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**Does existing UK copyright law adequately address
the issue of copyright enforcement in the digital age?**

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Abstract

The legal landscape in the digital age of copyright law is one of confusion and discord. Effective enforcement is difficult against websites, cumbersome and overly complex against individuals and a near impossibility against the tech-savvy. Therefore legislators are always left playing catch-up to the unrelenting change in technology. In general, they seek to deal with the problem via new and increasingly stringent legislation.

This thesis analyses these issues by studying the current state of copyright law in the UK, alongside the series of government commissioned reports on reform in this area. The thesis considers whether or not there is an appropriate balance reached between rights holders and consumers, deducing that the balance is currently too much in favour of rights holders, while still being largely ineffectual when attempting to adequately enforce those rights. Having established that legislation alone is not enough to face the challenges of copyright enforcement, the thesis looks to alternative and complementary methods of improving the balance of rights between copyright holders and users and ensuring better enforcement. The tax/levy model represents a strong solution to the problem, alongside other alternative revenue systems. The thesis concludes that the problem of copyright enforcement cannot be solved by any one single solution: the needs of all parties must be met as much as possible in order to ensure a workable balance and provide a strong framework capable of facing the challenges of the digital age. A balance between legislation, alternative revenue streams and education may be the only effective and appropriate way forward.

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Chapter 1 Introduction

To answer the question, 'Does existing UK copyright law adequately address the issue of copyright enforcement in the digital age?' a good starting point would be to consider the justifications behind copyright enforcement in the UK.

Copyright law serves an essential societal function as it protects, and consequently also encourages, creativity. By providing a means of controlling a piece of work, individuals are able to be compensated for its use, thereby imposing a pecuniary value on the material. It enables individuals to exploit their work and prevent others from doing so. This autonomous control over their own creations incentivises artists to constantly strive towards the development of new works. These rights allow their holders to maximise the potential of financial reward should their work be released into the public domain. If this were not the case, it may be that creators would feel less inclined to invest so much time, effort and money into creativity.

But why is it so important that creativity is incentivised in this way? Encouraging creativity and innovation provides, in turn, a valuable benefit to society through literary and artistic creations. This societal benefit can be demonstrated in both sociological and economic terms. Firstly, creativity and the arts serve to enrich our lives, as well as spreading new and developing knowledge in the public domain. This can then serve to inspire new creativity and research, causing a constant need and desire for progress and the betterment of society. For a more detailed discussion of the discussion of the justifications for copyright see, for example, Moore and Ken.¹

There has been much debate surrounding this, at times, controversial area of law. Some commentators take a utilitarian view, stressing the importance of copyright protection as a way of incentivising creativity by means of compensation, viewing it as a purely economic right.² Others took a Lockean³ view that copyright protection is important because it reflects an author's inherent ownership of their own material produced through their own hard work, deserving of reward, and therefore see it as a property right. This has been the foundation of copyright protection since the

¹ Justifications for copyright are often traced as far back as the natural property rights theory of John Locke. Further discussion on its importance can be found, for example, in the following: Adam Moore and Ken Himma, 'Intellectual Property' [2011] Stanford Encyclopedia of Philosophy, E Zalt (ed).

² Some jurisdictions' legislation focuses mainly on the utilitarian theory, such as in the US. See for example the US Constitution, Article 1 s 8 cl 8), the foundation of which is established in Jeremy Bentham, *Principles and Morals of Legislation 1781* (Philip Schofield ed, Dover Publications, 2007).

³ Based on John Locke, *Second Treatise of Government 1690* (Crawford MacPherson ed, Hackett Publishing 1980).

Statute of Anne.⁴ Tehranian argues that this theory of natural property rights has largely shaped our copyright framework as it is today.⁵ This does appear to be true, as copyright protection has not, historically, tended to take any potential rights of users into account, instead focussing on the inherent right of creators to exercise full control over their own creations with long durations and penalties for infringers.⁶ Whether this approach has been successful so far will soon become apparent, with this paper arguing that it has not achieved adequate protection for rights holders, nor has it fairly balanced this protection with the interests of consumers.⁷

Secondly, the importance of the creative industries to our economy cannot be overestimated. Currently, the creative industries account for 6% of GDP in the UK, and, even more importantly in difficult times, have an estimated 6.5% annual rate of growth between 2012 to 2016, vastly outpacing the growth rate of the UK economy as a whole.⁸

This leads to the key issue of balance between conflicting interests within the copyright framework.⁹ Clearly, both rights holders and society as a whole have valuable and specific claims with regard to the importance of copyright. Legislators have sought to balance the encouragement of creativity and innovation with the public benefit of suitable access to works. Ultimately, the perfect balance is what the copyright legal framework seeks to achieve. Currently, the balance is approached in the Copyright, Designs and Patents Act 1988 (CDPA). Its afforded rights can be defined positively, in that rights holders are able to make copies of their works, adapt works, and perform their works etc.¹⁰ Rights can also be defined negatively as well, as rights holders can prevent others from using their works without the rights holders' permission.¹¹ The Act sets out that the duration of copyright is generally a lengthy '70 years from the end of the calendar year in which the author dies'.¹² The subject matter covered by the CDPA encompasses, for example, literary, musical works, artistic works, sound recordings, dramatic works, film recordings, broadcasts and typographical arrangements (e.g. web pages).

⁴ Enacted in 1710; see also *George Putnam, Books and their Makers during the Middle Ages (1896) (Hillary House Publishing 1962) Part III.*

⁵ John Tehranian, *Infringement Nation: Copyright 2.0 and You* (OUP 2011) 54.

⁶ As in the CDPA, for example, in Chapter 2.1, 10-12.

⁷ Chapter 5, 106.

⁸ Creative Nation Report (CBI, January 2014)

<http://www.cbi.org.uk/media/2535682/cbi_creative_industries_strategy__final_.pdf> accessed 10th March 2015.

⁹ Ian Kilbey 'Copyright duration? Too long!' [2003] 25(3) EIPR 105, 105.

¹⁰ Section 16(1)(a)-(e).

¹¹ Section 16(2).

¹² Section 12(2) CDPA.

There is a clear distinction between two types of infringement set out in the CDPA: primary and secondary infringement. An infringer would be liable for primary infringement if he 'without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright'.¹³ Put another way, the infringer directly commits the infringing act by copying, providing copies to others, renting, performing, adapting, or otherwise disseminating the work to themselves or members of the public without the permission of the copyright owner. A secondary infringement involves a 'middle man' who physically produces the copy. The infringer is nevertheless still liable for secondary infringement if he imports¹⁴, possesses¹⁵ or provides the means for producing¹⁶ infringing copies of a work. This portrays a strong message that infringement is not to be tolerated in any form. It is interesting to note, then, how little this has permeated into the public mindset. This research will consider this gap between the expectations of consumers and its relationship with the marketing strategies of creative industry bodies, and how this might be redressed.¹⁷

This thesis will argue that, taken as a whole, the CDPA seems to swing the balance in favour of rights holders, allowing them an extraordinarily broad range of rights and powers. There appears to be little or no mention of the rights of society as a whole, and the importance of the public benefit. However in spite of this, rights holders are still dissatisfied with the status quo, and with good reason. It is reported that over a quarter of internet users worldwide regularly access pirated material online.¹⁸ Since the CDPA was implemented, technology has forged ahead with astonishing and relentless speed. The change in technology has had an impact on the ability of copyright holders to protect their works and has led to an increase in the ease of which infringement can occur. There have been several legislative attempts, at both national and European level, to keep up with this fast pace. European law will be briefly referred to where relevant to the subject matter of this thesis, but the focus of this study is chiefly national level legislation. The Electronic Commerce¹⁹ and the Information Society²⁰ Directives were both brought into force in 2000 and 2001 respectively. These Directives were designed to set out the rights and obligations in an internet age. Both directives require implementation into Member States' national law but also allow for a degree of flexibility in

¹³ Section 16(2).

¹⁴ Section 22.

¹⁵ Section 23.

¹⁶ Section 24.

¹⁷ Through education, for example. See Chapter 4.4, 99.

¹⁸ IFPI Digital Music Report 2014 <<http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf> > accessed 5th February 2015, 40.

¹⁹ Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178 (E-Commerce Directive).

²⁰ Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 (Information Society Directive).

interpretation. By the time the law was implemented, it was already somewhat out of date, as various technological measures were easily circumvented by tech savvy users.²¹ The Digital Economy Act (DEA) came into force in the UK in 2010, with the objective of trying to address the pace of technology and its effect on copyright enforcement.

The key issue here is that legislators are always trying to keep pace with technological advances, but always, inevitably, reacting to changes rather than anticipating them. It is not possible to adequately legislate for the constantly unforeseen changes and new developmental directions taken by technological and digital advancement. The move from analogue to digital in particular shows how difficult it is for legislators to win the race. As Howell observes, users can easily do in minutes what took hours or even days to achieve in the days of analogue.²² Copying a song onto a cassette tape was a tricky and laborious process, which often left the user with a poor quality copy. Now, it takes mere seconds to copy a song digitally, often with no loss of quality, no expensive equipment and very little technological skill required.

Unfortunately, this shows that this has reduced the effectiveness of having such extensive rights over one's own works, if the legislative framework is simply unable to enforce them adequately. The policing and monitoring of these digital activities is so much more difficult too, as increasingly easy ways to achieve anonymity online proliferate. Users may easily store huge quantities of illegal content on their hard drives, an ability which would have been inconceivable in the early days of the CDPA²³ when computers the size of a small building had less memory than a basic modern day laptop computer. In addition, strict law enforcement in one country is unlikely to prevent the exploitation of copyrighted material in other jurisdictions. The digital market is global and therefore access to pirated material will inevitably remain possible to those determined enough to seek it out. The key to the solution is, as Wing posits,²⁴ to attempt to remove the incentive to seek out this material by providing legal sources which offer a closer match to consumer expectations.²⁵

It is important to note that the fast pace of technology cannot be blamed for every problem facing copyright protection today. To argue this would be to imply that the legislative framework provided a perfect solution to effective copyright enforcement in the past, which was undoubtedly not the

²¹ Such circumvention is discussed in Chapter 2.1, at 14-17.

²² Claire Howell, 'The Hargreaves Review: digital opportunity: a review of intellectual property and growth' [2012] 1 JBL 71, 72.

²³ 1988.

²⁴ Mark Wing, 'The digital copyright time bomb in the BRIC economies, some ideas from the UK for the Indian market' [2012] 54(4) IntJLM 302, 309.

²⁵ Chapter 4,73.

case. Older media such as television and radio allowed copyrighted material to reach the eyes and ears of the general public long before the dawn of the internet, posing many of the same problems. It was possible, for instance, to record material directly from the television, or photocopy²⁶ written works, with devices available on the mass market.²⁷ Some of the same arguments, such as where the burden of enforcement should lie,²⁸ made during the last several centuries,²⁹ remain pertinent today. However, the internet age has clearly allowed the processing of data to be undertaken instantly, on a large scale,³⁰ in a way unimaginable to the legislators enacting the Copyright, Designs and Patents Act in 1988. It is this sheer volume of infringement on a global scale that has exacerbated the issue, bringing it to crisis point for all parties.

There are also fundamental issues of perception within the field of copyright. In the internet age it is seen as the norm to want instant access to digital content whenever it is desired. Users no longer expect to wait months between a cinema release and a digital copy of a film, for example. Good quality digital copies of material are often available freely online and consumption is so common, that many see it as acceptable to participate in these infringing activities. Indeed, many may not realise that such common behaviour is in fact illegal.³¹ Even if they do, many will justify their infringement by concluding that the availability of material is simply not meeting their requirements.³² Users want fast, easy and quality access to works. If they cannot get what they want legally, they will inevitably turn to illegal sources. Compounding the problem is the commonly held belief that copyright cannot really be theft, because when stealing a tangible product, the victim in the situation is left with nothing.³³ By making or accessing a copy of an intangible product, the original is still retained by the owner in its entirety. This view arguably stems from a lack of collective understanding about the way copyright law works, feeding in to the idea of the need for a nationwide (ideally global, given time) integration of copyright law into educational systems.³⁴ As Sugden succinctly argues, 'societal acceptance of legal changes occurs through individuals' and

²⁶ <<http://en.wikipedia.org/wiki/Photocopier>> accessed 6th January 2015.

²⁷ <http://en.wikipedia.org/wiki/Video_Cassette_Recording> accessed 6th January 2015.

²⁸ Discussed in Chapter 2, at 30 and 40-43.

²⁹ Ronan Deazley, *On the Origin of the Right to Copy, Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Hart Publishing 2004), 4.

³⁰ Howell (n 22) 72.

³¹ Ian Hargreaves, 'Digital opportunity: A Review of Intellectual Property and Growth' May 2011 <<http://www.ipo.gov.uk/ipreview-finalreport.pdf>> accessed 26th June 2014, 68.

³² Kantar Media 'Online Copyright Infringement Tracker Wave 4 (Covering period Mar 13 – May 13) Overview and key findings: Prepared for OFCOM' <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/w4/OCI_MAIN_REPORT_W4_FINAL.pdf> accessed 12th March 2015, 5.

³³ Thomas Field, 'Crimes Involving Tangible Property' [2012] 11 NHLJ 171, 171.

³⁴ Chapter 4.4, 99.

groups' acceptance of the need for legal change'.³⁵ Without some collective understanding of the importance of copyright law, any threat of punishment seems incomprehensible and risks continuing to be ignored.

Moreover, the conflation of the property right with the entitlement to reward for one's own skill and labour has exacerbated the discord between rights holder and consumer expectations. Griffin argues that the change in emphasis from the artistic to the economic value of copyrighted works has eroded the rationalisation of copyright in the public eye.³⁶ Individuals no longer see creators as the direct beneficiaries when they purchase legal material, but more often imagine huge profits for large corporations which now commonly own copyrights. The public tend to see the creator as the party expending the skill and labour – the creator - with little understanding or appreciation of the skill and labour of commercial entities.³⁷ In order to ensure the copyright system maintains its validity, 'the perceived rationality of the regulatory system must be kept in mind' by legislators.³⁸ In addition, nationwide education detailing the realities of copyright law would go some way towards helping to bridge the gap between public belief and the reality of the legal landscape.³⁹

The situation is further complicated with the question over whether 'deterrent' measures are really considered to be a deterrent by the general public. Take, for instance, the maximum fine for copyright infringement which is now set at £50,000.⁴⁰ If it were further increased, it may be thought that this would create an even stronger deterrent to commit infringing acts. But in reality it is likely that this would not be the case.⁴¹ Psychologically, a person in an ordinary financial position would struggle to envisage ever paying a £5,000 fine (the previous maximum fine), let alone £50,000. They would know that they would simply never have the money to pay that sort of sum. Therefore there is a definite detachment between the idea of this huge sum of money, and the reality of their own position in comparison. Moreover, many are not able to accept that simply downloading their favourite song or watch a film online occasionally allows them to fall into that category of 'infringers'. Individuals see huge fines as applicable to someone else, namely large-scale 'professional' infringers, and as therefore not relevant to the average, otherwise law-abiding

³⁵ Paul Sugden 'The power of one! The failure of criminal copyright laws (piracy) to blend into the greater cultural consciousness!' [2014] 36(6) EIPR 363, 372.

³⁶ James Griffin, 'Copyright evolution – creation, regulation and the decline of substantively rational copyright law' [2013] 3 IPQ 234, 250.

³⁷ *ibid* 244.

³⁸ *ibid* 252.

³⁹ Chapter 4.4, 99 expands on this theory.

⁴⁰ Digital Economy Act 2010, s 42.

⁴¹ Further analysis of the ineffectiveness of deterrents can be found in Chapter 4.4, 99-104.

member of the public. This thesis will argue that a deterrent such as a large fine is not sufficient to successfully prevent infringement,⁴² analysing academic research, that of Laurence Ross⁴³ and Tyler⁴⁴ in the main, to support this theory.

In seeking to answer the posed question: ‘Does existing UK copyright law adequately address the issue of copyright enforcement in the digital age?’, this thesis will scrutinise the law as it stands, as well as considering planned developments, in order to discover whether or not the law will ever be able to ‘keep up’ with the rapid advancement of technology. This research will take a literary approach, undertaking a critical analysis of current academic literature across a broad range of academic commentators in order to attempt to draw some conclusions and offer some possible solutions to the perceived problem.

In Chapter 2, analysis of the CDPA, and DEA in particular, will seek to demonstrate whether or not the law is effective and/or appropriate in its attempt to enforce copyright laws and balance the expectations of both the rights of creators and the benefit to society (consumers), drawing on commentators such as Farrand⁴⁵ and Garstka.⁴⁶ To an extent, the government eventually recognised these problems and commissioned various reports to try to take a positive step in the right direction towards tidying up the outdated legal framework. This thesis will study some of these reports, with chapter 3 focussing on the Gowers, Hargreaves’ and Hooper reports. Drawing on academic opinion,⁴⁷ it will determine whether these reports have produced any viable or realistic options to help redress the balance and, if not, why not?

The thesis will then consider whether the legal approach alone is sufficient to effectively enforce copyright provisions and if it has, or ever will, solve these inherent problems, concluding that it will not, having now ‘done all that it realistically can’⁴⁸ through legislation alone. A more rounded non-legal approach will also be evaluated as a means of tackling the enforcement deficit. Chapter 4 will

⁴² See Chapter 4.4, 99-104.

⁴³ Hugh Laurence Ross, *Deterring the Drink Driver: Legal Policy and Social Control* (Lexington Books 1982).

⁴⁴ Tom Tyler ‘Compliance with Intellectual Property Laws: A Psychological Perspective’ [1997] 29 New York University JILP 219.

⁴⁵ Benjamin Farrand, ‘The Digital Economy Act 2010 - a cause for celebration, or a cause for concern?’ [2010] EIPR 536.

⁴⁶ Krzysztof Garstka, ‘The amended Digital Economy Act 2010 as an unsuccessful attempt to solve the stand-alone complex of online piracy’ [2012] 43(2) IIC 158.

⁴⁷ Including Joel Smith and Rachel Montagnon who consider the Hargreaves Review in ‘The Hargreaves Review – a “digital opportunity”’ [2011] 33(9) EIPR 596; and Martin Brennecke’s commentary in relation to Hargreaves’ suggestion to consider a US-style fair use exception for copyright, in *Is “fair use” an option for U.K. copyright legislation?* (Institut für Wirtschaftsrecht, 2007).

⁴⁸ Wing (n 24) 309.

set out some key solutions proposed, aiming to identify and directly combat the various factors cited as major reasons for online copyright infringement.⁴⁹ These alternative approaches, such as a new tax/levy system,⁵⁰ could be used in conjunction with copyright law to better serve the interests of both users and rights holders.

The final chapter will set out some conclusions as to the adequacy of the current legislative framework for copyright enforcement, and conclude that implementation of some complimentary solutions designed to address the key issues facing copyright law are required to better accommodate the digital age.

⁴⁹ Factors include cost, ease of access, quality, and comprehensiveness of the source. See OFCOM Wave 4 Report (n 32) 5.

⁵⁰ See Chapter 4.1, 74.

Chapter 2 Current Legislation in the UK

This chapter will focus primarily on the Digital Economy Act (DEA), as a major, modern piece of legislation explicitly drafted to challenge the issues surrounding copyright enforcement. However it is first important to look at earlier legislation, insofar as it relates to the question of enforcement, on which the DEA is based. The sections on duration and restricted acts in the Copyright, Designs and Patents Act (CDPA) are essential to discuss, in order to set out the basic requirements needed even before the DEA can be applied. European and international law must be considered too, as they play a vital part in the scope of any potential UK legislation, and European law in particular has evidently shaped the DEA. Both the European Berne Convention⁵¹ and the World Trade Organization's TRIPS agreement⁵² will be briefly examined, although the emphasis of this thesis will be on UK legislation. The safe harbour provisions in the E-Commerce Directive 2000, implemented in the UK via the E-Commerce Regulations in 2002, and the further increase in copyright owners' rights in the 2004 Enforcement Directive will also be briefly used to set out the context of the global copyright legal landscape and any obligations incumbent on the UK legislature as a result.

Chapter 2.1 Early legislation and the Copyright, Designs and Patents Act

The Copyright, Designs and Patents Act was introduced in 1988, instating UK compliance with the Berne Convention⁵³. The Act was the first major piece of copyright legislation since 1956.⁵⁴ It sets out the main categories of copyrighted works, as well as all of the basic requirements of a copyrighted work including duration,⁵⁵ exceptions to restricted acts⁵⁶ and types of infringement.⁵⁷ Remedies are also provided.⁵⁸ This section will focus on duration and restricted acts, as these provisions are most pertinent to the question of copyright enforcement insofar as it relates to the modern age.

The duration of copyright is generally 70 years from the end of the calendar year in which the author dies.⁵⁹ Until recently, the exception was sound recordings which stood at 50 years from the end of the calendar year in which the recording is made.⁶⁰ Although the musical work itself is protected for

⁵¹ Berne Convention for the Protection of Literary and Artistic Works 1886, as amended at Stockholm 1967.

⁵² WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 1994.

⁵³ Berne Convention for the Protection of Literary and Artistic Works 1886, as amended at Stockholm 1967.

⁵⁴ Copyright Act.

⁵⁵ Section 12, CDPA.

⁵⁶ Section 16(1).

⁵⁷ Sections 17-27.

⁵⁸ Sections 96-102.

⁵⁹ Section 12(2).

⁶⁰ Section 13A(2).

70 years, the sound recording of it was not. It has since been amended to extend to 70 years,⁶¹ bringing it in to line with other works, although the initial campaign for 95 years failed. This is a strong factor tipping the balance in favour of copyright owners. It is difficult to justify the long duration of copyright in the modern age, let alone a durational increase at this stage. It is seen as important to more than encourage, to actually incentivise creativity. This is achieved by providing comprehensive and exclusive rights over the work for a very long period of time.

It is submitted that this is far too restrictive at the expense of the freedom of knowledge for the benefit of society as a whole.⁶² Such a lengthy duration is simply too strong a right which is becoming increasingly irrelevant in the modern age. In a recent Government initiated report, Hargreaves confirms that copyright duration has periodically extended in recent decades, 'In spite of clear evidence that this cannot be justified in terms of the core IP argument that copyright exists to provide economic incentives to creators to produce new works'.⁶³ Hargreaves attributes this to lobbying in Parliament, branding it a consistent problem in this area, especially with the introduction of the Digital Economy Act.⁶⁴ It may be that the 'life plus 50 years' requirement in the Berne Convention⁶⁵ had the admirable aim of providing for the author's children, but the advancement of society and the provision of social security systems has severely weakened this rationale.⁶⁶ Moreover, as Kilbey argues, this theory was not entirely convincing to begin with, as only a small minority of copyrighted works are sufficiently successful to provide for an income to support the author's descendants.⁶⁷ This argument can also be applied to the notion that duration provides for a return on publishers' investments. It could be argued that these diminishing justifications should be set against the benefit to society in order to decrease, not increase, copyright duration. It is generally accepted that material in the public domain 'serves as a valuable resource for creators, performers, researchers and educational institutions'.⁶⁸ It is submitted that the excessive duration of copyright can therefore actually stifle the creativity it was created to encourage. In addition, it may also be perceived by sections of the public as too long a duration of protection and lead to user self-justification of infringement.

⁶¹ Council Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011] OJ L 265/1.

⁶² For more on copyright justifications, see Irina Stamatoudi and Paul Torremans (eds), *Copyright in the New Digital Environment: The Need to Redesign Copyright* (Sweet and Maxwell 2000).

⁶³ Hargreaves (n 31) 93.

⁶⁴ *ibid.*

⁶⁵ Article 7(1).

⁶⁶ Kilbey (n 9) 106.

⁶⁷ *ibid.*

⁶⁸ Nicole Dufft, Natali Helberger, Stef Van Gompel & Bernt Hugenholtz 'Never forever: why extending the term of protection for sound recordings is a bad idea' [2008] 30(5) EIPR 174, 176.

The restricted acts⁶⁹ in the CDPA are comprehensive, and leave little room for manoeuvre. However sections 28 to 55 set out various limited exceptions to those acts, such as use in research, private study, critique and news reporting.⁷⁰ These exceptions are rather vaguely defined in general as ‘fair dealing’ with ‘sufficient acknowledgement’. A detailed description of exactly what constitutes fair dealing is not provided. Therefore it is left to individuals to personally judge whether their use of a protected work falls within ‘fair dealing’ and provides ‘sufficient acknowledgement’, or not.⁷¹ Although these terms may have been defined through case law, there is still a lack of certainty to their exact meaning. This may allow for flexibility but still leaves a degree of uncertainty.

Section 96(2) CDPA states that ‘In an action for infringement of copyright all such relief by way of damages, injunctions, accounts or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right’. This is quite an extensive range of remedies available to the injured party, especially when the broad range of rights and prohibited acts is taken into consideration.

The basis for national legislation was the Berne Convention.⁷² This European-wide treaty set out the three-step test for use of copyrighted works. Article 9(2) permits reproduced of copyrighted material in special cases, if this does not conflict with normal exploitation of the work and does not unreasonably prejudice the rights holder’s legitimate interests, although the form of this legislation was left to the individual country. Article 13 of TRIPS⁷³ reaffirmed the test as the basis for considering the scope of copyright exploitation, but the permissive nature of the obligation became mandatory.⁷⁴ The difficulties with copyright enforcement clearly drove the World Trade Organisation to tighten up enforcement measures in a bid to control copyright infringement, which has been a problem long before the digital age.⁷⁵ In other ways, too, the agreement went further than Berne, strengthening other aspects of copyright law. Article 9 enshrined the principle of inherent integrity of copyright by granting copyright status to works automatically without the need to formally register its existence. This seems to reflect the natural law interpretation of copyright as a right to

⁶⁹ Section 16(1)(a)-(e).

⁷⁰ Further copyright exceptions have since been introduced, including The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 and The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 coming into force October 2014.

⁷¹ See for example section 28A.

⁷² Berne Convention for the Protection of Literary and Artistic Works 1886, as amended at Stockholm 1967.

⁷³ WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 1994.

⁷⁴ Thomas Heide, ‘The Berne three-step test and the proposed Copyright Directive’ [1999] 21(3) EIPR 105, 105.

⁷⁵ For example, the decision in *Baller v Watson* (1729-1737) PRO c11 15552/3 was a landmark case in which a perpetual injunction was granted for the first time, preventing any future unauthorised use of the plaintiff’s work.

the inherent value of ownership of a personal creation and that individual's right to control any exploitation of their own works. By extension this also addressed the economic aspect of creativity. Full autonomy over their own works naturally allows individuals to exploit them economically, or not, as they see fit.

However, as Geiger notes,⁷⁶ the subtle change in wording echoes the mutation of the status of copyright and weakens the previous, highly valued interpretation of copyright as an inherent right for creators. The landscape of the creative industry market meant that, now, the legitimate interests of the rights holder were enshrined in law. Contrast this with the legitimate interests of the author specifically referred to in Article 10 of the Berne Convention. The economic value of copyright interests has inevitably, and perhaps understandably, begun to triumph over the natural law right as this sets the tone for future copyright enforcement laws.

The E-Commerce and Information Society Directives, for example, were the next major pieces of EU legislation to affect copyright law in the UK, enacted through the European Union in 2000 and 2001 respectively. The E-Commerce Directive was incorporated into UK law through the Electronic Commerce Regulations 2002. Articles 12, 13 and 14 provide some protection for Internet Service Providers (ISPs) in the form of the 'mere conduit', caching and hosting defences respectively. The ISP would escape liability if it was established that it had no 'actual knowledge' of the presence of unlawful content and, when knowledge was communicated, it must 'act expeditiously to remove or to disable access' to the information or work in question. Without this, an impossibly heavy burden would have been imposed on ISPs to prevent all infringing activity from occurring via, or in connection with, their services. However the phrase 'acts expeditiously' should be clarified. How much does the requirement to act 'expeditiously' outweigh any administrative or financial burden placed upon the ISP? This question will remain unanswered until the all elements of the Digital Economy Act become fully operational and a suitable case arises. In addition, copyright infringement is occurring hundreds of thousands of times daily. It is perhaps unrealistic to expect ISPs to expend a significant proportion of their time removing and disabling access every time they receive notice of infringement, which the ISP would then have to verify each time prior to taking action.

The Pirate Bay case⁷⁷ provides a good example of how the above 'safe harbour' provisions of the Directive may be interpreted. The website operators were found to be 'hosting'⁷⁸ infringing material,

⁷⁶ Christophe Geiger, 'From Berne to national law, via the Copyright Directive: the dangerous mutations of the three-step test' [2007] EIPR 486, 487.

⁷⁷ Stockholm District Court, 17 April 2009, case b 13301-06.

⁷⁸ The Electronic Commerce (EC Directive) Regulations 2002, s 19.

and had actual knowledge⁷⁹ of the infringement, as they had received multiple take-down notices from copyrights owners whose rights had been infringed. Therefore the website operators were guilty of assisting in making copyright content available or contributory liability. The defendants then attempted to rely on safe harbour provisions but failed. Importantly, it was not required that they must know of specific offenders, or even which specific works were involved. It was enough that they had actual knowledge that infringement of some sort was occurring.⁸⁰ This demonstrates how broadly 'actual knowledge' tends to be interpreted, and the associated difficulty of relying on safe harbour provisions. This broad interpretation of the 'actual knowledge' test set the tone for future judgments, such as the *Newzbin* and *Newzbin2* cases, analysed in more detail later in the chapter.⁸¹

The Pirate Bay case is significant because it highlights not only the use of blocking injunctions against a high profile piracy organisation, but it also brought to the fore the polarisation of the music industry and the disaffected (in their view) pirates, defenders of the users' 'right' (again, in their view) to freedom of information. It also confirms that criminal sanctions are not particularly effective in copyright enforcement, as the website reappeared within days of it being taken down. The prevailing attitude of internet pirates' contempt for the law is evident in their derisory language used throughout, with one of the founders even claiming that the website would be 'impossible' to shut down as it 'has a life of its own'⁸², and the instant availability of a new Pirate Bay website once the old one had been blocked. But it is in the questionable interpretation of the idea of freedom of speech often held by high profile internet pirates which has helped to fuel the fire of conflict between rights holders and users. A long term educational approach would help to dampen down the conflict with a balanced, informed debate.⁸³

Following the E-Commerce Directive, a year later the Information Society Directive encouraged further EU harmonisation of copyright legislation, in preparation for the ratification of the WIPO Copyright Treaty.⁸⁴ It included provisions for protection against circumventing technological measures designed to protect unauthorised use of material.⁸⁵ It also provided an exhaustive list of (optional) copyright exceptions, stating the need for fair compensation for the rights holder when

⁷⁹ Section 19(a)(i).

⁸⁰ *Dramatico v BSKyB* [2012] EWHC 268 (Ch).

⁸¹ Discussed at 37-40.

⁸² Paul Douglas '15 Memorable quotes from Pirate Bay's Peter Sunde' (*Techradar*, 14 March 2010) <<http://www.techradar.com/news/internet/15-memorable-quotes-from-the-pirate-bay-s-peter-sunde-676735>> accessed 13th January 2014.

⁸³ As demonstrated in Chapter 4.4, 99.

⁸⁴ WIPO Copyright Treaty 1996.

⁸⁵ Article 6(1).

using copyrighted works under such an exception.⁸⁶ The provisions of the Directive were implemented in UK legislation through The Copyright and Related Rights Regulations 2003, effected through amendment of the CDPA.

A major criticism of this Directive is that the anti-circumvention measures can be considered to be anti-competitive and even stifle progress,⁸⁷ leading to companies using lock-ins and other measures to prevent cross-compatibility for both hardware and software.⁸⁸ Lee argues that progress cannot be achieved without a marketplace of competition founded on interoperable products and consumer choice.⁸⁹ Although written in the context of US legislation, Lee's point is nevertheless applicable to European jurisdictions, bound as we are to the key principle of commitment to fair competition and the prohibition of unfair trade practices in the single market.⁹⁰ This interoperability may be needed not just for the advancement of technology in general, but may actually be required in order to provide access to copyrighted works for certain individuals who, through disability perhaps or many other reasons, cannot access the work in its original form.⁹¹ Rychlicki reminds us that copyright law is not the ultimate law and can therefore be trumped by other rights, such as those of societal interest.⁹² It is submitted that the reverse engineering of products or services for the purposes of enabling access to those who cannot access the work in its original form is just such a societal interest, as is the advancement of technology more generally through which interoperability is often required.

Indeed, as Rychlicki notes, it could be argued that these anti-circumvention measures may contradict EU principles relating to the Information Society itself.⁹³ The eEurope Action Plan directly refers to the need 'to strengthen competition and interoperability'⁹⁴ and the Information Society Directive itself stresses that 'Compatibility and interoperability of different systems should be encouraged'.⁹⁵ This emphasis on the importance of such activities in a global digital world renders

⁸⁶ Article 5(2).

