ARTICLE 19

# Balancing the Right to Freedom of Expression and Intellectual Property Protection in the Digital Age

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**Policy Brief**

# Executive summary

In this paper, ARTICLE 19 examines the main issues that arise in balancing the right to freedom of freedom of expression and free flow of information and the protection of intellectual property, especially copyright, in the digital age.

The tension between the right to freedom of expression and copyright is not new. Although freedom of expression is central to the diversity of cultural expression and creativity, it has increasingly been viewed by copyright holders as disrupting their business model based on exclusive proprietary interests over cultural expression. This has been exacerbated by the development of new technologies - especially the internet - which have enabled the deployment of free expression and culture beyond borders and at a speed and on a scale never before imagined.

Unsurprisingly, copyright holders have sought ever stronger enforcement of copyright in the online environment, pushing for the adoption of measures such as blocking and filtering of 'illegal' file-sharing websites and criminalising the circumvention of digital rights management tools. At the same time, the right to freedom of expression and information have been largely overlooked in this crackdown on 'online piracy' despite the dire consequences these copyright enforcement measures could have for fundamental rights, and in particular the free exchange of information and ideas online.

This paper seeks to shift the focus of the current debate on copyright enforcement online from purely economic considerations to fundamental rights and freedom of expression in particular. It also seeks to promote a better understanding of the rights framework underpinning the balance between freedom of expression and copyright.

The structure of the paper is as follows. First, it sets out the rights framework under international human rights law and the rights to freedom of expression and property in particular. It also details intellectual property rights as a subset of the right to property. Second, it outlines some of the key issues arising out of the conflict between freedom of expression and protection of intellectual property, and, namely "online piracy" and access to culture. Finally, it examines some of the key mechanisms for the enforcement of intellectual property rights and the dangers they pose to freedom of expression.

ARTICLE 19 hopes that the paper will help to shed light on some policy issues that need to be addressed by policy makers when considering the legitimacy of restrictions on the right to freedom of expression on the basis of copyright protection. Our intention is to lay the ground work for the elaboration, with a group of internationally recognised experts in the field of human rights, digital rights and intellectual property law, of a set of principles on the proper balance to be struck between the right to freedom of expression and copyright protection.

# Table of Contents

# About ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, Comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at http://www.article19.org/resources.php/legal/.

If you would like to discuss this background paper further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org. For more information about this analysis, please contact Gabrielle Guillemin, Legal Officer of ARTICLE 19 at gabrielle@article19.org or +44 20 7324 2500.

# Introduction

The potential for conflict between free expression and intellectual property is not new. Since the invention of the printing press, those with a financial stake in the dissemination of intellectual works and ideas have sought legal protection for their interests. Traditionally, intellectual property law has sought to strike a balance between those interests, i.e. the rights of creators and other rights holders in creative property on the one hand, and on the other hand, the public's right of access to those works. And at its core, intellectual property law seeks to promote creativity. Historically, therefore, intellectual property protection was limited in duration and scope. By the same token, the free flow of information and ideas was also protected, among other things, by making them available in the public domain.

However, as we will see in the course of this paper, the creative industries have obtained over time increasing powers over intellectual works and their use in a number of ways, including the extension of copyright terms. Against this background, the Internet has been perceived by many in these industries as a "disruptive" force.[1] Indeed, not unlike the VCR and cassette recorder before it, the Internet raises significant challenges for copyright holders by allowing the easy copying and spread of content. In particular, one of the most efficient technologies of the Internet, peer-to-peer (P2P) file-sharing, has enabled the sharing of content on a scale never before imagined. Unsurprisingly, the response of the creative industries has been to label these activities as plain theft, for, in Lord Mansfied's words, "a person may use the copy by playing it, but he has no right to rob the author of the profit, by multiplying copies and disposing of them for his own use."[2]

The entertainment industry's argument is straightforward: creative property is just as real as physical property and therefore must attract the same protection. The superficial appeal of this argument has found support in both parliaments and the courts. As a consequence of this, policymakers have been only too ready to support and adopt increasingly more stringent measures against the misuse and abuse of intellectual property online.

What is frequently less readily appreciated, however, is the impact that these measures have on the Internet itself and, in particular, the ability to exchange information and ideas. More and more states, for instance, have begun to adopt laws requiring Internet Service Providers (ISPs) to disconnect their subscribers from the Internet if they are found to engage in copyright infringement.[3] Similarly, websites alleged to engage in such practices are routinely taken down without as much as a court hearing. Even where such hearings take place, the courts uphold the rights of copyright holders in the vast majority of cases.[4]

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[1] This is at least, how Ed Vaizey, UK Minister for Culture, Communications and Creative Industries, described it at a Techtalk on Intellectual Property Rights organised by the Guardian in London on 31 October 2011.

[2] See *Bach v. Longman,* 98 Eng. Rep. 1274 (1777) Mansfield, quoted in L. Lessig, *Free Culture, op.cit.* at 17.

[3] See, for example, the HADOPI law in France; sections 3 to 17 of the Digital Economy Act in the United Kingdom; and the Copyright (Infringing File Sharing) Amendment Act 2011 in New Zealand. See also 2011 proposals to introduce a SOPA Act and E-PARASITE Act in the United States along similarly lines.

[4] See, for example, in the UK, *Twentieth Century Fox Films and others v. BT,* [2011] EWHC 1981 (Ch); available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/twentieth-century-fox-film-corp-others-v-bt.pdf. Also, in Finland, the Helsinki District Court recently ordered the Finnish ISP Elisa to block the file-sharing site Pirate Bay: http://torrentfreak.com/finnish-isp-ordered-to-block-the-pirate-bay-111026/. A similar order was made by the Antwerp Court of Appeal earlier this year. Meanwhile, a Swedish Court found a file-sharer guilty of copyright infringement: she was sentenced to probation and a fine equivalent to about $2,500:

There is more. Previously ordinary behaviour such as borrowing books and CDs for no profit can now be prevented through the use of Digital Rights Management systems (DRMs) by the creative industries to protect their rights. In some countries, circumventing these digital locks is criminalised.[5] Similarly, giving away legally obtained materials could now potentially expose to criminal sanctions if they are in digital form. With the repeated extension of copyright terms, the public domain is shrinking to the point that most 20th century works will not be freely available without permission from copyright holders before a great many years to come. And one can expect that the creative industries will come back for more.[6]

In all the debates so far, however, freedom of expression has been conspicuous by its absence. All too often, its importance has been sidelined or ignored. To the extent that it is mentioned, it is typically subsumed within one of the narrow exceptions provided by intellectual property (IP) law, e.g. notions of fair use or fair dealing. In this way, IP law distorts and downplays the importance of freedom of expression.

ARTICLE 19 believes that freedom of expression is, however, too important to be left to the margins of a debate about how best to enforce property rights. On the contrary, freedom of expression is central to the ethos of the Internet, underpinning its free flow of information and ideas. It is therefore necessary for those concerned with defending freedom of expression to address the ever-expanding scope of intellectual property rights and the increasingly drastic measures taken to enforce them. The very debate must be re-framed.

This paper, therefore, looks at some of the main issues that arise in balancing freedom of expression and intellectual property rights, especially copyright. The reason for this is that the battle over the free flow of information and the sharing of culture has mainly taken place in the copyright arena.[7] We have retained the term "intellectual property rights," however, because human rights law generally refers to intellectual property rights rather than their more specific subsets, namely copyright, patents and trademarks. It also better captures the policy debates currently taking place around the world about 'intellectual property enforcement'. Ultimately, our intention with this paper is to lay the ground work for the elaboration, with a group of internationally recognised experts in the field of human rights, digital rights and intellectual property law, of Principles on the proper balance to be struck between freedom of expression and intellectual property rights.

The paper is divided into three parts. Part I sets out the rights framework under international human rights law, and the rights to freedom of expression and property in particular. It also details intellectual property rights as a subset of the right to property. Part II outlines some of the key issues arising out of the conflict between freedom of expression and protection of intellectual property, and, namely "online piracy"[8] and access to culture. Part III examines some of the key

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http://torrentfreak.com/finnish-isp-ordered-to-block-the-pirate-bay-111026/.

[5] See, for example, the Digital Millennium Copyright Act (DMCA) in the United States.

[6] See *Internet Doomsday: Wrongs and Rights of Copyright Fortune Telling,* Torrent Freak, 7 November 2011, available at: http://torrentfreak.com/internet-doomsday-wrongs-and-rights-of-copyright-fortune-telling-111107/

[7] This should by no means undermine the distinct challenges raised by patents and trademarks for freedom of expression and which we hope to address in future. Nonetheless, they are beyond the scope of this paper.

