

Theories of Justice, Copyright and Music

Is the modern copyright system fair?

Mémoire réalisé par
Raphaël Schröder

Promoteur
Jacques Lenoble

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“If I hold a Conch Shell to my Ear, Do I owe a royalty to Neptune?”

Davis Schneiderman

Introduction

Copyright is a legal tool that plays a major role in our everyday lives: it controls our access to music, movies and other forms of entertainment. It guarantees that artists will be remunerated for their works by granting them the exclusive exploitation right over them. It was designed to enable the emergence of a balanced market of creativity in order to promote the broadest dissemination of culture, entertainment and artistic works. But in recent decades, copyright has come to be one of the least enforced and most often infringed property rights. Two evolutions have contributed to the crisis in which copyright finds itself today: the development of new online sharing technologies that make copyright infringement very easy and the populations' opinion that copyright is morally wrong and part of an unfair system. The structure of the creative market, typically dominated by a few big media conglomerates who have established powerful monopolies to control artistic creation, is viewed as preventing true competition. People often lament that monetary interests have come to replace the artist's goal to create something authentic and truly creative. One of the main critiques addressed to the modern copyright model is the privatization of culture also often referred to as *the second enclosure*. Copyright infringement by massively sharing artistic works over the internet is considered by some as a way to counter the corporate monopolies that have come to limit artistic expression. The dual nature of copyright in relation with art is best defined by Neil Weinstock who put it this way: "*Copyright is one of the big challenges of the 21st century because it has the capacity to promote and to burden one of the values that lie at the heart of our democracies: freedom of speech*"¹.

This work's goal is to address the philosophical gap that lies between the spirit of copyright laws and the mind-set of the growing number of citizens who don't feel bound to respect intellectual property rights. In order to know why people infringe on a system that is based on commonly shared values such as private property and desert, one needs to raise the question of the moral legitimacy of the modern rules and what their concrete effects on artistic creation and knowledge dissemination are. But the morality of the copyright system depends on what creative sector is concerned. Therefore, we will focus on only one of the creative activities protected by copyright: musical creation. Addressing the effects copyrights have on music is especially interesting given the special link there is between music, technology, copying and creativity. Furthermore, while we will take a look at copyright legislation around the world,

¹ N. WEINSTOCK., *Copyright's paradox*, New York, Oxford University Press, 2008, p. 10

the focus will nevertheless be put on the history and the nature of US copyright legislation because it's the most relevant in the context of global enforcement of musical creation. The biggest record companies are American and copyright pirates around the globe are sued primarily based on the violation of US law.

In order to find the answers to the questions this work is raising, it is structured in three parts. The first part is an analysis of the modern copyright system. We will start with some remarks on the inefficiency of copyright enforcement today to highlight the pertinence of the question this work addresses. Then, we will take a look at the evolution of copyright law through history. It will be followed by a brief explanation on how copyright works and we will conclude the first part with a chapter on the biggest technological inventions of the digital age and their effects on the music industry and the copyright regime. In the second part of the work, we will address the question that leads so many citizens to infringe on the copyright regime: is the modern copyright system fair? First we will analyse the philosophical justifications that lay the basis for our modern copyright regime. After that, we will compare the philosophical foundations of copyright with the reality of the music market by addressing the morality of copyrights in practice. In the third part, we will conclude by enumerating potential alternatives to the modern copyright regime and new music distribution business models.

Part I: The modern copyrights system

Chapter 1: The illusion of copyright enforcement

The crisis in which the current copyright regime is can be strongly highlighted by the massively ineffective enforcement of copyright rules. We first address this issue to show the symptoms that point to the bad state of modern copyright rules before taking a look at the reasons that lie at the basis of the regime's sickness.

Let's start with a few numbers to illustrate the magnitude of online piracy. In 2001, the International Federation of the Phonographic Industry (IFPI) estimated that almost 40% of all CDs and cassettes sold in the world were pirated copies, an illegal international business that amounted to more than 4.6 billion dollars². Furthermore, the latest reports of the IFPI found that 95% of music downloads in the world are illegal and thus 40 billion musical files are being shared illegally³. Moreover, piracy isn't just limited to individuals using their personal computer: corporate material is also often used for the infringing activity. A study estimated that half of all corporate broadband traffic is dedicated to the illegal download of music files, and that 20% of all computers in corporations host file-swapping software⁴.

The natural response from the music industry to copyright infringement has been lobbying for harsher rules, expanding the exclusive rights granted by copyright and trying to influence public opinion into believing that copyright is a felony just as serious as theft. None of these options have managed to stop copyright infringement and on the contrary they have contributed to further alienate the industry's consumers.

There are two ways how the law can influence human behaviour: through incentive and deterrence⁵. Copyright legislation has been focusing on the latter. In order to tackle the global copyright piracy that had become an habit for a lot of internet users, the American Congress adopted the No Electronic Theft Act⁶ of 1997 which strengthens criminal prosecution and

² R.J. PHILLIPS, *Rock and Roll fantasy? The reality of going from garage band to superstardom*, New York, Springer, 2013, p. 94

³ J.-C. LARDINOIS, *Les contrats commentés de l'industrie de la musique 2.0*, Bruxelles, Larcier, 2009, p. 203

⁴ R. GALVIN, J. TURNER, A. ORTEL, « The risk to corporations from employees' online piracy », in *Building and Enforcing Intellectual property value – an international guide to the boardroom 2003*, London, Global White Page Publishing, 2002, p. 116

⁵ W. PATRY, *How to fix copyright*, Oxford, Oxford University Press, 2011, p. 164

⁶ No Electronic Theft Act, December 16, 1997, 105th United States Congress

penalties against those who distribute copyrighted works without authorization. Sharing copyrighted works with anyone (including friends and family members) can be punished by jail time or fines if the value of the work exceeds 1 000\$⁷. Furthermore, this act incriminates various acts of copyright infringement without regard to whether the defendant received any financial benefit from the infringement⁸. But while rules became more and more punitive, it didn't manage to stop the copyright infringing trend and change the way people think about it.

The first requirement for people to obey the law is that it needs to be consistent with societal values and therefore coercion rarely succeeds in forcing compliance with laws that significantly depart from shared principles⁹.

As Professor Tyler highlights “*a law abiding society is one in which people are motivated not by fears, but rather by a desire to act in socially appropriate and ethical ways... To have a law-abiding society, we must have a polity in which social values lead them to feel responsible for following rules, irrespective of the likelihood of being caught and punished for rule breaking*”¹⁰. Put simply, laws that people don't believe in lack deterrent force¹¹.

In order for people to start respecting copyright laws and stop sharing copyrighted over the internet, one out of two conditions had to be met: the general public should consider the current copyright system as fair, and if they don't, they should at least acknowledge that the process by which the law was enacted is regarded as fair and legitimate¹². But especially these are the reasons why the big majority of the users who infringe on copyright don't feel guilty: they consider the current copyright system as unfair and regard the legislative process of copyright laws as manipulated by big interest holders¹³.

This is underlined by a comprehensive study for unauthorized copying that the Social Science Research Council (an U.S.-based independent non-profit organization) did, which notes that “*consumer attitudes are, for the most part, not unformed- not awaiting definition by a clear antipiracy message. On the contrary, we consistently found strong views. The consumer surplus generated by piracy in middle-income countries is not just popular but also widely understood in economic justice terms, mapped to perceptions of greedy United States of*

⁷ R. GALVIN, J. TURNER, A. ORTEL, « The risk to corporations from employees' online piracy », *loc.cit.*, p. 119

⁸ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, New York, Aspen, 2003, p. 499

⁹ W. PATRY, *How to fix copyright*, *loc. cit.*, p. 165

¹⁰ *Ibid.*, p. 166

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, p. 171

*America and multinational corporations and to the broader structural inequalities of globalization in which most developing-world consumers live. Enforcement efforts, in turn, are widely associated with the United States of America pressure on national governments, and are met with indifference or hostility by large majorities of respondents*¹⁴.

In the same vein, the National Recording preservation Board of the Library of Congress stated: *“In the perception of the public, copyright law has a reputation for being overly restrictive. This perception fosters a dismissive attitude toward the law in communities that can hardly be characterized as rogue elements of society”*¹⁵. The consequence is that when people who download illegally say they’re stealing, they’re joking, they don’t consider the use of P2P systems to access copyrighted materials as criminal¹⁶.

Besides being ineffective and unpopular, enforcing the copyright system also is costly for artists and recording companies. Those include search costs for identifying infringers, enforcement costs for suing copyright pirates, transaction costs for negotiating licenses with users and collection costs for obtaining payments from licenses¹⁷.

But how did we end up with this ineffective system that huge parts of the population don’t feel bound to respect? The answer lies in the origin of copyright rules, their evolution these last two centuries and especially the collision between modern restrictive copyrights and the new technologies of the digital age.

¹⁴ A. STROWEL, *Peer to peer file sharing and secondary liability in copyright law*, loc. cit., p. 175

¹⁵ *Ibid.*

¹⁶ C. McLAREN, « Copyrights vs. Copywrongs », in *Cutting across media – appropriation art, interventionist collage and copyright law* (dir. K. McLEOD, R. KUENZLI), Durham, Duke University Press, 2011, p. 39

¹⁷ A. STROWEL, *Peer to peer file sharing and secondary liability in copyright law*, loc. cit., p. 184

Chapter 2: Copyrights' Genesis

The first copyright to have been ever granted was in 1556 in England by royal decree as a direct response to the introduction of the Gutenberg's printing press in the country¹⁸. It granted the printers of the Stationer's Company (a London based publishing company) an exclusive perpetual right to control the printing and the sale of books¹⁹. But ironically, this first copyright gave no protection at all to the author of the works, who had to rely on the money the publisher was ready to pay to purchase his work. For English authors to be awarded any rights they had to wait until the passing of the Statute of Anne in 1710 by the English Parliament²⁰. The Act granted the authors statutory rights limited to 14 years, renewable for an additional 14 years²¹. The French version of the Statute of Anne was a decree of the Revolutionary Government in 1791 that, besides granting statutory rights akin to the British ones, established moral rights for the author²². We will discuss the nature of these moral rights later on.

The origin of copyright in the United States can be found in the US Constitution. The document allows Congress to enact a copyright law in order to “*Promote the progress of science*” by providing an economic incentive for the creation and dissemination of numerous works and authorships²³. The spirit of the Constitution was that copyright is a way to promote free speech by encouraging a community of autonomous authors and publishers, who would not be dependent on government official for financial support, thus allowing them to defend and publish critical opinion towards the ruling powers²⁴. Copyright doctrine should provide proprietary rights to serve those ends. But to the extent property rights in expression unnecessarily stand as an obstacle for free speech; they should be limited in scope and duration²⁵.

Even though the constitutional provision allows Congress to enact copyright laws, the first to do so have been the States themselves²⁶. But the application of the conflicting state laws became too complicated which led to the adoption in 1790 of the Copyright Act²⁷ which

¹⁸ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 320

¹⁹ *Ibid.*

²⁰ Statute of Anne, 5th April 1710, 8 Ann. c. 19

²¹ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 320

²² *Ibid.*, p. 321

²³ N. WEINSTOCK., *Copyright's paradox*, loc.cit., p. 5

²⁴ *Ibid.*, p. 5

²⁵ *Ibid.*, p. 11

²⁶ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 319

²⁷ United States federal Copyright Act, 31st May 1790

contained more or less the same 14 years-protection for authors as the Statute of Anne. Subsequent state-wide legislations broadened the scope and duration of copyright protection. The Copyright Act of 1909²⁸ expanded the protection to 28 years renewable for a second 28 years term and added works in progress and speeches to the protected material²⁹. The Copyright Act of 1976³⁰ broadened the scope of protection to “*all written works fixed in a tangible medium of expression*”, expanded the duration of copyright to the life of the author plus 50 years (or 75 years in the case of corporate authors) and codified the existing judicial defence of fair use³¹. The Copyright act was again modified in 1980³² to include computer programs and in 1990³³ to comply with the Berne Convention³⁴ the United States ratified in 1989. The Audio Home recording act of 1992³⁵ addressed the concerns about piracy of musical works and sound recordings through the introduction of digital audio tape technology³⁶. Finally, the Sonny Bono Copyright Extension Act³⁷ and the Digital Millennium Copyright Act³⁸ brought last modifications in US copyright law in 1998. The first added twenty years to copyright term while the latter afforded protection against the circumvention of copy protection technologies³⁹.

This legislative history highlights a trend that exists nowadays in all system around the world: the development of a copyright regime that is broader, longer in duration and protects more aspects of an artistic creation. With time and the increasing value of the copyright market, copyright became more and more a full-fledged property right rather than a limited common grant designed to further a particular public purpose⁴⁰. Copyright changed from being a finely honed instrument of expressive diversity to becoming an aggressively protected conventional property⁴¹.

²⁸ United States federal Copyright Act, 1st July 1909, 60th US Congress, Pub.L. 60–349

²⁹ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 322

³⁰ United States federal Copyright Act, 19th October 1976, 94th US Congress, Pub. L. 94-553

³¹ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 322

³² United States federal Computer Software and Copyright Act, 12th December 1980, United States 96th Congress, Pub. L. 96-517

³³ United States federal Architectural Works Copyright Protection Act, February 7 1990, 101th US Congress

³⁴ Berne Convention for the Protection of Literary and Artistic Works, Berne, 9 September 1886

³⁵ United States federal Audio Home recording Act, 28 october 1992, 102nd US Congress, Pub. L. 102-563

³⁶ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 322

³⁷ United States federal Copyright Extension Act, 27th Octobre 1998, 105th US Congress, Pub.L. 105–298

³⁸ United States federal Digital Millennium Copyright Act, 28th Octobre 1998, 105th US Congress, Pub. L. 105-304

³⁹ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 322

⁴⁰ N. WEINSTOCK., *Copyright's paradox*, loc.cit., p. 6

⁴¹ *Ibid.*, p. 7

After having described the legislative development of the copyrights regime, we will now take a look at the nature of the regime itself in order to figure out where the origins of its current flaws lie.

Chapter 3: The Nature of modern copyright rules

Copyright forms with patents and industrial design rights the classical regime of intellectual property. Their purpose is to protect creative individuals by protecting their ideas from misappropriation.

The definition of intellectual property itself varies as much as the opinion authors have about it. The American Biographer James Parton described intellectual property in 1867 as “*a kind of property which is at once the most precious, the easiest stolen, and the worst protected*”⁴². Others authors have come to describe it as a “*regime by which media-culture-entertainment monopolies and oligopolies exert power over artists, culture producers, communities and nations*”⁴³. In the same vein, copyright has been described as a “*legal device used by a few gatekeepers to control a winner-take-all marketplace of artificial scarcity, in which far fewer works are made available to the public than are created*”⁴⁴. But we’ll get to the core of the systems critic in the second part.

From a judicial point of view, copyright is an exclusive right that grants its owner the control of the exploitation of a work and the power to grant access of it to others, subject to certain limitations and objections⁴⁵. Ownership of copyright confers to the author the right to copy, the right to make derivative works, the right of distribution and the right of performance and display of his work⁴⁶. Copyright is generated automatically upon the creation of a work, and authors don’t need to register their works to benefit from the ownership protection⁴⁷.

⁴² R. SPOO, *Without Copyright – Piracy, Publishing and the Public Domain*, New York, Oxford University Press, 2013, p. 1

⁴³ J. CHANG, « A day to sing », in *Cutting across media – appropriation art, interventionist collage and copyright law* (dir. K. MCLEOD, R. KUENZLI), Durham, Duke University Press, 2011, p. 243

⁴⁴ A. STROWEL, *Peer to peer file sharing and secondary liability in copyright law*, loc. cit., p. 16

⁴⁵ O. OLA, *Copyright collective administration in Nigeria – Lessons for Africa*, Berlin, Springer, 2013, p. 4

⁴⁶ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 323

⁴⁷ I. DAROUSSOU, A. LIOUKOU, K. METAXOPOULOS, V. MONO-EVANGOPOULOS, « Copyright protection there, but enforcement weak in Greece », in *Building and Enforcing Intellectual property value – an international guide to the boardroom 2003*, London, Global White Page Publishing, 2002, p. 220

Nevertheless, if they want to secure proper evidence of their ownership, they can register their work with a notary.

