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FILE SHARING, COPYRIGHT AND FREEDOM OF SPEECH

Enrico Bonadio *

Abstract

The article explores the relationship between copyright and freedom of speech in the Internet environment. After highlighting the constitutional dimension of these conflicting rights, the phenomenon of file sharing and the role of Internet Service Providers (ISPs), the author analyzes the debate surrounding a particular sanction used in certain jurisdictions to punish unauthorized on line sharing of copyrighted material, i.e. the disconnection of Internet access. The increasingly important role played by private agreements between copyright holders and ISPs is also highlighted.
A set of proposals aiming at identifying possible areas of freedom for unauthorized file sharers are then analyzed.
In particular, the author believes that file sharing technologies may boost the exchange of information, opinions and ideas amongst Internet users and foster a number of values underpinning the very protection of free speech. It is for this reason – the author argues - that copyright rules might be relaxed when it comes to file sharing technologies, e.g. by transforming copyright from a "proprietary" to a "compensation" right.

1) Introduction

This article explores the relationship between copyright and freedom of speech in the digital environment. In particular, the author looks at the well known phenomenon of file sharing on the Internet, which often involves the exchange of information protected by copyright. The author also explores how a possible conflict between copyright and freedom of expression emerges and may be settled in the Internet environment (also in light of the European Convention on Human Rights). After briefly highlighting the constitutional dimension of these conflicting rights and introducing the phenomenon of file sharing, the author turns his attention to the debate surrounding a particular sanction used in certain jurisdictions to punish unauthorized on line sharing of copyrighted material, i.e. the disconnection of Internet access.

The author also analyzes the increasingly important role played by private agreements between copyright holders and Internet Service Providers (ISPs), i.e. a strategy of compelled voluntary collaboration currently pursued by certain copyright holders. This new strategy confirms that public law is not anymore the only vehicle through which copyright owners enforce their exclusive rights in the Internet context.

Finally, a set of proposal aiming at identifying possible areas of freedom for unauthorized file sharers are analyzed.

2) The constitutional dimension of the two conflicting rights

Both freedom of speech and copyright have a constitutional dimension.

Freedom of expression is strongly protected by all many countries' constitutions. For

example, in the US free speech is protected by the First Amendment to the Constitution as well as by many states' constitutions. Freedom of expression is also protected in the European Charter of Fundamental Rights (Article 11), the European Convention on Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 19) and the Universal Declaration of Human Rights (Article 19). The importance of protecting free speech has also been stressed several times by the European Court of Human Rights, the European Court of Justice and the US Supreme Court.

Also intellectual property rights (IPRs), and particularly copyright, are constitutionally protected in some countries (yet only a few industrialized countries' constitutions expressly protect copyright). For example, Section 1(8) US Constitution states that "*the Congress shall have the power to* […] *promote the Progress of Science and useful Arts, by securing for Limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*". In Europe three national constitutions expressly define copyright as fundamental right[1]; in most other European states the constitutional nature of copyright is merely inferred by constitutional courts in their decisions[2].

Furthermore, copyright and IPRs in general are recognised as human rights in several international treaties, including the Universal Declaration of Human Rights[3] and the European Charter of Fundamental Rights[4].

It is often said that copyright is constitutionally protected because it turns out to be "*engine of free expression*", as it was stated by the US Supreme Court in *Harper & Row*[5]. Indeed, by granting authors exclusive rights for the commercial exploitation of works, copyright gives an important incentive for the creation and diffusion of music, literature, art, movies, etc.

Yet, copyright is also capable of stifling freedom of expression. Indeed, copyright confers upon its owner exclusive rights, including the right to prevent copying or even access the whole or a substantial part of a protected work. For example, by relying on technology protection measures right owners can prevent people from accessing scientific articles published in online academic journals. In such a manner users can be prevented from accessing existing information, which in turn might negatively affect the ability of forming people's own opinion and expressing it. Thus copyright can be used to restrict the free use of existing works and as a result it has the potential to limit the flow of information necessary to form and communicate personal opinions. In other words, the creation of subsequent works ("down-stream" creations) often relies on the possibility of accessing and studying previous works ("up-stream" creations). If access to existing works is hindered,

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[1] See the Swedish Constitution (Article 19, par. 2), Portuguese Constitution (Article 42) and Spanish Constitution (Article 20).

[2] As far as the constitutional nature of IPRs is concerned, see Cristophe Geiger, *The Constitutional Dimension of Intellectual Property*, in Paul Torremans (ed.), *Intellectual Property and Human Rights*, Walters Kluwer, 2007, pp. 101-131.

[3] Article 27.2 of the Universal Declaration of Human Rights states that "*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*"

[4] Article 17.2 of the European Charter of Fundamental Rights simply states that intellectual property shall be protected.

[5] *Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558* (1985).

opportunities of coming up with new works are also likely to be reduced, which in turn may jeopardize the progress of our society's cultural life.

The fact that copyright has the potential of both enhancing and stifling freedom of expression has been labeled by Neil Netanel as the "copyright's paradox" [6]: indeed, copyright stimulates some speech ("up-stream" speech) while abridging other speech ("down-stream" speech)[7]. As will be shown later, in the digital environment it appears that copyright protection is more prone to stifling free speech rather than stimulating it.

3) Internet access as human right

As said above, the right to free speech is a fundamental right enshrined in several international instruments.

In the current digital age people express their opinion and ideas via the Internet. It is in the web where people, organizations, artists, musicians, etc. find opportunities and chances to form, modify, tailor and express their ideas. Thus, gaining access to Internet has become an important prerequisite for people and organizations to acquire the knowledge necessary to form and express their opinions and creativity. Access to, and use of, Internet strongly enhances freedom of speech.

It is therefore no surprise that there has recently been a push by the United Nations to make Internet access a human right. The right to Internet connection – also known as right to broadband – has been increasingly perceived as acquiring the same relevance as the right to other public goods, such as water, air, healthcare, education, etc. Internet has become vital in everyday life (*e.g.* for connecting families and friends, banking, shopping, earning a living, etc.) and positively affects the ability of people to communicate, work, manage finances, learn, and generally participate in the collective life of our society[8].

