

The Good, the Bad, and the Ugly – How have policymakers dealt with the growing complexity of the Intellectual Property debate and the issue of online piracy?

Draft – Comments Solicited

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Six years ago 39% of households in the then EU 15 had access to the internet at home. Last year that figure was 59% for the EU 15 countries and 54% for the full EU 27.¹ In the United States internet penetration is currently around 70% and there are an estimated 200 million users.² In the developing world internet penetration is still relatively scarce with rates of between 5-15%. But here to, the pace of change is staggering. China, for example, has already reached the 210 million mark in internet users, yet has a population usage rate of fewer than 20%.³

Just a decade ago few people had any real idea of what the World Wide Web was. But as internet and computer technologies become cheaper and more widespread increasing numbers of people will come to make use of the internet in their professional as well as personal lives. A growing side-effect of this increase in the use and spread of the internet has been a steady rise in levels of un-sanctioned downloading and viewing of music, film, books and the myriad other forms of content that is made available through the web. The growth and success of file sharing and peer-to-peer (P2P) websites such as Napster, Kazaa, and Grokster, as well as video upload sites like YouTube, all illustrate consumers' desire to access and display unsanctioned content through the internet. While many creative industries are adapting to this new environment by offering more authorised and varied downloading features, the overwhelming majority of internet downloading is estimated be of the illegal, or unauthorised, kind.

In the field of music – a particularly vulnerable target for illicit downloads as music files are small and relatively easy to up and download – illegal downloading is said to make up over 90% of all downloads.⁴ According to the IFPI – an international trade association representing the recording industry – in 2005 world-wide almost 20 billion songs were downloaded illegally.⁵ As a result, 35% of all illegal file sharers amongst European Internet users were said to be buying fewer CDs because of their downloading activity.⁶ The availability of free music seems to cut deep into the revenue stream of record companies and artists. While it is debatable whether all of this drop can be attributed to the growth in non-sanctioned downloading, these figures do provide a strong indication that artists and record

¹ Eurostat:

http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1996.39140985&_dad=portal&_schema=PORTAL&screen=detailref&language=en&product=STRIND_INNORE&root=STRIND_INNORE/innore/ir031

² <http://www.internetworldstats.com/stats2.htm>

³ *The Economist*, 'Alternative Reality The Internet in China', January 31, 2008.

⁴ BBC News online, 3 July, 2007, 'Global CD Sales Slump in 2006'

<http://news.bbc.co.uk/1/hi/entertainment/6265436.stm>

⁵ IFPI, <http://www.ifpi.org/content/library/piracy-report2006.pdf>

⁶ Ibid.

companies are, because of illegal downloading, facing a very serious situation.⁷ A similar case can be made for the motion picture industry which is said to have lost substantial sums of money – \$6.1 billion in 2005 alone – to internet piracy.⁸ In addition, television signal piracy and the illegal transmission of programming over the internet is also on the rise – the UK saw a 150% increase from 2004 to 2005.⁹ And, in Eastern Europe €700m is said to be lost from 2004 to 2010 due to signal piracy.¹⁰

Although some of these statistics have been questioned – indeed the music and film trade associations' figures have been accused of being exaggerated by, amongst others, Canada's own Michael Geist¹¹ – various independent opinion surveys frequently illustrate consumers' growing and broad acceptance of illegal downloading. For example, a British survey from last year found that almost half of those asked had engaged in some form of "unauthorised downloading".¹² In response to this trend, the UK Government recently issued a Strategy document, *Creative Britain*, in which it argued that it was vital to educate consumers from a young age of the value and economic worth of Intellectual Property.¹³ This would seem to underline the real threat to knowledge-based products that online piracy poses.

But it is not only big business and the trade associations representing large multinational conglomerates that are feeling the pinch of unsanctioned downloading. In the UK the independent music industry has repeatedly warned that a lack of copyright enforcement and agreements between artists and file sharing sites is a real problem. As early as 2004, in an interview with *Sound on Sound* magazine, Alison Wenham, CEO of the UK's Association of Independent Music (AIM), said that on the issue of peer-to-peer file sharing her view was that 'any copyright owner should have the choice as to whether their music is made available for free or not.'¹⁴ Similarly, former recording artist Feargal Sharkey – of early 1980s punk fame with *The Undertones* and now chief executive of British Music Rights, an interest group representing the British Academy of Composers & Songwriters, music publishers and performers – has been a vocal advocate for copyright protection and Intellectual Property Rights (IPRs) on the web.