The majority of legal systems classify the privileges that copyright grants in *economic rights* (reproduction, adaptation and performance rights) and *moral rights* (the privilege to be identified as the author, control the derogatory treatment of the work)⁴⁸. Another aspect of moral rights includes the author's discretion to decide when his work is communicated to the public and in what context⁴⁹. The main difference between the two aspects of copyright is that the economic rights can freely be transferred by the author to someone else (e.g. publisher) while the author retains the moral rights irrespective of who owns the actual copyright⁵⁰.

Copyrightable subject matter includes a broad range of literary and artistic expression including books, songs, dances, computer programs, movies sculptures and paintings⁵¹.

Copyright protection has always had an international dimension given the easiness with which it can be infringed and copied (literary works before, musical creation and motion pictures today). From the Berne Convention in 1886 to the creation of the World Intellectual Property Organisation (WIPO) in 1967, there has always been an interest to tackle these problems collectively. Furthermore, considering the global copyright economy and the reach of the internet, territorial or regional initiatives seem to be obsolete⁵².

Even though copyright regimes in developed nations are broadly harmonized, differences between common law and civil law remain. On the one hand, common law emphasizes the protection of the "work" (therefore legal entities such as limited companies can also be considered as "author") and on the other hand, civil law privileges an "author's right system" that stresses the protection of the individual author of the work⁵³. The Anglo-American tradition relies on an instrumental justification whereas the continental European tradition relies on a natural rights justification for copyrights⁵⁴. While common law has a tendency to be more dynamic and open-ended, civil law is less prone to interdisciplinary or critical

⁴⁸ S. STOKES, *Art and Copyright*, Portland – Oregon, Hart Publishing, 2012, p.3 et 4

⁴⁹ A. STROWEL, *Peer to peer file sharing and secondary liability in copyright law*, loc. cit., p.8

⁵⁰ S. STOKES, *Art and Copyright*, loc. cit., p. 5

⁵¹ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 323

⁵² M. BATTISTI, « Web 2.0 – Nouveaux usages, nouveaux droits ? », in *Alt+0169 : copyright v. copywrong*, Cahiers de la documentation, année 66, n°4, 2012, p.10

⁵³ S. STOKES, *Art and Copyright*, loc. cit., p. 5

⁵⁴ M. LAMBRECHT, J. CABAY, « Remix Allowed- Avenues for copyright reform inspired by Canada », *Journal of Intellectual Property Law and Practice*, Vol. 10, n°5, 2015, p. 22

entanglements and more focused on black-letter reading of the law⁵⁵. In this sense, European copyright law in the matter is characterized by a broad interpretation of the various exclusive rights and a strict interpretation of the regime's limits⁵⁶. Furthermore, the concept of originality varies from one system to another: to be original and therefore protected by copyright, skill and labour suffice in common law while civil law requires the abstract notion of creativity (the work has to reflect the personality of its creator)⁵⁷. The prestigious status granted in continental law to the author translates into a standard of originality that is higher than in the Anglo-American copyright system⁵⁸.

Nevertheless, in both systems the threshold for protection is defined by two conditions: a work must exhibit a form of originality (in the Anglo-Saxon or continental sense) and has to be fixed in a tangible medium of expression⁵⁹. Furthermore, the idea/expression dichotomy provides that copyright does not protect ideas, but only the form in which they are expressed⁶⁰. As copyright is a right of property, the infringement of that right is actionable without proof of damage⁶¹. It is also relevant to highlight the fact that copyright is a purely negative right⁶². Thus, unlike patents, copyrights don't give their owner the exclusive right to make or use the copyrighted material, but only allow them to prevent unauthorized copying⁶³.

The main limits to copyrights that are broadly shared in the different legal systems are the *fair use doctrine* (also called *fair deal* in UK law and whose civil law counterpart is the *théorie de l'abus de droit*) and the public domain, the common property pool in which creative works fall after copyright protection expired. We will examine these limits to copyright and their critics in the second part.

Now that we have taken a look at copyrights history and its current nature, we need to address the phenomenon that destabilized the whole system: the digital technology revolution of the late 20th century.

⁵⁵ E. HEMMUNGS WIRTÉN, « Visualizing Copyright- Seeing Hegemony », in *Cutting across media – appropriation art, interventionist collage and copyright law* (dir. K. MCLEOD, R. KUENZLI), Durham, Duke University Press, 2011, p. 263

⁵⁶ M. LAMBRECHT, J. CABAY, « Remix Allowed- Avenues for copyright reform inspired by Canada », *loc. cit.*, p.1

⁵⁷ S. STOKES, *Art and Copyright*, *loc. cit.*, p. 5

⁵⁸ S. STOKES, *Digital Copyright – Law and Practice*, Oxford, Hart Publishing, 2009, p. 6

⁵⁹ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, *loc. cit.*, p. 323

⁶⁰ S. STOKES, *Art and Copyright*, *loc. cit.*, p. 6

⁶¹ *Ibid.*, p. 231

⁶² *Ibid.*, p. 4

⁶³ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, *loc. cit.*, p. 324

Chapter 4: The Technological revolution of the late 20th century

Section 1: The new technologies

Reform in a legal system is often seen as the need to adapt to social change and opinions shifting on a political matter. But the main reason copyright legislation had to be updated in the last centuries has been the development of new technologies. There have been three main technological revolutions that have sparked reforms in the copyright regime. The advent of the printing press in Europe during the 15th century was the first impulse to protect the reproductions of authorial rights because it became easier to copy them. The second revolution, the development of the broadcasting technology (radio and television) in the 1920s, triggered a new wave of expansions and adjustments to copyright⁶⁴. Finally, the greatest set of challenges to the copyrights laws around the world has been the new modes of expression that emerged with the arrival of the digital technology and the internet in the 90's. This last stage marks the transition from the analogue to the digital age of music consumption, meaning that music isn't any longer fixed on material devices (vinyl's, cassettes or CDs) but is dematerialized into digital files. In this work, we will focus on the last technological revolution and the part it plays in distribution of musical works in order to understand today's copyright crisis.

§1. The MP3-technology

One of the major revolutions in the music industry appeared with the development of the MP3-technology. In 1987, the Fraunhofer ISS-A was charged with the task of finding a way to make sound files smaller in order to develop digital audio broadcasting by stocking a lot of audio files on a hard drive⁶⁵. By removing all the sounds inaudible to human ears, the scientists created in 1991 a sound format 1/12 the size of the ones (.WAV) used before⁶⁶. The

⁶⁴ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 319

⁶⁵ C. De WALQUE, *Le MP3 ou comment ébranler un système – Musique, Internet et droit d'Auteur*, Mémoire de Master en Sciences Politiques à l'Université Catholique de Louvain, Promoteur REMICHE B., Année Académique 2000-2001, p. 6

⁶⁶ C. De WALQUE, *Le MP3 ou comment ébranler un système – Musique, Internet et droit d'Auteur*, loc. cit., p.6

result was the modern MP3 (which stands for “Motion Picture/Audio layer 3”): a standard for storing music in digital, compressed form⁶⁷.

Because this new technology didn’t include an anti-theft device, it was soon used broadly to disseminate and illegally share music over the internet⁶⁸. Digital music on CD can be converted to MP3-files on a computer through a process called “ripping” and this digital file can then be efficiently transmitted and distributed through the Internet⁶⁹. Furthermore, a music file shared online can be burnt back onto a CD, with some loss of the audio’s quality.

But the development of the MP3 technology was only the first step which led to the global piracy system we know today. After making a musical format that was small enough to be shared over the internet, software was still needed in order to make users seeking a music file meet people who possessed a digital MP3 version of the desired song.

§2. The Peer-to-Peer technology

The big technological advancement that disrupted the musical industry has definitely been the development in the 90’s of the *peer to peer* technology. Peer-to-peer file sharing (P2P) enables people to exchange information over the internet via many equal or “peer” machines linked across a network, rather than on a central server⁷⁰. It’s a decentralized system of computers which interact with each other, allowing them to share information directly without the intervention of servers. The system is based on the fact that computers in the network can act as both servers (the origin of the information) and clients (the destination of the information)⁷¹. Basically, if a user is seeking a precise file (movie, song, computer game) and another user has this file on his computer, then the first can download the file directly from the other user’s computer. This is why the system is called *peer-to-peer*: users can exchange all the files they have on their computer only by using the P2P software. This technology was developed in the late ‘90s and popularized by the file sharing website Napster in 1999.

Regardless of the good or bad effects of this technology, the recording industry didn’t include any of them until recently (neither MP3 nor P2P) in their business models and held on to the old analogue distribution of music. The digital developments only got the majors attention

⁶⁷ S. STOKES, *Digital Copyright – Law and Practice*, loc. cit., p.147

⁶⁸ C. De WALQUE, *Le MP3 ou comment ébranler un système – Musique, Internet et droit d’Auteur*, loc. cit., p.8

⁶⁹ S. STOKES, *Digital Copyright – Law and Practice*, loc. cit., p.147

⁷⁰ A. STROWEL, *Peer to peer file sharing and secondary liability in copyright law*, Cheltenham, Edward Edgar, 2009, p.1

⁷¹ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 505

once they were used by pirates to share copyrighted music files. Some authors argue that if the recording industry had been more open to innovations such as the MP3 and online music distribution, the piracy market which sprung out of an unused part of the internet wouldn't have had the popular success it got from the start⁷².

The development of the MP3 and P2P technologies allowed the creation of new business models which in turn generated questions about the legality these emerging markets. We'll now take a look at the main challenges these innovation brought to the existing copyright liability system.

Section 2: Legal questions

Intrinsically, the MP3 technology and P2P file sharing aren't illegal, only the copyright infringing activity of users of these technologies is prohibited.

In the case of copyright infringement over the internet, we have to make a difference between the liabilities of the three main actors implicated in the illicit activity: the *content-provider* (the person who uploads the copyrighted material, e.g. the individual user), the *service provider* (the person who gives the content-provider the technical means to upload the copyrighted material, e.g. Peer-to-Peer networks such as Napster, Grokster, ThePirateBay) and the *access-provider* (the person who gives the user the access to the service providers website, e.g. Google and telecom companies)⁷³.

Content-providers are liable for copyright infringement because in the eyes of the law, downloading or uploading a music file equals making a copy of it, which always requires the prior authorization of the copyright holder⁷⁴. In the same line of thinking, putting a song on the internet is the equivalent of communicating a work to the public, a prerogative reserved exclusively to the copyright owner⁷⁵.

Access-providers are usually exempt from any liability since modern legislation has provided them with safe heavens in order to avoid being sued. They were granted this exception because it is materially impossible for them to control all illegal activity perpetrated by means of their services.

⁷² R.J. PHILLIPS, *Rock and Roll fantasy? The reality of going from garage band to superstardom*, loc.cit., p. 100

⁷³ M. BUYDENS, *Droits d'auteur et internet – Problèmes et solutions pour la création de données en ligne contenant des images et/ou du texte*, Bruxelles, Services fédéraux des affaires scientifiques, techniques et culturelles, 1998, p. 35

⁷⁴ J.-C. LARDINOIS, *Les contrats commentés de l'industrie de la musique 2.0*, loc. cit., p. 213

⁷⁵ *Ibid.*

The main problem with peer-to-peer technology lies in the question whether *service providers* (providers of peer-to-peer networks) are liable when users infringe copyright through their network⁷⁶. If a service provider's software is used to download a MP3-file of a copyrighted song, it enables an act of copying which needs the authors consent⁷⁷. Furthermore, P2P user also infringe on the moral rights of the author, because uploading a song to the internet often includes a degradation of its quality⁷⁸.

The music industry, represented in the Recording Industry Association of America (RIAA) quickly took action and started suing in 1997 individuals who were sharing MP3 files of copyrighted material on their website without the author's consent⁷⁹. The following cases are particularly interesting because they concern liability problems in US law that hadn't been addressed before. The basic copyright system was based on primary infringement for a person who directly copied a digitized work and on secondary infringement for people who knowingly distributed infringing copies⁸⁰. But the *Napster* and *Grokster* cases involved the question if manufacturing or distributing a program that can facilitate copyright infringement by others amounts to copyright infringement by the program provider himself⁸¹. We'll now take a look at the courts' and the legislators' answer to the new technologies and the changes they brought to the market of musical distribution.

Section 3: When innovation and law conflict

§1. The Courts' answer

Before the digital revolution copyright property was an excludable good, meaning that the enforcement of rules and exclusive use was easy and cheap (at least from the majors' point of view). But with the emergence of new file sharing technologies, transmission and copying costs fell drastically, the web allowed more anonymity and online piracy became a widespread global problem. The result was the rising cost of copyright enforcement and this property became therefore "non-excludable"⁸². Since it was impossible to sue every single

⁷⁶ A. STROWEL, *Peer to peer file sharing and secondary liability in copyright law*, loc. cit., p.1

⁷⁷ C. De WALQUE, *Le MP3 ou comment ébranler un système – Musique, Internet et droit d'Auteur*, loc. cit., p.56

⁷⁸ *Ibid.*, p.54

⁷⁹ *Ibid.*, p.58

⁸⁰ S. STOKES, *Digital Copyright – Law and Practice*, loc. cit., p. 147

⁸¹ *Ibid.*

⁸² A. GOSSERIES, « How (Un)fair is Intellectual Property », in *Intellectual property and theories of justice* (dir. A. GOSSERIES, A. MARCIANO, A. STROWEL) New York, Palgrave MacMillan, 2008, p. 12

infringing user, the main music labels adopted two approaches: do a few mediatized user lawsuits in order to frighten the general public and legal proceedings against the service provider of the P2P software and networks.

The first and most important lawsuit was against *Napster*, a company which offered its MusicShare software (a P2P service) for free. This software allowed users to share music and movie files with each other which were on each other's computers⁸³. In essence, Napster managed a file indexing service and provided software which allowed users to search for, request, download and play works, but did not in itself copy or store files⁸⁴. It worked similar to like a musical dating agency: it created links between seekers and possessors, but wasn't concerned by anything which happened afterwards⁸⁵. The impact of this software on the music market was huge, considering that it reached over 70 million users in its relatively brief period of operation⁸⁶.

In this case, the Californian courts (district and court of appeal) found that the service provider was responsible for contributory and vicarious liability by facilitating indirectly copyright infringement by its users⁸⁷. The conditions for *vicarious liability* were fulfilled: Napster encouraged copyright infringing behaviour and made profits from the illegal activity through advertisement on the website⁸⁸. Furthermore, Napster was also liable for *contributory infringement* since it had knowledge of the illicit activities of its users and failed to purge copyrighted material from the system⁸⁹. The fact that the Napster software could also have been used for legal purpose (the argument that it was "capable of substantial non-infringing use" established in the Sony-Betamax ruling⁹⁰) was rejected by the courts⁹¹. As a consequence of the judicial decision, Napster shut down its system in 2002 and was shortly afterwards purchased by Bertelsmann, one of the plaintiffs record labels⁹².

