainment/film/newsid_1979000/1979844.stm> (Last Accessed: 21/05/02).

15 The Economist, July 27, 1996, quoted in Beiderman, D. ‘Copyright Trends: With Friends Like These’, 17-FALL Ent. & Sports Law 3, <http://eon.law.harvard.edu/property00/MP3/biederman.html> (Last Accessed: 09/11/01).

16 MacKaay, E. ‘The Economics of Emergent Property Rights on the Internet’, in Hugenholtz, at page 14.

17 Eric Goldman, Salt Lake Tribune, October 16, 1998, quoted in Biegal, page 74. See also Hettinger, E. ‘Justifying Intellectual Property’, Philosophy and Public Affairs 1989 vol.18(1) 31-52, at page 32.

18 Comment by member of the First Chamber regarding the Dutch Copyright Amendment Bill of 1992, Kamerstukken 22600, quoted in Visser, D.J.G. ‘Copyright Exemptions Old and New: Learning from Old Media Experiences’, in Hugenholtz, at page 51, note 10.

19 See the RIAA Soundbyting Campaign at <http://www.riaa.org/Protect-Online-3.cfm> (Last Accessed: 09/08/02).

20 See, for example Stuart, G. ‘Technology outdates buying CDs, raises arguments’, Lakewood Times, <http://www.lakewoodtimes.org/site/focus/date/5_21_02/cds.htm> (Last Accessed: 09/09/02).

21 Valenti, J. ‘A Clear Present and Future Dangers: The Potential undoing of America’s greatest export trade prize’, April 23, 2002 <http://www.mpaa.org/jack/2002/2002_04_23b.htm> (Last Accessed: 21/05/02).

22 Biegal, page 5. See also Hamdani, A. ‘Who’s Liable for Cyberwrongs?’, 87 Cornell L. Rev. 90, at page 903.

23 A&M Records, Inc. v, Napster Inc., 239 F.3d 1004 (9th Cir. 2001) (hereafter Napster).

24 Free Online Dictionary of Computing, Imperial College Department of Computing (hereafter FOLDOC), <http://wombat.doc.ic.ac.uk/foldoc/foldoc.cgi?Internet+Service+Provider> (Last Accessed: 17/06/02).

25 (hereafter DMCA)

26 s512(k)(1)(B).

27 See Wong, N.A., et al. 'Online Content Liability Issues' (2001) 683 PLI/Pat 757, at 823.

28 Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (hereafter the E-Commerce Directive).

29 Ibid., Art.2(b).

30 DMCA s.512(a).

31 s.512(b).

32 s.512(c).

33 s.512(d).

34 Religious Techology Center v. Netcom 907 F. Supp. 1361 (N.D. Cal 1995) (hereafter Netcom), at 1372.

35 For an analysis of the case, see McGuire, J.F. 'When Speech is heard around the world: Internet Content Regulation in the United States and Germany', (1999) 74 N.Y.U.L. Rev. 750.

36 Art.12.

37 Art.13.

38 Art.14.

39 'DTI Consultation on Implementation of the Directive on Electronic Commerce (2000/31/EC): Summary of Responses', <http://www.dti.gov.uk/cii/ecommerce/europeanpolicy/edirec_resp.shtml> (Last Accessed: 18/06/02), Para 53.

40 Australian Copyright Amendment (Digital Agenda) Act 2000.

41 Ibid., c. 36 ¡± 1A

42 Singapore Copyright (Amendment) Act 1999 amending Copyright Act 1987 (Cap. 63, Rev. Ed. 1999); Information Technology Act 2000 ¡± 79 (India Code 2000). For an in-depth comparison see Unni V.K.

'Internet Service Provider's Liability for Copyright Infringement: How to Cleat the Misty Indian Perspective', (2001) 8 Rich. J. L. & Tech. 13.

43 Supra n. 39.

44 Playboy Enterprises, Inc. v. Frena 839 F. Supp. 1552 (M.D. Fla. 1993).

45 Gershwin Publishing Corp v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

46 CDPA 1988 s.24(2).

47 See Samuelson, P. 'The Copyright Grab', Wired 4.01, January 1996, <http://www.wired.com/wired/archive/4.01/white.paper_pr.html> (Last Accessed:10/06/02) (hereafter *The Copyright Grab*).

48 Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963).

49 MPEG-1 audio layer 3.

50 For a more complete definition, refer to FOLDOC <http://wombat.doc.ic.ac.uk/foldoc/foldoc.cgi?query=MP3> (Last Accessed: 18/06/02).

51 See Jones, L. 'An Artist's Entry into Cyberspace: Intellectual Property on the Internet', E.I.P.R. 2000, 22(2), 79-92, at 85.