While relatively few disagree over the basic point that downloading – authorised as well as unauthorised – is probably here to stay, what is currently a debating point is whether or not this is an intrinsically bad thing and what, if anything, policymakers should do about it. The purpose of this paper is to address this debate and outline the various ways in which policymakers and stakeholders in North America and Europe have responded to online piracy.

⁷ The case was made by *The Economist* in a 2004 article that between two-thirds and three-quarters of the industry's drop in sales had nothing to do with piracy. See *The Economist*, 'Music's brighter future', October 28, 2004.

⁸ From LEK Consulting report on piracy released by the MPAA in 2006, cited in Siwek, Stephen E., 'The True Cost of Motion Picture Piracy to the U.S. Economy', Institute for Policy Innovation, IPI Center for Technology Freedom, Policy Report 186, September 2006.

⁹ <http://networks.silicon.com/webwatch/0,39024667,39127919,00.htm>

¹⁰ http://www.nds.com/pdfs/Datamonitor_EE_Piracy_whitepaper_August2005.pdf

¹¹ See, for example, 'Piercing the peer-to-peer myths: An examination of the Canadian experience', http://firstmonday.org/issues/issue10_4/geist/

¹² *The Guardian*, 'Unease at filesharing crackdown', February 21, 2008.

¹³ Department for Culture, Media, and Sport, *Creative Britain New Talents for the New Economy*, February 2008.

¹⁴ *Sound on Sound*, 'Aim: Association of Independent Music', November 2004, <http://www.soundonsound.com/sos/nov04/articles/aim.htm?print=yes>

The State of the Debate

Arguments over intellectual property are not new. They can be dated as far back as 1474 when exclusivity privileges were granted for the first time in the city-state of Venice.¹⁵ Fundamentally, this debate boils down to the need to incentivise and compensate individuals for the efforts they have invested in the creation of new knowledge with the desire to use these creations as quickly and as widely as possible. What is in the public interest must be balanced with what is in the individual creator's best interest (be it a person, a company or any other innovator). Paradoxically, one cannot exist without the other, too excessive a clampdown on either will result in inhibiting knowledge producers in their creative pursuits or cutting off those who wish to enjoy the fruits of that knowledge

The current debate over unauthorised downloading can broadly speaking be divided up into two camps: those who would prefer to have information and content accessed and disseminated freely, and those who would rather have a strict enforcement of online copyright. Proponents of the internet as a copyright-free zone speak of the limits to intellectual freedom and innovation strong copyright measures result in. Some, like the Oxford Internet Institute's Dr Ian Brown, have publicly claimed that a greater enforcement of copyright in cyberspace runs contrary to free market principles espoused by the likes of thinkers such as Adam Smith and are, in fact, 'anti-competitive.'¹⁶ Most creators of content take the opposite view, arguing that if there is no protection of their work, there is much less of an incentive for them to keep on producing their creative products – music, film, literature or whatever it may be. They rightly argue that property rights – whether in the online or offline world – ought to be respected; the question is how does one go about doing this in the best way.

In reaction to the growth of online piracy, content creators, governments and other stakeholders have enlisted a range of tactics in their overall strategy of enforcing copyright protection online. Generally speaking there have been 3 responses:

- 1) the political and legislative
- 2) the legal
- 3) the self-regulatory and technological

Usually, more than one stakeholder has cooperated on a particular response or course of action. For example, both creators of content and governments have taken, and are taking, part in all three responses. What follows is a brief outline of these responses and some of the most important and illustrative examples of each individual response – what have they done well, what have done they badly and what have they not done at all?

The Political and Legislative Response

Copyright is not a particularly new way of protecting creations and their creators. In fact, the idea of holding a right to copy can be traced back to the English Licensing Act of 1662 and the 1709 Statute of Anne, or Copyright Act, which was named after Queen Anne and became British law in 1710. Similarly, international agreements on copyright protection also have a

¹⁵ Ladas, P. S. *Patents, Trademarks, and Related Rights: National and International Protection, vol. 1*, Cambridge, Massachusetts, Cambridge University Press, 1975.

