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A critical discussion of current online copyright enforcement and of a comprehensive solution to overcome its shortcomings

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Abstract

Illegal file sharing on the Internet is an immense problem for the creative industries and artists. For over twenty years all affected parties have tried to stop piracy without success. We stand in front of a bifurcation of either continuing the path of regulation of the Internet and, thus, the path of authority, or changing to the path of freedom. This dissertation suggests choosing the path of freedom. A path that embraces progress and values the chances of the Internet ensures a remuneration for artists and decriminalises a significant part of the population. We should introduce a content flat-rate, accompanied by public awareness campaigns and shorten the term of copyright protection. This solution is based on a critical analysis of the current copyright enforcement system, and a discussion of the solution taking into account technological and social developments. By adopting this solution, the EU would take a leading role in modern copyright law and ensure a free Internet.

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A critical discussion of current online copyright enforcement and of a comprehensive solution to overcome its shortcomings

Over the last twenty years, legislators, the creative industries and artists have tried to resolve the problem of illegal file sharing on the Internet without success. It has become a pressing need to adapt copyright law to the realities of the Internet. It is time to take action, change the direction of copyright law in the digital context and choose the path of freedom. There is a solution, which will reconcile the law with peoples' legal understanding and will bring benefits to all affected parties. Furthermore, a solution that embraces progress in technology and values the immense chances that lie on the Internet and accepts changing consumer habits will come with this progress. A solution that embraces consumption of contents instead of criminalising it as the industry relies on this consumption but ensuring adequate remuneration.

If we do not change the law now, we will choose the path of a highly regulated authoritarian Internet, or in other words, the path of authority. This will have highly destructive effects on our society and the rule of law. It will either lead to a very oppressive enforcement system that may be able to limit copyright infringements on the Internet, but to the price of an extremely strict enforcement. This would lead millions of people into criminal proceedings, including children, and limiting the availability of (also unprotected) creative content. Or, it will lead to a situation in which enforcement stays unsuccessful and consumers of copyrighted digital content think they can do whatever they want independent from the legal system. This would be a major threat for a state under the rule of law. In both scenarios, there would be an immense mismatch between the law and peoples' beliefs of what is right and wrong. Artists will have to decide whether they stand on the side of their customers, who ought to pay for their creative works, or on the side of the authorities who work to protect their works. Consequently, there would be no winners but only losers.

Since Napster in 1999, copyrighted content is being shared illegally on a massive scale on the Internet.[1] Consumers of this illegal content often do not consider this as wrong, or are indifferent to the infringement. As file sharing does not minimise, but by contrast,

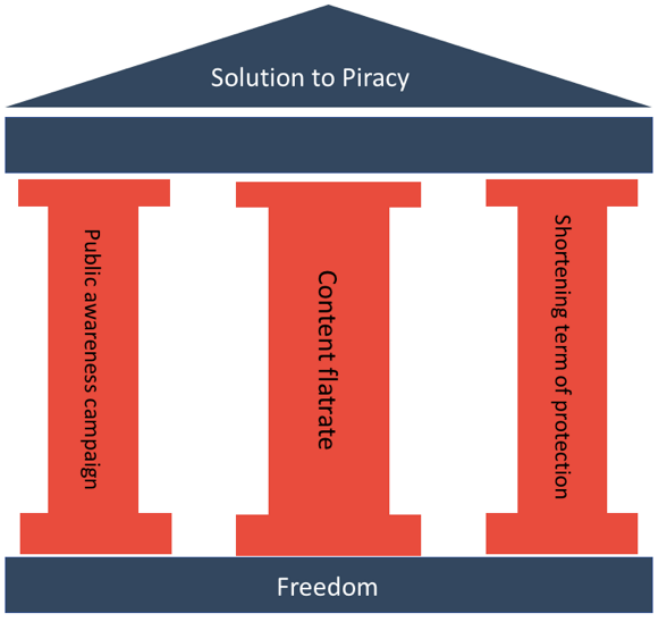
[1] Tom Lamont, 'Napster: the day the music was set free' *The Observer* (London, 24 February 2013) <https://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing> accessed 24 July 2018.

multiply the content, the accusation of theft of copyrighted content as it is seen by laypersons, seems to be hard to understand. Moreover, consumers have to search for content that may be damaged or infected by a virus. The creative industries try to fight back against piracy by enforcing copyright against users, platforms and intermediaries. Often, they initiate an enforcement against all three in civil and criminal procedures. Therefore, they have to spend millions in order to try to compensate for the lost income. Creatives potentially lose income, which endangers the interest of the society of a rich cultural creation. The situation is, therefore, more than unsatisfactory. In addition, all legislative efforts and enforcement measures were not able to solve the problem until now. This dissertation will not only focus on creators and the creative industries versus online copyright infringements but also on the entertainment industry versus the Internet; both cannot survive the way we know them today.

"Intelligence is the ability to adapt to change."[2] This quote attributed to Stephen Hawking may be seen as an appeal for every state or union of states to continuously monitor its laws in order to find the need for change where the circumstances have changed or the law has taken a wrong path. The appeal to change should be especially loud, where the law has been unsuccessful in the past and where it is clear that the law will be disproportionate and unsuccessful in the future. Moreover, if the law in question criminalises a larger part of the population. This need for change has been identified more than ten years ago in Europe. Yet, since then, there has been no change of direction in copyright law. Meanwhile, change has become a pressing need.

The solution, which should be adapted now, has three pillars. The central and most important one is a content flat-rate. As it is the most important pillar, the majority of the analysis presented here will be on content flat-rate. The other two pillars are a public awareness campaign and a shortening of the term of copyright protection. All three pillars are based on freedom instead of regulation and should, in large measure, lead to a solution to the piracy problem.

[2] Frances Bridges, '10 Things The Inspiring Stephen Hawking Told Mankind' *Forbes* (New York, 16 March 2018) <https://www.forbes.com/sites/francesbridges/2018/03/16/10-things-the-inspiring-stephen-hawking-taught-mankind/#5b27a55e38d0> accessed 24 July 2018.



The idea of a content flat-rate is not new and has been discussed under different names such as "alternative compensation system",[3] "culture flat-rate"[4] or "*contribution créative*" (creative contribution).[5] At that time, it was a visionary idea. Today, it has become a pressing necessity as enforcement measures become more and more oppressive and at the same time more and more ineffective while the justification for these enforcement measures fade.

To illustrate the problems in enforcement and the development of enforcement measures, this dissertation will often refer to The Pirate Bay (TPB). On the website www.thepiratebay.org and numerous mirror sites, one can download music, movies, games and software. TPB describes itself as "the galaxy's most resilient Bit Torrent-site" and has existed for 15 years. TPB does not store itself any content. The operators have changed the technical processes of searching, downloading and contributing content over time. Today,

[3] William Fisher, *Promises to Keep* (Stanford University Press 2004) chapter 6.
[4] Research Service of the German Bundestag 'Kulturflatrate contra Olivennes-Modell: Umgang mit Urheberrechtsverletzungen im Internet in Deutschland, Frankreich und Schweden' (10 February 2009). <https://www.bundestag.de/blob/407970/13874135c0eb2932192f1a37ad1d9a26/wd-7-015-09-pdf-data.pdf> accessed 22 July 2018.
[5] Philippe Aigrain, 'La contribution creative: Le necessaire, le comment et ce qu'il faut faire d'autre' (Internet & Création, 14 May 2009) <http://paigrain.debatpublic.net/?p=871> accessed 22 July 2018.

the system works over magnet links that download the desired content when opened in a BitTorrent Client from other users' computer.[6]

All sorts of different enforcement measures were directed against TPB. Users were sued, the servers seized, the operators convicted, and today 28 countries block access to TPB website. Further, the Court of Justice of the European Union (CJEU) stated that the operators themselves commit a copyright infringement and that ISPs have to block access to this website.[7] Nevertheless, this led only to short down times and the website was always back after a few hours or at least a day.[8] In fact, the website was always available via .onion on the Tor network.[9]

Yet, TPB is only one example. There are numerous alternative file sharing websites in every country like rarbg.to, torrentz2.eu, zippyshare.com, kinox.to and the list could go on and on. Similar, in February 2018 the German District Court of Munich I obliged the German Internet service provider (ISP) Vodafone to block kinox.to.

In the last 10 years enforcement measures became more and more oppressive and there are already ideas on how to establish even more oppressive enforcement measures like going against VPNs or blocking websites without judicial interference. In effect, the UK Intellectual Property Office (IPO) stated in their corporate plan 2018-2019 that they will explore the possibilities of administrative blocking injunctions.[10] Likewise, the French authority, which is called *Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet* (HADOPI)[11] stated in its latest activity report 2016-2017, that they

[6] Drew Olanoff, 'As promised, The Pirate Bay officially drops torrent files for Magnet links' (The Next Web, 28 February 2012) <https://thenextweb.com/insider/2012/02/28/as-promised-the-pirate-bay-officially-drops-torrent-files-for-magnet-links/> accessed 22 Juy 2018.

[7] C-610/15 Stichting Brein v Ziggo BV and XS4ALL Internet BV [2017] E.C.D.R. 19.

[8] Ernesto Van der Sar, 'The Pirate Bay suffers extended downtime (Update)' (TorrentFreak, 1 March 2018) <https://torrentfreak.com/the-pirate-bay-suffers-extended-downtime-180301/> accessed 22 July 2018.

[9] Kavita Iyer, 'The Pirate Bay Is Down But Tor Is Up And Running' (Tech Worm, 26 June 2018) <https://www.techworm.net/2018/06/the-pirate-bay-is-down-but-tor-domain-is-working.html> accessed 16 August 2018.

[10] UK Intellectual Property Office, 'Corporate Plan: 2018-2019' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713565/IPO-Corporate-Plan-2018 - 2019.pdf> accessed 29 July 2018, 28.

[11] High authority for the distribution of works and the protection of rights on the Internet.

encourage the legislator to grant them the possibility to update blocking injunctions to mirror sites.[12]

Throughout, this dissertation will argue that it is time to change the direction in copyright law. Only a content flat-rate can solve the problem. This content flat-rate should be combined with public awareness campaigns and a shortening of the term of protection. The dissertation will be divided into two sections. Section one discusses why the current copyright enforcement is ill-equipped to solve the piracy problem and part two the favourable solution with the three pillars. It will first look at enforcement measures against users, then against operators and then against intermediaries. Section two will first critically discuss the content flat-rate, then the public awareness campaign and finally the shortening of the term of protection. The dissertation will end with a conclusion.

Section One: Current Copyright Enforcement System

This part of the dissertation will argue that the current enforcement system is ill-equipped to deal with the piracy problem because it becomes more and more oppressive and has major shortcomings. It is in part impractical, unrealistic, faces problems of efficacy and proportionality, and criminalises significant parts of the population. This part of the dissertation will first look at enforcement actions against users, then against operators, and finally against intermediaries.

1) Actions against Users

Actions against users are generally straightforward. If someone infringes a copyrighted work by up or downloading it or streaming, then it appears logical that enforcement actions are directed against this infringer. These case-by-case enforcement measures have the benefit that they punish only illegal activities and do not prevent the sharing of content without copyright protection. However, there are several issues with the enforcement against users.

The first problem is volume. In the UK alone, 6.5 million citizens have used illegal content within the first three months of 2018, thereof 4.29 million aged between 12 and 35,

[12] Hadopi, 'Rapport d'Activité: 2016 - 2017' <https://www.hadopi.fr/sites/default/rapportannuel/HADOPI-Rapport-d-activite-2016-2017.pdf> accessed 29 July 2018, 77.

according to a study by the UK IPO.[13] Therefore, it is impossible to sue every single infringer. Consequently, if we continue like in the UK or in Germany to enforce only symbolically against users, users will get the feeling that they can behave on the Internet how they want with only a very small risk of being caught by authorities. This can be a serious threat to a state under the rule of law. If people feel that they do not have to obey the law on the Internet, this may build the ground for other criminal activities, such as cyber-mobbing, trading in arms, or child pornography.

Surely, one can seek to standardise enforcement measures and consequently establish a more oppressive system. This has been tried, for example, in France. France is the first European country to adopt a three-strikes system under the 'HADOPI law' in order to cope with the volume of file sharing on the Internet.[14] The three-strikes procedure stipulates that in case of a complaint of copyright infringement by a listed entity such as professional unions or collecting societies, the authority HADOPI sends a warning email to the Internet subscriber specifying only the time of the infringement, after having assessed the infringement. The ISP is then obliged to monitor the Internet connection for six months. If an offence is repeated, a certified letter is sent to the offending Internet subscriber. If the Internet subscriber infringes again in the following year, the ISP or the HADOPI can send the case to court.[15] HADOPI sent a total of 889 cases to court between July 2016 and June 2017.[16] This system may be seen as arbitrary. In cases of serious infringements one strike could already be enough in order to send the case to court, and in other cases three strikes may not be enough. Furthermore, it could lead Internet users to turn to encrypted systems, which can potentially be even more dangerous.[17]

The second problem is that users often do not know what content is illegal or legal and that, therefore, intent might be hard to prove. Even if there might be a general awareness that up and downloading is illegal, there is certainly not such an awareness for

[13] UK IPO, 'Online Copyright Infringement Tracker: Latest wave of research (March 2018)' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/729184/oci-tracker.pdf> accessed 29 July 2018, 6.

[14] Christophe Geiger, 'Honourable attempt but (ultimately) disproportionately offensive against peer-to-peer on the internet (HADOPI) - a critical analysis of the recent anti-file-sharing legislation in France' (2011) 42 (4) IIC 457.

[15] Alexandre Entraygues, 'The Hadopi Law – new French rules for creation on the Internet' (2009) 20 (7) Entertainment Law Review 264.

[16] Hadopi (n 12).

[17] Geiger (n 14).

streaming in every European country. In Germany, for example, streaming was seen as a legal activity or at least a legal grey area. Even if there was no decision of the German Federal Supreme Court, there were several lower instance decisions determining streaming as legal.[18] The CJEU decided in a recent decision that the sale of a multimedia player, in which there are hyperlinks to websites that offered unrestricted access to copyright-protected works, without authorisation is illegal.[19] Some scholars have therefore concluded that this allows for holding not only those who provide unlawful streams liable for copyright infringement but also viewers of such streams.[20] Consequently, this decision could lead to a higher legal certainty through a European comprehensive view on the illegality of streaming. It is also not easy to determine whether the content is only streamed or also up and downloaded on several websites

Finally, enforcement measures face practical problems. In order to enforce copyrights, ISPs have to disclose information so that the infringer can be identified. This interferes with privacy, which is protected by the EU-Charter. This is particularly problematic in standardised enforcement against users as the infringer may well be a child, who deserves a higher protection. Where the infringer is a child, education would be much better than enforcement.

These problems illustrate that actions against users are not so effective and therefore, enforcement measures have turned also against platforms.

2) Direct action against platforms

Before analysing the problem of how to enforce copyright against platforms, it will analyse the prerequisite question, whether the operator of an online sharing platform is liable for copyright infringements. In a judgement from June 2017, the CJEU decided this question in a case about TPB.[21]

The CJEU held that an operator of an online sharing platform can infringe copyright and is not only liable as an accomplice. The operators of TPB were communicating works to

[18] LG Köln, GRUR-RR 2014, 114; LG Hamburg, MMR 2014, 267.
[19] C-527/15 Stichting Brein v Jack Frederik Wullems (Filmspeler) [2017] ECLI:EU:C:2017:300.
[20] Eleonora Rosati, 'Filmspeler, the right of communication to the public, and unlawful streams: a landmark decision' (IPKat, 27 April 2017) <http://ipkitten.blogspot.com/2017/04/filmspeler-right-of-communication-to.html> accessed 21 June 2018.
[21] Stichting Brein v Ziggo (n 7).

the public as they had an indispensable role and intervened deliberately.[22] Even if the content has not been placed online by the operators but by users, the operators were still communicating to the public due to the acts of indexation of metadata relating to protected works and the provision of a search engine that allows users to locate and share those works. This act does not constitute a mere provision of physical facilities for enabling or making a communication. Moreover, the cumulative effect of making available to potential recipients and the fact that the operators gained a profit from the website had to be taken into account. According to the judgement, the concept of communication to the public must be interpreted broadly to ensure a high level of protection.

The judgement clarifies the notion of communication to the public and who is responsible for infringements of it. Furthermore, it increases the protection of IPRs and constitutes a step towards harmonisation.[23] However, even if the solution found in the judgement might be welcomed, the legal argumentation is questionable for two reasons. First, the judgement seems to be result driven. Good legal practice requires the judge to apply the facts to the law and from there find a solution instead of thinking of the solution first. Although, the Advocate General Szpunar admitted in his opinion, that a solution should be found in primary liability as secondary liability is not harmonised in EU law. A solution in secondary liability "would undermine the objective of EU legislation in the relatively abundant field of copyright, which is precisely to harmonise the scope of the rights enjoyed by authors and other right holders within the single market."[24] Therefore, the CJEU has been described as a European substitution-legislator.[25] Second, the Court does not differentiate between direct and indirect infringement. The users make available the copyrighted content and the operators of the platform only manage and index the content knowingly. The Court acknowledges this difference but sees no need to differentiate. This causes major conflicts with national tort law doctrines. It would have been more straight forward if the Court had stated that this is a question of non-harmonised secondary liability, which would have

[22] Directive of the European Council and the European Parliament (EC) 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 (InfoSoc Directive), Art. 3 (1).