[8] While "online piracy" is an expression coined by the creative industries, we use it here because it reflects the current antagonism in the discussions on the right to freedom of expression and protection of intellectual property.

mechanisms for the enforcement of intellectual property rights and the dangers they pose to freedom of expression.

# The Rights Framework

## Freedom of expression

Freedom of expression protects the free flow of information, opinion and ideas. It applies to all media and without regard to borders. It includes the right not only to impart but also to seek and receive information.[9] Indeed, the right to information is increasingly accepted under international law as an integral part of the right to freedom of expression.[10]

Freedom of expression has long been recognised as fundamental to both individual autonomy and a free society in general. The European Court of Human Rights (ECtHR) thus famously said that

> Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man.[11]

It is equally well-established that freedom of expression is essential for the enjoyment of other human rights. This was recently re-affirmed by the UN Human Rights Committee in its General Comment No.34.[12] In particular, the Committee stressed the importance of freedom of expression for the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote. Indeed, freedom of expression has customarily been associated with other civil and political rights which are essential to fostering democratic participation.

At the same time, freedom of expression is not solely concerned with the protection of political speech. The UN Human Rights Committee recently confirmed that among other things, freedom of expression covers literary, artistic and cultural expression, education and training, and even commercial advertising.[13] The last point has explicitly been recognised by the ECtHR as a form of expression protected under Article 10 of the European Convention on Human Rights (ECHR).[14] Moreover, the protection of freedom of expression is applicable

> [N]ot only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.[15]

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[9] That includes Article 19 of the Universal Declaration on Human Rights 1948; Article 19 of the ICCPR 1966; Article 10 of the ECHR 1950; and Article 13 of the American Convention on Human Rights 1969.

[10] See UN Human Rights Committee, General Comment No. 34 adopted on July 2011, available at: http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf. See also ARTICLE 19's call for the UN to adopt an international convention on the right of access to environmental information; available at http://www.article19.org/resources.php/resource/2811/en/rio-2012:-international-transparency-convention-&-new-laws-on-right-to-information-needed

[11] *Handyside v the United Kingdom,* no. 5493/72, para. 49, 7 December 1976.

[12] See UN Human Rights Committee, General Comment No. 34, para. 4.

[13] *Ibid.*, para. 11.

[14] See *Casado Coca v Spain,* no. 15450/89, para. 35, 24 February 1994.

[15] See *Handyside, op.cit.*, para. 49; UN Human Rights Committee, General Comment No.34, para.11.

Therefore, freedom of expression covers the full realm of human expression.[16] And nowhere is the variety of different kinds of expression more apparent than on the Internet.

Indeed, the Internet has radically transformed the way in which people receive and share information and ideas. From passive recipients of information, Internet users have become active publishers of content, notably through participation and collaboration on electronic social platforms and groups. The Internet has thus enabled freedom of expression to realise its full potential, creating a vibrant cultural environment on a scale never before imagined.

There is therefore a strong argument to be made that the Internet is a public good that must be protected. This is also implied in the recent recognition by the Council of Europe of the public service value of the Internet.[17] As one member of the House of Lords said during parliamentary debate in 2009, 'Internet access in the modern world is a utility like the telephone and electricity'.[18]

Freedom of expression is not absolute however. Article 19 of the International Covenant on Civil and Political Rights (ICCPR), Article 10 of the ECHR, and Article 13 of the American Convention on Human Rights (ACHR) make it clear that freedom of expression is a qualified right. This means that it may be limited provided the restriction complies with a three-part test, i.e. the restriction must (i) be provided by law; (ii) pursue of the legitimate aims recognised under international law; and (iii) be necessary in a democratic society. In particular, the requirement of necessity entails that the measure adopted must be proportionate to the aim pursued. If a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the least restrictive measure must be applied.

International law therefore allows that freedom of expression may be subject to certain restrictions for the sake of other legitimate interests including, among other things, the rights of others. As we shall see in the following section, this includes in principle the right to property.

## The right to property

At its most basic, property is a moral and legal concept governing access to and control of land and other material resources.[19] The justifications for property as a right, and the arguments against this, are many and various[20]. Despite this, the right to property has been recognised as a human right under international law although not to the same extent as most other rights.

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[16] See UN Special Rapporteur on Freedom of Expression, A/HRC /17/27, 16 May 2011, para. 22, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

[17] Recommendation CM/Rec (2007) 16 on measures to promote the public service value of the Internet, available at: https://wcd.coe.int/ViewDoc.jsp?id=1207291&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

[18] Baroness Kennedy of the Shaws QC, Hansard, House of Lords debates, 23 November 2009, column 210. http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/91123-0012.htm#09112343000011

[19] See "Property" entry in Stanford Encyclopedia of Philosophy; available at http://plato.stanford.edu/entries/property/

[20] See Jeremy Waldron, *The Right to Private Property,* Oxford University Press, (1988).

For instance, the right to property is recognised by Article 17 of the Universal Declaration of Human Rights, Article 2 of the 1789 Declaration of the Rights of Man and the Citizen, Article 1 of Protocol No.1 to the ECHR and Article 21 of the ACHR. However, there is no reference to the right to property in two of the main international human rights instruments, the ICCPR and the ICESCR.[21] Even Article 1 of Protocol No.1 of the ECHR has not been ratified by all Council of Europe Member States.[22]

As with the right to freedom of expression, it is clear that the right to property is a qualified right. Indeed, under Article 1 of Protocol No 1 of the ECHR, the scope for state interference with the right to property is much broader than that found in relation to other qualified rights, such as freedom of expression.

At its core, the right to property protects the 'peaceful enjoyment of one's possessions'. This means that it only guarantees a right to already *existing* rights of ownership or assets and claims in respect of which one can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right.[23]By contrast, the right to property does not include a right to acquire property.

The right to property may be restricted in different ways. Article 1 of Protocol No. 1 of the ECHR, for example, makes clear that States have a right to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. The right to property is also protected to the extent that arbitrary expropriation without adequate compensation is banned.

These rules reflect a balance between public and private interests. A good example of the way in which private interests and the public good are balanced is *Depalle v. France,* no. 34044/02, [GC], 29 March 2010 before the ECtHR. In this case, the applicant was ordered to demolish his house of many decades on the basis that the government wanted to maintain access to the seashore as "a public area open to all". The Court held that the interference with the applicant's property right pursued a legitimate aim that was in the general interest, namely to promote unrestricted access to the shore, the importance of which could not be ignored.[24]

States generally have a wide margin of appreciation in adopting laws which strike a balance between a variety of interests, including competing private interests, such as the rights of landlords and tenants. In *James and Others v the United Kingdom,* no. 8793/79, 21 February 1986, the ECtHR considered that the taking of property in pursuance of a policy calculated to enhance social justice within the community could properly be described as being "in the public interest". In particular, the fairness of a system of law governing the contractual or property rights of private parties was a matter of public concern and therefore legislative measures intended to bring about such fairness were capable of being "in the public interest", even if they involved the compulsory transfer of property from one individual to another.[25]

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[21] For obvious ideological reasons dividing the Eastern and Western blocks at the time the Covenant was being negotiated.

[22] Both Monaco and Switzerland have not signed Article 1 of Protocol No.1.

[23] See, for example, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, 30 August 2007.

[24] See *Depalle v. France,* no. 34044/02, [GC], para. 81, 29 March 2010.

[25] See *James and Others v the United Kingdom,* no. 8793/79, para. 41, 21 February 1986

The right to property is, therefore, far from absolute and it may be legitimately restricted in pursuance of many broader and competing economic and social interests. In particular, there are obvious analogies that can be drawn between the promotion of unrestricted access to the seashore in the *Depalle* case and consumers' access to knowledge and culture on the Internet. Like public property, the Internet is an open space that ought to be seen as a common good that must be protected[26] and to which the public at large is entitled to unimpeded access.

As we saw in the previous section, freedom of expression is also a qualified right and the "rights of others" has been interpreted by the ECtHR to include property rights.[27] Nonetheless, there are relatively very few cases in which international courts have had to strike the balance between freedom of expression and the right to property, and none which involve intellectual property rights and the Internet.[28] This may partly be explained by the fact that the Internet is a relatively recent development in international law terms and that most measures affecting Internet access were only recently adopted. Moreover, piracy claims are often settled at an early stage and therefore do not reach national courts, let alone international ones. Legal aid is also unlikely to be available to defend such claims.