¹⁶ Dr Brown made these statements in November 2007 at the conference 'Intellectual Property Rights and Consumer Rights', in London, organised by the Social Market Foundation, a local think tank.

long and pedigreed history. In 1886 the Berne Convention established the first internationally recognised and legally binding form of copy and dissemination rights, putting into treaty form the idea that the work of one author produced and protected by copyright in one country should be accepted and recognised by all Convention signatories. Berne established the principle of national reciprocity and of set and agreed standards of copyright protection, and it has served as model on which all subsequent international IP agreements are built on.

In December 1996 the World Intellectual Property Organization (WIPO) concluded two treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty. Because they related mainly to the new possibilities and threats posed by the digital and internet age, they have become known as the WIPO Internet Treaties. Purportedly designed as a ‘milestone in modernizing the international system of copyright and related rights, ushering that system into the digital age’ the WIPO Internet treaties in their national forms have not been without their critics.¹⁷ Many claim that the treaties have a built-in bias for rights-holders and that the treaties have curtailed innovation and research. The harshest form of criticism has been directed at the United States and its national version of the Internet Treaties, the Digital Millennium Copyright Act (DMCA).¹⁸ Some of this criticism seems misplaced as one of the results of the DMCA’s safe harbor provision has been that the policing of copyright infringement by third-parties has chiefly been in the hands of the content creators themselves under the notify-and-take down procedure. Due to the enormity of the web and the growing number of users, web sites, infringers and infringing activities, this arrangement puts a real strain on content creators to relay that information to internet mediators or service providers. When even large corporations and organisations like the English Premiership are forced to spend a considerable amount of their own resources as well as hiring external businesses to police the net for infringement activity, it is well nigh impossible for smaller rights’ holders to keep up.

While a majority of the 64 contracting parties that signed up to the WIPO Internet Treaties have also implemented and are enforcing them, there are a number of exceptions, such as Canada, which has signed but not implemented them. At the present time, there is an intense debate in Canada over the merits and demerits of introducing new copyright legislation which would recognise and incorporate these two treaties. In particular, fears have been raised over the prospect of Canada introducing legislation modelled on the DMCA. Most recently the *National Post* editorialised against the introduction of such legislation. It claimed that ‘For Canada to introduce DMCAstyle legislation now would do nothing but encourage nuisance lawsuits. There is nothing wrong with tough rules against copyright infringement, but criminalizing behaviour that might facilitate copyright infringement only incidentally is the wrong approach.’¹⁹

In Europe, the voice of strong copyright enforcement has been gaining increasing momentum with French, British and EU policymakers making speeches and proposing new policies.

¹⁷ WIPO, *The WIPO Internet Treaties*,

http://www.wipo.int/freepublications/en/ecommerce/450/wipo_pub_1450in.pdf

¹⁸ Critics have claimed that the DMCA has provided rights holders with too powerful a legal tool vis-à-vis consumers and internet users and stifled competition and innovation. This criticism has come as much from conservatives and libertarians, as from liberals and progressives. For example, Timothy B. Lee, of the Cato and Show-Me Institute, has written that the DMCA has resulted in ‘a legal regime that reduces options and competition in how consumers enjoy media and entertainment.’ See Lee, Timothy B., ‘Circumventing Competition: the Perverse Consequences of the Digital Millenium Copyright Act’, *Policy Analysis* 564, Cato Institute. http://www.cato.org/pub_display.php?pub_id=6025&print=Y

¹⁹ *National Post*, ‘The Post Editorial Board: Protect creators, respect consumers’, February 18, 2008.