⁸⁷ Timothy Lee 'Circumventing Competition: The Perverse Consequences of the Digital Millennium Copyright Act' [2006] Cato Institute Policy Analysis No. 564 at <<http://object.cato.org/sites/cato.org/files/pubs/pdf/pa564.pdf>> accessed 3rd February 2015.

⁸⁸ Discussed in Chapter 4.2.4, 89.

⁸⁹ Lee (n 87) 24.

⁹⁰ See Articles 101 – 109 of the Treaty on the Functioning of the European Union.

⁹¹ Tomasz Rychlicki 'An opinion on legal regulations on reverse engineering and technological protections measures' [2007] 13(3) CTLR 94, 97.

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ Section III of the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - eEurope 2005: An information society for all - An Action Plan to be presented in view of the Sevilla European Council, 21/22 June 2002 /* COM/2002/0263.

⁹⁵ Information Society Directive (54).

inexplicable the lack of clarification of, or even cursory reference to, this issue in the actual provisions of the Directive. Although there has been some development here in other areas of law, at e-government level for example,⁹⁶ the issue was not resolved in the Information Society Directive, leaving interoperability and reverse engineering of copyrighted technology in a complex and somewhat contradictory legal position.

The Copyright and Related Rights Regulations 2003 added section 296ZD to the CDPA which prohibits produces and services for sale, advertised or possessed for commercial purposes if they have only a limited commercially significant purpose or use other than to circumvent⁹⁷ or are 'primarily designed, produced, adapted or performed for the purpose of enabling or facilitating' circumvention'.⁹⁸ The terms 'limited commercially significant purpose' and 'primarily' are not defined and leave a wide discretion for the judiciary to interpret the provision to block new technological developments, unless the developers can prove that the product or service was not, in fact, developed 'primarily' for use for circumvention of technological protection measures.

These provisions could potentially impact on the development of interoperable products in particular, one of the key factors touted by Lee in the pursuit of progress through consumer choice,⁹⁹ making it very difficult for developers to produce hardware or software, for example, to be compatible with other products or services, without being caught by anti-circumvention measures. There is no requirement in the Directive, or subsequent UK provisions, that the circumvention must also include intent to infringe through that circumvention, so this would be no defence to developers looking to merely ensure that their new product or service would be compatible with another device or service, without going through a costly process of requiring full collaboration with the owners of that device or service¹⁰⁰. Lee argues that this ability to build interoperable products without permission or cooperation is 'vital' to technological innovation,¹⁰¹ a principle which he argues is backed up by US case law.¹⁰² The outcome of the *Microsoft* case¹⁰³ suggests that EU case law also supports this principle in theory, although the lack of clarification and specific guidance on

⁹⁶ For example the European Interoperability Framework for Pan-European e-Government Services 2004 Version 1.0 < <http://ec.europa.eu/idabc/servlets/Docd552.pdf?id=19529>> accessed 2nd February 2015.

⁹⁷ Section 296ZD (1)(b)(ii), as amended by The Copyright and Related Rights Regulations 2003.

⁹⁸ Section 296ZD (1)(b)(iii), as amended by The Copyright and Related Rights Regulations 2003.

⁹⁹ Lee (n 87) 24.

¹⁰⁰ *ibid* 4.

¹⁰¹ *ibid*.

¹⁰² For example, in *Sony v Connectix* 203 F.3d 596 (9th Cir 2000), the reverse engineering of a Playstation in order to creating a facility allowing users to play Playstation games on their computers was not a violation of Sony's copyright in developing the game.

¹⁰³ Case T-201/04 *Microsoft v Commission* [2007] ECJ II-03601.

interoperability at EU level does little to promote the aim. In *Microsoft*, it was held that Microsoft's refusal to allow interoperability had a damaging effect on consumer choice and put its competitors at a significant disadvantage, hindering technological progress.¹⁰⁴ As Mylly observes, this case highlights the vital role of interoperability in the development of technology.¹⁰⁵ But the case refers specifically to interoperability of computer programs, which is covered by a separate directive,¹⁰⁶ allowing users to 'study, observe and test' software 'in order to determine the ideas and principles' underlying its design and function.¹⁰⁷ The principle of the importance of interoperability of computer programs established in this case can still be applied to other types of interoperability however, and it is submitted that the permission given by the Software Directive should be extended to reverse engineering of other technological devices and services that may not be described specifically as 'software'.

Other EU countries have transposed the Information Society Directive in a similar way to the UK, causing the same problems to potentially arise. Germany's interpretation of the anti-circumvention measures in the Information Society Directive also has the potential to cause just such a dampening effect for example, as it is similarly broad in its definition of anti-circumvention technology. Section 95a(3)(2) and (3) set out that products and services are prohibited where they only have a 'restricted economic purpose or benefit' other than circumvention, or are 'mostly...produced...in order to facilitate or make easier' circumvention.¹⁰⁸ The terms 'restricted' and 'mostly' [nearest equivalents in translation] are similarly broad and again undefined,¹⁰⁹ left to be interpreted and applied by the judiciary on a case-by-case basis.

Thankfully, the *SAS Institute*¹¹⁰ case which came before the European Court of Justice has clarified one particular point with regard to reverse engineering. The case concerned whether or not functionality and interfaces of computer programs can be protected by copyright, as a competitor, World Programming, had used reverse engineering to emulate the functionality of SAS's computer programs. On appeal, Lewison LJ also held that 'neither the SAS Language nor the functionality of

¹⁰⁴ Case T-201/04 *Microsoft v Commission* [2007] ECJ II-03601 652-653.

¹⁰⁵ Ulla-Maija Mylly 'An evolutionary economics perspective on computer program interoperability and copyright' [2010] 41(3) IIC 284, 298.

¹⁰⁶ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJL 111/16 (Software Directive).

¹⁰⁷ Article 5(3).

¹⁰⁸ Copyright Act of September 9, 1965, § 54 (1965) (FRG).

¹⁰⁹ Matthias Leistner and Gerald Spindler 'Secondary Copyright Infringement – New Perspectives in Germany and Europe' [2006] 37(7) IIC 788, 809.

¹¹⁰ *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482.

the SAS System is protected by copyright', confirming the High Court's decision,¹¹¹ and so the appeal was dismissed.¹¹² In addition, Lewison LJ confirmed that, despite the licence stating that competitors could not use the program in order to develop a rival product, any such provision in a licence would be rendered null and void¹¹³ as such use is permitted by Article 5(3) of the Software Directive,¹¹⁴ as set out by Arnold J.¹¹⁵ Whilst this common sense ruling allowed reverse engineering in this particular instance, there are still no defined parameters for developers to abide by when using reverse engineering. With no guidelines to work within, progress may be stifled as developers hold back for fear of the unknown if their actions were to be challenged. The *SAS Institute* case also specifically involved computer programs, for which the Software Directive is applicable. The legal position on reverse engineering of other types of digital media therefore remains unclear.

Europe might look to France for some inspiration for interoperability standards, enacted as part of the DADVSI law,¹¹⁶ which amended the French Code de la Propriété Intellectuelle (CPI). Article L 331-5 states that technical protection measures (TPMs) should not have the effect of preventing effective implementation of interoperability, so long as this respects copyright. Moreover, suppliers of TPMs may also be required to provide information which is essential to interoperability.¹¹⁷ Initially these measures seem a promising provision for ease and speed of technical innovation. However, after much controversy including a high profile conflict with Apple,¹¹⁸ Article 14 at L 331-6 introduced a way for copyright holders to partially bypass these provisions, in that they can withhold interoperability information if they can show that this would contravene the copyright owner's express wishes. Case law may show whether or not this potential loophole can be exploited, but it would be unfortunate if it could, as it may undo all of the good work towards protection of interoperability that may be achieved by DADVSI.

To ensure compliance, regulate interoperability and undertake a monitory role,¹¹⁹ Article L 331-17 created the Autorité de Régulation des Mesures Techniques (ARMT). Jondet argues that this legislative framework, backed by the considerable powers of the ARMT, is robust and successfully

¹¹¹ [2013] EWHC 69, 82.

¹¹² [2013] EWCA Civ 1482, 19.

¹¹³ *ibid* 93.

¹¹⁴ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJL 111/16 (Software Directive).

¹¹⁵ [2013] EWHC 69, 61.

¹¹⁶ Loi 2006-961 du 1 août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information (DADSVI).

¹¹⁷ DADVSI Article L331-5.

¹¹⁸ Elinor Mills 'Apple calls French law 'state-sponsored piracy'' (*CNET News*, 22 March 2006)

<http://news.cnet.com/Apple-calls-French-law-state-sponsored-piracy/2100-1025_3-6052754.html> accessed 3rd March 2015.

¹¹⁹ Article L 331-8.

protects TPMs whilst at the same time providing adequately for interoperability and therefore avoids the stifling of innovation, without compromising copyright.¹²⁰ There is certainly some potential for inspiration in the French legislation for other European countries to explore. The competitive and innovative market created by interoperability provides a greater incentive for creators to develop new interoperable products and services with less fear of repercussions. The French legislature has clearly recognised that this is an important factor in the balancing of the protection of copyright with the encouragement of creators to build on and compliment the successes of others.

Jondet may be correct in asserting that France has achieved a fair and workable legal solution to DRMs and interoperability.¹²¹ But Leistner and Spindler argue that monitoring costs for the sort of secondary liability associated with anti-circumvention and interoperability laws, coupled with the potential hampering of desirable technological advances in those countries without France's level of interoperability protection, can lead to an inefficient and therefore unsatisfactory result. Levies, rather than liabilities, can be a more effective solution.¹²² Chapter 4.1 of this thesis sets out such a solution.

The next piece of EU legislation to be considered is the 2004 EU Enforcement Directive.¹²³ This was essentially intended to 'provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights'.¹²⁴ Its repetition of the importance of consumers' interests being 'taken into account'¹²⁵ implies a desire to balance rights holders' interests with those of users as well. Yet as Huniar states, 'the United Kingdom already providing a high level of protection for exclusive rights' and the Directive serves to further increase 'levels of protection for right holders'.¹²⁶ In reality it is therefore clear that the Directive merely enhances the rights of copyright owners, and does little to support the importance of access to material for the benefit and advancement of society as a whole, and nor does it acknowledge the lack of evidence for stronger enforcement equating to better protection for rights holders.

The next major piece of legislation to be considered is the Digital Economy Act 2010.

¹²⁰ Nicolas Jondet 'La France v Apple: who's the daddy in DRMs?' [2006] 3:4 SCRIPTed 473, 484.

¹²¹ *ibid.*

¹²² Leistner and Spindler (n 109) 810.

¹²³ Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16.

¹²⁴ Article 3(1).

¹²⁵ At (24).

¹²⁶ Kirstin Huniar, 'The enforcement directive – its effects on UK law' [2006] 28(2) EIPR 92, 99.

Chapter 2.2 Introduction to the Digital Economy Act

The Digital Economy Act was enacted in 2010 amid much controversy. The Gowers¹²⁷ report urged that 'If this [industry agreement of protocols to prevent online piracy] has not proved operationally successful by the end of 2007, Government should consider whether to legislate.'¹²⁸ Unsurprisingly, industry protocols had not cured the online piracy problem as research shows.¹²⁹ The 2009 Digital Britain report¹³⁰ preceded the enactment of the 2010 Act. In the report it was stated that legislation would be necessary and broadly set out two requirements to be imposed on ISPs. These involve notifying copyright infringers that they have committed an infringing act and to 'maintain and make available data to enable the minority of serious repeat infringers to be identified'.¹³¹ In addition, a code of practice would be set up. This would be regulated by OFCOM who would also be given the power to impose various obligations on ISPs such as blocking (site, IP, URL), content filtering and bandwidth capping.¹³² These measures would be implemented with the ambitious intention of reducing illegal file-sharing by '70-80%'.¹³³

The Act itself was arguably rushed through Parliament as part of the 'wash-up' period.¹³⁴ Clause 17 was introduced at the last moment, having not been part of the Digital Britain report. Despite this, it was drafted in to the final version of the Act.¹³⁵ This provision contained the ability to grant a blocking injunction against an ISP ordering it to block access to an offending website and was therefore a significant modification of the Digital Economy Bill, and therefore deserving of the appropriate amount of considered debate. These anomalies, combined with the speed with which it was rushed through Parliament, led to the Digital Economy Act's rather controversial reputation as an unhelpful and unfair piece of legislation.¹³⁶ To add to the general confusion surrounding the Act, the provisions it contains are largely amendments of the Communications Act 2003, and are treated as such. There are constant references to, and slight changes made to various sections of the 2003 Act, at times rendering it confusing and difficult to follow. Despite claims that its major impetus was to provide clarity and educate the public, the Act is in fact so inconsistent and inaccessible, that even

¹²⁷ HM Treasury, 'Gowers Review of Intellectual Property' (London: HMSO, 2006) <<http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>> accessed 19th January 2013.

¹²⁸ Gowers (n 127) 103.

¹²⁹ Department for Business, Innovation and Skills and Department for Culture, Media and Sport, 'Digital Britain - Final Report' (London: July 2009) <<http://image.guardian.co.uk/sys-files/Media/documents/2009/06/16/BERR-DigitalBritain.pdf>> accessed 17th December 2014, 109.

¹³⁰ *ibid.*

¹³¹ *ibid* 111.

¹³² *ibid* 113.

¹³³ *ibid* 110.

¹³⁴ Discussed at 23-24.

¹³⁵ Sections 17 'blocking injunctions' and 18 'Consultation and Parliamentary scrutiny'.

¹³⁶ For example, the criticisms of Farrand (n 45).

those required to implement its provisions (such as ISPs) will have difficulties with interpretation. Therefore end users will arguably be even less likely to be able to comprehend it, and so moderate their own behaviour accordingly.

The aim of the Act can be roughly divided into two key areas: outlining a new role of responsibility for Internet Service Providers (ISPs) and targeting users with the 'three strikes' process. The provisions of the Act, particularly those considered controversial, will be discussed below.

Chapter 2.3 Provisions of the Act

It is important to note that the provisions of the DEA currently only apply to ISPs with over 400,000 broadband lines. These account for around 93% of the market.¹³⁷ Only a brief perusal of the copyright infringement provisions of the Act is required to identify one major reason for its criticism – the heavy burden placed upon ISPs. Sections 3 and 4 set out ISPs' obligations to notify and provide lists of infringers if requested. This gives copyright owners significant powers whilst at the same time imposing an arguably onerous set of obligations on ISPs.

In section 3, it states that if an ISP receives a copyright infringement report (CIR) from a rights holder it must notify the subscriber [infringer] of the report, if the initial obligations code requires the provider to do so. This indicates that the ISP is also responsible for evaluating the report received to deduce whether or not the initial obligations code would apply and therefore whether notification is necessary. A notification involves the collection of a considerable amount of information. Whilst most of this involves standard advice to the subscriber such as how to legally obtain copyrighted works, a notification must also include items such as detailed evidence of the exact occurrences of infringing activities. This may involve a considerable amount of time and expense for the ISP in question. Yet the CIR, compiled by the rights holder, must also include evidence of the apparent infringement, including exact timing of occurrences, just as the notification requires of ISPs.¹³⁸ Essentially this indicates that the rights holder bears the burden of obtaining most of the necessary information, with ISPs only adding guidance to the information received before sending the notification off to the offending subscriber.

¹³⁷ The Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012 <<http://www.legislation.gov.uk/ukdsi/2012/9780111525838>> accessed 5th March 2015.

¹³⁸ Section 3.

The compilation of a CIR would likely be an arduous process for an individual rights holder, many of whom will have little or no legal or technical knowledge, and may even require costly legal advice. It would appear then that this sort of protection is, in reality, only available to those entities large enough to have the resources to undertake such an investigation. It is perhaps unlikely that individuals who are rights holders would be able to gather the required evidence without detailed guidance at the very least. It would seem that the law is drafted to benefit the industry, with little consideration for the individual rights holder. This does not sit well with the notion of copyright and its effective enforcement being intended for the protection and encouragement of creativity, if this protection is not applied equally in practice.

Moreover, section 3 is confusing, and charges ISPs with the difficult task of attempting to verify the evidence provided by the rights holder. It is unclear from the text of the Act, but it would appear that ISPs cannot simply take evidence provided at face value, as, if this were the case, many innocent individuals may be issued with notifications due to ineffective or not fully substantiated evidence gathering. As the standard is merely 'apparent infringement', ISPs may have to deal with a very large number of CIRs from rights holders keen to attack any possible signs of potential infringement. There is little in this section to address these issues. As part of the Initial Obligations Code, OFCOM suggests that 'a copyright owner (or an agent acting on their behalf) should, before submitting their first CIR (and from then on an annual basis), provide OFCOM with a quality assurance report, which details the processes and systems used by the copyright owner (or any party acting on its behalf) to gather evidence'. The quality assurance report requires a copyright owner (or their agent) to include a statement of compliance with relevant data protection laws'.¹³⁹ These 'relevant data protection laws' are not clarified in the Code. OFCOM will then approve (or not) the methods used by the copyright holder in compiling the CIR.¹⁴⁰ Whilst this is intended to prevent an overwhelming number of badly undertaken CIRs, in reality it imposes a further burden on individual rights holders. The legislation will only support the large-scale corporations with the financial resources to take on these significant hurdles.

A further issue is the effectiveness of the CIR. This approach to improving enforcement does not take into account the plethora of ways available to the savvy internet user to achieve anonymity or hijack innocent users' identities to commit illegal acts. Thus the main culprits, those who are most likely to commit large scale, or at least very regular, copyright infringement, are the ones most likely

¹³⁹ OFCOM Report 'Online Infringement of Copyright and the Digital Economy Act 2010' 26th June 2012 <<http://stakeholders.OFCOM.org.uk/binaries/consultations/online-notice/summary/notice.pdf>> accessed 30th December 2014, 38.

¹⁴⁰ *ibid* 42.

to be able to circumvent these measures. Therefore, identification of infringers still remains a major concern in need of attention.

Section 4 then requires ISPs to furnish rights holders with an 'infringement list' if requested, or obliged under the initial obligations code to do so. This list is essentially to identify repeat offenders, and must include which of the CIRs made by the rights holder to the ISP relate to the subscriber in question. The reasoning behind the inclusion of this convoluted section appears to be that although copyright owners may be able to acquire a list of IP addresses themselves, they may not be able to find out which IP address(es) belongs to which individual subscriber and therefore to identify repeat offenders.¹⁴¹ This is because often ISPs issue subscribers with dynamic IP addresses, which alter automatically every time they connect to their internet service. However, as Farrand observes, further explanation is vital to avoid confusion here, yet is not provided.¹⁴²

This appears to be a consistent problem with the Act and in Farrand's view leads back to the fact that it was rushed through Parliament, without the proper debate and scrutiny such a complex piece of legislation deserves.¹⁴³ As a result, the text at times reads more like a draft than a finalised piece of legislation, with Section 42, for example, referring to 'making or dealing with infringing activities etc'. The use of 'etc' supports Farrand's point, and is unacceptable in a legislative document. It is not possible to regulate one's own behaviour, or indeed for the courts to do so, without clearly defined parameters. Whilst words such as 'reasonable' are often used in law and are open to judicial interpretation, in this instance 'etc' refers to a list of undisclosed, prohibited behaviours.

Vagueness of legislation is not a new problem to copyright law. Larusson notes that the very ad hoc nature of its development over the years has inevitably led to 'considerable uncertainty'.¹⁴⁴ The fractured nature of the legislation makes it difficult for the individual to access one simple document containing all copyright laws in one place. There is much potential in the Copyright Hub to address this accessibility issue and provide the single, consolidated source of all legislation and guidance in copyright law that is so clearly required to promote clarity for all parties.¹⁴⁵

¹⁴¹ Farrand (n 45) 539.

¹⁴² *ibid.*

¹⁴³ OFCOM Report (n 48).

¹⁴⁴ Hafliði Larusson 'Uncertainty in the scope of copyright: the case of illegal file-sharing in the UK' [2009] 31(3) EIPR 124, 124.

¹⁴⁵ As discussed in Chapter 3.3, 61.

Larusson also suggests that a further cause for uncertainty is the difficulties posed by transposition of EU Directives.¹⁴⁶ This is an important point, as the very act of translation into another language raises the problem of interpretation and may unintentionally shift emphasis towards or away from the original meaning of the text, leading to the potential for over- or under- implementation. According to some commentators,¹⁴⁷ vagueness is very common at EU level as well, exacerbating the problem for national transposition. Brown takes this a step further, stating that the provisions in the 1996 WIPO Copyright Treaty were ambiguous, particularly in relation to the definition and scope of anti-circumvention measures for example.¹⁴⁸ Article 11 requires 'adequate' legal protection against circumvention of effective technological measures in connection with the exercise of authors' rights. Brown argues that the EU did not take the opportunity to improve this, instead replicating the vague language used in the Treaty.¹⁴⁹ Whilst this lack of certainty does allow for individual countries to interpret EU Directives in a way which best fits with their legal framework, it relies entirely on individual nations to provide the detailed provisions which are so lacking in the Directive. If this is not achieved, the consumer at the end of the line is unlikely to be able to interpret and apply the provisions to their own activities. Although the balance between the lack of certainty through the absence of definitions and allowing flexibility within the law can arguably be a good thing for lawyers, it can leave users confused and uncertain about the law.

Dimitrakopoulos also emphasises the political aspect to transposition of directives.¹⁵⁰ Inevitably, national legislatures will seek to transpose EU law in such a way as to minimise its impact on current national legislation. The UK, for example, seeks to keep EU legislation separate from UK legislation which may be viewed as a somewhat defensive attitude to transposition.¹⁵¹ The broad variation of political standpoints, ranging from enthusiasm to outright scepticism, across Europe will inevitably lead to some variation in transposition and subsequent interpretation of EU legislation. This lack of total harmonisation is understandable, but nevertheless serves to add an extra layer of confusion and vagueness to the mix for those seeking to determine exactly what the law is, and to regulate their behaviour accordingly.

¹⁴⁶ Larusson (n 144) 126.

¹⁴⁷ Larusson (n 144), see also Dionyssi Dimitrakopoulos 'The transposition of EU law: Post-decisional politics and institutional autonomy' [2001] 7(4) ELJ 442, 443.

¹⁴⁸ Ian Brown 'The evolution of anti-circumvention law' [2006] 20(3) IRLCT 239, 255.

¹⁴⁹ *ibid.*

¹⁵⁰ Dimitrakopoulos (n 147) 443.

¹⁵¹ *ibid.* 450.

In order to fulfil the complex obligations in Section 4 of the DEA then, the OFCOM Initial Obligations Code proposes that a time-based, three strike notification approach is appropriate.¹⁵² Therefore if an ISP is required to send three notifications to an infringing subscriber, any infringement committed following this will be subject to sanctions. It is considered that 'one month is an appropriate minimum time'¹⁵³ between the first and second notification, and 'a third notification should be sent if the subscriber has received two notifications within the previous 12 months'.¹⁵⁴ This graduated response approach, commonly referred to as the 'three strikes' rule, has received a largely negative response, and has in fact been delayed by an application for judicial review.¹⁵⁵ The warning letters approach was supposed to come into force in 2014, with the first notification letters due to be sent early that year. However, frequent delays mean that letters are unlikely to be sent until the end of 2015.

There is some concern over the format of notifications. Despite ISPs concerns over costs, OFCOM decided that all three notifications must be sent by first class post, not by email, although there is only a requirement to send the third and final notice by recorded delivery.¹⁵⁶ Therefore there is no guarantee that the user will actually receive the first two notifications, and their third and final strike may be the first they hear of the situation. It is somewhat unusual to insist on written communication as 'certainty of delivery is more important' than ISPs costs, then to resist the mandatory use of a recorded delivery service in order to ensure receipt. If certainty of delivery is so important, this provision does little to promote it.

This blanket three letters cease and desist approach appears to suggest that just 3 downloads per year is too many, assuming that the infringer is notified of all three occurrences. The legislation may be considered to be disproportionate here. The ordinary person's idea of large scale downloading is completely disconnected from the legislation. However, when taken together, these relatively infrequent downloads can add up to a real economic loss for copyright holders. This feeds into the idea of an alternative business model for gaining revenue.¹⁵⁷ It also shows that education is needed to teach society about the real losses associated with online infringement. Just because an individual is not physically taking a tangible item from another person, it does not mean that they are not still

¹⁵² OFCOM Report (n 48) 59.

¹⁵³ OFCOM Report (n 48) 60.

¹⁵⁴ *ibid* 61.

¹⁵⁵ See Chapter 2.4, 33-37.

¹⁵⁶ OFCOM Report (n 48) 61.

¹⁵⁷ Discussed in detail in Chapter 4.

causing real economic harm.¹⁵⁸ Chapter 4.4 emphasises the importance of education as a tool to tackle infringement in the long term.

Despite the presence of a similar legal framework in France,¹⁵⁹ the graduated response system has been criticised as a draconian measure by various sectors,¹⁶⁰ which may lead to many innocent users losing their internet access. In the modern age, this goes beyond being merely inconvenient. Many people depend on the internet in a multitude of ways, of which their livelihoods and vital contact with family and business contacts are just two that stand out. The potential consequences of internet disconnection are arguably not worth the potential benefit to copyright owners. Especially as, once again, it is the serial offenders who are mostly likely to be able to manipulate and circumvent such basic measures, leading vulnerable, (often) individuals to bear the burden.¹⁶¹ It is submitted that this is simply not a proportionate response. It is impossible to justify the removal of a vital service such as the internet from an individual who may wholly rely on it for many reasons, as a punishment for the relatively small loss of royalties suffered by the copyright holder caused by that individual.

Sections 5-7 provide a detailed set of instructions for OFCOM regarding the initial obligations code. Despite the relatively extensive criteria however, OFCOM still has a relatively wide scope to develop the initial obligations. Sections 5 and 6 also provide that the code does not have to be fixed, and can be amended if necessary. This provides a flexible framework for the evolving digital world, but admittedly does so at the expense of legal certainty.¹⁶²

Section 8 requires OFCOM to provide annual, or sometimes more frequent, progress reports to the Secretary of State once the initial obligations code has been implemented.

Under sections 9 and 10, which refer to obligations to limit internet access, 'Internet service providers and copyright owners must give OFCOM any assistance that OFCOM reasonably require' for limiting internet access due to infringement. The Secretary of State can, following OFCOM reports, direct OFCOM to 'assess' whether or not to impose a technical obligation on an ISP to limit a subscribers' access. This rather vague obligation does admittedly include the word 'reasonable', yet

¹⁵⁸ See for example Sugden (n 35) 372.

¹⁵⁹ HADOPI, text to n 255.

¹⁶⁰ Charles Arthur 'Opposition to Digital Economy Bill grows' (*The Guardian*, 5 February 2010) <<http://www.guardian.co.uk/technology/2010/feb/05/digital-economy-bill>> accessed 2nd March 2015; Duncan Geere 'Three-strikes letters for British file sharers won't be sent out until 2014' (*Wired*, 25 April 2012) <<http://www.wired.co.uk/news/archive/2012-04/25/deaf-letters-timetable>> accessed 5th March 2015.

¹⁶¹ Garstka (n 46) 173.

¹⁶² See Chapter 2.5 for more on the Initial Obligations Code, 44-49.

this is not defined and each party's interpretation of 'reasonable' will undoubtedly differ to a large extent. It is to be hoped that OFCOM is able to achieve a fair definition of 'reasonable' that does not impose too large a burden on ISPs. Case law will reveal whether or not this is the case.¹⁶³

Section 10(5) sets out the three steps OFCOM must include in its assessment:

(a) consultation of copyright owners, internet service providers, subscribers or any other person;

(b) an assessment of the likely efficacy of a technical measure in relation to a particular type of internet access service; and

(c) steps to prepare a proposed technical obligations code.'

These vague instructions provide no detailed criteria to be followed, and is therefore apparently left to OFCOM to determine. How and when the subscriber is notified of this investigation is not defined.

Section 13 of the Act seems to conflict with the subscribers' obligations under section 3. Section 3 states that a notification must contain 'information enabling the subscriber to obtain advice, about steps that a subscriber can take to protect an internet access service from unauthorised use'. Yet section 13 states that any appeal made by a subscriber may be won if the subscriber can prove that he 'took reasonable steps to prevent other persons infringing copyright'. The use of the 'other persons' implies that subscribers must also attempt to prevent infringing activity being committed by *authorised* users of his internet service, as well as unauthorised, despite advice concerning this being entirely absent from any notification received. Individuals may therefore be uncertain as to exactly how to protect themselves from liability.

A notification should also contain advice relating to 'reasonable steps' to take in order to prevent 'other persons' committing infringing acts. Yet the definition of 'reasonable steps' is not given and is therefore vague and uncertain. It is presumed that this means that the individual must inform authorised users that they must not commit infringing acts. It is wholly unclear whether or not this is sufficient. Must the rights holder remind users of this regularly? How regularly is sufficiently frequent? Is he required have the technological knowledge to explain in detail to authorised users how they may avoid infringement? And how could he possibly prove that he has done this? Users cannot surely be required to actively monitor internet usage. Most individuals do not have the

¹⁶³ See Chapter 2.5, 44-49 for more on the Initial Obligations Code.

technological capacity to do so. Indeed, some may not be aware of online infringement if they have never participated themselves. A good example here is to consider a parent and child. The parent may provide the internet with very little knowledge of its use, whilst the teenage child may very well be au fait with infringement and how to exploit a good internet connection in that way.

Ensuring that your WiFi is coded, to prevent unwanted usage, is common place. But not all protection measures are so simple. For example, games on mobile phones are often vague as to what is included for 'free' as part of the game, and what is to be downloaded at cost. Many people, particularly children, may well be unaware of the proper, legal way of doing this. Indeed, such is the nature of digital technology, that often one is not even aware that downloading is taking place. It is somewhat unrealistic to expect the subscriber to be able to prevent any authorised user from committing an illegal act, such as downloading a song or watch a film online. One would have to be well versed in the fast-paced world of illegal websites to be able to tell whether any user had been accessing a harmless legal website, or an illegal one, for example.

Accessible, easily comprehensible information is essential for society as a whole to understand how to protect against infringement in the case of both authorised and unauthorised use of internet services. As it stands the legislation of copyright law is confusing and often unintelligible to persons not well versed in legal jargon. The Digital Economy Act has done nothing to improve this situation. Indeed, it has undoubtedly contributed to the already prevailing uncertainty.

Moreover, a subscriber has a limit of just '20 working days from the date of receipt of a notification'¹⁶⁴ to make an appeal. This is a short period of time for a layperson to react and make a case for appeal. The appeal will cost the subscriber £20, although thankfully this will be refunded if the appeal is successful.¹⁶⁵ Individuals do not generally monitor their own usage, ignorant of any need to do so, and could not realistically be able to compile any meaningful information in any case. It is not made clear how much information a user can request from an ISP in order to help to build his case for appeal.

Section 14 affords a substantial power to OFCOM; that is, to impose an 'appropriate' and 'proportionate' fine of up to £250,000 for contravention of an initial or technical obligation. In other words, an obligation is imposed on an ISP. Rather ominously for ISPs, even this is not fixed, and 'The

¹⁶⁴ Department for Culture, Media and Sport, "Next steps for implementation of the Digital Economy Act 2010" August 2011

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78090/Next-steps-for-implementation-of-the-Digital-Economy-Act.pdf> accessed 6th March 2015, 6.

¹⁶⁵ *ibid.*

Secretary of State may by order amend this section so as to substitute a different maximum penalty'. This increases the already onerous burden placed on ISPs who appear to have been made essentially responsible for policing the internet and preventing online infringement. Although there is no official obligation to monitor, the various provisions of the Act arguably amount to the same thing. This substantial upper limit of the fine represents a tough approach to copyright infringement, tipping the balance further in favour of copyright holders' exclusivity.

The Sharing of Costs section¹⁶⁶ does only a little to relieve the burden of costs on ISPs and refers the possible sharing of costs between ISPs and rights holders to be established in the initial obligations code. The draft legislation¹⁶⁷ certainly sets out the various types of relevant costs, but essentially leaves the sharing of costs (that is, the title of this piece of draft legislation) to be determined by OFCOM. OFCOM has advised that it will order that 'Copyright Owners should bear all of the costs incurred by OFCOM, the majority of costs incurred by the appeals body, and 75% of the costs efficiently and reasonably incurred by Qualifying ISPs in carrying out their obligations.'¹⁶⁸ In addition, subscribers are forced to pay £20 to appeal against an infringement claim, however insubstantial the evidential basis for the claim may be.¹⁶⁹ However there has been a slight amendment to the costs sharing obligations, following judicial review.¹⁷⁰

The above provision does alleviate ISPs a little from what is a serious financial and administrative burden. However it does, of course, also mean that only those large corporations, or parties with many resources, will be able to afford to fully protect their rights. It would appear that individual rights holders have to afford a hefty financial investment in attempting to enforce their rights. This raises questions about the true motives behind copyright legislation. If our strong legal protection scheme is based on a steadfast belief in the importance and integrity of copyright ownership, why is its enforcement only realistically available to those who can afford to fight for it?

