

# Guest Author:

## *Creative Copyrighting for the Cyberworld: Some Models and Solutions*

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### Abstract

In this paper I suggest some models and solutions, which may be held to be unfounded in traditional legislation. I question the principle that all copyright provisions should be neutral from a technological point of view, and I address whether there should be particular copyright rules for Cyberspace partly distinctive from those in the physical world. I note that compulsory licensing in some ways may be better for rights-holders than exclusive rights, and I suggest that it would be relevant to regard streaming as rather similar to broadcasting.

The paper recommends that the ISPs/Telecoms should pay copyright revenues for their services; the content providers pay for their license, and the Telecoms should pay for their on-line distribution of non-licensed copyright-protected works.

On identifying operational priorities for CMOs (Copyright Management Organizations), especially among the third world countries, I underline the importance of developing huge databases, including both metadata and ripped recordings, combined with automatic tracking technology.

**Keywords:** *Copyright, Cyberspace, Legislation, Streaming, and Anti-piracy*

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## Introduction

Copyright protection today has to be justified for not only ten thousands of content providers but also for billions of private users, and new ideas are highly needed. Developing these ideas will not be a question only of skill, but even more of imagination.

The prime is past, and decay follows,  
meaning that it is contrary to the Way (:Dao)  
Whatever is contrary to the Way will soon perish.  
Lao-zi - DAO DE JING - WAY POWER BOOK  
English version by Sanderson Beck

Good old copyright has for a long time made the creators happy and sometimes even well paid, by establishing the right to own and control their works. This legal position is indeed unique and did not originate automatically or naturally. Based on the efforts of the rights-holders it was developed and strengthened over many years, and copyright<sup>1</sup> has expanded from being just a right to copy (books), to rights concerning distribution, importation, rental, lending, communication to the public, public performance, showing, adapting, broadcasting, retransmission of broadcasting and making-available on-demand.

Copyright management in Cyberspace is however facing opposition and disappointing business results. These two problems are obviously inter-related. Copyright control is not exactly justified for the new generations literally living inside Cyberspace with the position to cut-and-paste-and-adapt copyrighted material. Whatever these youths do in private affect, or are affected by copyright-protected works, indicating that they should be regulated in an even more direct way (?). How could that be done without establishing copyright as an old-fashioned obstacle, hindering their creative activity and impatience for quick access to everything – an obstacle they would hardly consider paying for?

May Cyber-copyright be successful if international law making has a non-dynamic and backward-looking character, while rights-holders are willing to adjust the legislation only within the traditional framework? Copyright is gradually transformed into an industrial right, while the on-going international debate about transforming copyright is dominated by creative common liberals. The rights-holders worry, but hardly take part – preferring to defend their position instead of being creative.

## PART 1 - COPYRIGHT CHALLENGED

### What Destroyed the Market?

The copyright family worries because copyright obviously is in crisis, and because the revenues from all this use, which have grown steadily over the years, have stagnated in the new millennium. Quoting from The Observer Sunday 14 August 2011 (article by Robert Levine)<sup>2</sup>

**How the internet has all but destroyed the market for films, music, and newspapers**

The author of Free Ride warns that digital piracy and greedy  
technology firms are crushing the life out of the culture business

Recent figures from the music sector are illustrating. Since its peak, around year 2000, CD sales have been dwindling – hopefully replaced by digital sales?

Not exactly; revealing figures from the Norwegian music market lay open:

- Year 2002: Trade revenues for sale of music (CDs)      NOK 1,000 million
- Figures for 2002, adjusted for inflation                      NOK 1.200 million
- Year 2011: Digital sales (downloads and streaming)      NOK 250 million

After several years digital sales (trade) still accounts for only 20% of the 2002 CD sales.<sup>3</sup>

Observation: The legal Cyberspace revenues seem unable to offset the decline in CD sales.

Norwegian total trade revenues (digital + physical) for 2011 were only half of the 2002 level. Even if the decline now is slowing down, returning to the good old 2002 days will be hard, and would provide that 20% of the total population (= every second house-hold) pay around 18\$ US (NOK 100) per month for digital purchase of music – would that be realistic?

On the other hand; The music industry income from public performances like broadcasting, communication to the public, retransmission of broadcasting and private copying compensation increased dramatically in Norway during the last ten years. From a copyright point of view this means that sales based on exclusive rights (physical and making available) failed, while sales based on various kind of compulsory licensing succeeded. On neglecting these facts, the international music industry is still a dedicated follower of the exclusive right fashion. (Re: footnote 18, quote from former IFPI Executive Vice President, Shira Perlmutter).

Even worse: Norway and Sweden are leading pioneers in digital music sales. The growth of international digital sales is more discouraging, underlined by global sales figures from IFPI London.<sup>4</sup>

Digital music revenues grew by an estimated six per cent globally in 2010  
 – Accounting for 29 per cent of record companies' trade revenues in 2010.  
 Just 16.5 per cent of online users in the US purchase music online (NPD Group)  
 and 14 per cent in the UK (Harris Interactive).

The 2011 growth hardly predicted a Klondike, and was only 8%.

My point is; this does not at all happen due to less demand for music. The problem is neither about music nor about the record industry. It is about copyright – apparently about peer-to-peer piracy and enforcement – but in reality it is about legislation, licensing and copyright management in Cyberspace.

Copyright is weakened in the new millennium strictly because it is not justified, and the basic justification will simply be that copyright proves to be fair. So how?

## Copyright vs. the Cyber Shark

The raison d'être for copyright are these truisms:

Copyright subsists only by virtue of law  
Copyright will exist only by virtue of popular favour.

Copyright cannot survive by fighting piracy. It must be apprehended as fair. Fifty years ago this justification concerned only the lawmakers and some hundred users like the publishing houses; the content providers of old days. The end users were not concerned, and did not pay attention to copyright when reading their books, listening to music or appreciating fine arts. Copyright used to be best left to the specialists. Today copyright protection has to be justified for ten thousands of content providers, and even more; copyright affects a larger set of societal interest, and has to be justified for diverse users in so far they have an Internet device – counting at more than two billion worldwide (half of them located in Asia).