⁸³ United States Court of Appeals for the Ninth Circuit, *A&M Records, Inc. v. Napster, Inc.*, 12th February 2001, 239 F.3d 1004

⁸⁴ S. STOKES, *Digital Copyright – Law and Practice*, loc. cit., p. 151

⁸⁵ L. LESSIG, *L'avenir des idées – le sort des biens communs à l'heure des réseaux numériques*, Lyon, Presse Universitaire de Lyon, 2005, p. 161

⁸⁶ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 505

⁸⁷ J.-C. LARDINOIS, *Les contrats commentés de l'industrie de la musique 2.0*, loc. cit., p. 220

⁸⁸ C.F.M. DE VRIES, « Subjectieve verwijtbaarheid », *Tijdschrift voor Auteurs-, Media- en Informatierecht (A.M.I.)*, 36 ed., n°1, januari/februari 2012, p. 3

⁸⁹ S. STOKES, *Digital Copyright – Law and Practice*, loc. cit., p. 152

⁹⁰ United States Supreme Court, *Sony Corp. of America v. Universal City Studios, Inc.*, 17th January 1984, 464 U.S. 417

⁹¹ J.-C. LARDINOIS, *Les contrats commentés de l'industrie de la musique 2.0*, loc. cit., p. 220

⁹² R. GALVIN, J. TURNER, A. ORTEL, « The risk to corporations from employees' online piracy », loc.cit., p. 117

The second generation of P2P websites tried to dodge the Napster case doctrine by developing a decentralized file sharing software which made it more difficult to find them liable for user infringement of copyright. Napster had been easy to indict because all information about the shared files was on Napster's central Web site, and therefore they couldn't claim they didn't know about the copyright infringing activity of their user. Grokster, one of the second generation P2P networks, on the other hand, did not have a central server on which the names and the nature of the swapped files was visible and therefore it was easier for them to claim they weren't aware of the online piracy. But courts around the world adapted their jurisprudence to encompass the new sites such as Kazaa, Grokster or Rapidshare⁹³. The US Supreme Court introduced a new category of liability (beside contributory and vicarious liability), namely *inducement liability*⁹⁴. If a company would provide a service with the intention to encourage illegal activities of users, it was liable for the copyright infringing activity it enabled⁹⁵.

The Supreme Court justified its decision in the following terms:

*“Despite offsetting considerations, the argument for imposing indirect liability here is powerful, given the number of infringing downloads that occur daily using respondent’s software. When a widely shared product is used to commit infringements, it may be impossible to enforce rights in the protected work effectively against all direct infringers, so that the only practical alternative is to go against the device’s distributor for secondary liability on a theory of contributory or vicarious infringement”*⁹⁶.

By creating a new form of liability in order to save the recording industry from total collapse, the Supreme Court took the opposing position to the Appeal Court which had suggested:

“We live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovations... The introduction of a new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an

⁹³ BGH (Bürgergerichtshof), Urt. v. 15. 8. 2013 – I ZR 80/12 (OLG Hamburg), « Konkretisierung der Störerhaftung von Rapidshare – File Hosting-Dienst », *Gewerblicher Rechtsschutz und Urheberrecht (G.R.U.R.)*, 10/2013, p. 1030

⁹⁴ C.F.M. DE VRIES, « Subjectieve verwijtbaarheid », *loc. cit.*, p. 4

⁹⁵ *Ibid.*

⁹⁶ United States Supreme Court, *MGM Studios, Inc. v. Grokster, Ltd.*, 27th June 2005, 545 U.S. 913

*MP3 player. Thus, it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude*⁹⁷.

These two affirmations show the divisions in legal ranks on the question whether the clash between new technologies and old business models should be regulated by the law or balanced by the market.

Even though Napster, Grokster and other websites were closed down, the concept of P2P file sharing had hence spread around the online community. An army of new P2P file sharing websites were created, always seeking new ways to exploit the law's loopholes. The record industry continues, to this day, to sue the administrators of these websites (as was the case in the latest *ThePirateBay*-case of 2010).

But simultaneously, media corporations started conducting lawsuits against individual users. According to US law, a copyright infringer may be ordered to pay actual damages and profits or statutory damages between 200\$ and 150 000\$, depending whether or not the infringement was knowing or wilful⁹⁸. In Belgium, a SABAM (Société d'Auteurs Belge – Belgische Auteurs Maatschappij) and IFPI lawsuit against a web user who had shared 3500 copyrighted MP3 files online for 5 months ended up with him being sentenced to pay 100 000 € in damages⁹⁹. But enforcement through court decisions is relatively costly and an action for damages is only interesting when the financial standing of the defendant is very strong (which is rarely the case)¹⁰⁰. The RIAA's idea was to make a few massively publicised cases that inflicted heavy fines on individual users in order to dissuade others from infringing. But the user-lawsuits did more harm than good: the record labels are at an all-time low in the public opinion and illegal downloading hasn't been stopped by the intimidation efforts of the music industry. Worst, some of its rivals even took advantage of the public relations debacle. For instance, Apple launched in 2004 a campaign to give away 100 million free downloads on its online music distribution platform iTunes and actually used people who were being sued

⁹⁷ US Court of Appeal for the Ninth Circuit, *MGM Studios, Inc. v. Grokster, Ltd.*, 19 August 2004, 380 F.3d 1154

⁹⁸ R. GALVIN, J. TURNER, A. ORTEL, « The risk to corporations from employees' online piracy », *loc.cit.*, p. 119

⁹⁹ Corr. Bruxelles, 28 avril 2003 et 28 octobre 2004, inédits, cités par SCHMITZ I. « Le Peer-to-Peer ou le réveil de Robin des bois », dossier consultable sur www.droit-technologie.org, 9 février 2005

¹⁰⁰ I. DAROUSSOU, A. LIOUKOU, K. METAXOPOULOS, V. MONO-EVANGOPOULOS, « Copyright protection there, but enforcement weak in Greece », *loc. cit.*, p. 222

by the Recording Industry Association of America (RIAA) in the commercial promoting iTunes¹⁰¹.

Another initiative from the record companies has been to focus on corporations that are helping their employees to illegally swap copyrighted files using corporate computers¹⁰². In this way, the RIAA started numerous cases against Fortune 500 Companies for turning a blind eye on the copyright infringing activities at their workplaces.

§2. The Legislators' answer

The courts and interests groups (such as the RIAA) were not the only one who acted to face the challenges of the new online technologies. At the international level, the WIPO Performances and Phonograms Treaty¹⁰³ and the WIPO Copyright Treaty¹⁰⁴ were adopted in 1996 at the World Intellectual Property Organisation (WIPO) to regulate the online distribution of works. These acts confirmed that traditional copyright rules, such as the right of reproduction and the right to control the communication to the public, also applied to the online domain¹⁰⁵.

At the European level, these treaties were implemented through the European Union directive on copyright in the information society in 2001¹⁰⁶. Besides codifying the WIPO rules into European law, the directive also introduced a “triple test” that allows member states to derogate from it by establishing exceptions and limitations to the copyrights if they respect three conditions: the exceptions have to affect only specific cases, they can't infringe on the normal exploitation of the work and they can't cause unjustified damage to the authors legit interests¹⁰⁷. The understanding of copyright as an *author's right* in continental Europe was again confirmed by the European Court of Justice case law which stated that these exceptions

¹⁰¹ R.J. PHILLIPS, *Rock and Roll fantasy? The reality of going from garage band to superstardom*, loc.cit., p. 91

¹⁰² R. GALVIN, J. TURNER, A. ORTEL, « The risk to corporations from employees' online piracy », loc.cit., p. 116

¹⁰³ World Intellectual Property Organization Performances and Phonograms Treaty, 20th December 1996, Geneva

¹⁰⁴ World Intellectual Property Organization Copyright Treaty, 20th December 1996, Geneva

¹⁰⁵ J.-C. LARDINOIS, *Les contrats commentés de l'industrie de la musique 2.0*, loc. cit., p. 208

¹⁰⁶ Dir. (CE) 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J.E.U., L 167, 22nd June 2001, p. 10

¹⁰⁷ M. BATTISTI, « Web 2.0 – Nouveaux usages, nouveaux droits ? », loc. cit., p. 9

must respect the Roman law maxim *exceptio est strictissimae interpretationis*, and therefore the interpretation must favour the author, not the user¹⁰⁸.

On the other side of the Atlantic, the United States Congress adopted the famous Digital Millennium Copyright Act (DMCA) in 1998 which amended the Copyright act of 1976 in order to adapt to the new technologies involved in copyright infringement¹⁰⁹. The act established anti-circumvention and anti-trafficking bans that prohibited the removal or alteration of *copyright management information*, such as digital watermarks and identifying information¹¹⁰. It also asserted the concerns of the most powerful opposing interest groups (internet service providers and telecom companies) by creating a series of online service provider safe harbours that insulate them from liability for acts such as transmitting, storing or linking to unauthorized content¹¹¹. Furthermore, this act allows a limitation to the liability of online service providers in case of copyright infringement of its users¹¹². A *notice and take down*-procedure (NTD) exempts the service providers if they fulfil control and intervention responsibilities on their website and quickly remove copyright infringing files as soon as they discover them¹¹³. If the service providers are informed through a NTD procedure of illegal file sharing on their website and fail to act against it (as was the case for The Pirate Bay¹¹⁴), then they are liable for the infringing activity¹¹⁵. Beside the NTD procedure, service providers now also have the responsibility to make sure that the copyrighted material that was taken down doesn't get uploaded again (this procedure is called *notice and stay down*)¹¹⁶.

Legislative evolutions on both sides of the Atlantic are being considered by many to be the result of intense lobbying from the part of the big record companies that aim to maintain the monopolistic powers they acquired before the advent of the internet. Nowadays, there is an unprecedented concentration of ownership of copyright in the hands of a few, mostly US-based corporations. Four record labels (Sony BMI Music, Warner Music Group, EMI Music Group and Universal Music) control about 85% of the US market for recorder music and 70% worldwide¹¹⁷. The monopoly that labels and record companies have in the music business and

¹⁰⁸ M. LAMBRECHT, J. CABAY, « Remix Allowed- Avenues for copyright reform inspired by Canada », *loc. cit.*, p. 24

¹⁰⁹ J.-C. LARDINOIS, *Les contrats commentés de l'industrie de la musique 2.0*, *loc. cit.*, p. 222

¹¹⁰ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, *loc. cit.*, p. 501

¹¹¹ *Ibid.*, p. 500

¹¹² Art. 512, DMCA

¹¹³ C.F.M. DE VRIES, « Subjectieve verwijtbaarheid », *loc. cit.*, p. 5

¹¹⁴ District court (tingsrätt) of Stockholm (Sweden), 17 april 2009, Verdict B 13301 – 06

¹¹⁵ C.F.M. DE VRIES, « Subjectieve verwijtbaarheid », *loc. cit.*, p. 10

¹¹⁶ M. BATTISTI, « Web 2.0 – Nouveaux usages, nouveaux droits ? », *loc. cit.*, p.8

¹¹⁷ A. STROWEL, *Peer to peer file sharing and secondary liability in copyright law*, *loc. cit.*, p. 111

the resulting commercial influence they dispose of also allowed them to pressure and lobby lawmakers in order to prevent the enactment of laws that would balance the market or favour more artist revenues¹¹⁸. On the contrary, they have been advocating for ever more draconian copyright laws and more relaxed antitrust norms¹¹⁹. One flagrant example was the way a House Judiciary Committee staffer snuck at the RIAA's request a take-away provision into an unrelated bill on satellite retransmission in 1999¹²⁰. The inclusion was made at the end of the Congress without a bill having been introduced and without hearings, and the responsible staffer was shortly thereafter hired by the RIAA for a very well-paid position¹²¹. Artists are the first ones to object to these practices that benefit the recording industry. As singer Sheryl Crow complained "*to let the looming presence of large organized special interest groups, working on behalf of film and recording companies, control the fate of the artist community is alarming*"¹²².

The legislative developments of copyright around the world have been deeply influenced by the interests of the current rights owner who defend the monopolies they established before the advent of the new digital technologies. As it stands now, copyright legislation and its enforcement represent fruitless efforts to preserve the *ancient regime* of the copyright industries¹²³. Even the Director General of the WIPO, Dr. Francis Gurry, argued that "*a successful copyright policy has to be based on neutrality to technology and to business models, and should not preserve business models established under obsolete or moribund technologies*"¹²⁴.

§3. The Doctrine's answer

The consequence of these technological developments is debated among scholars and interest holders. The music and entertainment industries have come to describe the widespread use of this technology as a threat to the creative market and a counter-incentive for artists to create. On the other hand, Alexander Peukerts' (an intellectual property law professor at the Goethe-University) opinion on the matter is that "*Peer-to-peer networks provide architecture for*

¹¹⁸ A. STROWEL, *Peer to peer file sharing and secondary liability in copyright law*, loc. cit., p.8

¹¹⁹ *Ibid.*, p. 35

¹²⁰ *Ibid.*, p. 172

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*, p. 12

¹²⁴ *Ibid.*, p. 40

stable, cheap and global sharing of any digitized information, be it music, movies, software, writings or other data. The end-to-end or peer-to-peer architecture makes it possible for thousands of terabytes to rush through P2P networks every month without anybody having to invest in and provide for a centralized server. The technology features characteristics that prompt great hopes for the advent of the global knowledge community". In the same vein, Professor Lessig pointed out that Napster's true potential wasn't that it allowed a huge number of copyright infringements, but more the fact that it granted access to a huge quantity of content¹²⁵. Besides giving out for free modern pop songs that could be bought in any retail store, the site gave above all access to old songs and albums that weren't commercialized anymore and impossible to find on the market. The architecture of the internet erases the market's entry barriers by granting access to resources that would otherwise not have been distributed¹²⁶.

Furthermore, some authors argue that in the context of new markets emerging, the development of new competing business models and the fast advance of technology, the incumbent copyright industries have used the law to stifle the competition from new media distributors. Just as the London Stationers tried to use perpetual copyright protection to prevent competition from provincial publishers, the record labels' lawsuits against Napster, MP3.com and YouTube are primarily a defensive mechanism against competing business models¹²⁷. Unfortunately, law may not be able to create new successful markets but it can be used to kill emerging businesses¹²⁸. Artists deserve remuneration, but this remuneration right shouldn't be translated into a right granted to the record labels to control the way innovation should evolve in new industries¹²⁹. This has resulted in a veto power the music industry now has over innovation: they made sure that no investor will support a start-up whose objective is to distribute content over the internet unless it has the approval of the music industry¹³⁰. The blurry definition of the substantial non-infringing use doctrine (that provides that a technology whose main use is non-infringing is legal even if it can be in some way used for copyright infringement) could discourage investment in new technologies out of fear that it could be used for copyright infringing activities and therefore be illegal¹³¹. From a previously technology neutral position, legislation has shifted in a way that allows copyright owners to

¹²⁵ L. LESSIG, *L'avenir des idées – le sort des biens communs à l'heure des réseaux numériques*, loc. cit., p. 163

¹²⁶ *Ibid.*, p. 166

¹²⁷ N. WEINSTOCK, *Copyright's paradox*, loc.cit., p. 75

¹²⁸ W. PATRY, *How to fix copyright*, loc. cit., p.37

¹²⁹ L. LESSIG, *L'avenir des idées – le sort des biens communs à l'heure des réseaux numériques*, loc. cit., p. 247

¹³⁰ *Ibid.*

¹³¹ C.F.M. DE VRIES, « Subjectieve verwijtbaarheid », loc. cit., p. 7

create artificial scarcity in a digital environment and to regulate technologies developed by third parties to control access to their works¹³². Copyright owners thus can block the use of a new technology if there is a possibility that it might be used to infringe on copyright. A lot of authors bemoan these evolutions and suggest that technology shouldn't be considered as the enemy but rather the means by which market expectations are created and satisfied¹³³.

¹³² W. PATRY, *How to fix copyright*, *loc. cit.*, p. 43

¹³³ *Ibid.*, p. 39

Part II: Is the modern copyright system fair?

The modern copyright system is an evolution of more than five centuries of legislative developments, court's decision and technological revolutions. But the evolution of the copyright system ended up on a modern conflict between user behaviour and the law. As pointed out in the beginning of the first part, this lack of respect of the law is rooted in the general public's mentality. They don't consider the philosophical values they cherish to be well represented by our current rules. The Copyright system is perceived as *unfair*.

But is this popular uproar against existing rules and practices justified? In order to correctly ask the questions about the fairness of the modern copyright rules, we first have to take a look at the philosophical justifications that lie at his basis (1) before verifying if the values that copyright is supposed to embody are present in the current music business (2).

Chapter 1: Philosophical justification of Copyright

Fundamental justifications for copyrights are based on the principle of property itself. The institution of private property lies at the heart of the modern capitalistic democracies we live in. The Blackstonian definition of property goes as follows “*(the) sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe*”¹³⁴. Locke described property as the main reason why men leave the state of nature to join an organized civil society¹³⁵. It justifies our economic system (capitalism) and underlines some democratic principles of our society (the state cannot take away what is rightfully mine). It is therefore not surprising that when our parliaments came to legislate over creations of the mind, they developed an intellectual property system that resembles a lot the property system of tangible goods.