[23] Christina Angelopoulos, 'Case Comment: Communication to the Public and accessory copyright infringement' (2017) 76 (3) CLJ 496.

[24] C-610/15 Stichting Brein v Ziggo BV and XS4ALL Internet BV [2017] E.C.D.R. 19, Opinion of AG Szpunar, para 3.

[25] Matthias Leistner, Die „The Pirate Bay"-Entscheidung des EuGH: ein Gerichtshof als Ersatzgesetzgeber"' [2017] GRUR 755.

caused less friction with national law and would have acknowledged the reality of a non-harmonised secondary liability system. Local tort law in EU countries differs on the principles of accessory liability and the case could have been an incentive to harmonise the accessory liability through a Directive. In conclusion, even if the solution of the CJEU in the TPB case might be questionable, operators of online sharing platforms are now liable for such infringements.

As the operators are potentially liable, this dissertation will discuss direct enforcement measures against the operators. One can identify the registrant of a domain name through a WHOIS search and send a cease and desist letter. These letters will most likely either be ignored, or the registered name is simply not the actual individual behind the website as identity-theft is common in this area. In light of these difficulties Justice Arnold concludes in his judgement Cartier v Sky B that such an enforcement measure is not a realistic alternative.[26]

Furthermore, the operators of a platform could be prosecuted and convicted. The servers of the website can be seized. This has been tried in the case of TPB. In 2006, the servers of TPB were confiscated. The website was shut down, but went online again after three days with double the number of visitors.[27] Thus, TPB illustrates as an ultimate example the "whack-a-mole issue". In 2009 the four operators of TPB were convicted by a Swedish court for assisting making available copyrighted content online and sentenced to one year in jail each and a total in $3.6m (£2.4m) in fines and damages.[28] However, this had no major impact on the availability of TPB website. On the contrary, it led to a greater activity on the website and to a political activism in favour of free file sharing and to the creation of the "Pirate Party" in several countries with seats in national parliaments (10 out of 63 seats in the Iceland parliament in 2016) and two seats in the European Parliament in 2014.[29] This

[26] Cartier International AG v British Sky Broadcasting Ltd [2014] EWHC 3354 (Ch) [198].
[27] David Kravets, 'The Pirate Bay raided, shattered' Wired (New York, 31 May 2006) <https://www.wired.com/2011/05/0531swedish-police-raid-pirate-bay/> accessed 21 June 2018.
[28] Jemima Kiss, 'The Pirate Bay Trial: Guilty verdict' *The Guardian* (London, 17 April 2009) <https://www.theguardian.com/technology/2009/apr/17/the-pirate-bay-trial-guilty-verdict> accessed 21 June 2018.
[29] Iva Kopraleva, 'Are Pirate Parties relevant to European politics?' (European Council on Foreign Relations, 20 January 2017) <https://www.ecfr.eu/article/commentary_are_pirate_parties_relevant_to_european_politics_7221> accessed 21 June 2018.

illustrates that there is not only the problem of ineffectiveness, but that these enforcement measures can have unexpected side-effects. Moreover, actions against platforms are time-consuming and costly. Therefore, it is very unlikely that small and medium-sized enterprises (SMEs) could afford the legal costs. In 2013, the UK established the Police Intellectual Property Crime Unit (PIPCU) to disrupt and prevent websites from providing unauthorised access to copyrighted content. They created the Infringing Website List, on which they list websites that infringe copyrights (Black Listing). Advertisers and other agencies can then decide not to place advertisements, which disrupts the advertising revenue for these websites.[30] Surely, this complicates the generation of income for file sharing websites. However, you can still find a lot of advertisement on these websites from not as reputable companies. Therefore, it seems to be only one stone in the mosaic of anti-piracy enforcement, and a way for companies not to be associated with such infringing websites. In conclusion, direct actions against platforms are either unrealistic or possibly without effect on the availability of the digital content.

3) Actions against intermediaries

As direct actions against platforms are unrealistic or ineffective, the next possibility is to take enforcement measures against intermediaries.

First, one could try to send a notice to the host of the website asking to take the operator's website down. This cheap solution may work in reputable host countries where contractual terms specify that IP infringements are prohibited, and hosts are obliged to implement a notice and takedown policy due to Arts. 12 -15 of the Electronic Commerce Directive of the European Union, or due to Sec. 512 of the Digital Millennium Copyright Act 1998 in the US.[31] However, if the host is not in the US or in a non-European jurisdiction it is unlikely that it will respond to such a notice and takedown request. Moreover, even if a website gets taken down, the operator can simply shift the website to a new host leading to a "whack-a-mole" game again.[32] Eventually, it will be shifted to a host in a country where

[30] City of London Police 'Operation Creative and IWL' (25 May 2016) <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/Operation-creative.aspx> accessed 21 June 2018.
[31] Althaf Marsoof, 'The blocking injunction - a critical review of its implementation in the United Kingdom in the context of the European Union' (2015) 46 (6) IIC 632, 633.
[32] Frederick Mostert, 'Study on Approaches to Online Trademark Infringements' (1 September 2017) WIPO/ACE/12/9. Rev. 2, 7.

enforcement is unpromising.[33] Furthermore, this kind of enforcement could potentially prevent people from using illegal content as a substitute for purchases. Further, it would prevent economically less harmful types of piracy, like the use of illegal content to sample in the process of purchasing, or to get access to content that is no longer sold. However, it will also prevent as a side effect the use of file sharing platforms to get access to content that is not protected anymore or that the copyright owner plainly endorses, which is legal and desirable.

Second, right holders can ask ISPs for website blocking and apply for blocking injunctions. There is a diversity of practices relating to blocking injunctions throughout Europe due to different implementations of Art 8 (3) InfoSoc Directive and Art 11 Enforcement Directive[34]. For example, Germany requires to sue the platforms and users first, constituting a major burden for blocking injunctions, whereas in the UK this is not required.[35] Also, courts in different countries take different views on proportionality and efficacy.

Blocking injunctions have the advantage that they can be enforced easily. Moreover, if users cannot access the concerned website, they cannot access the copyrighted material and it could potentially lead users to consume copyrighted material in a way that ensures remuneration to artists. However, volume and velocity are major problems for enforcement. Operators of these websites are technically versed and efficient. Once a website is blocked, they can open up identical websites under new domain addresses (mirror sites). Therefore, website-blocking can quickly turn into a "whack-a-mole game". In addition, the legal costs are a major burden for SMEs and for micro-businesses that may be especially hard affected by piracy and cannot run to court for every listing.

Furthermore, website blocking causes problems regarding proportionality and efficacy. Efficacy and proportionality are closely interrelated as efficacy is an important factor for proportionality, but for reasons of clarity they will be discussed separately. The UK Supreme Court decided in June 2018 upon the influence of costs on proportionality. While the first instance and the Court of Appeal concluded that a blocking injunction is

[33] Cartier v B Sky B (n 26) [199] - [201].
[34] Directive of the European Council and the European Parliament (EC) 2004/48 on the enforcement of Intellectual Property Rights [2004] OJ L 195/16.
[35] BGH MMR 2016, 180; BGH GRUR-RS 2016, 1908.

proportionate if the ISP bears the costs for the implementation of the website-blocking,[36] the Supreme Court stated that the right holder has to bear the costs not only of the application for the injunction but also of its implementation.[37] Even if this was in reference to a trademark case, it is very likely that this will apply likewise to copyright cases.

Website blocking needs to be proportionate. It concerns the freedom of the intermediary to conduct a business, ensured under Article 16 of the Charter and the rights of its customers to the protection of their freedom of information, whose protection is ensured by Article 11 of the Charter on the one side and the protection of copyrights, which are intellectual property and are therefore protected under Article 17 (2) of the Charter on the other side. These fundamental rights have to be reconciled. The CJEU stated in its 2014 judgement UPC Telekabel Wien that fundamental rights do not generally preclude blocking injunction. The Court found that an injunction, in this case, would not infringe upon the fundamental right to conduct a business. This is because the injunction in the case would allow the ISP to decide upon the measure to put in place, and the injunction wouldn't infringe "the very substance of the freedom of the ISP."[38] Furthermore, blocking injunctions are usually limited to a certain period of time. However, not much attention has been given to the fact that the blocking of these websites also hinders the access to un-copyrighted material (over-blocking). In the German decision 'Goldesel', the Federal Supreme Court of Germany stated that a blocking injunction would be disproportionate if there is a considerable amount of legal content available compared to the overall amount of illegal content.[39] Though, 4% of legal content compared to 96% of illegal content on the concerned platform was not enough. Yet, there seems to be no alternative to file sharing platforms to easily find un-copyrighted movies or music on the Internet. Therefore, the blocking of these file sharing websites also hinders the free flow and dissemination of cultural goods in the public domain unless the blocking injunction does not concern the whole website but only specific content.

The CJEU states that the implementation of an injunction must be sufficiently effective. It "must have the effect of preventing unauthorised access to the protected

[36] Cartier v B Sky B (n 26); Cartier International AG v British Sky Broadcasting Ltd [2016] EWCA Civ 658.
[37] Cartier Int AG v British Telecommunications Plc [2018] UKSC 28.
[38] C-314/12 UPC Telekabel Wien v Constantin Film Verleih [2014] Bus LR 541, para 51.
[39] BGH MMR 2016, 180 [54 f].

subject-matter or, at least, of making it difficult to achieve and of seriously discouraging Internet users who are using the services of the addressee of that injunction from accessing the subject-matter made available to them."[40] In consequence, the CJEU does not require the blocking injunction to result in a complete cessation of infringement. As a matter of fact, efficacy is difficult to assess for two reasons. First, even if the website is blocked, users can turn to other file sharing websites so that, in consequence, the overall amount of copyright infringement would not decrease. A simple Google search reveals that there are endless websites to turn to, which offer a similar service to TPB. One could argue that all piracy websites should be blocked and then there would be no alternatives anymore. However, this would misjudge the pirates' ability to find technical solutions to circumvent blocking injunctions. This leads to the second reason: users can use methods of circumvention to get access to the blocked website. Blocking injunctions can be circumvented by users who have little technical knowledge using DNS name blocking, proxy servers, virtual private networks or Tor.[41] For example, despite the fact that TPB has been blocked in 28 countries thereof 15 European countries, it is enough to search on Google for "Pirate Bay bypass" or "Pirate Bay Proxy" and the first search result will be a website that shows proxy sites and which is updated several times per day. With only one click on one of the links, the normal TPB website appears. Circumvention is also supported by the operators by setting up mirror sites themselves and providing an offline version that is not affected by any down times.[42] Furthermore, as websites like TPB have a loyal user base, the incentive to circumvent is high.

Even if efficacy could be undermined by circumvention it is important to keep in mind, that these actions by the operators should not lead to disadvantages of the right holders, who would otherwise be completely without protection. Yet, the effects of blocking injunctions must be carefully analysed. It has to be analysed how much the activity decreases due to the injunction. Furthermore, it has to be analysed whether the amount decreases because it is technically not possible to access the website, or because a judgement is reported in newspapers and has a certain moral deterrent effect. If the activity

[40] UPC Telekabel Wien v Constantin Film Verleih (n 38), para 62.
[41] Cartier v B Sky B (n 26), [26].
[42] Ernesto Van der Sar, 'OfflineBay Safes the Day When Pirate Bay Goes Down' (TorrentFreak, 3 March 2018) <https://torrentfreak.com/offlinebay-saves-the-day-when-pirate-bay-goes-down-180303/> accessed 16 August 2018.

decreases only because of the latter, then public awareness campaigns could be a more proportionate measure. This will be discussed in more detail in the second section.

Efficacy has been assessed differently. Justice Arnold, based on statistical data, concludes in Cartier v B Sky B that blocking injunctions proved to be efficient in the UK despite circumvention activities. Indeed, there are surveys supporting this view.[43] German courts have stated that circumvention is not to be taken into account. Efficacy, as prescribed by the CJEU, has to be understood in relation to the specific blocking, as otherwise rights owners would be without protection exactly in cases of copyright infringements on a massive scale.[44] Mostert, in the WIPO study, takes into account that no technical intervention by the user is needed to circumvent. He therefore concluded that efficacy of such measures depends on the 'right holders' continual vigilance in ensuring blocks are imposed on alternative "mirrors" or sources of infringing content'.[45] However, as described above, a comprehensive vigilance would also hinder the free flow of goods in the public domain (over-blocking). All this illustrates that proportionality and efficacy are by no means evident and can vary from case to case. Courts should, therefore, be highly prudent in granting such orders and should analyse carefully the proportionality of such orders.

Finally, it could also be possible to de-list platforms who share copyrighted material illegally from search engines. Google has so far not removed TPB from its search engine results and states that it will not ban entire websites.[46] However, in Google's transparency report, there are lists of delisted websites for copyright infringement, which seem to be file sharing platforms.[47] The delisting of platforms like TPB has the advantage, that it can be

[43] Brett Danaher, 'Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behaviour' (November 2015) <https://thepriceofpiracy.org.au/content/The%20Effect%20of%20Piracy%20Website%20Blocking%20on%20Consumer%20Behvaiour.pdf> accessed 16 August 2018.
[44] BGH MMR 2016, 180.
[45] Mostert (n 32) 24.
[46] Letter from Google Inc. to United States Intellectual Property Enforcement Coordinator (16 October 2015) <https://de.scribd.com/document/286275022/TorrentFreak-Google-Comment-Development-of-the-Joint-Strategic-Plan-on-Intellectual-Property-Enforcement> accessed 7 July 2018.
[47] Google Inc., 'Transparency Report' <https://transparencyreport.google.com/copyright/reporters/1847?request_by_domain=size:10;org:1847;p:MjpBTExfVElNRTozOjE4NDc6MTA6MTMwOjE0MA&lu=request_by_domain> accessed 7 July 2018.

potentially implemented worldwide.[48] Even though US courts prevent global implementation for now.[49] Furthermore, if the delisting would work quickly it could prevent users to find new file sharing platforms or mirror sites through Google. However, the website is only delisted and can still be accessed through its URL. Hence, the de-listing of www.thepiratebay.org would not be helpful as users know the address by heart.

As an interim result, one can see that we hold on to an ineffective but repressive enforcement system. The affected parties spend millions to take actions against users, operators and intermediaries without reaching more than a symbolic effect. If we do not change anything, the enforcement system will either become even more oppressive, leading to a highly unfree Internet. Or, and much more likely, due to the reasons discussed above, it will continue being ineffective and people will believe that they can do what they want on the Internet. The professor at the Harvard Law School Lawrence Lessig goes even so far to warn us against criminalising our children: 'what seems to them to be ordinary behavior is against the law. […] They see themselves as "criminals." They begin to get used to the idea.'[50] In light of these shortcomings, it is only logical to search for alternative systems.

Section Two: Solution to Piracy

1) Content flat-rate

Member States should introduce a private copy and making available exception in copyright law for digital content. As with this exception, file sharing would not be illegal anymore. This exception would have two limitations: it would apply only to private users / non-commercial users; it would be limited to works which are made available digitally. Hence, uploading, downloading and streaming for private purposes would be legal, but not the making available of illegally filmed movies in the cinema or of concerts. As compensation for the exception there should be a levy on the internet subscription. The amount of the levy can be calculated according to different methods, which has been explored in an expert opinion for

[48] *Google Inc.* v. *Equustek Solutions Inc.,* [2017] SCC 34 [39].
[49] Google LLC v. Equustek Solutions Inc. (D.C. ND Cal. 2017).
[50] Lawrence Lessig, 'In Defence of Piracy' *Wall Street Journal* (New York, 11 October 2008) <https://www.wsj.com/articles/SB122367645363324303> accessed 23 July 2018.

the German Bundestag. Realistically a levy between €5 and 22,47 per month would be charged.[51]

The legal feasibility of this proposal was already discussed ten years ago (albeit with a different structure) on the basis that it would require changes in European and national law. A content flat-rate would be in accordance with international law. In particular, with the three-step test that can be found in Art. 5 (5) of the InfoSoc Directive, Art. 9 (2) of the Berne Convention and Art. 10 of the WIPO Treaty and Art. 13 of the TRIPS Agreement. In order to implement this solution, there will need to be a change in European law and in the national laws in the EU. The content flat-rate would therefore qualify as a special case. It would not be in conflict with the normal exploitation of the work, and it would not constitute an unreasonable prejudice to the legitimate interest of the authors.[52]

Currently, in EU law Art. 5 Abs. 2 lit. b InfoSoc Directive allows only an exception for private copying and not for making available. Art. 5 (3) InfoSoc Directive states an exhaustive catalogue that shows in which areas Member States are allowed to use statutory exceptions for the making available of works. However, this catalogue knows no exception for the private making available. Therefore, the Directive should be amended with a new letter (p) thus:

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
(a) [...] – (o) [...]
(p) in respect of making a work available to the public provided that the work is not made available for commercial reasons, that the work was made available online and that the right holders receive fair remuneration.