At international level, the most relevant case involving a conflict between freedom of expression and the right to property appears to be *Appleby v United Kingdom,* no. 44306/98*,* 6 May 2003 before the ECtHR. In this case, the applicant complained that the State had failed to comply with its positive obligation to secure their right to campaign in the galleries of a Shopping Mall, which was operated by a private party. The Court found no violation of the applicant's right to freedom of expression essentially on the ground that she had other avenues at her disposal to disseminate her views.

In most other cases involving the right to property and freedom of expression before the ECtHR, the property at issue was not private land, but rather involved the State's administration of public property. In *Women on Waves v. Portugal,*[29] for example, the applicants were associations campaigning for the decriminalisation of abortion. They complained that the State's refusal to allow their ship to enter the Portuguese territorial waters was in breach of their right to freedom of expression. The ECtHR upheld their complaint, notably on the ground that the territorial waters were an open public space and therefore the applicants had not trespassed on private land or publicly owned property.[30]

While the IACtHR has dealt with cases raising intellectual property issues (see further below), we are not aware of any cases of the type described above in the Inter-American system of human rights protection. Further research is needed in this area, including on the way in which the

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[26] For a similar analogy with the environment, see J. Boyle, *The Public Domain,* Yale University Press (2008).

[27] See, for example, *Appleby v. United Kingdom,* no. 44306/98*,* 6 May 2003.

[28] While international courts examine claims lodged by individuals against a State, some rights are capable of horizontal application so that States have a positive obligation to secure those rights as between private parties. This is the case, for example, of the right to freedom of expression and the right of privacy. In *Von Hannover (no 2) v Germany,* (nos 40660/08, 60641/08), [GC], 07 February 2012, the ECtHR set out how both rights should be balanced. For a recent example of the balancing exercise between the right to freedom of expression and the right to property at national level, see *Arts groups tell BT to block access to the Pirate Bay,* BBC news, 4 November 2011, available at: http://www.bbc.co.uk/news/technology-15598438.

[29] *Women on Waves v. Portugal*, Application no. 31276/05, 3 February 2009, para. 40.

[30] Compare *Mouvement Raelien v Switzerland,* no.16354/06, 13 January 2011 concerning the administration by the State of public billboards. The case is currently pending before the Grand Chamber.

balance between freedom of expression and the right to property is struck in the case-law of major jurisdictions such as India, South Africa and Brazil.

## Protection of intellectual property

Intellectual property law seeks to protect creations of the mind, including inventions, literary and artistic works, symbols, names, images, and designs used in commerce. It is traditionally divided into two branches: industrial property and copyright. Industrial property includes patents that protect inventions and trademarks which essentially seek to exclusively identify the commercial source or origin of products or services. Copyright, by contrast, relates to artistic creations, such as books, music, paintings and sculptures, films and technology-based works such as computer programs and electronic databases. The term 'copyright' refers to the making of copies of a work, in particular literary and artistic creations, which may only be made by the author or with his authorization.[31]

One of the crucial distinctions between intellectual property rights as opposed to property rights in *material* objects is that there is no possible extinction of the available pool of ideas, inventions and creations of the human mind. Indeed, many have argued that the non-exhaustible nature of intellectual works means that traditional rules for the protection of property are inapplicable. As we shall see below, the fact that intellectual works are not typically consumed by their use and can be used by many individuals concurrently – making a copy does not deprive anyone of their possessions – is at the core of the clash between free expression and intellectual property rights on the Internet.

One of the key rationales for IP law protection is the promotion of literary, musical and artistic creativity, the enrichment of national cultural heritage and the dissemination of cultural and information products to the general public. In particular, copyright is intended to encourage the creation of new works and reward investment in their production and distribution.[32] Another justification for copyright, mostly in civil law jurisdictions, is that a work is the emanation of the personality of its author, who should therefore be put in a position to control his or her creation and be remunerated for it.

More generally, the value of a diverse array of ideas and information has been recognised repeatedly under international law, see e.g. Article 15 of the ICESCR, which guarantees the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its application, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[33]

In addition, intellectual works are extensively protected by a number of international treaties that are administered by the World Intellectual Property Office (WIPO), including the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of

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[31] See WIPO free publications: http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html

[32] See, for example, *Copyright and Human Rights,* Council of Europe publication, June 2009, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf(2009)12_en.pdf

[33] The Committee on Economic, Social and Cultural Rights has published General Comment nos. 17 and 21 in respect of Article 15 ICESCR. The Committee's General Comments provide authoritative guidance on the meaning of Article 15; available at: http://www2.ohchr.org/english/bodies/cescr/comments.htm. See also Article 27 of the Universal Declaration on Human Rights which is drafted in very similar terms to Article 15 ICESCR.

Performers, Producers of Phonograms and Broadcasting Organisations and the WIPO Copyright Treaty.[34]

By contrast, with the sole exception of Article 17 (2) of the EU Charter of Fundamental Rights, intellectual property rights are protected only indirectly under international human rights law. In *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, 11 January 2007, for example, the ECtHR recognised that intellectual property rights fell within the scope of Article 1 of Protocol No. 1 to the ECHR. Similarly, the Inter-American Court of Human Rights (IACtHR) has held that intellectual works are 'assets', which are protected under Article 21 of the ACHR.[35] Indeed, in *Palamara-Iribarne v. Chile,* the IACtHR noted the close relationship between the protection of IP rights and freedom of expression. The Court said:

> [T]he contents of the intellectual property rights which protect the use, authorship, and integrity of the works, and whose exercise includes the right to disseminate the creation, are closely related to the two dimensions of the right to freedom of thought and freedom of expression (supra para. 69).[36]

Although existing case-law on this issue is very sparse, there are also reasons to believe that measures seeking to promote the diffusion of science and culture would be deemed legitimate. In *Akdas v Turkey,* no. 41056/04, 16 February 2010, for example, the ECtHR considered that the seizure of a translation of *Les Onze Mille Verges* by Guillaume Apollinaire and conviction of the publisher hindered the public's access to a work belonging to the European literary heritage. While the case concerned Article 10 of the ECHR, i.e. freedom of expression, there are no reasons in principle why a similar approach could not be applied in the context of intellectual property rights.

At the same time, the case of *Balan v Moldova*[37] suggests that freedom of expression may lose out to copyright where there are other ways of expressing a particular idea without infringing someone else's copyright. In that case, the ECtHR found a violation of the Article 1 Protocol No. 1 in circumstances where the government had used, without permission and without compensation, the applicant's photograph of a castle as background for identity (ID) cards. While recognising the importance of issuing ID cards to the population as an 'undoubtedly important public interest', the Court considered that '*this socially important aim could have been reached in a variety of ways not involving a breach of the applicant's rights*'.[38]

Indeed, traditionally IP law has struck a balance between encouraging creativity and innovation by offering protection to the works of artists and inventors on the one hand, and on the other hand providing the wider public with access to this pool of knowledge and culture through a number of exceptions such as 'fair use' in the United States and limitations to the period of copyright protection.[39] A historical review of IP law is beyond the scope of this paper, but it is useful to bear

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[34] A full list of the treaties and other international agreements administered by the WIPO is available at: http://www.wipo.int/treaties/en/

[35] See *Palamara-Iribarne v. Chile,* judgment of 22 November 2005, paras 102-104, available here: http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf

[36] *Palamara-Iribarne v. Chile,* judgment of 22 November 2005, para. 107.

[37] *Balan v Moldova*, Application no.19247/03), 29 January 2008.

[38] See para. 45 of the judgment. For an analysis of copyright and freedom of expression in the English court and the ECtHR, see Graham Smith, *Copyright and freedom of expression in the online world,* Journal of Intellectual Property Law and Practice, 2010, Vol. 5, No. 2.

[39] See, also the WIPO, *op.cit.*

in mind Lessig's insight that whereas IP law was originally a very narrow and distinctive area of law, which only applied to a small number of booksellers and publishers, the Internet has rendered IP law ubiquitous.[40] So ubiquitous in fact that SciFi writer Cory Doctorow recently made the point that

> [T]here isn't such thing as "copyright policy" anymore. Every modern copyright policy becomes Internet policy – policy that touches on every aspect of how we use the net.[41]

Rights protect interests which are sufficiently important to justify protection by society at large. They protect not only individual interests but also public goods. As can be seen from the above, some of the interests protected by freedom of expression can also be detected in the framework of IP law itself. One of the difficulties with integrating freedom of expression into this debate is that IP law recognises a variety of interests, not all of which can be assimilated to either freedom of expression or the property rights of the rights holders. This is because the public interest under IP law is a broad category and does not just include the public interest in freedom of expression. The purpose of this paper is to invite a reflection on the ways in which freedom of expression can regain its place in the debate on how best to strike a balance between IP rights and freedom of expression. This is all the more important given that, as we will see further below, there is growing discrepancy between the law and social norms.