The introduction of the concept of 'qualifying ISPs' is important too. These are defined as the main six ISPs.¹⁷¹ This is because, at present, it is considered that to impose such obligations on smaller ISPs

¹⁶⁶ Section 15 DEA.

¹⁶⁷ The Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012 <http://www.legislation.gov.uk/ukdsi/2012/9780111525838> (accessed 5th March 2013).

¹⁶⁸ OFCOM Consultation 'Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012' <<http://stakeholders.OFCOM.org.uk/consultations/infringement-implementation/summary>> accessed 5th March 2015, 1.4.

¹⁶⁹ *ibid* 1.5.

¹⁷⁰ Discussed at 33-37.

¹⁷¹ BT, Virgin Media, TalkTalk, BSkyB, O2 and Everything Everywhere.

would be impractical and unfair. Although this has been challenged,¹⁷² it is so far set to remain. However this raises the problem that most public WiFi providers, such as hotels and libraries, are very likely to be subscribed to one of these ISPs and may therefore be the victim of action taken by ISPs who have no choice but to do so, if a user of the WiFi service was to commit an infringing activity.

Sections 17 and 18 of the Act were to require ISPs to block access to infringing websites. Websites such as Youtube, where infringing videos are constantly being uploaded, would technically fall under this definition and could potentially be subject to an injunction under the Act. These 'blocking injunctions', set out in section 17, would afford the Secretary of State considerable power, but would be extremely difficult to successfully implement against the might of an organisation such as Youtube, owned by Google, not least due to the substantial contribution in revenue also gained by copyright holders through promotion of material on Youtube. As Garstka points out, an injunction against a website like Youtube would likely never happen,¹⁷³ because any attempt to do so would not get past, for example, freedom of expression laws¹⁷⁴ and those concerning the protection of the legitimate interests of other parties.¹⁷⁵ These other parties widely use Youtube for publicity purposes, for example bands upload new material to whet fans' appetites and the film industry releases teaser trailers etc. For these legitimate users, the blocking of Youtube could be a devastating loss of the promotion and exposure so vital to success in their industry.

This may lead to difficulty ensuring that the injunctions were applied fairly and equally, without the Secretary of State being required to make any sort of value judgement on the website itself and other aspects of its contents in order to decide whether or not to impose a blocking injunction. This could lead to a two-tier system in which a website which was able to establish and evidence a strong legitimate interest for its users, as Youtube has done, would be relatively difficult to challenge under the law even if it were used for piracy as well. As a result of an OFCOM report,¹⁷⁶ in 2012 the government announced that it would not be implementing the website blocking provisions (sections 17 and 18 of the Act) as they would be ineffective and section 97A CDPA was already in existence, and becoming more prominently used by the judiciary.¹⁷⁷

¹⁷² Discussed at 33-37.

¹⁷³ Garstka (n 46) 165.

¹⁷⁴ Enshrined in Article 10 of the European Convention on Human Rights.

¹⁷⁵ In the CDPA, as amended by the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003.

¹⁷⁶ OFCOM Report "'Site Blocking" to reduce online copyright infringement' 27th May 2010

<<http://stakeholders.OFCOM.org.uk/binaries/internet/site-blocking.pdf>> accessed 30th December 2014.

¹⁷⁷ Discussed in Chapter 2.4 Application of the Act, 33ff.

In addition, Garstka goes on to argue that the ‘inherent flaw’ in blocking injunctions is the tendency of blocked pirated websites to instantly reappear under a new name, or sometimes not even that but merely a new ISP.¹⁷⁸ When The Pirate Bay reappeared with the same name, traffic actually increasing on their new website following the publicity caused by the court case and blocking injunction.¹⁷⁹

The notion of ‘qualifying ISPs’ may be considered reasonable due to cost issues for small ISPs, but from an effectiveness point of view, it is clearly flawed, allowing infringers to continue to exploit copyrighted material freely via hundreds of non-qualifying ISPs. The law should never be discriminatory. Most likely this decision has been based on the practicalities of cost implications for smaller ISPs, but surely this issue alone should cause alarm bells to ring, and raise questions as to the fairness and practical suitability of this new system. Worse still, this application of the law to a restrictive category of ISPs leaves the Act vulnerable to manipulation. Individuals determined to continue to obtain copyrighted material in an illegal manner may be more likely to move to a smaller, non-qualifying ISP to evade liability under the Act.

In addition, Cusack raises the possibility of qualifying ISPs claiming that this will have an anti-competitive effect as customers may be incentivised to migrate to smaller operators.¹⁸⁰ Whilst this may be a somewhat unconvincing claim, as it is difficult to justify the need to be competitive for users seeking to commit crimes, this example does serve to illustrate the complex interaction of the many different rights and needs that are affected by copyright law and infringement. This legislation clearly affects rights holders and consumers, but also significantly impacts on the activities of other sectors such as ISPs and businesses such as hotels, libraries and cafes which provide WiFi for their customers as a valuable selling point for their organisation. This interplay between various different rights is undoubtedly difficult, but it is submitted that the various obligations imposed on ISPs, together with section 14’s potential £250,000 fine for failure to fulfil obligations, are too burdensome and it is at present difficult to justify their new role as ‘copyright cops’.¹⁸¹ Edwards questions the justification of this burden, bearing in mind the total lack of potential gain for ISPs from the process, other than potential litigation or customer ill will. There is not enough clarification for ISPs here either, as it is difficult to determine what may lead to a fine. Would the provision of

¹⁷⁸ Garstka (n 46) 173.

¹⁷⁹ Kate Solomon, ‘Blocking Pirate Bay obviously working as traffic shoots up’ (*Techradar*, 1 May 2012) <<http://www.techradar.com/news/internet/blocking-pirate-bay-obviously-working-as-traffic-shoots-up-1078679>> accessed 21st January 2015.

¹⁸⁰ Nick Cusack, ‘Is the Digital Economy Act 2010 the most effective and proportionate way to reduce online piracy?’ [2011] 33(9) EIPR 559, 561.

¹⁸¹ Lilian Edwards ‘Mandy and Me: Some Thoughts on the Digital Economy Bill’ [2009] 6:3 SCRIPTed 534, 537.

infringement information to rights holders be challengeable if it was too slowly provided, or incomplete? How speedy and accurate does the information have to be in order to escape blame? In Edwards' rather forceful words, as a pre-cursor to Farrand on the DEA itself, the Digital Economy Bill did read as though it were 'drafted in haste on the back of an envelope on a wet Tuesday'.¹⁸² It is unfortunate that its introduction through the wash-up period did not allow it to be sufficiently revised and redrafted to achieve its aim of clarity.

Yet, as ISPs are in part facilitating infringement by providing internet connections to the masses, it would be fair to advocate the importance of their involvement in the protection process. It is submitted that the tax/levy system developed later in this paper¹⁸³ could improve the fairness of the ISP obligations in the DEA by providing revenue to help to compensate ISPs more fairly for their involvement in the protection of rights holders, in their new role as 'copyright cops'. This would be a more proportionate way to maintain the use of ISPs in the enforcement process. As Cusack concludes, given the difficulties with identification of infringement and the level of detail required in infringement reports, the burden placed on ISPs in particular in the Digital Economy Act is too onerous.¹⁸⁴ Ultimately, the consumer is likely to pay the price as ISPs will have to look to their own pricing structures to try to recoup some of these costs.¹⁸⁵

Section 42 continues the attack on online piracy, amending section 107 of the CDPA to raise the maximum penalty for 'making or dealing with infringing articles etc' from £5,000 (in England and Wales) to £50,000, as previously mentioned. This tenfold increase follows Gowers' recommendation to 'match penalties for online and physical copyright infringement'.¹⁸⁶ Whether or not this new maximum fine will act as a deterrent to persistent offenders is unclear, as is the vague use of 'etc' in the provision. It seems the drafters of the Act were trying to provide a flexible framework from which various interpretations would be possible. As discussed earlier, language such as 'appropriate' and 'etc' are used throughout the text of the Act, without any clear parameters being set to define them. The result is merely a confusing and uncertain set of provisions that make it somewhat difficult for individuals, without extensive legal advice, to regulate their behaviour appropriately.

How the various provisions of the Act have been applied in case law will be analysed below.

¹⁸² Edwards (n 181) 537.

¹⁸³ This is proposed in Chapter 4.1, 74.

¹⁸⁴ Cusack (n 180) 562.

¹⁸⁵ Garstka (n 46) 173.

¹⁸⁶ Gowers (n 127) 8.

Chapter 2.4 Application of the Act

Although the Digital Economy Act has not yet been fully implemented, it is important to consider a few noteworthy cases which have been concluded after the introduction of the new legislation in 2010. Judicial review proceedings, as well as the following cases, have highlighted some considerable issues with the new Act from the judiciary and within the wider context of copyright enforcement: *Newzbin*, *Newzbin2*, *Dramatico v BSKyB* and *EMI v BSKyB*.

The implementation of the Digital Economy Act was delayed by judicial review proceedings.¹⁸⁷ The claimants (BT and TalkTalk) challenged the Act on a number of grounds. These included whether the Initial Obligations were technical regulations, and infringed 'certain Articles of the E-Commerce Directive'¹⁸⁸ and the Authorisation Directive,¹⁸⁹ whether they amounted to an obligation to monitor, and whether there was a privacy issue concerning the collecting of information for copyright infringement reports.

The challenge failed on all grounds, bar a relatively minor one relating to administrative charges. However, the arguably weak and confusing reasoning behind the decision is worthy of consideration. The first ground was that the contested provisions should be unenforceable as they had not been notified to the EU. It was stated that, in the first instance, it was difficult to determine exactly how the Initial Obligations Code would take effect, as it was yet to be enacted.¹⁹⁰ It would seem that the claimants had perhaps been too quick to challenge the legislation. It will only be possible to properly establish the exact scope of the Initial Obligations once they are fully underway. The court held that the Initial Obligations would need to be notified to the EU once fully drafted, so the claimants challenge was premature. Therefore Mr Justice Kenneth Parker dismissed the first ground on this basis.

The claimants also alleged that the Act contravened Articles 12, 15 and 3(2) of the E-Commerce Directive.¹⁹¹ It was said that the mere conduit protection provided in Articles 12 and 15 were intended to be interpreted very broadly. Parker J disagreed. He argued that to do so would be to tip the balance in favour of ISPs and away from copyright owners. Instructing ISPs to act to prevent current or likely future infringement, without making them directly liable for that infringement, is

¹⁸⁷ *R (on the application of British Telecommunications Plc and another) v Secretary of State for Culture, Olympics, Media and Sport* [2011] EWHC 1021.

¹⁸⁸ *ibid* [95].

¹⁸⁹ *ibid* [168]-[183].

¹⁹⁰ *ibid* [84]-[94].

¹⁹¹ *ibid* [98].

suggested as the balance being more fairly struck.¹⁹² Yet this is simply not the case. The Act appears to consistently favour copyright owners over ISPs to a disproportionate level. Other interested parties, such as end users and any potential right to freedom of information, are treated as all but irrelevant.

Article 15 specifically provides that 'Member States shall not impose a general obligation on providers'.¹⁹³ The claimants argued that the provisions of the Digital Economy Act amounted to exactly that. Again, unsurprisingly, the court disagreed.¹⁹⁴ The reasoning given was nothing short of bizarre, presenting an unusual definition of 'monitor' and arguing that therefore the provisions in the Act 'cannot accurately be called 'monitoring''. This is because 'when the ISP sends a CIL [Copyright Infringement List] to a copyright owner' it is merely asserting that 'according to information held by the ISP, a particular subscriber, identified through the IP address or addresses, has infringed the owner's rights on a number of occasions (to be specified in the code)'. The judgment continues, stating that 'The knowledge acquired is no more than a by-product of the different non-monitoring role that I have set out above' and therefore is essentially a 'passive role'. Put another way, the (emphasis added) 'essential function of the ISP is not to investigate facts or circumstances, but to identify the wrongdoer'.¹⁹⁵ It is unclear how an ISP can possibly identify a wrongdoer without any sort of action on its part. How can it identify any individuals without some sort of active investigation taking place? It may often be merely the checking of facts provided by others, such as copyright owners, but even this has to be done, and done correctly, to avoid being penalised.

The court's explanation is poorly expressed, and appears to constitute a weak attempt to bypass the 'no obligation' principle. In reality there is nothing 'passive' about the significant role imposed on ISPs in acting on notifications received by copyright owners, and compiling copyright infringement lists and reports. These can and will be time consuming and costly procedures. The court's reasoning in this instance has no solid foundation beyond a desire to impose this burden on ISPs, in spite of the E-Commerce Directive.

The claimants also contended 'whether the relevant processing of personal data is permissible'.¹⁹⁶ It was argued that personal data should only be accessible if the data controller intends to commence legal proceedings. Parker J argued that this was unreasonable, as 'The data controller might not

¹⁹² *BT Plc* (n 187) [103].

¹⁹³ Article 15(1), Council Directive 2000/31/EC.

¹⁹⁴ *BT Plc* (n 187) [115].

¹⁹⁵ *ibid* [118].

¹⁹⁶ *ibid* [158].

know at an early stage in processing the relevant data' and 'it might be only after the relevant data processing that he could sensibly decide whether it was appropriate to commence proceedings'.¹⁹⁷ This again affords significant powers to copyright owners and at the same time provides no real protection to the privacy of users. In addition, it implies that a large proportion of an ISPs work in compiling and sending out CIRs and CILs may be rendered pointless, as more often than not a copyright owner may 'change his mind'¹⁹⁸ and decide not to pursue a case after all. This appears to condone a very inefficient system, wasteful of both time and resources.

The fourth ground for review was a supposed breach of the Authorisation Directive.¹⁹⁹ The claimants submitted that 'the provisions in respect of "qualifying costs", "relevant costs" and "case fees" are conditions of a general authorisation'.²⁰⁰ This was rejected, and it was held to be reasonable that the claimants must pay 25% of 'relevant costs' and case fees, although not 'qualifying costs'. The reasons behind this decision to make ISPs responsible for costs relating to the enforcement of an individual's private right are, again, not well explained. It is simply stated that 'relevant costs' and 'case fees' do not fall under the category of 'administrative charges'. In fact, Parker J seems to suggest that ISPs are actually lucky to receive any compensation for 'discharging their obligations under the DEA' at all. He further states that 'the DEA could have left ISPs to bear such costs entirely'.

It is unclear how this could possibly be considered equitable or proportionate. If these obligations were enacted in previous legislation, and the provisions for partial recovery of costs were contained in a new amendment, then this position would perhaps be understandable. But these obligations were imposed upon ISPs in the same piece of legislation as the initial provision for the recovery of costs. So it does not make sense to indicate that ISPs are somehow lucky to be receiving a small amount (although described by in the judgment as 'substantial'²⁰¹) of compensation for undertaking their (new) statutory obligations, when both provisions were enacted simultaneously in any case. Moreover, Parker J does not explain why it is justifiable for ISPs to have these statutory obligations and to bear a significant proportion of the costs involved. It appears to be part of a very rights holder-centric attitude, where ISPs have been arbitrarily chosen to be the parties essentially responsible for improving copyright enforcement.

¹⁹⁷ *BT Plc* (n 187) [160].

¹⁹⁸ *ibid.*

¹⁹⁹ Council Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services [2002] OJ L108/21.

²⁰⁰ *BT Plc* (n 187) [191].

²⁰¹ *ibid* [193].

The final ground related to discrimination and proportionality. The inclusion of only the six largest ISPs in the Initial Obligations was held to be not discriminatory, but a proportionate decision by OFCOM. 'Any alleged "migration" of infringers to smaller ISPs' 'could be addressed if it began to present real problems',²⁰² which it not a satisfactory response as it undoubtedly will, and indeed already does, occur. With regard to proportionality, the claimants questioned whether 'the contested provisions represent a disproportionate restriction on the free movement of services and/or the right to privacy and/or the right to free expression or to impart and receive information'.²⁰³ This section of the text of the case presents further problematic statements. Parker J states that although 'technical means of avoiding detection are available, for those knowledgeable and skilful enough to employ them,' 'the central difficulty of this argument is that it rests upon assumptions about human behaviour'. Here, he is effectively dismissing the argument that the Act will not affect those whom it is supposedly designed to target: repeat, large-scale offenders. The reasoning is simply that it is too difficult to predict human behaviour, and thus such a statement cannot be sufficiently relied upon in deciding the case for judicial review.

Yet Parker J immediately goes on to do the very thing he warns against; using assumptions about human behaviour to decide on the likely success of the various (in this instance, educational) provisions in the Act. He states that 'through systematic CIRs the recipient will be better informed about the nature of his conduct and of the likely consequences for others, and he may be disposed to cease'. This idealistic reasoning is not based on any sound foundation. Only a relatively minor group will be 'disposed to cease', those most likely being very small-scale offenders in any case. The judgment also advises that it is 'not an unreasonable burden' to require subscribers to restrict access to their WiFi in order to avoid liability. This is simply untrue as it in fact poses a substantial problem to organisations such as libraries and hotels. This judgment does nothing to explain or alleviate this problem.

The case for judicial review was therefore, unsurprisingly, almost entirely rejected. Only one minor point was conceded. Therefore the Digital Economy Act has only recently been successfully implemented. Recent cases demonstrate how the DEA has been taken into account on occasions but ultimately marginalised.

²⁰² *BT Plc* (n 187) [201].

²⁰³ *ibid* [203].

An example of this would be the *Newzbin*²⁰⁴ and *Newzbin2*²⁰⁵ cases. The first *Newzbin* case held that the website, which was indexing torrents from which users could download illegal material, fell under the UK definition of authorisation.²⁰⁶ It was held that the website provided a sophisticated search facility, with no filtering system to attempt to protect copyright, despite the website linking to many major feature films.²⁰⁷ It was stated that evidently the website owners would have been aware that at least some of these would be under copyright protection.²⁰⁸ In addition, the NZB facility (an integral part of the website) essentially allowed users to create and store an infringing copy of a work on their own computer.²⁰⁹ For these reasons, the website was subsequently ordered to be shut down. Almost instantly, it was reincarnated in the not so subtle form of *Newzbin2*²¹⁰. In this second case, Mr Justice Arnold essentially assumed that the new website, being so similar to the old, would be considered to be 'authorising' infringement. This was therefore not really discussed in any detail. Instead an unprecedented order was made; BT was instructed to block access to the website altogether. This shows a clear shift in approach, as the service provider was targeted, rather than the website or the users. It was not possible to target the website in this instance, as it had relocated to a country outside this jurisdiction. Pursuing a major ISP, BT, was the next best thing. But this is not a satisfactory position, and does little to target the real problem. It may solve the issue in the short term, for that particular website, but is evidently not a plausible, long term solution. It simply ignores the practicalities of blocking all potentially infringing websites, through a slow court process, when in just minutes a new website may emerge.

It is important to note that this was done on the basis of section 97A of the CDPA, and did not take the Digital Economy Act into account. Although not yet fully implemented, the Act was the most recent and relevant piece of legislation, and arguably should have been considered in the judgment. This calls the validity of the Digital Economy Act into question. If it is simply ignored, and such a significant result as website blocking is achieved without it, then what material difference does the Act make to copyright enforcement as it stands? In fact, the website blocking sections of the new Act have actually been rejected. That is, the main weapon used against infringing websites today comes not from the Act specifically designed to deal with online infringement, the DEA, but is from old legislation, conceived before the prevalence of the internet.

²⁰⁴ *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EHC 608.

²⁰⁵ *Twentieth Century Fox and Others v British Telecommunications* [2011] EHC 1981 (Ch).

²⁰⁶ Defined as 'to grant, or purport to grant, expressly or by implication, the right to do the act complained of' in *CBS Songs Ltd v Amstrad* [1987] 2 WLR 1191.

²⁰⁷ *Newzbin* (n 204) [99].

²⁰⁸ *ibid* [101].

²⁰⁹ *ibid* [100].

²¹⁰ *Newzbin2* (n 205).

The interpretation of ‘actual knowledge’ in section 97A CDPA was afforded a broad scope, and Arnold J clearly stated that he did ‘not consider that this [section 17 DEA] provides any assistance with regard to the interpretation of the requirement for actual knowledge in section 97A’, believing it to have a ‘different [yet wholly unexplained] reach’.²¹¹ It was reiterated that ‘it is not essential to prove actual knowledge of a specific infringement of a specific copyright work by a specific individual’.²¹² There is no clear explanation as to why this might be. This case reads as if the outcome was decided from the beginning. *Newzbin2* offered a paid, subscriber-only service, to a (relative to other similar websites) small, select group of individuals. It was not, in short, the most obvious and necessary target. It appears as if it was used as an excuse to impose such a blocking injunction, and work as a deterrent to others.

Section 97A was once again the provision of choice in the more recent *Dramatico v BSKyB*²¹³ case, applied with a similar result, in which there was again no reference to the Digital Economy Act at all. Initially, Arnold J sets out reasons why the ISP has been targeted and the various other parties have not.²¹⁴ It is suggested that it would be ‘impracticable’ and ‘wholly disproportionate’ to pursue all users of the The Pirate Bay, or the website itself, due to both issues of cost and the fact that the website is based outside of this jurisdiction. Whilst this is true, it is an uncomfortable position to maintain; pursuing the ‘easy target’ can be unfair and moreover does little to tackle the root problem of infringement.

Evidence submitted by the defendants in this case was compiled by a company ‘specialising in evidence gathering on the internet’. This is further confirmation of the fact that only copyright owners with plentiful resources can realistically defend their rights. Due to the attitude of The Pirate Bay, establishing authorisation was relatively easy. It was held that ‘the operators of The Pirate Bay induce, incite or persuade its users to commit infringements of copyright, and that they and the users act pursuant to a common design to infringe.’²¹⁵ This case proved that the ruling in *Newzbin2* was not an anomaly and the legitimate target in copyright infringement cases may well be the ISP. In fact these site blocking cases are becoming commonplace, despite their relatively ineffectual nature. In fact, The Pirate Bay had more hits on its new website after the publicity surrounding the trial, than it had ever had before.²¹⁶

²¹¹ *Newzbin2* (n 205) [138] (Arnold J).

²¹² *ibid* [148].

²¹³ [2012] EWHC 268 (Ch).

²¹⁴ *ibid* [9]-[14].

²¹⁵ *ibid* [83].

²¹⁶ Solomon (n 179).

In *EMI v BSKyB*,²¹⁷ the defendants were found to have actual knowledge of the infringements²¹⁸ and Arnold J confirmed that 'The [blocking] orders are necessary and appropriate to protect the intellectual property rights of the Claimants'. A blocking injunction was accordingly applied to the defendants.

In this case, Arnold J considered that ease of circumvention (of the relevant blocking injunctions) was a factor. But he remained of the opinion that if it blocks just a small minority of users, it should be considered to be justified.²¹⁹ This appears to miss the point of the legislation. It is surely the main intention of a successful copyright enforcement regime, to attempt to control large scale offenders first. Private individuals, who download one or two small items per month, say, are not particularly important, at this stage at least. By the above statement, Arnold J has clearly established the complete inadequacy of the current legislation. He further relies on the relatively large reduction in usage of the website *Newzbin2* following his blocking injunction against BT, to prove his point. However, this is not quite so clear cut as it seems. *Newzbin2* was a paid subscription service. Those using it would be very unlikely to continue to pay for something that may no longer be easily accessible, due to the complications of a high profile blocking injunction made against it. Individuals are simply not going to pay for a service they are no longer able to be guaranteed to receive. In any case, the popular payment facilitation entity Paypal actually blocked potential new users from purchasing a subscription using their service, thus bringing the website, eventually, to a halt.

In addition, many of those who paid for the service would be more likely than users of free services to assume that what they were doing was in fact legal, as the subscription process would appear to 'legitimise' the process to those less aware or perhaps non tech-savvy users. Therefore once they were aware that they were paying for an illegal service, they may likely stop. These two important factors would no doubt contribute to the considerable reduction in users of the *Newzbin2* site alluded to by Arnold J. But most large scale illegal websites are free of charge and would arguably see far less of a reduction in service, as long as it was able to circumvent blocking provisions, than *Newzbin2*. Bearing in mind that those individuals setting up such websites are able to do so because of pre-existing, extensive knowledge of web technology in the first place, blocking injunction circumvention seems likely to be commonplace.

Whilst it may be argued that the blocking injunction in *Newzbin2* was successful, in that it brought about the eventual downfall of the website, in reality it will not significantly impact on the

²¹⁷ [2013] EWHC 379 (Ch).

²¹⁸ *ibid* [89].

²¹⁹ *ibid* [104].

prevalence of online piracy: the ultimate aim of the legal framework. As Garstka suggests, there appears to be a misjudgement among lawmakers that such injunctions would force users to abandon their favoured illegal source of material, and turn to legal sources.²²⁰ But surely it is equally as likely, if not more so, that these users will simply turn to another illegal source?

The above cases evidence a new regime of targeting ISPs and imposing blocking injunctions. If this is as successful as the judiciary are claiming, it raises questions surrounding the relevance of the Digital Economy Act. It would appear that, so far, the Digital Economy Act has been essentially sidelined. Although not fully implemented, it should still have been considered worthy of interpretation in post-Act cases. If there is a newly emerging method of copyright enforcement being routinely used, then is there any point to this new legislation. It does not appear to fill any 'gaps' in the CDPA, as it merely places further burdens on ISPs. Bearing in mind the new trend of blocking injunctions, it appears that ISPs are already covered. The DEA arguably makes no practical improvement to previous legislation in this area, and is already becoming irrelevant. It seems unlikely that it will be effective or appropriate to the proper regulation of copyright online.

Chapter 2.5 Current legislation – a successful framework?

There are many reasons contributing to the submission that, overall, the Digital Economy Act is not, and will never be, a success in its current form.

The chief complaint seems to be that the Act essentially targets the wrong infringers in the wrong manner, in spite of widespread agreement that targeting individuals is ineffective.²²¹ Professional internet pirates simply will not be deterred from infringement by the receipt of a letter. Such individuals are likely to be able to seek alternative ways to continue to act illegally.

In addition, too high a burden is placed on ISPs. This arguably contravenes the 'no monitoring' principle set out in Article 15 of the E-Commerce Directive,²²² and subsequently enforced in ECJ cases such as *Scarlet*.²²³ In this case, it was held that requiring an ISP to implement a filtering system

²²⁰ Garstka (n 46) 162.

²²¹ Ryan Hocking 'Secondary liability in copyright infringement: still no Newz?' [2012] 23(4) Ent LR 83, 83.

²²² Article 15(1) states that 'Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity'.

²²³ Case C-70/10 *Scarlet Extended SA v Societe belge des auteurs, compositeurs et editeurs SCRL (SABAM)* [2011] EUECJ 771.

which would block access to any musical work via peer-to-peer file-sharing services without the required rights holder's permission, would not strike 'a fair balance' between 'the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other'.²²⁴ It would clearly be a disproportionate burden on ISPs and would mean placing the right to intellectual property on a more highly valued legal pedestal, disproportionately raising it above all three of the other rights mentioned above. There is no legal basis in either UK or EU law to support this imbalanced weighting of rights in favour of the right to intellectual property and the judgment reflected this.

The argument surrounding the burden imposed on ISPs pertains to pre-internet interpretations of copyright liability and where this burden should lie. In *CBS Songs Ltd v Amstrad Consumer Electronics*²²⁵ it was held that manufacturing and selling hi-fi systems with tape recording facilities did not amount to incitement to infringe copyright. This was because no purchaser could 'reasonably deduce from the facilities incorporated in it or from the advertisements that the first defendants possessed or purported to possess the authority to grant any required permission for a record to be copied'.²²⁶ Lord Templeman confirmed that 'authorisation' means to grant or purport to grant to do the infringing act. It was held that Amstrad conferred the *power* to copy but not the *right* to do so.²²⁷ Therefore this meant that Amstrad did *not* authorise the infringing acts and CBS's appeal was dismissed. Oswald argues that the *Amstrad* case indicates that *control* is key in UK law.²²⁸ This is confirmed in the previously mentioned *Pirate Bay* case, where Arnold J held that the founders of the website were able to remove illegal torrents but specifically decided not to exercise that control in relation to violation of the rights of copyright owners.²²⁹ Whilst authorisation would have been easy to find on the basis of their clear statement of intent to infringe on the website itself, it is still important to consider other factors referred to in the judgment and how they may be applied in the context of ISPs. Owen's argument of control being central to such decisions is strengthened when considering the position of ISPs. What differentiates ISPs from the position of Amstrad in this case is control, as ISPs do or can have some control over the use of the service they provide. Therefore UK case law suggests that ISPs should take some responsibility for control of infringement, but it is

²²⁴ *Scarlet* (n 223) [53].

²²⁵ [1988] AC 1013.

²²⁶ *ibid* 1050 (Lord Templeman).

²²⁷ *ibid* 1054.

²²⁸ Lynda Oswald 'Secondary liability for intellectual property law infringement in the international area: framing the dialogue' in Robert Bird & Subhash Jain (eds), *The Global Challenge of Intellectual Property Rights* 2008 Edward Elgar Publishing Inc at 37, 48.

²²⁹ *Dramatico v BSKyB* [2012] EWHC 268 (Ch) [79] (Arnold J).

submitted that the burden placed on them by law is disproportionate when balanced against the reality of the extent of their control.

Edwards believes that ISPs will surely think about moving offshore as a result of the onerous obligations imposed by the DEA.²³⁰ Driving ISPs away with prohibitive liability obligations to where legislators can no longer control them would not help copyright holders to protect themselves against infringement in long run. Cusack agrees that this burden on ISPs is onerous, and threatens them with a 'disproportionate sanction'.²³¹ This, he argues, is because the 25% share of costs allocated to ISPs²³² is at odds with the 'beneficiary pays' principle, inasmuch as copyright holders are the sole beneficiaries in this arrangement. Yet ISPs are expected to bear an administrative burden, as well as a significant percentage of the costs, for no benefit at all.

The positive impact of ISPs on copyright holders has not been included as part of the debate surrounding liability. It is too simplistic to suggest that the provision of internet provides pirates with an opportunity to steal content, without also recognising the fact that it without doubt affords copyright holders an invaluable opportunity, one which could only be dreamed of by pre-internet rights holders, to promote and sell their works to a global market of around 3 billion users.²³³ Whilst the internet has evidently opened up further avenues for abuse of rights, its economic impact on facilitating the lucrative exploitation of copyright ownership cannot be overestimated. This factor should have been given due consideration when considering whether, or to what extent to burden ISPs with costly and laborious obligations.

Therefore it is clear that 'the whole landscape of liability for the messenger needs to be reviewed'.²³⁴ Clark argues that the obligations imposed on ISPs 'overlooks the critical differences in relation to culpability', corroborating Cusack's beneficiary pays argument, and 'undervalues and threatens civil liberties' as a result.²³⁵ This reinforces the argument that the various rights have not yet been

²³⁰ Edwards (n 181) 537.

²³¹ Cusack (n 180) 562.

²³² Department for Culture, Media and Sport, 'Impact Assessment of draft SI "The online infringement of copyright (Initial Obligations)(Sharing Costs) order 2011" June 2011 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78093/IA_Sharing_of_Costs_SI.pdf> accessed 20th April 2015, 5.10.

²³³ Estimated by the end of 2014: <https://www.itu.int/net/pressoffice/press_releases/2014/23.aspx> accessed 21st May 2014.

²³⁴ Brian Fitzgerald, 'Copyright 2010: The Future of Copyright' [2008] EIPR, 51.

²³⁵ Robert Clark, 'Sharing out online liability: sharing files, sharing risks and targeting ISPs' in Alain Strowel (ed) *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* 2009 Edward Elgar Publishing Inc. at 196, 228.

appropriately weighed against each other in the context of copyright law. Proportionality is a key concept here which should be relied on both when drafting legislation and weighing up judgments in court proceedings.

An additional problem with the current legislation framework is that the new Digital Economy Act is full of false presumptions. For example, it seems to be generally accepted that individuals, once notified of their transgressions, will instantly desist and turn instead to legal methods of obtaining material. It is not considered that perhaps the more likely result will be that they merely seek an alternative *illegal* means. Similarly, there is little or no real consideration of the various interests and motives of internet pirates. As Garstka notes, for some it is actually the fame that they are seeking, not necessarily economic interests.²³⁶ This particular group of infringers will see the new legislation as nothing more than a new challenge, to be overcome. When presented as a battle of wits, the new Act cannot hope to compete. Therefore, those committing the largest quantity of infringing activities are the very ones most likely to be able to circumvent the measures of the Act.