Finland has been the first country to introduce at constitutional level a legal right to Internet access[9], and also Estonia recently passed a law stating Internet access as a fundamental human right of its citizens. Moreover, as will be shown later, in a decision of June 2009 the French Constitutional Court basically confirmed that the right to Internet access is a fundamental right[10]. Also the Constitutional Chamber of the Supreme Court of Costa Rica recently declared Internet access as essential for the exercise of fundamental rights[11].

At EU level Article 3-*bis* Directive 140/2009 is relevant[12]. This provision attaches great importance to the right to Internet access, and expressly makes reference to the fundamental

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[6] Neil Weinstock Netanel, *Copyright's Paradox*, OUP (2008).
[7] *Ibidem*, p. 34.
[8] Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, *Oregon Law Review* 2010 (available on the Internet at SSRN: http://ssrn.com/abstract=1565038, p. 48).
[9] As from 1st July 2010 all citizens of Finland have the right to have a broadband Internet connection of at least 1 Megabit per second. And the promise was made to upgrade every citizen to a 100Mbps connection in five years time.

[10] See below at paragraph 6.
[11] Supreme Court of Costa Rica, 20-7-2010.
[12] Precisely, Article 3-*bis* Directive 140/2009 amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and Directive 2002/20/EC on the authorization of electronic communications networks and service. This provision states that "*Measures*

rights and freedom of natural persons enshrined in the European Convention on Human Rights (ECHR).

4) File sharing, copyright enforcement and the role of Internet Service Providers

One of the tools massively used to exchange information on line is file sharing. This technology refers to the sharing of computer data or space on a network. It allows multiple users to access the same file (containing data, audio and/or video) stored in a central server, giving the user the ability to read, modify, print or copy it.

And what about "peer-to-peer" (P2P) file sharing? Peer-to-peer technology enables the sharing of files by a direct exchange between end-users' computers. P2P networking means that the files are not stored on a central server. Instead, certain software which can be installed in individuals' computers work as a server for shared files. This permits each computer which is equipped with the software in question to act as a mini-server from which other P2P users can download files. P2P's popularity derives from the fact that it is user-friendly and convenient. Such technology has empowered informal networks of file sharers to make files available to each other, around the world. Thus, P2P file sharing enables peoples around the globe to exchange information over the Internet by using machines connected through networks, which in turn allows a cheap and worldwide sharing of digitized information.

As is known, these technologies often turn out to clash with copyright. Indeed, when they are used to share files containing copyright protected material, such activities are usually considered copyright infringement, and particularly a violation of the "communication to the public" and "making available" rights, which are reserved to copyright owners. Such rights are now protected by most countries as a result of implementing Article 8 of the WIPO Copyright Treaty and Articles 10 and 14 of the WIPO Performances and Phonograms Treaty. These provisions state that copyright holders enjoy the exclusive right to authorize any communication to the public of their works, including the making available to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them. File sharing technologies – which allow the making available of copyright protected works to the public - have often been deemed by courts to fall within said provisions[13].

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taken by Member States regarding end-users access' to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law. Any of these measures regarding end-users' access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed".

[13] See also Michael Schlesinger, *Legal issues in peer-to-peer file sharing, focusing on the making available right*, in *Alain Strowel (Edited by), Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Edward Elgar (2009), pp. 43-70, at p. 45.

Copyright owners have regularly enforced their exclusive rights by taking legal action against those who uploaded, downloaded and generally shared copyright protected material with other peers, especially music and movies files. Such actions have often been successful.

In addition to taking action against individual files sharers ("primary infringers"), right owners often chase "secondary infringers", i.e. those companies or organizations which permit or encourage primary and direct infringement by individual file sharers, or build up the technical means which make said direct infringement possible. These are called Internet Service Providers (ISPs) and – to the eyes of copyright owners - they often act as gatekeeper and make possible individuals' file sharing of copyrighted protected material.

Liability is therefore not limited to people who personally infringe copyright, i.e. who upload and make available the files in question. As it happens with other kinds of tort, liable is also who encourages, facilitates, helps or anyhow benefits from carrying out an unlawful act. Copyright makes no exception to this rule. Indeed, several legislations consider liable for copyright infringement whatsoever person or organization connected to primary infringements, being them music halls (which broadcast music from the radio), copy shops (which allow the copying of protected material) or ISPs which offer users the technical means to share and make available infringing files[14].

It should be noted however that both EU (see Articles 12-14 Directive 2000/31) and US legislations (see Section 512 of the 1998 Digital Millennium Copyright Act) have created an exemption for ISPs and other Internet intermediaries, by shielding them from liability for copyright infringement committed by others, provided certain conditions are met[15].

5) Repositioning file sharing: not only copying music and movies

As already said, copyright owners have taken a large number of legal actions in many countries against companies, ISPs or even individuals providing or using file sharing network services. Many legal actions – especially those actions involving the unauthorized sharing of music or movies files – are well known and have already been commented[16].

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[14] Allen N. Dixon, *Liability of users and third parties for copyright infringements on the Internet: overview of international developments*, in *Alain Strowel (Edited by), Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Edward Elgar (2009), pp. 12-42, at p. 12.