Convincing these people that some sort of payment should compensate creators may be feasible. Much more difficult to convince the public opinion that exercising strict copyright control is fair. The natural position will be: Payment + Free use. It is simply not easy to get public support for copyright restrictions in Cyberspace. And that is in fact why copyright holders sometimes have tried to justify their need for restrictions by referring to the obvious need for restrictions against child pornography.

The considerable increase in public interest in copyright brings the nightmare close: Copyright is gradually becoming a part of political parties' policy – entering the front papers, the world of party programs and of parliamentary election debates. And politicians are good at counting and pleasing voters; They know that the number of copyright users in Cyberspace is a thousand times bigger than the number of rights-holders.

Subsisting will be hard, and even worse if the system appears to be fixed and inflexible. Cyberspace is like a huge shark; eating everything by uploading – including all musical, literary and artistic works ever made public. Once uploaded there will be no Missing Link; Cyberspace offers links to all. If not restricted by copyright, the result should be a kind of *digital incontinence*.

The challenging question becomes; which is the stronger; Copyright or Cyberspace? And if Cyberspace happens to be the stronger, who shall have to adapt and not be stiff? A Chinese proverb predicts; *A stiff straw, not bowing in the strong wind, will break.*

This is the challenge copyright is facing today. How does the copyright family face it? Is this family realistic about its position, or are they aspiring sooner or later to train-the-shark – dreaming of literally taming Cyberspace?

## Four Observations: Streaming, YouTube, GoogleArt and National Archives

Google's vast book-scanning project on copying libraries and archives, going back to 2005, was one of the first serious warnings for the copyright world about the future incontinent flow of works in Cyberspace. The books case showed how Cyberspace itself will pave the way if politicians (US Congress) are dawdling over new legislation. There's no doubt that Google's digitization of books and creation of a universal digital library was a breach of copyright, but lot of people are also convinced that the model is such a fantastic research tool, compared with the traditional catalogue search, that it cannot be stopped. The long-standing lawsuit and attempts for settlement seem almost dead (April 2012), and Google seems rather unconcerned – quoting Google's managing counsel, Hilary Ware: *"Regardless of the outcome, we'll continue to work to make more of the world's books discoverable online through Google Books and Google eBooks."*<sup>6</sup>

The basic copyright problem laid open from this book case, is now stated in new fields, like the following four observations.

### 1: *Streaming of Recorded Music*

Holding an exclusive copyright gives the rights-holder the position to license or refuse every kind of use. For streaming of a sound recording in Cyberspace such exclusive rights are (in most countries) granted to the composer, to the lyricist, to the arranger, the publisher, the featured artist, the session musicians and the record company....All of them. Separately. And for every single recording being uploaded in Cyberspace.

The content providers of recorded music have to cope with all of these rights-holders. Sure, there is a well-functioning international system among authors for managing these rights collectively. But for record companies there is no such body, and the major companies do not actually want to work together – they are instructed by the competition authorities to compete, and they love it. What is worse for the musicians, having to assign their exclusive streaming right to the record company via the recording contract – meaning they will receive a rather small royalty for the streaming – or try licensing the streaming themselves, which seems impossible.

This position is based on the rather recent «making-available» right stating that ...performers (producers) shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them (WPPT)<sup>7</sup>

This exclusive making-available right, given by the WPPT, had mainly downloading in mind when drafted soon twenty years ago. On-demand downloading would soon be there to stay, and the rights-holders wanted downloading to be dependent on exclusive rights, in the same way as physical sales and reproduction of plastic CDs. Ten years ago, downloading of music had hardly begun. Today it is already stagnating, maybe fading out simultaneous with the CD-sales? Streaming takes

the lead, and streaming is rather far from reproduction. But this new treaty right included all making-available activities, including streaming-on-demand.

Instead of granting an exclusive right to license streaming services, would it be better to regard streaming as rather similar to broadcasting? This would imply that performers and producers would have no right to block streaming of their music. So what? They are used to this from broadcasting of their recordings. Could stream-on-demand be analogized with broadcasting?

In most European countries there is no exclusive right for both musicians and record companies for the broadcasting or for the public performance of their recordings. However there are well functioning systems of compulsory licensing, giving the rights-holders only one position; the right to be remunerated for every single broadcast. The musicians seem to be very happy about this. The revenues are substantial, and performers are put on an equal footing with the producers because of a 50/50 sharing of the total revenue. Even record producers admit that compulsory licensing for broadcasting gives them high revenues.

The benefits achieved from the exclusive right are not quite impressive. There are several stories about rights-holders getting paid next to nothing from content providers like Spotify. Jon Hopkins twittered about having been remunerated at eight Pounds Sterling for 90,000 streams – indicating a tariff at around one Pound for 10,000 streams. Should any copyright tribunal setting a compulsory rate ever dream of establishing such tariff? Business enterprises like the providers are accustomed to micro-regulations, and would favour detailed statutory provisions instead of broadly worded copyright regulations.

Observation 1: Music performers become the big losers thanks to the exclusive streaming right. Licensing of music stream based on a compulsory system might be better for both the rights-holders and the content providers.

## 2: YouTube

According to IFPI “You Tube remains the most popular platform for viewing music videos online, accounting for around 40 per cent of online videos watched in major markets.” The copyright situation is complex, since the service offers a mixture of commercial music videos, bootlegged performances, private video recordings, unauthorized remixed adoptions, Creative Commons licensed videos for free use, old historic recordings in public domain and videos outside the scope of copyright. The platform has become a kind of speaker’s corner for sharing every kind of video there is, from historic documentation to private footage of a celebration and trivialities.

Exclusive copyright management used to be based on the principle of Prior Informed Consent - PIC - presupposing obligatory consulting before the use of works by 3rd parties, including reached agreement on appropriate terms. But the content provider, YouTube have introduced a new kind of PIC; Post Informed Consent, and takes no direct responsibility for what people are uploading whilst using their

service. In some way they are willing to compensate or take-down videos if the copyright holders successfully prove that their video is in fact uploaded, but only based on notifications from the rights-holders;<sup>8</sup> It is funny to note that YouTube states that abuse of this notification form “may result in the closure of your YouTube account” – what about closing the account of the infringers?