¹³⁴ W. PATRY, *How to fix copyright*, loc. cit., p. 178

¹³⁵ J.W. YOLTON, *Locke – an introduction*, Oxford, Blackwell, 1985, p. 68

We'll first take a look at two philosophical justifications of private property that can serve as reasons for copyright before analysing two concepts that justify directly the copyright institution.

Section 1: The private property justifications

Two interesting concepts that advocate for private property are the Lockean natural law theory and the Rawlsian liberty principle.

Natural law theory

The natural law theory, as John Locke has stated in his Second treatise of Civil Government, supposes that *“every man has a property in his own person. This no body has any right to but himself. The labour of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property”*¹³⁶. In this theory, labour plays a crucial role in the justification of property: working on something equals projecting oneself into that thing and, in a way, to create it¹³⁷. Man has property over things that used to be in the common possession but which he transformed through his labour. In light of this theory, copyright is justified by the fact that if a man has mixed his intellectual efforts (labour) with music, ideas or concepts (something that lied in the state of nature) then the fruit of his mental creativity should be his.

But some authors have come to advocate for an understanding of intangible property different from the one we have for material goods. One argument that provides for a different conception of Lockean property and copyright property is the idea of “non-rivalry”. The total amount of Lockean property, say, a parcel of land, is materially limited and the use by one individual lessens the extent to which another can use it¹³⁸. The consumption of the land is therefore *rival*. On the other hand, my use of intellectual property does not reduce the degree to which my neighbour can use it¹³⁹. This non-rivalry principle highlights that there is an intrinsic difference between theft of a tangible property and the online piracy of intellectual

¹³⁶ S. STOKES, *Art and Copyright*, loc. cit., p. 17

¹³⁷ B. EDELMAN, *Le sacre de l'auteur*, Paris, Seuil, 2004, p. 197

¹³⁸ A. GOSSERIES, « How (Un)fair is Intellectual Property », loc. cit., p. 10

¹³⁹ J.-C. LARDINOIS, *Les contrats commentés de l'industrie de la musique 2.0*, loc. cit., p. 205

property: it does not deprives the property owner of its use. But it prevents him from enjoying the full benefits of his creation.

Liberty principle

Rawls on the other hand, argues that property is one of the core values that are needed for men to live in a free society. He expresses this idea in his liberty principle: “*Among the basic liberties of the person is the right to hold and to have the exclusive use of personal property. The role of this liberty is to allow a sufficient material basis for a sense of personal independence and self-respect both of which are essential for the development and exercise of the moral powers*”¹⁴⁰. The concepts of independence and artistic liberty advocated by Rawls play a major role in the justification of copyright. Copyright defenders often point out the fact that copyright was created in order to grant financial independence to artists in a way that allowed them to achieve works that also criticised the powerful. Since artists didn’t have to rely on church or states donations anymore and could finance themselves through an individual property right (copyright), they created more freely and the result was an enhanced freedom of expression.

But modern authors have come to dismiss this theory by arguing that the battle against governmental control over creativity was won only to reinforce the control of the market over it¹⁴¹. As Mr. Weinstock claims: “*Copyright once helped to free authors and the press from servile dependency on royal and church patronage; it now gives behemoth media conglomerates control over the images, sounds, and texts that are the very language of our culture*”¹⁴². The nature and opinion of published works are always dependent on the source of financial support. Before copyright authors were dependent on the government and the church for financing and their content was therefore influenced by their patron. Today, artists are dependent on the market imperatives (maximum output for minimum input and the commercial value of an artist trumps his talent).

Furthermore, some authors have tried to justify copyright through Rawls maximin principle that inequalities are tolerated insofar as they maximize the support of the least advantaged in

¹⁴⁰ R.P. MERGES, *Justifying intellectual property*, Cambridge, Harvard University Press, 2011, p. 105

¹⁴¹ L. LESSIG, *L’avenir des idées – le sort des biens communs à l’heure des réseaux numériques*, loc. cit., p. 331

¹⁴² N. WEINSTOCK., *Copyright’s paradox*, loc.cit., p. VII

the society¹⁴³. Therefore, even though intellectual property rights lead to distributional unfairness, it is justified if one can prove that the weakest members of humankind benefits from this system. The idea goes: there is no need to justify the distributional consequences of a basic liberty if it is truly basic¹⁴⁴. We will address this maximin later in the “winner-take-all”-section, and ask the question if copyright, while granting a monopolistic power to a few, also benefits the least well-off of society.

Section 2: The copyright property justifications

Two philosophical theories that argue in favour of copyright itself are the just-reward theory and the personality theory.

Just-reward theory

The just-reward theory, also called desert theory or value-added labour theory, justifies copyright on the basis that the effort the artist did to create a work should award him a proprietary right that guarantees he will be recognized and rewarded for his labour¹⁴⁵. This theory is also the ground for the unjust enrichment argument based on the principle *it is unjust to reap where you have not sown*¹⁴⁶. The *sweat of the brow* justification for copyright as formulated by the House of Lords also relies on this philosophy: “*anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may reap what the copyright owner has sown*”¹⁴⁷.

Personality theory

The personality theory, advocated by the likes of Kant and Hegel, argues that copyright is based on the assumption that the work of an artist is an extension of his own personality¹⁴⁸. Therefore, there is a natural obligation for society to respect the author’s ownership of his

¹⁴³ R.P. MERGES, *Justifying intellectual property*, loc. cit., p. 104

¹⁴⁴ *Ibid.*, p. 117

¹⁴⁵ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 325

¹⁴⁶ S. STOKES, *Art and Copyright*, loc. cit., p. 16

¹⁴⁷ S. STOKES, *Digital Copyright – Law and Practice*, loc. cit., p. 6

¹⁴⁸ S. STOKES, *Art and Copyright*, loc. cit., p. 19

works¹⁴⁹. Because production of mental labour is exclusively produced by the workers mind, this immaterial property should even be regarded as more sacred than tangible property¹⁵⁰. Especially in civil law countries, where the authors' moral rights play a crucial role, this theory is well represented in the vision that every person can claim protection of his personality and therefore copyright as an extension of the artists personality has to be sheltered from harm¹⁵¹. Whereas the common law term *copyright* puts the emphasis on the right to make copies for the purpose of promoting arts and literature, civil law countries use the term *droit d'auteur*, *Urheberrecht* or *derecho de autor* to emphasize the importance of the author in their copyright regimes¹⁵². But as we will further analyse in the public good section, this theory is highly criticized by a great number of authors that consider artistic creation to be always influenced by pre-existing artistic work from the public domain. They distance themselves from the romantic civil law concept of the artist as a genius whose creative activity involves nothing else but his own mind. The idea is that those artists are always part of an artistic community that impacts their works¹⁵³.

Law

All these philosophical justifications are at one point or another used in the copyright debate, may it be in the media, in the doctrine or in front of courts. Nevertheless, we can note that nowadays the predominant philosophical framework underlining modern copyright law present in constitutions and Acts around the world is mainly utilitarian and instrumentalist¹⁵⁴. The American Constitution highlights this in its proviso that copyrights main purpose is “to promote the Progress of Science and useful arts”. The statute of Anne's original name is *An Act for the Encouragement of Learning*. Justices of the Supreme Court have also come to remind the utilitarian nature of copyright again and again. Justice Stewart put it in these words: “The immediate effect of our copyright law is to secure a fair return to an author's creative labour. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good”¹⁵⁵. And Justice Stevens stated: “The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special

¹⁴⁹ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 324

¹⁵⁰ S. STOKES, *Art and Copyright*, loc. cit., p. 19

¹⁵¹ *Ibid.*

¹⁵² R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 326

¹⁵³ S. STOKES, *Art and Copyright*, loc. cit., p. 21

¹⁵⁴ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 325

¹⁵⁵ *Ibid.*, p. 325

private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved”¹⁵⁶. Even on the old continent, the neo-Lockean conception of copyright is sometimes criticised by the courts. The European Court of Human Rights found in its *Ashby Donald v. France* decision that copyright law can itself be an exception to freedom of expression and described it as an “*island of property in an ocean of liberty*”¹⁵⁷. Locke’s theory, which is advocated above all by the music industries and copyright owners, accounts for a much privatized conception of copyright, whereas the utilitarian public interest is the one present in our constitutions and basic law norms.

We will now verify if these theoretical provisos also hold when faced with the reality of the modern copyright system and its effects on artistic creation. In order to do so, we will analyse five aspects of the copyright system: the public domain and fair use exceptions, the free riding phenomenon, the incentive argument and finally the winner-take-all architecture of the music industry.

¹⁵⁶ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 325

¹⁵⁷ M. LAMBRECHT, J. CABAY, « Remix Allowed- Avenues for copyright reform inspired by Canada », loc. cit., p. 26

Chapter 2: Moral legitimacy of the modern copyright rules

Section 1: The Importance to copy - public domain and fair use

In the copyright system, there are two mechanisms that allow artists to borrow from existing material when creating on their own: the public domain and the fair use doctrine. We will first analyse the public domain and how modern copyright laws have come to limit its scope. Then, we'll take a look at the fair use doctrine and how it gives artists the breathing space they need to create. Furthermore, in order to assess the true importance copying has in the creative process, we'll ask the question of the origin of creativity and analyse the modern definition of originality. Finally, we'll inspect the development of subversive and playful cultural practices such as appropriation art, collage, remix, mash-ups that have become increasingly accessible and popular and that are linked to the number of works available in the public domain and the reach of the fair use doctrine.

§1. Public domain development

The public domain is a pool of artistic creation that includes all works that are not subject to copyright and therefore belong to the public as a whole¹⁵⁸. This can be the case in two situations: either the work is by nature not protected by copyright (as are images, photographs and texts that aren't original, that don't wear the mark of their author) or when the copyrights have expired after a certain period¹⁵⁹. Others have come to describe the public domain as a place that can be mined by any member of the public, or even as a “lawyer-free zone”¹⁶⁰.

The public domain appeared simultaneously with the invention of copyright. It is directly linked to copyright legislation because each time the law modifies the period of time an artist has the exclusive exploitation right of his work, the public domain is affected. The public domain wasn't always as restricted as it is nowadays and we will focus on its evolution since the 18th century. Already in the “Loi Le Chapelier” of 1791 that instituted copyright in French law, it was planned that after a determined period “*everybody should be able to print and publish the works which have helped to enlighten the human spirit*”¹⁶¹.

¹⁵⁸ E. HEMMUNGS WIRTÉN, « Visualizing Copyright- Seeing Hegemony », *loc. cit.*, p. 253

¹⁵⁹ M. BUYDENS, *Droits d'auteur et internet – Problèmes et solutions pour la création de données en ligne contenant des images et/ou du texte*, *loc.cit.*, p. 17

¹⁶⁰ E. HEMMUNGS WIRTÉN, « Visualizing Copyright- Seeing Hegemony », *loc. cit.*, p. 253

¹⁶¹ S. STOKES, *Art and Copyright*, *loc. cit.*, p. 20

In the 19th century, there didn't exist a global system of copyright yet. In consequence, a book copyrighted in Europe didn't benefit from authorial protection in the United States and fell into the American public domain. It is interesting to see that at this time, the public good was an aggressively legislated invitation to piracy in the interest of American publishers and readers¹⁶². Once the global system of copyrights and the WIPO was established, the public domain lost its attractiveness for American business and legislators also shifted opinion. It is interesting to see that laws on the public domain vary depending on who benefits from it. From "aggressively legislating" for the public domain in the 19th century, the Congress came in the 20th and 21st century to enact legislation that makes it almost impossible for a copyrighted work to fall into the public domain.

The Uruguay Round Agreement Act¹⁶³ (URAA), that implemented the rules of the WIPO and TRIPS after the United States joined it in 1994, provided copyright protection to foreign works that had prematurely entered the American public domain. A lot of classic works had not been subject to copyright because the previous US legislation only granted that right to works manufactured on US soil, therefore excluding all works manufactured in Europe from American¹⁶⁴. Moreover, in 1998 Congress adopted the Sonny Bono Copyright Term Extension Act which added another twenty years to all existing and future copyrights¹⁶⁵. Many works that have been in the American public domain are now back in private hands. In a case before the US Supreme Court plaintiffs challenged the URAA on the basis that it had altered the bedrock principle that once a work enters the American public domain it stays there¹⁶⁶. A similar complaint was launched against the Sonny Bono act¹⁶⁷. In both cases the Supreme Court rejected the plaintiffs challenge. These decisions suggest that the public domain is reduced to a negative remnant; an incidental leftover after copyright has been subtracted¹⁶⁸. The "limited period" that was initially designed for copyright protection went from 14 years to nowadays almost the tenfold. Parliaments are free to grant a perpetual right to copyright holders similar to a renewable lease¹⁶⁹. These cases and the recent legislative activity of the American Congress highlight the fact that the law is shifting from the original

¹⁶² R. SPOO, *Without Copyright – Piracy, Publishing and the Public Domain*, loc. cit., p. 3

¹⁶³ United States federal Uruguay Round Agreements Act, 8th December 1994, 103rd US Congress, Pub.L. 103-465

¹⁶⁴ R. SPOO, *Without Copyright – Piracy, Publishing and the Public Domain*, loc. cit., p. 264

¹⁶⁵ *Ibid.*, p. 265

¹⁶⁶ *Ibid.*

¹⁶⁷ United States Supreme Court, *Eldred v. Ashcroft*, 15th January 2003, 537 U.S. 186

¹⁶⁸ R. SPOO, *Without Copyright – Piracy, Publishing and the Public Domain*, loc. cit., p. 266

¹⁶⁹ L. LESSIG, *L'avenir des idées – le sort des biens communs à l'heure des réseaux numériques*, loc. cit., p. 244

utilitarian and public purpose conception of copyright towards an author-centric, privatized view of intellectual ownership¹⁷⁰.

This tendency also highlights the departure from the principle that copyright is justified by the economic incentive it gives to artists to create. Because as Justice Stephen Breyer said in a dissenting opinion in the *Golan vs. Holder* Case of 2012¹⁷¹ concerning the URAA: “*the statute before us... does not encourage anyone to produce a single new work... it bestows monetary rewards only on owners of old works – works that have already been created and already are in the American public domain*”.

But not all systems are as restrictive as the American one. There are exceptions in some legal systems that allow creatives to use copyrighted works in order to create a new version of their own. For example the Canadian Copyright Modernization act of 2012¹⁷² provided for a *user generated content* exception that allowed artists to use an existing work in the creation of a new work and to disseminate it¹⁷³. Nevertheless, four conditions have to be met in order to be granted this permission: it is done for non-commercial use; proper attribution is given; the original work used comes from a lawful source; and the use includes a *non-substantial adverse effect* on the exploitation of the work by its owner¹⁷⁴.

This last condition has a lot of times been invoked in Canada in order to prohibit the user generated content out of a copyrighted work on the basis that it could harm a potential market of the original work. But as Mr. Labrecht and Mr. Cabay interestingly highlight: “*If copyright law is not an absolute property right but rather a right justified by the need to incentivize creation, we should only protect the copyright holder against the uses that would substantially impair the incentive to create new works, and not any potential market that it could develop*”¹⁷⁵.

Relying on works that are in the public domain is one way for artists to build on pre-conceived musical creations. Another judicial defence mechanism incorporated into copyright that allows artists to borrow from existing works to create new art is the fair use doctrine.