[15] The US Digital Millennium Copyright Act (DMCA) is particularly important. It implements the 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty and outlaws the unauthorized on line reproduction and distribution of copyrighted material.
Section 512 exemption is commonly known as the "safe harbour" provision, as it gives ISPs a shield from copyright infringement. By exempting Internet intermediaries from liability, such provision aims at finding a balance between the conflicting interests of copyright owners and Internet users. For such exemption to apply ISPs must *inter alia* adopt and reasonably implement a policy of addressing and terminating subscription and accounts of users who are held to be "*repeat infringers*" (on this point see below at paragraph 6).
It is worthwhile mentioning the recent case *Viacom Int'l Inc., et al., v. YouTube, Inc., et al.*, Nos. 07-Civ-2103 (LLS), 07-Civ-3582 (LLS), *i.e.* a decision of June 2010 from the US District Court for the Southern District of New York which confirmed the availability of the Section 512 exemption in a case of video sharing. The case was as follows. The entertainment company Viacom took action against Youtube and its corporate parent Google for copyright infringement requesting more than $1 billion in damages. The plaintiff claimed that the popular video-sharing website YouTube was engaging in massive intentional copyright violation for making available 160,000 unauthorized clips of Viacom's entertainment programmes. The Court granted summary judgement for Google and basically held that mere and general knowledge of copyright infringement, no matter how widespread and clear, was not sufficient for Youtube not to benefit Section 512 exemption.

[16] See *inter alia A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (Ninth Circuit, 2001); *MGM Studios Inc v Grokster Ltd*, 545 US 913 (US Supreme Court 2005); *IO Group Inc. v Veoh Networks Inc.* (U.S. District

Yet, file sharing is not limited to the exchange and copying of music or movie files. People also use these technologies in order to exchange information, ideas and opinions as well as to critic other people's beliefs and in general to convey messages. File sharing is often used as a tool for finding works which would otherwise be unavailable, finding out new genres, carrying out personalized compilations as well as for posting creative remixes, sequels and new interpretations of existing works (including parody)[17]. It therefore provides far more opportunities than in the off line world for artists and authors to reach, analyze and further develop a great number of existing works.

Several universities - especially in the US - use file sharing technologies to make easy the sharing of class notes, class assignments and other forms of content and it is believed that such networks have enhanced educational and research capabilities[18]. Viewed from this social and cultural perspective, file sharing can be considered as an activity that fosters a number of values underpinning the very protection of free speech. This is particularly true when it comes to P2P file sharing which – as shown above - enables the sharing of files by a direct exchange between end-users' computers. Indeed, its decentralized feature (as opposed to centralized systems) permits users to create and disseminate countless kinds of resources, in manners which have never been possible earlier: in this case, the potential exchange of information and ideas is maximised.

File sharing networks have thus become necessary components of many global virtual communities where for example information and cultural artefacts are shared and discussed in chat rooms[19] or other virtual spaces. For several communities (e.g. academia, defense sector, etc.) file sharing has opened new scenarios and has become an important tool of cultural, scientific and technical collaboration. This is the main feature of the so-called "Web 2.0" networks, also known as User Generated Content (UGC) services, which are generally associated with Internet applications that make easy interactive information sharing, interoperability and user-centered design.

In a nutshell, file sharing and generally Internet technologies – by linking together communities of users, artists and creators (i.e. communities of people who are not just interested in copying music and movie files) - have the potential of dropping individuals'

Court of California, 2008); *Universal Music v Veoh* (California Central District Court, 2009); *Viacom Int'l Inc., et al., v. YouTube, Inc., et al.*, Nos. 07-Civ-2103 (LLS), 07-Civ-3582 (LLS) (US District Court New York 2009); *Arista v. Lime Wire* (US District Court New York, 2010*)*; *Polydor v. Brown* [2005] EWHC 3191 (Ch); *Brein v Mininova*, Rb Utrecht 26 August 2009, LJN BJ6008, 250077/HA ZA 08-1124; *Pirate Bay*, B 13301-06, Stockholm District Court, Division 5, Unit 52, Verdict B [2009]; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242; *Roadshow Films Pty Ltd v. iiNET Limited* (Federal Court of Australia 2010); *SGAE (Sociedad General de Autores y Editores) v Jesus Guerra*, Case N. 261/09, Barcelona Commercial Court N. 7, March 2010; *Telecinco v YouTube* (Madrid Commercial Court, September 2010).

[17] Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, The University of Texas School of Law, Law and Economics Working Paper No 009, December 2009, p. 3 (available on the Internet at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=468180).

[18] Jason Putter, *Copyright Infringement v. Academic Freedom on the Internet: Dealing with Infringing Use of Peer-To-Peer Technology on Campus Networks*, J. L. & Pol'y 419 (2006), pp. 419-469, at. pp. 421 (note 5) and 425.

[19] Robert Danay, *Copyright vs. Free Expression: The Case of Peer-to-Peer File-Sharing of Music in the United Kingdom*, *8 Yale Journal of Law & Technology 32* (2005) (available on the Internet at http://ssrn.com/abstract=847905, p. 20).

reliance on traditional mass media for information and entertainment and thus maximizing the exchange of ideas and opinions with a wider range of people[20].

Having said that, it seems that copyright owners are also keen in enforcing their exclusive rights against the above mentioned communities. The following case is self-explaining. In 2003 the company Diebold Electronic Systems – producer of an electronic voting machines' software - started sending cease-and-desist letters to US University students who had engaged in posting and circulating on the Internet Diebold's internal communications[21]. In these communications (which consisted of both email messages and internal memorandums) various problems and flaws of Diebold's software were highlighted. The files were circulated amongst students also by means of P2P file sharing technologies (and posted in various websites) and included thousands of e-mails highlighting bugs in Diebold's software and warnings that its computer network was poorly protected against hackers [22]. Warning letters were also sent by Diebold to ISPs which hosted the internal documents revealing flaws in Diebold's e-voting machines.

In the cease-and-desist letters Diebold invoked copyright infringement pursuant to the DMCA (it claimed that the files in question contained copyright protected material) and requested the documents to be removed. One ISP involved, Online Policy Group (OPG), refused to take them down invoking the right to free speech.

Two students and the ISP OPG took action against Diebold alleging *inter alia* that the former's claim of copyright infringement was based on knowing material misrepresentation. The three plaintiffs sought a judicial declaration that the publication of the above communications was lawful and requested to enjoin Diebold from threatening or bringing any action for copyright infringement.