This leads to a further issue: whether innocent subscribers may be erroneously targeted by OFCOM, without reliable proof of wrongdoing.²³⁷ As previously stated, for an individual with extensive technical knowledge, and a good incentive to succeed, an IP address can be faked or hijacked. This could lead to a Copyright Infringement Report being sent to the wrong individual, failing to reach its intended target. Farrand argues that there is an already significant and increasing 'demand for anonymity in cyberspace'²³⁸ being met. And this is not something only available to the knowledgeable few, as websites helping the non-tech savvy to achieve anonymity are increasing in number.²³⁹ This will surely increase to accommodate the new legislation until those doing the most harm are successfully able to continue business as usual, while the odd teenager downloading a few songs a month, say, may possibly be targeted and deterred.

In fact, as Cusack argued, the new Act may actually serve to 'assist professional internet pirates'.²⁴⁰ By notifying them that their activities are being monitored, it may prompt them to cease and begin using a new ISP, for example, or a new identity. It would act as a useful check, triggering a reaction which may save the user from being penalised, thereby incentivising user anonymity.

²³⁶ Garstka (n 46) 166.

²³⁷ Wing (n 24) 305.

²³⁸ Farrand (n 45) 539.

²³⁹ See for example, <<http://www.hidemyass.com>> and <<http://www.anonymizer.com>> accessed 12th January 2015.

²⁴⁰ Cusack (n 180) 561.

Again, the question of WiFi usage remains unanswered. There is no clear position for hotels and libraries, for example, on which to base their actions. Cusack also highlights the near impossibility of WiFi providers being able to document the personal details of all temporary users and their internet activity.²⁴¹ This is not a realistic or proportionate obligation to impose on WiFi providers in practice, as the turnover of users is high and users can often be anonymous, in cafes or on trains for example. The threat of liability may outweigh the perceived benefit of providing this important facility, and may lead to internet access being considerably restricted to some individuals who rely on public WiFi availability. This would actually impact heavily on the livelihoods of those running online businesses, for example, as well as mere convenience and enjoyment for the general public. Whilst it is reasonable to expect WiFi providers to take common sense step to protect themselves, such as password protection, it is not realistic to expect them to be able to prevent the most tech savvy individuals from circumventing any blocking measures in order to use the WiFi connection to commit illegal acts. To follow this logic, nobody but the most technologically adept individuals would be able to provide a WiFi service as only they could be reasonably confident that they could prevent others from accessing illegal sources of infringing content. Commentators such as Edwards even argue that this amounts to ‘constructive prohibition of unsecured WiFi by the back door’.²⁴² Cusack argues that this position seems at odds with the idea of a Digital Britain with internet access for all, if legislators are introducing new liability risks to the very businesses that provide these public services.²⁴³ This may result not only in hindering the development and availability WiFi but also may lead to unwanted control of WiFi and distort the roll out of WiFi across the UK.

This important issue has not been given the attention it deserves. A Consumer Focus report²⁴⁴ highlighted this manifestly unfair position. It stated that the requirement in section 13 DEA of subscribers to take ‘reasonable measures’ to ensure others did not use their internet connection unlawfully, is simply impractical and unrealistic. Moreover the apparent lack of definition for this term ‘results in a lack of legal certainty’,²⁴⁵ a common criticism of the new Act.²⁴⁶ Consumer Focus argues that OFCOM should assess whether the potentially harmful effect of this legal uncertainty is proportionate (as required to do so under section 124E(1)(k)) to the aim the Initial Obligations Code

²⁴¹ Cusack (n 180) 561.

²⁴² Edwards (n 181) 536.

²⁴³ Cusack (n 180) 561.

²⁴⁴ ‘Consumer Focus response to OFCOM notice on Draft Initial Obligations Code, Digital Economy Act 2010’ July 2012 < <http://www.consumerfocus.org.uk/files/2012/07/Consumer-Focus-response-to-OFCOM-notice-on-draft-Initial-Obligations-Code-Digital-Economy-Act-2010.pdf>> accessed 22nd April 2015.

²⁴⁵ *ibid* 53.

²⁴⁶ See for example the criticisms of Farrand (n 45), discussed in Chapter 2.3, at 23 and Chapter 2.5 at 43.

intends to achieve.²⁴⁷ OFCOM has not done so. It appears to merely assume that this is already a given fact. This is somewhat understandable, as it may be forgiven for assuming that this important issue had already been considered and concluded as part of the drafting process of the Act itself.

OFCom could have used its powers under section 403 of the Communications Act 2003 'to make provision subject to such exemptions and exceptions as OFCOM think fit'. It could therefore have provided different criteria for those providing a public WiFi service. Admittedly this would need serious consideration, to avoid a situation where infringers set up such a service as a smokescreen for their illegal activities. Perhaps OFCOM felt this would be too bold an action for it to take alone, bearing in mind that there were no instructions relating to this issue in the Act itself. As it stands however, the Draft Initial Obligations Code is not acceptable, as OFCOM has not correctly fulfilled all of its obligations in relation to the Code.

Another criticism of the Digital Economy Act, is its complete failure to tackle the facilitating software.²⁴⁸ (The tax/levy system proposed in Chapter 4.1 offers a possible way to address this). Instead, the Act focuses wholly on the obligations of ISPs and relies heavily on them to effectively solve the problem. This is not a practical, or fair, approach and undermines the balance between various interested parties' rights. It is becoming increasingly apparent that pressure from large, influential copyright owners, such as film and record labels, has influenced recent copyright enforcement debates. It is true that the creative industries account for 6% of GDP in the UK, and, importantly, have an estimated 6.5% annual rate of growth between 2012 to 2016.²⁴⁹ This is evidently why the government has been so cautious in this area. But it does not mean that copyright law should be completely dominated by their interests as a result. In spite of this, attempts to appease these important contributors have not been successful in reality, as the increasing strict enforcement measures have yielded little beneficial results for the creative industries.²⁵⁰ A better balance is required to create a more suitable legal framework for all.

Many are rightly concerned about the cost of the Digital Economy Act. The French equivalent of the graduated response system is HADOPI.²⁵¹ This has been in force since 2010. At present, over 1.1

²⁴⁷ Consumer Focus 27.

²⁴⁸ Hocking (n 221) 83.

²⁴⁹ Creative Nation Report (CBI, January 2014)

<http://www.cbi.org.uk/media/2535682/cbi_creative_industries_strategy__final_.pdf> accessed 10th March 2015.

²⁵⁰ See Chapter 4.4 for analysis of the limited deterrent effect of strict enforcement of copyright law 99-104.

²⁵¹ Loi no. 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la creation sur internet.

million notification letters have been sent,²⁵² at a cost of tens of millions of Euros.²⁵³ Yet only 14 people have actually been sued in 20 months. It is difficult to determine whether this is due to the success of the notifications, or the clear impracticalities, and costs, of suing all repeat offenders. In 2014 HADOPI has been placed under review, after fears of costs spiralling and failure to fulfil its potential.²⁵⁴ There is concern that, eventually, this significant cost will be passed on by ISPs to users in the form of higher ISP fees. Copyright owners too, may increase their fees to accommodate the new costs of enforcing their rights. Therefore users will be left to bear the brunt from all sides. This will in turn provide further incentive for individuals to pursue illegal means of obtaining material. Thus innocent individuals will again be left to pay these increased costs, to subsidise the illegal activities of others. In addition, can this really be considered to be a proportionate response to the problem? If notifications alone can run into tens of millions of Euros, is this fairly justified when scrutinised against the potential losses to copyright holders?

OFCOM's Initial Obligations Code²⁵⁵ does little to reassure on this point of clarity. It was anticipated as a clarification of the many perceived vague points of the Digital Economy Act. Instead, it arguably creates yet more questions and provides few answers. The DEA clearly left the majority of the details to be developed by OFCOM in the Code, but this has not been achieved. There is a quality assurance process set out in sections 3.5 to 3.7, but this neither specifies detailed standards of evidence, nor how this evidence may be correctly obtained.²⁵⁶ This is despite directions to do so in sections 5 to 7 of the DEA itself.

Further to the above, there appears to be no penalty if any information or case turns out to be incorrect, although courts do have the power to strike out vexatious cases,²⁵⁷ and normal practice dictates that claimants pay costs as a result. Edwards argues that, even so, it is of concern that there is no reference in the Bill (nor the subsequent Act) to any consequences of vexatious cases nor even

²⁵² Megan Guess 'French anti-piracy agency Hadopi only sued 14 people in 20 months' (*Arstechnica*, 6 September 2012) <<http://arstechnica.com/tech-policy/2012/09/french-anti-piracy-agency-hadopi-only-sued-14-people-in-20-months/>> accessed 22nd April 2015.

²⁵³ 'Hadopi wants to turn to privatised protection measures' (*EDRI*, 13 March 2013) <<http://www.edri.org/edriagram/number11.5/hadopi-wants-privatised-law-enforcement>> accessed 18th April 2015.

²⁵⁴ For example, costs of around 12 million euros annually, see Monica Horten 'Hadopi budget to be slashed as French review 3-strikes' (*IPtegrity*, 3 August 2012) <<http://www.iptegrity.com/index.php/france/785-hadopi-budget-to-be-slashed-as-french-review-3-strikes>> accessed 12th March 2015.

²⁵⁵ OFCOM Report 'Online Infringement of Copyright and the Digital Economy Act 2010' 26th June 2012 <<http://stakeholders.OFCOM.org.uk/binaries/consultations/online-notice/summary/notice.pdf>> accessed 20th December 2014.

²⁵⁶ Charles Arthur 'Draft file sharing code flawed, says Open Rights Group' (*The Guardian*, 22 July 2010) <<http://www.guardian.co.uk/technology/2010/jul/22/file-sharing-OFCOM-open-rights-group>> accessed 6th April 2015.

²⁵⁷ Civil Procedure Rules 3.4.

a reasonable duty of care.²⁵⁸ This lack of clarity and omission of vital information to the potential accused leaves non-lawyers in the dark with regard to their rights and legal obligations should they rightly or wrongly become the target of legal proceedings.

It follows that such individuals can be largely at the mercy of powerful rights holders, and may find themselves involved in a dispute in which they are mistakenly accused and entirely innocent, but feel threatened by aggressive tactics into settling without taking advice. This type of 'speculative invoicing' as it is sometimes known, can and does occur. Measures should be taken to ensure that innocent users are not left vulnerable, and intimidated into paying 'compensation' for infringements not committed, in order to avoid a trial. Thankfully, this concern has since been addressed by the judiciary, in the *Golden Eye* case²⁵⁹ for example. Joseph and Ward argue that speculative invoicing itself has not been condemned through case law, when the issue was raised in the *Golden Eye* case, allowing the intimidation of subscribers and the potential for vexatious cases to remain a problem.²⁶⁰ In this case, Arnold J held that Golden Eye's 'interests in enforcing their copyrights outweigh the Intended Defendants' interest in protecting their privacy and data protection rights',²⁶¹ concluding that Golden Eye was entitled to a Norwich Pharmacal Order.²⁶² However, the draft letter to the Intended Defendants (O2 customers) was ordered to be amended.²⁶³ This was because, whilst such a demand letter was not prohibited per se, the specific request for an unjustified £700 in compensation within a short timeframe was found to be unreasonable.²⁶⁴ Arnold J suggested that a request for a settlement sum, without specifying an amount, would be a more appropriate course of action.²⁶⁵ Therefore whilst speculative invoicing is not prohibited per se, threatening language and ultimatums within the content of such communications will clearly not be viewed favourably by any court.

In addition, Arnold J made it clear that Norwich Pharmacal Orders should only be made where it 'proportionately and fairly' balances the interests of both claimant(s) and defendant(s), taking into account the legitimate interests of the intended defendant as well.²⁶⁶ This language implies that the balance between the interests of copyright holders and other legitimate interests such as those of

²⁵⁸ Edwards (n 181) 534.

²⁵⁹ *Golden Eye (International Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch).

²⁶⁰ Paul Joseph and Charlotte Ward 'Case Comment: *Golden Eye (International) Ltd v Telefonica UK Ltd*' [2012] 23(6) Ent LR 183, 185.

²⁶¹ *Golden Eye* (n 259) [145].

²⁶² An order to provide details of customers where infringement of copyright is suspected, named after the order made in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1973] UKHL 6; [1974] AC 133.

²⁶³ *Golden Eye* (n 259) [145].

²⁶⁴ *ibid* [131]-[138].

²⁶⁵ *ibid* [138].

²⁶⁶ *ibid* [146].

privacy is being considered within the judiciary, even if there is little evidence of this balance within the legislative framework.

A further example of the lack of clarity in the draft Initial Obligations Code, may be found in section 2(4)(a) and (b). A qualifying copyright owner must establish ‘an estimate in relation to a notification period and...provide that estimate to the qualifying ISP and to OFCOM’. The Code would be very difficult to comprehend, and therefore to take advantage of, by the lay person. There is no explanation as to how an estimate is to be made, why it is required, and what will happen if it turns out to be incorrect. An individual would likely need to seek legal advice on how to obtain a proper estimate and submit it to the appropriate authorities. It is submitted again that this legislation is being drafted to suit the creative industries’ large corporations, rather than the individual. This should not be the case, especially as the supposed intention behind the legislation is the integrity of copyright, and the importance of its protection. It seems that only the protection of copyright owned by large corporations with plentiful resources matters here.

Even the detailed Sharing Costs Impact Assessment²⁶⁷ failed to consider the economic impact of copyright owners inevitably charging higher prices to recover expenditure on accessing information and compiling CIRs. These higher prices will deter others from sampling or building on pre-existing works, thereby deterring creativity to some extent. If OFCOM were to believe its own research, then as many as 32% of users would stop infringing activities if cheaper (than present) legal alternatives were available.²⁶⁸ Cost was the most common factor given by infringers in the report that, if reduced, may influence them to stop infringing. Bearing this in mind, enacting legislation which will lead to substantially increased prices payable by users, does not seem like a wise move. Other major factors highlighted as potential reasons to stop infringing were convenience, ease of access to all material and speed of stream/download.²⁶⁹ If these issues were targeted, rather than completely ignored, in legislative (and non-legislative) proposals, then it would go a long way to significantly reducing illegal downloading. Only 16% of those who exclusively illegally download stated that nothing would induce them to stop.²⁷⁰

The issue of the cost of copyright enforcement demonstrates just how inadequate this legislation is, creating an environment in which nobody wins, and everybody loses. Only those copyright holders

²⁶⁷ Department for Culture, Media and Sport, ‘Impact Assessment of draft SI “The online infringement of copyright (Initial Obligations)(Sharing Costs) order 2011” June 2011
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78093/IA_Sharing_of_Costs_SI.pdf> accessed 20th April 2015.

²⁶⁸ See OFCOM Wave 4 Report (n 32), 5.

²⁶⁹ *ibid* 26.

²⁷⁰ *ibid* 5.

able to pay their 75% share of enforcement costs will be able to aggressively enforce their rights. The remaining 25% is offloaded onto ISPs with little justification for the extent of their involvement. This is likely to result in revenue being recouped by increasing prices for innocent subscribers. When this cost bearing disaster is coupled with the Act's likely ineffectiveness,²⁷¹ the result of the DEA provisions is an unsatisfactory position for everyone involved and demonstrates the need for an alternative revenue system designed to run alongside the legal framework.²⁷²

The vagueness and complexity of UK copyright law in both form and content is a major concern. The many layers of legislation, as well as the political nature of EU Directive implementation adds further complications.²⁷³ Christie suggests that complexity alone would not be enough to warrant legislative reform, unless it can be shown that the complexity is not necessary. But, he argues, this is the case.²⁷⁴ The non-specific nature of many of the above sections of the Act does provide flexibility of interpretation to the judiciary, but comes at the expense of legal certainty, especially for non-lawyers. This is problematic in such an area which is already so poorly understood by the public, with 24% of infringers claiming that they would cease if it was clearer whether or not an activity was legal.²⁷⁵ This legal certainty for the consumer is especially important when taking into consideration the largely self-regulatory nature of copyright infringement avoidance. The vast majority of such activity is undertaken in the privacy of the home and it is therefore more crucial than ever that the individual fully understands their rights and limitations with regard to copyrighted works, so as to least avoid accidental infringement if nothing else. The new Act arguably does little to address this problem.

As well as lack of clarity, it is submitted that the current legal regime contains too many flaws to allow successful enforcement of copyright law. The problem of where the burden of enforcement should lie has not been fully addressed, resulting in a significant proportion being assigned to ISPs. Whilst there may be some justification for this, in that ISPs certainly have a part to play in the process, it is arguable that the burden is too great²⁷⁶ and there is not sufficient explanation as to the fairness or proportionality of the role given to ISPs. The difficulties surrounding the identification of perpetrators of online piracy, with the prevalence of anonymity technology freely available online,²⁷⁷ is simply not addressed by the graduated response method. Although this part of the Digital

²⁷¹ Garstka (n 46) 174.

²⁷² Discussed in Chapter 4, 73ff.

²⁷³ Discussed in Chapter 2, 23-24.

²⁷⁴ Andrew Christie 'A proposal for simplifying UK copyright law' [2001] 1 EIPR 68, 73.

²⁷⁵ See OFCOM Wave 4 Report (n 32), 5.

²⁷⁶ See Fitzgerald, Clark and Cusack: Brian Fitzgerald, 'Copyright 2010: The Future of Copyright' [2008] EIPR, 51, Clark (n 235) 228 and Cusack (n 180) 562.

²⁷⁷ As argued by Farrand (n 45) 539 and Cusack (n 180) 561.

Economy Act is not yet fully in force, it does not appear that the threat of warning letters has yet had any sort of deterrent effect. Only 14% of individuals stated that a letter threatening suspension of internet access from an ISP would 'put them off' (not in itself an indication that it would cause them to stop infringing altogether), falling to just 11% being potentially put off by a more general warning letter without direct threat of disconnection.²⁷⁸ This public disregard for such measures strongly indicates that the warning letter method is unlikely to lead to a successful result. When its own research proves to OFCOM that others factors are far more influential on infringers, it is unclear why it, and the government, continue to pursue the fight against copyright infringement with the provisions laid out in the Digital Economy Act. In its current form, it cannot accomplish the aim it was developed to achieve. As Cusack succinctly concludes, the Act imposes 'punitive and unfair sanctions on an innocent majority for the offences of a criminal minority who remain largely unaffected by the DEA'.²⁷⁹

In addition, there is the problem of WiFi restrictions and its direct conflict with the concept of a Digital Britain, encouraging greater internet accessibility²⁸⁰ with a legislative framework that is 'clear and fair' for all.²⁸¹ Unfortunately, these factors lead this research to conclude that the current legislative framework in the UK is not adequate to properly enforce copyright law in the digital world. The following chapter analyses some recent law reform proposals, and how these may, or may not, improve upon current legislation as it stands.

²⁷⁸ OFCOM Wave 4 Report (n 32), 5.

²⁷⁹ Cusack (n 180) 564.

²⁸⁰ Digital Britain Report (n 129) 34.

²⁸¹ *ibid* Foreword.

Chapter 3 Recent Reviews of Copyright Law

There have been many reports and reviews on this contentious area of copyright law over time. The focus of this chapter will be three of the recent major reports – Gowers, Hargreaves and Hooper. The main provisions, insofar as they relate to copyright law and online piracy, will be examined and analysed.

Chapter 3.1 Gowers Review

In 2005, Andrew Gowers was commissioned by Gordon Brown to perform an independent review of Intellectual Property. From the outset it recognises that major changes are required to tackle a growing problem. It states that ‘the UK’s music and film industries lose around twenty per cent of their annual turnover through pirated CDs and illegal online file sharing’.²⁸² The Gowers Review sets out some potential solutions to the various problems associated with illegal use of copyrighted works. It makes some valuable points, but falls short of providing a satisfactory agenda for reform.

The Review recommended ‘stronger enforcement of IP rights’ yet at the same time ‘greater balance and flexibility of IP rights’ as is consistent in the digital age.²⁸³ This potentially confusing set of objectives is not clarified. The underlying foundation of the report is based on the premise that the problem is that strong enforcement of these rights is vital, and it is merely strictness that is lacking. Perhaps it is time to consider the clear shift in users’ behaviour and attitudes towards copyrighted material. That is not to say we should merely allow individuals to ignore the law and thus discourage innovation altogether. It is important to consider why it is deemed so important to create more stringent enforcement of copyright owners’ rights, seemingly at all costs. This balance between protecting rights holders, and at the same time encouraging innovation and the sharing of knowledge, is often referred to, but, arguably, never addressed in this or subsequent reports.

It is difficult, however, to argue that even this possible imbalance in favour of rights holders over users achieves what it sets out to achieve - the successful protecting of copyright owners’ rights - when one considers the lack of effective protection from infringement that the legislative framework provides to copyright. The inherent flaws in copyright and the difficulties associated with enforcing law which regulates private activity, often undertaken in an individual’s own home, have been exacerbated by the introduction of the digital age. Whether one takes a utilitarian view of the

²⁸² Gowers (n 127) 3.

²⁸³ *ibid* 119.

economic incentive necessary to encourage creativity, or follows the principles of inherent ownership set out by John Locke, it is clear that the current underlying principles of copyright law emphasised by Gowers above are not being sufficiently protected through legal constraint alone. Yet Gowers does not go on to suggest any non-legal, complimentary measures that could be used to run alongside a legal framework. It is a shame that lawmakers have, as yet, afforded too little attention to these possibilities of creating alternative ways to compensate owners for example,²⁸⁴ preferring instead to hope that increasingly punitive laws of enforcement will finally drive away infringement altogether.

It is suggested in the report that a limited private copying exception would be prudent, and would improve clarity.²⁸⁵ This was a good example of how the law and common practice were simply not aligned in this area. Technology is always one step ahead of the law, and legislators are left playing catch-up. In reality, this refers to the prevalent existence of private copying already taking place at the time. Private copying, for example copying from vinyl to cassette tape, has been the norm for 20 years or more, prior to this new exception eventually coming into force in June 2014²⁸⁶. It is made clear that such an exception would fall within EU Law, as long as 'fair compensation' was provided to the copyright owner. This could be included in the sale price.²⁸⁷ The meaning of fair compensation is uncertain in that there is no given definition of 'fair' or who would be required to define it, so presumably the judiciary on a case by case basis. In any case, if this compensation is included in the sale price as suggested, and if this were to lead to the increase in sale prices of works including a private right to copy, this would surely serve to actively increase online piracy, not reduce it. There would be a further incentive for individuals to obtain illegal materials if one was forced to pay extra for the privilege of a copyable work. It also may lead to public confusion over how this change may affect the user's right to copy. It may also be perceived by the user that as they are paying more for 'fair compensation', then it must mean that they have more rights to use the work as they wish, rather than the limited uses provided by the exception in reality. Interestingly however, the new Regulations do not refer to 'fair compensation' at all, presumably assuming that this has already been built in to the price beforehand,²⁸⁸ or perhaps owing to a feeling that this idea won't work, due to reasons outlined above.

²⁸⁴ See Chapter 4, 73 for an analysis of some of these potential measures.

²⁸⁵ Hargreaves (n 31) 7.

²⁸⁶ The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014.

²⁸⁷ Gowers (n 127) 63.

²⁸⁸ The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014.

The copying exception is also broadened to include all formats, even electronic storage areas.²⁸⁹ This is welcome news to cloud storage (secure, digital storage via the internet) users who may now legitimately copy their DVDs, for example, and upload them to their private storage, so that if the DVD were to become damaged or lost, the content will still be safely stored.

Drafting a law to legitimise an already commonplace activity has certainly achieved a little more 'clarity' at least. In the digital age with so many different devices available, it seems that copying a digital copy of a song, for example, from a computer to an mp3 player is considered by society to be a normal part of life.

Section 42 CDPA already allows library archivists to make a single copy of a work. However this does not include sound recordings, television shows or films.²⁹⁰ The Gowers Review proposed to amend section 42 by 2008 to 'permit libraries to copy the master copy of all classes of work.'²⁹¹ This is a helpful concession to archivists. The most important of the three exceptions recommended by Gowers is arguably this one. It has certainly led to the most change, with the new Regulations allowing libraries to copy a 'reasonable proportion'²⁹² of works, irrespective of the format, and the ability to provide this copy to others for private study and non-commercial research. This gives librarians a wider scope to copy as well as greater certainty of law, provided they remain within the relatively broad scope of 'fair dealing' of course²⁹³. Educational institutions are also afforded the power to apply the principle of 'fair dealing' to the use of a work under section 32, as amended. Backing up or preserving copies of works is very important too, in order to avoid potential losses and, sometimes, increase dissemination if that would be to the benefit of society. Section 42(1)(a), as amended, allows institutions to produce copies 'in order to preserve or replace that item in that collection' without reference to a single copy only, implying that where appropriate, more than one copy may be produced and stored.

A further exception advised in the report is to provide for caricature, parody or pastiche.²⁹⁴ This was already allowed in European law,²⁹⁵ and there was no reason why it could not simply be transposed into UK law. However the timescale set by Gowers for these various changes to take place did not materialise. For example, he recommended that the copying exceptions should be implemented by the government by the end of 2008. In June 2014, some of these various exceptions are only just

²⁸⁹ Section 28B(5)(c) CDPA as amended.

²⁹⁰ Gowers (n 127) 66.

²⁹¹ *ibid.*

²⁹² Section 42A(1)(b) CDPA, as amended.

²⁹³ Gowers (n 127) 40.

²⁹⁴ *ibid.* 68.

²⁹⁵ Article 5(3)(k) of Directive 2001/29/EC.

coming into force, with the exception for quotation and parody due later in the year.²⁹⁶ This painfully slow uptake was symptomatic of the general political reluctance to tackle copyright law issues at the time. Gowers also states that 'If the Government accepts and implements the Review's recommendations, the Review believes that the portfolio of measures will ensure that the UK IP system is fit for purpose in the digital, global age.'²⁹⁷ This ambitious statement is arguably not true, as whilst the suggestions made in his report do go some way towards improving clarity of copyright law, they do not tackle other major issues such as failure of enforcement. In any case it is extremely difficult to ensure that a legal system is 'fit for purpose' in the modern age. As technology develops so fast, it can be difficult to accommodate these changes in a fixed legal framework. The few proposed exceptions in the report hardly conclusively and permanently prepare the UK legal system for any future technological advancement, and we must look to non-legislative measures to address this issue.²⁹⁸

Gowers also recommended that 'If this [industry agreement of protocols to prevent online piracy] has not proved operationally successful by the end of 2007, the Government should consider whether to legislate.'²⁹⁹ In the Government's response paper to the Gowers Review³⁰⁰ it was stated that a private copying and archivist exception would be taken forward, but one for parody would not,³⁰¹ although this decision was later reversed.³⁰² It also stated that draft legislation 'will be laid in Parliament with a view to its coming into force in October 2010.'³⁰³ The legislation referred to has now taken the form of the Digital Economy Act.

Section 42 of the Act adopts another of Gowers' proposals, namely that the penalty of copyright infringement online is now a maximum of £50,000 as opposed to just £5,000 previously. Cybercrime is as illegal as physical crime; a simple statement, but one that needed confirming to society as a

²⁹⁶ The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 and The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 coming into force October 2014.

²⁹⁷ Gowers (n 127) 119.

²⁹⁸ Chapter 4, 73.

²⁹⁹ Gowers (n 127) 103.

³⁰⁰ Intellectual Property Office 'Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions' 11 December 2009 <<http://www.ipo.gov.uk/consult-gowers2.pdf>> accessed 23rd January 2015.

³⁰¹ *ibid* 3.

³⁰² The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.

³⁰³ Intellectual Property Office 'Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions' 11 December 2009 <<http://www.ipo.gov.uk/consult-gowers2.pdf>> accessed 23rd January 2015, 4.

whole. Without a proper system of educating the public as to the changes however, they are likely to go relatively unnoticed.³⁰⁴

Unfortunately, the Gowers Review gave a merely cursory acknowledgement of the chronically widespread problem of online piracy. In spite of this however, it at least demonstrated some recognition that there exists issues surrounding copyright law that require addressing by the UK government. It has subsequently served as a catalyst to the many following debates and reports surrounding copyright law, but ultimately lacked any real substance as it tended to focus too much on the small exceptions. The tentative progress recommended in this cautious paper was exacerbated by government inertia on this issue, as stated previously. Recommendations that Gower argued should be in place by 2008 were only implemented in June 2014.

Chapter 3.2 Hargreaves Review

This independent paper published in 2011 is a lengthy report led by Professor Ian Hargreaves. Commissioned by the government in 2010, there were high hopes for this report to provide some long overdue solutions to the many deep-set problems with UK copyright law. Instead, however, the result was something of a 'mixed bag', as was its predecessor, the Gowers report.³⁰⁵ Positively, some realistic and sensible statements were made at the outset. The fact that 'The UK has the largest national creative sector in Europe'³⁰⁶ emphasises the importance of the publication of this report, and its subsequent implementation. Hargreaves evidently believes that the UK's legal system, with regard to copyright, is 'falling behind what is needed'.³⁰⁷ Crucially, the report notes that 'the Government has a severely time limited opportunity' to create an up to date copyright system. However the government have yet to act on large areas of this report with urgency, choosing instead to commission yet further reports.³⁰⁸ As Hargreaves notes, only 25 of the 54 recommendations in the previous major investigation into copyright law were actually implemented.³⁰⁹ He goes on to repeat some of the suggestions put forward in the Gowers report.

³⁰⁴ See Chapter 4.4, 99 for more on education.

³⁰⁵ Hogarth Chambers, 'The Hargreaves Review – another mixed bag' [2011] 33(9) EIPR 599, 599.

³⁰⁶ Hargreaves (n 31) 27.

³⁰⁷ *ibid* 1.

³⁰⁸ See, for example, Richard Hooper and Ros Lynch, 'Copyright works: Streamlining copyright licensing for the digital age' July 2012 <<http://www.ipo.gov.uk/dce-report-phase2.pdf>> accessed 12th June 2014.

³⁰⁹ Hargreaves (n 31) 6.

The fact that the current law (at that time) was ‘too inflexible’ and ‘too difficult for non-lawyers to understand’ was one important admission.³¹⁰ Clearly this was an unacceptable position. Hargreaves notes that several responses received during the Call for Evidence emphasised the complex nature of the copyright regime. One example given is the submission of the National Education Network, which refers to children attempting to undertake a learning activity as having to ‘traverse the vagaries of copyright and licensing. They will trip over ‘orphans’, bump into third party rights, be turned away by pay-for services, use licensed and make their own materials – often without knowing that there are multiple copyright dimensions to what they are doing, because, who can know all about copyright?’³¹¹ This succinctly summarises the hugely diverse and complex nature of the copyright regime. Hargreaves attributed some of this complexity to the ‘distorted policy outcomes’ due to ‘the persuasive powers of celebrities and important UK creative companies’.³¹² This, he claims, is emphasised by the increasing divergence of interest between rights holders and consumers.³¹³ The point about lobbying is an important one, as it reflects an ad hoc legislative framework which is the result of endless conflict and disagreement surrounding the hierarchy and importance of rights surrounding copyrighted works. It is perhaps inevitable then that the Digital Economy Act is yet another victim of such destructive politics, increasing confusion, and it ‘exemplifies the environment in which copyright policy is made’.³¹⁴ Rather than concentrating on legislative methods for copyright protection and enforcement, it is also time to consider complementary measures such as a tax/levy which, although it does not directly deal with protection and enforcement in any significant way, should generate income to offset losses due to illegal activities.³¹⁵

In response to this inherent confusion for non-lawyers in the legal framework, Hargreaves proposes a new service from the Intellectual Property Office to issue formal opinions on copyright matters.³¹⁶ A version of this promising move in the direction of clarity and legal certainty for non-lawyers has only just been implemented, in May 2014,³¹⁷ and it is hoped that over time its value will become apparent. At present it is limited to more general copyright principles, and is not able to advise on

³¹⁰ Hogarth Chambers, ‘The Hargreaves Review – another mixed bag’ [2011] 33(9) EIPR 599, 600.

³¹¹ Hargreaves (n 31) 42.

³¹² *ibid* 93.

³¹³ *ibid*.

³¹⁴ *ibid*.

³¹⁵ Chapter 4.1, 74 sets out this proposal in detail.

³¹⁶ Hargreaves (n 31) 95-96.