[40] See Lessig, *Free Culture*, *op.cit.*

[41] Cory Doctorow, *It's time to stop talking about copyright,* 2 November 2011, available at: http://www.locusmag.com/Perspectives/2011/11/cory-doctorow-its-time-to-stop-talking-about-copyright

# Freedom of Expression and Protection of Intellectual Property: the Challenges

## "Online Piracy"

"Online piracy" is at the heart of the current conflict between freedom of expression on the Internet and IP rights. [42] Not that piracy did not exist before the Internet came into existence. Indeed, the creative industry has a long history of battling against new technological developments.[43] One need only think of the *Sony Corp. of America v. Universal City Studios, Inc.*,[44] otherwise known as the 'Betamax' case, in which the Hollywood studios claimed that Sony should be held liable for the production of the home video recording system (VCR) which, the studios said, enabled its users to engage in copyright infringement. The thrust of the studios' complaint was that Sony had created a device, which allowed its users to record copyrighted movies and shows in the comfort of their home for free. The studios lost. The US Supreme Court held that VCR manufacturers should not be held liable for copyright infringement. Moreover, the Court concluded that home recording of TV shows constituted fair use.

There are many other instances of the creative industries waging a war on technological innovations, especially those allowing the making of copies of intellectual works: Xerox photocopiers are another example.[45] Enter the Internet. With its ability to produce digital copies of identical quality to the original at virtually no cost and to distribute them instantaneously and universally, the Internet poses a significant challenge (and creates many opportunities) for the creative industries. In particular, the peer-to-peer (P2P) application which enables Internet users to share content on an unprecedented scale without necessarily distinguishing between copyrighted or non-copyrighted works has been at the heart of the copyright controversy.

### *File-sharing: the industry's perspective*

The arguments of copyright holders are well known and have already been touched on above. Copyright holders essentially assert a property right, one which they say should be respected in cyberspace in the same way as it is respected in the physical world. On this view, intellectual property rights are like property rights in material objects. Nobody would object that stealing someone else's car is wrong. The same applies to copyrighted film or music. And just like it is wrong to steal a CD in a music store, it is wrong to download music without the copyright holder's consent.

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[42] For present purposes, online piracy will be defined as illegal copying, downloading, or selling of copyrighted material such as music, films or software.

[43] See, for example, *A History of Hyperbolic Overreaction to Copyright Issues: the Entertainment Industry and Technology,* Tech Dirt, 9 November 2011, available at: http://www.techdirt.com/blog/innovation/articles/20111108/17562016686/history-hyperbolic-overreaction-to-copyright-issues-entertainment-industry-technology.shtml

[44] *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417 (1984).

[45] See, for example, http://blogs.ischool.berkeley.edu/i103su09/structure-projects-assignments/research-project/projects-and-presentations/copyright-and-the-advent-of-xerox-machines/

Underlying this claim is the assumption that intellectual works have a value, and that if someone wants to enjoy these works or use them for the purposes of creating their own work, they must ask for permission.[46] The point is perhaps best put by Jack Valenti, former President of the Motion Picture Association of America, who said that

> Nothing of value is free. It is very easy ... to convince people that it is in their best interest to give away somebody else's property for nothing, but even the most guileless among us know that this is a cave of illusion where commonsense is lured and then quietly strangled.'[47]

In other words, one of the deeply held beliefs of the creative industries is that they have a 'right to make money' from the creative work in which they have a copyright.

From this perspective, the Internet and P2P technologies have been highly disruptive, in that they have been used to circumvent copyright law and get music and other intellectual works for free. It is argued that every time someone downloads copyrighted music or film without permission, i.e. illegally on the Internet, this is a lost sale for the copyright holder. The content industries have thus time and again declared 'devastating' losses in sales, which they blame on the Internet.[48] This has led to a steady push for copyright law reform to protect them from the changes brought about by the new technologies.

And by and large, their call for greater copyright protection has been upheld both by the legislature and the courts. In the late 90's, for instance, the US Congress adopted the Digital Copyright Millennium Act 1998, which criminalises the production and dissemination of devices and software intended to circumvent Digital Rights Management (DRM) measures. The Stop Online Piracy Act currently being discussed in Congress would allow the Attorney General to cut off copyright infringing sites from the Internet. Similarly, the vast majority of file-sharing lawsuits are regularly upheld in favour of the creative industries.[49]

### *File-sharing: the users' perspective*

What are the arguments on the other side? One important point is that much of the Internet relies extensively on shared material for the purposes of creating original material, whether it is a blog post, a YouTube commentary, fan fiction, a music remix or video mash-up. The very ease with which modern technology allows existing material to be produced, altered and amended on the fly is arguably central to the creativity of the medium itself.

More generally, as Stefan Larsson explains in his thesis "Metaphors and Norms – Understanding Copyright Law in a Digital Society", the 'theft' metaphor used by the entertainment industry to describe copyright infringement is deeply misleading because the basic idea underlying the concept of theft is that one is deprived of one's property, in the sense of losing it. By contrast, file-

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[46] See Lessig, *Free Culture, op.cit.*

[47] Jack Valenti, Testimony at Hearing on Home Recording of Copyrighted Works (1982), available here: http://cryptome.org/hrcw-hear.htm

[48] For example, the Recording Industry Association of America (RIAA) estimates that in the decade since P2P file-sharing site Napster emerged in 1999, music sales in the US have dropped by 47%, from $14.6 billion to $7.7 billion. See RIAA website Q&A section, available at: http://www.riaa.com/faq.php

[49] These lawsuits are regularly documented on websites such as www.torrentfreak.com

sharing enables mere copying, which does not involve the loss of property as such but only the loss of *opportunity* to make a sale.[50] The theft metaphor is therefore premised on the assumption that *every* 'stolen' copy is a lost sale. However, just because someone buys a cheap copy of a song or downloads it for free on the Internet does not necessarily mean that they would or could have bought the song at the market price. This, in any case, does not deprive the copyright holder of his property in the digital world. Therefore, the industry's assertion that the effects of online piracy are 'devastating' must be put into perspective.[51]

Nonetheless, the claim that online piracy is excusable because it does not significantly harm the industry is a controversial one, especially as regards the unlawful taking of copyrighted content for *commercial* purposes. For many, this kind of piracy is morally wrong regardless of the actual harm to its owner.[52] Indeed, even the most vocal defenders of a 'free culture' condemn it.[53]

As for those who use P2P file-sharing instead of buying content for *personal* consumption, they often argue that they would not need to turn to illegal file-sharing services if *'lawful, timely, affordable, competitively priced and wide-ranging choice of digital content'* was made available.[54] In developing countries, for example, affordability is clearly an issue as buying a DVD or a book at the market price is highly likely to be disproportionately expensive for individuals on low incomes.[55]

Even in more developed economies, the absence of legal access to certain types of content is frequently cited as a reason for resorting to P2P file-sharing in breach of copyright.[56] For instance, if Sky does not provide access to the latest US TV shows in the UK, consumers should normally be able to seek access to those TV shows from another provider. If, however, no UK service provider can give access to those TV shows, and the only way to get access to them is using P2P, this is a market failure and consumers should not be penalised for using P2P in breach of copyright.

Similarly, there are those who use P2P to get access to content that is no longer commercially available elsewhere on the market but in which copyright remains. This type of file-sharing is in many ways the online equivalent of second-hand bookshops or libraries, the economic harm to the

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[50] See *Piracy is NOT theft: Problems of a nonsense Metaphor,* TorrentFreak, 4 November 2011, available at: http://torrentfreak.com/piracy-is-not-theft-111104/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+Torrentfreak+%28Torrentfreak%29

[51] See, for example, *Piracy problems? US copyright industries show terrific health,* Ars Technica, 3 November 2011, available at: http://arstechnica.com/tech-policy/news/2011/11/piracy-problems-us-copyright-industries-show-terrific-health.ars; see also William Patry's broader point that it is the market that ultimately determines whether money can be made from copyright in William Patry, *How to Fix Copyright,* Oxford University Press, (2012), p.37.

[52] Indeed, the analogy comes from the law of trespass, which is a strict liability tort in the common law.

[53] See Lessig, *Free Culture*, *op.cit.*; M. Boldrin and D. K. Levine, *Against Intellectual Monopoly,* Cambridge University Press (2008).

[54] See *Ericsson Joins Online Copyright Debate,* Content Technology Magazine, 9 November 2011; available at: http://www.content-technology.com/asiapacificnews/?p=1655

[55] The counter-argument is that many of those countries have signed international agreements that make this type of piracy illegal. Obviously, many have criticised the fact that developing economies are put under great economic pressure from countries like the US or the EU to sign those agreements.