YouTube is setting a new standard by leaving the rights-holders with all responsibility for the time-consuming and expensive work of cleaning up after the infringements occurred, and even worse; the rights-holders seem to accept this sad situation, and do not enforce their exclusive rights. Responding to this challenge seems hopeless, meaning that YouTube will turn copyright daily life upside down. And the real challenge for the rights-holders is to organise a new kind of CMO being tailor-make for untraditional services like YouTube.

A recent (20th April 2012) court decision in Hamburg (GEMA vs. YouTube) is upholding the traditional PIC-principle, but the final outcome and impact is still not clear.<sup>9</sup>

Observation 2 illustrates two typical Cyberspace challenges:

The rights-holders may have to give up the exclusive right as a **pre-requisite** in order for them to license their works, and they have to leave the position that everyone (like YouTube) who is involved in up-loading without consent, should be charged with engaging in an act of piracy.

### 3: GoogleArt

What should happen if a web site streamed all the collections of fine art from all museums worldwide? The embryo is already here. To date, Google Art, [www.googleartproject.com](http://www.googleartproject.com), streams an increasing number of fine art masterpieces from the main galleries worldwide. The service does not offer downloading, but is anyhow copyright-related. The selection is still mainly consisting of old masterpieces that are out of copyright. But then, what happens?

People get used to viewing famous paintings at home for free. As this continues to get popular; which museum could resist joining such a service if many others are joining? Most museums will accept uploading of not only a few old masterpieces, but also whole collections – and not just from the exhibition walls, but including the huge amount of hidden/non-accessible fine arts from the archives in dark basements. Art lovers would demand more and more paintings, and museums would love it from a publicity point of view. Politicians would of course support it, like they support free libraries for books

Observation 3: No exclusive right could stop services like GoogleArt from making copyrighted fine art available in Cyberspace, and the real challenge will be to grant all-inclusive licenses for services like this, instead of giving it away for free. Pushed to extremes, if Google succeeds building its monopoly; Should Google pay the rights-holders for making the art available, or will the museums later on have to pay Google for boosting their collections?



#### 4. National Libraries/-Archives

National archives/libraries are digitizing their huge collections of national heritage in most countries. The institutions would like to present this to the nation, and they would like to do it for free. Yes, indeed: Why shouldn't the national heritage of art and culture be available for free in Cyberspace? Underlining – Free for the users, but nevertheless remunerating the rights-holders. Or as stated by the British Record Industry, BPI:

Free music online doesn't have to be illegal. Far from it. There are a multitude of services that give you access to music for free and, crucially, ensure that the artists get paid. From the ad-funded download and stream services to the sites of the artists themselves and permanent download sites.<sup>10</sup>

Commercial products for sale, like books and phonograms, are a dominant part of the national heritage, and could not be excluded, except for recent/premium publications. There might be a window of three (?) years for new releases, and all other works could be offered by streaming. I hardly believe that such a national website would kill the commercial websites – these will offer a broader repertoire for sale, including premium releases and international repertoire.

Observation 4: The national libraries should be willing to pay for acting as a content provider. The politicians should be happy to grant the revenues, and copyright should be an instrument of national cultural policy.

Summing up: These four observations highlight that streaming and Cyber services like YouTube and GoogleArt cannot be dammed up by the old copyright system. On the contrary; New OTT-services (over-the-top content) like Hulu<sup>11</sup> will increase the flood, leaving the rights-holders with only one big challenge: To offer collective licenses by CMOs<sup>12</sup> being mandated in a proper way by the rights-holders.

#### Particular Cyber Legislation?

Copyright law must respond to technological developments, and one of the principles that made the international copyright system a long-lasting success story, is the axiom of drafting copyright legislation in such a way that the provisions are neutral from a technological point of view. Lawmakers were very skilled in writing provisions that would be applicable for all kinds of technological use of the protected works – including future technologies.

Various technologies covered by one general law – this has unfortunately come to an end. Copyright experts have been busy trying to squeeze Cyberspace exploitation of works into the bottle of VSOP Copyright, like conceptualizing browsing as copying and constituting temporary copying as a reproduction.

In the preface to the second edition of his user's copyright guide Michael Flint wrote:

...new technologies...that have evolved over the last five years, make considerable use of copyright material. It has become increasingly evident that the law of copyright in the



United Kingdom is out-dated and needs substantial revisions to deal with new technologies.<sup>13</sup>

May this be an observation from today? It could have been, but was in fact written way back in 1984. Since then there have been several «substantial revisions» of out-dated laws, but the numerous additional provisions have not been fully adequate. International copyright legislation and Cyberspace still do not fit together, and this problem has increased over the last decade. Why then?

Because Cyberspace is not another new technology like the radio, the TV, photocopier, satellite television, cable TV, home video recorder, CD, digital audiotape or computer software. In official copyright terms, Cyberspace is described as wire or wireless means. But Cyberspace is not just an Internet wire; it is an organic space, an independent world like a brain developing according to its own inner logics, and according to new rules.

These are rules (or lack of) for individual privacy, for social connections, for obtaining information and entertainment, for doing business, consumer expectations about availability, rapidity and not least about pricing – or zero pricing;

- Physical letters cost the price of stamps – e-mail is better and free of charge.
- Encyclopaedia books are expensive – Wikipedia is for free, and sometimes even better.
- Glossy porn photo magazines cost a lot – Cyberspace offers numberless porn films for free.
- ...and we have free Internet telephone like Skype, and so on.

Most people could not distinguish between the links for information/edutainment/entertainment and for culture/art, which is why liberalistic demands for free flow of information often include vulgar claims for free flow of culture and art already having been eaten by the Cyberspace shark – as if Abba's music or Munch's paintings should be some sort of info? Challenged by this, the response from rights-holders and legislators has been the traditional strategy of just broadening and extending the definitions and provisions of the old copyright system. But adaptations of existing legislation can never cater the unique usage in Cyber world. Copyright should not appear to be an obstacle, but should instead go-with-the-flow in Cyberspace, and the daring question is: Must the copyright family sacrifice their iconic integral law and accept that:

- There should be particular copyright rules for Cyberspace.
- These unique Cyber rules should be partly distinctive from those in the physical world,

and that the main distinction affects the most sacred relic; The Holy Exclusive Right.