[51] Gerald Spindler 'Rechtliche und Ökonomische Machbarkeit einer Kulturflatrate: Gutachten erstellt im Auftrag der Bundestagsfraktion „Bündnis 90/DIE GRÜNEN"'
(6 March 2013) <https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/medien/Gutachten-Flatrate-GrueneBundestagsfraktion__CC_BY-NC-ND_.pdf> accessed 23 July 2018, 155.
[52] Alexander Roßnagel, 'Die Zulässigkeit einer Kulturflatrate nach nationalem und europäischem Recht' <http://docplayer.org/14450852-Die-zulaessigkeit-einer-kulturflatrate-nach-nationalem-und-europaeischem.html> accessed 23 July 2018.

The UK and Ireland do not have a private copy exception in national law. Therefore, they would have to introduce the exception and the levy. Further, both countries have to decide which collecting society or societies distribute the revenue from the levy. The remaining European countries, which already have a private copy exception, can simply expand this exception.

a) Objections to the solution

There would be resistance in the population to pay the levy if they do not consume illegal content. They might feel that they only pay because some others do not follow the law and thus pay for the decriminalisation of the wrongdoers. Instead, they might want a strict enforcement. However, first it must be acknowledged that the solution can only work if all pay. Otherwise, one would have to monitor who uses illegal content which would be a problem in data protection law. In order to make a concession and to find a more balanced solution, the levy should vary according to different access speeds. Nevertheless, the objection is understandable. Though, by the same argument, there would be no money gained from taxes that could be used for police, health care or operas, which are also often supported by the state. Moreover, once the exception is introduced, they may also benefit from this rich culture available on the Internet of protected and unprotected content; it is possible that they might not have used it, simply because it was illegal.[53] In order to pick up on this objection, it is crucial to support the content flat-rate with a public awareness campaign, which shows that people do not have to pay the levy so that others can continue their criminal activities but for a copyright, which works in the digital era.

Next, the creative industries and artists may argue that this would be an unjustified interference with their intellectual property rights. They may argue that they should be able to enforce their rights if they wish to do so. If someone would steal a car, the car owner would also not be happy with a compensation but would try to prevent the theft. However, there is an important difference between tangible property and IP. Professor Melville Nimmer wrote that "an absolutist interpretation [of rights] is both unrealistic and

[53] Volker Grassmuck, 'A Copyright exception for Monetizing File-Sharing: A proposal for balancing user freedom and author remuneration in the Brazilian copyright law reform' (18 January 2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1852463> accessed 16 August 2018.

undesirable."[54] Therefore, they always have to be balanced against competing rights. Tangible property is only more protected because only a few people can use it. These users keep it functioning through ongoing investment and there is no conflict with freedom of expression. In contrast, IP interferes with freedom of expression and can be used everywhere in the world at the same time. Even if copyright is widely considered intellectual property, it is not without limits and does not entirely fulfil the characteristics of property.

Copyright is granted for a certain period of time and, therefore, it is not durable. Furthermore, it cannot be enforced against everyone as an absolute right. There are fair use exceptions, which can be defined by the state. In other words, the state can regulate the modalities of copyrights. For example, in Germany and many other countries, there is a private copy exception. Producers and importers of tape records are required to add a copyright levy to the price of their devices. The justification for this limitation to copyright is that the private copying cannot be controlled. Prohibitions that cannot be enforced are deemed useless and detrimental to the authority of the legislator. Therefore, copying in such a broad extent can only be captured through an indirect claim to remuneration.[55] In the same way, and with the same logic as this has been done in Germany for offline copying, so could be done for online copying. One should keep in mind that it is not the point that the aims of copyright are flawed, or that music should be given away for free. The point is that there might be a solution, which benefits all affected parties better than individual enforcement of copyrights.

Moreover, the creative industries and artists could argue that such an exception would deprive the artists of its remuneration as they may get less money from the levy than they would get from usage-based royalties. However, most of the artists do not profit from a strict enforcement as they have buy-out contracts, in particular in the music industry.[56] In contrast, enforcement measures are very costly and seem to result more from a policy of deterrence than from the desire to receive the remuneration in every single case. Instead, the content flat-rate would provide a considerable secure source of income.

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[54] Melville Nimmer, 'The Right To Speak From Times To Time: First Amendment Theory Applied to Libel And Misapplied to Privacy' (1968) 56 California L. Rev. 935, 941.
[55] Haimo Schack, *Urheber- und Urhebervertragsrecht* (5th edn, Mohr Siebeck 2010) 266.
[56] Natali Helberger, 'Never forever: why extending the term of protection for sound recordings is a bad idea' (2008) 30 (5) EIPR 174, 180.

Next, distribution systems for other levies are generally criticised for being non-transparent and unfair. However, the online environment has a big advantage, that in contrast to the physical world every activity can potentially easily be tracked. Therefore, every work could be provided with a watermark, potentially through the blockchain. Thus, everybody could know exactly how often which work has been streamed or up or downloaded. There would be no incentive to circumvent this watermark as the use would not result in higher costs. However, if collecting societies should track how often a work has been used, this could potentially have data protection issues. Although, for the calculation of the distribution of the levy it would not be important who has seen which movie but how often it has been seen in general. Therefore, the data could be anonymised according to the GDPR.

Finally, the practical implementation of the solution can be difficult. As discussed, the solution requires a change in EU law. These changes take time and are influenced by lobby groups. Naturally, entertainment companies and special interest groups like the International Federation of the Phonographic Industry (IFPI) will lobby against the change in the law. They have a lot of experience, enough money and the opportunity to influence the public opinion through their own media or through interviews and news articles. Therefore, it is extremely important that other interest groups lobby on the other side in favour of a content flat-rate.

b) Decriminalisation

The introduction of the content flat-rate would have the advantage that a large part of the population that commits copyright infringements as a criminal offence would be decriminalised and would not have to fear fines or civil proceedings. Also, parents could be more relieved about their childrens' internet behaviour. With the possibilities of hiding one's identity, it is likely that the only people who will get caught will not know how to hide their identity and/or have no criminal intent. These will often be children. Therefore, enforcement affects the wrong people. Many examples of children and teenagers around the world sued for several million dollars for copyright infringements can be found, especially in the dot com

era but also in more recent years.[57] In the UK and in Germany 15% of all Internet users use illegal content and the majority of them is aged between 12 and 35 years old.[58] Lawrence Lessig stated that this results in a criminalisation of a whole generation of our children but that enforcement cannot stop these activities, it can only drive them underground.[59] This decriminalisation is by no means a moral devaluation of copyright, or a lack of respect for creation. It is only the more efficient solution for the piracy problem, which can balance the interests of creators, industries and users in a better way. Furthermore, the decriminalisation and the fact that civil proceedings would be rendered unnecessary would alleviate the workload in courts.

c) Content flat-rate as a proportionate answer

The current enforcement system becomes increasingly disproportionate as the problem of piracy becomes less and less significant. Laws always need a justification and have to be proportionate. If the facts change, so can the assessment of proportionality. If we look forward to the next ten years, we can see that the piracy problem will become less significant with the changing technology and Internet market. For that reason, a strict enforcement system would be akin to using a sledgehammer to crack a nut. If fewer people use illegal content, but still sharing websites are being blocked, this will hinder the free flow of content in the public domain. By contrast, a content flat-rate would overcome this disproportionate situation. This part will first look at developments in the music and film industry as the most pirated industries and in technology as such.

The music industry has already changed a lot since the piracy problem occurred and convinces people to pay for content. With the introduction of iTunes in 2003, songs could be downloaded for 99 cents per song. This was the equivalent price of a song on a CD, though there were no costs to produce the disk. Yet, download revenues are decreasing (-20.5%

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[57] David Kravets, 'File Sharing Litigation at a Crossroads, After 5 Years of RIAA Litigation' *Wired* (New York, 09 April 2008) <https://www.wired.com/2008/09/proving-file-sh/> accessed 15 August 2018.

[58] Dietmar Harhoff, 'Nutzung urheberrechtlich geschützter Inhalte im Internet durch deutsche Verbraucher: Ergebnisübersicht einer repräsentativen quantitativen Erhebung' (22 January 2018) <https://www.ip.mpg.de/fileadmin/ipmpg/content/projekte/Nutzerverhalten_Kurzbericht.pdf> accessed 23 July 2018; UK Copyright Infringement Tracker (n 13).

[59] Lessig, 'In Defence of Piracy' (n 50).

globally from 2016 to 2017) in favour of new subscription services. Spotify and Apple Music are an answer to the expectation of convenient access on all devices to as much content as possible in the best quality. These services offer an easy one-stop-shop for music. Almost all content can be found on these subscription services. Furthermore, in 2015 New Music Friday was introduced, on which new music is always released globally on a Friday. This helps to minimise customer frustration, which occurred when one album was only released in the US and not in the customers home country.[60] This success is reflected in the global revenue. In 2017, the industry saw a 41.1% growth in streaming revenue, which was the largest revenue source for the first time (compared to physical, digital [excluding streaming], performance rights and synchronisation revenues).[61] In the past three years, the music industry has seen an overall growth with 8.1% revenue growth in 2017. This was one of the highest rates of growth since 1997.[62] In 2017, there were 176 million users of paid subscription accounts.[63] However, the total revenue is still only 68.4% of the peak in 1999.[64] Though, the industry cannot expect to be immediately at the same level as they have ignored customer expectations for too long. Therefore, overall, it can be said that the music industry has understood the new situation and is going in the right direction. The Senior Vice President of digital strategy and business development at Universal Music, Jonathan Dworkin said that,

> we cannot be afraid of perpetual change because that dynamism is driving growth. There's going to be so much disruption and so much new technology, we're just going to have to fasten our seat-belts and show a high degree of sensitivity and willingness to listen. Whilst disruption is challenging, it's also going to be very exciting and create a lot of value.[65]

In the future, the music industry will go along this path and ensure that the paid services are always more convenient and offer a better quality than what can be found for free on the

[60] Kory Grow, 'Music Industry Sets Friday as New Global Release Day" *Rolling Stone* (New York, 26 February 2015) <https://www.rollingstone.com/music/music-news/music-industry-sets-friday-as-new-global-release-day-73480/> accessed 7 July 2018.
[61] IFPI, 'Global Music Report 2018: Annual State of the Industry' <http://www.ifpi.org/downloads/GMR2018.pdf> accessed 25 August 2018, 10.
[62] ibid.
[63] ibid.
[64] ibid.
[65] ibid, 19.

Internet. Therefore, they have to invest in digital innovation to enrich customers' experiences, for example in voice-controlled speakers that do not disturb the listening experience and the discovery of new artists.[66] People are already sharing stories, photos and information on a large scale online, but music is surprisingly not really a part of this sharing culture. The industry should work on becoming part of it and create a new source of income for artists. Consequently, we can see a major trend towards paid subscription services. If people use these services they won't use illegal content anymore.

Much like the music industry, the film industry has also realised that it has to adapt to new customer expectations. However, the film industry seems to lag behind the music industry. There are numerous subscription accounts, the most famous being Netflix, Amazon Prime, HBO and Hulu. However, all these accounts offer a more or less different selection of movies and series, and the offer varies from country to country. There is no one-stop-shop for movies and series. Customers will not subscribe to all services, and even if they would they would not be able to find every movie or series, especially not recently released ones. Consequently, it seems to be more likely that customers will close these offer gaps through illegally downloading or streaming them. Furthermore, the film industry adheres to the release window system. Pursuant to this system, a movie will first be released on cinemas, four months later on DVD, even later on pay-tv and video-on-demand and years later on mainstream broadcasting networks.[67] However, customers want to choose if they want to watch a movie at the cinema, on DVD or via a subscription service without having to wait several months. Therefore, this system has been described as an "analog era relict".[68] If a customer watched the first season of a series and the second one is released only in the US, then the customer will probably not wait until the series is released in his/her country. Instead, he/she will turn to illegal offers. Admittedly, it seems understandable that a simultaneous global release on all mediums would face some resistance, given the fact that the production of movies and series is costly. It seems only logical that people will go less to cinemas if they can just watch the movie at home via their subscription account. However, release windows are shrinking and there were even movies which were released

[66] ibid, 10.
[67] Frederic Filloux, 'Different Release Times of Films and TV Shows Boost Global Piracy' *The Guardian* (London, 26 November 2012) <https://www.theguardian.com/technology/2012/nov/26/films-tvs-global-piracy> accessed 7 July 2018.
[68] ibid.

simultaneously on Netflix and in cinemas.[69] Netflix releases all episodes of a series globally on one date. Yet, the adaptation is very slow and mainly driven by subscription services instead of the movie companies themselves. This slower adaptation could possibly be explained by the fact that box office sales increased over the past five years to $40.6 billion in 2017.[70] However, the potential of subscription services also as a source of revenue through royalties for the larger movie companies can be seen in the fact that subscriptions to online video services (446.8 million globally) increased by 33% when comparing 2017 to 2016.[71] Since 2013, global theatrical consumer spending has increased by 13%.[72] Though digital home entertainment has increased 161%.[73] In the future, movie companies will continue shortening release windows and release movies globally on the same date. Cinematic distribution and home distribution may possibly be seen as separate distribution channels instead of successive channels. This would even allow the industry to have a single global marketing campaign. Furthermore, subscription accounts will work on having as much content as possible on their accounts, so that the offer gaps can be closed. In June 2018, there were first reports that Apple may introduce a single subscription service including music, news and their original TV shows.[74] To that end, one can conclude that also in the movie business people will be incentivised not to use illegal content anymore.

The developments in the creative industries are accompanied and supported by the evolution of technology. This evolution is leading to an overall smart and connected environment. Already today, there are more people connecting to the Internet on mobile

[69] Nelson Granados, 'Changes To Hollywood Release Windows Are Coming Fast And Furious' *Forbes* (New York, 8 April 2015) <https://www.forbes.com/sites/nelsongranados/2015/04/08/changes-to-hollywood-release-windows-are-coming-fast-and-furious/#10d3407d6dc7> accessed 7 July 2018.
[70] MPAA, 'THEME Report: A comprehensive analysis and survey of the theatrical and home entertainment market environment (THEME) for 2017' <https://www.mpaa.org/wp-content/uploads/2018/04/MPAA-THEME-Report-2017_Final.pdf> accessed 25 August 2018, 7.
[71] MPAA (n 70) 13.
[72] ibid, 7.
[73] ibid, 11.
[74] Jessica Toonkel, 'Apple Eyes Streaming Bundle for TV, Music and News' *The Information* (San Francisco, 27 June 2018) <https://www.theinformation.com/articles/apple-eyes-streaming-bundle-for-tv-music-and-news> accessed 23 July 2018.

devices than people connecting to it from a computer and this trend will continue.[75] The Internet Society predicts that we will see a fundamental change within the next five to seven years. The Internet of Things will become reality and we will see an "explosion of ubiquitous connectivity".[76] Furthermore, the Internet will be faster and more affordable.[77] The state of omnipresent connectivity will lead to the situation that in the majority people will not watch movies and series only at home but, potentially, everywhere they go with mobile devices. Therefore, people will expect an easy and convenient way to access a large range of content in a high quality on all devices. For that reason, it will be unlikely that people will search for, by today's standards, illegal content with the risks which come with that: viruses, other security issues, and often poor quality. Subscribing will not only be more convenient and easier than using free content. We will see a reaction of the economy to the expectation of having convenient access. Already today, we can see first examples for that: Vodafone offers free Spotify, Amazon Prime and Netflix subscriptions with their mobile phone contracts and these applications can then be used without data consumption.[78] In consequence, this development will ultimately encourage users to prefer "convenient" over "free".

However, one could argue that there will be more new Internet users in countries such as Eritrea.[79] The choice of free over convenient may only be a reality in countries with a high living standard and economic power. Hence, it is very possible that people in other countries will choose free over convenient access, even if they live in a connected world. However, compared to the number of people who are already connected to the Internet, this may be neglected. Further, in countries with less economic power, people will generally spend less on movies and music. Therefore, the economic impact of piracy in these countries is lower than in countries with a strong economy. Moreover, new technology standards like 8K resolution or others which we don't imagine yet will be introduced.[80] If people buy devices with such a high resolution, they will need content in a likewise high quality.

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[75] Internet Society, '2017 Internet Society Global Internet Report, Paths to Our Digital Future' <https://future.internetsociety.org/wp-content/uploads/2017/09/2017-Internet-Society-Global-Internet-Report-Paths-to-Our-Digital-Future.pdf> accessed 07 July 2018, 17.
[76] ibid, 10, 43.
[77] ibid, 6.
[78] Vodafone Ltd 'Vodafone Passes' < https://www.vodafone.co.uk/mobile/pay-monthly/vodafone-passes > accessed 7 July 2018.
[79] Internet Society (n 70) 12.
[80] John Archer, 'Samsung Announces Two New Ranges Of 8K TVs: And Discusses Future 8K TV tech' *Forbes* (New York, 28 June 2018)

To that end, the piracy problem will become less significant as people will be more likely to pay for content, as the paid content has a competitive advantage to free content. However, there may still be a smaller amount of people using free content. Website blocking and possible future enforcement measures such as easily blocking mirror sites and forbidding VPNs would become increasingly oppressive and could potentially seriously interfere with people's fundamental rights without justification and would, therefore, be disproportionate. This picture of the future is very important to keep in mind for any legal changes, as any legal change should also be made with an eye on the future.[81] Hence, a content flat-rate would overcome this problem.

d) Ongoing willingness to pay for subscription services

Finally, one could argue that once a content flat-rate would be introduced, people would not be willing to pay for subscription services or other paid content as they feel that they already pay for the content.