³¹⁷ <<https://www.gov.uk/copyright-notices>> accessed 29th January 2015.

specific circumstances or disputes, which is unfortunate. If successful, perhaps it should be expanded to take on a more advisory role, linked in to a programme of wider public education.³¹⁸

Hargreaves suggested one other key way to improve this confusing state of affairs by introducing some clarity to copyright ownership. The Digital Copyright Exchange (DCE) was to essentially be a fully comprehensive database of copyright ownership and licensing. Yet at the same time, whilst being strongly incentivised, the scheme was to be voluntary. Clearly this was a majority, but not universal, solution then. On the positive side, it was a major step towards achieving the clarity, transparency and cost efficiency badly needed in the digital copyright era. Hargreaves had established a good starting point for future reform. However his suggested time frame was considered ambitious,³¹⁹ bearing in mind the enormity of the task. Indeed if the DCE has a major flaw, it is undoubtedly the administrative and financial burden of implementation, and subsequent maintenance. Whilst Hargreaves argues that it will require little attention once up and running, it is submitted that this is unlikely. Even if the initial set up is achieved, day to day monitoring will have to be rigorous in order to ensure it is kept absolutely up to date.

Hargreaves states that it would not be solely the task of the government to bring about the DCE. The role of the politicians would merely 'involve bringing together all relevant interests, and finding ways to overcome divergences of interest to secure the bigger prize in a way that takes account of the interests of all.'³²⁰ It is unclear from this statement exactly who would be responsible for all or part of the DCE. Equally it is left to others to decide who should bear the burden of costs and maintenance.

Hargreaves also addresses the significant lack of copyright exceptions in UK law. He also recommends allowing private copying, use of material for parody and library archiving to be introduced as legal exceptions to copyright restrictions.³²¹ The rationale behind this recommendation is that it would allow greater flexibility in UK law, which is permitted by EU law. It has been argued that 'this approach may be viewed as a dilution of proprietors' rights which does not provide anything in return'.³²² However Hargreaves sensibly reasons that 'A limited private copying exception which corresponds to the expectations of buyers and sellers of copyright content, and is therefore already priced into the purchase, will by definition not entail a loss for right

³¹⁸ Chapter 4.4, 99.

³¹⁹ Joel Smith and Rachel Montagnon, 'The Hargreaves Review – a "digital opportunity"' [2011] 33(9) EIPR 596, 597.

³²⁰ Hargreaves (n 31) 32.

³²¹ *ibid* 48-52.

³²² *ibid* 598.

holders.³²³ Admittedly this does further complicate pricing issues, as, in reality, the expectations of buyers and sellers differ so greatly in the digital age that a genuine consensus is all but impossible. Indeed the vast difference in expectations between these two groups in the modern day is one of the main difficulties copyright law faces.³²⁴ Like Gowers, Hargreaves also fails to acknowledge the real reason behind the introduction of the private copying exception, namely that private copying has increasingly become the norm, despite its illegality, for decades.

Nevertheless broadly speaking the introduction of the above copyright exceptions, as permitted by EU law, does go a little way to legitimising a more reasonable balance between rights holders and users. In December 2012 the government published a paper stating that this proposal would broadly be enacted via secondary legislation, which was due to come into force in 2013,³²⁵ having promised to do so in its response paper.³²⁶ In the end, the exceptions came into force in June 2014, with one still due in October 2014.

Hargreaves also considers the US 'fair use' doctrine,³²⁷ noting that 'the creative industries continue to flourish in the US in the context of copyright law which includes Fair Use'.³²⁸ The principle is a freer, more workable one than the limited copyright exceptions suggested. It would allow greater flexibility to accommodate advancements in technology and unforeseen developments. However UK Government lawyers have indicated that transposing a US-style fair use system into UK law would cause 'significant difficulties', in particular conflicting with EU law.³²⁹

The interpretation of Brenncke³³⁰ supports this proposition, referring to Article 5 of the Information Society Directive which sets out an exhaustive list of (optional) copyright exceptions.³³¹ Brenncke argues that the three-step test³³² must also be applied to any future copyright exceptions by Member States and that this effectively prohibits the adoption of an entirely new exception such as the 'fair use' doctrine.³³³ Heide argued along similar lines prior to the implementation of the

³²³ Hargreaves (n 31) 49.

³²⁴ Discussed in Chapter 4.2.1, 80.

³²⁵ HM Government, 'Modernising Copyright: A modern, robust and flexible framework' December 2012 <<http://www.ipso.gov.uk/response-2011-copyright-final.pdf>> accessed 8th January 2015, 4-6.

³²⁶ HM Government 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' August 2011 <<http://www.ipso.gov.uk/ipresponse-full.pdf>> accessed 6th January 2015, 8.

³²⁷ Section 107 US Copyright Act sets out the basic factors to which judges must refer: the purpose and character of the use, the nature of the work, the amount and substantiality of the portion used, and the effect of the use on the potential value of the work.

³²⁸ Hargreaves (n 31) 45.

³²⁹ *ibid* 46.

³³⁰ Brenncke (n 47) 15.

³³¹ Heide (n 74) 108.

³³² Discussed in Chapter 2.1, 12.

³³³ Brenncke (n 47) 15.

Directive, stating that it would preclude any future copyright exceptions which may be devised to accommodate the changes to the future environment, including those caused by the internet age.³³⁴

Perhaps there is more scope here than is suggested, however. In fact there is evidence, alluded to in the Review,³³⁵ that a 'fair use' defence of sorts *could* be transposed into UK law. Bently argues that enough scope is afforded to national powers to accommodate such a doctrine.³³⁶ He argues that the language of the WIPO Copyright Treaty,³³⁷ which refers in its Preamble to 'the need to maintain a balance between the rights of authors and the large public interest', could be incorporated into Chapter III of our CDPA.³³⁸ This could be used to direct interpretation towards a broader construction of the listed exceptions, and to address this newly enshrined balance with a 'fair use' concept which takes into account the rights of authors *and* the rights of access to information.³³⁹ This suggestion uses language directly derived from the WIPO treaty and therefore does provide one possible solution. It would help to expand the scope of judicial scrutiny in future cases, by adopting a more elastic 'fair use' doctrine which is better able to accommodate the rights of all parties on a flexible case-by-case basis.

Hugenholtz and Senftleben supported this view, also arguing that there *is* in fact scope within EU law to create a system almost as flexible as the US fair use doctrine.³⁴⁰ This argument is perhaps not too much of a stretch, especially when bearing in mind the often broad interpretation of our own 'fair dealing' principle.³⁴¹ Undoubtedly, however, the most desirable solution would be for the 'fair use' doctrine to be introduced as a new or adapted exception at European Union level, as Hargreaves suggests,³⁴² thereby adequately recognising the obligation to balance copyright owners' rights with the rights of users, as set out in the WIPO Treaty.

The main thrust of the Hargreaves Review is to urge a 'twin-track approach' to be taken by the government.³⁴³ On the one hand creating copyright exceptions where possible under EU law, whilst simultaneously, and vitally, working with the European Union to create 'a new mechanism in copyright law to create a built-in adaptability to future technologies which, by definition, cannot be

³³⁴ Heide (n 74) 108-9.

³³⁵ Hargreaves (n 31) 46.

³³⁶ Professor Lionel Bently, 'Exploring the Flexibilities Available to UK Law' <<http://www.ipo.gov.uk/ipreview-c4e-sub-bently.pdf>> accessed 19th January 2015, 23.

³³⁷ World Intellectual Property Organization Copyright Treaty 1996.

³³⁸ Bently (n 336) 26.

³³⁹ *ibid.*

³⁴⁰ Berndt Hugenholtz and Martin Senftleben, 'Fair Use in Europe: In Search of Flexibilities' (Amsterdam, November 2011) < <http://ssrn.com/abstract=1959554> > accessed 21st January 2015, 29.

³⁴¹ As noted by Gowers (n 127) 40.

³⁴² Hargreaves (n 31) 47.

³⁴³ *ibid.*

foreseen'.³⁴⁴ Here Hargreaves pinpoints a key issue in the modern age of copyright law. Enacting any new legislation is quite simply futile unless it can be suitably flexible to accommodate the endless evolution of digital technology. As Hargreaves suggests, any such mechanism cannot be created at UK level alone, but requires EU collaboration.³⁴⁵ There is, however, nothing to prevent the UK government from submitting a proposed legal framework to its European partners for consideration, interpreting the relevant Directive to 'fit' and therefore driving change at both national and European level. Hargreaves advocates arguing for a new exception at EU level, incorporating elements of a 'fair use' doctrine for example, as above, which would be more appropriate to accommodate future technological advancement.³⁴⁶

The Government response paper on implementing the Hargreaves review was published in August 2011. It 'sets out the Government's broad acceptance of its recommendations'³⁴⁷ but is typically vague in its statement of action. A further report is commissioned, to be undertaken by Richard Hooper CBE. Perhaps Gowers and Hargreaves, having both reiterated many significant proposals, should have been enough to instigate some new legislative changes. However these did not follow until after the publication of the Hooper report.³⁴⁸

The response does at least accept the viability of the DCE,³⁴⁹ and begins a process of investigation into how such a body would operate. This was a positive step towards real progress in copyright reform. It also commits to publish 'minimum standards for voluntary codes in early 2012' for collecting societies. Prior to this, collecting societies arguably did not have 'enforceable codes with independent review mechanisms'.³⁵⁰

A final commitment made in the response paper was for the Intellectual Property Office to set out plans for a copyright opinions service.³⁵¹ This system would particularly help educational institutions who are 'often required to make difficult judgements' in an area in which they have little or no expertise. These bodies can innocently and mistakenly infringe copyrights due to inherent uncertainty over what is legal.³⁵² Teaching is therefore often unnecessarily limited by this. Although the new Regulations should help educational institutions by clarifying their position and legal ability to copy in certain circumstances, this exception is clearly not a 'carte blanche' and care will still need

³⁴⁴ Hargreaves (n 31) 47.

³⁴⁵ *ibid.*

³⁴⁶ *ibid* 5.

³⁴⁷ Government Response Paper (n 326) Foreword.

³⁴⁸ For example the copyright exceptions, enacted in June 2014, and to be enacted October 2014.

³⁴⁹ Government Response Paper (n 326) 5.

³⁵⁰ *ibid* 7.

³⁵¹ *ibid* 13.

³⁵² *ibid* 41.

to be taken in order to ensure compliance with the law. Such institutions should welcome the new opinions service, which should provide an extra layer of legal certainty through advice in uncertain or marginal situations. However, government plans are yet to materialise.

It is apparent that the Hargreaves review is something of a mixed bag. Whilst there is little in its contents to address the crux of the copyright and enforcement problem, it does present some good observations on EU collaboration and fair use exceptions, as well as the DCE proposal which did provide a good starting point for the later Copyright Hub. Importantly, the government also accepted in its response that 'An efficient and flexible cross-border licensing framework is essential to the creation of a single EU market'.³⁵³ The problems entrenched into our outdated copyright legal framework cannot be rectified without consultation at European level.³⁵⁴

Chapter 3.3 Hooper Report

From the outset, it is evident that the 2011 Hooper report³⁵⁵ was drafted in response to concerns expressed in the Hargreaves Review.³⁵⁶ What is less apparent however is whether this report does, in fact, adequately address the issues set out by Hargreaves.

It is perhaps unsurprising that the Hooper report begins as an evidence collecting exercise.³⁵⁷ However, this is kept relatively short, with the main content focussing on reform proposals. The key feature of the Hooper report is the suggested creation of a not-for-profit, industry-led Copyright Hub.³⁵⁸ This would be based on 'voluntary, opt-in, non-exclusive and pro-competitive principles'.³⁵⁹ Essentially, the Hub would provide a centralised basis from which copyright owners, potential licensees and any interested party may register a work, easily discover the copyright status of a work or simply learn about copyright law. It targets the key problem area - large scale, low value transactions. The object is to provide clarity and negate the commonly held belief that copyright law is confusing and difficult to negotiate. Much of the report focuses on this, reiterating the importance of providing a 'marketplace of rights'³⁶⁰, comprehensible to all. It is made clear that the 'sectors

³⁵³ Government Response Paper (n 326) 6.

³⁵⁴ See Chapter 4.3, 96-98 for further detail.

³⁵⁵ Hooper (n 308).

³⁵⁶ *ibid* 1.

³⁵⁷ Mark Owen, 'Do we really need a digital copyright exchange?' [2012] IPM Jun. 35.

³⁵⁸ Hooper (n 308) 1.

³⁵⁹ *ibid*.

³⁶⁰ *ibid* 24.

themselves as being in the best position to bring about the necessary advances'.³⁶¹ If they ensure they do all they can, then it is for the government to ensure appropriate measures are in place to reduce copyright infringement.³⁶² This view is supported by Owen who recognises that such a sector specific area of law lends itself to close industry involvement.³⁶³ Therefore a strong incentive is provided for securing the success of the Hub.

However it is important to ensure that 'a balance that is beneficial to both parties' should be attained, 'leading to further and sustained growth and innovation in the UK creative and internet industries.'³⁶⁴ Later in the report this is phrased rather differently. Hooper states that in fact the aim is to 'balance the rights of rights holders with the ease of use requirements of rights users'.³⁶⁵ This 'ease of use' problem remains important, although is supposedly almost eradicated,³⁶⁶ it is clearly not the only factor to be balanced against the rights of rights holders. The issues of cost and quality of material are of equal significance. A comprehensive and accessible resource at a fair price would provide stiff competition for some of the more sluggish and erratic illegal sources of digital content online.

The Copyright Hub is certainly a slimmed down³⁶⁷ derivative of the less manageable Digital Copyright Exchange featured in the Hargreaves Review. A one-stop shop of this sort, will very likely partially achieve the objective of informing the public. Prior to the Hub's implementation in September 2013, anyone wishing to discover the accessibility of a copyrighted work would struggle to do so. Music collecting societies can hold 'incomplete data and worse still conflicting data'.³⁶⁸ But it is submitted that perhaps those more likely to use this new facility, are less likely to attempt to obtain it illegally in any case. Those illegal users will likely not be encouraged to start legally purchasing copyrighted material, simply because it is registered on a centralised database. Arguably then, illegal downloading would continue to thrive as before, at least initially.

However, the Hub is primarily aimed at copyright holders. It provides a form of registration that will allow the identification of rights, enforcement and exploitation of their works. Reduced transaction costs and the possible increase in licensing agreements due to the simplification of the process are major advantages to copyright holders. In addition, providing a one stop shop should afford more

³⁶¹ Hooper (n 308) 24.

³⁶² *ibid* 37.

³⁶³ Owen (n 357) 35.

³⁶⁴ Hooper (n 308) 37.

³⁶⁵ *ibid* 30.

³⁶⁶ *ibid* 1.

³⁶⁷ Rosie Burbidge 'The copyright hub: moving copyright licensing into the digital future' [2012] 205 IHL 24, 24.

³⁶⁸ Hooper (n 308) 16.

flexibility to copyright owners to better exploit their works. Instead of having to negotiate and transact with each individual licensee, licenses can be bought quickly and easily through one single source.

The positives for copyright owners created by the Hub are undeniably significant. Yet a possible side effect of this improvement to the position of copyright holders' is the potential for reduced cost to consumers. So the Hub may have a limited positive effect on online piracy, in that by streamlining licensing, transaction costs would be reduced, and this reduction in costs should eventually be passed on to the consumer. License pools like the Hub are also used in the patents sector. Patent pools work the same way, facilitating collective licensing, resulting in the simplification of the licensing process for copyright holders. In addition, these pools, like the new Copyright Hub, help to alleviate the problem of 'royalty stacking'. Royalty stacking refers to the paying of royalty charges to multiple different sources to obtain access to material protected by intellectual property laws. Whilst each individual charge may be small, combined the cost may become prohibitively high. By providing the ability to access multiple protected works from one source, transaction costs can be greatly reduced. Licensing pools can therefore be described as generally pro-competitive organisations, which is positive for both national and EU level development.³⁶⁹

It is suggested that some critics fear that the Hub will fail, and result in a substantial loss of money and time.³⁷⁰ Importantly, the monetary burden would likely be passed on to licensees. Although this issue has been downplayed, as 'fear of failure is never a good reason not to try to improve an inadequate system',³⁷¹ it is in fact a genuine concern. Obviously it is true that all reform comes with some level of risk of failure. But the above statement appears to suggest that the only two options available at the time were to do nothing, or set up the Copyright Hub. This is evidently not the case. Perhaps a different system, not so administratively and financially challenging, would be preferable when considering the infringement reduction aspect of the Hub concept. The current entity presents an expensive and laborious process, and has created a body which arguably will have little success in the battle against infringement, even if it does provide a streamlined licensing facility for rights holders. A European licensing system should significantly improve on this effect.³⁷²

³⁶⁹ Bill Batchelor and Tom Jenkins 'Commission consults on revisions to the competition rules on technology transfer regime: proposes tightening of the rules' [2013] 34(7) ECLR 348, 350.

³⁷⁰ Burbidge (n 367) 24.

³⁷¹ *ibid* 25.

³⁷² Council of Europe 'Better access to online music – Collective management of copyright' <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/141081.pdf> accessed 19th March 2015.

Will the Hub also address the vitally important issue of accessibility? Certainly it provides a more accessible system for copyright holders and potential licensees, but less likely to significantly improve accessibility for the general public. The report does not discuss this concern. Indeed Hooper seems to be somewhat complacent about the accessibility of legally obtained material, stating that ‘some of the “excuses” that have been put forward over the years for “justifying” copyright infringement on the fixed and mobile internet have been and are being eradicated, such as the fact that copyright infringing websites are easier to use by consumers than legal websites’.³⁷³ There is no evidence given to support this statement. There has arguably been no significant advancement in the accessibility and affordability of legal sources, apart from the music sector to some extent, in which websites such as Spotify have emerged.³⁷⁴ Indeed later in the report, it is stated that ‘Lovefilm (now Amazon Prime) has a subscription streaming repertoire of 8,000 films over the internet but a much greater repertoire of 70,000 films is available (DVDs and BDs - Blu-ray discs) via the traditional route of the Royal Mail’.³⁷⁵ Clearly there is much room for improvement in the legal provision of copyrighted digital material, before it can genuinely threaten the illegal trade.³⁷⁶ The Copyright Hub may have some beneficial effect on services like Amazon Prime. Savings on both licensing costs and time should lead to subscription providers to be able to improve their services.

Yet Burbidge, to some extent, agrees with the surmise that the music industry is already succeeding in providing readily accessible, low cost, legal material.³⁷⁷ She argues that ‘The same benefits will hopefully reach other rights-centric worlds thanks to the hub’.³⁷⁸ This position is arguably hard to justify. The music industry has by no means ‘solved’ the problem of internet piracy – indeed it is positively flourishing.³⁷⁹ It is also difficult to ascertain how the Hub would ensure material was priced according to current standards, if it is to address infringement issues at all. Whilst it was not set up for this reason, it is hoped that, through simplifying licensing, transaction costs would be reduced and these reductions would filter down to the consumer. Time will tell whether or not this will materialise. The industry must face the fact that consumers are no longer willing to pay high prices for digital products. The widespread perception, whether true or false, that digital music and books must be far cheaper to produce than hard copies, is entrenched in the public mind-set. It is

³⁷³ Hooper (n 308) 1.

³⁷⁴ More on Spotify (a website providing music for free, subsidised by adverts) in Chapter 4.2.3, 86-87.

³⁷⁵ Hooper (n 308) 34.

³⁷⁶ See proposals in Chapter 4, particularly on licensing improvements, 93ff.

³⁷⁷ Burbidge (n 367) 25.

³⁷⁸ For example, over 26% of all internet users are still regularly accessing pirated content online via desktop devices. This statistic does not include additional smartphone and tablet-based mobile piracy - IFPI Digital Music Report 2014 (n 18) 40.

³⁷⁹ See Chapter 1 Introduction.

simple - prices must reflect this shift in market forces driven by societal demands,³⁸⁰ or illegal downloading will continue to be a large scale threat to the creative industries.³⁸¹ The Copyright Hub may at least be a good starting point in the fight against infringement however. It may not be the solution to online piracy, but it is certainly a step in the right direction towards consolidating and streamlining copyright services.

The 2011 report appears to present the same flaws found in earlier studies. In parts, action is encouraged without being specified. Refer to the section on 'repertoire imbalance' (the lack of digital copies of printed works) for example.³⁸² Here Hooper urges that the industries should, 'especially the audio-visual industry where repertoire imbalance is the biggest issue, continue to reduce the problem of repertoire imbalance between the digital and physical worlds'. Arguably this is not so much a recommendation, but a statement of the obvious, but acknowledging the issue at least. The problem is recognised, but left to the sector to solve without so much as a vague suggestion of a practical, low-cost solution. Instructing the industry to 'continue to reduce the problem' provides little benefit unless accompanied by incentives to digitise, and without at least reference to another part of the report containing practical advice.

The beginning of the report³⁸³ pays particular attention to educational institutions and the music industry. It concludes that licensing should be streamlined where possible, to reduce cost and complexity. It is unclear why educational institutions are highlighted as a key problem in this area. Illegal downloading of copyrighted material was, and is, somewhat more pressing. Although the streamlining of licensing is an important development, it does little to address the key issue of online piracy. This report seems to suggest that substantial progress is being made in this area however, which is arguably not the case.

Encouragingly, the report recognises the ever changing nature of the digital age, and also recommends that 'an overall steering group is formed, called the Copyright Licensing Steering Group (CLSG) with a wide mandate to ensure continuing cross-sector and where possible cross-border coordination.'³⁸⁴ It is generally accepted that keeping 'one step ahead' of internet piracy is extremely difficult with the relentless evolutionary nature of digital technology. It is hoped that this steering group would work to try to push forward the progress of the Hub, keeping it as up to date as possible. Again it is not particularly evident from the text exactly how this will be enacted or

³⁸⁰ See, for example, chapter 4.2.1, 80 on micropayments.

³⁸¹ Analysed in Chapter 4, 73ff.

³⁸² Hooper (n 308) 35.

³⁸³ *ibid* 4.

³⁸⁴ *ibid* 5.

achieved. The report appears to suggest a vague framework for the creative industries to adopt, without rigorously investigating its viability.

Another development is the weight given to the need for a unique identifier to be assigned to each individual work.³⁸⁵ This is intended to aid in the protecting and enforcement of owners' rights. But existing Digital Rights Management (DRM) technology such as this has its problems. If a particular DRM scheme is discontinued, for example, a work may be rendered inaccessible.³⁸⁶ In addition, other problems present themselves. For example, if an individual were to purchase copyrighted material as a present for another individual, who subsequently infringed that right, it would be extremely difficult to determine who to trace the claim back to. It would be patently unfair if the purchaser were to automatically bear the burden of blame for whatever was done to the purchased material. Even Apple's CEO Steve Jobs has spoken out against DRMs in the past, stating that it is the music companies who have forced Apple to use DRMs, but that they 'haven't worked, and may never work, to halt music piracy'.³⁸⁷

The report then establishes that the BBC should be obliged to take action on this venture, on the premise that 'where the BBC leads, others will follow'.³⁸⁸ A huge corporation such as the BBC cannot be responsible for developing a universal system of unique identification, using tax payers' money for a copyright protection system for the whole industry. Naturally the BBCs own benefit would be the primary motive behind any development. Individual rights holders need to be able to access and afford any technology or equipment required; otherwise the key aim of the Hub, for all copyrights to be registered, would be undermined.

An important aspect of the Copyright Hub proposal was the decision to make it a voluntary 'opt in' register. This poses a serious difficulty. It would be difficult to expect all creators to become part of a register for many reasons. But the current alternative is not entirely satisfactory either. In reality, this 'one stop shop' will not be so, as not all rights owners will be registered. Therefore the current issues surrounding accessibility of information will be merely lessened, not eradicated.³⁸⁹ Any improvement is, of course, to be welcomed but it is also important to recognise the potential confusion that this extensive, but not all-inclusive, register may cause for the general public.

³⁸⁵ Hooper (n 308) 13.

³⁸⁶ Ruth Suehle 'The DRM graveyard: A brief history of digital rights management in music' (*Opensource.com*, 3 November 2011) <<http://opensource.com/life/11/11/drm-graveyard-brief-history-digital-rights-management-music>> accessed 5th May 2015.

³⁸⁷ Steve Jobs 'Thoughts on Music' (*Apple.com*, 6 February 2007) <<http://www.apple.com/kr/hotnews/thoughtsonmusic/>> accessed 28th April 2015.

³⁸⁸ Hooper (n 308) 12.

³⁸⁹ Chris McLeod and Gillian Dennis, 'Steering in the right direction?' [2012] IPM Nov. 15.

Individuals may infer, incorrectly, that material not on the Hub is not protected by copyright law. Given how poorly copyright law is understood by the general public, this is a real possibility.³⁹⁰

In the recent government response paper, it is made clear that the Copyright Hub is supported by the government. But it is also stated that pre-Hub alterations to the UK system may be unnecessary and premature.³⁹¹ Unfortunately it appears that copyright reform is to continue to be a painfully slow process. In addition the paper indicates that questions surrounding the scope and operation of the private-sector Hub 'cannot be readily addressed until the Copyright Hub is a practical reality'.³⁹² This implies that the government is to have little role in its inception and development. This wait and see approach is perhaps not the best way to ensure that the Hub properly balances rights holder and user rights, or to tackle the most pressing associated issues. The Hub has now been a practical reality for several months (since July 2013), funded by the creative industries and governed by a not-for-profit organisation in partnership with the government-funded Technology Strategy Board.³⁹³ The one stop shop it provides will undoubtedly aid with accessibility and ease of understanding for non-lawyers. The easy to read guides explaining legal positions and directing individuals to the correct source to obtain licences and permission for use helps to consolidate and present information from different sources clearly and relatively concisely. However, without some sort of prompting, the majority of individuals are unlikely to be aware of its existence, still less to understand the necessity to use it. The suggestion for a nationwide educational campaign through schools, put forward in this thesis,³⁹⁴ would be a key way to make full use of this comprehensive resource and therefore allow the public to take advantage of the facility it provides, as well as the clear advantages it provides to copyright holders.

In February 2014, the EU announced the proposed EU-wide collective management initiative, or the EU 'Hub' equivalent.³⁹⁵ This should facilitate the growth of our own UK Hub as well as reducing costs EU wide for this developmental project. As Rosati suggests, the UK Hub provides a real opportunity to progress the modern digital market if it serves as a model for the EU initiative as well.³⁹⁶ The concept still retains the inherent flaws discussed concerning Hooper's UK Hub however, such as

³⁹⁰ Around a quarter of individuals believe that it is difficult to discern what is and is not legal with regard to copyright infringement, according to the OFCOM Wave 4 Report (n 32), 5.

³⁹¹ Hooper (n 308) 13.

³⁹² *ibid* 51.

³⁹³ According to the Copyright Hub Manifesto <<http://www.copyrighthub.co.uk/Documents/Copyright-Hub-Blueprint-v1-2-summary.aspx>> accessed 2nd February 2015.

³⁹⁴ Chapter 4.4, 99.

³⁹⁵ Council of Europe 'Better access to online music – Collective management of copyright' <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/141081.pdf> accessed 19th March 2015.

³⁹⁶ Eleonora Rosati 'The Hargreaves report and copyright licensing: can national initiatives work per se?' [2001] 33(11) EIPR 673, 675.

coverage and cost, but the advantages of harmonisation at EU level could well outweigh these weaknesses.³⁹⁷

The government response paper also states that, despite suggestion by both Hargreaves and Hooper, this government will ‘not embark on such a major programme of revision’; that is, to ‘simplify it [Copyright, Designs and Patents Act 1988] and make it easier to apply’. Therefore no major revision of the cumbersome and uncertain legal framework of copyright will take place in the near future.

It is submitted that the Hooper report proposes a rather unrealistic solution to the problem of online piracy and copyright enforcement, building on the proposals in the Hargreaves Review, which fails to adequately address all of the main copyright law issues. The Copyright Hub does have positive intentions to achieve clarity in this uncertain area, but in its current form, does not provide a solution to the problem of copyright enforcement in the UK.

Chapter 3.4 Where now?

In December 2012 the Government published a final report called Modernising Copyright.³⁹⁸ Despite its promising title, the main body of the report merely affirms its imminent implementation of the few copyright exceptions discussed in previous reports.³⁹⁹ The research exception is to include user copying and library copying, as well as archiving, which is an improvement on the previously suggested, very strict librarian/archivist only exception. Admittedly this is at the expense of clarity however, as any definition of the phrase is absent, and as there is no case law as yet, the scope of the exception is unclear. The new legislation was due to come into force in October 2013 but instead did so mid-2014.⁴⁰⁰

The report also reiterates the government’s relative distance from the inception and development of the Copyright Hub. It promises to ‘support and facilitate the development of this industry-led work where necessary’, emphasising that ‘the industry has responded positively to the report’s recommendations’.⁴⁰¹ If not the government then perhaps OFCOM should be involved in its regulation and/or the production of guidance. An independent body may be able to better balance the various parties’ interests and thus create a system which is accessible to all.

³⁹⁷ The pan-European licensing system is analysed in Chapter 4.3, 96-98.

³⁹⁸ n 325.

³⁹⁹ *ibid* 4.

⁴⁰⁰ *ibid* 6.

⁴⁰¹ Modernising Copyright (n 325) 7.

In terms of clarity, the various reports do emphasise education of society.⁴⁰² This would, of course, enable more people to understand the scope and limitation of copyright, as well as how to legitimately access material. However the Copyright Hub does not promote clarity on a broader scale. Indeed individuals may be confused by the voluntary nature of the Hub, inferring that material not registered on the Hub is therefore probably not protected by copyright and free to use.⁴⁰³ The superiority of the creation of a Hub over merely uniting the existing, barely mentioned, collecting societies is not established.

Also, bear in mind the other major factor promoted in the reports, namely cost reduction, ultimately for all parties. This would necessarily suffer as a result of the various educational campaigns and, of course, the significant financial burden of the Hub itself. It is also a concern that, eventually, the financial burden of the Hub will trickle down to fall on the consumer, whether it is a success or not.

The Intellectual Property Office promises to ensure that ‘consumers and young people understand the importance of respect for and the harm counterfeiting of illegal downloads can do’,⁴⁰⁴ targeting schools for the most part.⁴⁰⁵ This is another rights holder-centric move designed to encourage the public to use available legal sources, even if they may be inferior to non-legal sources, or risk the loss of the UK’s vast creative industries. Again the real issue is ignored here. Most ordinary people know that most material is copyrighted already, without another expensive IPO campaign. Until viable legal alternatives are available, illegal usage will continue. Some emphasis should be placed on the creative industries to develop new business models providing accessible, low-cost material on a large scale. This is an important opportunity to help protect against infringement. The IPO’s educational activity is important but may be limited in its effect, as outlined, unless accompanied with other, more long term educational programmes, as discussed in Chapter 4.4.

To supposedly aid the perceived unfairness of Digital Rights Management (DRM), the Government will ‘allow people to make requests electronically for override of DRM/TPM’ to help in situations where legitimate users are prevented from accessing material because of DRM issues. In reality, this is a very slight modification of section 296ZE (8) CPDA which allows such a request already, but states that ‘Any direction given under this section shall be in writing’. Even so ‘writing’ could be interpreted to mean electronic written correspondence so in fact this new provision is meaningless, and does not alter the status quo at all. It is yet more baffling when taking into account the current unpopularity of DRM. Many rights holders are choosing not to use DRM as it can prevent legitimate

⁴⁰² For examples Hargreaves (n 32) 78-79.

⁴⁰³ Text to n 390.

⁴⁰⁴ Modernising Copyright (n 325) 15.

⁴⁰⁵ See Chapter 4.4, 99 on education.

users from accessing works.⁴⁰⁶ Whatever the government hopes to achieve with this provision, it is very unlikely in reality to have any effect whatsoever on copyright protection or enforcement.

A Post Implementation Review was announced, to investigate the benefits and pitfalls of the system once in place, with the main source of data being 'industry figures'.⁴⁰⁷ It seems that the legislature is only interested in the approval of the creative industries, leaving consumers entirely out of the debate. Industry figures may not be an accurate representation of the overall success of the copyright system, all views included. The suggestion of a balance between rights holders and users seems to have been abandoned altogether. In each consecutive report it has taken less prominence.

As the report comes to a conclusion, it rather curiously announces that 'the Government is aware of calls for a broader review of the relevant copyright legislation particularly the Copyright, Designs and Patents Act 1988 (as amended), to simplify it and make it easier to apply. The Hargreaves Review made this suggestion, as have a number of others.' This appears to suggest that widespread calls for reform have been issued from a variety of sources. Yet, inexplicably, this statement is immediately followed by 'Having committed to no further major reviews of the IP system in this Parliament, the Government does not intend to embark on such a major programme of revision.' It is submitted that the inherent flaws in the old copyright system are persistently ignored and downplayed in the digital age. The title of the report being 'Modernising Copyright', it is unclear why the legal regime is left to continue essentially unaltered, utterly outdated.