52 RIAA v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir. 1999).

53 Sony v. Universal City Studios 104 U.S. 774 (1984).

54 DMCA s.512(d).

55 Biegal, page 87.

56 See Borland, J. 'Eminem CD spotlights new piracy patterns', CNET Tech News, May 28, 2002, <http://news.com.com/2102-1023-923472.html> (Last Accessed: 05/06/02).

57 But c/f Maverick Records selling a commercial unencrypted MP3 in a good faith effort, in Featherly K. 'Major Label First: Unencrypted MP3 For Sale Online', Newsbytes, 23 May 2002, <http://www.newsbytes.com> (Last Accessed: 27/05/02).

58 See Ku, R. 'The Creative Destruction of Copyright: Napster and the New Economies of Digital Technology', 69 U. Chi. L. Rev. 263 (hereafter Ku), at 304.

59 Ibid., at 300.

60 KaZaA B.V. v. Buma & Stemra, Summary Proceedings, Amsterdam Court of Appeals, Fourth Three-Judge Section for Civil Matters, 28 March 2002. Unofficial English translation available at <http://www.brownraysman.com/InternetLawUpdate/Kazaa.pdf> (Last Accessed: 10/06/02). Original Dutch judgement available at <http://www.rechtspraak.nl/uitspraak/frameset.asp?ui_id=32573> (Last Accessed: 18/06/02).

61 Ibid, para. 4.9.

62 'Employer pays $1 million for employees' MP3 library', out-law dot com News, 10/04/2002, <http://www.out-law.com/php/page.php3?page_id=employerpaysmil1018443092> (Last Accessed: 12/04/02).

63 Refer to Macmillan, F. et al. 'The Copyright Liability of Communication Carriers', 1997 (3), The Journal of Information, Law and Technology (JILT), <http://elj.warwick.ac.uk/jilt/commsreg/97_3macm/macmill.htm> (Last Accessed: 08/11/01).

64 Sifferd, J. 'The Peer-to-Peer Revolution: A Post-Napster Analysis of the Rapidly Developing File-Sharing Technology', (2002) 4, Vand. J. Ent. L. & Prac. 93 (hereafter Sifferd), at 103.

65 MacQueen, H. 'Copyright and the Internet', in Edwards, L. & Waelde, C. (Eds) (1997) 'Law and the Internet. Regulating Cyberspace', Hart Publishing: Oxford, page 69.

66 See Johnson, D and Post, D. 'Law and Borders: The Rise of Law in Cyberspace', Stanford Law Review 48 (1996): 1367, at 1375.

67 Agreement on Trade-Related Intellectual Property Rights (hereafter TRIPs).

68 Maskus, K. (2000) 'Intellectual Property Rights in the Global Economy', Institute For International Economics: Washington, DC, page 6.

69 Vivant in Lodder, A.R. and Kaspersen, H.W.K. (Eds.) (2002) 'eDirectives: Guide to European Union Law on E-Commerce'. 'Commentary on the Directives on Distance Selling, Electronic Signatures, Electronic Commerce, Copyright in the Information Society, and Data Protection', Kluwer Law International: The Hague, at 117.

70 Yahoo!, Inc. v. La Ligue Contre Le Racisme et L*Antisémitisme (LICRA) 169 F. Supp. 2d 1181 (N.D. Cal. Nov. 7, 2001.

71 For a more detailed analysis, see Lesser, L. & Grandpr', V. 'Courts Expand ISP Protection, But Pitfalls Remain: 2001 In Review', 6 NO. 10 Cyberspace Law. 7.

72 Shapiro A. (1999) 'The Control Revolution. How the Internet is Putting Individuals in Charge and Changing the World We Know', Century Foundation: New York, page 31.

73 Siffard, at 95.

74 Clause 2.3, Internet Service Providers Association of Ireland 'Code of Practice and Ethics', 11 January 2002, <http://www.ispai.ie> (Last Accessed: 08/08/02).

75 See Baker & McKenzie Global E-law Alert <Http://www.bmck.com/elaw/DisplayAlertbyID.asp?AlertID=23741> (Last Accessed:08/08/02).

76 Spoor, J.H. 'The Copyright Approach to Copying on the Internet: (Over)Stretching the Reproduction Right?', in Hugenholtz, page 79.

77 Lessig, L. 'The "Dinosaurs" Are Taking Over', Business Week Online, May 13 2002, <http://www.businessweek.com:/print/magazine/content/02_19/b3782610.htm> (Last Accessed: 08/08/02).

78 See the Berne Convention, especially Article 11bis (allowing statutory compulsory licensing for broadcasts), Article 13 (allowing compulsory licensing for the recording of music), and Article 14 (prohibiting compulsory licensing for movies).