### **Locked in by Copyright Conventions**

Compulsory licensing may often be better for rights-holders than exclusive rights.

Such legislation sets an obligation for the users to pay an equitable remuneration, and a final and binding rate will eventually be effectively determined by some kind of copyright tribunal. More important is that compulsory licensing normally establishes the CMO as a legal monopoly, holding the position of collecting on behalf of all rights-holders in a specific field. A young CMO just having been established could collect without having to first recruit a dominant share of actual rights-holders in advance. Rights-holders are often hesitant in joining a CMO before someone offers revenue – the collection should preferably come before the recruiting campaign.

It is even more for cyberspace where the number of actual rights-holders is huge. As for the act of streaming the local heritage from a national library, a compulsory licence would be splendid. The problem is that the international conventions and treaties like the Berne Convention<sup>14</sup> (1886) and the twin treaties WPPT and WCT (both mid 90's)<sup>15</sup> state that compulsory licensing of stream-on-demand is not permissible. In addition there are obligations according to the WTO, TRIPS Agreement (1994). The old Berne convention was a rather perfect instrument for (book) protection in the previous century, but this unbreakable armor for protecting rights-holders may in Cyberworld be not only a blessing but also a stiff hindrance. Is there a realistic strategy for achieving a more flexible copyright system?

A strategy of redrafting these international instruments seems unrealistic for two reasons: A modification or amendment is an extremely complicated and slow process. And in addition to that, the Bern convention is drafted like a kind of prison with a one-way door – once a state has joined, it is impossible to withdraw. The member countries are all legally locked in. It should however be mentioned that some countries, like Norway, have still not ratified WPPT, even if their national legislation may be complying with the treaty. These states (including most African countries) have an option of legislating by introducing a compulsory streaming right for producers and performers involved in sound recordings.<sup>16</sup>

Many people will agree that copyright is rather conservative and strict, while Cyberspace requires a flexible system, including a legislative process responsive to the quick changes in the technological development. May the lack of interest from rights-holders for new ideas, countering the challenges mentioned in Part One, be due to an opinion that suggestions for new copyright are unrealistic and imaginative? And yes, may be they are – so what?

How could a prospective copyright legislation be drafted without fantasy? Does fantasy have to be realistic? Don't creators like imagination? There are unfortunately very few brainstorming sessions about new ideas for the future. Instead we are offered numerous seminars coached by experts who make their living out of teaching and swotting copyright provisions from the previous century.

## PART 2 - WAYS AND COURSES FOR CREATIVE COPYRIGHTING

The result of all the challenges mentioned in my four observations is that the rights-holders increasingly are losing control over the utilization of their works inside Cyberspace. The crisis is evident, but the clever response is not. Losing control in the events of new exploitation stamps these as kind of attacks on copyright, and a normal, but questionable response on attacks will reluctantly be control freaking.

### *The Blind Alley: Anti-Piracy Flopping*

The non-creative and defensive answer to copyright challenges becomes enforcement, punishment and legal action, or in short: Anti-piracy campaigns. The rights-holders have been spending lot of money and efforts in fighting piracy, and the historical lessons are not exactly encouraging.

During the period 1995-2005 one could notice how the international record industry spent impressive amounts recruiting and running a private international police force/army for bringing the pirates down worldwide. China happened to suck the British (mainly Scottish) Hong Kong police force after the 1997 hand-over of the old Crown colony, and an enthusiastic record industry recruited them! The tough guys were enrolled (nick-name of the leader was *The Fist*), the national bodies of IFPI were all instructed to back them, advanced equipment was acquired, intelligence established and worldwide conferences should synchronize the global anti-piracy war, aimed at paving the way for new legal business in African, Asian, South-American and Eastern-European Pirate-land.

The bid made was all-time strong, and the results accordingly negligible. All record companies may have experienced some musical flops, but this was a total and all-embracing industry flop – and of course never spoken about neither in public nor internal in the Federation (IFPI). No one assumed responsibility for the failure and the wastage of money. Finally the record industry turned around 180 degrees, and gave up worldwide anti-piracy work, gave up cleaning infected markets, abandoned the African market (except for RSA/.za) and focused on defending their traditional fortresses; Western Europe, North America Japan and Australia.

Later on came dubious campaigns against private copying and illegal downloading, starting with an international meeting where all IFPI national directors were asked to wear a slogan T-shirt telling *Don't Copy Music!* (Sic! - the writer still keeps his personal relic). Next flop was the drive for TMs (Technical Measures) for copy control, which from a legislative point of view was a success, but from a practical point useless, because these technical measures proved to be so unreliable and controversial that the companies dropped the whole idea.

And today? Facing challenges and piracy in Cyberspace they are running a campaign confronting the Telecoms to make them block piracy, preferably by the so-called *Graduated Response Model*.<sup>17</sup> The clever idea is to punish pirates by suspending them from Internet, and the strategy is to challenge the Telecoms in a

defensive way. This position was underlined by (former) IFPI Executive Vice President, Shira Perlmutter, during her lecture at The University of Arizona, November 19, 2009.

Perlmutter was till 2012 the most prominent copyright scholar in the record industry and head of IFPI Global Legal Policy. In her 2009 speech with the exciting title: *Reconnecting the Copyright Value Chain: The Role of ISPs in Enabling the Online Marketplace*, she mentioned four big challenging problems in Cyberspace, but numbering compliance and enforcement as category number one.<sup>18</sup> In reflecting traditional IFPI policy, Perlmutter outlined the main role for the ISPs in the marketplace as being anti-piracy partners for the rights-holders. When mentioning that the ISPs were breaking the value chain when being paid by the public without paying anyone else backwards in the chain, no comments stated that this should be changed.

The only option for ISP payment mentioned by Perlmutter was the new role of some ISPs, redefining their business model by launching subscription services in joint venture with large content holders (record companies) – the so-called Integration Model. However this kind of sharing is based on an ISP wearing two hats, acting also as a content provider, and does not challenge their Internet subscription income. When being asked ex auditorio about alternative licensing models based on some kind of compulsory license, Perlmutter showed no current interest.<sup>19</sup>

A new challenge today is Apple's iCloud. This system seems to convert downloaded pirate files being stored in the clouds into the legal iTunes version.<sup>20</sup> Paying Apple for the storing service, results in kind of legalising or whitewashing of private collections of music files, regardless of origin. From a moral point of view this looks like contributing to piracy, but clarification from a Cyberspace legislative point of view is lacking.