[56] See for example *Hadopi, biens culturels et usages d'Interent: la perception des internautes francais,* HADOPI report, 23 January 2011, available at: http://www.hadopi.fr/sites/default/files/page/download/hadopiT0.pdf

copyright owner is therefore minimal. Lessig argues for example that this type of sharing is socially beneficial because it allows the spread of culture that would otherwise be unavailable.[57]

Others also argue that piracy has created a "television without borders" and is the future of television" as the preferred means of acquiring television for large numbers of people, not because it is free, but because it is the best means currently available of consuming TV.[58]

Another argument which is frequently put forward in defence of piracy is that it helps promote copyrighted works, thereby creating demand for the commercial product, such as software programmes. Talking about China, Bill Gates commented:

> As long as they are going to steal it, we want them to steal ours. They'll get sort of addicted, and then we'll somehow figure out how to collect sometime in the next decade.[59]

One difficulty with the promotional argument, however, is that if 'property' is to mean anything, then the copyright holder will wish to assert control over who gets access to his property: the decision whether to distribute free copies is something the copyright holders will want to make for himself. Nonetheless, a Spanish court recently concluded that P2P file-sharing may boost sales for the music industry.[60]

Finally there are those who use P2P to get access to non-copyrighted material. This entirely legitimate use of P2P is currently seriously at risk of being undermined by court orders to take down entire websites, including legitimate content.[61]

### *File-sharing and freedom of expression*

Freedom of expression is too little mentioned in the public debate over filesharing. Typically, it focuses on whether sharing copyrighted material is illegal or whether it may constitute fair use. For P2P file-sharing sites, therefore, the sole issue becomes whether they encourage or facilitate copyright infringement, rather than the social value of the activity.[62] Most often, arguments relying on freedom of expression provisions are summarily dismissed by the courts.[63]

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[57] See Lessig, *Free Culture*, *op.cit.*

[58] Abigail De Kosnik, *Piracy is the Future of Television*, University of California, Berkeley, 17 March 2010; available at http://convergenceculture.org/research/c3-piracy_future_television-full.pdf

[59] *Gates, Buffett a bit bearish*, CNET, 2 July 1998; available at http://news.cnet.com/2100-1023-212942.html

[60] See *Piracy May Boost Sales,* Torrent Freak, 2 November 2011; available at: http://torrentfreak.com/piracy-may-boost-sales-111102/

[61] See, *Twentieth Century Fox Films and others v. BT*, *op. cit.*

[62] In the US, for example, active encouragement has to be demonstrated: *MGM Studios, Inc. v. Grokster, Ltd,* 545 U.S. 913 (2005).

[63] See, for example, *IFPI v.Beckers*, Court of First Instance, Antwerp, Dec. 21, 1999, RG 99/23830*;* available at http://www.jura.uni-tuebingen.de/-s-besl/text/ifpi-v-beckers.pdf; see also *British Telecommunications plc and Anor v the Secretary of State for Business, Innovation and Skills,* [2011] EWHC 1021 (Admin), available at http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2011/1021.html&query=%22Digital+and+Economy+and+Act%22&method=boolean. The Court of Appeal has granted leave to appeal in this case.

However, sharing information or files is an activity that clearly involves the exercise of freedom of expression. This has been recognised to some extent by academics such Alain Strowel and Vicky Hanley, who have argued that linking is a form of expression that should be protected[64] while at the same time maintaining that '*links that unnecessarily refer to illicit content, such as files infringing copyright'* lose the protection of free expression.'[65]

But Strowel and Hanley miss the point: a measure that would have a disproportionate impact on P2P user's freedom of expression, e.g. cutting off access to the Internet, would be disproportionate, regardless of whether or not such users are engaged in copyright infringement. Nor does it address the prior question of whether the claim of copyright was itself justified, or the extent of what may legitimately be considered fair use. Indeed, as we will see further below, arguments based on freedom of expression are likely to be most effective when examining unduly harsh enforcement measures.

The more difficult question is whether or not a particular intellectual work deserves the protection of copyright and whether IP law strikes the right balance between fostering innovation and access to culture by the wider public. The latter is clearly a freedom of expression issue.

## Access to culture

A more general problem, which is often downplayed in the debate on IP law and freedom of expression, is that the Internet has made IP law omnipresent in our everyday life, at least to the extent that it involves going on the Net. As noted earlier, this is particularly problematic in the context of the explosion of amateur culture that the Internet has enabled.[66] It is increasingly difficult for non-professionals, and indeed professional artists, to create derivative works without stumbling on IP rights claims.[67]

There are two main reasons for this: first, the scope of protected rights in relation to intellectual works has been vastly expanded over the years, and secondly, the term of copyright protection has steadily been increased.[68] The irony is that much of the creative industries have heavily relied on 'free culture' themselves: Disney was free to draw upon folk culture and other materials freely available in the public domain.

### *Derivative works in the digital age*

One of the main criticisms of copyright protection is that its scope has been unduly broadened to cover derivative works, i.e. creative works that build on existing content. This means, for example, that in order to produce a film, a large number of licences must be sought from copyright holders, e.g. if a movie features a contemporary painting for a couple of minutes, a licence would normally

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[64] A. Strowel and V. Hanley, "Secondary Liability for Copyright Infringement with regard to Hyperlinks" in *Peer-to-Peer File-Sharing and Secondary Liability in Copyright law,* Edward Elgar Publishing, (2009), at 71.

[65] *Ibid.*

[66] L. Lessig, *Code Version 2.0,* (2006), available at: http://codev2.cc/. Boyle makes a similar point in *Public Domain, op.cit.*

[67] *Ibid.*

[68] The EU Commission has just approved a 20-year extension of the copyright term in sound recordings: http://www.wired.co.uk/news/archive/2011-09/08/eu-copyright-extension

have to be sought from the artist in order to use a very short snapshot of his painting. This can have a deeply chilling effect on the production of cultural goods for those who try to play by the rules of copyright law. If the artist demands GBP 10,000 for a 3 minute shot of his painting, independent movie makers are unlikely be able to afford it and may well have to abandon the idea of making a film altogether. Similarly, some companies have taken to restricting photography of their buildings on the grounds that reproduction of pictures infringes the copyright in the building's design. Whether or not such claims are ultimately unjustified is beside the point. The threat of litigation can sometimes be enough to deter would-be creators of original content. On a larger scale, if less culture is being produced, by the same token, the public will get less exposure to a wide range of information and ideas.

Some of these issues could perhaps be avoided using the fair use (US) or fair dealing (UK) doctrine in common law countries, or relying on a number of exceptions to copyright in civil jurisdictions. However, the recent example of the Lady Googoo song being taken down from the Monshi Monsters channel on YouTube suggests that the freedom to create artistic works is being left to the subjective assessment of judges applying the property-orientated approach of IP law.[69]

The same also applies in principle to derivative user-generated content (UGC). Given the number of Internet users who engage in creative activity such as 'rip, mix, burn ' and 'mash-ups', however, a recent study of the Council of Europe recommended that COE member states should review their legislation and consider taking measures to allow creative and transformative use of original works for non-commercial purposes.[70]

### *Unlocking the public domain*

The steady increase of copyright terms is a major issue for access to culture as it effectively means that fewer and fewer works enter the public domain. James Boyle thus comments that

> [M]ost of culture of the twentieth century is still locked up and will be for many years to come.[71]

This is especially worrying at a time where new technologies have enabled exponential amateur creativity. Nonetheless, the EU recently extended the copyright term of sound recording from 50 to 70 years[72] and given the history of copyright,[73] there are reasons to believe that the creative industries may ask for longer terms in the future.

Some however are questioning whether the extension of copyright terms the creative industries regularly demand is warranted. Interestingly, the Hargreaves Review into UK Copyright law

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[69] See Lady Gaga bans Lady Googoo song, BBC news, 14 October 2011, available at: http://www.bbc.co.uk/news/entertainment-arts-15307052. In particular, the Lady Googoo story point to an anomaly of English law which does not allow copying for parody purposes.

[70] See Group of Specialist on Human Rights in the Information Society, *Copyright and Human Rights*, Council of Europe Publishing, June 2009, available at: http://www.bka.gv.at/DocView.axd?CobId=40267. The study also mentions a number of national and EU initiatives on this subject.

[71] Boyle, *Public Domain, op. cit.*, at 131.