Most recently European Information Society Commissioner Viviane Reding, stated that: 'Copyright is a cornerstone of the information and knowledge-based society.'²⁰ Policy-wise the focus has been on introducing new primary legislation that would put pressure on Internet Service Providers (ISPs) to do more to monitor and stop the unsanctioned downloading of copyrighted material. In France late last year the Sarkozy administration endorsed an industry-wide agreement – The Olivennes Memorandum of Understanding – between content creators such as Canal +, and ISPs, like France Telecom (Orange), that sought to do just that. This document recommended a three-strikes-and-you-are-out policy for unauthorised downloading and of setting up a special public authority – overseen by a judge – to monitor and enforce the agreement. The Memorandum was the result of an independent review headed by Denis Olivennes, the chairman of Fnac, a French chain of entertainment superstores. Its overriding purpose is to push ISPs into taking a much more active role in the monitoring of web activity and would place sanctions on ISPs who did not cooperate.²¹ Subsequent to its introduction the Memorandum has been hailed by the music industry and the IFPI. That body's CEO, John Kennedy, recently stated that 'More than anyone else in 2007, our industry has to thank French President Nicolas Sarkozy and the chairman of FNAC Denis Olivennes for the change of mood.'²²

However, implementing the agreement will not be easy. First, it faces a major legislative hurdle in that several pieces of current French copyright, data protection, telecoms and consumer protection legislation would have to be amended or introduced for this new special public authority to be established.²³ Second, some ISPs seem to be having second thoughts. Only a few weeks after the Memorandum was made public, Orange/France Telecom hinted that ISPs would not play that big a role in the proposed arrangement and certainly not take part in any monitoring activity. An article from *IP-Watch* quoted an Orange company spokesman as saying: 'The ISPs will not monitor their customers' activities...It will be the copyright protection groups that will set up "honey pots", and then denounce pirates to the authorities.'²⁴ The spokesman also emphasised that this agreement only represented a working framework and would be changed and revised over the coming two years.²⁵

In the United Kingdom, there has also been some movement towards similar legislation. In mid-February this year a front page London *Times* headlines read: 'Internet users could be banned over illegal downloads'.²⁶ The paper's story was based on a leaked copy of a Strategy document the UK government was due to publish. But when that document was finally made public the only commitment made was that the government 'would consult on legislation that would require internet service providers and rights holders to co-operate in taking action on illegal file sharing – with a view to implementing legislation by April 2009.'²⁷ Still, the

²⁰ *IP-Watch*, 'EU Online Copyright Bill Coming; Publishers Debate DRMs', December 9, 2007, <http://www.ip-watch.org/weblog/index.php?p=861>

²¹ 'Accord pour le developpement et la protection des oeuvres et programmes culturels sur les nouveaux reseaux', November 23, 2007, <http://www.elysee.fr/accueil/>

²² *Business Week*, 'Music Firms Want EU to Cut Off Pirates', January 28, 2008, http://www.businessweek.com/globalbiz/content/jan2008/gb20080128_493404.htm?chan=globalbiz_europe+index+page_top+stories

²³ *Financial Times*, 'World News: France proposes to cut off persistent internet pirates', November 23, 2007.

²⁴ *IP-Watch*, 'France's Online Anti-Piracy Plan Comes Under Scrutiny', December 7, 2007, <http://www.ip-watch.org/weblog/index.php?p=860>

²⁵ Ibid.

²⁶ *Times*, 'Internet users could be banned over illegal downloads', February 12, 2008, http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article3353387.ece

²⁷ Department for Culture, Media and Sport, *Creative Britain New Talents for the New Economy*, p. 51

message that had been coming out of government circles for some time was that there is a need for urgency and greater action from all stakeholders, and ISPs in particular. Then Parliamentary Under-Secretary of State for Intellectual Property and Quality Lord Triesman early on made clear that he would not tolerate the status quo. In a much publicised interview with the BBC from October 24th he argued with regard to the responsibilities of ISPs that ‘if we can’t get voluntary arrangements we will legislate.’²⁸

Internationally, the EU has together with the US put an increasing emphasis of building an internationally recognised political process that accepts and agrees on the need for strong copyright enforcement. This has been done in two ways. First, the establishing of a new international framework – ACTA (Anti Counterfeiting Trade Agreement) – for combating piracy and counterfeiting was late last year announced with the support of the United States, the EU, Mexico, Japan, Korea, Switzerland, New Zealand and most recently, Australia. The purpose of this proposed agreement is to provide the necessary international tools and harmonised standards to effectively tackle global counterfeiting and digital piracy.²⁹ Second, both the US and the EU have since the early 2000s included the strong protection of IP as part of their bilaterally negotiated Free Trade Agreements (FTA).