Underlining the message by the objections mentioned in this section; Anti-piracy work is not negative as such, but bitter experience shows that running anti-piracy efforts are very delicate, and frequently flop – and the new idea of suspending people from manoeuvring in Cyberspace is of course a dead end.

The main objection is that piracy seldom is the inner, real sickness. No one can cure pneumonia by cough lozenges. The preposterous assertion made in this article is that the current copyright crisis hardly is a piracy depression, and accordingly cannot be solved by giving preference to enforcement.

### **A New Value Chain?**

Cyberspace and copyright are related: They are both about creative activity. The main ideas for creative copyrighting suggested in this article is in short: Less exclusive rights, less control, less criminalizing, less enforcement – and on the other hand: More Cyberspace legislation, more flexibility, more collective management and more public favour. All in all resulting in increased revenues.

The traditional value chain has been transferred into the Cyberworld; the users and advertisers pay the distributors (content providers), the distributors pay the producers and the producers pay the authors and performers. Could an untraditional value chain, distinctive for Cyberspace be more propitious for copyright? The authors have already taken a small step by claiming that revenues from music streaming should be paid directly from the content providers to authors' CMOs, unlike the situation for selling music via CDs.

Why shouldn't the users pay directly for their general usage of copyrighted works, which are available for free? Cyberspace will always be full of non-licensed/orphan/pirated works, including a great share of the informative content – informative books were never given away for free, why should they be free in Cyberspace? The rights-holders should come up with suggestions for collective payment for this, like introducing a copyright levy/tax on Internet subscriptions or on all digital products capable of down-loading/streaming. The users could in return uphold their free access in Cyberworld. A levy like this could from a practical political point of view be woven together with existing levies for private copying.

Similar ideas are presented in a recent report (October 2011) on private copying from Martin Kretschmer (director of Bournemouth University's Centre for Intellectual Property Policy & Management) introducing a system where people should be able to buy a license that allows them to download and pass on copyright material.

A more widely conceived exception that would cover private activities that take place in digital networks (such as downloading for personal use, or non-commercial adaptation and distribution within networks of friends) might be best understood not as an exception but as a statutory licence. Such a licence could include state regulated payments with levy characteristics as part of a wider overhaul of the copyright system, facilitating the growth of new digital services.<sup>21</sup>

Furthermore, if the politicians really want to make the national heritage available to its citizens for free – and in many countries I think they do – then let the State pay a collective remuneration based on extended collective licensing. Would models like this disarrange the traditional market? Indeed, and it should. Cyberspace is a new and particular market; once again quoting professor Kretschmer: "In digital networks, the distinction between private and public spheres has become blurred. Regularly, new services are invented that challenge earlier divisions (P2P, social networks, cloud servers)."

### **The Golden Avenue: Charging Telecom Revenues**

They should in fact all pay: the content providers, the **State** and the users. But the big challenge (and with it the big money) still remains: What about the ISPs? (Internet Service Providers). The prevailing legislative status is that these Telecoms only provide Internet connection and not any content, and are outside the scope of copyright. We all know that this is far from reality. Why don't the rights-holders confront the ISPs to pay a share of their profit as copyright revenue? The principal

distinctive copyright regulation for Cyberspace should be about E-commerce and the role of the ISPs.

The Telecoms do NOT only offer a line for communication like an old telephone company. They resemble much more a TV-cable network; both the networks and the ISPs offer subscriptions for cable/wire/wireless connection including a variety of «free» channels/content, being supplemented by optional pay-tv channels and content providers not for free. Cable networks do not operate outside the scope of copyright, why should the ISPs do?

What the ISPs do offer for sale is a gateway to Cyberspace – including tons of free available content. The subscription fee to the service providers gives free access to lot of traditional copyright material including feature films, more or less pirated music, pornography, orphan works, You Tube services, news, information and much more. The customers would never pay rather high rates for Internet «connection» if it did not include free content. Who would pay a ticket for a cinema theatre just to enter a room without any film actually running?

That's what people pay the Telecoms for. The ISPs should by law be obliged to pay the rights-holders for all non-licensed copyright works they are profiting from making available. This should be combined with the optional licensing to the various content providers, and would not establish a situation with “double-dipping” (claiming additional compensation on top of a paid license fee). It is not either-or. The content providers pay for their license, and the Telecoms should pay for the content not being licensed. This position is indeed contrary to prevailing international law, like the EU directive on E-commerce, but the «telephone-line» legislation is out-dated, and should be challenged by the rights-holders.

The Belgian Music CMO, SABAM, have been leading the way for such claims against the Telecoms. Media reports from mid November 2011 tell that SABAM is proposing kind of piracy levy on ISPs, charging them to pay 3-4% of their Internet subscription income because they are facilitating copyright infringement, quoting Out-Law.com 14.11.2011;

SABAM claims that Internet downloads and streaming activity constitute “public broadcasts,” which, under Belgian copyright law, entitles rights holders to compensation for those transmissions. Cable television broadcasters in Belgium are already charged 3-4% of fees they charge subscribers for broadcasting copyrighted content.

SABAM said that whilst its proposed ‘piracy licence’ would legitimise the ISPs’ part in allowing users to access illegal content, it would not make copyright infringement itself a legitimate act. The Belgian ISPs said that SABAM’s charge is “not legally justified,” according to Torrent Freak.<sup>22</sup>

The daring question becomes; What could be achieved if the work priority for rights-holders, instead of being anti-piracy and enforcement, was new legislation making the ISP services copyright related? The result could be less control but increased revenues? Would that be acceptable?