The general recurring themes of the many various published reports on copyright reform have been clarity, simplification and the reduction of costs. These reports are littered with sometimes rather grandiose claims. For example, Hargreaves' statement that 'If the Review's recommendations are acted upon, the result will be stronger rates of innovation and increased economic growth.' Moreover, 'IP law, including copyright law, would become clearer and be observed by most people without controversy.' Considering the relatively minor suggestions put forward by Hargreaves, with the exception of the slightly cumbersome Hub, it is extremely unlikely that copyright law would suddenly be observed by most people without controversy. Surely it seems highly unlikely that the unsatisfactory range of expensive, incomplete and often low quality legal sources are going to instantly become the sole source of purchase, just because the copyrighted status of works is made a little clearer. For illegal downloading and usage to be eradicated, a lot more needs to be done.⁴⁰⁸

⁴⁰⁶ Tim Anderson 'How Apple is changing DRM' (*The Guardian*, 15 May 2008)

<<http://www.guardian.co.uk/technology/2008/may/15/drm.apple>> accessed 10th February 2015.

⁴⁰⁷ Modernising Copyright (n 325) 21.

⁴⁰⁸ See Chapter 4 for some non-legal alternatives, 73.

With regard to the copyright exceptions, true clarity is equally elusive. For example with regard to the educational exception, copying 'fair', but not 'significant'⁴⁰⁹ extracts from books is acceptable without a licence. What this exactly consists of is uncertain, and arguably leaves teachers and educational institutions as confused as before. The exception for parody is rather similarly vague, described as 'limited'⁴¹⁰ with little elaboration. Thankfully these were at least partially addressed in the Regulations by reference to the 'fair dealing' doctrine, increasing legal certainty, but with no rigid definition of 'fair dealing' it will still sometimes be difficult for individuals to decide how much is too much. The Opinion of Advocate General Cruz Villalón on the *Deckmyn* case⁴¹¹ held that parody should include a 'humorous or mocking intention'⁴¹² and 'elements sufficiently original' so as not to confuse the parody with the original work.⁴¹³ Beyond that, it is advised that parody should be an autonomous concept, and will be left to Member States to interpret as they see fit.⁴¹⁴ Yet again, whilst this can be easier for lawmakers and the judiciary to adapt to new situations as they arise, it is at the expense of clarity and legal certainty for non-lawyers, which includes those who may wish to use this copyright exception in order to create such parody.

It is submitted that the general aims of clarity and cost reduction have not been portrayed in the various reports and legal reform proposals, and will not be achieved in the forthcoming minor changes to copyright law. Arguably, this is because the basis for these reports is wrong. All start from a foundation built on various assumptions. These include the superiority of copyright owners' rights and the importance of a vigorous protection of our current copyright laws, which in turn implies a belief that such vigorous protection is actually successful. Moreover, these laws are awkwardly added to and built upon legislation created in a time where many now commonplace technological advancements were not even contemplated (CDPA).

The UK needs to revisit the concept, analysing the basis and rationale behind copyright as a whole. It is time to reconsider the principles behind copyright, in the light of modern technological advancements. All parties should be involved in this debate, and more weight should be given to legal academics who have provided a range of interesting and potentially viable solutions.⁴¹⁵ More is needed to ensure a fair, balanced system of copyright, beneficial to all parties. A wide range of both interested and non-interested parties should be consulted. Non-legal alternatives should be

⁴⁰⁹ Modernising Copyright (n 325) 4.

⁴¹⁰ *ibid.*

⁴¹¹ Case C-201/13 *Johan Deckmyn v Helena Vandersteen* [2004], Opinion of Advocate General Cruz Villalón.

⁴¹² Opinion of Advocate General Cruz Villalón 41.

⁴¹³ Opinion of Advocate General Cruz Villalón 89(2).

⁴¹⁴ Opinion of Advocate General Cruz Villalón 89(1).

⁴¹⁵ For example, Neil Netanel in 'Imposing a Noncommercial Use Levy to Allow Free Peer-to-Peer File sharing' [2003] 17(1) *Harv. J L and Tech* 1.

considered. The tax/levy approach set out in the following chapter is arguably a good starting point for a new, modern system of copyright.

An analysis of the reports and reviews of copyright law over the last few years indicates that any changes to the law, such as the private copying and parody exceptions, will only have a minimal effect on copyright enforcement and online piracy. The main concepts in the reports have been the introduction of the industry-led Hub, and limited copyright exceptions to help with libraries and educational institutions. Government involvement has been so far limited, and a more hands-on approach may be required.⁴¹⁶ That is not to say that there is no merit or progressive policy in the reports and reviews discussed in this paper. It is simply that they have only addressed the fringes of the online piracy problem, and not the core issues, despite piracy being the key obstacle to successful copyright enforcement.

⁴¹⁶ To implement the proposed tax/levy system, for example.

Chapter 4 Complimentary Measures and Revenue Sources

Having argued in the preceding chapters that legislation alone is not enough to combat infringement, this chapter will suggest some alternative and complimentary measures to run alongside the legislative framework. In the main, these solutions will attempt to address some of the key problem factors commonly cited as incentives to continue committing copyright infringement. In an OFCOM survey, only 16% of infringers who *exclusively* illegally download stated that nothing would induce them to stop.⁴¹⁷ Of the rest, the main issues included cost (32%), quality, ease of access, availability (27%), speed and clarity regarding what is and isn't legal (24%).⁴¹⁸ As Wing notes, 'in order to survive, a cold hard look will have to be taken by copyright owners'.⁴¹⁹

If, as stated above, only 16% of those who exclusively illegally download refuse to stop, then surely tackling these key factors of costs, quality, accessibility, availability, speed and clarity, which affect 84% of infringers in total, will lead to a significant reduction in levels of online copyright infringement. To put the figure into perspective, the report states that of their sample population, around 17% of internet users consumed some illegal content online, with only 4% of these users *exclusively* consuming illegal material.⁴²⁰ The statistic above shows that only 16% of *those* people could not be induced to stop consuming illegal material. This is a tiny proportion of internet users, and is a positive indication that resolving some of the key factors cited above should, in theory, deter the vast majority of infringers from illegal sources, a view largely corroborated by Wing who encourages 'competition with the pirates'⁴²¹ as the way forward. Hargreaves corroborates this view in his review, suggesting that whilst enforcement and education have so far struggled to impact on online piracy levels, there is evidence of success where creative industries have provided lower priced products in a form consumers want.⁴²²

In the same OFCOM report, only 11% of infringers stated that a letter from their ISP would put them off.⁴²³ It is quite clear that the strategy set out in the Digital Economy Act is simply not adequate to tackle this problem, as a standalone solution. More is evidently required. Encouragingly, Wing points out that 'there has been more evidence of success where creative businesses have responded to

⁴¹⁷ OFCOM Wave 4 Report (n 32), 5.

⁴¹⁸ *ibid* 3-5.

⁴¹⁹ Wing (n 24) 309.

⁴²⁰ OFCOM Wave 4 Report (n 32), 3.

⁴²¹ Wing (n 24) 305.

⁴²² Hargreaves (n 31) 79.

⁴²³ OFCOM Wave 4 Report (n 32), 5.

illegal services by making available lower priced legal products in a form consumers want'.⁴²⁴ As almost one third of infringers cited cost as the main factor for their illegal activities, it must surely be a key area for the industry to target. More recently, University of Portsmouth research⁴²⁵ provided further examples of justifications and motives behind infringement. Collins and Cox suggest that the research confirms financial savings as the key factor motivating infringers.⁴²⁶ It is also noted that there is limited evidence⁴²⁷ to support the suggestion that knowledge of the law or threat of harsh punishment will act as an effective deterrent.⁴²⁸

However, the data does indicate that quality of illegal content is a main reason users may be encouraged to eschew illegal content in favour of higher quality, paid alternatives. This, Wing argues, is a key area in which legitimate content providers should be able to win over internet pirates, and should be further exploited.⁴²⁹ Pirated content is often low quality and can be riddled with viruses.⁴³⁰ This is one area in which internet pirates struggle to compete. The provision of safe and reliable, quality online content would be a major plus point for legitimate content providers, providing a real incentive for users to eschew illegal sources for its legal equivalent.

Based on conclusions drawn from the research above, improving in key areas such as cost and quality of legitimate sources should lead to a real reduction in infringement. Some of the following complimentary measures should contribute towards the solution to these recurring issues.

Chapter 4.1 Tax/levy system

The tax/levy system is a serious contender in the hunt for a solution to the piracy issue. Indeed it has recently been confirmed by the European Court of Justice that, in theory, it would be compatible with EU law.⁴³¹ The Information Society Directive refers to the idea of 'fair compensation' in the

⁴²⁴ Wing (n 24) 309.

⁴²⁵ Alan Collins and Joe Cox 'Sailing in the same ship? Differences in factors motivating piracy of music and movie content' [2014] 50 JBEE 70.

⁴²⁶ *ibid* 77.

⁴²⁷ *ibid*.

⁴²⁸ See Chapter 4.4, 99-104 for an analysis of the effect of deterrents in copyright law.

⁴²⁹ Wing (n 24) 307.

⁴³⁰ *ibid*.

⁴³¹ The ECJ 'does not preclude legislation of a Member State which indiscriminately applies a private copying levy on the first placing on the market in its territory, for commercial purposes and for consideration, of recording media suitable for reproduction' as long as there is a 'right to reimbursement of the levies paid in the event that the final use of those media does not meet the criteria set out in that provision'. Case T-344/99

context of the currently available copyright exceptions,⁴³² requiring rights holders to be adequately compensated for the use of their works under the current exceptions. The already established idea of fair compensation could certainly be applied to this tax/levy system.

This method of collecting revenue should provide a better balance between the rights of all parties; creators, copyright holders and consumers, which is, after all, an idea advocated in the Preamble of the WIPO Treaty. Essentially the model entails a tax which is imposed upfront on services and products whose value is increased by file sharing⁴³³ in return for permitting unhindered, non commercial peer-to-peer file sharing (online piracy).⁴³⁴ This 'provides funds to be distributed among right holders without requiring them to establish a collective society and without relying on the readiness of consumers to pay a subscription fee'.⁴³⁵ Peukert rightly indicates that this represents a significant advantage over collective licensing. This is because collective licensing relies on the voluntary agreement of rights holders to create a society, and will, of course, only work if consumers are incentivised to pay for content.⁴³⁶ This is an ever present issue, even where there isn't the issue of lack of complete content coverage, as is often the case with collective licensing.

Perhaps one of the most comprehensive studies into this particular model is provided by Netanel.⁴³⁷ The writer cites Germany as an example of a country with a similar system already in operation. Under the German Copyright Act,⁴³⁸ 'personal copying [is] noninfringing, but [they] impose a levy on the sale of audio and video recording equipment, as well as recording media such as blank tapes and cassettes and copying equipment'.⁴³⁹ By distributing the burden of cost among those most likely to facilitate file sharing and other infringing activity, rights holders are duly compensated and many current problems with enforcement are dissipated. Lessig refers to this as 'compensation without control'.⁴⁴⁰ For such a system to work however, rights holders would have to accept this fundamental premise. For the minority for whom economic benefits are not the key motivation behind their creation, it may be a difficult position to accept.⁴⁴¹

Amazon.com International Sales Inc. and Others v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH [2011] I-00000 at 67.

⁴³² Information Society Directive 35.

⁴³³ Alexander Peukert 'A bipolar copyright system for the digital network environment' in Strowel A (ed), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar Publishing Inc 2009), 191.

⁴³⁴ Netanel (n 415) 67.

⁴³⁵ Peukert (n 433) 191.

⁴³⁶ *ibid.*

⁴³⁷ Netanel (n 415).

⁴³⁸ Copyright Act of September 9, 1965, § 54 (1965) (FRG).

⁴³⁹ Netanel (n 415) 31.

⁴⁴⁰ Lawrence Lessig, *The Future of Ideas 201* (New York Vintage 2002).

⁴⁴¹ For example, followers of the Lockean view of inherent ownership of property due to hard labour.

But enforcement of copyright is currently so ineffectual, there does not seem to be any alternative. Clearly the German system referring to blank tapes and cassettes is now irrelevant. Most copyright infringement is now performed digitally. This was not a very future-centric piece of legislation, but the important thing to note here is the way the levy model was implemented. According to the Explanatory Memorandum,⁴⁴² collective management organisations (CMO) would be responsible for collecting these tariffs and the Act set out exact tariffs. In 2008, this was amended, so that CMOs and the producers of recording equipment were to 'agree on such tariffs themselves'.⁴⁴³ Although technology has moved on and to some extent left the law behind, in principle this demonstrates that this system could work in the digital age.

However, it is not only since the dawn of the tech age that these problems have arisen of course. Infringement of copyright by photocopying books and cassette tapes was rife in the preceding decades and it all boils down to lack of control over what individuals do in their private homes. It is arguably too difficult to successfully regulate enforcement solely through the law, and as a result a better alternative must be sought for rights holders. This compensation with less control approach would certainly fit with the utilitarian view of copyright as a means of compensation and incentive for creators. However, the purely legal approach has simply not been successful enough to sway public opinion towards this sort of view.⁴⁴⁴

Writers such as Litman argue for the opt-out tax/levy model.⁴⁴⁵ This is seen as an important way to quickly impose a new regime. All copyright holders are involved, unless they specifically exclude themselves. However Peukert argues that this would likely fall at the hurdle of compliance with international law obligations.⁴⁴⁶ TRIPS requires complete compliance with Articles 1 to 21 of the Berne Convention, of which Article 5 prohibits the establishment of formality requirements such as this.⁴⁴⁷ Therefore an opt in model would be problematic without any major change at international level. It would also fall foul of the concept of 'compensation without control' inherent in this

⁴⁴² Explanatory Memorandum BT-Drucks 15/38 of 6.11.2002 for the Copyright Act of September 9, (1965) (FRG).

⁴⁴³ Jorg Reinbothe, 'Collective Rights Management in Germany' in Daniel Gervais, (ed) *Collective Management of Copyright and Related Rights* (2nd edition, Kluwer Law International 2010) at 215, 235.

⁴⁴⁴ See for example Pirate Bay attitude, text to n 81.

⁴⁴⁵ Jessica Litman, 'Sharing and stealing' [2004] 27 *Hastings Comm & Ent L J* 1.

⁴⁴⁶ Peukert (n 433) 183.

⁴⁴⁷ Berne Convention for the Protection of Literary and Artistic Works 1886, as amended at Stockholm 1967, Article 5, para 2.

model,⁴⁴⁸ creating a confusing two-tier system of rights holders who wished to retain control using the current legal protection framework and others opting in to the new system whose works would be open to exploitation. This clearly would not be a workable solution.

Netanel sensibly suggests that 'P2P-related consumer good[s] or service[s] should be exempt only if the levy on that item would be so small as not to be worth the costs of administration'.⁴⁴⁹ This is a sensible exemption as such costs would be pointless and burdensome. However one aspect of his proposed model may need further investigation, namely that 'Suppliers would pay differential levies, in amounts reflecting, at least in part, the Copyright Office finding of how much the value of each product and service is enhanced by P2P file swapping'.⁴⁵⁰ He chooses not to elaborate on how exactly the Copyright Office would reach these specific findings. Clearly there would have to be some sort of monitoring system, to ensure that the Copyright Office's conclusions seem fair, proportionate and unbiased. Griffin rightly warns against 'the gradual development of assumptions as to the nature of what the funds are intended to achieve' and that therefore 'The means by which funding is devolved will need to be carefully managed'.⁴⁵¹ Further government involvement would be essential, with regular reviews of the Copyright Office's progress taking place to ensure that the regime was properly regulated.

Netanel reminds us that any concern that intermediaries would become increasingly obsolete because of the new digital business model, would be unfounded. There are many other functions still retained by many intermediaries, for example, record labels such as 'distributing records, discovering artists who may have popular appeal, help assemble bands, package and market albums, and finance recording costs and concert tours'.⁴⁵² Although written in 2003, Netanel's opinion has so far proved to be correct.⁴⁵³

Another major advantage of this model would be that 'The economic interests of right holders, and the cultural interests of makers and recipients, can be dealt with under different regimes'.⁴⁵⁴ The endless conflict between rights holders seeking to retain and strengthen their rights, and users seeking to access and re-use copyrighted material, would be diminished. Each stakeholder would be

⁴⁴⁸ Peukert (n 433) 191.

⁴⁴⁹ Netanel (n 415) 44.

⁴⁵⁰ *ibid.*

⁴⁵¹ James Griffin, 'Making a new copyright economy: a new system parallel to the notion of proprietary exploitation in copyright' [2013] 1 IPQ 69, 86.

⁴⁵² Netanel (n 415) 59.

⁴⁵³ See recent positive statistics for live music in n 522 and n 523.

⁴⁵⁴ Netanel (n 415) 87.

provided for. The balance between economic interests, in a sector clearly vital to the UK economy, and cultural importance would be somewhat better struck. As a starting point, this model would go some way to achieving a solution acceptable to all parties. Lim and Longdin argue that it is vital that 'wider societal interest' 'be kept firmly in view'.⁴⁵⁵ The above model arguably does just that. A significant obstacle to imposing new regulation in the area of copyright law is government reluctance to become involved in an area dominated by the creative industries which, as a whole, combine to become a major UK economic contributor. This model should provide an opportunity for government involvement that does not cause grief to the powerful creative industries, who would receive compensatory revenue from a new source. By properly compensating rights holders through a levy, it would then be possible to ensure that users have a non-commercial right to use copyrighted material at the same time. Thus, if copyright holders would welcome such a levy, they may have to give something in return. This right to use, known as the 'user privilege',⁴⁵⁶ could be protected by law and not be circumvented by copyright holders.⁴⁵⁷ In effect, the proposal is to create a compensatory levy which essentially legalises non-commercial piracy, instead of, in Lessig's words, 'criminalising a generation',⁴⁵⁸ and without successful results for those whom the law is designed to assist (copyright owners) in any case.

Crucially, there would no longer be a distinction between those who could, and those who couldn't afford to stand up for their rights in order to be compensated, on any side of the equation. Many of the infringement problems highlighted in this paper would be eradicated, with the added advantage of removing the current status quo in which rights holders and end users tend to be on one of two different 'sides' of a conflict. Infringement is wrong, that much is undoubtedly clear, but the increasing impossibility of adequate prevention in the digital age requires a drastic change of approach which allows rights holders to be compensated in a different way. The tax/levy system poses a real, permanent solution to the constantly changing cycle of infringement and attempted enforcement, greatly reducing the need for constant reviews, reports and law reforms in this complex area. However, the success of this system in actually reducing online piracy would hinge on the willingness of copyright holders to reduce costs and improve access to materials, addressing the key factors for infringement, as a result of their being appropriately compensated for infringement. In terms of redressing the balance of power between various parties, however, the levy would

⁴⁵⁵ Louise Longdin and Pheh Hoon Lim, 'P2P online file sharing: transnational convergence and divergence in balancing stakeholder interests' [2011] 33(11) EIPR 690, 698.

⁴⁵⁶ Netanel (n 415) 40.

⁴⁵⁷ *ibid.*

⁴⁵⁸ Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Bloomsbury Academic, 2008), xviii.

properly compensate rights holders for inevitable copyright infringement, whilst at the same time decriminalising the public as a whole for non-commercial use of copyrighted material.

There are, of course, some difficulties of implementation and maintenance to be overcome. Who is to bear the responsibility of this development would have to be determined. In addition, there is the issue of what to impose the levy on. At this stage, perhaps the best solution would be to impose the levy on broadband charges, as well as storage devices and copying equipment.⁴⁵⁹ Perhaps there could even be a sliding scale for the levy, depending to some extent on your internet speed and, therefore, your potential download capacity. Clearly online copyright infringement, by definition, cannot take place unless there is an internet connection. Although indirect, there is a necessity here which is not always present with other services and products sometimes used to facilitate file sharing. As most infringement now takes place in the digital world, placing levies on data storage devices such as hard drives, without also levying internet accessibility services, would be harder to justify. Whilst at present hard drives are often used to store illegally downloaded material, the use of online storage 'clouds' is becoming increasingly popular, and will continue to expand in the near future, so this should also be taken into account.

It may be argued that this levy is requiring innocent users to subsidise the illegal actions of others. However this tax/levy model arguably mitigates some of that perceived injustice. By paying a little extra for their internet connection, all users will be able to freely access any digital content for non-commercial purposes, without fear of reprisals. This means that all users would be able to take advantage of the new system. As the digitalisation of media continues to increase, the use of digital content online will only become more necessary, and it is in all users' interests to ensure that this becomes easier, faster and, perhaps most importantly, cheaper. Leistner and Spindler argue that the strong economic advantages of such a levy [specifically on computers and data storage devices in their 2006 paper] would outweigh the small disadvantage of obliging the minority of users who will not access online content to pay for users' utilisation.⁴⁶⁰

In addition, there is some precedent for this type of course of action in other areas of law. A flood levy may be introduced to all home insurance premiums, despite the fact that many home owners may have deliberately bought property in areas with no risk of flooding to avoid such problems and

⁴⁵⁹ Netanel (n 415) 60.

⁴⁶⁰ Leistner and Spindler (n 109) 811.

potential costs.⁴⁶¹ This is arguably a weaker justification than the copyright levy, as there is absolutely no advantage for those homeowners in non-flood areas, whereas at least the broader access to copyrighted material would be available to all internet users, even if they did not wish to utilise it.

Chapter 4.2 Alternative Revenue Systems

Chapter 4.2.1 Micropayments

Micropayments are an obvious solution to the problem of cost, speed and ease of access in some forms of digital media, particularly the gaming industry. Essentially, these are very small payments made by users, without the inconvenience of entering payment details on a regular basis, for nominal monetary transactions. Bearing in mind that almost a third of infringers claim that cheaper legal services would encourage them to stop infringing,⁴⁶² it follows that successful use of micropayments should provide a substantial decrease in infringement.

But as Milton argues, ‘the music industry was shockingly late to offer consumers a legitimate, user-friendly way to buy online’.⁴⁶³ The writer is very much of the view that it is ‘incumbent on you [the rights holder]’ to provide an easy, accessible, low cost service. He further argues that merely searching for stronger ways to enforce rights will never eliminate piracy altogether. The harsh reality is that rights holders are often perceived as simply asking too high a price for their products. Consumers are aware of the diminishing costs of the production, storage and dissemination of digital material, in contrast to ‘hard copy’ methods, such as books, DVDs and CDs, a claim disputed by many in the industry, but not all. David Derrico, an author who also edits and publishes ebooks, argues that perhaps publishers’ claims⁴⁶⁴ that costs to produce ebooks are the same as physical ones are somewhat exaggerated.⁴⁶⁵ Yet there appears to be a great reluctance among creative industry bodies to alter their prices according to the evolving market. Again consider e-books as an example. Even today the cost of e-books is fairly random – it can be less, but also can be as much, or more

⁴⁶¹ Caitlin Morrison <<http://www.insuranceage.co.uk/insurance-age/news/2191088/flood-levy-could-add-10-to-home-insurance-premiums>> accessed 12th January 2015.

⁴⁶² OFCOM Wave 4 Report (n 32), 5.

⁴⁶³ Neil Milton ‘Micro-payments offer a solution to copyright infringement’ (*The Lawyers Weekly*, 27 November 2009) <<http://www.lawyersweekly.ca/index.php?section=articleandarticleid=1050>> accessed 29th December 2014.

⁴⁶⁴ For example, Michael Hyatt ‘Why do ebooks cost so much? A publisher’s perspective’ <<http://michaelhyatt.com/why-do-ebooks-cost-so-much.html>> accessed 4th April 2015.

⁴⁶⁵ David Derrico ‘Cost Breakdowns: E-books vs Printed Books’ <<http://www.davidderrico.com/cost-breakdowns-e-books-vs-printed-books/>> accessed 28th March 2015.

than, the same publication in hard copy form.⁴⁶⁶ This is, understandably, immensely frustrating to consumers who feel that they are being ripped off. Having invested in their expensive e-reader, they feel that there must be some financial advantage to doing so. Awareness as to the costs involved in producing digital copies of publications is almost non-existent, with many still assuming that digital works should be far cheaper than hard copies.⁴⁶⁷

This recurring perception among consumers that hard copies of books require many materials, factory machinery, storage etc whilst digital copies only cost money to create and comparatively little to reproduce is problematic. Prices are viewed as evidence of pure greed, and alternative, often illegal, methods of obtaining the material are sought.⁴⁶⁸ This is symptomatic of the confusing nature of the copyright legal system and the various myths and contradictory opinions that arise from it. To alter this, we also need to address the issue of consumer perception of copyright infringement by educating the public as to the true facts of the costs involved.⁴⁶⁹

The technology to implement a micropayment system has already been developed in the gaming sector, which may well have contributed towards there being comparatively far less piracy in this industry,⁴⁷⁰ as Turbine provides the facility to operate 'micro-transactions' within downloaded games.⁴⁷¹ Indeed the gaming industry can and should provide some inspiration to sectors less willing to accept the new digital landscape. Micropayments in gaming became high profile in 2008 when EA released 'Battlefield Heroes': a free to use game subsidized by advertising and micropayments.⁴⁷² These micropayments were not designed to impact on the playability of the game however. For example, individuals could purchase items of clothing for their game character, but not 'better' weapons with which players would outperform others to an extent which would deter non-paying users.

⁴⁶⁶ 'Tracking Amazon: The Rise of High-Price E-books' (*Publishers Weekly*, 18 September 2012) <<http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/54001-tracking-amazon-the-rise-of-high-priced-e-books.html>> accessed 23rd April 2015.

⁴⁶⁷ OFCOM Wave 4 Report (n 32).

⁴⁶⁸ Cory Doctorow 'Why the entertainment industry's release strategy creates piracy' (*The Guardian*, 20 December 2012) <<http://www.guardian.co.uk/technology/2012/dec/20/entertainment-industry-creating-piracy>> accessed 12th January 2015.

⁴⁶⁹ Chapter 4.4, 99.

⁴⁷⁰ See Levels of Infringement at 2% vs 9% for music for example, in the OFCOM Wave 4 Report (n 32) 3.

⁴⁷¹ Andrew Edgecliffe-Johnson 'Warner buys Turbine for micro-payment push' (*Financial Times*, 20 April 2010) <<http://www.ft.com/cms/s/0/80184a5c-4cbb-11df-9977-00144feab49a.html#axzz1CpPD1V1y>> accessed 11th May 2015.

⁴⁷² Ben Kuchera 'EA revamps Battlefield with free ad-supported online title' (*Arstechnica*, 22 January 2008) <<http://arstechnica.com/gaming/2008/01/ea-revamps-battlefield-with-free-ad-supported-online-title/>> accessed 12th May 2015.

This bold move by a major player in the gaming world has arguably been successful. Statistics provided to IGN in 2009 have proved surprisingly positive.⁴⁷³ Over and above revenue realised through advertising, EA claim that buyers spend, on average, around twenty US dollars.⁴⁷⁴ Although it is not made clear what percentage of users are buyers, this is clearly a good result, so early in the development. Interestingly, 76% of expenditure was on 'vanity clothing items', rather than 'advancement widgets' for acquiring a broader range of weapons etc. Perhaps this indicates that users obtaining legitimate, good quality, and, most importantly, free copies of games will feel more willing to spend very small sums on enhancements, once invested in the game. Arguably, many would not do so if they have had to purchase a copy of the game. The success of this business model suggests that psychologically, as well as financially, users seem more inclined to make in-game purchases when all major obstacles (these being cost, accessibility, quality and speed) are removed. The most obvious and important advantage to this business model is the complete lack of piracy. The game is provided for free. Users only pay very small sums voluntarily, for non-essential extras, and yet the industry still makes a profit through micropayments and advertising combined.

Another example of success using this type of business model is the online game Candy Crush. The game itself is free, but users must pay for extra levels to progress further with the game. With an annual turnover of £300 million,⁴⁷⁵ this company makes it clear that users can and will invest substantial amounts of money into games, not in spite of, but *because* of it being initially free of charge. This allows the user to become 'hooked' and motivated to pay to continue their enjoyment. Many users, if unable to play at all without first registering and paying, may simply not bother as they have not yet been given an opportunity or incentive to want to pay, or become invested in the product or service.

Whilst different to films or music, the gaming industry has demonstrated that it can utilise the micropayment system effectively. But the micropayment model could be considered by other creative industry bodies. As Wing states, 'Sooner or later, simply in order to survive, a cold hard look will have to be taken by copyright owners'.⁴⁷⁶ Yet this does not seem to have been the case. Although there are an ever increasing number of legitimate websites purporting to offer such

⁴⁷³ Steve Butts 'By the Numbers: Battlefield Heroes' (*IGN*, 12 August 2009) <<http://uk.ign.com/articles/2009/08/12/by-the-numbers-battlefield-heroes?page=2>> accessed 13th May 2015.

⁴⁷⁴ This appears to be over a 5 month period, based on the game beta closing [so, beginning] in February 2009, and statistics being released in August 2009.

⁴⁷⁵ Elizabeth Day 'Candy Crush Saga: sweet success for global flavour of the moment' (*The Guardian*, 11 May 2014) < <http://www.theguardian.com/technology/2014/may/11/candy-crush-saga-games>> accessed 28th May 2015.

⁴⁷⁶ Wing (n 24) 309.

services, they often provide a limited and inconsistent range of material,⁴⁷⁷ require a better quality internet connection than similar illegal websites, and are arguably still too expensive. For example, an individual would have to subscribe to many different film provision websites, in order to be able to access an almost full range of modern and old films. With Amazon Prime and Netflix both standing users at £5.99, the figures soon mount up. In addition, users are unable to keep or re-watch any of the films viewed on the subscription site, as soon as their subscription lapses.⁴⁷⁸

Micropayments should be incorporated in to business models, where appropriate, in order to help create a fair and workable system for all parties. There may be some scope in the film industry for example. Many people buy DVDs in order to access the plethora of extra content. Whether it be cast interviews, directors' cuts, film commentary, outtakes, production interviews or deleted scenes, these extras continue to be offered with DVDs but are generally absent from online content providers. It would be easy to provide a film (perhaps for free, funded by advertisements, as outlined below⁴⁷⁹), then use micropayments to offer the various extras to consumers to generate extra revenue. Deleted scenes, in particular, can be hugely popular, with one scene from *Mission Impossible: Ghost Protocol* achieving 400,000 views in just two days.⁴⁸⁰ Similarly in the music industry, there is potential to produce band interviews and unreleased tracks for nominal charges. Unreleased tracks in particular would tempt fans, creating an air of exclusivity and increasing the fans' involvement in the experience. The gaming industry has shown (above) that the more invested in an experience consumers are, the more willing they are to contribute financially to the experience. These would also serve as promotional material for gigs, gaining artists valuable publicity, as well as encouraging the purchase of further tracks from an artist's catalogue once one song has been heard for free.

However as Rita McGrath rightly notes, micropayments will never become the norm until a seamless and transparent system is developed.⁴⁸¹ Users need to know exactly what and how much they are paying for content, and the transaction needs to be completed with minimal interruption and inconvenience to the user. The quicker the process, the more likely that the model will be successful,

⁴⁷⁷ As at 10th March 2014, some of the most popular films such as the *Lord of the Rings* and *Harry Potter* series, and TV programmes such as *Friends*, were not available on either Amazon Prime or Netflix. Checking both the UK and US versions also revealed that the content of Netflix differs, depending on the country.

⁴⁷⁸ Further detail on subscription based business models in Chapter 4.2.3, 87-89.

⁴⁷⁹ Chapter 4.2.2, 84-86.

⁴⁸⁰ <<http://www.mostwatchedtoday.com/tag/mission-impossible-deleted-scene-with-ellen/>> accessed 20th February 2015.

⁴⁸¹ Rita McGrath 'Why I hate Micropayments' (*Harvard Business Review Blogs*, 22 February 2010) <<http://blogs.hbr.org/hbr/mcgrath/2010/02/why-i-hate-micropayments.html>> accessed 21st May 2015.

argues Wing.⁴⁸² A constant process of entering details and frustratingly frequent captcha⁴⁸³ entries will quickly become frustrating and likely be abandoned by those of us used to instant one-click purchasing processes (such as Amazon) and interruption-free online content. Some may argue that Bitcoin⁴⁸⁴ embodies that model. Unlike most transactions, Bitcoin does not involve banks and therefore does not incur transaction fees. Unfortunately the service has been plagued by hackers, scams and 'extreme price fluctuations'.⁴⁸⁵ Truly reliable technology is urgently required to ensure the viability of services such as Bitcoin. Despite its problems however, the service continues to thrive. In March 2013, 'The combined value of all Bitcoins in circulation surpassed \$1billion'.⁴⁸⁶

The micropayment model is arguably successful in the gaming world because it attempts to tackle one of, if not *the* major factor which induces infringement, namely cost, as cited previously. If care is taken to consider *why* infringement takes place, it can be easier to establish a way of tackling the issue. For too long, the UK government has essentially decided that what the creative industries want, they can have. But this clearly hasn't worked to date, as online infringement continues to flourish. It is important then to investigate all parties' perspectives in order to develop a proper strategy. The gaming industry has, at least in part, achieved this. The subconscious impact of purchasing a game, or worse, paying a monthly subscription, is apparently a substantial one. This subscription model is more popular in the film and music industry however, as it allows the user to access a broad range of films or albums, as opposed to a single game as in this context. There is certainly scope for the film and music industries to consider micropayments for 'extras', emulating the success of the gaming industry.