The California district court found that Diebold knowingly misrepresented that online commentators, including the above college students, had violated the company's copyrights. It was held that "*No reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold's voting machines were protected by copyright*". The court added that Diebold tried to use copyright provisions "*as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property*" [23].

This case shows that file sharing networks and Internet technologies in general can be used to foster freedom of speech, stimulate critical thinking as well as exert leverage on companies, government officials and politicians – and that copyright provisions may maliciously be invoked to stifle and chill said potentialities. These potentialities might be chilled also when copyright owners do not actually enforce their exclusive rights: this happens when speakers, artists or authors – being aware of the existence of copyright provisions allowing right owners to enforce their exclusive rights - prefer to engage in self-

[20] Netanel, above note 6, p. 9.
[21] Generally speaking, in that period US copyright owners in the creative content industries were very active in protecting their IPRs. Either they sent letters to hundreds of colleges and universities, requesting them to take action to prevent P2P infringement on campus networks, or they sent notices to universities detailing specific cases of unlawful file sharing on their networks. See Putter, above note 18, pp. 431-432.
[22] See *New York Times* of 3 November 2003.
[23] *OPG v. Diebold*, 337 F. Supp. 2d 1195, N.D. Cal. 2004.

censorship rather than running the risk of being sued and paying lots of money as compensation.

We have seen that file sharing is not limited to music and movie works, but it also entails the exchange of other kind of information.

In any case, it should be noted that also file sharing of music files does contribute to marketplace of ideas. It has been said that such exchange is increasingly perceived as a new form of "*interest-based social interaction*"[24]. Even the passive sharing of songs with unknown people sitting in front of their PC at the other corner of the globe is to be considered an important form of cultural exchange. Those websites permitting to share music, videos or other material and allowing people to leave comments regarding such material (*e.g.* YouTube) are pertinent examples. These Internet fora are comparable to big rooms where persons face-to-face exchange opinions, ideas and information[25]. P2P file sharing systems – by permitting that – may constitute a relevant part of several persons' "*sense of community, identity and therefore self-fulfillment*"[26]. Sharing music files – coupled with the possibility of exchanging comments and points of view regarding songs – contributes to the evolution of music and boosts the cultural development of a given community. No doubt people who are exposed to more music are better prepared to offer their new ideas and solutions into the artistic community.

Musical and in general artistic works are thus stimulated if there is massive exposure to (and creative appropriation of) previous works[27] – and such exposure is particularly favored by the use of file sharing technologies. Any author needs access to previous works in order to create new music [28] – and without such access the creation of new music (and generally of new artistic forms) is hindered. It has been argued that the speech and art of previous authors and creators are the "raw material" of subsequent artists and authors[29]. Take the example of hip-hop or jazz music. It has been pointed out that these music genres developed and became successful as a consequence of the re-interpretation of previous works[30].

It could therefore be said that file sharing is another "*engine of free speech*". People who employ this technology and use existing copyrighted pieces to create derivative works and thus express their opinion are no less deserving of protection and no less innovative than the author of the previous work[31].

Yet, one might stress that unauthorized file sharing is not "speech" and thus cannot be invoked as a tool for exercising freedom of expression.

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[24] Daniel Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, *Journal of Intellectual Property Law*, 12.1 (2003), pp. 39-74, at. p. 41.

[25] Netanel, above note 6, p. 74.

[26] Danay, above note 19, p. 20.

[27] Also classical composers like Beethoven and Mozart regularly took inspiration from already existing segments, motifs and themes.

[28] See also Wendy J. Gordon, *Copyright Norms and the Problem of Private Censorship*, in Jonathan Griffiths – Uma Suthersanen (edited by), *Copyright and Free Speech – Comparative and International Analyses*, OUP (2005), pp. 67-96, at p. 67.

[29] Netanel, above note 6, pp. 58-59.

[30] *Ibidem*, pp. 19-22; Lea Shaver – Caterina Sganga, *The Right to Take Part in Cultural Life: on Copyright and Human Rights*, *Wisconsin International Law Journal*, pp. 637-662, at p. 645.

[31] Netanel, above note 6, p. 29.

The reply would be easy, however. Indeed, it could be argued that music, movies and other artistic works do constitute "speech", and that access to such existing speech and information – which is greatly enhanced by file sharing technology - is no less important to freedom of expression than is the making of the speech itself[32]. Indeed, the US Supreme Court has constantly affirmed that freedom of expression policy serves both "speakers" and "listeners"[33]. US policy in the telecommunication sector confirms the above, as US legislation has always guaranteed cheap access to programs, information and opinions throughout public libraries and free over-the-air television: and it has done so exactly with a view to boosting freedom of speech[34].

File sharing is instrumental to the system of free expression also because it strongly reduces the traditional copyright-supported media power of content supply and distribution. Thus, minor artists, creators and authors who are not associated to major labels, studios or publishers have the potential to access and reach a larger market of information, contents and ideas, and carry out creative appropriations and remixes of existing works: which in turn strengthens the cultural life and creativity of our society.

6) Disconnecting Internet access of file sharers under French, UK and US law

We have seen that the right to Internet connection has become more and more important, having acquired the same relevance as the right to other public goods, such as water, air, healthcare, education, etc. Internet allows people to use useful technologies (including file sharing networks) which boost and strengthen freedom of speech and generally artistic and cultural activities.

Having said that, a few national legislations provide that Internet connection of persistent file sharers is terminated provided certain conditions are met. The author will briefly look at the recent French and UK laws, as well as at the relevant US provision.

Preliminary, it should be noted that the decision of terminating users' Internet access is very sensitive. In addition to eliminating a tool which has become vital in everyday life, it might negatively affect the entire family of the single alleged infringer, as a family usually relies on just one Internet subscription.

The French scenario

France has recently taken in serious consideration the phenomenon of on line copyright infringement and of unauthorized file sharing in particular. In May 2009 the first version of the so-called Hadopi law was adopted. This law aims at controlling and regulating Internet access as a means to encourage compliance with copyright provisions. It was lobbied by the French president Nicolas Sarkozy, who believed that a strong legislative action to react against online infringement of copyright was badly needed.