¹⁷⁰ R. SPOO, *Without Copyright – Piracy, Publishing and the Public Domain*, loc. cit., p. 267

¹⁷¹ United States Supreme Court, *Golan v. Holder*, 18th January 2012, 565 U.S.____

¹⁷² Canada Copyright Modernization Act, 29th June 2012, C-11, 41st Parliament, 1st Session, S.C. 2012, c. 20

¹⁷³ M. LAMBRECHT, J. CABAY, « Remix Allowed- Avenues for copyright reform inspired by Canada », loc. cit., p. 6

¹⁷⁴ Art. 29.21, Canada Copyright Modernization Act

¹⁷⁵ M. LAMBRECHT, J. CABAY, « Remix Allowed- Avenues for copyright reform inspired by Canada », loc. cit., p. 10

§2. Fair use doctrine

One argument providing that the modern copyrights rules are just is the limit the *fair use* doctrine (or *fair dealing* in UK law¹⁷⁶) imposes on the exclusive use of copyrights. This privilege for the general public protects nonliteral reworking's and minimal copying that pose no threat to the market of the original¹⁷⁷. In American law, this principle was codified in the Copyright Act of 1976.

This doctrine requires courts to take a case by case analysis influenced by four statutory factors: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used and the effect of the use upon the potential market for or value of the copyrighted work¹⁷⁸. In American law, as opposed to the restrictive European conception, fair use is often described as “open” exceptions because the list of authorized purposes is open (a list that includes criticism, comment, news reporting, teaching, scholarship or research)¹⁷⁹. The Canadian version of fair use, “fair dealing”, is now even considered as a user’s right which forms integral part of the Copyright Act rather than only being a defence¹⁸⁰. It is interesting to note that since fair dealing has become a user’s right in Canada, its interpretation is not any more restrictive than the copyrights owner prerogative¹⁸¹. In this system, both authors’ and users’ rights have an equal status. In contrast to other legislative evolutions in the US and in the European Union, the Canadian Supreme Court seems to leave the neo-Lockean conception of copyright in order to go back to a more utilitarian and public understanding of this right.

The fair use doctrine is based on the principle that in order to create, and artist always has to build upon prior work and that “every book in literature, science, and art, borrows and must necessarily borrow, and use as much which was well known and used before”¹⁸². In a constricted reading of the fair use doctrine, the US Supreme Court decided that the burden of proof is on the user to demonstrate the absence of harm to any potential market the copyright owner could have benefited from¹⁸³. Dissent already at this time suggested that this pro-

¹⁷⁶ S. STOKES, *Art and Copyright*, loc. cit., p. 7

¹⁷⁷ N. WEINSTOCK., *Copyright's paradox*, loc.cit., p. 63

¹⁷⁸ M. LAMBRECHT, J. CABAY, « Remix Allowed- Avenues for copyright reform inspired by Canada », loc. cit., p. 14

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, p. 16

¹⁸¹ Supreme Court of Canada, CCH Canadian Ltd v Law Society of Upper Canada, 4th March 2004, 1 SCR 339, para 48

¹⁸² N. WEINSTOCK., *Copyright's paradox*, loc.cit., p. 63

¹⁸³ United States Supreme Court, Harper & Row v. Nation Enterprises, 20 May 1985, 471 U.S. 539

copyright reading of the fair use doctrine put too much pressure on the user and that it would hamper the progress of arts and science¹⁸⁴. The restrictive interpretation and limits put these last decades on the fair use doctrine brought Lawrence Lessig to describe it as “*the right to hire a lawyer*” to engage in protracted, costly and time consuming litigation to defend one’s right to speak¹⁸⁵. And in practice the fair use system has created a “clear it or delete it” culture that forces artists and publishers to obtain permission for all potentially actionable uses of copyrighted material out of fear of a costly litigation with the rights holder¹⁸⁶.

§3. Creativity and originality

In the debate over the public domain and fair use, the concept of creativity has been used by both sides: by rights holders in a way to justify exclusive domination over an expression and by the copy free advocates, as a way to encourage the importance of the public domain and its influence in the creation of new works.

We can draw an analogy with the two aspects of Disney, the author and the company, that both represent the virtues and the vices of the links between creativity and the public domain. The author relied for his most successful stories hugely on content that lied in the public domain (Snow White, Sleeping Beauty, Cinderella, the Jungle Book...) while the company nowadays advocates harshly for a restrictive view on the public domain in order to prevent its works from entering it¹⁸⁷. This is the dichotomy of the whole public good dilemma: when an artist is looking for inspiration before he creates, he is thankful to be able to use the public domain as a pool of ideas and expressions. But once he created something, even if his work relied heavily on pre-existing works, his interests lie in preventing his work falling into it. But as we’ll see later on, a line has to be drawn between *creators* who support the public domain and *copyright holders* who oppose it.

“*Good artists borrow; great artists steal*”. “*A good composer doesn’t imitate; he steals*”. “*Immature poets imitate; mature poets steal*”. Even if these four quotes could seem like radical opinions stemming from piracy advocating users, it couldn’t be further from the truth. All those quotes come from individuals who supposedly benefit the most from copyright:

¹⁸⁴ N. WEINSTOCK., *Copyright’s paradox*, loc.cit., p. 64, Justice Brennan dissent

¹⁸⁵ *Ibid.*, p. 66

¹⁸⁶ *Ibid.*

¹⁸⁷ E. HEMMUNGS WIRTÉN, « Visualizing Copyright- Seeing Hegemony », loc. cit., p. 255

creators. In order of quotation, the Spanish painter Pablo Picasso, the Russian composer Igor Stravinsky and the American essayist T.S. Eliot all recognized the crucial role pre-existing works played in the creation of new art¹⁸⁸.

The special nature of musical creation has always involved borrowing from previous musical expressions that lied in the public domain in order to find inspiration for new art¹⁸⁹. All works exist in context with past and present artists, and therefore creativity requires the breathing space necessary to permit all authors to draw on the whole of culture¹⁹⁰. The narrow definition of copyrights some rights holder advocate for today would probably, if they had existed and been enforced in that way before, have prevented classical composers to borrow from each other, or even prevented rock and roll to be influenced by gospel, hillbilly and blues music¹⁹¹. In the same fashion, it would have prevented British rock groups of the late 1960s to early 1970s to base their success on copying from American blues artists and Elvis Presley, or Ray Charles to deliberately copy the musical style of Nat King Cole¹⁹². The American writer Steve Tomasula gives us a beautiful metaphor for the interaction between the public domain and creative works: “*Truly, the imagination, which seems to bear much individual fruit, is root’d in a compost of forgotten books*”¹⁹³. Similarly, the Wright Brothers’ attempt to build and test the first plane was an extraordinary exercise of their creative faculties, but it must not be forgotten that their success was only made possible through the knowledge of previously developed principles of aerodynamics¹⁹⁴. Lessig argues that nothing in this world is ever completely new: science, technology and culture develop themselves through continuous creation based on existing ideas¹⁹⁵.

The famous British High Court judge Laddie put it this way “*The whole of human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who preceded us. We borrow and develop what they have done; not necessarily as parasites, but simply as the next generation. It is at the heart of what we know as progress*”¹⁹⁶. It is interesting to note that even judge Laddie borrowed the cited “*standing on the shoulders*

¹⁸⁸ N. WEINSTOCK., *Copyright’s paradox*, loc.cit., p. 58

¹⁸⁹ D. LAMETTI, « The virtuous p(eer) : reflections on the ethics of file sharing », loc. cit., p.297

¹⁹⁰ N. WEINSTOCK., *Copyright’s paradox*, loc.cit., p. 91

¹⁹¹ D. LAMETTI, « The virtuous p(eer) : reflections on the ethics of file sharing », loc. cit., p.297

¹⁹² N. WEINSTOCK., *Copyright’s paradox*, loc.cit., p. 95-97

¹⁹³ D. SCHNEIDERMAN, «Everybody’s got something to hide except for me and my lawsuit : William S. Burroughs, DJ Danger Mouse, and the Politics of Grey Tuesday», loc. cit., p. 138

¹⁹⁴ O. OLA, *Copyright collective administration in Nigeria – Lessons for Africa*, loc. cit., p.3

¹⁹⁵ L. LESSIG, *L’avenir des idées – le sort des biens communs à l’heure des réseaux numériques*, loc. cit., p. 252

¹⁹⁶ S. STOKES, *Art and Copyright*, loc. cit., p. 22

of...”- expression from French philosopher Bernard de Chartres. The process of copying from others is essential in the learning and developing of musical skills and the quest to find one’s own style. An artist absorbs the sounds of the musicians he loves in order to find his inner voice¹⁹⁷. Northrop Frey, a Canadian literary critic, wrote “*poetry can only be made out of other poems; novels out of other novels*”¹⁹⁸.

Since social influence of pre-existing works were a basic input for the new music created by these artists, the society as a whole should consequently also benefit from the artists output. This idea is reflected in the advocacy for a broader public domain and shorter exclusive exploitation rights of works. A rich and deep public domain develops over time and benefits everyone, no matter how situated in society¹⁹⁹. Here we can see that Rawls maximin proviso isn’t fulfilled. The distributive inequality brought by the limitation of the public domain isn’t counterbalanced by a benefit from the least well-off of society: the less works there are in the public domain, the less accessible culture will be to the poorest. Furthermore, upcoming artists who wish to build on the foundation of older works will be prevented from doing this through the copyright monopoly of big record companies. This leads to an unfair system that could have tremendous negative effects on creativity and culture. If the legislators keep on pushing back the deadline necessary for works to fall into the public domain (as the American legislator did with the URAA and the Sonny Bono Act), the artistic potential lost from this appropriation of cultural heritage could prove to be very high. This is very dangerous as the public domain initially was designed as the “*positive other, the unwavering defence against the missiles launched by the blitzkrieg inclined copyrights holders, a benevolent Dr Jekyll to ward off Mr Hyde’s hyperaggression*”²⁰⁰. Already at the time the Statute of Anne was adopted, the public domain was highly valued by British judges, leading even one to declare in opposition to perpetual copyright “*I have no difficulty to maintain that a perpetual monopoly of books would prove more destructive to learning, and even to authors, than a second irruption of Goths and Vandals*”²⁰¹.

Furthermore, research even points out that artists don’t benefit from extremely long copyrights that prevent their works to fall into the public domain. At the time of the 1909 Copyright Act, authors had the exclusive use of their work for 28 years and could apply for a

¹⁹⁷ W. PATRY, *How to fix copyright*, loc. cit., p. 96

¹⁹⁸ *Ibid.*, p. 97

¹⁹⁹ R.P. MERGES, *Justifying intellectual property*, loc. cit., p. 130

²⁰⁰ E. HEMMUNGS WIRTÉN, « Visualizing Copyright- Seeing Hegemony », loc. cit., p. 253

²⁰¹ W. PATRY, *How to fix copyright*, loc. cit., p. 85

14 year renewal at the end of this period. However, a very small percentage of the copyrights were ever actually renewed because the economic value ceased in most cases long before the expiration of the first twenty-eight years²⁰². A study of 10,027 books published in the United States in 1930 (and therefore still under copyright until 2025) showed that only 174 were still in print²⁰³. While the current copyright laws benefit few works (1.7 %) it prevents above all a large majority (98.2 %) to fall into public domain in order to be used in derivative works or serve as inspiration for new artists. A work which has lost its usefulness to the eyes of his author can still help other artists to create original works.

Initiatives such as *Eldritch Press* or the *Gutenberg Project* have taken up the task to post on the internet all the literary works that have fallen into the public domain in order to make them freely available for everybody worldwide. Anybody with a computer and internet can nowadays read all the works that lie in the public domain. This truly represents an opportunity for free culture dissemination. However, if laws are designed to keep as many works as possible out of the public domain, these unique opportunities technology gives us today may as well be lost.

Since the work we have in front of us is focused on the impact which copyright protection has on the musical world, it seems important to highlight the special nature of emerging musical styles such as sample using, mash-ups and remixes and how they use existing works in order to be creative.

§4. Samples and mash-ups

Exclusive copyrights have been in conflict with emerging musical styles for over a decade now. New technological innovations allowed artist to manipulate existing works more easily and to modify them in order to create something new. The digital revolution helped to create the rap and hip hop genres, both relying heavily on sampling²⁰⁴. Sampling is the act of taking a portion, or sample, of one sound recording and reusing it as an instrument or a sound recording in a different song or piece²⁰⁵. This technique had an enormous importance for the musical style of hip hop, a rhyming speech that is chanted over a stylized rhythmic music. As

²⁰² W. PATRY, *How to fix copyright*, loc. cit., p. 104

²⁰³ *Ibid.*, p. 106

²⁰⁴ R.J. PHILLIPS, *Rock and Roll fantasy? The reality of going from garage band to superstardom*, loc.cit., p. 94

²⁰⁵ [https://en.wikipedia.org/wiki/Sampling_\(music\)](https://en.wikipedia.org/wiki/Sampling_(music)) (consulted the 22/07/2015)

a member of the notorious hip hop group Public Enemy points out: “*Sampling basically comes from the fact that rap music is not music. Its rap over music*”²⁰⁶.

The question arose whether sampling was stealing music from somebody else or taking it and making something new. Hip hop artists have been putting it this way: “*I’ve always been into using sampler more like a painter’s palette than a Xerox*”²⁰⁷. The idea is that just as a musician would take the sounds off of an instrument and arrange them in their own particular way, samplers use riffs of guitars or beats from existing songs to make their own sound²⁰⁸.

When the record industry got wind of the sampling technique, it started suing. From a legal point of view, sampling violates *publishing* copyrights (the written music, the song structure) and *master recording* copyrights (the song as it is played on a particular recording)²⁰⁹. Sample and remix opponents discard this technique as theft and point to the Lockean property conception to justify their monopoly over created sounds. In that way of thinking, Locke’s proviso (that when we mix labour to a good that is in common possession it becomes ours) doesn’t apply to remix since the remixed work already belongs to someone and labour cannot justify an act of misappropriation²¹⁰. It is labour applied on top of labour, added over the work of the original creator, whose earlier efforts on a blank slate justifies a superior claim²¹¹.

Nowadays, clearing a sample in order to use it on a commercialised track isn’t impossible, but it became very costly. A buyout can cost up to 7,500\$ and rollover rates make sure that you pay that amount again for every 100,000 units of the sampling song you sell²¹². This commercial counterincentive brought the emerging hip-hop artists to give up the trend to sample existing material and to switch to record themselves the sounds using organic instruments. They still infringed on the publishing copyright (and have to pay royalties for it), but no longer on the costly recording copyright. This had, according to artists, a negative effect on the music: “*A guitar sampled off a record is going to hit differently than a guitar sampled in the studio. The guitar that’s sampled off a record is going to have all the compression that they put on the recordings, the equalization. It’s going to hit the tape*

²⁰⁶ K. McLEOD, « How copyright law changed hip-hop », in *Cutting across media – appropriation art, interventionist collage and copyright law* (dir. K. McLEOD, R. KUENZLI), Durham, Duke University Press, 2011, p. 153

²⁰⁷ W. PATRY, *How to fix copyright*, loc. cit., p. 102

²⁰⁸ K. McLEOD, « How copyright law changed hip-hop », loc. cit., p. 153

²⁰⁹ *Ibid.*

²¹⁰ R.P. MERGES, *Justifying intellectual property*, loc. cit., p. 255

²¹¹ *Ibid.*

²¹² K. McLEOD, « How copyright law changed hip-hop », loc. cit., p. 154

*harder... Something that's organic is almost going to have a powder effect*²¹³. Moreover, American courts found that there is no minimum threshold for sound recordings and that the copying of any amount of copyrightable material (even a two second sample) is infringing²¹⁴. The result was a change in the hip hop creative process. By forbidding sampling, a very original and creative form of copying, the copyright system cuts artists from the very culture that gave rise to their creativity²¹⁵.

In the same vein as sampling, **mash-up** has become a rising cultural trend in music-making. A mash-up is a song or composition created by blending two or more pre-recorded songs, usually by overlaying the vocal track of one song seamlessly over the instrumental track of another²¹⁶. Some authors describe mash-up artists as creators of “*highly creative compositions that take pieces from other works and combine and transform them to result in a new work that gives us fresh insights*”²¹⁷. It's a deconstruction and reconstruction of the original songs, the laptop and mixing software being the artist's instruments.