As we have seen in the argument above, changes in technology and in the creative industries will offer an incentive for customers to choose paid convenient content over content which would be paid for by the levy. By extension, consumers are willing to pay for creative content as long as there is a reason to pay. At the moment, consumers don't pay for content because there is no better alternative, but they would pay if there would be such an alternative. This willingness to pay can be concluded from two studies in the UK and in Germany. In the UK, the copyright infringement tracker with its latest wave from June 2018 commissioned by Ofcom and sponsored by the UK IP Office found that the reasons for British online consumers to use illegal content were that it is free, that it is easy/convenient and that it is quick.[82] Moreover, they found that there are fewer people using free content. They conclude that "this is an indication that people are chasing the best content and are willing to pay for ease of access to it." The German joint study of the Max Planck Institute for IP and the Munich Centre for Internet Research from January 2018 found that the reasons

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<https://www.forbes.com/sites/johnarcher/2018/06/28/samsung-announces-two-new-ranges-of-8k-tvs-and-discusses-future-8k-tv-tech/#609277567caa> accessed 23 July 2018.

[81] Lawrence Lessig *Free Culture: How Big Media Uses Technology And The Law To Lock Down Culture And Control Creativity* (Penguin Press 2004) 297 f.

[82] UK Copyright Infringement Tracker (n 13).

for the illegal behaviour are that it is free, that it is easy and that it is fast.[83] Interestingly, they found that online consumers spend overall more money on culture than the average consumer. This indicates a certain willingness to pay according to the authors. The fact that consumers with a mixed legal and illegal online user behaviour have the highest overall spending for these areas (including physical purchases, merchandising, concert- and cinema-tickets), contradicts the presumption that consumers use illegal content mainly to save costs. Moreover, Radiohead released their album *In Rainbows* for free download and received significant amounts of voluntary payments from their fans.[84] One can draw from this example that just because a work is available for free, it does not mean that people would not pay for it.

Moreover, people pay a BBC TV licence in the UK, which costs £150.50 per year. This could be seen as an analogy to the online content flat-rate. Even though people could find the same content illegally online, most people pay this license as it is more convenient to watch TV legally than to stream it. Likewise, in Germany, people have to pay €210 per year and per household for public-law broadcasting TV no matter if there is a TV or not. In addition, most people pay an additional fee for private-law broadcasting TV. This illustrates, that even with the burden of a mandatory fee, people are still willing to pay for additional content that could be found illegally online.

e) Rebalancing copyright online

To a certain extent, copyright originally was created to protect artists and creative spirits and to provide them with a chance to monetise their work. Today, it also protects investments to some extent. However, copyright is not granted limitlessly and in absolute terms as it has to be reconciled with freedom of expression. First, there is a time limit, which will be discussed separately in the third part of this section. Second, there are limits to the content. For example, if a consumer buys a book he/she is allowed to re-read it; he/she is allowed to lend it to a friend and even to sell it. The creator is not financially involved in any of these acts. This is the result of a sophisticated balancing act between the interest of the artist in a

[83] Harhoff (n 58).
[84] Daniel Kreps, 'Radiohead Publishers Reveal "In Rainbows" Numbers' *Rolling Stone* (New York, 15 October 2008) <https://www.rollingstone.com/music/music-news/radiohead-publishers-reveal-in-rainbows-numbers-67629/> accessed 23 July 2018.

possible remuneration as an incentive for creation and the interest of society in the dissemination and participation in cultural life. In the example of books, authors receive royalties for every sold book but not for any downstream uses. The author knows this in advance and is able to determine the price structure accordingly. Consequently, people who are not able to afford the purchase price of the book can lend or buy the book second-hand and take part in cultural life.

Yet, copyright was designed in the context of a physical world. The characteristics of the Internet result in a stricter online than offline world. Despite the permission in the physical world, it is not allowed to lend or sell an e-book, because you necessarily have to duplicate it. Lawrence Lessig concludes that the default in the analogue world was freedom, the default in the digital world is regulation.[85] In consequence, a private copy and making available exception for digital content would transfer the balance from the physical world to the online world.

The content flat-rate would go further than rebalancing the online world, as it would also facilitate access to a work which has not been purchased before (with the levy as a compensation). Yet, the content flat-rate's main purpose is not the rebalancing, but to find a solution that ensures remuneration to creatives. The rebalancing would be a positive side-effect.

2) Public awareness campaigns

The introduction of the digital private copy exception should be supported by public awareness campaigns. This part will first look at a campaign accompanying the content flat-rate and second at more general forms of public education to increase the appreciation of creativity.

a) Raising acceptance for the content flat-rate

The public awareness campaigns serve for informing the public so that they can make their own informed decision about a topic. If the legislator wants to introduce a new levy there will naturally be a negative attitude towards it. The campaign must explain the benefit of the flat-rate model for artists and the society. In other words, a remuneration through the flat-

[85] Lessig 'Free Culture' (n 81) 139 ff.

rate may well be worse than an individual remuneration, but it is better than to have no remuneration at all. Therefore, it is crucial that users who pay the levy understand that they are not paying so that other users will continue with criminal behaviour of file-sharing, but rather in order to ensure that copyright law itself adapts to the digital age.

The awareness campaign is primarily directed at adults, who pay the levy. Therefore, traditional mediums can be used: newspaper articles, TV advertisements and the ISPs should inform and explain the levy to their customers. In addition, social media platforms provide an effective way to reach Internet subscribers. Social media platforms themselves have an interest to see the content flat-rate succeed as they could, potentially, be held liable for the sharing of illegal content.

One could also be inspired by a very successful campaign in Sweden where the authority, which is responsible for TV licensing, launched a campaign in order to increase the number of people who pay their TV broadcasting fee.[86] They launched an interactive video, in which a hero who is presented at a press conference is responsible for ensuring that what one hears and sees on TV and radio is true. In the video, everyone stops what he/she is doing and celebrates the hero. Once the picture of the hero is revealed, the viewer sees a picture of him/herself. The picture is shown on the news, billboards, and even on a notepad in a space shuttle. He/she is the hero because he/she pays TV broadcasting fees, and the viewer of the advert can either upload a picture of him/herself, or of a friend and send him/her the video. This campaign has raised international attention and led to a high number of new payments to the TV license. A similar concept could be adapted for the content flat-rate. Users who pay the content flat-rate are heroes as they help artists to survive, to decriminalise children, and to ensure a free internet.

b) General education

In addition, state authorities like the UK IPO should continue to educate people - especially children - in order to increase the appreciation of creative content. If people value creativity and understand the value chain for creative content, they will be more likely to pay for subscription sites, which would enhance a license-based remuneration.

[86] Martin Lindelöf, 'Tackfilm.se – a walk through' (YouTube, 9 March 2010) <https://www.youtube.com/watch?v=DAVwG8DCJiU&frags=pl%2Cwn> accessed 15 August 2018.

The UK IPO has already launched several campaigns to educate children like the radio series "Nancy and the Meerkats",[87] which guides pupils through the process of setting up a band, recording and releasing music and the problems with IP. The "Karaoke Shower",[88] a mobile shower booth that aims at enhancing the respect for copyright and creativity in a fun way, and "crackingideas.com"[89] giving schools and colleges free access to teaching resources.

This is a good start, and the UK has understood that a positive approach is better than a negative one. In the past, campaigns have often used scare tactics with slogans like "Piracy is Theft!" and "Home Taping is killing music" both in the 1980s, and "You can click but you can't hide" and "Piracy - it's a crime" both in 2005. Yet, studies have shown that positive messages are more successful than negative ones.[90]

Further, the UK IPO should start using social media. Social media provides a powerful tool to reach people of all ages. In the UK there are 44 million active social media users of overall 66.06 million Internet users.[91] The average daily time spent on social media (including messengers) is 1h, 54 minutes.[92] For example, the IPO could collaborate with reliable influencers on Instagram, which would provide a possibility to reach people not as an authority with a certain distance, but through someone people relate to and identify with.

3) Shortening the term of protection

The third pillar to solve the problem of piracy is a shorter term of copyright protection, but what is the link between piracy and the term of protection in the context of a content flat-

[87] Children's Radio UK Limited, 'Nancy and the Meerkats' <http://www.funkidslive.com/learn/nancy-and-the-meerkats/#> accessed 15 August 2018.
[88] UK IPO, 'Getting the Nation Singing with the Karaoke Shower Live Tour' (15 November 2013) <https://www.gov.uk/government/news/getting-the-nation-singing-with-the-karaoke-shower-live-tour> accessed 15 August 2018.
[89] UK IPO, <https://crackingideas.com> accessed 15 August 2018.
[90] Brian Wansink, 'Which Health Messages Work Best? Experts Prefer Fear- or Loss-Related Messages, but the Public Follows Positive, Gain-Related Messages' (2015) 74 (4) Journal of Nutrition Education and Behaviour S93.
[91] We Are Social, 'Digital in 2018 in Northern Europe Part 1 – West' (29 January 2018) <https://www.slideshare.net/wearesocial/digital-in-2018-in-northern-europe-part-1-west-86864594> accessed 14 August 2018, 122.
[92] ibid, 126.

rate? Obviously, if the term of protection is being shortened then the works, which have been pirated yesterday, could be free to use tomorrow. Consequently, the overall number of works in the public domain would be higher, and the number of pirated content would be lower. If this would be the only rationale, it would not justify a change of the term of protection, as the content flat-rate solves the infringement problem. If works become part of the public domain earlier, they will very likely appear on paid subscription services as these do not have to pay royalties anymore. Consequently, the offer of these services will be better and customers will be more likely to pay for such a service. This will increase the remuneration for artists. Further, with the levy, there will only be a certain amount of money that can be distributed among all right holders. Therefore, either artists will benefit and receive more money with the same levy, or the levy can be reduced, which would be beneficial for the public, or a mix of the two. To some extent, there is something arbitrary to the current time limit of 70 years *post mortem auctoris* (p.m.a.). There is no justification if it is 70, 72 or 65 years p.m.a. Nevertheless, it is not completely arbitrary. It is the result of a balancing act. This part of the dissertation will argue that the current term is too long and should be reduced to 50 years p.m.a.

The US professor Mel Nimmer introduced a methodology to balance copyright against freedom of speech in the US, which is also applicable in the EU with freedom of expression.[93] Freedom of speech is protected in the US by the First Amendment and freedom of expression in the EU by Art. 11 of the EU-Charter. Copyright laws "fl[y] directly in the face" of freedom of speech.[94] Therefore, these two rights have to be balanced. Nimmer argued for a “definitional balancing”.[95] This means that in determining which of two rights should prevail, it should not be asked which right in a specific case should prevail (ad hoc balancing) but what kind of free speech should be restricted. Definitional balancing, therefore, is more abstract and creates a general rule.

The underlying interests of freedom of expression according to Nimmer are, firstly, that it is a necessity in a democracy; it is important that people exchange views in a “marketplace of ideas” for informed voters.[96] Second, it is an end in itself as every human

[93] Melville Nimmer, ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 UCLA L. Rev. 1180, 1181.
[94] ibid.
[95] ibid, 1186.
[96] ibid, 1191.

being can only find self-fulfilment if he/she is free to express himself/herself. Third, it is important for a safe and stable state as people are less violent if they can use non-violent forms of expression as a valve for anger.[97]

According to Nimmer, copyright exists because the monopoly is necessary as an economic encouragement for creation, and because the public benefits from creative activities. Furthermore, copyright supports the author's right to privacy as it also protects unpublished works.[98] Beyond these three reasons stated by Nimmer, European countries also protect (to a different extent) moral rights of the author as the post-mortal protection of an artist's dignity and reputation is a part of the human dignity.[99] Even if moral rights do not necessarily have to have the same duration as copyright itself, the Revised Berne Convention states that moral and economic rights shall generally have the same duration.[100] Further, modern copyrights also protect investments to some extent, for example in software and technical drawings, which will be balanced separately in the second half of this part.

All these interests have to be balanced in order to define the term of protection.

Creative works should at least have a protection for the lifetime of the author. Artists would potentially engage less in creation if they are not able to monetise it in order to live. Of course, artists may feel an inner compulsion to create, but they still need to sleep, eat and pay rent. Otherwise, creators would be dependent from a patron of arts. In consequence, there would only be creation for the ones who can afford it, which would be detrimental for a democratic society in which diverse expressions are valued. Further, some creation is very expensive and will only be done if creators have the chance to amortise the investment. Also, privacy would not be sufficiently protected if anyone could publish, for example, a diary after a certain period of time while the author is still alive. Conversely, there is no particular freedom of expression interest to allow the use of the content in question. It is not necessary for a democracy that people can use expressions of living authors as long as they can use their ideas. Also, it is not necessary for self-fulfilment to use

[97] ibid, 1188.
[98] Nimmer (n 93) 1186.
[99] Paul Hughs, 'Painting on a broader canvas: the need for a wider consideration of moral rights under EU law' (2018) 40 (2) EIPR 95.
[100] Berne convention for the protection of literary and artistic works [1886, last revised 1967], art. 6bis (2) 1.

the expression of someone else. Further, people would not be more violent just because they are not allowed to use a work of a living artist.

So why not make the term of protection perpetual? Some countries, such as France,[101] Spain,[102] Poland,[103] and Italy[104] have a perpetual moral right. These countries argue that works are part of the culture of a nation and they fear that this could be destroyed if anyone could deform cultural goods. Yet, copyright does not protect the work itself but the relation of the author to his work. Countries use perpetual moral rights to drive culture in a certain direction, which is not part of the copyrights *raison d'être*. A perpetual copyright would also interfere with a vivid contemporary art, which is in the interest of the public. For example, Monthy Python's movie *Life of Brian*, a satire comedy movie about Jesus Christ can be judged as poor taste, but it would be reductive if the state would argue with the copyrights of the four evangelists. Therefore, there must be a dividing line somewhere between the death of the author and perpetual protection.

The incentive rationale is difficult to assess as it is very complicated to predict if people would create less if they would know that only they and not their children and grand-children could exploit their works. The interest of artists to look after their heirs is understandable but there are lots of professions in which people work but heirs only get the heritage without an additional exploitation possibility. Therefore, it seems rather unlikely that there would be less creation. However, production companies invest large sums, for example in movies. In order for that investment to be worthwhile, they need a few years to exploit the movie. If a film director would be very old, a company would not work with him anymore as the movie could potentially not be exploited as planned if the director would die promptly. Consequently, there would be less creation. In effect, the British Statute of Anne 1710 had a period of 14 years starting with the publication of the work and not with the death of the creator. Yet, in the movie industry, which can be characterised by high investment costs on average, and a legitimate interest to cross-finance less successful movies, the release windows altogether are not more than two years. The exploitation may go on after these two years through the sales of DVDs, downloads, royalties and so on. However, most of the revenue will naturally be created during the first two years. The most

[101] Code de la propriété intellectuelle, Art. L. 121-1.
[102] Art. 15(1), 14(1)3 and 4 Spanish Copy Right Act (CRA) 1996.
[103] Art. 16 Polish CRA 1994.
[104] Art. 23 Italian CRA 1931.

famous movies, which were released exactly 70 years ago were *Fort Apache*, *Rope* and *The Treasure of the Sierra Madre*.[105] The producers do not exploit these movies anymore to an extent, which is important for the amortisation. Moreover, even if a longer term of exploitation may lead to more income for entertainment companies, it is not said that this leads to more creation. Entertainment companies can use the money for making new movies, but they can also use it for anything else.[106]

Yet, there is another interest, which requires a longer protection period. The author's interest in the protection of his/her moral rights remains after his/her death. However, this interest fades if fewer people know the author. In an individual case, some works will be widely attributed to an author decades after his/her death and, in other cases, nobody will know the author of a work even during his/her lifetime. However, in a definitional balancing, we need to find a general rule. Some people argue that after 70 years, no heirs in the first or second generation live anymore who had known the author of the work. Even if this is true, at least if the author meets the average life expectancy, we need to balance this with the public interest in creation. The longer the term of protection, the harder the attribution of a specific work to an author ("orphan works"). If someone wants to use a work he/she has to contact the right holders for a license. This becomes very difficult if right holders are a group of heirs potentially spread throughout the world, especially as there is no registry for copyrights. In consequence, use is being prevented instead of promoted.

The extension of the term of protection in the past has largely been influenced by the entertainment industry. In the US it was particularly Disney who tried to prevent, successfully, that Mickey Mouse becomes part of the public domain.[107] There seems to be a general attitude that if there is a value, there must be a right.[108] However, the "if value, then

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[105] Internet Movie Database, 'Most Popular Films Released 1948' <https://www.imdb.com/search/title?year=1948&title_type=feature&> accessed 1 August 2018.

[106] Erwin Chemerinksy, 'Balancing Copyright Protection and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional' (2002) 36 Loy. L.A. L. Rev. 83, 96.