[72] See Directive 2011/77/EU available at : http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm

[73] See Lessig, *Free Culture, op.cit.*, at 86 ff.

recently suggested that objective evidence supporting the need to extend copyright terms is lacking at present. [74] In 2003, the Economist suggested to go back to the initial 14-year term of 18th century British and American copyright laws. [75]Others, like Lessig, suggest a maximum copyright term of 75 years granted in five years increments.[76] Whether 14 or 75 years, the current life plus 70 years that is currently the norm seems hardly justified.

Another side effect of the extension of copyright terms worldwide is the growing number of orphan works - works whose access is locked because their author cannot be traced. The 'unlocking' of orphan works has been strongly recommended both at national and international level. For example, the Hargreaves review recommended that the UK government take a lead in this area, which is also under examination in the EU.[77] This means that libraries must be allowed to digitize these works in order to make this pool of knowledge widely available to the general public.[78] Conversely, the work of companies such as Google in leading digitization projects may seem a positive measure up until the point that they begin to acquire exclusive rights over the content or, at least, access to it.

### *Alternative models of information sharing*

Authors like Lessig or Boyle have warned about the dangers of the relentless expansion of the reach of copyright law that increasingly bars access to our cultural heritage.[79] In particular, they have documented some of the ways in which copyright has considerably reduced our ability to build on the work of others to create a vibrant cultural environment. At the same, they have suggested ways of moving forward to stem the tide of copyright law.

For instance, Lessig was one of the founders of Creative Commons, which is essentially a licensing scheme that allows authors to give others greater freedoms to build on their work than fair use.[80] Similarly, the private sector launched the Open Invention Network, which acquires patents and licenses them royalty-free to create a collaborative environment.[81] Both initiatives have helped nurture the otherwise shrinking public domain. These 'emerging models for content dissemination and sharing' have won praise from the Council of Europe which recommended that more research should be conducted in this area at state level[82].

Access to culture in the digital age cannot be limited to IP law solutions however. Some, for example, have underlined the importance of 'code', i.e. technology, in solving some of the issues

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[74] See Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, May 2011, at 20, available at: http://www.ipo.gov.uk/ipreview-finalreport.pdf

[75] *A Radical Rethink: the best way to foster creativity in the digital age is to overhaul current copyright laws,* the Economist, 23 January 2003; available at: http://www.economist.com/node/1547223

[76] L. Lessig, *Future of Ideas,* (2001).

[77] See Hargreaves Review, *op. cit.,* at 40.

[78] *Ibid.*

[79] See Lessig, *Code Version 2.0, op.cit.*; Boyle, *op. cit.*

[80] See http://creativecommons.org/

[81] See http://www.openinventionnetwork.com/

[82] See Council of Europe, *Copyright and Human Rights* report, *op. cit.*

outlined above.[83] Economists have generally emphasised the role of new business models in fostering growth in the creative industry.[84] The challenge for human rights advocates is to send a clear message that IP law is as much about freedom of expression as it is about competition law and technology.

[83] See for example J. Zittrain, *The Future of the Internet,* Penguin, (2008). Although technologies such Digital Rights Management systems have created their own set or problems, for example the criminalisation of the dissemination of circumvention technologies, see: https://www.eff.org/deeplinks/2008/10/dmca-ten-years-unintended-consequences

[84] See above, in relation to "piracy."

# IP Enforcement and Freedom of Expression: Finding the Right Balance

Whatever the broader merits of a radical overhaul of IP laws, there is no doubt that it is those measures taken to protect and enforce IP rights that pose the most immediate threat to Internet freedom and freedom of expression generally. There are now a wide variety of measures that may be taken against individuals and ISPs for the purpose of protecting IP rights, depending on the jurisdiction in question. Some of these (e.g. content-filtering) are not necessarily restricted to alleged IP infringement. In other instances, the measures are specific to the nature of the infringement (e.g. the provision of criminal offences for copyright infringement). In every case, however, the conflict between freedom of expression and IP rights is either the sole or primary justification for the measure in question. This section examines the most common forms of protection and enforcement measures: (i) website blocking; (ii) content filtering; (iii) cutting off access to the Internet; (iv) content removal (otherwise known as 'notice and takedown') which is linked to the issue of civil liability of intermediaries; (v) other forms of civil liability of alleged infringers; and (vi) criminal liability.

## Blocking, Filtering and Disconnection

Website filtering and blocking and cutting off access to the Internet ('disconnection') are measures which have come to be seen by copyright holders as a silver bullet in their fight against online piracy. However, they are a cause for major concern from a legal and human rights perspective. In outline:

- Cutting off a person's access to the Internet is a draconian measure, which is almost always likely to be a disproportionate restriction on free speech;
- Blocking and filtering measures result in access to legitimate content being wrongfully restricted, either because (a) court orders are overbroad,[85]or (b) copyright holders make unreasonable or unfounded demands on an Internet Service Provider to remove or block material on the Web,[86] or (c) filtering or blocking mechanisms accidently deny access to legitimate content;
- In the large majority of cases, website blocking is implemented by intermediaries without a court order, following policies that lack transparency;
- Website blocking and filtering measures are unreliable and ineffective in any event;
- The availability of measures as harsh as cutting off access to the Internet for mere copyright infringement in some jurisdictions sends a signal to rogue governments, and indeed democratic ones, that the same sort of measures could be used in a more sensitive context,

[85] See *Twentieth Century Fox Films and Others v BT,* [2011] EWHC 1981 (Ch); cited above.

[86] See *Warner Bros Admits Sending HotFile False Takedown requests,* Torrent Freak, 10 November 2011, available at: http://torrentfreak.com/warner-bros-admits-sending-hotfile-false-takedown-requests-111109/

for example to write off 'harmful' speech or suppress political dissent under the guise of 'national security' concerns.

All these measures have been widely criticised by internet experts and activists as profoundly antithetical to the ethos of the Internet, which was developed in a spirit of unlimited freedom to share information.[87] As this paper has sought to demonstrate, they are also profoundly inimical to free speech. While the provisions protecting freedom of expression do not detail which types of restrictions are permissible under international law, restrictions on free speech such as blocking or filtering must meet the three-part test described in part I above.[88]

### *Blocking and filtering*

Blocking and filtering measures prevent end-users from getting access to certain content but leave that content online. In this sense, they must be distinguished from content removal or 'takedown', which is examined in more detail further below in relation to intermediary liability. While blocking software typically block access to sites included on a blacklist, filtering software block pages containing certain keywords related to content deemed inappropriate or unlawful.

There are several blocking/filtering techniques that can be used to restrict access to websites on the Internet with varying degrees of precision.[89] The most common methods used, either alone or combined, include: [90]

- Uniform Resource Locator (URL) blocking, which allows the blocking of specific web pages;
- Internet Protocol (IP) address blocking, which prevents the connection between a server or website and certain IP addresses, i.e. websites, mail servers or other Internet servers;
- Domain Name System (DNS) tampering, which bars access to entire domain names; and
- Deep-Packet-Inspection (DPI), which scans the content of each data packet that passes through its network.[91]

Examples of web filtering and blocking measures abound and, as noted above, are not limited to copyright infringement. To cite but a few, in 2009, Turkey blocked access to the site http://sites.google.com to prevent a doctoral student from publishing his views on that site. A wide range of users of the site were unable to access the site as a result. A case is currently pending against Turkey in the European Court of Human Rights.[92] Similarly, China uses very sophisticated filtering software that among other things denies its citizens access to politically sensitive

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[87] See Tim Berner-Lee, *Long Live the Web: a Call for Continued Open Standards and Neutrality,* Scientific American, 22 November 2010: http://www.scientificamerican.com/article.cfm?id=long-live-the-web

[88] See also, for example, the four Special Rapporteurs' Joint Declaration on Freedom of Expression and the Internet, June 2011, available at: http://www.article19.org/data/files/pdfs/press/international-mechanisms-for-promoting-freedom-of-expression.pdf

[89] Each of these methods also has various implications for the integrity of the network, i.e. the very architecture of the Internet.

[90] For a short introduction to web filtering, see http://opennet.net/about-filtering.

[91] DPI is commonly used for network management purposes, e.g. to filter out viruses and spam. If used for other purposes, however, it can significantly interfere with the right to privacy.

[92] See *Yldirim and Akdeniz v Turkey,* nos. 3111/10 and 20877/10, communicated on 16 February 2011. Similarly, YouTube has been blocked on and off in Turkey for over two years: http://news.cnet.com/8301-1023_3-20021288-93.html.

websites. In the field of copyright, a number of Hollywood studios recently obtained a court order blocking access to the Newzbin site in the United Kingdom.

One of the issues with these types of measures is that they are not always provided by law.[93] When that is the case, the restriction is *per se* illegal under international law.