### The Side Streets: Some Additional Ideas

Distinctive Cyber copyright should comprise much more than alternatives to the exclusive right. The scope of this article gives no room for drafting this in detail, but a few topics for new legislation could be mentioned:

- Simulcasting and Internet “radio”
- Adaptation right and Sampling
- Browsing and Temporary copies
- Out-of-commerce works (still copyright-protected) and Orphan works (untraceable rights-holder) being digitized and made available by publicly accessible cultural institutions
- Collaborative authorship and coauthorship among virtual world developers
- ...maybe even the protection of collective knowledge of (3rd world) societies

All these topics are of course dealt with also today, based on traditional legislation, directives, agreements or MOUs. But they are highlighted in Cyber. The aim of this article is to give a touch of new creative copyrighting, and some ideas are presented here. The first one is about sampling of musical works/-recordings.

#### *a. Sampling*

The authors’ societies are handling sampling based on the exclusive right. All sampling except short legal quotations or fair use requires specific licensing from a CMO, normally supplemented with a personal permission from the author herself (due to the moral right involved). The result is that sampling, which is technically easy and practicable, becomes legally awful bothersome. This contradiction results of course in countless breaches of copyright or kind of piracy.

The creative alternative would be sampling regulations, based on agreements or statutory law, similar to the traditional mechanical royalty. There could be detailed tariffs, thresholds for minimum and maximum sample lengths, systems for revenue collection and distribution and so on. The authors’ CMOs have for a long time kindly offered standard licenses for the rerecording of all songs/works belonging to their repertoire. Why couldn’t they manage sampling in the same way, without bothering the samplers? The record companies and “their” performers are in the same position related to sampling of recordings. Neither of the parties is willing to offer standard licenses, and enforcing them by law, eventually combined with statutory license, seems of present interest.

The objection would obviously be all the new problems and challenges related to tracking of usage and collection of revenues. And that is exactly the point; Finding creative solutions to such challenges is the job and business of the CMOs, and solving this would be more productive than enforcing as if the samplers were pirates.

#### *b. The Nordic Extended Licensing System*

A model similar to a compulsory licence would be the so-called Nordic extended



licensing system. A provision for this will normally state that:

When there is an agreement with an organization which allows specific use of a work (referring to sections...), a user who is covered by this agreement shall, in respect of rights-holders who are not so covered, have the right to use in the same field and in the same manner works of the same kind as those to which the agreement (the extended collective licence) applies. The provision shall only apply to use in accordance with the terms of the agreement.<sup>23</sup>

These non-covered rights-holders have to accept that on-line publication of a work effectively means global “distribution,” regardless of their wishes. The most effective way of mandating this organization is that the various rights-holders’ federations, via their by-laws, are empowered to assign the rights to the CMO on behalf of all its members. This licensing system has been an obvious success in the Nordic region.

### **c. Virtual Creations**

In addition to rules for the Cyberworld usage of works from the real world, there is a growing challenge of how to retain copyright in virtual creations. A matter of particular interest is protection for game players vis-à-vis games providers for user generated content, or player-based creations. A recommendation for a derivative work compulsory licensing system is drafted in the paper “*Making Virtual Copyright Work*,” by Matthew R. Farley.<sup>24</sup> He argues that compulsory legislation for highly integrated derivative virtual works would acknowledge the unique value for these creations, and be efficient and not time consuming for the involved parties – plus having the effect to decriminalize and ease fear of lawsuits.

### **d. Private International Copyright Law-making**

Licensing for Cyberspace will always be inherently international and set global rates for copyright disputes, even if these rates happens to be fixed by purely national courts or tribunals. Traditional copyright legislation has no solution to this dilemma. The United Nations agency, WIPO<sup>25</sup> is offering a not exactly overloaded arbitration service,<sup>26</sup> but the question of choice of law will anyhow be a challenge. Could a new system, with particular copyright rules for Cyberspace, pave the way for arbitration of international copyright disputes – and by reference, not to national copyright laws, but to a version of the *Lex Mercatoria*,<sup>27</sup> enable the recognition and development of international copyright norms?

This idea is raised by Professor Graeme B. Dinwoodie (Chicago-Kent College of Law), suggesting (way back in year 2000) that the role of public international copyright law-making should consciously be supplemented by private international copyright law-making, – including arbitration and courts,

...the use of cybercontractual arrangements in the supply of copyrighted works makes arbitration based upon ex ante agreement a more likely resource for copyright development than was previously the case because such arrangements create contractual privacy between copyright disputants typically not found in the bricks-and-mortar world.<sup>28</sup>

Professor Dinwoodie maintains that national courts have a role to play in the creation, recognition, and enforcement of global norms, and that a new approach to choice of law can facilitate that role;

....courts should decide international copyright cases not by choosing an applicable law, but by devising an applicable solution. International copyright disputes implicate interests beyond those at stake in purely domestic copyright cases. National courts should thus be free to decide an issue in an international case using different substantive copyright rules that reflect not only a single national law, but rather the values of all interested systems (national and international) that may have a prescriptive claim on the outcome.<sup>29</sup>

#### *e. Third World Approach*

Copyright should accept a certain degree of national autonomy – especially for developing countries – and different national approaches to new challenges like this are highly desirable, since copyright needs experiments in designing a new international standard. Simply supporting developing countries to imitate the old western copyright system from previous century – or forcing them to do via the WTO/TRIPS – will hardly help. Copyright could be seen as a parallel to anti-corruption work, where several international support programs for teaching and training these countries in anti-corruption by transferring western models have failed totally.<sup>30</sup>

#### *f. China*

Will the growth of China open a perspective for radical changes? China is likely to enter many new positions once the technocratic regime holding office is succeeded by real politicians and self-confident leaders like Xi and Li. Before taking position they have – according to Chinese tradition - avoided revealing too much about their modern views, but changes will come after the 18th party congress (autumn 2012). Switching from cheap manufacturing, the future growth of China will depend on innovation, and Copyright rules hindering innovative creativity inside Cyberspace will be undesirable. Will China develop an alternative copyright system once they feel strong enough?

An interesting indication was given end of March 2012 by a controversial amendment draft for revising China's copyright law. The draft limits certain parts of the exclusive right of music authors to a three months window, and introduces a kind of compulsory licensing for re-recording of their works. Collective management gets strengthened by the introduction of such a system with statutory licensing based on rates stipulated by the National Copyright Administration, and will no doubt increase the power of the Music Copyright Society of China – may be even in the field of performers.<sup>31</sup>

There are an increasing number of issues like copyright in WTO context.<sup>32</sup> Several countries in the third world including India and Brazil may follow suit if China challenges TRIPS and Berne.