[107] Timothy Lee, '15 Years Ago, Congress Kept Mickey Mouse Out Of The Public Domain. Will They Do It Again?' *The Washington Post* (Washington, 25 October 2015) <https://www.washingtonpost.com/news/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again/?utm_term=.d6939cee8cf1> accessed 1 August 2018.

[108] Rochelle Dreyfuss, 'Expressive Genericity: Trademarks as Language in the Pepsi Generation'(1990) 65 Notre Dame Law Review 397.

right" rationale is not a legitimate justification for copyright protection as it neglects entirely competing interests.

In addition, software and technical drawings are also protected under copyright law. Unlike other literary works, software is more functional. Much of its value resides in its functionality, not its expression as a literary work. In reference to the definitional balancing, we will find no interference with freedom of expression. Software and technical drawings are neither important for self-fulfilment or as a valve for anger. Neither do they impede people to exchange ideas, as the idea of a software or technical drawing is not protected. Yet, this protection interferes with a free market and free competition as it provides a monopoly. Therefore, one has to ask why we protect the free market? The invisible hand leads to the best allocation of resources in a market. Free competition leads to lower costs, better quality, more choices and variety, economic development and growth, greater wealth equality, more innovation, a stronger democracy by dispersing economic power and greater wellbeing by promoting individual initiative, liberty and free association.[109] Thus, the interest of the free market has to be balanced against granting a copyright for software and technical drawings.

On the copyright side, some sort of protection may be required due to the incentive rationale. Developers - most of the time large corporations - who use freelancers or employees to develop software or technical drawings, tend to invest a high amount of time and money in the development.[110] If competitors were allowed to copy the new product and sell it at a lower price since they do not have to compensate the costs of the development of the software or technical drawing, this would be a disincentive to creators to invent new products. Besides, reaping without sowing is unfair. One business should not profit from the hard work and invested money from another company without any effort of their own. However, it is very questionable if people would not create technical drawings or software anymore if there would be no copyright protection. Especially as software can also be protected through trade secrets, sometimes patents and with trademarks.[111] Further, software or technical drawings do not concern moral rights as they are more functional and

[109] Maurice Stucke, 'Is Competition Always Good?' (2013) 1(1) Journal of Antitrust Enforcement 162, 165 f.
[110] Directive of the European Council and the European Parliament (EC) 2009/24 on the legal protection of computer programs [2009] OJ L 111/16, recital 2.
[111] Paolo Guarda, 'Looking for a feasible form of software protection: copyright or patent, is that the question?' (2013) 35 (8) EIPR 445.

not an expression of the artistic spirit. Therefore, a protection after the death of the creator is unnecessary.

Concerning the free market, the monopoly leads to higher costs. Without the protection, a competitor could imitate the software or technical drawing. This would increase the supply and drive down the price. Therefore, the monopoly harms consumers and leads to less choice and variety. This monopoly leads to less innovation. The efforts of the present are built on the efforts of the past. In the case of software, developers are allowed to use a software's structure, input and output routines, appearance or manner of operation ("look and feel") and its functionality. However, they are not allowed to use even parts of the source code. Therefore, developers will be very hesitant on follow-on software development and have to start developing software more or less from a blank slate. Consequently, both slavish copying and follow-on copying reduce incentives for innovation.[112] In addition, the quality cannot improve if developers cannot use the code to refine the software.

In conclusion, the copyright protection of software and technical drawings is more a protection of investment instead of the protection of the relation between the creators and their works. A long protection period, therefore, seems inadequate. This has been acknowledged in patent law. In patent law, the balance between incentivising invention and not impeding technological progress of society has been found with a protection period of usually 20 years as a maximum, and the inventors have to disclose the invention in return to ensure progress of society. There is no reason why the protection period for software and technical drawings should be so much longer with 70 years p.m.a. Such a long protection period has an enormous negative impact on the technical progress of society. Moreover, the software market is dominated by big companies such as Microsoft, IBM and Oracle.[113] A long protection period strengthens the position of these dominant companies and inhibits competition from and among smaller companies. Yet, as software and technical drawings are protected under copyright law regardless of whether this might be assessed as good or

[112] Bradford Smith, 'Innovation and Intellectual Property Protection in the Software Industry: An Emerging Role for Patents?' (2004) 71 The University of Chicago Law Review 241, 242.
[113] Price Waterhouse Coopers, 'PwC Global 100 Software Leaders' (2016) <https://www.pwc.com/gx/en/technology/publications/global-software-100-leaders/assets/global-100-software-leaders-2016.pdf> accessed 14 August 2018.

bad, the specifics of these more functional subjects have to be taken into account in the overall balancing in order to find an appropriate term of protection.

The definitional balancing with freedom of expression and with the free market shows that the term of protection should be shorter than 70 years. The Revised Berne Convention obliges states to protect works for a minimum of 50 years p.m.a. European law obliges Member States to protect works generally 70 years p.m.a.[114] In light of the definitional balancing and the international legal framework, the term of protection should at least be reduced to 50 years p.m.a., which has also been concluded by several other scholars.[115]

Conclusion

Making changes to copyright law has become a pressing need. It is a fact that if we do not act now, the current copyright enforcement with all its discussed shortcomings will either become more oppressive leading to a very strict enforcement system, leading millions of people to court. Alternatively, it will stay ineffective and lead to a perceived legal vacuum on the Internet, which is harmful to a state under the rule of law. The adaption of the content flat-rate accompanied by a shorter term of protection and public awareness campaigns will solve the problem of piracy of copyrighted content on the Internet.

The content flat-rate would ensure a secure source of considerable income for right holders and decriminalise significant parts of the population. Moreover, the content flat-rate would be a proportionate solution for the future. In the long-term, the piracy problem will decrease due to the technological progress leading to a ubiquitous connectivity and the developments in the industries, leading to better subscription services because of an enhanced expectation of convenient access to creative content. The enforcement system will, therefore, become disproportionate if we do not change it. In addition, the content flat-rate would help to rebalance copyright law in the online environment.

The introduction of the content flat-rate first requires a change in European law so that Member States can then change their national copyright laws. The author of this

[114] Directive of the European Council and the European Parliament (EC) 2006/116 on the term of protection of copyright and certain related rights [2006] OJ L 372/12, art. 1.
[115] Nimmer (n 93) 1194; Schack (n 55) 249.

dissertation has, therefore, written a letter to the Commissioner for Trade Ms Cecilia Malmström in order to ask her and the European Commission to propose to the European Parliament an amendment of the InfoSoc Directive.[116] Changes in European law are slow and extremely difficult. The creative industries will most likely lobby against such an amendment. Therefore, the author has contacted the lobby groups European Digital Rights, the Electronic Frontier Foundation and Culture Action Europe to ask for their support.[117]

The content flat-rate should be accompanied by public awareness campaigns as people need to understand why they have to pay the levy. Authorities should explore modern communication channels in addition to traditional ones in order to reach as many people as possible and convince them. Further, a general education to increase the appreciation of creative content will help to minimise the piracy problem.

The shortening of the term of protection is important, as works will become part of the public domain earlier and, therefore, appear on subscription services earlier as well, which will make them more attractive. Further, it will benefit the calculation of the levy. The term of protection must be shorter as there is no justified interest to deprive works of the public domain for such a long time, whereas there are interests of freedom of expression to use the content. Moreover, with the copyright protection of software and technical drawings, such a long term of protection is highly detrimental to the technological progress of a society.

This solution is based on freedom and it reconciles the law with people's legal understanding and will lead to a win-win situation for the public and creators. Europe can take a leading role in modern copyright law and influence other countries to go along the same path. Being able to adapt to new situations is not only a sign of intelligence but also a sign of courage, especially if one tries to adopt new concepts that have not been tried in other countries before. Likewise, this courage is needed in the future. New technologies will continue to disrupt creative industries and the state needs to continue to adapt the laws to

[116] Letter from author to Commissioner for Trade Ms Cecilia Malmström (13 August 2018) Annex 1.

[117] Letter from author to the President of European Digital Rights Mr Andreas Krisch (13 August 2018) Annex 2; Letter from author to the President of Culture Action Europe Mr Robert Manchin (13 August 2018) Annex 3; Email from author to the Chairman of the Board of the Electronic Frontier Foundation Mr Brian Behlendorf (13 August 2018) Annex 4.

new developments in technology and customer behaviour. Technological progress is unstoppable and fast. Therefore, laws have to be made with an eye on the future. Otherwise, the legislator will not be able to keep pace with the pressure to adjust.

Once the content flat-rate is introduced, IP enforcement can concentrate on IP infringements that pose major threats to our society, such as trademark infringements in fake pharmaceuticals, fake spare parts for cars, or fake clothes with dangerous substances. These products - which infringe IP rights - can pose a threat to life. Therefore, the need for action in such cases is much more pressing than in copyright infringement cases.

The introduction of this solution will not only guarantee an income to right holders. It will also guarantee that the Internet stays a space of liberty instead of authority. Sharing ideas is important for democracies, sharing creative content is important for creative stimulation and progress. Creators create their content mostly not for themselves, but so that others can enjoy it, be disturbed by it, think about it and talk about it. If musicians would not want others to hear their song, they would not have to record it or even write down the sheet music. If artists would not want others to see their painting, they could just keep the idea in their heads. Sharing is the essence of creation. Therefore, it is wrong to criminalise it. If file sharing is illegal, this will not only concern copyrighted content but the sharing culture as such. The content flat-rate in combination with the public awareness campaign and the shorter term of protection will maintain this sharing culture, therefore the essence of creation and an Internet of freedom.

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Appendices

Appendix 1: Letter from author to Commissioner for Trade (13 August 2018)

[redacted]

[redacted]

Commissioner for Trade Ms Cecilia Malmström
Directorate-General for Trade
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Belgium

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[redacted]@kcl.ac.uk

London, 13 August 2018

Dear Commissioner for Trade Ms Cecilia Malmström,

I am an LL.M. student at King's College London (Dickson Poon School of Law), specializing in Intellectual Property (IP). I'm writing my dissertation about the problem of online copyrights infringements on file-sharing platforms. With the present letter, I would like to ask you and the European Commission to propose to the European Parliament an amendment of Directive 2001/29/EC (InfoSoc Directive).

For about twenty years now, legislators, creative industries and artists have tried to resolve the problem of illegal file sharing on the Internet without success. It has become a pressing need to adapt copyright law to the realities of the Internet. It is time to take action, change the direction of copyright law in the digital context and choose the path of freedom. There is a solution, which will reconcile the law with people's legal understanding and will bring benefits to all affected parties. Furthermore, a solution, which embraces progress in technology and values the immense chances which lie on the Internet and accepts changing consumer habits. A solution that embraces consumption of contents instead of criminalising it as the industry relies on this consumption but ensuring adequate remuneration.

I want to suggest to change Art. 5 (3) of the InfoSoc Directive in order to enable European Member States to introduce a private copy and making available exception for digital content.

If we do not change the law now, we will choose the path of a highly regulated authoritarian Internet or with other words the path of authority. This will have highly destructive effects on our society and the rule of law. It will lead either to a very oppressive enforcement system, which may be able to limit copyright infringements on the Internet but to the price of an extremely strict enforcement, leading millions of people into criminal proceedings including children and limiting the availability of (also unprotected) creative content. Or, it will lead to a situation in which enforcement stays unsuccessful and consumers of copyrighted digital content think they can do whatever they want independent from the legal system. This would be a major threat for a state under the rule of law. In both scenarios, there would be an immense mismatch between the law and people's beliefs of what is right and wrong. Artists will have to decide whether they stand on the side of their customers, who ought to pay for their creative works or on the side of the authorities who work to protect their works. Consequently, there would be no winners but only losers.

Copyrighted content is being shared illegally on a massive scale on the Internet. Consumers, who consume this illegal content often don't consider this as wrong or are indifferent to the infringement. The creative industries try to fight back against piracy by enforcing copyright against users, platforms and intermediaries. Often, they initiate an enforcement against all three in civil and criminal procedures. Therefore, they have to spend millions in order to try to compensate for the lost income. Creatives potentially lose income, which endangers the interest of the society of a rich cultural creation. The situation is, therefore, more than unsatisfactory. In addition, all legislative efforts and enforcement measures were not able to solve the problem until now. This problem is not only about creators and the creative industries versus online copyright

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infringements. It is also about the entertainment industry versus the Internet. Both cannot survive the way we know them today.

1) The current digital copyright enforcement system has major shortcomings. It is in part impractical, unrealistic, and faces problems of efficacy and proportionality.

- Actions against users face the problem of the immense volume of infringers. The number of people using online platforms for the sharing of copyrighted material is so high, that it seems impossible today to start proceedings against every single infringer. Standardised enforcement systems like the 'HADOPI law' in France seem arbitrary as in cases of serious infringements one strike could already be enough in order to send the case to court and in other cases three strikes may not be enough. Furthermore, it could lead Internet users to turn to encrypted systems, which can potentially be even more dangerous. Next, users often don't know what content is illegal or legal. For example, in Germany streaming was seen as a legal activity or at least a grey area. Even if the CJEU's Filmspeler decision may bring some legal security on this issue, people may still use illegal content as they think it is right to do so. Finally, enforcement measures face practical problems. In order to enforce copyrights, Internet service providers (ISPs) have to disclose information so that the infringer can be identified. This interferes with privacy, which is protected by the EU-Charter and this is particularly problematic in standardised enforcement against users as the infringer may well be a child, who deserves a higher protection. Where the infringer is a child, education would be much better than enforcement.

- Direct actions against operators are either unrealistic or possibly without effects on the availability of the digital content. One can identify the registrant of a domain name through a WHOIS search and send a cease and desist letter. These letters will most likely either be ignored or the registered name is simply not the actual individual behind the website as identity-theft is common in this area. Furthermore, the operators could be arrested, brought before a court and convicted. The servers of the website can be seized. However, the example of the Pirate Bay case in Sweden shows that this will eventually be without major impact on the availability of the concerned website and may even lead to a greater activity on the website. Next, the Infringing Website List, created by the UK Police Intellectual Property Crime Unit (PIPCU), on which they list websites, which infringe copyrights, surely complicates the generation of income for file-sharing websites. However, one can still find a lot of advertisement on these websites from less serious companies. Therefore, it seems to be only one stone in the mosaic of anti-piracy enforcement and a way for companies not to be associated with such infringing websites.

- Actions against intermediaries also face several problems. Sending a notice to the host of the website asking to take the operator's website down may be a cheap solution and may work in reputable host countries where contractual terms specify, that IP infringements are prohibited and hosts are obliged to implement a notice and takedown policy. However, if the host is not in the US or in a non-European jurisdiction it is unlikely that he will respond to such a notice and takedown request. Moreover, even if a website gets taken down, the operator can simply shift the website to a new host leading to a whack-a-mole game.
  Second, right holders can ask ISPs for website-blocking and apply for blocking injunctions. Blocking injunctions have the advantage, that they can be enforced easily. Furthermore, if users cannot access the concerned website, they cannot access the copyrighted material and it could potentially lead users to consume copyrighted material in a way, which ensures remuneration to artists. However, operators of these websites are technically versed and quick. Once a website is blocked, they can open up identical websites under new domain addresses (mirror sites). Therefore, website-blocking can quickly turn into a whack-a-mole game as well. Furthermore, website-blocking causes problems regarding proportionality and efficacy, which are by no means evident and can vary from case to case and from country to country. One should therefore be very hesitant about relying on this enforcement measure. Finally, it could also be possible to de-list platforms which share copyrighted material illegally from search engines. So far, Google states that it will not ban entire websites. However, in Google's transparency report, there are lists of delisted websites for copyright infringement, which seem to be file sharing platforms. The delisting of platforms has the advantage, that it can be potentially implemented worldwide. Furthermore, if the delisting would work quickly it could prevent users to find new file-sharing platforms or mirror sites through Google. However, the website is only delisted

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and can still be accessed through its URL. Hence, the de-listing of www.thepiratebay.org would not be helpful as users widely know the address by heart.

2) Member States should introduce a private copy and making available exception in copyright law for digital content. This exception would have two limitations: First, it would apply only to private users / non-commercial users and, second, it would be limited to works which are made available digitally. Hence, uploading, downloading and streaming for private purposes would be legal. However, the making available of illegally filmed movies in the cinema or of concerts would not be included in the exception. As a compensation for the exception, there should be a private copy levy on the internet subscription. The amount of the levy can be calculated according to different methods, which has been explored in an expert opinion for the German Bundestag.[1]

   Currently, Art. 5 (2) lit. b InfoSoc Directive allows only a private copy exception. Art. 5 (3) InfoSoc Directive states an exhaustive catalogue, which shows in which areas Member States are allowed to use statutory exceptions for the making available of works. However, this catalogue knows no exception for the private making available. Therefore, a new letter (p) should be introduced:

   3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
   (a) – (o)

   "(p) in respect of making a work available to the public provided that the work is not made available for commercial reasons, that the work was made available online and that the right holders receive fair remuneration"

3) Surely, there would be resistance in the population to pay the levy if they do not consume illegal content. They might feel that they only pay because some others do not play according to the rules and the law and thus pay for the decriminalisation of the wrongdoers. Instead, they might want a strict enforcement. However, the solution can only work if all pay. Similarly, with the same argumentation there would be no money gained from taxes which could be used for police, health care or operas, which are also often supported by the state. Moreover, once the exception is introduced, people may also benefit from this rich culture available on the Internet of protected and unprotected content if they only did not use it before because it was illegal. In order to pick up on this objection, it is crucial to support the content flat-rate with a public awareness campaign, which shows that people do not have to pay the levy so that others can continue their criminal activities but for a copyright, which works in the digital era.