If provided by law, these measures are often disproportionate. As the UN Special Rapporteur on freedom of expression recently pointed out: [94]

> [E]ven where justification is provided, blocking measures constitute an unnecessary or disproportionate means to achieve the purported aim, as they are often not sufficiently targeted and render a wide range of content inaccessible beyond that which has been deemed illegal.

More generally, it is important to appreciate that, while blocking of certain websites or filtering of certain terms may seem acceptable (e.g. for the protection of children), the basic problem is that no code is perfect and is therefore likely to block or filter more content than it is supposed to.[95] For instance, the UK media regulator, Ofcom, recently warned that currently available blocking techniques typically carry a risk of over-blocking and are not a 100% effective.[96] In particular, legitimate sites may be blocked because they use the same IP address as unlawful sites. Moreover, website blocking, as opposed to blocking of specific webpages, ignores the fact that the content of websites changes is liable to change over time, often significantly.[97]

Another cause for concern is that content is often blocked without the intervention of or possibility for review by a judicial or independent body.[98] Similar concerns arise in relation to removal of content under the so-called notice and take-down procedure (see civil liability of intermediaries further below).

Filtering systems can also be problematic. In this regard, the four special mandates for the protection of freedom of expression recently stated that:[99]

> Content filtering systems which are imposed by a government or commercial service provider and which are not end-user controlled are a form of prior censorship and are not justifiable as a restriction on freedom of expression.

Similarly, the Court of Justice of the European Union (CJEU) recently held in *Scarlet Extended v* SABAM[100] that blanket web filtering systems installed by ISPs to prevent illegal file-sharing on

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[93] See OSCE Report, Freedom of Expression on the Internet, 2011, available at: http://www.osce.org/fom/80723

[94] See UN Special Rapporteur's report, *op.cit*.

[95] Moreover, as blocking is imperfect, there is a corresponding risk of under-blocking, which is particularly problematic in the case of online child protection as parents derive a false sense of security from the knowledge that web blocking measures are in place. It is important not to forget however that web-filtering is no substitute for law enforcement and prosecution of serious crimes committed over the internet.

[96] Ofcom, *'Site-blocking' to reduce online copyright infringement: a review of sections 17 and 18 of the Digital Economy Act,* 27 May 2011, available at: http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf

[97] See for example *Wayne Crookes v Newton*, 2011 SCC 47, in which the Supreme Court of Canada concluded that there could be no liability for hyperlinking in a defamation claim.

[98] See, for example, UN Special Rappoteur's report, *op.cit.*

[99] See 2011 Joint Declaration on Freedom of Expression and the Internet, *op.cit.*

peer-to-peer networks was incompatible with fundamental rights. [101]The Court made it clear that intellectual property rights as enshrined in the EU Charter of Fundamental Rights are far from absolute and that there was nothing whatsoever in the Charter or the Court's jurisprudence to suggest that such rights must be protected at all costs[102]. This ruling was strongly reaffirmed in *SABAM v Netlog* which raised the same question in relation to social networks.[103]

An additional issue is that the content industry often strives to remove, block or filter more content than is necessary to protect their interests: it was recently reported that Warner Bros had sent takedown requests to a file-sharing site in relation to materials in which it had no copyright.[104] This, however, is penalised in some countries. For example, the US Digital Millennium Copyright Act 1998 imposes liability on those who demand the removal of information knowing that the material is not unlawful.[105]

### *Disconnection*

The increasing number of states that have adopted "graduated response" laws to combat online piracy is equally worrying, e.g. the so-called Hadopi law in France, the Digital Economy Act in the United Kingdom. A similar "three-strike" law recently came into force in New Zealand.[106] In a nutshell, these laws require ISPs to disconnect Internet users from the Internet if they are found to be engaged in copyright infringement.

Disconnection is a drastic measure which is almost always likely to be a disproportionate restriction on free speech. In this regard, it is worth noting that the UN Special Rapporteur on Freedom of Expression recently expressed alarm at proposals to disconnect internet users from the Internet if they violate intellectual property rights.[107]

## Civil Liability of Intermediaries

In addition and related to the above, there is the equally pressing issue of intermediary liability for hosting websites or providing services to those alleged to be engaged in copyright infringement.

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[100] See *Case C-70/10 Scarlet Extended SA v Societe belge des auteurs compositeurs et editeurs (SABAM),* judgment of 24 Novembre 2011. A link to the judgment is available from ARTICLE 19's press release: http://www.article19.org/resources.php/resource/2872/en/landmark-digital-free-speech-ruling-at-european-court-of-justice

[101] In particular, the Court held that blanket web filtering was incompatible with freedom of expression and the right to privacy.

[102] See para. 43 of the judgment.

[103] See Case C-360/10 *Sabam v Netlog,* judgment of 16 February 2012. See also ARTICLE 19's press release: http://www.article19.org/resources.php/resource/2968/en/web-filters-preventing-illegal-sharing-violate-rights-says-eu-court .

[104] See the *Warner Bros Admits Sending False Take-Down Requests to Hotfiles* story cited at n 78 above.

[105] See §512 DMCA, Section f.

[106] The Copyright (Infringing File Sharing) Amendment Act 2011, New Zealand, *op.cit.*

[107] See UN Special Rapporteur on Freedom of Expression report, *op.cit.*

Since the Internet is essentially privately controlled, intermediaries have come to be considered as the gatekeepers of the Internet, facilitating the free flow of information and ideas worldwide.[108] For this reason, intermediary immunity from liability for third-party content has been considered crucial by digital rights defenders to preserve the Internet as a free platform for the exchange of information and ideas. Given the huge amount of information that goes through the Internet, and that could potentially be unlawful, e.g. copyright law, defamation laws, hate speech laws, criminal laws for the protection of children against child pornography and so forth, ISPs have had a strong interest in seeking immunity from liability on the Internet.

And, in many western countries, intermediaries have been granted immunity for third-party content.[109] They have also been exempted from monitoring content. [110] However, they have been made subject to 'notice and take-down' procedures, which creates a powerful incentive for them to remove content once they are put on notice by private parties or law enforcement agencies that a particular content is unlawful: i.e. failure to remove unlawful content will result in the loss of their immunity from liability. This system can be found for example in the E-commerce directive in the EU[111] and the Digital Copyright Millennium Act 1998 (the so-called 'safe harbours').

The problem with this procedure, however, is its lack of fairness: rather than obtain a court order requiring the intermediary to remove infringing material (which, in principle at least, would involve an independent judicial determination that there was an infringement of copyright), intermediaries are encouraged to act merely on the say-so of a private party or public body leading to the removal of content that may be entirely legitimate. This is because the mere assertion that particular content is in breach of copyright does not mean that the expression at issue is unlawful. This point is well illustrated by the Darfunica case, in which a District Court of the Hague rejected Louis Vuitton's argument that the depiction of its handbag in a painting about famine in Darfur was a breach of Vuitton's intellectual property rights.[112]

A similar problem arises for the regional and national bodies responsible for registering domain names, such as Nominet in the UK. Not only public bodies but increasingly private companies are making requests for domains to be removed or frozen by the Registry itself. Again, there can be legitimate reasons for doing so (e.g. domain names engaged in serious criminality) but there is also obvious potential for rights-holders to use Registry removal as a means to address alleged violations of copyright.

The right to freedom expression requires greater protection than this. Accordingly, the four special rapporteurs on FOE have recommended that no one should be liable for content produced by

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[108] For present purposes, 'intermediaries' includes ISPs, social networks, search engines, advertisers and online payment services. See also 'information society service providers' as defined under the E-commerce; available at: http://ec.europa.eu/internal_market/e-commerce/directive_en.htm.

[109] See for example, the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, the "E-commerce Directive" in the EU or the Communications Decency Act 1996 in the US. By contrast, some countries impose liability on ISPs, such as Turkey or Thailand. For more details on these laws, see the UN Special Rapporteur's report, *op. cit.*; for a study of the laws in the OSCE region, see the OSCE Freedom of Expression and the Internet report, *op.cit.*

[110] See, for example, Article 15 of the E-commerce Directive; available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:NOT.

[111] *Ibid.*

[112] District Court of the Hague, 4 May 2011, IER 2011/39.

others when providing technical services, such as providing access, searching for, or transmission or caching of information.[113] Liability should only be incurred if the intermediary has specifically intervened in the content, which is published online.[114] They have further recommended that ISPs and other intermediaries should only be required to take down content following a court order, contrary to the practice of notice and takedown.[115]

Similarly, a number of NGOs and civil society groups, such as ARTICLE 19, have insisted that the decision to remove content should be made by a judicial authority. A court-based system would also deal with another issue, namely that notice and take-down procedures lack sufficient transparency. ACCESS, for instance, recently proposed the creation of a special administrative system to deal with take-down requests.[116]

## Civil liability of the alleged infringer

In addition to the secondary measures described above, copyright infringement is of course a civil wrong and actionable as such. In one sense, it is of course better that IP owners pursue their actions through the courts rather than via such extra-judicial measures as notice and takedown: this, at least, affords the individual affected the opportunity to present their case. The reality, however, is that the threat of civil litigation is frequently used to pressure individuals from any use of copyrighted material on the Internet, whether or not it may constitute fair use, etc.