These two processes suggest that there is a divide developing within the existing WIPO structure. Specifically, there seems to be a conflict between developing and developed countries over the type of IP legislation that is needed. Within one of WIPO’s discussion fora, the Advisory Committee on Enforcement (ACE), two divergent approaches towards IP protection have emerged. Developed countries would like to push for a new treaty (an Italian proposal was made at the latest WIPO General Assembly), whereas developing countries have expressed disagreement with this direction and wish to slow things down. WIPO’s new Committee on IP and Development will have its first meeting in March and this may shed some light on how the Development Agenda will interact with the enforcement one.³⁰

The Legal Response

Whether it be through initiating legal proceedings against technological multi-nationals for the alleged enabling of copyright infringement or suing private individuals for unauthorised downloads, the legal response to online piracy has long been a well-trodden battleground for artists and rights holders. But piracy and the infringement of copyright is not a new phenomenon. Car boot sales of illegally copied film and music are still prevalent today, just as they were 25 years ago and physical copies of movies, music and copyrighted goods are still traded and sold all over the world. This is an important point as significant parts of the judicial debates over the rights and wrongs of copyright infringement are remarkably similar today to those 30 years ago.

Many of us will remember the intensity of the court cases and arguments between the music industry and makers of cassette and video recorders during the 1980s. In the UK, one of the biggest court cases took place in 1986, and was between the British Phonographic Industries – a trade association of the British music industry – and Amstrad Consumer Electronics plc, a

²⁸ <http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/7059881.stm>

²⁹ Press Release, October 23, 2007, European Commission, ‘European Commission seeks mandate to negotiate major new international anti- counterfeiting pact’.

³⁰ *IP-Watch*, ‘Officials Outline International Organisation’s IP Enforcement Policies’, 18 Feb, 2008, <http://www.ip-watch.org/weblog/index.php?p=929>

consumer electronics company headed by Alan Sugar; Sir Alan who recently starred as the British version of Donald Trump in the BBC adaptation of *The Apprentice*.

In this case, the argument was not only over the legality of home-copying but, more importantly, the extent to which Amstrad had incited individuals – through their marketing and production of cassette recorders – to engage in the unlicensed activity of copying audio content either off the radio or from existing cassettes.³¹ The final court ruling made clear that while home-copying was an infringement of copyright Amstrad could not be held accountable for what its customers chose to do after purchasing their cassette recorders. As the judge Lawton LJ put it: ‘Amstrad market machines which can be, and are, used for lawful purposes. What purchasers do with the machines is outside Amstrad’s control.’³²

A few years earlier, in 1984, the United States Supreme Court came to a similar conclusion with regard to film content in *Sony Corp et al. v Universal City Studios*, the so-called Betamax case. Here it was found that the alleged copyright infringement – enabled by Sony’s home video tape recorder (VTR) – was not the responsibility of Sony as

The sale of VTR’s to the general public does not constitute contributory infringement of respondents’ copyrights...The sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes, or, indeed, is merely capable of substantial noninfringing uses.³³

The Betamax case has been hugely influential. Above all, what the Supreme Court clarified in this case was the principle of “fair use”. Established by Congress in the Copyright Act of 1976, Betamax was the first major case in which fair use was interpreted and thoroughly defined. While an exhaustive outline of the Court’s ruling would be overly time consuming in the context of this paper, suffice it to say that the four factors identified by the Court have been central to recent and ongoing cases. Indeed, over the years fair use has come up as the key arguing point in online piracy cases. It was central in *A&M Records, Inc v Napster* in 2001, in *MGM Studios, Inc. et al v. Grokster, Ltd. et al.*, in 2005 and will undoubtedly play a big part in the ongoing *Viacom v YouTube* case.