No one can tell what an alternative Chinese model would look like, but it could possibly be a system designed for Cyberspace, and based on collective management of non-exclusive rights. This might weaken copyright control, but it may also be a standard, which in the long run proves better for the rights-holders than the Berne system – at least inside Cyberworld.

### **Management assisted by Automatic Tracking**

In this situation the rights-holders of copyright should give their utmost efforts to adapt within the limits given by the convention and treaties. And such adjustment is possible based on a new attitude of copyright management, realizing that the exclusive right to copy is simply not the crucial point in Cyberspace. Looking from today's perspective streaming will be the dominant form of usage, and a streaming right enables the CMOs to; Collect-rather-than-Protect, Endorse-rather-than-Enforce and to be more positive than defensive. And of course; management should be more collective and compulsory – less individual and exclusive.

The remaining question is of how to split and distribute collective revenues into remuneration for individual rights-holders according to actual usage. An obvious answer is huge databases and automatic tracking. Monitoring all content being performed is a main duty for CMOs, and within one or two years we will see Asian and African CMOs running databases with local music repertoire – containing not only metadata, but also digital ripped music. Combined with systems for digital tracking, this will enable them to distribute individual revenues for actual broadcasting of each and every track of sound recordings – not being dependant of paper log sheets or user reports.

Extending these data bases with international repertoire does not seem very difficult. Private companies can offer this at any time. It is a paradox that databases with ripped music could not be offered by the professional CMOs operating in Europe and US. It is a fact that they still haven't got any. Even the task of establishing international databases just for the metadata of the recordings belonging to performers and producers have taken an endless time, and the CMOs have still not fulfilled the task. But the technology and systems are there:

Ten years ago, copyright owners had no easy way of tracking whether their content was being infringed upon, but today many content-producing companies are using digital rights management systems. DRM systems add code to electronic files which, when read by a computer, define the rules for accessing the file and can be used to monitor and generate reports on the number of times a document is opened, saved, printed or forwarded. DRM systems have become so effective in tracking and documenting infringement that the reports they generate are often used as evidence in lawsuits.<sup>33</sup>

Should we have to leave this to the bad guys who understand what is at stake, and for who time is of the essence, like the Google and Nielsen companies? This is in some way happening right now; since WIPO may start a joint venture with some of them to develop a comprehensive international database for music works/recordings.

Collective licensing will make it easy to collect revenues, and databases in combination with digital tracking will ensure individual distribution of money – and just underlining; not only for broadcasting, but possibly also for Cyberspace streaming. The systems will register everything being played or streamed. Those creators, who don't like to be involved in copyright affairs, should just not register/claim their revenue or mark their work with a CC license (Creative Commons). The challenge is to establish CMOs that are licensed by law or by assignment of rights. And for music it seems hard to understand why the three traditional parties of rights-holders (authors, performers and producers) just don't establish national one-stop licensing bodies, making it easier for the users to get a legal licence.

The Cyber shark is hungry – are the CMOs hungry enough?

## Conclusion

### Coda - Instead of a Conclusion - Get No Kicks of Lex Twenty-Six

Drafting copyright in Cyberspace is not mainly about swotting of rules, but of circumstances.

Legislating and managing copyright today is not depending only on skill but more on imagination.

...and indeed contrary to this little story about Cyberworld Lex 26:

Library books for lending usually get tattered and damaged, and after some time need to be replaced by new ones, which means additional sales for the publishers. On negotiating agreement for Cyberspace lending of Ebooks, the publishers had to realize that these would never be damaged since they are digital. No additional sales?....No problem! Some publishers just claimed a loan cap as additional revenue for artificial Cyberspace damages, to compensate for good old days. Library Journal described the rule like this;

*“In the first significant revision to lending terms for ebook circulation, Harper Collins has announced that new titles licensed from library ebook vendors will be able to circulate only 26 times before the license expires. Josh Marwell, President, Sales for Harper Collins, told LJ that the 26 circulation limit was arrived at after considering a number of factors, including the average lifespan of a print book, and wear and tear on circulating copies.”*

...Jenny still tries spinning

## Endnotes

- 1 The term copyright will in this article beside Author's rights comprise the rights of performers and producers.
- 2 [www.guardian.co.uk/media/2011/aug/14/robert-levine-digital-free-ride](http://www.guardian.co.uk/media/2011/aug/14/robert-levine-digital-free-ride).
- 3 Comparing with physical sales for 2010 gives no sense, since CD sales are collapsing – the digital share will soon be close to 100%, irrespective of the (low) level of sales.
- 4 International Federation of the Phonographic Industry, [www.ifpi.org/](http://www.ifpi.org/).
- 5 IFPI press release 20th January 2011, [www.ifpi.org/content/section\\_resources/dmr2011.html](http://www.ifpi.org/content/section_resources/dmr2011.html)” [www.ifpi.org/content/section\\_resources/dmr2011.html](http://www.ifpi.org/content/section_resources/dmr2011.html) .
- 6 GALLEYCAT, [www.mediabistro.com/galleycat/google-books-settlement-rejected\\_b26180](http://www.mediabistro.com/galleycat/google-books-settlement-rejected_b26180).
- 7 WPPT: WIPO Performances and Phonograms Treaty, Article 10, [www.wipo.int/treaties/en/ip/wppt/trtdocs\\_wo034.html](http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html).
- 8 “Please identify each video that is allegedly illegal by providing the URL(s) of the video(s) and/or the YouTube user name in question.” The notification system is based on complex requirements, and when filing a notification the claimant is asked to first; «...consult your legal counsel or see Section 512(c) (3) of the Digital Millennium Copyright Act to confirm these requirements, [www.google.com/support/youtube/bin/request.py?contact\\_type=otherlegal](http://www.google.com/support/youtube/bin/request.py?contact_type=otherlegal).
- 9 [www.bbc.com/news/technology-17785613](http://www.bbc.com/news/technology-17785613).
- 10 British Phonographic Industry, [www.bpi.co.uk/digital-music/article/free-music.aspx](http://www.bpi.co.uk/digital-music/article/free-music.aspx).
- 11 In the fields of broadcasting and content delivery, over-the-top content (OTT) means on-line delivery of video and audio without the Internet service provider being involved in the control or distribution of the content itself. OTT in particular refers to content that arrives from a third party, such as Netflix or Hulu, and arrives to the end user device, [http://en.wikipedia.org/wiki/Over-the-top\\_content](http://en.wikipedia.org/wiki/Over-the-top_content).
- 12 CMO; a Copyright Management Organisation.
- 13 Michael F. Flint (1990), *A User's Guide to Copyright*, Third edition, Butterworths London.
- 14 The Berne Convention for the Protection of Literary and Artistic Works (1886, last revised in Paris in 1971).