For instance, many individuals suspected of being involved in copyright infringement are routinely sent intimidating cease-and-desist letters to put an end to alleged copyright infringements. Cease-and-desist letters, i.e. the threat of litigation, are problematic for a number of reasons:

- The letters hit at the wrong target causing unnecessary distress, e.g. when someone's wifi network has been hacked by someone else to illegally downloads music;[117]

- The threat of litigation stifles creative activities: creators opt to take down material alleged to infringe copyright rather than assume the risk of litigation that they cannot afford, even though they might ultimately have been successful on fair use grounds;

- The creative industries and lawyers have used the threat of litigation as a way of making profit.[118]

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[113] See 2011 Joint Declaration on Freedom of Expression and the Internet, *op.cit*.

[114] *Ibid.*

[115] *Ibid.* A case raising this issue is currently pending before the ECHR in relation to defamation claims, *Delfi A.S. v. Estonia*, (communicated).

[116] See Access, *Towards a Rights-Respecting Copyright Enforcement Mechanism: An Alternative to Notice and Take-Down,* September 2011, available at: https://s3.amazonaws.com/access.3cdn.net/1a153f88d1ada103f3_1cm6ivbpt.pdf

[117] See Consumer Focus, *Consumer Focus and Citizens Advice response to notification of Digital Economy Act cost sharing order,* October 2011, available at: http://www.consumerfocus.org.uk/files/2010/10/Consumer-Focus-and-Citizens-Advice-response-to-notification-of-Digital-Economy-Act-cost-sharing-order.pdf

[118] See *How Mass Bit Torrent Lawsuits Turn Low-Budget Movies into Big Bucks,* Wired, 31 March 2011, available at: http://www.wired.com/threatlevel/2011/03/bittorrent/

More generally, there is almost always a mismatch between the resources available to private users and those of larger IP rights-holders who can typically afford to engage in lengthy litigation to protect their interests. Of course, this problem is not limited to IP law and indeed raises broader issues of access to justice and low-cost forms of dispute resolution. Nonetheless, the very scale of the Internet means that the assertion of IP rights has become much more widespread than in the past.

## Criminal liability

Copyright enforcement is not just a matter of civil liability. Under pressure from the creative industries, criminal law is increasingly relied upon to enforce IP rights. The argument goes like this: since IP rights' infringement is theft, i.e. a crime, it should accordingly be punished with criminal sanctions. Like piracy itself, criminal sanctions for copyright infringement are not a recent phenomenon but, again like piracy, the prospect of criminal sanctions has grown in significance with the rise of the Internet.[119] For instance, Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) 2001 requires signatory countries to establish criminal procedures and penalties in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.

More recently, the scope of criminal sanctions for copyright enforcement has been widened at international level with the adoption of ACTA.[120] Indeed, ACTA goes beyond the wording of Article 61 of the TRIPs agreement by defining acts carried out on a commercial scale as "*acts that include at least those carried out as commercial activities for direct or indirect economic or commercial advantage*". Moreover, Article 23.4 provides that signatory countries must ensure that aiding and abetting laws are enacted in respect of the intellectual property–related crimes. The criminal provisions of ACTA have been widely criticised by academics and NGOs alike.[121] In particular, it has been said that under Article 23.1 of ACTA, innocent or trivial infringement of intellectual property rights could be criminalised thanks to an overly broad definition of 'commercial scale'.[122]

The criminal law has also been used to penalise the circumvention of digital rights management (DRM) systems used by copyright holders to protect their rights. For example, Sections 1201 *et seq.* of the Digital Copyright Millennium Act 1998 criminalise the circumvention of technological measures that effectively control access to a protected work. The production and distribution of software, services or other devices intended to circumvent DRM measures is also criminalised. Similar measures can also be found in ACTA.

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[119] This has been matched with an increase in extradition requests for criminal copyright infringement. A prime example is the recent high-profile extradition of British student, Richard O'Dwyer, and Megaupload boss, Kim Dotcom, for copyright infringement: http://www.wired.co.uk/news/archive/2012-03/13/odwyer-extradition

[120] For a more in-depth analysis of ACTA, see our briefing at: http://www.article19.org/data/files/medialibrary/2901/11-12-14-acta-V2.pdf. While ACTA has been signed, it has not yet been ratified. As of May 2012, ratification of ACTA has been suspended in the EU with the European Parliament set to vote on the agreement's ratification in July 2012.

[121] For a summary of those criticisms, see D. Korff and I. Brown, *Opinion on the compatibility of the Anti-Counterfeiting Trade Agreement with the European Convention on Human Rights and the EU Charter of Fundamental Rights,* 31 August 2011, available at: http://www.greens-efa.eu/fileadmin/dam/Documents/Studies/ACTA_fundamental_rights_assessment.pdf

[122] *Ibid.,* at 26 *et seq*.

One of the best examples of the incongruous consequences of circumvention provisions and how they can chill free speech involved an academic named Ed Felten, a computer scientist who had published a paper showing DRM technology could be evaded. As a consequence, he was threatened with litigation by the Recording Industry Association of America (RIAA) under the terms of the DCMA.[123] While his paper could clearly have helped the creative industries by developing a more reliable DRM system, he was threatened with litigation instead. More generally, it highlights how academic freedom and free expression are diminished by the threat of the criminal law.

More broadly, ACTA is an example of a legislative scheme that enables law enforcement agencies to take action of their own motion to fight IP rights-related infringement, i.e. without as much as a complaint from right holders. This is consistent with the practice of law enforcement agencies in a number of jurisdictions to deal directly with the ISP or Registry body to remove alleged copyright infringing websites or domains as the case may be, rather than to seek a court order, for reasons of expediency.[124]

More fundamentally, there appears to be a growing divergence between the measures levelled against alleged copyright infringers and what is perceived to be acceptable behaviour by the public. There is an increasing widening gap between laws that, by and large, disproportionately favour the creative industries and social norms.[125] However, for a law to be respected, it cannot fly in the face of common sense and social values. As Lessig notes:

> When at least forty-three million citizens download content from the Internet, and when they use tools to combine that content in ways unauthorised by copyright holders, the first question we should be asking is not how best to involve the FBI. The first question should be whether this particular prohibition is really necessary in order to achieve the proper ends copyright law serves.[126]

Imposing criminal sanctions on someone for sharing songs or movies that they like on peer-to-peer networks for no profit is not only unnecessary to achieve the ends of copyright law; it is also at loggerheads with freedom of expression. It has long been recognised that, subject to very narrow exceptions, criminal sanctions for speech-related offences are in breach of international human rights law as they have a chilling effect on freedom of expression.[127] There are therefore good reasons to believe that if criminal sanctions were to be imposed for merely sharing culture in ways unauthorised by copyright holders, they would not pass muster at least in human rights tribunals.

The primary driver of creativity and innovation is not copyright or intellectual property. It is the free flow of information and ideas. By pushing for ever stronger penalties against individuals who

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[123] Felten eventually brought a lawsuit against the RIAA, which was supported by the Electronic Frontier Foundation. The case was eventually dismissed for lack of standing. More details about the case can be found here: https://w2.eff.org/IP/DMCA/Felten_v_RIAA/; see also Lessig, *Free Culture,* cited above, at 155 *et seq*.

[124] This much was suggested by Charlie McMurdie, of Police Central e-crime unit, UK Metropolitan Police Service, at the London Cyberspace Conference, 1 November 2011.

[125] See, for example, Torrent Freak, *File-Sharing Prospers Despite Tougher Laws,* 22 May 2012, available at: http://torrentfreak.com/file-sharing-prospers-despite-tougher-laws-120522/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+Torrentfreak+%28Torrentfreak%29.

[126] Lessig, *Free Culture, op.cit*, at 202.

[127] These are hate speech, child pornography, incitement to terrorism and incitement to commit genocide. See UN Special Rapporteur's report, A/66/290, 11 August 2011, paras 20-36.

simply want to share culture, the creative industries only highlight the fact they have failed to adapt to the realities of the 21st century and bring IP law into further disrepute. Now is time to strike the right balance between freedom of expression and intellectual property rights.