   Next, the creative industries and artists may argue that this would be an unjustified interference with their intellectual property rights. They may argue that they should be able to enforce their rights if they wish to do so. Even if copyright is widely considered intellectual property, it is not without limits and does not entirely fulfil the characteristics of property. Not only is copyright granted for a certain period of time and, therefore, is not durable. Also, it cannot be enforced against everyone as an absolute right. There are fair use exceptions, which can be defined by the state. In other words, the state can regulate the modalities of copyrights. For example, in many European countries, there is a private copy exception. One should keep in mind that it is not the point that the aims of copyright are flawed, or that music should be given away for free. The point is that there might be a solution, which benefits all affected parties better than individual enforcement of copyrights.

   Moreover, the creative industries and artists could argue that such an exception would deprive the artists of its remuneration as they may get less money from the levy than they would get from usage-based royalties. However, most of the artists do not profit from a strict enforcement as they have buy-out contracts, in particular in the music industry. In contrast, enforcement measures are very costly and seem to result more from a policy of deterrence than from the desire to receive the remuneration in every single case. Instead, the content flat-rate would provide a considerable secure source of income.

[1] https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/medien/Gutachten-Flatrate-GrueneBundestagsfraktion__CC_BY-NC-ND_.pdf

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Further, distribution systems for other levies are generally criticised for being non-transparent and unfair. However, the online environment has a big advantage, that in contrast to the physical world every activity can potentially easily be tracked. Therefore, every work could be provided with a watermark, potentially through the blockchain. Thus, everybody could know exactly how often which work has been streamed or up- or downloaded. There would be no incentive to circumvent this watermark as the use would not result in higher costs. However, if collecting societies should track which work has been used how often, this could potentially have data protection issues. Though, for the calculation of the distribution of the levy, it would not be important who has seen which movie but how often it has been seen in general. Therefore, the data could be anonymised according to the GDPR.

4) The introduction of the content flat-rate would have the advantage that a big part of the population, that commits copyright infringements as a criminal offence would be decriminalised and would not have to fear fines or civil proceedings. Also, parents could be more relieved about their children's internet behaviour. In the UK and in Germany 15 % of all internet users use illegal content and the majority of them is aged between 12 and 35 years old. Lawrence Lessig stated that this results in a criminalisation of a whole generation of our children but that enforcement cannot stop these activities, it can only drive them underground. This decriminalisation is by no means a moral devaluation of copyright or a lack of respect for creation. It is only the more efficient solution for the piracy problem, which can balance the interests of creators, industries and users in a better way. Further, the decriminalisation and the fact that civil proceedings would be rendered unnecessary would alleviate the workload in courts.

5) Furthermore, it would be disproportionate to maintain an oppressive legal system if, in contrast, the problem will become less significant in the next ten years. In the future, technology will evolve and accordingly customer expectations will change. This development can already be seen today and we can predict that paid subscription services for creative content will be much more attractive than illegal streaming or downloading offers.

   The industries are adapting to new customer expectations and are creating new revenues from them. Spotify and Apple Music are a brilliant answer to the expectation of convenient access on all devices to as much content as possible in the best quality. These services offer an easy one-stop-shop for music. Furthermore, the in 2015 introduced New Music Friday, on which new music is always released globally on a Friday, helps to minimise customer frustration, which occurred when one album was only released in one country and not in the customer's home country. This success is reflected in the global revenue. In the past three years, the music industry has seen an overall growth with 8.1% revenue growth in 2017. This was one of the highest rates of growth since 1997.

   The film industry has also realised that it has to adapt to new customer expectations. However, the film industry seems to lag behind the music industry. There are numerous subscription accounts, the most famous being Netflix, Amazon Prime, HBO and Hulu. However, all these accounts offer a more or less different selection of movies and series and the offer varies from country to country. Consequently, it seems to be more likely that customers will close these offer gaps through illegal downloads or streaming. Furthermore, the film industry adheres to the release window system. Though, customers want to choose, if they want to watch a movie at the cinema, on DVD or via a subscription service without having to wait several months. But, release windows are shrinking. Yet, the adaptation is very slow and mainly driven by subscription services instead of the big movie companies themselves. The potential of subscription services also as a source of revenue through royalties for the big movie companies can be seen in the fact that subscriptions to online video services (446.8 million globally) increased by 33 % when comparing 2017 to 2016.

   Next, the evolvement of technology is leading more and more to an overall smart and connected environment. The circumstance of omnipresent connectivity will lead to the situation that in the majority people won't watch movies and series only at home but possibly everywhere they go with mobile devices. Furthermore, technologies like 8K resolution will require content in a very high quality. Therefore, people will expect an easy and convenient way to a big range of content in a high quality on all their devices. This excludes the search for a way of accessing the content illegally with the risks which come with the illegal content, such as viruses and other security issues and often a poor quality.

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Finally, consumers, who use illegal online access to copyrighted content, would be willing to pay for the content, if there would be a good alternative. This can be concluded from two studies in the UK and in Germany.[2]

6) Finally, one could argue that once a content flat-rate would be introduced, people would not be willing to pay for subscription services or other paid content as they feel that they already pay for the content. As we have seen in the argument above, changes in technology and in the creative industries will offer a big incentive for customers to choose paid convenient content over content which would be paid for by the levy. By extension, consumers are willing to pay for creative content as long as there is a reason to pay. At the moment, consumers don't pay for content because there is no good alternative but they would pay if there would be such an alternative. In the UK, the copyright infringement tracker with its latest wave from June 2018 found that there are fewer people using free content. They conclude that "this is an indication that people are chasing the best content and are willing to pay for ease of access to it." The German joint study of the Max Planck Institute for IP and the Munich Centre for Internet Research from January 2018 found that online-consumers overall spend more money on culture than the average consumer. This indicates a certain willingness to pay according to the authors. The fact that consumers with a mixed legal and illegal online user behaviour have the highest overall spending for these areas (including physical purchases, merchandising, concert- and cinema-tickets), contradicts the presumption that consumers use illegal content mainly to save costs. Moreover, people pay a BBC TV licence in the UK, which costs £150.50 per year even if it is not mandatory. This could be seen as an analogy to the online content flat-rate. Even though people could find the same content illegally online, most people pay this license as it is more convenient to watch TV legally than to stream it.

7) Copyright originally came, to some extent, into being to protect artists and creative spirits and to provide them with a chance to monetise their work. Today, it also protects investments to some extent. However, copyright is not granted limitless and in absolute terms as it has to be reconciled with freedom of expression. There are limits to the content. For example, if a consumer buys a book he is allowed to re-read it, he is allowed to lend it to a friend and even to sell it. The creator is not financially involved in any of these acts. This is the result of a sophisticated balancing act between the interest of the artist in a possible remuneration as an incentive for creation and the interest of society in the dissemination and participation in cultural life. In the example of books, authors receive royalties for every sold book but not for any downstream uses. The author knows this in advance and is able to determine the price structure accordingly. Consequently, people who are not able to afford the purchase price of the book can lend or buy the book second-hand and take part in cultural life.
Yet, copyright was designed in the context of a physical world. The characteristics of the Internet result in a stricter online than offline world. Despite the permission in the physical world, it is not allowed to lend or sell an e-book, because you necessarily have to duplicate it. Lawrence Lessig concludes that the default in the analogue world was freedom, the default in the digital world is regulation. In consequence, a private copy and making available exception for digital content would transfer the balance from the physical world to the online world. The content flat-rate would go further than rebalancing the online world, as it would also allow getting access to a work which has not been purchased before (with the levy as a compensation). Yet, the content flat-rate's main purpose is not the rebalancing but to find a solution, which ensures remuneration to creatives. The rebalancing would be a positive side-effect.

I'm looking forward to your response. Please feel free to contact me concerning any questions. My email address is [redacted]@kcl.ac.uk.

Please receive my kindest regards,

[redacted]

[2] UK: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723047/online-copyright-infringement-tracker-written-report-final.pdf; Germany: https://www.ip.mpg.de/fileadmin/ipmpg/content/projekte/Nutzerverhalten_Kurzbericht.pdf

Appendix 2: Letter from author to the President of European Digital (13 August 2018)

[redacted]

[redacted]

EDRi – European Digital Rights
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London, 13 August 2018

Dear Mr Krisch,

I am an LL.M. student at King's College London (Dickson Poon School of Law), specializing in Intellectual Property (IP). I'm writing my dissertation about the problem of online copyrights infringements on file-sharing platforms. With the present letter, I would like to ask your support for a legislative amendment of Directive 2001/29/EC (InfoSoc Directive) in order to preserve a free Internet.

For about twenty years now, legislators, creative industries and artists have tried to resolve the problem of illegal file sharing on the Internet without success. It has become a pressing need to adapt copyright law to the realities of the Internet. It is time to take action, change the direction of copyright law in the digital context and choose the path of freedom. There is a solution, which will reconcile the law with people's legal understanding and will bring benefits to all affected parties. Furthermore, a solution, which embraces progress in technology and values the immense chances which lie on the Internet and accepts changing consumer habits. A solution that embraces consumption of contents instead of criminalising it as the industry relies on this consumption but ensuring adequate remuneration.

I want to suggest to change Art. 5 (3) of the InfoSoc Directive in order to enable European Member States to introduce a private copy and making available exception for digital content.

If we do not change the law now, we will choose the path of a highly regulated authoritarian Internet or with other words the path of authority. This will have highly destructive effects on our society and the rule of law. It will lead either to a very oppressive enforcement system, which may be able to limit copyright infringements on the Internet but to the price of an extremely strict enforcement, leading millions of people into criminal proceedings including children and limiting the availability of (also unprotected) creative content. Or, it will lead to a situation in which enforcement stays unsuccessful and consumers of copyrighted digital content think they can do whatever they want independent from the legal system. This would be a major threat for a state under the rule of law. In both scenarios, there would be an immense mismatch between the law and people's beliefs of what is right and wrong. Artists will have to decide whether they stand on the side of their customers, who ought to pay for their creative works or on the side of the authorities who work to protect their works. Consequently, there would be no winners but only losers.

Copyrighted content is being shared illegally on a massive scale on the Internet. Consumers, who consume this illegal content often don't consider this as wrong or are indifferent to the infringement. The creative industries try to fight back against piracy by enforcing copyright against users, platforms and intermediaries. Often, they initiate an enforcement against all three in civil and criminal procedures. Therefore, they have to spend millions in order to try to compensate for the lost income. Creatives potentially lose income, which endangers the interest of the society of a rich cultural creation. The situation is, therefore, more than unsatisfactory. In addition, all legislative efforts and enforcement measures were not able to solve the problem until now. This problem is not only about creators and the creative industries versus online copyright

infringements. It is also about the entertainment industry versus the Internet. Both cannot survive the way we know them today.

1) The current digital copyright enforcement system has major shortcomings. It is in part impractical, unrealistic, and faces problems of efficacy and proportionality.

- Actions against users face the problem of the immense volume of infringers. The number of people using online platforms for the sharing of copyrighted material is so high, that it seems impossible today to start proceedings against every single infringer. Standardised enforcement systems like the 'HADOPI law' in France seem arbitrary as in cases of serious infringements one strike could already be enough in order to send the case to court and in other cases three strikes may not be enough. Furthermore, it could lead Internet users to turn to encrypted systems, which can potentially be even more dangerous. Next, users often don't know what content is illegal or legal. For example, in Germany streaming was seen as a legal activity or at least a grey area. Even if the CJEU's Filmspeler decision may bring some legal security on this issue, people may still use illegal content as they think it is right to do so. Finally, enforcement measures face practical problems. In order to enforce copyrights, Internet service providers (ISPs) have to disclose information so that the infringer can be identified. This interferes with privacy, which is protected by the EU-Charter and this is particularly problematic in standardised enforcement against users as the infringer may well be a child, who deserves a higher protection. Where the infringer is a child, education would be much better than enforcement.

- Direct actions against operators are either unrealistic or possibly without effects on the availability of the digital content. One can identify the registrant of a domain name through a WHOIS search and send a cease and desist letter. These letters will most likely either be ignored or the registered name is simply not the actual individual behind the website as identity-theft is common in this area. Furthermore, the operators could be arrested, brought before a court and convicted. The servers of the website can be seized. However, the example of the Pirate Bay case in Sweden shows that this will eventually be without major impact on the availability of the concerned website and may even lead to a greater activity on the website. Next, the Infringing Website List, created by the UK Police Intellectual Property Crime Unit (PIPCU), on which they list websites, which infringe copyrights, surely complicates the generation of income for file-sharing websites. However, one can still find a lot of advertisement on these websites from less serious companies. Therefore, it seems to be only one stone in the mosaic of anti-piracy enforcement and a way for companies not to be associated with such infringing websites.

- Actions against intermediaries also face several problems. Sending a notice to the host of the website asking to take the operator's website down may be a cheap solution and may work in reputable host countries where contractual terms specify, that IP infringements are prohibited and hosts are obliged to implement a notice and takedown policy. However, if the host is not in the US or in a non-European jurisdiction it is unlikely that he will respond to such a notice and takedown request. Moreover, even if a website gets taken down, the operator can simply shift the website to a new host leading to a whack-a-mole game.
  Second, right holders can ask ISPs for website-blocking and apply for blocking injunctions. Blocking injunctions have the advantage, that they can be enforced easily. Furthermore, if users cannot access the concerned website, they cannot access the copyrighted material and it could potentially lead users to consume copyrighted material in a way, which ensures remuneration to artists. However, operators of these websites are technically versed and quick. Once a website is blocked, they can open up identical websites under new domain addresses (mirror sites). Therefore, website-blocking can quickly turn into a whack-a-mole game as well. Furthermore, website-blocking causes problems regarding proportionality and efficacy, which are by no means evident and can vary from case to case and from country to country. One should therefore be very hesitant about relying on this enforcement measure. Finally, it could also be possible to de-list platforms which share copyrighted material illegally from search engines. So far, Google states that it will not ban entire websites. However, in Google's transparency report, there are lists of delisted websites for copyright infringement, which seem to be file sharing platforms. The delisting of platforms has the advantage, that it can be potentially implemented worldwide. Furthermore, if the delisting would work quickly it could prevent users to find new file-sharing platforms or mirror sites through Google. However, the website is only delisted

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and can still be accessed through its URL. Hence, the de-listing of www.thepiratebay.org would not be helpful as users widely know the address by heart.

2) Member States should introduce a private copy and making available exception in copyright law for digital content. This exception would have two limitations: First, it would apply only to private users / non-commercial users and, second, it would be limited to works which are made available digitally. Hence, uploading, downloading and streaming for private purposes would be legal. However, the making available of illegally filmed movies in the cinema or of concerts would not be included in the exception. As a compensation for the exception, there should be a private copy levy on the internet subscription. The amount of the levy can be calculated according to different methods, which has been explored in an expert opinion for the German Bundestag.[1]

   Currently, Art. 5 (2) lit. b InfoSoc Directive allows only a private copy exception. Art. 5 (3) InfoSoc Directive states an exhaustive catalogue, which shows in which areas Member States are allowed to use statutory exceptions for the making available of works. However, this catalogue knows no exception for the private making available. Therefore, a new letter (p) should be introduced:

   3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
   (a) – (o)

   "(p) in respect of making a work available to the public provided that the work is not made available for commercial reasons, that the work was made available online and that the right holders receive fair remuneration"

3) Surely, there would be resistance in the population to pay the levy if they do not consume illegal content. They might feel that they only pay because some others do not play according to the rules and the law and thus pay for the decriminalisation of the wrongdoers. Instead, they might want a strict enforcement. However, the solution can only work if all pay. Similarly, with the same argumentation there would be no money gained from taxes which could be used for police, health care or operas, which are also often supported by the state. Moreover, once the exception is introduced, people may also benefit from this rich culture available on the Internet of protected and unprotected content if they only did not use it before because it was illegal. In order to pick up on this objection, it is crucial to support the content flat-rate with a public awareness campaign, which shows that people do not have to pay the levy so that others can continue their criminal activities but for a copyright, which works in the digital era.

   Next, the creative industries and artists may argue that this would be an unjustified interference with their intellectual property rights. They may argue that they should be able to enforce their rights if they wish to do so. Even if copyright is widely considered intellectual property, it is not without limits and does not entirely fulfil the characteristics of property. Not only is copyright granted for a certain period of time and, therefore, is not durable. Also, it cannot be enforced against everyone as an absolute right. There are fair use exceptions, which can be defined by the state. In other words, the state can regulate the modalities of copyrights. For example, in many European countries, there is a private copy exception. One should keep in mind that it is not the point that the aims of copyright are flawed, or that music should be given away for free. The point is that there might be a solution, which benefits all affected parties better than individual enforcement of copyrights.