This law has also created an *ad hoc* administrative agency, called Hadopi (*Haute autorité de diffusion des oeuvres et de protection des droits sur internet*), which has been given the task to control that "*internet subscribers screen their Internet connections in order to*

[32] *Ibidem*, p. 47.
[33] See for example *Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390* (1969).
[34] Netanel, above note 6, p. 47.

prevent the exchange of copyrighted material without prior agreement from the copyright holders" (Art. L. 336-3 French Intellectual Property Code).

The law states that individual subscribers must ensure that their accounts are not accessed and used to reproduce or make available artistic works without the authorization of the copyright holder. It provides the so-called "three-strikes" rule, also labelled as "graduated response": if subscribers fail to properly supervise their account within the year following the receipt of the first recommendation (and after a second recommendation has been sent to him), the administrative agency could - after an hearing - either suspend Internet access for between two months and a year (during which the subscriber is enjoined from entering into a service agreement with any other Internet service provider) or order subscribers to implement security measures aimed at preventing other unauthorized downloads or uploads, with penalty fees for non-compliance.

Thus, one of the main features of this first version of the Hadopi law is the preeminent role of an administrative agency entrusted with the power to impose sanctions, including the disconnection of Internet access. Why has the first version of the Hadopi law provided that such a sanction be decided by an administrative body? It should be noted that judicial proceedings are usually expensive and slow: that might be a reason why a speeder and cheaper "extra-judicial" approach was initially chosen as opposed to a standard court proceedings[35].

This law was scrutinised by the French Constitutional Court, which in June 2009 found a part of it unconstitutional. As terminating individuals' Internet access affects individuals' right to free expression (which is a fundamental right), the French Constitutional Court held that any decision involving Internet disconnection should be taken by a court after a careful balancing of the two interests at stake, i.e. copyright protection and freedom of speech. As the Hadopi law gave an administrative agency the power to terminate individuals' Internet access, the Court held such grant of authority as unconstitutional. And it specified that French Parliament was not at liberty to vest an administrative authority with such power in light of Article 11 of the Declaration of the Rights of Man and the Citizen of 1789[36].

The Constitutional Court's finding that freedom of speech entails access to online communications services was also interesting. In particular, when commenting on the right enshrined in the above Article 11 of the Declaration of the Rights of Man and the Citizen, the court stressed that "*in the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services*" (paragraph 12). Such finding not only clearly recognizes the importance of the right to have Internet access in the present era, but also impliedly affirms its fundamental nature.

The French Constitutional Court also dealt with the following aspect of the Hadopi law, i.e. the fact that the burden of proof was placed on Internet subscribers. That meant that - in

[35] See also Alain Strowel, *Introduction: peer-to-peer file sharing and secondary liability in copyright law*, in Alain Strowel (edited by), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Edward Elgar (2009), pp. 1-11, at p. 10.

[36] This provision states that "*the free communication of ideas and opinions is one of the most precious rights of man. Every citizen may thus speak, write and publish freely, except when such freedom is misused in cases determined by Law*".

order to be successful in the procedure – Internet subscribers had to prove that they were not liable for the alleged on-line infringement. In other words, subscribers should have proved that they properly secured their Internet access or that a third party was in fact responsible for the alleged infringement. According to the court, this boiled down in a presumption of guilt on Internet subscribers and was a violation of the constitutional principle of presumption of innocence[37].

On September 2009 the French parliament passed another bill (informally known as Hadopi 2), which was intended to remedy the enforcement gap left by the Constitutional Court's decision. The most relevant difference between the first version of the law and Hadopi 2 is that the sanctions to be applied against the alleged infringer will be decided by a court and not by the administrative agency (as indirectly recommended by the Constitutional Court). The entire process is still speeded up by the Hadopi-driven administrative procedure, however.

The British scenario

Also the UK has recently issued a law specifically aimed at fighting on line copyright infringements including unauthorized file sharing. It is the Digital Economy Act of April 2010.

A proposed code of practice which implements said Digital Economy Act has been adopted by Ofcom in June 2010[38]. It is expected to come into force soon and requires ISPs to send notifications to their subscribers to inform them of allegations that their accounts have been used for copyright infringement, *e.g.* unauthorized file sharing. It also proposes a Hadopi-like three stages process for ISPs to inform subscribers of copyright infringements and provides that subscribers which have received two notifications within a year (and have not stopped infringing copyright) may be included in a list requested by a copyright owner. This would be useful to copyright holders, who will then be able to take legal action against the alleged infringers.

The most controversial provision of the Digital Economy Act is Section 17(1), which grants powers to the Secretary of State to disconnect people or slow their connections if they ignore warnings in case of alleged infringement. This provision states that "*The Secretary of State may by regulations make provision about the granting by a court of a blocking injunction in respect of a location on the Internet which the* ***court*** *is satisfied has been, is being or is* ***likely to be used*** *for or in connection with an activity that infringes copyright*"[39] (emphasis added).

Thus also the UK Digital Economy Act provides – at least in principle – the disconnection of Internet in case of on line copyright infringement. Yet, it also takes for granted that such

[37] See Article 9 of the Declaration of the Rights of Man and the Citizen of 1789, which states that "*as all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law*".

[38] The Ofcom is the UK independent telecommunications regulator and has been entrusted by the Digital Economy Act with the task to draw up and enforce a code of practice implementing the new provisions (the Code is available on the Internet at http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/summary/condoc.pdf).

[39] However, according to the Ofcom draft code "*The Secretary of State has not indicated his intention to make use of these provisions at this time and this consultation is not concerned with this aspect of the DEA* [Digital Economy Act]".

disconnection is to be decided by a judicial authority. The UK Parliament – in doing so – might have taken into consideration the above decision from the French Constitutional Court. Indeed Section 17(5) of the Digital Economy Act states that "*in determining whether to grant an injunction, the court must take account of* […] *(e) the importance of freedom of expression*"[40].