- 15 These treaties were intended for forestall the Cyber crisis in international copyright, but the technical explosion did rather quick surpass these instruments, and today they already look old-fashioned.
- 16 Less exclusivity does not mean that exclusive rights are never needed inside Cyberspace. Film producers may need exclusive rights to control the timing of opening or closing various sales channels, like Cinematographic sales, physical DVD (BD) sales, Cyber sales, Pay-Tv sales and finally Cyber stream for free – until they start selling over again in connection with release of a next part of the film. Acts like copying music recordings into film or commercials must of course also be covered by the exclusive right, but this would hardly be core music business in Cyberworld.
- 17 A rather soft enforcement model related to file sharing peer-to-peer, based on step-by-step warnings instead of taking to court, and engaging the ISP with obligation to take action with sanction against the uploading infringers, like one-year suspension from Internet. The model is mainly based on French governmental policies from 2007. IFPI has for several years launched a broad international campaign for this model in the whole western world.
- 18 Perlmutter: "...I would submit that the fundamental game-changing challenge for copyright is the first category (: compliance and enforcement) of problems.", [www.law.arizona.edu/emailapp/4thInnovation.cfm](http://www.law.arizona.edu/emailapp/4thInnovation.cfm).
- 19 Perlmutter: "As a copyright lawyer I would say, you know, that a compulsory license is at general imposed at a point when the market just can't work and there's no other option."
- 20 [www.apple.com/itunes/itunes-match/](http://www.apple.com/itunes/itunes-match/).
- 21 [www.out-law.com/en/articles/2011/october/users-should-be-able-to-buy-licences-to-allow-copying-of-copyright-protected-material/](http://www.out-law.com/en/articles/2011/october/users-should-be-able-to-buy-licences-to-allow-copying-of-copyright-protected-material/).
- 22 [www.out-law.com/en/articles/2011/november/royalties-collector-proposes-piracy-licence-on-belgian-isps/#TstQ5KvQaSo.email](http://www.out-law.com/en/articles/2011/november/royalties-collector-proposes-piracy-licence-on-belgian-isps/#TstQ5KvQaSo.email).
- 23 Norwegian Copyright Law, Unofficial translation of Article 36.
- 24 Matthew R. Farley, Making Virtual Copyright Work, 41 Golden Gate U. L. Rev. (2010), <http://www.digitalcommons.law.ggu.edu/ggulrev/vol41/iss1/4>.
- 25 The World Intellectual Property Organisation, [www.wipo.int](http://www.wipo.int).
- 26 WIPO Arbitration and Mediation Centre, [www.wipo.int/freepublications/en/arbitration/919/wipo\\_pub\\_919.pdf](http://www.wipo.int/freepublications/en/arbitration/919/wipo_pub_919.pdf).

- 27 LEX MERCATORIA. That system of laws which is adopted by all commercial nations - the international law of commerce that constitutes a part of the law of the land.
- 28 Graeme B. Dinwoodie, A New Copyright Order: Why National Courts Should Create Global Norms, 149 University of Pennsylvania Law Review 469 (2000). [http://works.bepress.com/cgi/viewcontent.cgi?article=1014&context=grae\\_me\\_dinwoodie](http://works.bepress.com/cgi/viewcontent.cgi?article=1014&context=grae_me_dinwoodie).
- 29 The author underlines that unlike a WTO dispute settlement ruling, a court decision articulating international standards is more readily subject to legislative reversal, and thus more closely linked to the democratic process.
- 30 A report from Hertie School of Governance concludes that the strategy of transferring the anti-corruption mechanisms and institutions of western countries is giving no results. [www.norad.no/en/tools-and-publications/publications/publication-page?key=383808](http://www.norad.no/en/tools-and-publications/publications/publication-page?key=383808).
- 31 China.org, [www.china.org.cn/arts/2012-04/06/content\\_25077760.htm](http://www.china.org.cn/arts/2012-04/06/content_25077760.htm).
- 32 China has been under fire in its biennial WTO trade policy review from the US and EU for lax IP rights enforcement and possibly discriminatory encouragement of domestic innovation. India and China are raising concerns about the TRIPS-plus activity, culminating in the form of ACTA (the Anti-Counterfeiting Trade Agreement). It is becoming a big issue why a 2003 TRIPS amendment intended to help poor countries obtain affordable medicines more easily has almost never been used. Intellectual Property Watch, [www.ip-watch.org/weblog/2010/06/03/china-india-to-raise-concerns-at-wto-about-%E2%80%9Ctrip-plus%E2%80%9D-measures-acta/](http://www.ip-watch.org/weblog/2010/06/03/china-india-to-raise-concerns-at-wto-about-%E2%80%9Ctrip-plus%E2%80%9D-measures-acta/).
- 33 Kimberly B. Herman, partner at Sullivan & Worcester LLP, [www.masshightech.com/stories/2011/08/15/newscolumn1-Beware-Copyright-trolls-lurking-in-cyberspace.html](http://www.masshightech.com/stories/2011/08/15/newscolumn1-Beware-Copyright-trolls-lurking-in-cyberspace.html).
- 34 Library Journal. [www.libraryjournal.com/lj/home/889452-264/harpercollins\\_puts\\_26\\_loan\\_cap.html.csp](http://www.libraryjournal.com/lj/home/889452-264/harpercollins_puts_26_loan_cap.html.csp).