World famous stars such as rapper Jay-Z and rock group Linkin Park (with their collective album *Collision Course*) as much as internet producers such as DJ Danger Mouse with his *Grey album* (a mix of Jay-Z's Black album and The Beatles' White album) equally use the art of mixing two sounds to create something new out of something old. But the only defence mash-up artists can rely on, that they did a *transformative use* of the original and therefore benefit from the fair use exception. Transformative use is an infringing use that adds creative input from the infringer, brings the infringed work into a new realm or market, or simply produces an end product that is so differed from the original that the musician cannot be held liable for copyright infringement²¹⁸. But it is not a fixed judicial principle and therefore mash-up artist can risk very high copyright infringement costs if the court sides with the rights holder.

Record companies often rely on the old concept of *musical genius* in order to dismiss mash-up artists' claim that they did something original through their mixing of different sounds. But some authors point to the Woodsworthian formula that considers remixing, sampling and mashing as a form of organic genius and that “*synthesis can operate at a secondary or meta-*

²¹³ K. McLEOD, « How copyright law changed hip-hop », *loc. cit.*, p. 154

²¹⁴ W. PATRY, *How to fix copyright*, *loc. cit.*, p. 93

²¹⁵ *Ibid.*, p. 102

²¹⁶ [https://en.wikipedia.org/wiki/Mashup_\(music\)](https://en.wikipedia.org/wiki/Mashup_(music)) (consulted 30/07/2015)

²¹⁷ W. PATRY, *How to fix copyright*, *loc. cit.*, p. 100

²¹⁸ R.P. MERGES, *Justifying intellectual property*, *loc. cit.*, p. 253

*level of composition and loses neither its intuitive and organicist credentials nor its protectability as a result of cumulative effort*²¹⁹.

Also, in most cases the copied artists aren't even bothered by the new use other artists made of their music (Jay-Z on the Grey album: *"I think it's original"*, Public Enemy on remixes of their works: *"I think it's great"*²²⁰). Moreover, the mash-up artist is often deeply affected by the copied artists' opinion of his work (Danger Mouse: *"I'm just worried whether Jay-Z will like it or whether Paul and Ringo will like it"*²²¹). Mashup artists and sampling today copy parts of copyrighted songs in the same way that parody masses in the middle of the sixteenth century copied the style of original masses²²². The point was to show respect for the original music while simultaneously showing off the second artists (composer, mash-up artist or sampler) own skill.

Furthermore, a track that samples or mash-ups another song doesn't acts as perfect substituent and harms the record sales of the sampled song. On the contrary, the sample can have a beneficial effect of drawing the listener's attention to the original song²²³. Aspiring musicians nowadays understand that allowing remixes of their works and giving away samples for free has become a tactic for career building and a way to maintain audience awareness²²⁴.

§5. Considerations

We are witnessing an enclosing of cultural legacy and it is no less than our imagination that is being privatized²²⁵. Even Locke, whose theories are often cited to justify the large interpretation of private property, declared that every man should enjoy the exclusive exploitation of the fruit of his labour only *"where there is enough and as good left in common for others"*²²⁶. But as copyright's modern restrictive nature is already starting to prevent new forms of originality to emerge, we have to ask the question if it still leaves enough freedom for other creators. By only allowing artists produced by them to sample and remix

²¹⁹ D. SCHNEIDERMAN, «Everybody's got something to hide except for me and my lawsuit : William S. Burroughs, DJ Danger Mouse, and the Politics of Grey Tuesday», *loc. cit.*, p. 137

²²⁰ K. McLEOD, « How copyright law changed hip-hop », *loc. cit.*, p. 157

²²¹ D. SCHNEIDERMAN, «Everybody's got something to hide except for me and my lawsuit : William S. Burroughs, DJ Danger Mouse, and the Politics of Grey Tuesday», *loc. cit.*, p. 137

²²² W. PATRY, *How to fix copyright*, *loc. cit.*, p. 99

²²³ C. McLAREN, « Copyrights vs. Copywrongs », *loc. cit.*, p. 48

²²⁴ R.P. MERGES, *Justifying intellectual property*, *loc. cit.*, p. 256

²²⁵ J. CHANG, « A day to sing », *loc. cit.*, p. 245

²²⁶ J.W. YOLTON, *Locke – an introduction*, *loc. cit.*, p. 70

copyrighted material they hold, record companies are starting to establish a monopoly of creativity because creativity is often inspired by the act of copying. An elite minority uses the newly privatized public domain to make profit while the underclass majority becomes passive cultural and political consumers²²⁷.

Furthermore, by preventing new forms of creativity to feed off old, unused artistic material, copyrights holder also contradict with Locke's proviso that "*if a man acquired more goods than he could use before they perished, that man offended against the common Law of Nature and was liable to be punished*"²²⁸. Similarly, record labels own copyrights of tracks that aren't commercialized anymore and prevent new artists to sample from this musical compost, letting the old records rot with nobody benefiting from their unused potential. The way the music industry has been approaching the remix, sample and mash-up phenomenon seems to confirm the idea that if innovation is controlled by the most influential market actors, it will be systematically blind to new forms of creativity²²⁹. New creative individuals such as Hip-hop artists, remixers and mash-up artists have already come to suffer from the restrictive copyright system. All arts practice a form of recycling, and there would be less artistic creativity if every use of existing works was taxed by the copyright owners. Monopolistic controls are the exception in a free society; they're the rule in a closed one²³⁰. The points made in this section tend to indicate that the modern copyright system and its effect on the public domain aren't fair and rather tend to favour existing monopolies than to encourage the emergence of new creative forms of expressions.

²²⁷ J. CHANG, « A day to sing », *loc. cit.*, p. 246

²²⁸ J.W. YOLTON, *Locke – an introduction*, *loc. cit.*, p. 71

²²⁹ L. LESSIG, *L'avenir des idées – le sort des biens communs à l'heure des réseaux numériques*, *loc. cit.*, p. 173

²³⁰ *Ibid.*, p. 309

Section 2: Free riding

In the debate about online piracy, one argument that is often used by copyright users is that illegally downloading a music file is a form of bad free riding. As Ms. Lever puts it briefly: “*Free riding is possible whenever the behaviour of others generates positive externalities- or good side-effects – from which people can benefit without having to contribute*”²³¹. It’s contrary to the just reward theory and represents a form of misappropriation. The artist, the publisher and the promoter have put a lot of time, effort and money into the creation of the music and somebody is reaping the fruits of this labour without compensating the workers.

Intrinsically, free riding is in no way amoral: take the example of a person enjoying the view and smell of the flowers his neighbour has planted in his front garden. The man who planted those flowers to benefit from their presence isn’t negatively affected by the positive externalities they bring to his neighbours²³². It would be absurd to ask passers-by to pay for the view of the flowers they did not ask for. The idea is that free riding only becomes morally wrong when it is linked to negative properties such as ingratitude or selfishness²³³.

But we have to consider two types of free riders. There are those who download music for free rather than paying a price they could readily afford only in order to have more expendable income for buying other consumer goods. Those individuals fall into the category of morally wrong free riders. But there are those who simply can’t afford to pay the legal price of copyrighted music and who wouldn’t be able to benefit from it if it wasn’t shared illegally. Only a small percentage of a typical teenager’s 10 000 song collection, downloaded through unlicensed P2P networks, actually displaces music that the teenager could or would otherwise have bought²³⁴. If the copyright pirate could not or would not pay the price charged by the owner of the copyrighted work, then piracy does not cost the owner any lost sales²³⁵. Free riding doesn’t affect negatively the sale of a copyrighted good if the free rider isn’t able to enter the market of musical distribution²³⁶. The issue of the relative price of legal goods compared to illegal goods also plays a major role in this aspect. The example of illegal production of music CDs in Southeast Asia highlights this question. Given the high costs of

²³¹ A. LEVER, « Introduction », *New frontiers in the philosophy of intellectual property* (directed by A. LEVER), New York, Cambridge University Press, 2012, p.25

²³² G. DEMUJNCK, « Is P2P Sharing of MP3 an Objectionable Form of Free Riding ? », in *Intellectual property and theories of justice* (dir. A. GOSSERIES, A. MARCIANO, A. STROWEL), New York, Palgrave MacMillan, 2008, p.142

²³³ A. LEVER, « Introduction », *loc. cit.*, p.25

²³⁴ N. WEINSTOCK., *Copyright’s paradox*, *loc.cit.*, p. 47

²³⁵ A. GOSSERIES, « How (Un)fair is Intellectual Property», *loc. cit.*, p. 11

²³⁶ G. DEMUJNCK, « Is P2P Sharing of MP3 an Objectionable Form of Free Riding ? », *loc. cit.*, p.142

producing legal products, but the relatively low cost of producing illegal products, would society be better off if illegal copying were prohibited totally²³⁷?

Put simply: the only effect of the illegal sharing of copyrighted material between impoverished people and copyright infringement by clandestine cd sellers is the dissemination of culture and the entertainment of societies' least well-off. If online piracy can grant access to music that is beneficial to one's emotional and social development and can be a creative force behind artistic progress without causing the creators of the work any financial losses, then it truly contributes to human flourishing²³⁸. Looking at the problem this way would undermine seriously the numbers of sales losses the recording industry often cites during copyright debates. Not every copy of a work is a copy people would have been willing or even capable to pay for.

These points highlight the interesting link there is between the price the music industry asks for musical purchase and its impact on the willingness of the users to play by the rules. As we will see later, the root of the massive change in the users' mentality also relies on their perception that the current system is not fair and that the price of music nowadays in no way represents its production costs. The winner-takes-it all aspect of the music industry we'll analyse in §4 justifies for some authors the argument that copyright is not protecting a fair system that benefits everyone and that therefore it isn't morally wrong to exercise free riding in an unfair system²³⁹. Copyright infringing downloading of music *"is seen as an act of civil disobedience in protest against the economic and political power of larger music interests as a result of previous perceived bad behaviour as "middlemen" or as a means to weaken their economic or political power in present and future"*²⁴⁰. If the music market isn't just in its allocation of revenues, then the illegal act of bypassing the commercial limits the copyrights holder have created isn't additionally unjust to the artists, who saw little of revenues anyway²⁴¹.

Mr Demuijnck thoughts point to the same conclusions. For him, P2P file sharing is only morally wrong if three conditions are met: the potential downloader benefits from the copyright system if he doesn't download; the scheme as a whole makes practically everyone better off when generalized; and there isn't any moral objections to the way copyright

²³⁷ R.J. PHILLIPS, *Rock and Roll fantasy? The reality of going from garage band to superstardom*, loc.cit., p. 96

²³⁸ D. LAMETTI, « The virtuous p(eer) : reflections on the ethics of file sharing », loc. cit., p. 300

²³⁹ A. LEVER, « Introduction », loc. cit., p.26

²⁴⁰ D. LAMETTI, « The virtuous p(eer) : reflections on the ethics of file sharing », loc. cit., p.302

²⁴¹ *Ibid.*, p. 286

works²⁴². The first condition is fulfilled if the free rider could have afforded to pay for the downloaded content, but isn't fulfilled when there's no market interaction with the infringer (for logistic or commercial reasons). The second condition depends on one's opinion of the good effects of the copyright system. As we will see in §3, good externalities of the copyright system such as the incentive to create and the fair distribution of revenues don't hold up when confronted with reality. Lastly, the monopoly a few market giants have in the music market, the privatization of the public domain and the winner-take-all aspect of the music industry point to multiple moral objections to the current copyright system.

To sum it up, free riding can be considered morally right in two circumstances. Either the free rider couldn't have, for financial or practical reasons, purchased legally the musical product, or the free riding occurs in an unfair system that doesn't benefit society as a whole and the infringing activity is only considered as a way to counterbalance the initial inequality. In both cases the legitimacy of the modern restrictive copyright system can be challenged.

²⁴² G. DEMUIJNCK, « Is P2P Sharing of MP3 an Objectionable Form of Free Riding ? », *loc. cit.*, p.146

Section 3: Balance between access and incentive

Copyright law has always tried to strike a balance between fostering incentives for the creation of artistic works and the optimal use and dissemination of such works. The basic argument for the incentive-justification of copyright has been that if the system provides sufficient remuneration to authors and publishers, they will be encouraged to create and distribute original expressions²⁴³. This incentive grants the owner of the copyright exclusive rights to his works, but limited by the understanding that they serve primarily to provide public benefit²⁴⁴. As the two primary acts regarding copyrights stated, its main purpose is “*the encouragement of learning*” (Statute of Anne) and “*to promote the Progress of Science and useful arts*” (US Constitution)²⁴⁵. Precise, limited and exclusive rights are granted in order to foster desirable and ethical goals²⁴⁶. It is in the public interest that authors are encouraged to publish their works in order to guarantee the widest dissemination of knowledge and culture as possible²⁴⁷. Here we are reminded that the basic justification for copyrights in our constitution is the utilitarian, public benefit argument and not the lockean private property one. This justification of copyright is composed of two elements: a *static* element, meaning that the owner retrieves a positive benefit from the ownership of the copyright, and a *dynamic* element, in that it acts as an incentive to invest time and money in the creation of a work that only the author can exploit²⁴⁸.

§1. Incentive to create

But rather than just assuming this incentive as given, we need to ask the question whether artists would still express themselves if they knew their works wouldn't be protected by copyright. It is a known fact that Mozart wrote mainly for financial gain and declarations of artists such as Samuel Johnson (“*no man but a blockhead ever wrote, except for money*”) or John Lennon (“*today, let's write a swimming pool*”) seem to indicate that remuneration played a motivational role for some creators²⁴⁹. It is interesting to note that copyrights advocates are quick to rely on the figure of the *romantic author*- an authentic genius who

²⁴³ N. WEINSTOCK, *Copyright's paradox*, loc.cit., p. 7

²⁴⁴ *Ibid.*

²⁴⁵ D. LAMETTI, « The virtuous p(eer) : reflections on the ethics of file sharing », loc. cit., p.290

²⁴⁶ *Ibid.*

²⁴⁷ S. STOKES, *Art and Copyright*, loc. cit., p. 14

²⁴⁸ *Ibid.*, p. 13

²⁴⁹ W. PATRY, *How to fix copyright*, loc. cit., pp. 15 and 16

creates for the sake of art- in order to grant him a monopolistic (moral) right over his creation but when they discuss the incentive argument, they go back to consider the artist as a rational *homo economicus* whose creative activity is only driven by economic gain²⁵⁰.

Following this line of thinking, it seems that the emergence of copyright in the 18th century should have served as incentive for artists and fostered musical creation. If it is true that already successful classic composers such as Verdi and Brahms made a lot of money thanks to the passing of copyright laws, researches point out that most composers were not financially successful²⁵¹. The same researches highlight the fact that the first copyright laws didn't encourage more people to become composers in the first place; it only benefited already established ones²⁵². Furthermore, the emergence of massive illegal downloads of copyrighted songs and the huge drop in CD sales in the beginning of the 21st century should have acted as a counter-incentive for new artists to create musical content. But recent studies found that there is no evidence that illegal downloading affects the quantity of new, acclaimed recorded music or new artists coming to the market²⁵³. There still is a constant flow of new artists, albums and musical creation that doesn't seem to have been discouraged by online piracy. On the contrary, thanks to the new digital technologies, unknown and unproduced artists are now creating and distributing their works on the internet without any form of copyright.

Copyright only emerged in the 18th century, and before that artists had been creating works of art, literature and music for millennia²⁵⁴. Great artists such as Picasso would probably have created their masterpieces regardless of the existence of copyright²⁵⁵. Artists have been expressing themselves in all sorts of hazardous circumstances: in prisons, in poverty, in the absence of any kind of support or encouragement. Writers kept writing in World War II concentration camps and artists in the former Soviet Union were being creative despite a very limited copyright protection²⁵⁶. Other sectors of creative activity, such as innovation in cuisine, have been thriving with inventive competition even though recipes have never been protected by copyright²⁵⁷. Joy, competitiveness, prestige, celebrity and the relation between the artist and his audience are all reasons that encourage a human being to engage in

²⁵⁰ R. SPOO, *Without Copyright – Piracy, Publishing and the Public Domain*, loc. cit., p. 9

²⁵¹ W. PATRY, *How to fix copyright*, loc. cit., p.37

²⁵² *Ibid.*

²⁵³ R.J. PHILLIPS, *Rock and Roll fantasy? The reality of going from garage band to superstardom*, loc.cit., p. 96

²⁵⁴ W. PATRY, *How to fix copyright*, loc. cit., p. 14

²⁵⁵ S. STOKES, *Art and Copyright*, loc. cit., p. 14

²⁵⁶ R.P. MERGES, *Justifying intellectual property*, loc. cit., p. 246

²⁵⁷ W. PATRY, *How to fix copyright*, loc. cit., p. 128

creativity²⁵⁸. The desire to create arises out of our need as human beings to make things that are meaningful to ourselves and to others; our need to leave a permanent mark on this world²⁵⁹.