On the other hand, the presence of the words "*likely to be used*" in Section 17(1) has been perceived by the first commentators of the Act as worrying and risky. Don Foster, the Liberal Democrats' spokesman for culture, media and sport, stressed that such a clause is too wide-ranging, as it would entail that a website containing suspected files could be blocked on its assumed intentions rather than its actions[41].

The US scenario

What about the US? Does the DMCA make reference to Internet disconnection in case of on line copyright infringement?

It does. Precisely, the DMCA makes reference to such sanction when dealing with the "safe harbour" exemption. Indeed, this exemption applies to ISPs provided they *inter alia* have adopted and reasonably implemented a "*policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers*" (Section 512(i)(1)(A) DMCA).

This provision does not clarify who should finally decide to impose such sanction, however[42]. The ISP which has adopted the policy in question? A judicial body? Thus far US courts have not given guidelines on that issue and on the meaning of the term "*repeat infringers*" in particular.

An interpretation of this term has been given by David Nimmer: one may not be considered an infringer unless he has been found as such by a court[43]. Indeed, when the US Congress wanted to refer to individuals who were not proven infringers, it used the terms "claimed infringers" or "alleged infringers". On the contrary in Section 512 – unlike in other DMCA provisions - the expression "repeat infringers" is used. This term should therefore refer to those against whom the infringement has been adjudicated, and not against whom it is merely alleged[44]. This interpretation appears to be in line with the second version of the

[40] Article 17(5)-(d) of the Act also states that courts – when granting injunctions preventing access to Internet – should take into consideration "*whether the injunction would be likely to have a disproportionate effect on any person's legitimate interests*".

[41] See *The Guardian* of 8 April 2010.

[42] What is clear is the purpose of this provision, i.e. to prevent future infringements by users. When enacting the DMCA, the US Congress noted that "*those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access*" (H.R. Rep. No. 105-551, pt. 2, at 61, 1998).

[43] Or unless an ISP has actual knowledge that an infringement has been committed. See David Nimmer, *Repeat Infringers*, *Journal of the Copyright Society of the USA* (2005), Vol. 52 Part 2, pp. 167-224, pp. 179-184.

[44] *Ibidem*, p. 183.

A recent Bill – presented on 20 September 2010 by Sen. Patrick Leahy – also deals with on-line copyright infringement including file sharing. It envisages the institution of a blacklist of websites ("dedicated to" or "primarily designed" for copyright infringing activities) which can be seized by the US Government. The actions would be taken by a state's Attorney General, but there is no provision in the Bill requiring a hearing, trial or defence from the defendant.

Hadopi law and with the Digital Economy Act, which – as shown above – require Internet disconnection to be decided by a judicial authority.

7) The EU perspective: the debate at the European Parliament on on-line copyright infringement and Internet disconnection and other relevant issues

The issue of on-line copyright infringement and Internet disconnection has also been debated at the European Parliament during the negotiations which led to the adoption of the so-called "Telecom Package". Such reform package was first presented by the former EU Commissioner Viviane Reading to the EU Parliament in 2007, with a view to changing the EU telecoms rules and particularly completing the internal market in the EU telecommunications industry.

During these negotiations two positions emerged.

On the one hand, the EU Council and the entertainment industry promoted a "three-strikes" rule managed by an administrative authority, a proposal very similar to the first version of the Hadopi law.

On the other hand, the European Parliament and several advocacy groups promoting digital rights and freedom of expression lobbied a less strict and harsh solution, i.e. they claimed that Internet disconnection should be decided exclusively by courts and not by administrative bodies. Such groups expressly made reference to the ruling of the French Constitutional Court which – as shown above - stressed the importance of involving courts when it comes to deciding the termination of Internet access.

In particular, the European Parliament promoted the so-called "*amendment 138*", which had been embraced twice by a huge majority in the plenary assembly (88% of EU Parliament)[45]. This amendment sought to prevent EU member countries from adopting legislations allowing Internet disconnection of persistent file sharers without a previous authorisation of a court. It read as follows:

- "*Applying the principle that no restriction may be imposed on the fundamental rights and freedoms of end-users, without a prior ruling by the **judicial** authorities, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, save when public security is threatened in which case the ruling may be subsequent*" (emphasis added).

Yet, such initial position of the European Parliament was last abandoned. On October 2009 a Parliament delegation - led by MEPs Catherine Trautmann and Alejo Vidal-Quadras - accepted to renounce to the above amendment and instead to work on a new amendment presented by the EU Council. The latter amendment is different from the above mentioned "amendment 138": indeed, it no longer requires that only judicial authorities be allowed to cut off Internet access of persistent file sharers. It just says that any measures aimed at

[45] See *e.g.* European Parliament legislative resolution of 24 September 2008 on the proposal for a directive of the European Parliament and of the Council amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and Directive 2002/20/EC on the authorisation of electronic communications networks and services (COM(2007)0697 – C6-0427/2007 – 2007/0247(COD)), Brussels, 24 September 2008.

disconnecting Internet access may only be adopted "*as a result of a prior, fair and impartial procedure*". The word "judicial" has been removed from the key sentence of the amendment. That means that the right to judicial review is guaranteed on appeal, but the first instance ruling can still be issued by a non-judicial authority. Such amendment brought about by the Telecom Package has been inserted into the EC Directive 2002/21 on a common regulatory framework for electronic communications networks and services (see the new Article 1, paragraph 3(a)[46].

This outcome has been criticised by several groups advocating freedom of speech on the Internet, as they believe that – also in view of the French Constitutional Court decision – it is important that disconnection of Internet access is to be decided exclusively by a judicial authority, and not by an administrative body[47]. It is thought that reserving to courts the power to issue such a harsh sanction would guarantee a stronger protection of the right to Internet access and accordingly of freedom of speech[48].