In Europe, where common law systems are less widespread and court precedent, consequently, plays a less important role than in the United States, there are nevertheless some recent examples of important cases involving ISPs and internet download sites. For example, earlier this year a Danish court ruled that Tele 2, a Scandinavian ISP and telecoms giant, would have to take measures to prevent its subscribers and users from accessing the Swedish and Dutch website *Pirate Bay*.³⁴ *Pirate Bay* has recently risen to fame as the new hotspot for internet users wishing to access content via peer-to-peer technology. The website claims to be the ‘world’s largest bittorrent tracker’, a technology used to quickly and reliably download and transfer large computer files.³⁵ Founded in 2003 by an ‘anti copyright’ organisation, *Piratbyrå* (the Pirate Bureau) *Pirate Bay* was only a few months ago charged by a local prosecutor in Stockholm for violating Swedish copyright law.³⁶ In the case briefing the prosecution argued that *Pirate Bay* had commercially exploited material – music, film,

³¹ Staines, Anne, ‘Putting the Record Straight’, *The Modern Law Review*, Volume 49, May 1986, p. 385.

³² *Ibid.*, p. 387.

³³ *Sony Corp. of America et al. v. Universal City Studios inc, et al.*, 464 U.S. 417, 418

³⁴ *Dagens Nyheter*, ‘The Pirate Bay stoppas i Danmark’, February 4, 2008, <http://www.dn.se/DNet/jsp/polopoly.jsp?a=739490>

³⁵ See <http://thepiratebay.org/about>

³⁶ *Ibid.*

video games, computer software etc. – protected by copyright legislation by generating advertising revenue from the website.³⁷ In addition, the American artist Prince has sued *Pirate Bay* both in the United States and in Sweden for violating the copyright protection of his music.³⁸ (Interestingly, Prince was most recently criticised by music retailers himself for giving away his latest album free of charge together with the British newspaper the *Daily Mail*.)³⁹

Self-regulation and the use of technology

Many companies and governments have explored ways of getting industry stakeholders to agree on a set of principles to regulate the online traffic of copyrighted material. Talks have involved the creators of content, ISPs, the mediators of content, such as search engines and popular download sites such as YouTube, and consumers' interest groups. Governments have often taken part in these types of negotiations in a back-room capacity, quietly prodding the various parties along.

Today there are a number of industry-wide agreements and principles on the regulation of content on the internet which include some, but, crucially, not all stakeholders. Most recently in Canada, suggestions to toughen up and change the existing copyright legislation by incorporating the WIPO Internet Treaties into Canadian law have been criticised by a who's-who coalition of big business. The Business Coalition for Balanced Copyright includes Google, Yahoo, Rogers, Telus, the Canadian Association of Broadcasters and the Retail Council of Canada. This Coalition argues that any proposed re-write of the copyright law needs to do more to expand the existing copyright exceptions, such as fair dealing, as well as limit ISPs responsibility for enforcing copyright.

Overtures have, and are being made, to conclude an antipiracy agreement that includes all stakeholders, but as they seem to have such differing views on what copyright means and what kind of policies the legitimate enforcement of copyright should result in, no universal agreement has yet been reached. The most obvious disagreement is between internet mediators, such as Google and YouTube, and the creators of content. There exists a fundamental suspicion between these two groups over what their respective business interests are and if there is any overlap between what they wish to achieve. The pending \$1billion lawsuit brought by Viacom and others against YouTube in the spring of 2007, and the English Premier League's – one of Europe's biggest and most profitable sports leagues – class action lawsuit against Google and YouTube strongly suggest that there is a real sense of animosity between the two parties.

Yet in the autumn of 2007 these two competing groups of stakeholders launched two antipiracy plans which show a remarkable degree of convergence on recognising what a problem online piracy is, and what should be done about it. On October 15th, YouTube and Google launched their much mooted Video Identification software which, according to YouTube, 'goes well above and beyond our legal responsibilities' and aims at 'accurate identification, choice for copyright holders and a greater user experience.'⁴⁰ The software is meant to provide YouTube – and content creators working with YouTube – with the ability to

³⁷ *Dagens Nyheter*, 'Fyra åtalade i Pirate Bay-härvan', January 31, 2008,

<http://www.dn.se/DNet/jsp/polopoly.jsp?d=3130&a=738344>

³⁸ Ibid. 'Prince stämmer Pirate Bay', <http://www.dn.se/DNet/jsp/polopoly.jsp?d=3130&a=743184>

³⁹ BBC News online, 30 June, 2007, 'Anger at Prince free CD giveaway'.