Books, Journal and Magazine Articles

BBC News 'Star Wars: cloned on the net', Friday, 10 May 2002, <http://news.bbc.co.uk/hi/english/entertainment/film/newsid_1979000/1979844.stm> (Last Accessed: 21/05/02).

Beiderman, D. 'Copyright Trends: With Friends Like These', 17-FALL Ent. & Sports Law 3, <http://eon.law.harvard.edu/property00/MP3/biederman.html> (Last Accessed: 09/11/01).

Biegal, S. (2001) 'Beyond Our Control? Confronting the Limits of Our Legal System in the Age of Cyberspace', MIT Press: London.

Borland, J. 'Eminem CD spotlights new piracy patterns', CNET Tech News, May 28,

2002, <http://news.com.com/2102-1023-923472.html> (Last Accessed: 05/06/02).

Department of Trade and Industry, 'DTI Consultation on Implementation of the Directive on Electronic Commerce (2000/31/EC). Summary of Responses' <http://www.dti.gov.uk/cii/ecommerce/europeanpolicy/edirec_resp.shtml> (Last Accessed: 18/06/02), Para 53.

Featherly K. 'Major Label First: Unencrypted MP3 For Sale Online', Newsbytes 23 May 2002 <http://www.newsbytes.com> (Last Accessed: 27/05/02).

Geller, P.E. 'Conflicts of Law in Cyberspace: International Copyright in a Digitally Networked World', in Hugenholtz P.B. (Ed.) (1996) 'The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium', Kluwer Law International: The Hague.

Hamdani, A. 'Who's Liable for Cyberwrongs?', 87 Cornell L. Rev. 90.

Hettinger, E. 'Justifying Intellectual Property', Philosophy and Public Affairs 1989 Vol. 18(1), pp. 31-52.

Hugenholtz, P.B. 'Adapting Copyright to the Information Superhighway', in Hugenholtz P.B. (Ed.) (1996) 'The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium', Kluwer Law International: The Hague.

Internet Service Providers Association of Ireland 'Code of Practice and Ethics', 11 January 2002, <http://www.ispai.ie> (Last Accessed: 08/08/02).

Johnson, D. & Post, D. 'Law and Borders: The Rise of Law in Cyberspace', Stanford Law Review 48 (1996): 1367.

Jones, L. 'An Artist's Entry into Cyberspace: Intellectual Property on the Internet', E.I.P.R. 2002, 22(2), 79-92.

Ku, R. 'The Creative Destruction of Copyright: Napster and the New Economies of Digital Technology', 69 U. Chi. L. Rev. 263.

Lesser, L. & Grandpr', V. 'Courts Expand ISP Protection, But Pitfalls Remain: 2001 In Review', 6 NO. 10 Cyberspace Law. 7.

Lessig, L. 'The "Dinosaurs" Are Taking Over', Business Week Online, May 13 2002, <http://www.businessweek.com:/print/magazine/content/02_19/b3782610.htm> (Last Accessed: 08/08/02).

Lodder, A.R. and Kaspersen, H.W.K. (Eds.) (2002) 'eDirectives: Guide to European Union Law on E-Commerce. Commentary on the Directives on Distance Selling, Electronic Signatures, Electronic Commerce, Copyright in the Information Society, and Data Protection', Kluwer Law International: The Hague.

MacKaay, E. 'The Economics of Emergent Property Rights on the Internet', in Hugenholtz P.B. (Ed.) (1996) 'The Future of Copyright in a Digital Environment:

Proceedings of the Royal Academy Colloquium', Kluwer Law International: The Hague.

Macmillan, F. et al. 'The Copyright Liability of Communication Carriers', 1997 (3) The Journal of Information, Law and Technology (JILT), <http://elj.warwick.ac.uk/jilt/commsreg/97_3macm/macmill.htm> (Last Accessed: 08/11/01).

MacQueen, H. 'Copyright and the Internet', in Edwards, L. & Waelde, C. (Eds) (1997) 'Law and the Internet. Regulating Cyberspace', Hart Publishing: Oxford.

Maskus, K. (2000) 'Intellectual Property Rights in the Global Economy', Institute For International Economics: Washington, D.C.

McGuire, J.F. 'When Speech is heard around the world: Internet Content Regulation in the United States and Germany', (1999) 74 N.Y.U.L. Rev. 750.

'Napster all over again?', The Economist, March 23, 2002, page 80.

Out-Law Dot Com News 'Employer pays $1 million for employees' MP3 library', 10/04/2002, <http://www.out-law.com/php/page.php3?page_id=employerpaysmil1018443092> (Last Accessed: 12/04/02).

Out-Law Dot Com New, 'Does P2P help or hinder music sales?', 10/05/2002, <http://www.out-law.com/php/page.php3?page_id=doespphelporhin1021028325> (Last Accessed: 16/05/02).