Chapter 4.2.2 Advertisements

Copyright owners should be able to source further revenue by the incorporation of advertising into their business models. Advertisements are already used extensively on illegal websites. In 2012, 36 U.S. companies had advertising budgets of \$1 billion or more, with Proctor and Gamble heading the

⁴⁸² Wing (n 24) 306.

⁴⁸³ A program designed to ensure that the user is a human rather than a computer. The user must type in the given letters or numbers correctly in order to progress to the next screen.

⁴⁸⁴ <www.bitcoin.org> accessed 5th January 2014.

⁴⁸⁵ Adrienne Jeffries 'Why won't Bitcoin die?' (*TheVerge*, 21 May 2013)

<<http://www.theverge.com/2013/5/21/4348064/why-wont-bitcoin-die>> accessed 21st May 2015.

⁴⁸⁶ Louis Goddard 'Total Bitcoin value passes \$1 billion' (*TheVerge*, 30 March 2013)

<<http://www.theverge.com/2013/3/30/4164634/total-bitcoin-value-passes-1-billion>> accessed 20th May 2015.

table at a huge \$10 billion per year globally.⁴⁸⁷ It is abundantly clear that the provision of advertising space is in great demand and can therefore be extremely lucrative.

As indicated previously,⁴⁸⁸ the world of online gaming leads the way in using adverts to subsidise a free-to-play gaming model. Battlefield Heroes provided a gaming experience unmarred by interrupted play.⁴⁸⁹ Instead, adverts are concentrated on the website and the beginning section of the game, so as not to spoil 'in-game experience' for users.

It is not only the gaming industry using an advertisement-based business model however. Until recently, legal websites such as Crackle⁴⁹⁰ provided free full-length films, subsidised by adverts. Although the range of films available is presently very limited, it is a positive move towards a more up to date business model. Other websites such as The Guardian online newspaper,⁴⁹¹ and even Youtube, use advertisements to fund themselves. Admittedly Youtube has the might of Google behind it, and therefore is perhaps not the most reliable indicator of the success, or otherwise, of the advertisement-based model, but it does provide a good example of how to maximise exposure and promote this model profitably.

It would appear, then, that the use of advertisements, alongside alternative sources of income such as micropayments in the case of gaming and perhaps the film industry, to maximise revenue, should lead to a facility which costs an almost nominal fee to the end user, whilst at the same time providing profits to the rights holder.

However, at the same time it is also important to target advertisers who are supporting illegal websites by using them for advertisements. In *Grokster*,⁴⁹² the contribution of profits from advertising was taken into account and used as a factor to find liability against a website providing access to illegal sources of digital content. This should make it clear to potential advertisers that advertising on illegal websites is not acceptable. Perhaps fines should be used to discourage companies from risking advertising on illegal websites. Companies would then take more care to ensure that their advertisements were displayed legally and were not associated with illegal products or services, such as illegal streaming websites. It is estimated that piracy websites receive

⁴⁸⁷ Christina Austin 'The Billionaire's Club: Only 36 companies have \$1000-million plus ad budgets' (*Business Insider*, 11 November 2012) <<http://www.businessinsider.com/the-35-companies-that-spent-1-billion-on-ads-in-2011-2012-11?op=1>> accessed 9th July 2014.

⁴⁸⁸ See Chapter 4.2.1 on micropayments, text to n 471.

⁴⁸⁹ Kuchera (n 472).

⁴⁹⁰ <<http://www.crackle.com>> accessed 3rd June 2014.

⁴⁹¹ Although there are rumours that it may be unsustainable, see Peter Kirwan 'Ad-funded Guardian could switch off presses by 2015' (*Wired*, 20 May 2010) <<http://www.wired.co.uk/news/archive/2010-05/20/ad-funded-guardian-could-switch-off-presses-by-2015>> accessed 30th June 2014.

⁴⁹² *MGM Studios Inc v Grokster Ltd* (04-480) 545 US 913 (2005), Opinion, 22.

around £137m in revenue from advertising every year.⁴⁹³ Addressing this problem should go some way to removing a significant proportion of their income, and thus reducing the pirates' ability to provide a comprehensive and quality service. This should lead to consumers becoming increasingly dissatisfied with these sources of digital material and, it is hoped, drive them to better quality legal services.

A 2013 report⁴⁹⁴ indicated that advertisements from many major brands, including Amazon, Visa and Microsoft,⁴⁹⁵ regularly appear on illegal websites containing pirated material. This poses a real risk of further confusing consumers who already admit to sometimes finding it difficult to determine the legality or otherwise of online content.⁴⁹⁶ It is feasible that an advertisement by a trusted brand such as Microsoft may imply legality to the consumer, and allay their doubts about the legitimacy of the source. Indeed, the presence of a trusted brand on a website was cited as the main indicator as to the legality, or otherwise, of a website by those unsure as to the legitimacy of an online content provider.⁴⁹⁷ The Police Intellectual Property Crime Unit (PIPCU), under their Operation Creative initiative,⁴⁹⁸ have created the Infringing Website List⁴⁹⁹ in order to aid companies in their efforts to avoid advertising on illegal websites. Without an incentive to use and abide by the list however, its effect will arguably be minimal.⁵⁰⁰ A fine for advertising on illegal websites, either wilfully or negligently, may perhaps provide just such an incentive. If both the brand advertised and the advertising company were in the firing line, this would encourage both parties to ensure that they are doing their best to avoid advertising inappropriately. The Infringing Website List does provide a useful tool for the advertising industry to self-regulate, however, which is likely the desired effect. The better equipped the advertising industry is to quickly and cheaply investigate the legality of their advertising space, the less likely they are to erroneously (or negligently) utilise illegal sources.

⁴⁹³ City of London Police <<https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/pipcu-news/pages/city-of-london-police-call-for-help-tackle-cyber-crime.aspx>> accessed 7th January 2015.

⁴⁹⁴ Annenberg Innovation Lab 'USC Annenberg Lab Ad Transparency Report' 12 June 2013 <http://www.annenberglab.com/sites/default/files/uploads/USCAnnenbergLab_AdReport_May2013.pdf> (accessed 2nd January 2015).

⁴⁹⁵ *ibid* 2.

⁴⁹⁶ OFCOM Wave 4 Report (n 32) 30.

⁴⁹⁷ *ibid* 5.

⁴⁹⁸ Operation Creative is designed to disrupt and prevent websites from providing unauthorised access to copyrighted content, in partnership with the creative and advertising industries. See <<http://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/default.aspx>> accessed 25th March 2014.

⁴⁹⁹ <<https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/Operation-creative.aspx>> accessed 5th January 2015.

⁵⁰⁰ Dave Lee 'Attempt to cut off illegal websites' advertising revenue' (*BBC News*, 31 March 2014) <<http://www.bbc.co.uk/news/technology-26788800>> accessed 7th January 2015.

Chapter 4.2.3 Subscription-based business models

The subscription-based business model is, overall, a solid one. This concept aims to tackle the perceived problems of lack of quality and convenience by providing unlimited access to high quality digital content for a monthly or annual subscription fee. For films, there are services by those such as Amazon Prime offering access to around 70,000 films. Spotify provides a free service initially, subsidised by advertisements, then after 6 months requires the user to pay £4.99 to receive ad-free, unlimited access to around 20 million songs.⁵⁰¹ Users who do not wish to pay, continue to experience advertisements, and are restricted to 10 hours of streaming per month. Both Napster and Newzbin⁵⁰² are also good examples of the potential success of this kind of business model. Although illegal, both websites provided cheap and easy access to digital content. It is simple; consumers are willing to pay when they are given what they want.

In addition, legally licensed copies of works tend to be high quality, glitch free products. Users need not worry about blurry films or inexpertly edited content. The infringement factor cited as ease of access⁵⁰³ is addressed through user-friendly interfaces provided by subscription-based business models. Users are safe in the knowledge that their chosen service is virus, glitch and pop up-free, with quick and easy access to their favourite films and TV shows. Instead of sifting through links to various versions of their favourite film on an illegal website, only to find that many of the links have been deleted, users know that what they see is exactly what they get. Extra features, such as the ability to save quick links to their favourite TV programme, to record which episode the user is up to in a series, and to auto-play the next episode for convenience for example, can be used to enhance the experience and effectively retain consumer patronage.

However there is a major flaw in the current legal versions of this model, which needs to be overcome if it is to provide a service that rivals illegal websites. The problem is coverage limitations. This is evident in two different ways. The first is the pace at which hard copies of films and music are translated into digital copies. This is referred to by Hooper as 'repertoire imbalance'.⁵⁰⁴ Take Amazon Prime as an example. It has a repertoire of 70,000 films available by post, yet only 8,000 of those are available for online streaming.⁵⁰⁵ Worse still, the range of coverage is limited, as competitors such as Netflix have also managed to obtain (often exclusive) rights to many films and TV shows not covered

⁵⁰¹ Nate Lanxon 'Spotify announces major updates to service, gets Metallica catalogue' (*Wired*, 6 December 2012) <<http://www.wired.co.uk/news/archive/2012-12/06/spotify>> accessed 1st July 2014.

⁵⁰² See Chapter 2.4, 37-40.

⁵⁰³ OFCOM Wave 4 Report (n 32), 27.

⁵⁰⁴ Hooper (n 308) 54.

⁵⁰⁵ *ibid* 34.

by Amazon Prime, leading to incomplete and seemingly random coverage by each website. The reasonable price of £5.99 per month may initially seem cheap for unlimited access, but if subscriptions to several different providers become necessary in order to access all of your favourite films and TV shows, the monthly costs will soon add up to become prohibitively expensive. An added complication here is the complete absence of subtitles available on subscription sites like Amazon Prime, rendering its content totally inaccessible to the approximately 9 million hearing-impaired and deaf consumers in the UK.⁵⁰⁶

These flawed and incomplete services must be improved to provide a more comprehensive facility in order to compete with illegal services. As Wing argues,⁵⁰⁷ the creative industries are missing out on vital opportunities to outplay illegal providers by exploiting flaws in their services. The inconsistent supply of subtitles on illegal digital content can and should be exploited by legal sources such as Amazon Prime. Comprehensive provision of subtitles would hugely increase desirability to that significant market of 9 million individuals, who would likely eschew the difficult task of finding subtitled content illegally in favour of a comprehensive legal source.

Hooper suggests that notions such as repertoire imbalance can be more about perception than reality, and that in fact there is a broader coverage than is generally believed.⁵⁰⁸ He also notes that the conversion of old recordings to digital format can be very costly for the creative industries. This reiterates the importance of a nationwide educational awareness campaign to debunk copyright myths and help the public to understand the reality of this complex area of law.⁵⁰⁹ Admittedly this is a long term strategy and would do little to solve the problem of public perception in the short term. The tax/levy model proposed in this chapter should be able to produce faster solutions for copyright holders in the meantime.

The music industry is making a little more progress in this area than the film industry. Recently Spotify has accelerated its acquisition of back catalogues of artists' work, such as the recent addition of Metallica's full musical repertoire.⁵¹⁰ In addition, other companies have recognised the need to keep pace with technology. One example is Nokia, a mobile phone provider, who 'has taken

⁵⁰⁶ <<http://www.disability.co.uk/sites/default/files/resources/UKStatistics%26Facts.pdf>> accessed 2nd February 2015.

⁵⁰⁷ Wing (n 24) 307.

⁵⁰⁸ Hooper (n 308) 34.

⁵⁰⁹ Discussed further in Chapter 4.4, 99.

⁵¹⁰ Lanxon (n 501).

advantage of mobile music, by bundling unlimited downloading into the price of a handset'.⁵¹¹ This addresses one of the psychological aspects of infringement by removing the 'cost' of the service or content at the point of use, incorporating it into the purchase of a product which is in any case likely to be used for the consumption of such services. It is then perceived as inclusion in the price of what is already a higher priced article which the individual wishes to invest in, in any case. This one-off purchase can then be seen as providing 'free' music for purchasers of the phone, even though in reality this service has been included in the purchase price. These advances and adaptations of business models are finally starting to increase, but there is arguably still a long way to go.

The second key limitation is the lack of coverage particularly regarding new and popular films. This is largely due to the cost of licensing with copyright holders. It is likely that the new Copyright Hub⁵¹² and the pan-European licensing system⁵¹³ will have a positive effect in this area. By streamlining licensing, and increasing its efficiency, this should lead to a reduction in transaction costs. However, as many major films are produced outside of Europe, in the US for example, this effect may be somewhat minimal. Only global collaboration could seek to overcome this obstacle entirely, although any collaboration at all can only be a good thing. Illegal websites provide access to major feature films almost immediately on release. No legal service is yet able to do this, due to transaction costs. This major flaw in the subscription-based business model will only be solved by improvements to the licensing system, analysed later in the chapter.⁵¹⁴ If this problem of licensing costs can be overcome, we will see a real solution to the problem of illegal digital content sources offering a broader range of material than legal sites.

Chapter 4.2.4 Lock-ins and technical content protection

One clever way of securing permanent custom is the 'lock-in' system. This method is most commonly associated with companies such as Apple, and works very simply. Material such as music, apps and other digital content are coded so that they can only be used with an Apple product, such as an iPhone or Mac computer. Rather than working together to create maximum coverage and therefore a true monopoly on all digital content, some companies instead prefer to adopt this system, attempting to monopolise large proportions of the market in this way. To be successful at this, the product, such as is the case with Apple, must be very attractive to consumers. Then, once locked in, it is made difficult and disadvantageous for consumers to migrate elsewhere. Amazon's

⁵¹¹ Allana Duboff, 'BPI Music Nation 2010 –Pirate Wars' [2011] 22(3) EntLR 85, 86.

⁵¹² Hargreaves (n 31) and Hooper (n 308).

⁵¹³ See Chapter 4.3, 96-98 for an analysis of the pan-European licensing system.

⁵¹⁴ Chapter 4.3, 93.

ebook catalogue is another good example, with the widest range of ebooks,⁵¹⁵ but solely available to Amazon Kindle (ereader) owners. Some of the most common digital formats of ebooks, such as epub, are therefore unavailable to Kindle owners, who are only able to access Amazon's own ebooks on their ereader. Such lock-ins are certainly good for manufacturers, and potentially for copyright holders too, and because of this lock-ins may have the effect of reduced cost being passed down the line to the consumer. It is about finding the correct balance between providing a flexible product for consumers to address the market need for interoperability in the modern world, whilst still allowing copyright owners to exploit their product in a profitable way.

The way companies enforce these 'lock-in' protection measures are unsurprisingly forceful. Apple claims that users who attempt to 'unlock' their iPhone so that they can access other digital content, are in fact violating its rights and the Digital Millennium Copyright Act (US copyright law).⁵¹⁶ Apple went further than this, even downloading its own browser, Safari, onto users' computers during a routine Apple 'software update'.⁵¹⁷ Clearly this sort of aggressive marketing strategy has driven some users to seek alternative ways of acquiring digital content. Apple seems to be ignoring one of the key factors users cite as missing from the currently available legal sources of digital content: comprehensive compatibility. This is closely linked to the issue of cost. By tying users into one system, the company is then able to decide its own costs for products and services. Users who realise their mistake once tied in, are forced to either comply, undertake the expensive process of changing to another service losing all digital content obtained whilst with Apple, or seek an alternative cheaper and more comprehensive source. This alternative source may very well be an illegal one.

When used aggressively, the 'lock in' strategy can be anti-competitive and does little to address consumers' current issues with legal sources of digital material. Brown expands on this argument, stating that consumers are 'extremely unhappy' with technical protection measures like lock-ins, particularly where they prevent format shifting.⁵¹⁸ He argues that if rights holders do not accept the balance required in copyright law then anti-circumvention laws will likely be brought into further disrepute, as consumer discussion and campaigning against such TPMs has become so much easier

⁵¹⁵ According to <<http://www.amazon.co.uk/Kindle-eBooks-books/>> accessed 7th March 2014.

⁵¹⁶ Dan Tynan 'Bad Apple: Five Classic Apple Marketing Tactics That Lock You In' (*PCWorld*, 3 November 2009) <http://www.pcworld.com/article/181200/apple_marketing_locks_you_in.html?page=2> accessed 1st July 2014.

⁵¹⁷ *ibid.*

⁵¹⁸ Brown (n 148) 256.

to achieve through the internet.⁵¹⁹ Brown's argument feeds in to the battle analogy, which sees rights holders and consumers as two sides of a conflict, with both sides trying (and, it is submitted, largely failing) to win. As stated previously, a tax/levy system could help to break down this unhelpful position. Allowing format-shifting and providing an excellent platform - Apple continues to be relevant here - adds to the potential positive impact of lock-ins and provide incentives to consumers to buy in to the concept.

Following France's lead,⁵²⁰ more collaboration and increased interoperability between different products and services could also have a positive impact, providing more flexibility and choice for the consumer whilst at the same time retaining the quality of the product or service. This may offer a key advantage over illegally sourced or adapted digital material, which can be poorer quality and can sometimes be incompatible with legal devices or services.

Chapter 4.2.5 Live performances

With regard to the music and film industries in particular, there is one major source of revenue which is, unsurprisingly, usually left out of copyright owners' calculations when producing profit and loss reports. Clark argues that 'revenue opportunities being afforded to touring, live performances and merchandising outstrip record sales by some distance'.⁵²¹ Moreover, the live music industry seems to be going from strength to strength. Pollstar claims that 'Between 1999 and 2009 concert-ticket sales in America tripled in value, from \$1.5 billion to \$4.6 billion.'⁵²² This trend was set to continue, as in 2012 the 'Top 100 Tours in North America generated a combined gross of \$1,125.9 million, up 1.2 percent over last year [2011].'⁵²³ The continuing growth and popularity of live concerts can be attributed to one key fact: 'There is no way to digitally recreate the excitement and atmosphere of a live concert.'⁵²⁴ Concert lovers will always pay to see their favourite artists live, irrespective of whether or not they own the track(s) performed. This is surely a key way in which copyright owners in the music can continue to obtain substantial revenue, to help subsidise a far cheaper retail value for their recorded material.

⁵¹⁹ Brown (n 148) 256.

⁵²⁰ Chapter 2.1, 18.

⁵²¹ Clark (n 235) 197.

⁵²² CBS News 'Cash-strapped music industry pins hope on festivals' (*CBS News*, 21 August 2012) <http://www.cbsnews.com/8301-505263_162-57497067/cash-strapped-music-industry-pins-hope-on-festivals/> accessed 18th May 2014.

⁵²³ Pollstar 'Pollstar's Mid-Year Charts and Figures' 13 May 2012 <http://www.pollstar.com/news_article.aspx?ID=802058> accessed 16th May 2014.

⁵²⁴ Wing (n 24) 307.

Live concerts would also be a perfect opportunity to implement an increased advertising regime, as suggested earlier in this chapter. Advertising should be a key factor in the reshaping of the copyright landscape. It offers a reciprocally beneficial arrangement to both the advertisers and the host forum, and, ultimately, the consumer at the end of the chain. This could be achieved both through the website selling the concert tickets, as well as at the venue itself. This two-fold advertising campaign could realise even further profits. Not all artists are taking sufficient advantage of the alternative revenue sources available to them. Perhaps this is because, although it is in their own interests, it is not in the interests of the ultimate copyright owners: their record labels. Before too much pity is felt for recording companies however, it should be noted that, despite the prevalence of copyright infringement, 'Digital music revenues to record companies grew by 8 per cent globally in 2011 to an estimated US\$5.2 billion. This compares to growth of 5 per cent in 2010.'⁵²⁵ Claims that record companies will struggle and fail in the current climate do not seem to be upheld by the real facts and figures.

It would appear that the creators themselves, those being the individuals that copyright law was supposedly developed to protect, generally support these alternative systems. Many artists have experimented with these methods, and have, by and large, been successful in doing so. For example, some bands have provided free copies of their music to fans to publicise their live tours, of which McFly, The Kinks and Prince are just a few. Indeed, Prince found his album giveaway to be so successful (it led to a record breaking, sell out concert tour) that he repeated the experiment with his next album.⁵²⁶ Beyonce recently released an album directly to iTunes, with no prior publicity.⁵²⁷ Whilst it is undeniably unfortunate for high street record shops to have to suffer as a result of this, this cannot be a sufficient reason to deter the trend. High street retailers will simply have to adapt to the new changes in digital technology, just as producers of floppy disk and VHS cassette equipment (to name but a very few examples) were forced to do before them. The consumer and technology, as ever, will not wait.

Yet it seems to be a commonly held belief that it should, or that providers of outdated technology have some sort of right to continue to profit from their increasingly redundant products. Duboff

⁵²⁵ IFPI Digital Music Report 2012 <<http://www.ifpi.org/content/library/dmr2012.pdf>> accessed 20th May 2014, 6.

⁵²⁶ BBC News 'Prince in second free album deal with papers' (*BBC News*, 1 July 2010) <<http://www.bbc.co.uk/news/10459020>> accessed 18th May 2014.

⁵²⁷ Michael Hann 'Beyonce releases new album straight to iTunes with no warning' (*The Guardian*, 13 December 2013) <<http://www.theguardian.com/music/2013/dec/13/beyonce-surprise-new-album-itunes>> accessed 6th May 2014.

states for example that 'In the United Kingdom, digital growth during 2011, reported at 24.7 per cent by the BPI in February 2012, only offsets two-thirds of the decline in income from sales of physical music products.'⁵²⁸ But why should digital sales have to 'offset' physical products? This epitomises the industry attitude in this area. The decline in sales of physical music products, is an unfortunate (for those involved in their production) but inevitable consequence of technological advancement, and user habits, and has been throughout recent history. There should be no obligation to, in some way, 'subsidise' this sector. Many retailers of physical music products have altered their business models to suit the now flourishing digital market, following the underlying market trend led by consumer demand. This is arguably how it should be. The simple fact is, less people are now buying DVDs as online digital content becomes increasingly common.⁵²⁹ This is not, despite music industry claims, due to online piracy, but due to technological advancement and the increasing digitalisation of products. Hence the need for industry recognition of changes in user practises and to adapt their business models to match, or at least take into account this change.

For the most part, consumers tend to support this model too, as the consistent growth of concert ticket sales mentioned above indicates. This may be because live concerts are seen as special events by consumers, to be remembered long afterwards, and are psychologically categorised entirely separately to the purchase of a track or album. As Wing points out, for some there is no substitute for the experience.⁵³⁰ The time and expense expended on organising and producing the event is more evident to the consumer, who is therefore more willing to pay a relatively large sum for a ticket. The atmosphere and environment of the event is all part of the experience, shared with other fans. This theme of interactive or experience-based business models can be linked to other sectors, such as the film industry, and indeed 3D cinema is one way to create this unique experience currently being used. As previously suggested,⁵³¹ another way to exploit this idea would be to allow consumers to access a film or TV programme for free, then once the consumer is hooked, provide directors' cuts, film commentaries, sneak previews etc using micropayments to gain revenue.

The government has to some extent recognised the value of live music, enacting the Live Music Act 2012. This allows a little more flexibility in live music venues, removing the need to obtain a license for live music under certain conditions. This promotes more flexibility in live music venues, facilitating this increasingly successful method of generating revenue.

⁵²⁸ Allana Duboff, 'IFPI Digital Music Report 2012 – what's the story?' [2012] 23(4) EntLR 96, 98.

⁵²⁹ OFCOM Wave 4 Report (n 32), 3.

⁵³⁰ Wing (n 24) 308.

⁵³¹ Chapter 4.2.1, 82.

Chapter 4.3 Licensing

Changes to licensing procedures would be an essential part of an infringement reduction strategy. This is where the positive aspect of Hargreaves and Hooper's Copyright Hub came into play. Prior to this, there were many different collecting societies which dealt with licensing agreements for copyright holders and transactions involving copyrighted material. However as previously mentioned, collecting societies often hold incomplete and conflicting data.⁵³² This can lead to confusion and difficulties in discerning how to obtain licenses for copyrighted products. Being fragmented in this way makes it harder for copyright owners to exploit their works. By introducing a 'one stop shop' in the form of the Hub, the idea is that licensing should be simpler and clearer. This will promote efficiency of licensing which, in turn, should lead to reduced transaction costs. Again, copyright owners are more easily able to exploit their works, and are no longer forced to transact with each individual licensee.

Licensing costs are a significant contributory factor to online infringement. As Doctorow⁵³³ and Wing⁵³⁴ both argue, extortionate prices for new film releases, and worse, films being released at different times worldwide, is asking for trouble. 'The fact that people eschew the black market when there is a legitimate alternative tells you that they're not thieves looking to steal.'⁵³⁵ In fact 'they are potential customers whose purchases have been forfeited by a business that has violated rule number one: offer a product that people want to buy at the price they're willing to pay'.⁵³⁶ Put simply, if films, television programmes and music are released at different times in different countries, sometimes many months apart, potential customers have no option but to wait months, or obtain illegal copies of the film or song.⁵³⁷ In the digital age, consumers are no longer accustomed to 'waiting' and are likely to obtain new releases, or unreleased material, by any means possible. Wing questions whether these staggered release structures actually maximise revenue, or does it in fact 'play into the hands of the digital pirate' who is able to provide illegitimate copies for those unprepared to wait.⁵³⁸ Tackling these differing release procedures is vital then, to maximise legal availability of products for consumers.

⁵³² Hooper (n 308) 16.

⁵³³ Doctorow (n 468).

⁵³⁴ Wing (n 24) 308.

⁵³⁵ Doctorow (n 468).

⁵³⁶ *ibid.*

⁵³⁷ James Gong, Wim Van de Stede & Mark Young 'The business of making money with movies' [2010] *Strategic Finance* 35, 36.

⁵³⁸ Wing (n 24) 308.

The traditional business model for film-makers was to create three separate revenue streams: initial cinema release, video/DVD release, then televised release which can be broken down into paid and free TV streams.⁵³⁹ These three distinct sources would be separated by a significant amount of time – months or even years – in order to maximise profitability.⁵⁴⁰ But it is important to emphasise to industry bodies that by adapting this model to new trends, the new model should not lose out in the long term, because it is tailored to what consumers want. By ensuring film availability very soon after its cinematic release, the significant issues of speed and access would be addressed.

Consumers who no longer expect to have to wait long periods will not feel the need to access illegal sources as they currently do, and therefore profits should continue. As Doctorow argues, this is not unique to the creative industries, but is common to all markets.⁵⁴¹ In reality, he concludes, businesses have to balance profit maximisation within marketing structures that customers are willing to pay for, so that profits are not ultimately lost to a much higher degree by illegal activity later on down the line. He emphasises this point further noting that with the rise of social media, it is becoming increasingly less likely that customers will wait months to see a film or TV programme that all of their friends are discussing on Twitter or Facebook, revealing plotlines and leading consumers to feel that they are missing out. The argument of commentators such as Wing and Doctorow are a sound depiction of the market as it currently stands, which puts it at odds with the realities of societal demand. This is not a new issue born of the digital age. Individuals were able to copy VHS tapes long before the dawn of the internet,⁵⁴² and VHS tapes often began with a copyright infringement warning produced by the Federation Against Copyright Theft in the 1990s.⁵⁴³ However, it is both the instantaneous nature of the internet and the ease and convenience of vast dissemination of illegal material to millions of people at the click of a mouse that have exacerbated the problem to such a degree that enforcement laws are becoming almost entirely ineffectual.⁵⁴⁴ It is true that, as it stands, ‘we all lose’,⁵⁴⁵ and market forces should be heeded by the film industry in order to produce a better release structure than the present one.

⁵³⁹ Gong, Van de Stede and Young (n 537) 36.

⁵⁴⁰ *ibid.*

⁵⁴¹ Doctorow (n 468).

⁵⁴² For example, video recorders were available in the 1980s, which meant that people were able to, and did, record films and TV programmes at will - <http://en.wikipedia.org/wiki/Videocassette_recorder> accessed 3rd March 2015.

⁵⁴³ <http://en.wikipedia.org/wiki/Federation_Against_Copyright_Theft> accessed 3rd March 2015.

⁵⁴⁴ See Chapter 2 on Current Legislation in the UK for difficulties and ineffectiveness of enforcement.

⁵⁴⁵ Doctorow (n 468).

Whilst this staggered release timescale should have been reducing over the years, in fact it often appears to be increasing.⁵⁴⁶ Take the recent James Bond film *Skyfall* as an example. Having been released on 26th October 2012 in cinemas nationwide, a digital version of the film was not available for purchase until nearly three and a half months later (5th February 2013). Worse still, the DVD was not available in the UK until 18th February, over a week later than its North American release.⁵⁴⁷ The market is showing no signs of improving either, as *Captain America: The Winter Soldier* was released in cinemas in March 2014 and will not be released on DVD until September 2014. Until the gaps between cinematic release and digital release are greatly reduced, consumers will continue to feel 'forced' to obtain their copies by other means. Perhaps the DVD stage should be skipped, or at least timed exactly with online release, as good quality illegal copies of DVDs go live usually on the day of release. Allowing users to view the film legally online soon after the cinema release, or at the very least alongside the DVD release, would help to reduce user temptation to watch illegal copies.

However, it is accepted that the above may not be straightforward, at least initially. Films in particular require colossal prior investment in development and production before any revenue is generated at all. Clearly filmmakers must be able to recover this investment in order for the film industry to continue successfully. It would be in nobody's interest to suggest that filmmakers should accept that income must be drastically reduced as a result of the changes suggested above. However, the tax/levy model discussed earlier in the chapter should help to compensate rights holders' future losses resulting from the instant provision of cheap, online versions of films normally released many months after cinematic release. The experience of the cinema cannot be easily replicated, and this revenue stream at least is unlikely to be too much affected. An example of the continuing public love of cinema is evident in the *Captain America* film grossing at \$714,766,572 million worldwide, with a production budget of \$170,000,000.⁵⁴⁸

European integration is a key issue with regard to licensing. A UK-wide Copyright Hub will only have limited effect. Due to the global nature of online copyright infringement, the more multi-national the integration, the better the protection that will be offered. At present licensing could arguably be seen as a barrier to international market trade. Thankfully, in 2014, new European legislation has been passed on a pan-European licensing system.⁵⁴⁹ This should help to facilitate and streamline the

⁵⁴⁶ Successful blockbusters can remain in cinemas for eight months, as did *Lord of the Rings: The Two Towers* for example. This is ample time for film lovers to wish to see the movie again, but they will be unable to do so unless they again pay for a cinema ticket. Gong, Van de Stede and Young (n 537) 36.

⁵⁴⁷ <<http://www.imdb.com/title/tt1074638/>> accessed 3rd January 2015.

⁵⁴⁸ <<http://www.boxofficemojo.com/movies/?id=marvel14b.htm>> accessed 12th January 2015.

⁵⁴⁹ Council Directive 2014/26/EU of 26 February 2014 collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84/72.

licensing procedure yet further by performing a similar role to the UK Hub.⁵⁵⁰ By providing EU-wide standards for collective licensing, the EU will help to bring the various collective licensing systems across the EU more into line, increasing transparency and efficiency, whilst streamlining cost. The Directive allows for providers of online music services to obtain licences from collective management organisations (CMOs) across national borders, to further the aim of creating a digital single market. It sets out in detail the many requirements place on CMOs with regard to multi-territorial licensing and appropriate management of licensing. Article 28 of the Directive also obliges CMOs to ensure 'accurate and timely payment to rights holders' which must include information detailing the period and territories for which the uses [being paid for] took place.⁵⁵¹ The high standard for accountability and transparency in the Directive has received general praise. PRS for Music, for example, stated that such standards were welcome, and would serve to create 'a more integrated, efficient and valuable single market for licensing music'.⁵⁵² Rapporteur Marielle Gallo praised the new Directive, stating that it should allow 'a Lithuanian singer to choose what collective management organisation he wants to hand over his repertoire'.⁵⁵³ This increase in choice for rights holders introduces an added level of competition between CMOs across borders, which should encourage any poorly governed organisations to strive to attain the 'high standard of governance, financial management, transparency and reporting' required by the Directive in order to remain competitive. It is hoped that the positive response to this Directive will lead to further European licensing integration for other digital media such as cinematic and literary works. Long term, any such cooperative streamlining of transactions and costs is welcome, and can only have a positive impact on the industry and its consumers.