§2. Incentive to invest

But, as Mr Thomas highlights, “*though artists would continue to express themselves, as they have done before throughout history, under all kinds of economic and social constraints, the publishers, impresarios and galleries needed to bring their own works before the public might be less inclined than under copyright protection to take financial risks*”²⁶⁰. If we follow this idea, we conclude that the copyright doesn’t give incentives for artist to create, but rather to the middlemen (who nowadays generally own the copyrights) to invest in such work. From this point of view, incentives may well have more to do with the quality of creative works that are produced (influenced by the amount of money invested in its creation), rather than whether a person will produce at all²⁶¹. Basically, without copyright, artist would still make movies but sponsors needed for big-budget films wouldn’t invest in them anymore. We would still have independent movies, but would lose the blockbusters.

Mr Vaidhyathan, a media scholar, notes: “*We don’t actually know that copyright works as an incentive to create. We just assume it. It’s not bad assumption, but it’s almost impossible to test... Look at the development of the Internet. Most of the content on the Internet was not done for profit: it was done for love. But the incentive is more defensible by saying that it’s about the incentive to distribute, the incentive to market. It’s easier to argue that nobody would make a full-length feature film and distribute it to hundreds of thousands of theatres throughout the country if there were no faith in the copyright system*”²⁶².

In a society where publishers and promoters are needed for the broad dissemination of works, the incentive of publishers confound itself with the incentive of artists (as it was in the pre-digital age). If a publisher was only ready to invest in and promote an artist if there was sufficient copyright protection and artists couldn’t get their works broadly distributed without

²⁵⁸ R. SPOO, *Without Copyright – Piracy, Publishing and the Public Domain*, loc. cit., p. 9

²⁵⁹ W. PATRY, *How to fix copyright*, loc. cit., p.15

²⁶⁰ D. THOMAS, *Copyright and the Creative Artist* (London, Institute of economic affairs, 1968, p. 27, viewed in S. STOKES, *Art and Copyright*, Portland – Oregon, Hart Publishing, 2012, p. 14

²⁶¹ C. McLAREN, « Copyrights vs. Copywrongs », loc. cit., p. 46

²⁶² *Ibid.*, p. 45

the publishers help, the incentive to invest amounted to the incentive to create. No copyright, no distribution. No distribution, no creation. But with the advent of the MP3 and the peer-to-peer file sharing technology, middlemen aren't needed anymore for widespread publication and the incentive argument doesn't affect the creator anymore. It is the fall of the commercial transaction costs and the correlated extension of the market's reach that has had the biggest impact on creative activity²⁶³. Nowadays, artists can, thanks to the falling prices of recording material, record their songs at home, rework the sound themselves and upload it for free on an online platform. From there on, creations can spread through sharing websites and social media and the broad dissemination of a work takes place without the need of any middle man, publisher or promoter. In the context of digital technology and online social networks, the classic "*incentive to invest = incentive to create*" equation doesn't hold up anymore. From this point of view, classic incentive-based justifications of copyright seem out-of-date.

§3. Incentive to monopolize

Furthermore, the assumption that copyrights is an incentive to create because it guarantees most benefits to the artist can also be criticized. The benefits from ownership of copyrights, even for superstars, have always flowed disproportionately to gatekeepers who are interested in artificial scarcity and monopoly profits rather than abundance and diversity²⁶⁴. But in order to understand this critique of the benefit distribution of copyrights, we need to take a look at the structure of the music business and the monopoly that record companies rely on.

The record industry used scarcity in two ways in order to charge monopolistic prices for music sales: *scarcity of material support* and *scarcity of artists*.

First, the scarcity of the support on which music used to be stocked (records, cassettes, CDs) allowed gatekeepers to limit distribution and to use their control to charge monopoly profits that were completely detached from the costs of production²⁶⁵. This model of analogue scarcity has come to clash with the reality of digital abundance in which technology projected us. The marginal cost to create a copy of a produced work was brought down to almost 0€ by the development of the MP3- and P2P-technology. To pay the same price for an album as before the digital revolution (15\$-20\$) seems ridiculous to consumers considering that most

²⁶³ L. LESSIG, *L'avenir des idées – le sort des biens communs à l'heure des réseaux numériques*, loc. cit., p. 157

²⁶⁴ W. PATRY, *How to fix copyright*, loc. cit., p.13

²⁶⁵ *Ibid.*, p. 38

albums are released digitally and sold on online platforms which erases all pre-existing external costs (CD plants, cover printing, plastic hulls).

Second, labels avoided the usual economic fate of falling prices that occurs when competitors enter the same market by focusing on promoting only a handful of artists²⁶⁶. Since labels control the main distribution channels to the market, they minimize competition and create artificial scarcity by permitting fewer works into the market in order to drive up demand for the works they do publish²⁶⁷. As the rock artist Courtney Love recalls: “*record labels had the monopoly over promotional campaigns and marketing; they were the only ones that could get your songs to be played on the radio or to be sold in big retail stores*”²⁶⁸. This aspect of the music industry will be addressed thoroughly in the “winner-take-all” section of this work.

This monopoly a handful of record companies have over the market of musical distribution puts them on a higher ground for the bargain of the distribution of copyright benefits. As artists’ rights are frequently transferred to business interests, it is Capital (the majors) not Labour (the artist) that ultimately benefits from copyrights²⁶⁹. For example, the deals most artists have with the online selling platform iTunes provides for a wealth distribution that amounts to the creator being paid 10% of the track sales, while middlemen (the online platform and record companies) take the other 90%²⁷⁰. In view of these numbers, it seems that the people pressing for harsher copyright laws are acting in the interests of the 90% middlemen instead of defending the incentive to create. Legislators have been focusing on how much money is being made in the music industry rather than on how the wealth is distributed among the different actors of musical creation. Even though wealth creation begins with the creative activity of individual artists, most of the wealth produced doesn’t end up in their pocket²⁷¹. This is what Mr. Patry calls a “*trickle up system*”, meaning that increasing copyrights are translated into more money flowing up away from creators to executives of the media companies²⁷².

²⁶⁶ W. PATRY, *How to fix copyright*, loc. cit., p. 82

²⁶⁷ *Ibid.*

²⁶⁸ L. LESSIG, *L’avenir des idées – le sort des biens communs à l’heure des réseaux numériques*, loc. cit., p. 158

²⁶⁹ S. STOKES, *Art and Copyright*, loc. cit., p. 24

²⁷⁰ W. PATRY, *How to fix copyright*, loc. cit., p.8

²⁷¹ *Ibid.*, p. 113

²⁷² *Ibid.*

§4. Incentive to enhance free speech

One of the main argument in the defence of copyright is the incentive it guarantees to artists to be rewarded if they express themselves and therefore to promote free speech. But since the ownership of copyright has switched from creator to publisher in the last decades, we have to ask the question if modern copyright rules still serve the end of artistic creation. The biggest media conglomerates are beholden by their shareholders²⁷³. Two of the music industries majors are owned or controlled by investment firms²⁷⁴. Consequently, their decisions regarding what expression to produce are driven by profits rather than the desire to convey a message about the world²⁷⁵. Artists have become *brands* and the main activity of record companies has become *marketing*. Both have a negative effect on musical creativity. First, branding is about selling the same thing over and over again until audiences are tired of it and then move on to the next tested product that can be sold over and over again²⁷⁶. Artists and talent have become a commodity, to be consumed by us and eventually discarded for the next superstar in a cycle of endless consumer purchases²⁷⁷. Second, marketing is about looking what is selling and then selling more of it²⁷⁸. The basic market logic is that the most popular artist that produces the best music will be the most successful and that record companies will produce them. But nowadays, due to the scale on which record companies operate, rather than producing the most qualitative music, they invest in the artists which have the best marketing value. Risk-averse record companies will favour works that stay in the mainstream culture rather than promoting new styles and forms of art. Media corporations invest huge sums into artists in the hope of even bigger returns. But the general rule in artistic creation is that the public is slow to respond favourably to truly creative works and generally reject the unfamiliar²⁷⁹. Therefore, majors are prone to promote musicians who create familiar works, rather than supporting new radical artists with disruptive ideas or sounds. “Art for Art’s sake” appears to be more of a marketing slogan than an actual business model²⁸⁰. The purpose of creating diverse works by diverse members of our society in order to create a rich cultural heritage has never been the objective of copyright advocates²⁸¹. The only creative activity of today’s media giants takes the form of crafting financial vehicles and devising new forms of

²⁷³ EMI, Sony, Universal and Warner Music

²⁷⁴ W. PATRY, *How to fix copyright*, loc. cit., p. 21

²⁷⁵ N. WEINSTOCK, *Copyright’s paradox*, loc.cit., p. 110

²⁷⁶ W. PATRY, *How to fix copyright*, loc. cit., p. 24

²⁷⁷ *Ibid.*, p. 87

²⁷⁸ *Ibid.*, p. 24

²⁷⁹ *Ibid.*, p.19

²⁸⁰ *Ibid.*, p.26

²⁸¹ *Ibid.*, p.80

product placement²⁸². The end copyright initially pursued of artistic expression has been diluted into profit making by their new owners. As the CEO of the RIAA stated in 2000 when referring to the role of record labels today: *“They don’t create the heart and the passion of the artist, nor transform their music into reality. Their sphere of expertise is really the marketplace. It is marketing, promotion and creating demand. Find the fans, sell the music”*²⁸³. This objective seems far away from the artistic creation purpose of copyright that we started with. The way majors (in order to protect their private commercial interests) invoke the argument that strong copyrights encourages the artists creativity amounts to putting a row of women and children in front of a line of soldiers²⁸⁴. Some authors raise the question if money spent on “Respect Copyright” fear propaganda (such as the “you wouldn’t steal a car... piracy is a crime” video²⁸⁵) truly fosters creativity or primarily guarantees the economic interests of copyright owners. In a society where school arts and music programs are cut back for financial reasons but majors spend millions each year to combat copyright infringement, is creativity really the priority²⁸⁶?

Copyright forms part of an unequal system (as we will detail in the “winner-takes-it-all” section) which provides little or no benefit to most musicians while offering extravagant rewards to a few chose ones²⁸⁷. One could argue that it is this musical lottery that guarantees the incentive for small unknown musicians to produce music for free in order to get the attention of the industries gatekeepers. Or one could also highlight the fact that most unproduced musicians put their works for free on the internet in order to get the attention of fans they can attract to live performances, a hypothesis where copyright remuneration isn’t seen as the main incentive for musical creativity. Indeed, online creative communities such as YouTube, Soundcloud or Bandcamp are filled with musical works that artists created and put online without the need for economic incentives²⁸⁸. Digital distribution platforms provide a direct link between artists and their fans and guarantees dissemination at a far lower distribution cost than any brick-and-mortar store of the past²⁸⁹.

To conclude on the incentive argument, we can say that the cultural trend towards user-generated content and its free publishing and promotion through social media websites by

²⁸² W. PATRY, *How to fix copyright*, loc. cit., p. 22

²⁸³ *Ibid.*, p. 21

²⁸⁴ *Ibid.*, p. 107

²⁸⁵ <https://www.youtube.com/watch?v=HmZm8vNHBSU> (consulted the 28/07/2015)

²⁸⁶ W. PATRY, *How to fix copyright*, loc. cit., p. 79

²⁸⁷ A. LEVER, « Introduction », loc. cit., p.28

²⁸⁸ S. STOKES, *Art and Copyright*, loc. cit., p. 25

²⁸⁹ W. PATRY, *How to fix copyright*, loc. cit., p. 17

generations who have grown up with the internet undermines the classic economic incentive argument that prevailed for a long time as justification of copyright²⁹⁰. Copyright laws can protect the fruits of creativity, but they are not responsible for their existence²⁹¹.

While we analysed in this section the wealth distribution between the artists and the middlemen (see Incentive to monopolize), we'll take a look in the next section on the wealth distribution in the artists' community itself and by analysing the winner-take-all aspect of the music business.

Section 4: The Winner-takes-all market of creation

The economics of the music industry is governed by what authors call the “winner-takes-it-all” competition model: in the musical market a great many people struggle to survive on very low wages while a few winners reap tremendous benefits if chosen by the industries gatekeepers (record labels)²⁹². In 2009 only 2.1% of all the albums released sold over 5000 copies²⁹³. This asymmetric wealth distribution system makes it difficult for the average non-superstar to sustain a level of income that exceeds alternative income, especially considering the short length of careers due to age and physical limitations or popularity of a musical style²⁹⁴. The way copyright works right now encourages investment in the superstar-market, but does not help the majority of artists to make a living out of their music²⁹⁵.

The huge numbers of creators wanting to access the kind of widespread promotion that only record labels can offer gives the gatekeepers enormous leverage and grants them the advantage to draft contracts in a way that primarily benefits themselves (as described in the Incentive to monopolize)²⁹⁶. This may not be the case with already successful stars that can use their previously established fan base as leverage (as Madonna or Elvis Presley have done to better their contract conditions²⁹⁷) or even use their own funds to produce themselves (as was the case of American hip hop artists *Dr. Dre* who established his own label in 1996). But the majority of unknown artists still has to sign disadvantageous contracts in order to access

²⁹⁰ S. STOKES, *Art and Copyright*, loc. cit., p. 233

²⁹¹ W. PATRY, *How to fix copyright*, loc. cit., p. 79

²⁹² A. LEVER, « Introduction », loc. cit., p.28

²⁹³ W. PATRY, *How to fix copyright*, loc. cit., p. 80

²⁹⁴ R.J. PHILLIPS, *Rock and Roll fantasy? The reality of going from garage band to superstardom*, loc.cit., p. 100

²⁹⁵ W. PATRY, *How to fix copyright*, loc. cit., p.12

²⁹⁶ *Ibid.*, p.29

²⁹⁷ C. McLAREN, « Copyrights vs. Copywrongs », loc. cit., p. 47

the record labels promotional network. This overabundance of artists who come knocking at the record labels door in order to live from their passion for music is explained by Robert Frank and Philip Cook in the following terms: “Winner-take-all markets attract too many contestant in part because of a common human frailty with respect to gambling – namely our tendency to overestimate our chances of winning. Become a contestant in a winner-takes-all market entails a decision to pit one’s own skills against a large field of adversaries. An intelligent decision obviously requires a well-informed estimate of the odds of winning. Yet people’s assessment of these odds is notoriously inaccurate”²⁹⁸. The existence of copyright in this context does not guarantee that creators of copyrighted works receive substantial or even fair benefits, but merely suggest that they have something to bargain away²⁹⁹. And the structure of the market for creative works is designed in a way to take advantage of this “optimism bias”³⁰⁰.

Furthermore, the winner-take-all aspect of the music industry also prevents legitimate competition between world known famous groups and upcoming new artists. Superstar groups like the Rolling Stones earn millions from their concerts and recording sales, money they can use to advertise and direct consumers to their music in a way that small, unknown and poor bands can’t³⁰¹. The unknown band and the Rolling Stones aren’t equal competitors because popular success and widespread dissemination is in part manufactured through investment in advertisement and costly video-clips³⁰². This is not to say that there is not a competition between artists who have the ability to reach the same number of potential consumers (competition between superstars). But the access to broad dispersion and advertisement of musical works has been and still is in the hands of a few gatekeepers. Therefore, there is an unbalanced competition between artists outside of the record industry and those inside. If a fan pays \$200 for a Rolling Stones show, then there is less money available to spend on other performers. When Justin Bieber makes \$53 million in one year, this is \$53 million in consumer spending that is not going to other artists. And with the vast sums collected, the super stars will earn back the money they spent on making the market less

²⁹⁸ W. PATRY, *How to fix copyright*, loc. cit., p.81

²⁹⁹ *Ibid.*, p. 30

³⁰⁰ *Ibid.*, p. 82

³⁰¹ R.J. PHILLIPS, *Rock and Roll fantasy? The reality of going from garage band to superstardom*, loc.cit., p. 101

³⁰² S. KNOPPER, *Appetite for self-destruction – The spectacular crash of the record industry in the digital age*, Berkeley, Soft Skull Press, 2009, p. 40 et s.

competitive (advertisement etc.). This is what Robert Frank and Philip Cook have called the “wasteful competition”³⁰³.