   Moreover, the creative industries and artists could argue that such an exception would deprive the artists of its remuneration as they may get less money from the levy than they would get from usage-based royalties. However, most of the artists do not profit from a strict enforcement as they have buy-out contracts, in particular in the music industry. In contrast, enforcement measures are very costly and seem to result more from a policy of deterrence than from the desire to receive the remuneration in every single case. Instead, the content flat-rate would provide a considerable secure source of income.

[1] https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/medien/Gutachten-Flatrate-GrueneBundestagsfraktion__CC_BY-NC-ND_.pdf

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Further, distribution systems for other levies are generally criticised for being non-transparent and unfair. However, the online environment has a big advantage, that in contrast to the physical world every activity can potentially easily be tracked. Therefore, every work could be provided with a watermark, potentially through the blockchain. Thus, everybody could know exactly how often which work has been streamed or up- or downloaded. There would be no incentive to circumvent this watermark as the use would not result in higher costs. However, if collecting societies should track which work has been used how often, this could potentially have data protection issues. Though, for the calculation of the distribution of the levy, it would not be important who has seen which movie but how often it has been seen in general. Therefore, the data could be anonymised according to the GDPR.

4) The introduction of the content flat-rate would have the advantage that a big part of the population, that commits copyright infringements as a criminal offence would be decriminalised and would not have to fear fines or civil proceedings. Also, parents could be more relieved about their children's internet behaviour. In the UK and in Germany 15 % of all internet users use illegal content and the majority of them is aged between 12 and 35 years old. Lawrence Lessig stated that this results in a criminalisation of a whole generation of our children but that enforcement cannot stop these activities, it can only drive them underground. This decriminalisation is by no means a moral devaluation of copyright or a lack of respect for creation. It is only the more efficient solution for the piracy problem, which can balance the interests of creators, industries and users in a better way. Further, the decriminalisation and the fact that civil proceedings would be rendered unnecessary would alleviate the workload in courts.

5) Furthermore, it would be disproportionate to maintain an oppressive legal system if, in contrast, the problem will become less significant in the next ten years. In the future, technology will evolve and accordingly customer expectations will change. This development can already be seen today and we can predict that paid subscription services for creative content will be much more attractive than illegal streaming or downloading offers.

   The industries are adapting to new customer expectations and are creating new revenues from them. Spotify and Apple Music are a brilliant answer to the expectation of convenient access on all devices to as much content as possible in the best quality. These services offer an easy one-stop-shop for music. Furthermore, the in 2015 introduced New Music Friday, on which new music is always released globally on a Friday, helps to minimise customer frustration, which occurred when one album was only released in one country and not in the customer's home country. This success is reflected in the global revenue. In the past three years, the music industry has seen an overall growth with 8.1% revenue growth in 2017. This was one of the highest rates of growth since 1997.

   The film industry has also realised that it has to adapt to new customer expectations. However, the film industry seems to lag behind the music industry. There are numerous subscription accounts, the most famous being Netflix, Amazon Prime, HBO and Hulu. However, all these accounts offer a more or less different selection of movies and series and the offer varies from country to country. Consequently, it seems to be more likely that customers will close these offer gaps through illegal downloads or streaming. Furthermore, the film industry adheres to the release window system. Though, customers want to choose, if they want to watch a movie at the cinema, on DVD or via a subscription service without having to wait several months. But, release windows are shrinking. Yet, the adaptation is very slow and mainly driven by subscription services instead of the big movie companies themselves. The potential of subscription services also as a source of revenue through royalties for the big movie companies can be seen in the fact that subscriptions to online video services (446.8 million globally) increased by 33 % when comparing 2017 to 2016.

   Next, the evolvement of technology is leading more and more to an overall smart and connected environment. The circumstance of omnipresent connectivity will lead to the situation that in the majority people won't watch movies and series only at home but possibly everywhere they go with mobile devices. Furthermore, technologies like 8K resolution will require content in a very high quality. Therefore, people will expect an easy and convenient way to a big range of content in a high quality on all their devices. This excludes the search for a way of accessing the content illegally with the risks which come with the illegal content, such as viruses and other security issues and often a poor quality.

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Finally, consumers, who use illegal online access to copyrighted content, would be willing to pay for the content, if there would be a good alternative. This can be concluded from two studies in the UK and in Germany.[2]

6) Finally, one could argue that once a content flat-rate would be introduced, people would not be willing to pay for subscription services or other paid content as they feel that they already pay for the content. As we have seen in the argument above, changes in technology and in the creative industries will offer a big incentive for customers to choose paid convenient content over content which would be paid for by the levy. By extension, consumers are willing to pay for creative content as long as there is a reason to pay. At the moment, consumers don't pay for content because there is no good alternative but they would pay if there would be such an alternative. In the UK, the copyright infringement tracker with its latest wave from June 2018 found that there are fewer people using free content. They conclude that "this is an indication that people are chasing the best content and are willing to pay for ease of access to it." The German joint study of the Max Planck Institute for IP and the Munich Centre for Internet Research from January 2018 found that online-consumers overall spend more money on culture than the average consumer. This indicates a certain willingness to pay according to the authors. The fact that consumers with a mixed legal and illegal online user behaviour have the highest overall spending for these areas (including physical purchases, merchandising, concert- and cinema-tickets), contradicts the presumption that consumers use illegal content mainly to save costs. Moreover, people pay a BBC TV licence in the UK, which costs £150.50 per year even if it is not mandatory. This could be seen as an analogy to the online content flat-rate. Even though people could find the same content illegally online, most people pay this license as it is more convenient to watch TV legally than to stream it.

7) Copyright originally came, to some extent, into being to protect artists and creative spirits and to provide them with a chance to monetise their work. Today, it also protects investments to some extent. However, copyright is not granted limitless and in absolute terms as it has to be reconciled with freedom of expression. There are limits to the content. For example, if a consumer buys a book he is allowed to re-read it, he is allowed to lend it to a friend and even to sell it. The creator is not financially involved in any of these acts. This is the result of a sophisticated balancing act between the interest of the artist in a possible remuneration as an incentive for creation and the interest of society in the dissemination and participation in cultural life. In the example of books, authors receive royalties for every sold book but not for any downstream uses. The author knows this in advance and is able to determine the price structure accordingly. Consequently, people who are not able to afford the purchase price of the book can lend or buy the book second-hand and take part in cultural life.
Yet, copyright was designed in the context of a physical world. The characteristics of the Internet result in a stricter online than offline world. Despite the permission in the physical world, it is not allowed to lend or sell an e-book, because you necessarily have to duplicate it. Lawrence Lessig concludes that the default in the analogue world was freedom, the default in the digital world is regulation. In consequence, a private copy and making available exception for digital content would transfer the balance from the physical world to the online world. The content flat-rate would go further than rebalancing the online world, as it would also allow getting access to a work which has not been purchased before (with the levy as a compensation). Yet, the content flat-rate's main purpose is not the rebalancing but to find a solution, which ensures remuneration to creatives. The rebalancing would be a positive side-effect.

I'm looking forward to your response. Please feel free to contact me concerning any questions. My email address is [redacted]@kcl.ac.uk.

Please receive my kindest regards,

[redacted]

[2] UK: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723047/online-copyright-infringement-tracker-written-report-final.pdf; Germany: https://www.ip.mpg.de/fileadmin/ipmpg/content/projekte/Nutzerverhalten_Kurzbericht.pdf

Appendix 3: Letter from author to the President of Culture Action Europe (13 August 2018)

[redacted]

[redacted]

Culture Action Europe
Mr Robert Manchin
Rue Ravenstein, 23
1000 Brussels
Belgium

[redacted]
[redacted]
[redacted]
[redacted]@kcl.ac.uk

London, 13 August 2018

Dear Mr Manchin,

I am an LL.M. student at King's College London (Dickson Poon School of Law), specializing in Intellectual Property (IP). I'm writing my dissertation about the problem of online copyrights infringements on file-sharing platforms. With the present letter, I would like to ask your support for a legislative amendment of the European Directive 2001/29/EC (InfoSoc Directive) in order to preserve a wide distribution of culture on the Internet and ensuring adequate remuneration for artists at the same time.

For about twenty years now, legislators, creative industries and artists have tried to resolve the problem of illegal file sharing on the Internet without success. It has become a pressing need to adapt copyright law to the realities of the Internet. It is time to take action, change the direction of copyright law in the digital context and choose the path of freedom. There is a solution, which will reconcile the law with people's legal understanding and will bring benefits to all affected parties. Furthermore, a solution, which embraces progress in technology and values the immense chances which lie on the Internet and accepts changing consumer habits. A solution that embraces consumption of contents instead of criminalising it as the industry relies on this consumption but ensuring adequate remuneration.

I want to suggest to change Art. 5 (3) of the InfoSoc Directive in order to enable European Member States to introduce a private copy and making available exception for digital content.

If we do not change the law now, we will choose the path of a highly regulated authoritarian Internet or with other words the path of authority. This will have highly destructive effects on our society and the rule of law. It will lead either to a very oppressive enforcement system, which may be able to limit copyright infringements on the Internet but to the price of an extremely strict enforcement, leading millions of people into criminal proceedings including children and limiting the availability of (also unprotected) creative content. Or, it will lead to a situation in which enforcement stays unsuccessful and consumers of copyrighted digital content think they can do whatever they want independent from the legal system. This would be a major threat for a state under the rule of law. In both scenarios, there would be an immense mismatch between the law and people's beliefs of what is right and wrong. Artists will have to decide whether they stand on the side of their customers, who ought to pay for their creative works or on the side of the authorities who work to protect their works. Consequently, there would be no winners but only losers.

Copyrighted content is being shared illegally on a massive scale on the Internet. Consumers, who consume this illegal content often don't consider this as wrong or are indifferent to the infringement. The creative industries try to fight back against piracy by enforcing copyright against users, platforms and intermediaries. Often, they initiate an enforcement against all three in civil and criminal procedures. Therefore, they have to spend millions in order to try to compensate for the lost income. Creatives potentially lose income, which endangers the interest of the society of a rich cultural creation. The situation is, therefore, more than unsatisfactory. In addition, all legislative efforts and enforcement measures were not able to solve the

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problem until now. This problem is not only about creators and the creative industries versus online copyright infringements. It is also about the entertainment industry versus the Internet. Both cannot survive the way we know them today.

1) The current digital copyright enforcement system has major shortcomings. It is in part impractical, unrealistic, and faces problems of efficacy and proportionality.

- Actions against users face the problem of the immense volume of infringers. The number of people using online platforms for the sharing of copyrighted material is so high, that it seems impossible today to start proceedings against every single infringer. Standardised enforcement systems like the 'HADOPI law' in France seem arbitrary as in cases of serious infringements one strike could already be enough in order to send the case to court and in other cases three strikes may not be enough. Furthermore, it could lead Internet users to turn to encrypted systems, which can potentially be even more dangerous. Next, users often don't know what content is illegal or legal. For example, in Germany streaming was seen as a legal activity or at least a grey area. Even if the CJEU's Filmspeler decision may bring some legal security on this issue, people may still use illegal content as they think it is right to do so. Finally, enforcement measures face practical problems. In order to enforce copyrights, Internet service providers (ISPs) have to disclose information so that the infringer can be identified. This interferes with privacy, which is protected by the EU-Charter and this is particularly problematic in standardised enforcement against users as the infringer may well be a child, who deserves a higher protection. Where the infringer is a child, education would be much better than enforcement.

- Direct actions against operators are either unrealistic or possibly without effects on the availability of the digital content. One can identify the registrant of a domain name through a WHOIS search and send a cease and desist letter. These letters will most likely either be ignored or the registered name is simply not the actual individual behind the website as identity-theft is common in this area. Furthermore, the operators could be arrested, brought before a court and convicted. The servers of the website can be seized. However, the example of the Pirate Bay case in Sweden shows that this will eventually be without major impact on the availability of the concerned website and may even lead to a greater activity on the website. Next, the Infringing Website List, created by the UK Police Intellectual Property Crime Unit (PIPCU), on which they list websites, which infringe copyrights, surely complicates the generation of income for file-sharing websites. However, one can still find a lot of advertisement on these websites from less serious companies. Therefore, it seems to be only one stone in the mosaic of anti-piracy enforcement and a way for companies not to be associated with such infringing websites.

- Actions against intermediaries also face several problems. Sending a notice to the host of the website asking to take the operator's website down may be a cheap solution and may work in reputable host countries where contractual terms specify, that IP infringements are prohibited and hosts are obliged to implement a notice and takedown policy. However, if the host is not in the US or in a non-European jurisdiction it is unlikely that he will respond to such a notice and takedown request. Moreover, even if a website gets taken down, the operator can simply shift the website to a new host leading to a whack-a-mole game.
  Second, right holders can ask ISPs for website-blocking and apply for blocking injunctions. Blocking injunctions have the advantage, that they can be enforced easily. Furthermore, if users cannot access the concerned website, they cannot access the copyrighted material and it could potentially lead users to consume copyrighted material in a way, which ensures remuneration to artists. However, operators of these websites are technically versed and quick. Once a website is blocked, they can open up identical websites under new domain addresses (mirror sites). Therefore, website-blocking can quickly turn into a whack-a-mole game as well. Furthermore, website-blocking causes problems regarding proportionality and efficacy, which are by no means evident and can vary from case to case and from country to country. One should therefore be very hesitant about relying on this enforcement measure. Finally, it could also be possible to de-list platforms which share copyrighted material illegally from search engines. So far, Google states that it will not ban entire websites. However, in Google's transparency report, there are lists of delisted websites for copyright infringement, which seem to be file sharing platforms. The delisting of platforms has the advantage, that it can be potentially implemented worldwide. Furthermore, if the delisting would work quickly it could prevent users to

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   "(p) in respect of making a work available to the public provided that the work is not made available for commercial reasons, that the work was made available online and that the right holders receive fair remuneration"

3) Surely, there would be resistance in the population to pay the levy if they do not consume illegal content. They might feel that they only pay because some others do not play according to the rules and the law and thus pay for the decriminalisation of the wrongdoers. Instead, they might want a strict enforcement. However, the solution can only work if all pay. Similarly, with the same argumentation there would be no money gained from taxes which could be used for police, health care or operas, which are also often supported by the state. Moreover, once the exception is introduced, people may also benefit from this rich culture available on the Internet of protected and unprotected content if they only did not use it before because it was illegal. In order to pick up on this objection, it is crucial to support the content flat-rate with a public awareness campaign, which shows that people do not have to pay the levy so that others can continue their criminal activities but for a copyright, which works in the digital era.

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Further, distribution systems for other levies are generally criticised for being non-transparent and unfair. However, the online environment has a big advantage, that in contrast to the physical world every activity can potentially easily be tracked. Therefore, every work could be provided with a watermark, potentially through the blockchain. Thus, everybody could know exactly how often which work has been streamed or up- or downloaded. There would be no incentive to circumvent this watermark as the use would not result in higher costs. However, if collecting societies should track which work has been used how often, this could potentially have data protection issues. Though, for the calculation of the distribution of the levy, it would not be important who has seen which movie but how often it has been seen in general. Therefore, the data could be anonymised according to the GDPR.

4) The introduction of the content flat-rate would have the advantage that a big part of the population, that commits copyright infringements as a criminal offence would be decriminalised and would not have to fear fines or civil proceedings. Also, parents could be more relieved about their children's internet behaviour. In the UK and in Germany 15 % of all internet users use illegal content and the majority of them is aged between 12 and 35 years old. Lawrence Lessig stated that this results in a criminalisation of a whole generation of our children but that enforcement cannot stop these activities, it can only drive them underground. This decriminalisation is by no means a moral devaluation of copyright or a lack of respect for creation. It is only the more efficient solution for the piracy problem, which can balance the interests of creators, industries and users in a better way. Further, the decriminalisation and the fact that civil proceedings would be rendered unnecessary would alleviate the workload in courts.

5) Furthermore, it would be disproportionate to maintain an oppressive legal system if, in contrast, the problem will become less significant in the next ten years. In the future, technology will evolve and accordingly customer expectations will change. This development can already be seen today and we can predict that paid subscription services for creative content will be much more attractive than illegal streaming or downloading offers.

   The industries are adapting to new customer expectations and are creating new revenues from them. Spotify and Apple Music are a brilliant answer to the expectation of convenient access on all devices to as much content as possible in the best quality. These services offer an easy one-stop-shop for music. Furthermore, the in 2015 introduced New Music Friday, on which new music is always released globally on a Friday, helps to minimise customer frustration, which occurred when one album was only released in one country and not in the customer's home country. This success is reflected in the global revenue. In the past three years, the music industry has seen an overall growth with 8.1% revenue growth in 2017. This was one of the highest rates of growth since 1997.

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all their devices. This excludes the search for a way of accessing the content illegally with the risks which come with the illegal content, such as viruses and other security issues and often a poor quality.