After the adoption of the Telecom Package, the European Parliament went on debating issues related to the online infringement of intellectual property rights. Indeed a resolution was approved on 22 September 2010[49], stressing that unauthorised uploading of copyrighted material on the Internet is a clear infringement of IPRs prohibited by both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)[50].

Yet this resolution does not mention what has been highlighted earlier, i.e. that file sharing also involves the exchange of information useful to form and express people's opinion. The Socialist group in the European Parliament had proposed amendments to the previous draft of the resolution (the Gallo Report) with a view to stressing the above. Such amendments (which were not accepted) mainly regarded the recognition of "non-commercial file sharing for personal use" and an alternative remuneration scheme to compensate this use (private copying): the aim was to distinguish between counterfeiting of goods and the less dangerous on line IPRs infringements.

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[46] See also above note 11.

[47] Pro freedom of expression groups take this critical view even though the new Article 1, paragraph 3(a) Directive 2002/21 (inserted as a result of the adoption of the Telecom Package) takes the pain to specify that any measures liable to restrict fundamental rights or freedoms may only be imposed if it is appropriate, proportionate and necessary within a democratic society, and shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms (see again above note 11).
It has also been said that the European Parliament was betrayed by their delegates, the MEPs Catherine Trautmann and Alejo Vidal-Quadras, as they accepted to unilaterally renounce to the old amendment 138 apparently in contradiction with the mandate given by their colleagues representing the EU Parliament. See the web-pages of the advocacy group *La Quadrature du Net* at http://www.laquadrature.net/en/amendment-138-the-parliament-betrayed-by-its-negotiators.

[48] The issue was also debated during the negotiations which led to the Anti-Counterfeiting Trade Agreement (ACTA), an international agreement signed by a group of (mainly) industrialized countries on 15 November 2010 and that establish new international standards on IPRs. See Annemarie Bridy, *ACTA and the Specter of Graduated Response*, June 2010, p. 5 (available on the Internet at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619006). Yet, the final version of the ACTA does not refer to the disconnection of Internet access as a possible sanction for deterring on-line copyright infringement.

[49] See European Parliament Resolution of 22 September 2010 on enforcement of intellectual property rights in the internal market (2009/2178(INI)). This resolution takes origin from a report drafted by the MEP Marielle Gallo, which was firstly voted on June 2010 by the Legal Affairs Committee of the EU Parliament (so-called "Gallo Report").

[50] Recital L of the resolution.

Instead, the resolution in question made no substantial difference between counterfeiting and unauthorised file sharing, leading to believe that the two activities are identical and should be treated in the same way and be subject to the same sanctions[51]: the risk is that ordinary citizens sharing online copyrighted material (including people sharing files merely with a view to enjoying and commenting existing works, without any lucrative purpose) can be treated like criminal organizations devoted to counterfeiting[52].

8) The role of private agreements between copyright holders and ISPs

As already noted, it is important that decisions ordering the disconnection of Internet access of file sharers be taken exclusively by courts.

In recent years, however, copyright owners have entered into a number of agreements with ISPs, obliging the latter to adopt graduated response regimes which envisage the possibility of terminating Internet access of unauthorized file sharers. It therefore seems that suing file sharers in court is not anymore the main solution pursued by right holders to combat on line copyright infringement. Instead a strategy of compelled voluntary collaboration with ISPs seems now to be more popular: which confirms that public law is not anymore the only vehicle through which graduated response regimes and decisions on Internet disconnection can be taken[53]. Indeed, private law mechanisms driven by market forces are more and more used by copyright owners to pursue enforcement measures.

Such agreements are becoming popular, especially in the US. Annemarie Bridy brought interesting examples of collaboration agreements entered into in the US between copyright owners and ISPs (according to which ISPs undertake to forward notices of infringement to their subscribers): it seems that in some cases leading ISPs have suspended Internet access of persistent file sharers without any court order or other finding of an infringement[54]. The same reportedly occurs in other countries, including Ireland where a graduate response regime has become a common rule for over 40% of Irish Internet subscribers as a result of a settlement agreement between major films distributors and the most important Irish ISP (Eircom): this regime does not envisage the involvement of any court and said ISP is the only "judge" who decides whether the subscriber deserves or not to have its Internet connection terminated[55].

The "transformation" of ISPs into copyright' enforcement agents is probably a consequence of a *do ut des* strategy. There are signals that ISPs act as entertainment industry enforcement agents in exchange for them acquiring the right to transmit copyright holders' programs over

[51] See for example paragraph 45 of the resolution.

[52] These concerns do not seem to be adequately addressed by a mere reference (contained in paragraph 5 of the resolution) that any measure to enforce IPRs must respect the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

[53] Bridy, above note 49, p. 10.

[54] *Ibidem*, pp. 7-10. With reference to these agreements see also Michael P. Murtagh, *The FCC, the DMCA, and Why Takedown Notices Are Not Enough*, *Hastings Law Journal*, Vol. 61 (2009), pp. 246 *et sqq*.

[55] Bridy, above note 49, pp. 14-15. This outcome is worrying as previous case law of the Irish High Court had clarified that ISPs should not be considered liable for their customers downloads nor did Irish law envisage any provision mentioning a "three strikes" rule.

their Internet networks[56]. Right holders and ISPs' interests are therefore becoming more and more convergent and aligned[57].

It has been argued that these agreements may represent a first step in the context of a "*more complete private ordering of the project of online copyright infringement*"[58]. They also seem to be encouraged at international level, particularly by the recently-approved Anti-Counterfeiting Trade Agreement (ACTA)[59]. Article 2(18)(3) of this treaty promotes "*cooperative efforts within the business community to effectively address* […] *copyright or related rights infringement* […]". Commentators do not rule out that this provision could be interpreted as requiring states to set up regimes encouraging ISPs to enforce copyrights on behalf of right owners, and particularly to take decisions affecting Internet connectivity of unauthorized file sharers[60].

The private agreements in question seem to penalize too much file sharers. Let's take for example the US scenario.