Samuelson, P. 'The Copyright Grab', Wired 4.01, January 1996, <http://www.wired.com/wired/archive/4.01/white.paper_pr.html> (Last Accessed:10/06/02).

Shapiro A. (1999) 'The Control Revolution. How the Internet is Putting Individuals in Charge and Changing the World We Know', Century Foundation: New York.

Sifferd, J. 'The Peer-to-Peer Revolution: A Post-Napster Analysis of the Rapidly Developing File-Sharing Technology' (2002) 4 Vand. J. Ent. L. & Prac. 93.

Spoor, J.H. 'The Copyright Approach to Copying on the Internet: (Over)Stretching the Reproduction Right?', in Hugenholtz, P.B. (Ed.) (1996). 'The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium', Kluwer Law International: The Hague.

Stuart, G. 'Technology outdates buying CDs, raises arguments', Lakewood Times, <http://www.lakewoodtimes.org/site/focus/date/5_21_02/cds.htm> (Last Accessed: 09/09/02).

Unni, V.K. 'Internet Service Provider's Liability for Copyright Infringement: How to Cleat the Misty Indian Perspective', (2001) 8 Rich. J. L. & Tech. 13.

Valenti, J. 'Study Shows Copyright Industries as Largest Contributor to the U.S. Economy', MPAA Press Release, April 22, 2002, <http://www.mpaa.org/jack/2002/2002

_04_22.htm> (Last Accessed: 21/05/02).

Valenti, J. 'A Clear Present and Future Danger: The potential undoing of America's greatest export trade prize', MPAA Press Release, April 23, 2002, <http://www.mpaa.org/jack/2002/2002_04_23b.htm> (Last Accessed: 21/05/02).

Visser, D.J.G. 'Copyright Exemptions Old and New: Learning from Old Media Experiences', in Hugenholtz, P.B. (Ed.) (1996). 'The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium', Kluwer Law International: The Hague.

Wong, N.A., et al. 'Online Content Liability Issues' (2001) 683 PLI/Pat 757.

Cases Cited

A&M Records, Inc. v, Napster Inc., 239 F.3d 1004 (9th Cir. 2001).

Gershwin Publishing Corp v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

KaZaA B.V. v. Buma & Stemra, Summary Proceedings, Amsterdam Court of Appeals, Fourth Three-Judge Section for Civil Matters, 28 March 2002.

English Version: <http://www.brownraysman.com/InternetLawUpdate/Kazaa.pdf> (Last Accessed: 10/06/02).

Dutch Version: <http://www.rechtspraak.nl/uitspraak/frameset.asp?ui_id=32573> (Last Accessed: 18/06/02).

Playboy Enterprises, Inc. v. Frena 839 F. Supp. 1552 (M.D. Fla. 1993).

Religious Technology Centre v. Netcom On-line Communication Services 907 F. Supp. 1361 (ND Cal, 1995).

Reno v. ACLU 521 U.S. 844 (1997).

RIAA v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir. 1999).

Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963).

Sony v. Universal City Studios 104 U.S. 774 (1984).

Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme (LICRA) 169 F. Supp. 2d 1181 (N.D. Cal. Nov. 7, 2001.

Statutes

Agreement on Trade-Related Intellectual Property Rights (TRIPs)

Audio Home Recording Act 1992

Australian Copyright Amendment (Digital Agenda) Act 2000

Copyright (Amendment) Act 1999 (Singapore)

Copyright, Design and Patents Act 1988 (U.K.)

Digital Millennium Copyright Act 1998

Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

Information Technology Act 2000 ¡± 79 (India)

WIPO Copyright Treaty 1996

WIPO Performances and Phonograms Treaty 1996

Websites

Baker & McKenzie Global E-law Alert

<Http://www.bmck.com/elaw/ > (Last Accessed:08/08/02).

Department of Trade and Industry

<http://www.dti.gov.uk/> (Last Accessed: 18/06/02)

Divx Video Compression Standard

<http://www.divx.com/> (Last Accessed: 28/05/02)

Electronic Frontier Foundation

<http://www.eff.org> (Last Accessed: 06/08/02)

Free Online Dictionary of Computing (FOLDOC)

<http://foldoc.doc.ic.ac.uk/> (Last Accessed: 27/05/02)

Home Recording Rights Coalition

<http://hrrc.org/> (Last Accessed: 10/08/02)

Motion Picture Association of America (MPAA)

<http://www.mpaa.org/> (Last Accessed: 10/08/02)

MP3.Com

<http://www.mp3.com> (Last Accessed: 10/08/02)

Recording Industry Association of America (RIAA)

<http://www.riaa.org> (Last Accessed:09/08/02)