Finally, consumers, who use illegal online access to copyrighted content, would be willing to pay for the content, if there would be a good alternative. This can be concluded from two studies in the UK and in Germany.[2]

6) Finally, one could argue that once a content flat-rate would be introduced, people would not be willing to pay for subscription services or other paid content as they feel that they already pay for the content. As we have seen in the argument above, changes in technology and in the creative industries will offer a big incentive for customers to choose paid convenient content over content which would be paid for by the levy. By extension, consumers are willing to pay for creative content as long as there is a reason to pay. At the moment, consumers don't pay for content because there is no good alternative but they would pay if there would be such an alternative. In the UK, the copyright infringement tracker with its latest wave from June 2018 found that there are fewer people using free content. They conclude that "this is an indication that people are chasing the best content and are willing to pay for ease of access to it." The German joint study of the Max Planck Institute for IP and the Munich Centre for Internet Research from January 2018 found that online-consumers overall spend more money on culture than the average consumer. This indicates a certain willingness to pay according to the authors. The fact that consumers with a mixed legal and illegal online user behaviour have the highest overall spending for these areas (including physical purchases, merchandising, concert- and cinema-tickets), contradicts the presumption that consumers use illegal content mainly to save costs. Moreover, people pay a BBC TV licence in the UK, which costs £150.50 per year even if it is not mandatory. This could be seen as an analogy to the online content flat-rate. Even though people could find the same content illegally online, most people pay this license as it is more convenient to watch TV legally than to stream it.

7) Copyright originally came, to some extent, into being to protect artists and creative spirits and to provide them with a chance to monetise their work. Today, it also protects investments to some extent. However, copyright is not granted limitless and in absolute terms as it has to be reconciled with freedom of expression. There are limits to the content. For example, if a consumer buys a book he is allowed to re-read it, he is allowed to lend it to a friend and even to sell it. The creator is not financially involved in any of these acts. This is the result of a sophisticated balancing act between the interest of the artist in a possible remuneration as an incentive for creation and the interest of society in the dissemination and participation in cultural life. In the example of books, authors receive royalties for every sold book but not for any downstream uses. The author knows this in advance and is able to determine the price structure accordingly. Consequently, people who are not able to afford the purchase price of the book can lend or buy the book second-hand and take part in cultural life.
Yet, copyright was designed in the context of a physical world. The characteristics of the Internet result in a stricter online than offline world. Despite the permission in the physical world, it is not allowed to lend or sell an e-book, because you necessarily have to duplicate it. Lawrence Lessig concludes that the default in the analogue world was freedom, the default in the digital world is regulation. In consequence, a private copy and making available exception for digital content would transfer the balance from the physical world to the online world. The content flat-rate would go further than rebalancing the online world, as it would also allow getting access to a work which has not been purchased before (with the levy as a compensation). Yet, the content flat-rate's main purpose is not the rebalancing but to find a solution, which ensures remuneration to creatives. The rebalancing would be a positive side-effect.

I'm looking forward to your response. Please feel free to contact me concerning any questions. My email address is [redacted]@kcl.ac.uk.

Please receive my kindest regards,

[redacted]

[2] UK: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723047/online-copyright-infringement-tracker-written-report-final.pdf; Germany: https://www.ip.mpg.de/fileadmin/ipmpg/content/projekte/Nutzerverhalten_Kurzbericht.pdf

Appendix 4: Email from author to the Chairman of the Board of the Electronic Frontier Foundation (13 August 2018)

Von: [redacted]@kcl.ac.uk
Betreff: Introducing a content flat-rate to preserve a free Internet
Datum: 13. August 2018 um 16:01
An: brian@eff.org

Dear Mr Behlendorf,

I am an LL.M. student at King's College London (Dickson Poon School of Law), specializing in Intellectual Property (IP). I'm writing my dissertation about the problem of online copyrights infringements on file-sharing platforms. With the present letter, I would like to ask your support for a legislative amendment of the European Directive 2001/29/EC (InfoSoc Directive) in order to preserve a free Internet.

For about twenty years now, legislators, creative industries and artists have tried to resolve the problem of illegal file sharing on the Internet without success. It has become a pressing need to adapt copyright law to the realities of the Internet. It is time to take action, change the direction of copyright law in the digital context and choose the path of freedom. There is a solution, which will reconcile the law with people's legal understanding and will bring benefits to all affected parties. Furthermore, a solution, which embraces progress in technology and values the immense chances which lie on the Internet and accepts changing consumer habits. A solution that embraces consumption of contents instead of criminalising it as the industry relies on this consumption but ensuring adequate remuneration.

I want to suggest to change Art. 5 (3) of the InfoSoc Directive in order to enable European Member States to introduce a private copy and making available exception for digital content.

If we do not change the law now, we will choose the path of a highly regulated authoritarian Internet or with other words the path of authority. This will have highly destructive effects on our society and the rule of law. It will lead either to a very oppressive enforcement system, which may be able to limit copyright infringements on the Internet but to the price of an extremely strict enforcement, leading millions of people into criminal proceedings including children and limiting the availability of (also unprotected) creative content. Or, it will lead to a situation in which enforcement stays unsuccessful and consumers of copyrighted digital content think they can do whatever they want independent from the legal system. This would be a major threat for a state under the rule of law. In both scenarios, there would be an immense mismatch between the law and people's beliefs of what is right and wrong. Artists will have to decide whether they stand on the side of their customers, who ought to pay for their creative works or on the side of the authorities who work to protect their works. Consequently, there would be no winners but only losers.

Copyrighted content is being shared illegally on a massive scale on the Internet. Consumers, who consume this illegal content often don't consider this as wrong or are indifferent to the infringement. The creative industries try to fight back against piracy by enforcing copyright against users, platforms and intermediaries. Often, they initiate an enforcement against all three in civil and criminal procedures. Therefore, they have to spend millions in order to try to compensate for the lost income. Creatives potentially lose income, which endangers the interest of the society of a rich cultural creation. The situation is, therefore, more than unsatisfactory. In addition, all legislative efforts and enforcement measures were not able to solve the problem until now. This problem is not only about creators and the creative industries versus online copyright infringements. It is also about the entertainment industry versus the Internet. Both cannot survive the way we know them today.

1) The current digital copyright enforcement system has major shortcomings. It is in part impractical, unrealistic, and faces problems of efficacy and proportionality.

- Actions against users face the problem of the immense volume of infringers. The number of people using online platforms for the sharing of copyrighted material is so high, that it seems impossible today to start proceedings against every single infringer. Standardised enforcement systems like the 'HADOPI law' in France seem arbitrary as in cases of serious infringements one strike could already be enough in order to send the case to court and in other cases three strikes may not be enough. Furthermore, it could lead Internet users to turn to encrypted systems, which can potentially be even more dangerous. Next, users often don't know what content is illegal or legal. For example, in Germany streaming was seen as a legal activity or at least a grey area. Even if the CJEU's Filmspeler decision may bring some legal security on this issue, people may still use illegal content as they think it is right to do so. Finally, enforcement measures face practical problems. In order to enforce copyrights, Internet service providers (ISPs) have to disclose information so that the infringer can be identified. This interferes with privacy, which is protected by the EU-Charter and this is particularly problematic in standardised enforcement against users as the infringer may well be a child, who deserves a higher protection. Where the infringer is a child, education would be much better than enforcement.

- Direct actions against operators are either unrealistic or possibly without effects on the availability of the digital content. One can identify the registrant of a domain name through a WHOIS search and send a cease and desist letter. These letters will most likely either be ignored or the registered name is simply not the actual individual behind the website as identity-theft is common in this area. Furthermore, the operators could be arrested, brought before a court and convicted. The servers of the website can be seized. However, the example of the Pirate Bay case in Sweden shows that this will eventually be without major impact on the availability of the concerned website and may even lead to a greater activity on the website. Next, the Infringing Website List, created by the UK Police Intellectual Property Crime Unit (PIPCU), on which they list websites, which infringe copyrights, surely complicates the generation of income for file-sharing websites. However, one can still find a lot of advertisement on these websites from less serious companies. Therefore, it seems to be only one stone in the mosaic of anti-piracy enforcement and a way for companies not to be associated with such infringing websites.

- Actions against intermediaries also face several problems. Sending a notice to the host of the website asking to take the operator's website down may be a cheap solution and may work in reputable host countries where contractual terms specify, that IP infringements are prohibited and hosts are obliged to implement a notice and takedown policy. However, if the host is not in the US or in a non-European jurisdiction it is unlikely that he will respond to such a notice and takedown request. Moreover, even if a website gets taken down, the operator can simply shift the website to a new host leading to a whack-a-mole game.

  Second, right holders can ask ISPs for website-blocking and apply for blocking injunctions. Blocking injunctions have the advantage, that they can be enforced easily. Furthermore, if users cannot access the concerned website, they cannot access the copyrighted material and it could potentially lead users to consume copyrighted material in a way, which ensures remuneration to artists. However, operators of these websites are technically versed and quick. Once a website is blocked, they can open up identical websites under new domain addresses (mirror sites). Therefore, website-blocking can quickly turn into a whack-a-mole game as well. Furthermore, website-blocking causes problems regarding proportionality and efficacy, which are by no means evident and can vary from case to case and from country to country. One should therefore be very hesitant about relying on this enforcement measure. Finally, it could also be possible to de-list platforms which share copyrighted material illegally from search engines. So far, Google states that it will not ban entire websites. However, in Google's transparency report, there are lists of delisted websites for copyright infringement, which seem to be file sharing platforms. The delisting of platforms has the advantage, that it can be potentially implemented worldwide. Furthermore, if the delisting would work quickly it could prevent users to find new file-sharing platforms or mirror sites through Google. However, the website is only delisted and can still be accessed through its URL. Hence, the de-listing of www.thepiratebay.org would not be helpful as users widely know the address by heart.

2) Member States should introduce a private copy and making available exception in copyright law for digital content. This exception would have two limitations: First, it would apply only to private users / non-commercial users and, second, it would be limited to works which are made available digitally. Hence, uploading, downloading and streaming for private purposes would be legal. However, the making available of illegally filmed movies in the cinema or of concerts would not be included in the exception. As a compensation for the exception, there should be a private copy levy on the internet subscription. The amount of the levy can be calculated according to different methods, which has been explored in an expert opinion for the German Bundestag.[1]

Currently, Art. 5 (2) lit. b InfoSoc Directive allows only a private copy exception. Art. 5 (3) InfoSoc Directive states an exhaustive catalogue, which shows in which areas Member States are allowed to use statutory exceptions for the making available of works. However, this catalogue knows no exception for the private making available. Therefore, a new letter (p) should be introduced:

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) – (o)

"(p) in respect of making a work available to the public provided that the work is not made available for commercial reasons, that the work was made available online and that the right holders receive fair remuneration"

3) Surely, there would be resistance in the population to pay the levy if they do not consume illegal content. They might feel that they only pay because some others do not play according to the rules and the law and thus pay for the decriminalisation of the wrongdoers. Instead, they might want a strict enforcement. However, the solution can only work if all pay. Similarly, with the same argumentation there would be no money gained from taxes which could be used for police, health care or operas, which are also often supported by the state. Moreover, once the exception is introduced, people may also benefit from this rich culture available on the Internet of protected and unprotected content if they only did not use it before because it was illegal. In order to pick up on this objection, it is crucial to support the content flat-rate with a public awareness campaign, which shows that people do not have to pay the levy so that others can continue their criminal activities but for a copyright, which works in the digital era.

Next, the creative industries and artists may argue that this would be an unjustified interference with their intellectual property rights. They may argue that they should be able to enforce their rights if they wish to do so. Even if copyright is widely considered intellectual property, it is not without limits and does not entirely fulfil the characteristics of property. Not only is copyright granted for a certain period of time and, therefore, is not durable. Also, it cannot be enforced against everyone as an absolute right. There are fair use exceptions, which can be defined by the state. In other words, the state can regulate the modalities of copyrights. For example, in many European countries, there is a private copy exception. One should keep in mind that it is not the point that the aims of copyright are flawed, or that music should be given away for free. The point is that there might be a solution, which benefits all affected parties better than individual enforcement of copyrights.

Moreover, the creative industries and artists could argue that such an exception would deprive the artists of its remuneration as they may get less money from the levy than they would get from usage-based royalties. However, most of the artists do not profit from a strict enforcement as they have buy-out contracts, in particular in the music industry. In

contrast, enforcement measures are very costly and seem to result more from a policy of deterrence than from the desire to receive the remuneration in every single case. Instead, the content flat-rate would provide a considerable secure source of income.

Further, distribution systems for other levies are generally criticised for being non-transparent and unfair. However, the online environment has a big advantage, that in contrast to the physical world every activity can potentially easily be tracked. Therefore, every work could be provided with a watermark, potentially through the blockchain. Thus, everybody could know exactly how often which work has been streamed or up- or downloaded. There would be no incentive to circumvent this watermark as the use would not result in higher costs. However, if collecting societies should track which work has been used how often, this could potentially have data protection issues. Though, for the calculation of the distribution of the levy, it would not be important who has seen which movie but how often it has been seen in general. Therefore, the data could be anonymised according to the GDPR.

4) The introduction of the content flat-rate would have the advantage that a big part of the population, that commits copyright infringements as a criminal offence would be decriminalised and would not have to fear fines or civil proceedings. Also, parents could be more relieved about their children's internet behaviour. In the UK and in Germany 15 % of all internet users use illegal content and the majority of them is aged between 12 and 35 years old. Lawrence Lessig stated that this results in a criminalisation of a whole generation of our children but that enforcement cannot stop these activities, it can only drive them underground. This decriminalisation is by no means a moral devaluation of copyright or a lack of respect for creation. It is only the more efficient solution for the piracy problem, which can balance the interests of creators, industries and users in a better way. Further, the decriminalisation and the fact that civil proceedings would be rendered unnecessary would alleviate the workload in courts.

5) Furthermore, it would be disproportionate to maintain an oppressive legal system if, in contrast, the problem will become less significant in the next ten years. In the future, technology will evolve and accordingly customer expectations will change. This development can already be seen today and we can predict that paid subscription services for creative content will be much more attractive than illegal streaming or downloading offers.

The industries are adapting to new customer expectations and are creating new revenues from them. Spotify and Apple Music are a brilliant answer to the expectation of convenient access on all devices to as much content as possible in the best quality. These services offer an easy one-stop-shop for music. Furthermore, the in 2015 introduced New Music Friday, on which new music is always released globally on a Friday, helps to minimise customer frustration, which occurred when one album was only released in one country and not in the customer's home country. This success is reflected in the global revenue. In the past three years, the music industry has seen an overall growth with 8.1% revenue growth in 2017. This was one of the highest rates of growth since 1997.

The film industry has also realised that it has to adapt to new customer expectations. However, the film industry seems to lag behind the music industry. There are numerous subscription accounts, the most famous being Netflix, Amazon Prime, HBO and Hulu. However, all these accounts offer a more or less different selection of movies and series and the offer varies from country to country. Consequently, it seems to be more likely that customers will close these offer gaps through illegal downloads or streaming. Furthermore, the film industry adheres to the release window system. Though, customers want to choose, if they want to watch a movie at the cinema, on DVD or via a subscription service without having to wait several months. But, release windows are shrinking. Yet, the adaptation is very slow and mainly driven by subscription services instead of the big movie companies themselves. The potential of subscription services also as a source of revenue

through royalties for the big movie companies can be seen in the fact that subscriptions to online video services (446.8 million globally) increased by 33 % when comparing 2017 to 2016.

Next, the evolvement of technology is leading more and more to an overall smart and connected environment. The circumstance of omnipresent connectivity will lead to the situation that in the majority people won't watch movies and series only at home but possibly everywhere they go with mobile devices. Furthermore, technologies like 8K resolution will require content in a very high quality. Therefore, people will expect an easy and convenient way to a big range of content in a high quality on all their devices. This excludes the search for a way of accessing the content illegally with the risks which come with the illegal content, such as viruses and other security issues and often a poor quality.

Finally, consumers, who use illegal online access to copyrighted content, would be willing to pay for the content, if there would be a good alternative. This can be concluded from two studies in the UK and in Germany.[2]

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7) Copyright originally came, to some extent, into being to protect artists and creative spirits and to provide them with a chance to monetise their work. Today, it also protects investments to some extent. However, copyright is not granted limitless and in absolute terms as it has to be reconciled with freedom of expression. There are limits to the content. For example, if a consumer buys a book he is allowed to re-read it, he is allowed to lend it to a friend and even to sell it. The creator is not financially involved in any of these acts. This is the result of a sophisticated balancing act between the interest of the artist in a possible remuneration as an incentive for creation and the interest of society in the dissemination and participation in cultural life. In the example of books, authors receive royalties for every sold book but not for any downstream uses. The author knows this in advance and is able to determine the price structure accordingly. Consequently, people who are not able to afford the purchase price of the book can lend or buy the book second-hand and take part in cultural life.

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the levy as a compensation). Yet, the content flat-rate's main purpose is not the rebalancing but to find a solution, which ensures remuneration to creatives. The rebalancing would be a positive side-effect.

I'm looking forward to your response. Please feel free to contact me concerning any questions. My email address is [redacted]@kcl.ac.uk.

Please receive my kindest regards,

[redacted]

[redacted]

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[1] https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/medien/Gutachten-Flatrate-GrueneBundestagsfraktion__CC_BY-NC-ND_.pdf

[2] UK: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723047/online-copyright-infringement-tracker-written-report-final.pdf; Germany: https://www.ip.mpg.de/fileadmin/ipmpg/content/projekte/Nutzerverhalten_Kurzbericht.pdf