⁴⁰ http://www.youtube.com/t/video_id_about

monitor what type of content is being uploaded to the website and let the content creator decide whether it should be left on the website, taken down or, monetised in partnership with YouTube.⁴¹

Four days later, on October 18th, a coalition of content heavy-weights, media companies, and providers of online services, unveiled a set of User Generated Content Principles (UGC). The UGC agreement seeks 'to foster an online environment that promotes the promises and benefits of UGC Services and protects the rights of Copyright Owners'.⁴² This agreement, whose signatories includes Disney, News Corp, CBS, Viacom, MySpace, Fox, Microsoft, *Dailymotion*, NBC Universal, and Veoh, is chiefly about what principles should be applied to use and implement filtering technology. The agreement seeks to implement 'state of the art filtering technology with the goal to eliminate infringing content on UGC services, including blocking infringing uploads **before** they are made available to the public'.⁴³

Both these plans underline the extent to which a technological filtering solution based on fingerprinting content is increasingly becoming viewed as the best solution to identifying and dealing with user generated content. But as these are still separate models it would seem that no matter how advanced the technology is, or how convergent the thinking is on the use of technology to battle internet piracy, it will be impossible to take full advantage of technology if all stakeholders cannot come to terms on an universal agreement themselves.

Conclusion

Pirates and counterfeiters are no longer restricted by time, space, or access to a physical copy of film, music or the written word. Instead, the internet has enabled users across the world to interact together in their usage of legal as well as illegal content. This paper has attempted to provide a broad overview of what some of the important developments and trends in Europe and North America have been in response to this challenge of online piracy.

What has become clear is that internet piracy is indeed a growing problem and one which policymakers wish to take very seriously, but which it seems they are still looking for the best policy solutions. The lack of any universally applied and implemented international agreements or readily agreed ways of dealing with what is essentially a global problem seems to be part of the problem. As does the fact that industry stakeholders ranging from content creators to internet and content mediators have not been able to reach an agreement of what a practical balance between the rights of content creators and of the consuming public would look like. This has led to a dear stalemate. The economic cost of the uncertainty that creators of content, mediators of content, and the broader internet-using public face is substantial. But what can be done about it?

As consumer technology stands today it seems inevitable that consumers will continue to expect to be able to shift content from one format to another and make use of that content free of charge. The dilemma the content industry faces is how to effectively deal with this. The argument for complete freedom of access to content online would seem to establish a different set of standards on the internet than those currently being applied in the offline world where intellectual property and rights of copy are respected and enforced. Certainly, it

⁴¹ Ibid.

⁴² <http://www.ugcprinciples.com/>

⁴³ Disney Press Release, October 18, 2007, 'Internet and Media Industries Unveil Principles to Foster Online Innovation while Protecting Copyrights'.

is true that the availability of certain types of content – covered by such concepts as fair use and fair dealing – has led to more innovation and advances in human knowledge. But it is worth bearing in mind of the very real risk that within the creative community, content creators will be more reluctant to share their content with others if they do not retain a level of control and compensation. While artists, writers, filmmakers, performers and musicians undoubtedly have a strong altruistic desire to bring the joys of their work to as many people as possible, they – like everyone else – have bills and mortgages to pay. And just like most people, they rightly wish to retain as much control over how their fruits of labour are used and displayed in the public arena.

Where does that leave policymakers? Clearly, legislation can never be the entire solution as online piracy presents as much of a cultural and educational challenge as it does a legislative one. Asking ISPs to take more responsibility for limiting piracy on the internet is part of the answer, but it is doubtful that it can be the entire solution. If ISPs are solely relied upon to enforce copyright in the online world there is a risk that consumers, who are not necessarily copyright infringers, will object to the monitoring of their internet usage as a breach of privacy. Particularly as there is some debate over whether ISPs are technically able of monitoring and filtering out the illegal from legal usage of content with a high enough degree of accuracy. Successfully tackling the problem of online piracy would seem to need the involvement of all stakeholders – ISPs, content providers as well as internet mediators; the latter which play an increasingly significant role as gate-keepers to what is actually on the internet.

Protecting copyright and intellectual property is not an easy task; nor is protecting the rights of consumers to use legally purchased content freely and within reasonable limits. Achieving both in the digital age will require a commitment from all stakeholders to compromise and make concessions. As of today the prospects for such an agreement look bleak, but let us hope that the seriousness of the situation will prompt sensible action from all parties.