In order for the pan-European licensing system to be successful, it may be that full harmonisation of Member States' copyright laws will be required. Rosati argues that such a regime may struggle to work efficiently if it is necessary for pan-European licensing to comply with 27 different national laws.⁵⁵⁴ Following Rosati's argument, the new Directive may allow for too much discretion for Member States and therefore lacks the harmonious structure required to guarantee its success. The Directive calls for Member States to provide for 'appropriate and effective mechanisms' for

⁵⁵⁰ < http://europa.eu/rapid/press-release_MEMO-14-79_en.htm?locale=en accessed 2nd April 2015.

⁵⁵¹ Article 28(2).

⁵⁵² PRS for Music Position Paper March 2013

<<https://www.prsformusic.com/SiteCollectionDocuments/CRM%20Directive%20PRS%20for%20Music%20Mar%202013%20English%20FINAL.pdf>> accessed 1st March 2015.

⁵⁵³ As stated by Eleanor Steyn in 'Collective rights management: multi-territorial licensing and self-regulation' [2014] 25(4) Ent LR 143, 144.

⁵⁵⁴ Rosati (n 396) 675.

members' participation in CMOs⁵⁵⁵ and for rights holders to receive 'appropriate remuneration for the use of their rights'⁵⁵⁶ to name but two examples. Evidently, such decisions are left to the discretion of Member States, allowing for a range of different interpretations on implementation for the Directive. This lack of cogent legal framework inevitably poses difficulties for the implementation of a full pan-European licensing system. Angelopoulos recognises that this problem is made worse by a lack of underlying doctrinal coherence at EU level, with national theories surrounding the nature of copyright out of sync.⁵⁵⁷ The legal uncertainty and conflicting interpretations at national level as a result of this will continue without a cross-border, unifying regime.⁵⁵⁸ As Angelopoulos notes, without agreement as to the nature of copyright, its scope and extent of protection, full European harmonisation may be difficult to achieve.

Perhaps Rosati's concerns over the theory of the pan-European licensing system have now been somewhat allayed by the reality of the new Directive. It is hoped that the competitive element created by the Directive will help to encourage development of the poorer national legislatures, who will be incentivised to provide better regulation of their CMOs in order to remain competitive. As previously mentioned, Member States will be acutely aware that the increase in choice for copyright holders, provided by the Directive, and that unhappy national copyright holders should be able to move to an alternative European CMO relatively easily. It is likely that they will strive to emulate the high standards of practice demonstrated by Member States such as the UK, with the Hub being the model for successful streamlining and consolidation of collective licensing.

This attempt to level the playing field through the pan-European licensing Directive is certainly a positive step towards creating an EU copyright framework alongside which alternative and complimentary measures would sit well and help to create a more harmonious balance. The importance of this cannot be overestimated, in a global industry which contributes a massive 5.4% of GDP.⁵⁵⁹ Large markets such as the US have yet to be included in similar initiatives however. In the future, it is hoped that licensing can be expanded globally further in this way.

⁵⁵⁵ Article 6 (3).

⁵⁵⁶ Article 16(2).

⁵⁵⁷ Christina Angelopoulos 'Beyond the safe harbours: harmonising substantive intermediary liability for copyright infringement in Europe' [2013] 3 IPQ 253, 273-274.

⁵⁵⁸ *ibid* 273-274.

⁵⁵⁹ <http://europa.eu/rapid/press-release_MEMO-14-79_en.htm?locale=en> accessed 2nd April 2015.

Chapter 4.4 Education and deterrents

It has been suggested that educating the public as to the meaning and scope of copyright would go some way to targeting the problem of online piracy,⁵⁶⁰ This could be aimed at addressing two of the factors previously cited as reasons for infringement, namely accessibility and lack of clarity over the legality, or otherwise, of products or services. Many individuals are simply not aware that they are infringing copyright when they listen to and download music from Youtube, or even produce copies of a CD for friends. Public education then, is required. Exactly what form this educational programme will take is unclear however. Hargreaves confusingly suggests that the main educational tool in the Digital Economy Act is the notification process. This informs infringers of the illegality of their actions, giving them a chance to cease before they are penalised.⁵⁶¹ But this approach reaches a very small minority of the population and in any case, only attempts to educate once some damage has already been done. This surely cannot be the only source of 'education' foreseen by Hargreaves. Yet despite his repeated urging for the necessity of education, there is no other suggested way forward apparent in his report.

Howell notes a further problem with the above approach. That is, that 'The report could find little evidence that the increasing of penalties reduces infringement in the long term'.⁵⁶² It indicates that a survey 'conducted just after the first RIAA announcement, showed a 50 per cent drop in the percentage of users acknowledging use of P2P services, from 29 per cent to 14 per cent. However, by 2005 this number had reverted to 24 per cent.'⁵⁶³ Clearly the deterrent effect of enforcement measures to date has been fleeting and temporary. Individuals, even once aware of their transgressions, do not appear to be sufficiently discouraged.

Tyler⁵⁶⁴ argues that one of the main reasons for high infringement levels in copyright law in particular, is the risk factor involved. He suggests that whilst deterrents may work to a small extent in cases with a high rate of detection and conviction such as homicide, copyright infringement is perceived to be difficult to detect and therefore punishment may be seen as too unlikely to affect an infringement decision.⁵⁶⁵ Similarly, the opportunity to commit such a crime is comparatively high, with copyrighted material surrounding us in our daily lives. The author further claims that the main approach to copyright enforcement is to seek to protect created rights with threats, resulting in

⁵⁶⁰ See, for example, Hargreaves (n 31) 78-79.

⁵⁶¹ *ibid* 76.

⁵⁶² Howell (n 22) 74.

⁵⁶³ Hargreaves (n 31) 77.

⁵⁶⁴ Tyler (n 44).

⁵⁶⁵ *ibid* 223.

‘widespread noncompliance with the law’.⁵⁶⁶ This is absolutely still relevant in the digital age, as the more platforms and sources of content are developed, the more open to abuse that content will be. The tenfold increase in penalties in the Digital Economy Act⁵⁶⁷ only serves to confirm that Tyler’s proposition is still true of modern day enforcement attitudes. But no significant changes in infringement levels⁵⁶⁸ also corroborate the theory of ineffectual deterrents.

The effectiveness, or otherwise, of deterrents has long been the subject of debate, and is not exclusive to copyright law.⁵⁶⁹ In a 1981 study on deterrence in the context of drunk driving, Laurence Ross posited the theory that harsh penalties and strict enforcement of laws only produce a short term deterrent effect, with little long term effect on behaviour.⁵⁷⁰ Even the strict enforcement of drink driving laws by Scandinavian police, through road blocks and other strategies, only had a temporary deterrent effect. The writer argues that this is because the initial publicity surrounding an enforcement campaign leads to an overestimation of likelihood of punishment, but that this cannot be sustained. The belief in the likelihood of capture wanes over time, until levels of compliance drop, as the individual’s experience proves that such punishments and consequences are probably not as likely as initially claimed.⁵⁷¹ The more time passes, the more the individual comes to believe that the risk of capture and punishment have been grossly exaggerated and falls back into old behaviours.

This analogy can certainly be applied to copyright law enforcement, and is to some extent corroborated by research.⁵⁷² Even pre-internet, the likelihood of detection when copying a book or tape in one’s own home was, in reality, very low. The internet age has produced an abundance of new opportunities for committing infringement, whilst at the same time decreasing the likelihood of detection as anonymity online is perfectly practicable. Laurence Ross’s theory is supported by Tyler, who notes that threats of harsh penalties are insufficient to gain widespread public compliance with the law.⁵⁷³ It would appear that even though deterrents initially seem to legislators like the quickest and easiest tool to ensure compliance with the law, in reality they are extremely difficult to implement effectively, and so do not have the desired effect in the long term.⁵⁷⁴

⁵⁶⁶ Tyler (n 44) 224.

⁵⁶⁷ Section 42.

⁵⁶⁸ OFCOM Wave 4 Report (n 32), 3.

⁵⁶⁹ See, for example, Laurence Ross (n 43).

⁵⁷⁰ *ibid* 77.

⁵⁷¹ *ibid* 96.

⁵⁷² A report commissioned by OFCOM found that fear of the threat of ISP infringement notification letters, for example, decreased from quarter to quarter following the Digital Economy Act from 22% of respondents in Wave 1 to 14% in Wave 4. See OFCOM Wave 4 Report (n 32), 5.

⁵⁷³ Tyler (n 44) 224.

⁵⁷⁴ *ibid* 229.

It is very easy to demonise infringers; to see them as deliberately trying to beat the system and to get away with stealing from rights holders. But this interpretation of a relatively widespread societal behaviour is arguably too simplistic. At best it is likely only to apply to a very small proportion of infringers. Tyler suggests that voluntary cooperation with the law is more influenced by morality and legitimacy, than by the potential for punitive legal sanctions.⁵⁷⁵ That is, both the individual's perception of right and wrong, and whether or not the individual feels that they ought to comply with the law. Tyler sees this as crucial in explaining the prevalence of copyright infringement.⁵⁷⁶ The fact is that the majority of individuals simply don't see it as morally wrong. Tyler states that formal law loses its power if and when it diverges from public morality and what the public as a whole sees as fair.⁵⁷⁷ This is absolutely true, and shows that only a change in public perception of morality will lead to the increased effectiveness of copyright law enforcement. Toughening up with threats of harsher penalties will not suffice. This is where education becomes imperative. To alter the public perception of copyright infringement, we must embark on a long term process of socialisation to create a 'positive moral climate'.⁵⁷⁸ As Eining and Christensen advocate, society-wide education from a young age should be central to the development of this long term approach.⁵⁷⁹

Similarly, if the notion of legitimacy of copyright laws can be achieved, individuals would be more likely to comply with the law, even if their moral principles did not correspond precisely with the law.⁵⁸⁰ Interestingly, Tyler found that people's willingness to accept rules is often more dependent on how the rule was made, and if this decision-making process was fair, than the actual content of the rule.⁵⁸¹ This may help to explain why individuals feel so aggrieved about copyright law, and react so contemptuously.⁵⁸² Right or wrongly, many members of society see copyright law as created under the dominion of major creative industry bodies, to maximise profit and minimise consumer access and freedom of information.

It certainly appears that way, as legislators regularly tighten up increasingly strict restrictions and penalties, with only the occasional, cursory reference to the improvement of products and services

⁵⁷⁵ Tyler (n 44) 224.

⁵⁷⁶ *ibid* 226.

⁵⁷⁷ *ibid* 227.

⁵⁷⁸ *ibid* 229.

⁵⁷⁹ Martha Eining and Anne Christensen, 'A Psychosocial Model of Software Piracy: The Development and Test of a Model' in Roy Dejoie, George Fowler and David Paradise (eds) *Ethical Issues in Information Systems* (Boyd and Fraser Publishing 1991).

⁵⁸⁰ *ibid* 229 – 230.

⁵⁸¹ Tyler (n 44) 231.

⁵⁸² For example, The Pirate Bay's Peter Sunde's public denials of the legitimacy of copyright law. See Douglas (n 82).

for the consumer.⁵⁸³ This attitude is perpetuated by popular individuals such as The Pirate Bay's Peter Sunde. It may be an entirely erroneous view, or it may not. The fact is that with no formal education surrounding this area of the law, it is perhaps unsurprising that opinions such as Peter Sunde's are so ingrained in the psyche of many consumers, as it is this skewed impression of the hostile intentions behind copyright law that is reaching consumers. There is no formal education system to inform and balance out the debate. Aggressive tactics from either side are not constructive, nor are they particularly successful in challenging infringement.⁵⁸⁴ A more nuanced approach through fair and factual education would be a more practical solution.

It is certainly true that, so far, 'educating people about infringement does not seem to lead to a change in behaviour,'⁵⁸⁵ or at least not yet creating a significant, permanent shift in behavioural patterns. However, perhaps this is because education so far mainly attempts to preach to the converted. That is, individuals who are already committing illegal activities, many of whom may be likely to be aware that they are doing so in any case. A more sensible approach would be to educate children about the law of copyright in schools. Primary schools would need to be targeted with a nationwide educational campaign. This would ensure that the entire population would be sufficiently aware of what is and is not legal with regard to the dissemination of material.⁵⁸⁶

In addition, this campaign would need to stress the moral argument against infringement. It is vital to remind the public that this is not an entirely victimless crime, as it is often perceived to be. Crucially, it would connect with each new generation *before* they reached an age at which they might potentially commit infringing acts, if taught early enough in the school curriculum. If children grew up knowing the scope and consequences of infringement, there is a higher likelihood that they would be deterred than under the current approach of notifying once the damage has been done. Education in terms of sending cease and desist letters which set out the law is more a case of reacting to wrongdoing rather than educating prior to the development of this illegal behaviour. If the downloading of illegal material is already seen as the norm, and part of everyday life, it would then be a case of trying to change an opinion already ingrained in society as a whole.

⁵⁸³ For example, the brief reference to maintaining a fair balance in the Preamble to the World Intellectual Property Organization Copyright Treaty 1996.

⁵⁸⁴ See the threatening behaviour of various large corporations such as Getty Images in Wendy Grossman 'Is a picture really worth £1,000?' (The Guardian, 27 November 2008) <<http://www.theguardian.com/technology/2008/nov/27/internet-photography>> accessed 12th January 2015.

⁵⁸⁵ Howell (n 22) 74.

⁵⁸⁶ Confusion over the legality of sources of online content being another major factor contributing towards infringement - OFCOM Wave 4 Report (n 32), 5.

Entities such as International Federation of the Phonographic Industry (IFPI) who have a vested interest in ensuring the sanctity of copyright protection have done a little to further this aim. Take for example, their collaboration with the charity Childnet to produce leaflets for parents and teachers, detailing how young people can keep safe and legal while enjoying music online.⁵⁸⁷ It also produced a free program called Digital File Check, which is able to remove or block any unwanted file-sharing program commonly used to distribute copyrighted files illegally from your computer. However individuals may not be willing to install such software, without knowing exactly what it might do. The IFPI obviously have a certain agenda, and it is unlikely that many individuals who have committed infringing acts would want to admit to it by first obtaining the software, and then potentially lose their illegally obtained content as a result. Therefore the market for this sort of program would be very limited. The impact of such campaigns will always be limited, unless there is some government involvement on a nationwide scale.

There is good news in this area however in that the BBC is beginning to seek innovative ways to ensure future patronage. It is not only music artists who have used the potential of free material to tempt individuals to ultimately pay for more in the future.⁵⁸⁸ The BBC has recently released a Youtube-only nature documentary channel, aimed at teenagers.⁵⁸⁹ It aims to attract a new audience to what the BBC has to offer. Clearly it recognises the direction most new users are taking when it comes to material for entertainment. The channel is a good example of the acceptance of a short term loss in order to, it is hoped, reap long term rewards by attempting to secure the patronage of the next generation.

As Howell notes above,⁵⁹⁰ research suggests that education has not yet led to any lasting reduction in infringement. However until a specific educational programme is implemented in schools throughout the country, it remains to be seen whether education would have any serious positive impact on incidents of infringement in the UK in the long term. At least it may go some way to addressing the 'accessibility' issue. Once individuals are aware of exactly where and how to access legitimate online sources, as well as recognising illegal sources, one major 'excuse' for illegal activity will be eliminated. In a similar vein, teaching society the potentially negative consequences of illegal

⁵⁸⁷ IFPI 'New Licensing Models, Education and ISP Cooperation – the priorities of the Digital Music Market' <<http://www.ifpi.org/content/library/ISPS240708.pdf>> accessed 20th May 2014.

⁵⁸⁸ Such as Prince and Beyonce discussed in Chapter 4.2.5, 92.

⁵⁸⁹ Chris Smith 'BBC launches Earth Unplugged original content channel on Youtube' (*techradar.com*, 17 November 2012) <<http://www.techradar.com/news/internet/web/bbc-launches-earth-unplugged-original-content-channel-on-youtube-1113362>> accessed 18th March 2015; <<http://www.youtube.com/user/EarthUnpluggedTV>> accessed 18th March 2015.

⁵⁹⁰ Howell (n 22) 74.

downloading should lead to a long term improvement in consumer compliance amongst those generally law-abiding citizens.

Chapter 4.5 Can legislation be complemented by alternative methods?

This chapter suggests that alternative and complimentary measures could help to significantly reduce copyright infringement online, by targeting the significant infringement factors of cost, quality, speed, ease of access, availability and lack of clarity over the legality of products or services. Many individuals who currently download illegally may well be induced to cease these activities and begin to use legal services to source their digital content as a result of some of these changes. It is worth noting also that this tax/levy concept, or compensation without control regime, represents the deconstruction of the copyright regime as a game to be won. This may reduce the incentive for even those pirates who indicate that nothing would induce them to stop their infringing behaviour,⁵⁹¹ as it would reduce the element of fame associated with beating the system, cited by Garstka as a real incentive to infringement.⁵⁹²

There is some evidence that the creative industries are adapting their business models to keep pace with technology and new consumer trends. The subscription-based business model is promising, if problems of lack of coverage can be overcome. The new Ultraviolet technology⁵⁹³ built into many new DVDs is interesting too, not least because it finally admits to normal common practice, facilitating the downloading of DVD content onto the users other digital devices.⁵⁹⁴ This also allows users to download material to a cloud-based digital storage facility. However there is still inherent confusion, in that how the digital content can be used varies from title to title, and depends on the company responsible for the film's release. For example, some Ultraviolet products feature permission for the consumer to share the film with up to 5 friends. Confusion surrounding whether or not this is an option with other titles is bound to ensue. Moreover, despite these new, useful features, these DVDs still remain priced at the hopelessly outdated £11 to £16 mark.⁵⁹⁵ It is submitted that most individuals now see this pricing structure as prohibitively expensive, leaving the way open for subscription-based business models to really exploit this societal trend.⁵⁹⁶

⁵⁹¹ Only 16% of those who exclusively infringe stated that nothing would induce them to stop, according to the OFCOM Wave 4 Report (n 32), 5.

⁵⁹² Garstka (n 46) 166.

⁵⁹³ <<http://www.uvvu.com>> accessed 30th December 2014.

⁵⁹⁴ <<http://www.uvvu.com/what-is-uv.php>> accessed 30th December 2014.

⁵⁹⁵ According to the range provided by Tesco at <www.tesco.com> accessed 3rd December 2013.

⁵⁹⁶ Chapter 4.2.3, 87-89.

The law alone cannot solve this problem. It is too difficult to 'undo' what has already been done without offering alternatives. That is, now that illegal downloading has become so ingrained into society as a normal everyday activity, merely continuing to legislate is likely to continue to be ineffectual. In any case, it is clear that 'Criminalizing an entire generation is too high a price to pay for almost any end. It is certainly too high a price to pay for a copyright system crafted more than a generation ago'.⁵⁹⁷ The current legislation-focussed approach is somewhat outdated, and can only be effectively used to enforce the law and properly uphold protection of copyright if it is part of an overall regime that provides maximum flexibility and changes pace with the ever evolving world of technology.

⁵⁹⁷ Lessig (n 458) xviii.

Chapter 5 Conclusion

Ultimately this thesis is concerned with striking a balance between the rights of copyright holders and those of users, or the general public. This is key to ensuring the proper encouragement of innovation and creativity, whilst at the same time defending the public benefit gained from these creations. This is no small challenge, as leaning too far in one direction could have disastrous results for the UK economy. Stricter copyright laws will likely drive aggrieved users to illegal sources, and anger copyright holders further. Yet clearly any appearance of 'favouring' the cause of users for more liberal access may risk driving away some members of the creative industries, a significant contributor to the UK economy,⁵⁹⁸ to conduct their business elsewhere. The process will require a fundamental change in attitude towards copyright issues, defining copyright holders' rights in a positive way, that they be rewarded for their innovation. This contrasts with the current approach to copyright whereby the holder must seek to enforce their right when it has been abused and, often, the damage has already been done. This is a reactive approach, rather than an infinitely preferable preventative one.

This thesis addresses the perceived gaps and weaknesses in current copyright legislation when addressing the imbalance of rights concluding that legislation alone has but limited effectiveness on online piracy. It is submitted that both the CDPA and, more significantly, the comparatively recent DEA target the wrong individuals in the wrong way.⁵⁹⁹ The new DEA rules are cumbersome and ineffective, having only a limited positive effect on a minority group. The reality is that legislators simply cannot keep up with technological advances and the new, innovative techniques constantly being developed by savvy internet users to circumvent the law. The false presumption that stronger measures equal a greater deterrent and will somehow lead to a vast reduction in online piracy overnight needs to be abandoned. Even the government-approved body OFCOM suggests that legislation will not deter the majority of infringers.⁶⁰⁰ In addition, the responsibilities placed on ISPs are arguably too burdensome, and this implied requirement to monitor does not fall under the intended remit of the function of ISPs.⁶⁰¹

The government appeared to recognise the need to address the balance of rights in this area, and commissioned several reports and recommendations by prominent lawmakers and politicians. It

⁵⁹⁸ Employing over 2 million people, for example - <<http://www.cbi.org.uk/business-issues/creative-industries/>> accessed 16th June 2014.

⁵⁹⁹ Chapter 2.5, 40-50.

⁶⁰⁰ For example, in a 2013 survey only 14% stating that a three strikes type 'warning letter' from an ISP would 'put them off' - OFCOM Wave 4 Report (n 32), 5.

⁶⁰¹ Chapter 2.3, 21-32.

looks to these reports as an indication of how the government sees the shaping of copyright legislation in the recent past and near future. However it is quickly apparent that the above issues relating to current legislation are simply not addressed in these reports. Instead they fixate on the idea of a Copyright Hub, which, it is submitted, would only have limited positive effect. Although aspects of these reports were indeed contributory, none fully address the significant issues faced by copyright law in the internet age. Despite the repeated refrain of 'clarity' permeating the reports, it appears that of any of the recommendations, only the Copyright Hub, will actually promote this aim. Although even here, it may be that even further confusion is caused as copyright holders not registered on the Hub may be vulnerable to piracy as users mistakenly think their works are unprotected. So far, the government has largely ignored many of the recommendations for copyright reform found in these reports, preferring instead to pin their hopes on the Copyright Hub and the limited copyright exceptions introduced in 2014. This, unfortunately, will not be enough. Moreover, in order for it to stand a good chance of success, it is vital that copyright holders themselves are enthusiastic and engage fully with the Hub during its development.

Evidently then, the constant development of legislation isn't working as a standalone solution. We need to take a more rounded approach to copyright exploitation, considering the needs and expectation of all parties. Only then, by marrying together a range of both legal and non-legal approaches to the problem, will there be a chance of successfully balancing the rights of all parties.

Recent reports and reviews of the law analysed in Chapter 3 have produced some positive results such as the Copyright Hub, and the improved copyright exceptions for both private copying and libraries and archives.⁶⁰² The promising aspects of the Hub⁶⁰³ may be somewhat limited in their effect on online piracy, but nevertheless provide an important stepping stone towards clarity and streamlining of transaction costs which, it is hoped, may be passed on to the consumer. In this way, one of the major factors cited for copyright infringement online, cost, may be slightly improved. Similarly, the new copyright exceptions clearly recognise the needs of parties other than copyright holders. The private copying exception clarifies the legal position on an activity already undertaken as part of daily life. Extra protection for libraries and archives, as well as parody and pastiche, consider the public interest value of use of protected works.⁶⁰⁴ In spite of these positive outcomes of the many reports and reviews of copyright law, again the discourse never gets to the heart of the

⁶⁰² See Chapter 3.1, 53.

⁶⁰³ Chiefly, the increased clarity surrounding copyright ownership as well as the streamlining of costs for licensing, both of which provide an excellent model for pan-European and, perhaps eventually, globally copyright licensing regimes.

⁶⁰⁴ See Chapter 3, 58-59 and 71.

issue: the need to address the chronic online copyright infringement problem. Without a multi-dimensional approach to this challenge, real progress cannot be made.

No single approach to copyright enforcement benefits all parties. But attempting to confront the problem from the same angle time and time again isn't benefitting anyone at all. There is still no clear balance between the rights of copyright holders and users. The majority of legal emphasis has been put on stronger enforcement in order to appease powerful creative industries, despite research indicating the long term failure of deterrents.⁶⁰⁵ Ironically, by doing this and little else, it has had the opposite effect, leaving rights holders with the increasingly difficult task of actually enforcing their rights, whilst copyright infringement still flourishes. It does not matter how strong anti-infringement legislation is if rights holders are still finding it as difficult as ever to prevent infringement and adequately enforce their rights. The law still doesn't achieve what rights holders hope, and what the law intends, to accomplish. This thesis therefore argues that the current copyright enforcement regime can be said to be both ineffective and inappropriate.

It is also clear that the public understanding of copyright law needs to be challenged.⁶⁰⁶ As suggested in chapter 4, this is where alternative solutions to the copyright 'problem' become crucial. A solid foundation in the national system of education would provide the next generation of users with a better understand of the legal, financial and social effects of copyright infringement. Although improvements are evidently crucial, it is important that the system is fully supported and enforced. Without a basic public understanding of how copyright law works, any attempt to enforce laws will be doomed to fail.

The tax/levy model⁶⁰⁷ would arguably improve the current imbalance of rights markedly. By putting such a system into place, rights holders can allow their creations to be widely accessible, and be guaranteed compensation in return. In addition, perhaps revenue from this model could be used to support ISPs in a more monitory role. As it is, the duties assigned to ISPs are arguably unfairly burdensome,⁶⁰⁸ but it is undeniably a factor in helping to challenge infringement online. Some financial assistance through a tax or levy could support a stronger, more active monitory role. All of these options help to make infringement less easy, and altogether less attractive. Combined they can have a significant impact on copyright infringement, redressing the balance of rights.

⁶⁰⁵ See Laurence Ross (n 43) and Tom Tyler (n 44).

⁶⁰⁶ See Chapter 4.4, 99.

⁶⁰⁷ See Chapter 4.1, 74.

⁶⁰⁸ See Chapter 2, 30 and 40-42.

In reality, the facts can be stated very simply: providing realistic alternatives would undercut pirate sites, eradicating their market advantage. Research supports the idea that providing high quality, easily accessible material at a low cost would contribute most towards a drastic reduction in online infringement.⁶⁰⁹ By addressing the factors cited,⁶¹⁰ we can go some way to markedly reduced copyright infringement online. The public attitude to the products and services protected by copyright is very much one of instant gratification. The proposed tax/levy model would serve to remunerate copyright holders for their inevitable loss of full control over their works, with the hope that this will lead to better services for consumers, provided by rights holders feeling more secure financially as a result of the compensation levy. Indeed, it is arguable that infringement is so easy and therefore endemic that copyright holders now no longer retain control over their works in any case. Language such as the regularly occurring 'normal exploitation' of works, to be expected by rights holders according to the CDPA, reflects the outdated nature of the legislation. The 'normal exploitation' envisaged by historic legislators is arguably unrecognisable as that of the digital age. Rights holders need to accept that the status quo is no longer viable, and cannot therefore be maintained. It is as much in their own interests as those of users to support and encourage the development of a new system of copyright exploitation.

The complimentary approaches analysed in Chapter 4 at least partially address each of the main factors cited as reasons for infringement. Beginning with the tax/levy model, this proposal directly addressed the most common reason for infringement – cost. It offers an alternative avenue of compensation for rights holders, so that non-commercial use of their works ceases to be a devastating blow to their income earned through exploitation of their works. Users would be able to freely access digital content, for non-commercial purposes, without threat of punishment. This levy would also help to address the thorny issue of balancing the rights of all parties. Copyright owners would be better compensated for inevitable use and would no longer be forced to seek redress against elusive and tech savvy infringers. Non-commercial users would be able to take advantage of this compensation without control strategy, funded through a fairer taxation system which levies all products and services associated with file sharing, proportioned according to how much its value is enhanced by this activity.⁶¹¹ It is hoped that by providing proper compensation, this will encourage copyright owners to provide cheaper, more comprehensive services, as well as reducing the 'game to be won' incentive⁶¹² by legalising non-commercial use. Whilst this may be unlikely to *significantly*

⁶⁰⁹ OFCOM Wave 4 Report (n 32).

⁶¹⁰ As discussed in Chapter 4, these are cost, quality, ease of access, speed, availability and clarity over what is and is not legal.

⁶¹¹ Netanel (n 415) 60.

⁶¹² Garstka (n 46) 166.

reduce piracy, what it *can* do is to provide an alternative strategy to complement enforcement. Enforcement of the law as it stands is ineffectual. Infringers are undeterred. It is submitted that legalising non-commercial piracy whilst adequately compensating copyright owners for their loss of control over their works in such situations provides a compromise that all parties should be able to live with.

Other proposals analysed in Chapter 4 should address other factors cited as reasons for infringement, and therefore cause a reduction in infringement. Micropayments can be a real alternative solution to cost. They have been used with particular success in the gaming industry, but it is submitted that there is scope in the film and music industry to exploit this method of receiving revenue.⁶¹³

The idea of advertisements as a means of raising revenue for access to copyrighted works is twofold. Firstly, it provides a clear solution to the issue of cost. Use of advertisements to raise extra revenue allows content to be available more cheaply to the consumer as a result. How the advertisements are deployed is key, however. Use of adverts is achieved successfully in the gaming industry by allowing uninterrupted playback, with advertisements concentrated on the website itself and at the beginning of the game, as well as in-game product placement.⁶¹⁴ Spotify, a music subscription service, also offers an effective strategy. Subscription is free for the first 6 months, funded by advertisements.⁶¹⁵ Secondly, the issue of big brands advertising on website providing illegal content must also be tackled, in order to eradicate the majority of funding required by illegal website to continue their activities. Without sufficient funds, such websites would find it increasingly difficult to provide the comprehensive coverage and high quality works expected, allowing legal sources to provide an increasingly superior alternative with which to tempt consumers. In addition, resolving this issue would impact favourably on the legitimacy factor cited by infringers, that is, whether or not a website is legal. After all, the sight of a familiar or reputable brand on a website was cited as a key indicator as to the legitimacy of the source.⁶¹⁶

Subscription-based business models have the opportunity to address the cited factors of quality, a key aspect in which legal sources should excel as Wing notes,⁶¹⁷ and ease of access. Legally licensed copies of works tend to be high quality, glitch free products. Users need not worry about blurry films or inexpertly edited content. The convenience factor (ease and speed of access) can be addressed

⁶¹³ See Chapter 4.2.1, 80.

⁶¹⁴ See Chapter 4.2.2, 85.

⁶¹⁵ See Chapter 4.2.3, 87-88.

⁶¹⁶ OFCOM Wave 4 Report (n 32) 5.

⁶¹⁷ Wing (n 24) 307.

through user-friendly and glitch-free interfaces provided by subscription-based business models.⁶¹⁸ Spotify provides a good example of how well some of these alternative revenue sources can complement each other. The combination of initial advertisement funding, then subscription fees, allows Spotify to provide a flexible service to consumers in a form they want, without losing revenue.

Lock-in strategies have been used effectively, particularly by Apple, to provide an immersive overall experience for consumers as well as potentially reducing costs to the consumer.⁶¹⁹ Sophisticated interoperability of locked-in products, such as computers and phones, can please consumers, but it is important to also ensure interoperability with consumers alternatively-sourced content in order to steer clear of anti-competitive practices which may be dimly viewed by those tech savvy users who cited ease of access and availability as factors leading to infringement. Live performances are irreplaceable as a source of entertainment and revenue for the music industry in particular. The provision of free content online has been a successful strategy for musicians promoting tours,⁶²⁰ whilst at the same time mitigating the cost factor for consumers.

Licensing is a big area of potential development when taking many infringement factors into account, availability in particular. The UK Copyright Hub and the pan-European licensing system, through streamlining of the licensing process, will reduce transaction costs and such savings should then be passed on to the consumer. In addition, the increased flexibility and consolidation within licensing should work hand in hand with the subscription-based business model approach discussed above, increasing the ability for these legal content providers to supply a greater range of content, improving coverage limitation issues, a current flaw in the subscription-based business model, and increasing availability to consumers.

A nationwide educational campaign through the school curriculum, reaching the public before the infringing mindset has become ingrained, would tackle the final factor cited as a reason for infringement - lack of clarity as to what is, and is, not legal. Enforcing the law once the damage has been done is important, naturally, but addressing the issue in a preventative rather than reactive way would work towards a long term strategy to tackle the widespread confusion and conflicting beliefs surrounding the nature of copyright and the legalities of exploitation of copyrighted works.

It is submitted, therefore, that copyright enforcement is not achieving a successful result at present because it simply does not address key reasons for copyright infringement. In order to successfully

⁶¹⁸ See Chapter 4.2.3, 87-89.

⁶¹⁹ Chapter 4.2.4, 89.

⁶²⁰ Chapter 4.2.5, 92.

reduce online piracy, solutions to alleviate the perceived factors need to be introduced to complement the legal system. A combination of approaches is required, then, in order to achieve this end. Ultimately, the aim of this research is to put forward solutions whose cumulative effect will ensure that all parties benefit.

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