Furthermore, besides being unfair, the winner-takes-it-all market’s unequal distribution of income has also a depressing effect on economic growth³⁰⁴. Indeed, the fact that those at the top earn more than they would in a competitive market leads to a misallocation of resources in society³⁰⁵. The artificially high price of music entertainment prevents the public from spending money on other goods or artists, blocking a wealth distribution that would benefit the economy³⁰⁶. This concentration of wealth also runs counter to the distributional elements inherent to copyright that each creator should obtain rights proportional to the value of his contribution³⁰⁷. The value of the artist’s contribution is flawed by the winner-take-all aspect of the musical market and the monopoly a few key actors hold. The basic philosophical argument for proportionality is that users of a work receive as much of its benefit as exceeds the author’s proportional reward³⁰⁸. But then, modern copyrights pirates could argue that since the creator’s reward is completely disproportioned to the value of his work, they can illegally download everything that “exceeds the author’s proportional reward”. This Robin Hood philosophy is reflected in the broadly shared opinion of copyright pirates that they do not inflict true harm when stealing profits from multimillion corporations and artists who earn millions with each of their albums.

Here again, the Rawlsian maximin proviso is not fulfilled because the unequal wealth distribution does not benefit unknown emerging artists and prevent the public from having a more diverse choice of music. Market structures are used to prevent competition; artificial barriers prevent a certain number of artists to enter the musical market and wealth distribution between artists is unequal. The winner-take-all aspect of the music industry truly fosters the unfairness of the system and contributes to justify copyright infringing behaviour.

It is interesting to note that also in this regard, the internet has been changing the balance. Artists now have the possibility to establish a vast fan base by posting their works for free on the internet, which gives them bargaining power when they finally sign with a record label. The top-down approach of advertising is being replaced by a *bottom-up marketing* that grants

³⁰³ R.J. PHILLIPS, *Rock and Roll fantasy? The reality of going from garage band to superstardom*, loc.cit., p. 101

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ W. PATRY, *How to fix copyright*, loc. cit., p.10

³⁰⁷ R.P. MERGES, *Justifying intellectual property*, loc. cit., p. 130

³⁰⁸ *Ibid.*, p. 131

creators without financial support an easier access to distribution channels³⁰⁹. In this case again, the online distribution of music contributes to counterbalance the unfair system of the music industry. In the analogue age, only large media firms had the capacity to produce creative works and distribute them to a mass audience. The major record labels' funds and infrastructures to mass-produce, package and distribute music allowed them to dominate the musical landscape³¹⁰. But the new digital technology can be seen as counterbalancing the dominance of copyright supported media conglomerates over content distribution: it allows unsigned artists to reach sizeable audiences with their music without being dependent upon major labels³¹¹. Digital technology changed the existing monopolies radically: the costs of production and distribution reduced drastically thus anyone can be author and publisher simultaneously³¹². In the last years we have seen the advent of a great deal of independent artists over the internet. World known artists such as Macklemore or Odd Future all started out without a label and built their fame on the success of songs they released for free on the internet (especially on YouTube). This is an obvious example of how technology increases competition and helps to eliminate the institutional structures (the record companies, labels, radio, MTV) that were the basis of the winner-takes-all market³¹³. By jumping the middle man, bands that are just starting out are able to offer their music directly to the consumers; a trend that benefits both fans and musicians³¹⁴.

³⁰⁹ L. LESSIG, *L'avenir des idées – le sort des biens communs à l'heure des réseaux numériques*, loc. cit., p. 172

³¹⁰ N. WEINSTOCK., *Copyright's paradox*, loc.cit., p. 76

³¹¹ *Ibid.*, p. 48

³¹² W. PATRY, *How to fix copyright*, loc. cit., p. 39

³¹³ R.J. PHILLIPS, *Rock and Roll fantasy? The reality of going from garage band to superstardom*, loc.cit., p. 101

³¹⁴ *Ibid.*, p. 102

Part III: Alternatives to the modern copyright system

Considering all the dissenting voices that make themselves heard in the debate about copyright, it is no surprise that a great deal of authors, entrepreneurs and artists have come up with new ways to challenge the existing business models and copyright regimes in order to revolutionize how music is produced. What follows are some of the most interesting alternatives to the current copyright regime.

Chapter 1: Collective licencing of exclusive rights

One approach championed by the Electronic Frontiers Foundation (EFF) would be the voluntary collective licencing of exclusive rights³¹⁵. The idea put forward would be the creation of a collecting society by the music industry that would offer file-sharing users the opportunity to switch to a legal model by making a reasonable regular payment (around 5 dollars per month) that would allow them to download whatever they like with any software that works best for them³¹⁶. Even though the EFFs proposition has not been realised yet per se, an alternate version of this idea now exists in the new business model of collective licencing of music streaming, the two most notorious services being *Spotify* (launched September 2010, 20 million subscribers and more than 75 million active users)³¹⁷ and *Apple Music* (launched June 2015). The users pay a monthly fee (9,99 \$) that allows for unlimited streaming of the music available on the platform . The difference with the EFF proposition is that access to the music is limited to the online platform offering it and that instead of owning the songs (being able to download them permanently on one's computer) the said services only allow to lend the music (to stream it). The average rate per stream is about \$0.007 and the services pay approximately 70% of their revenue to copyrights holder³¹⁸.

³¹⁵ A. STROWEL, *Peer to peer file sharing and secondary liability in copyright law*, loc. cit., p. 152

³¹⁶ *Ibid.*

³¹⁷ <https://news.spotify.com/no/2015/06/10/20-million-reasons-to-say-thanks/>, (consulted 15/07/2015)

³¹⁸ <http://www.spotifyartists.com/spotify-explained/> (consulted 4/08/2015)

Chapter 2: Mandatory remuneration rights

Another option could be to replace exclusive rights in copyrightable subject matter with mandatory remuneration rights³¹⁹. This alternative is inspired by the already existing royalty system established by the Audio Home Recording Act that provides that manufacturers of equipment that benefits from copyright infringement pay 2-3% of transfer prices to owners of musical compositions³²⁰. This proposition is based on a system where non-commercial file sharing would be legalized under the condition that copyright holders would be compensated by a levy or a tax on products and services used for file sharing. The products affected by this levy would be those who enable, and thus benefit, from the sharing technology: USB flash drives, computers, iPod, P3 players and mobile phones³²¹. The owner of a copyrighted song would register it with a Copyright office that would grant him a unique file name which would allow him to track the distribution and consumption of the song³²². A government agency would estimate the frequency with which each song was listened to and tax revenues would then be distributed to copyright owners in proportion to the rates with which their registered works were being consumed³²³. This system of compensation without control would supposedly allow keeping the benefices of P2P file sharing while providing for a just remuneration for authors³²⁴. It is a try to maintain the support to creative pursuit through exclusive rights and innovation while guaranteeing the development and use of new communications technology³²⁵.

Chapter 3: Creative Commons

Another alternative to the classic copyright system was introduced by the American Law Professor Lawrence Lessig in 2001: the Creative Commons project³²⁶. Creative Commons is a « *non-profit organization that enables the sharing and use of creativity and knowledge through free legal tools* »³²⁷. Basically, the rights holder of a copyrighted work can choose out of a pool of preconceived license contracts how he wants to communicate his works to the

³¹⁹ A. STROWEL, *Peer to peer file sharing and secondary liability in copyright law*, loc. cit., p. 154

³²⁰ R.P. MERGES, P.S. MENELL, M.A. LEMLEY, *Intellectual property in the new technology age*, loc. cit., p. 498

³²¹ W. PATRY, *How to fix copyright*, loc. cit., p. 180

³²² A. STROWEL, *Peer to peer file sharing and secondary liability in copyright law*, loc. cit., p. 157

³²³ *Ibid.*

³²⁴ *Ibid.*, p. 154

³²⁵ *Ibid.*, p. 194

³²⁶ J.-C. LARDINOIS, *Les contrats commentés de l'industrie de la musique 2.0*, loc. cit., p. 212

³²⁷ <http://creativecommons.org/about> (consulted the 18/07/2015)

public. The creator can choose what kind of use he allows for his work (commercial and non-commercial) and to what extent users can modify, transform or adapt the original work³²⁸.

Lessig's idea is that since users will not stop using P2P networks despite recognizing that they are breaking the law, it is time to change the system to accommodate inevitable real-world behaviours of those who "naturally do what new technologies encourage doing"³²⁹. This initiative suggests using P2P technology in order to share and diffuse information and knowledge, while aiming for some kind of remuneration for the author (direct funding through donations or promotion and advertisement for his project)³³⁰. For Lessig, the real problem in the digital era is not the compensation aspect of property rights, but the fact that those rights allow so much control of the copyrighted work³³¹. Therefore he advocates for a system of remuneration without control.

Besides the Creative Commons initiative, Professor Lessig also suggests reforming the existing copyright lengths, by granting a 5 year exclusive exploitation right to authors (15 times renewable)³³². The idea is that authors will not renew the monopoly right as soon as they stop making profit from their work, and therefore it would fall sooner into the public domain.

Chapter 4: Free music philosophy

The last alternative we analyse in this research is the proposition made by Ram Samudrala, a professor of computational biology and bioinformatics at the State University of New York in Buffalo. He is an adept of the free music philosophy which is "*an anarchistic grass-roots, but high-tech, system of spreading music: the idea that creating, copying, and distributing music must be as unrestricted as breathing air, plucking a blade of grass, or basking in the rays of the sun*"³³³. He suggests that artists benefit from all kinds of revenues that are not just limited to record sales and that therefore the access to music should be completely free. Concerts, merchandise and direct donations from the fan to the artist are for

³²⁸ <http://creativecommons.org/licenses/> (consulted 18/07/2015)

³²⁹ R.P. MERGES, *Justifying intellectual property*, loc. cit., p. 239

³³⁰ J.-C. LARDINOIS, *Les contrats commentés de l'industrie de la musique 2.0*, loc. cit., p. 213

³³¹ R.P. MERGES, *Justifying intellectual property*, loc. cit., p. 264

³³² L. LESSIG, *L'avenir des idées – le sort des biens communs à l'heure des réseaux numériques*, loc. cit., p. 310

³³³ The Free Music Philosophy, Ram Samudrala, <http://www.ram.org/ramblings/philosophy/fmp.html> (consulted the 18/07/2015)

him the future of musical funding³³⁴. One concrete example for this ideology was the initiative of the successful English rock band Radiohead which launched and distributed their new album called *In Rainbows* over the internet on a “pay-what-you-want” basis (fans could decide what amount of money they were ready to pay for the album, even 0€)³³⁵. Another application of Samudralas philosophy is the use of the Kickstarter platform to crowd-fund creators. In 2012 Amanda Palmer, an American rock artists, left her record label and asked her fans to fund her new album in order to allow her to produce it independently. The result was an astonishing total of \$1,192,793 raised from 24,883 fans, an average of nearly \$50 per person³³⁶. She produced her album and put it for free on the internet for everyone to download, whether they had contributed to the Kickstarter campaign or not.

All these alternatives suggest that success for future artists lays in making smart use of the internet, new technologies and social media in order to build a closer relationship with their fans rather than suing them for wanting their work. The bottom line of this philosophy is that it would be beneficial for musicians if they spent more time in Silicon Valley than in Hollywood³³⁷.

³³⁴ J.-C. LARDINOIS , *Les contrats commentés de l'industrie de la musique 2.0*, loc. cit., p. 218

³³⁵ I. PITT, *Economic Analysis of Music Copyright*, New York, Springer, 2010, p. 74

³³⁶ <https://www.techdirt.com/blog/casestudies/articles/20120601/01173819160/amanda-palmer-raises-12-million-kickstarter-crowd-goes-wild.shtml> (consulted the 20/07/2015)

³³⁷ W. PATRY, *How to fix copyright*, loc. cit., p.9

Conclusion

The copyright system is in a crisis. Artists are not able to enforce their copyrights properly and infringing activities of economic use of their works seem unstoppable. Consumers cannot use the new opportunities of the digital age to spread and share works of artists throughout the world because of strict copyright limitations. And technologic innovation is slowed by the constant threat of copyright infringing use of one's invention. Thus the system is ill-suited for the main actors of the musical market: the artist, the consumer and the innovator. The only actor benefitting from extensive copyright laws seems to be the middle man. As copyright is tailored to protect the *economic* benefits of creativity, it favours the actor whose main goal is profit: the record companies. This unequal structure of the copyright system led to the modern legitimacy crisis of the west's copyright system.

The analysis we did in the second part of this work also highlights the moral shortcomings of our current copyright system. The two limits that were designed to shield artists and consumers against the exaggerations of restrictive copyrights, the public domain and the fair use doctrine, don't fulfil their purpose anymore. Legislators around the world are in favour of an ever longer exclusive exploitation period of copyrighted works. The public domain, the pool of common culture that inspired so many great works, is becoming smaller and smaller, which in turn could harm the creativity of artists. New emerging creative techniques such as sampling or mash-ups are being suffocated by the narrow interpretation of the fair use doctrine. One of the most important aspects of artistic creativity is being incriminated: the ability to copy in order to create.

Furthermore, the free riding of copyright pirates is not fundamentally wrong and can even be considered as morally right. People who can't take part in the market of musical sales don't displace actual profits of copyrights holders. And as many copyright pirates argue nowadays, it is not morally wrong to deceive an unethical system. The inequalities in wealth distribution and the monopolies which distinguish the winner-take-all model of the music business highlight the unfairness of the current copyright system. The strong sharing potential of new technologies and the internet can thus be seen as rectifying the unbalanced musical market.

Finally, the classic argument that copyrights serve as an incentive for artists to create isn't valid. Artists create because it's their nature, because they have to express in their own way something they need to share with other people. But what copyrights do serve as an incentive

for is the action of investing in the publication and promotion of a work. However, due to the new online technologies' strong power of dissemination and the cheapening of recording devices, one could point out the fact that big investment is not needed anymore for the production and the widespread distribution of new works.

All these observations lead to the conclusion that the modern copyright system is not fair. Lobbying and advocating for restrictive and exclusive rights in the last decades have transformed copyrights from a utilitarian tool for the public good into a neo-Lockean private property. This evolution harms the two actors that were supposed to benefit from copyrights, the artists and the general public. The winner of this system seems to be an actor that wasn't even considered by the creators of copyright: the middle man. Copyright is nowadays far from its original design to be a legal construct which favours creativity and the dissemination of knowledge.

But while the copyright infringing activities of online pirates could be considered as a temporary way to counter the shortcomings of the system, long term solutions to this problem need to be found elsewhere. Legislators should draft laws that are more in accordance with the values of the new generation and less influenced by the lobbying efforts of private interest groups. Courts should adapt the interpretation of long-standing concepts such as "artist", "creativity" and "copying" to the realities of new technologies and emerging social practices. And entrepreneurs should, as some have already started to do, design new business models that include the sharing methods of the new technologies.

In order to overcome the crisis in which it finds itself now, copyright has to return to its original purpose in order to win back the hearts of those it is supposed to serve. As Mr. Stokes brilliantly stated: *"Law has to be believed in, or it will not work. It involves not only man's reason and will, but his emotions, his intuitions and commitments, and his faith"*³³⁸.

³³⁸ S. STOKES, *Art and Copyright*, loc. cit., p. 233

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Place Montesquieu, 2 bte L2.07.01, 1348 Louvain-la-Neuve, Belgique www.uclouvain.be/drt