These agreements usually provide that ISPs merely forward to alleged infringers the so-called "DMCA take down notices". Said notices are envisaged by Section 512(c) DMCA and are basically information - from the right holder to the user - saying that the former has a good faith belief that the latter has violated its copyright. Several agreements between copyright holders and ISPs provide that – after forwarding to users these notices on behalf of right owners and should other alleged violations occur – ISPs are entitled to suspend and even terminate users' Internet connection.

The above contractual provisions are risky for users insofar as the collaboration between right holders and ISPs – and a possible final decision suspending or terminating users' Internet access – is exclusively based on DMCA take down notices. Indeed, such notices are not always precise and reliable, as they reflect just the right holders' point of view, i.e. what they claim it is an infringement of their copyright. They do not require ISPs to find out whether a copyright infringement has really occurred. It has been argued that take down notices are "*flawed, easy to generate, often meritless, and an inadequate substitute for a full trial on the merits*"[61]; in fact they are issued unilaterally by right holders without the involvement of neutral adjudicators such as a court or a panel of arbitrators, and therefore without a strong proof of actual infringement.

9) Article 10 European Convention on Human Rights and file sharing

It is also worthwhile to verify whether invoking copyright against unauthorized file sharers is in line with the European Convention on Human Rights (ECHR).

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[56] Bridy, above note 8, pp. 22-23 (pointing out that the ISP Verizon reached an agreement with the company Disney to forward infringement notices to users, in exchange for receiving the right to transmit Disney's programs).
[57] Murtagh, above note 54, p. 257.
[58] Bridy, above note 8, p. 6.
[59] See above note 48.
[60] See the Internet website of the advocacy group *La Quadrature du Net* at www.laquadrature.net/en/final-version-of-acta-must-be-rejected-as-a-whole. It should however be noted that Article 2(18)(3) ACTA also provides that the cooperative efforts in question should take place "*while preserving legitimate competition and consistent with each Party's law, preserving fundamental principles such as freedom of expression, fair process, and privacy*". On this issue see also Bridy, above note 48, p. 6.
[61] Murtagh, above note 54, p. 257.

The starting point is Article 10(1) ECHR: "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.* […]"

We have seen that file sharing - by giving users the possibility of exchanging information, ideas and reflections - has the potential to promote and boost freedom of speech.

However, the right to free speech cannot be considered in a vacuum, but it should be balanced with other rights. That is why Article 10(2) ECHR states that "*the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society* […] *for the protection of the reputation or the* ***rights of others***" (emphasis added).

This provision tells us that freedom of speech can be lawfully restricted if the restriction is *inter alia* "*necessary in a democratic society*".

The European Court of Human Rights has never overtly faced the conflict between copyright and freedom of speech. Rather, such conflict has been specifically analysed by the European Commission of Human Rights[62]. In particular, in an important decision of 1997 the latter stated that in principle copyright protection constitutes a significant limitation to freedom of speech[63]. Yet it added that copyright protection can lawfully restrict freedom of speech as long as the requirements of Article 10(2) ECHR are met.

Said that, it is important to verify whether enforcing copyright against unauthorized file sharers – which is capable of restricting freedom of expression – can be considered "*necessary in a democratic society*". If it cannot be considered as such (and provided the other conditions of Article 10(2) are met), the enforcement activity in question could be deemed contrary to Article 10 ECHR.

In answering the above question the author makes reference to an interesting paper by Robert Danay which mainly focuses on music file sharing[64].

Danay argues that – in order to determine if restricting music file sharing is necessary in a democratic society – we should verify whether such restriction is really useful to meet copyright's purposes. Which are the objectives pursued by copyright legislation? (i) The securing of a reward for the authors and (ii) the promotion and encouragement of creativity. Said that, the next question to be answered is the following: is the restriction of freedom of speech (brought about by enforcing copyright against file sharers) useful to meet the above copyright's purposes? Danay believes that in most cases it might not be useful. He then concludes that in most cases restricting freedom of expression by enforcing copyright against music file sharers is not necessary in a democratic society and accordingly not in conformity with Article 10 ECHR.

How does Danay reach this conclusion?

[62] Protocol 11 of the European Convention on Human Rights, which came into force in 1998, abolished the Commission.
[63] European Commission of Human Rights, *France 2 c. France*, 15-1-1997, n. 30262/96.
[64] Danay, above note 19.

He argues first of all that file sharing does not seem to really affect music sales. This assertion seems to have its merits. Indeed, file sharing can even augment music sales, as such phenomenon has the potential to bring artists' music (especially minor artists' music, who represent the majority) in direct contact with potential consumers[65]. Moreover, statistics about the traffic of file sharing networks can turn out to be useful to copyright owners: e.g. they can reveal the world areas where new artists are most famous, even before the release of their works, so that right owners can better target their overall sale strategies[66]. It follows that, as long as file sharing is capable of increasing right holders' business opportunities, copyright restrictions *vis-a'-vis* such phenomenon do not secure rewards for authors nor promote the diffusion of music.

Even if it is assumed that file sharing does negatively affect music sales (for example, in terms of less CDs sales), overall the remuneration received by copyright holders would not be diminished. In fact, Danay's argument goes, file sharing network is capable of boosting and promoting related activities such as advertising and merchandising (*e.g.* it might encourage the sale of posters, t-shirts, etc. of the artists in question) as well as public appearances, which remain the primary resources of revenue for copyright holders. This would entail again that copyright restrictions *vis-a'-vis* file sharing do not secure rewards for authors nor promote the diffusion of music. Again, the conclusion would be that restricting freedom of expression by enforcing copyright against file sharers is not necessary in a democratic society.

Danay finally argues that – even if we take for granted that file sharing negatively affects music sales – nonetheless the availability of alternative systems of compensation which do not impose sanctions as tough as the ones provided in case of copyright infringement (*e.g.* private copying levies) would still guarantee a reward for all copyright holders. Such alternative systems – which should replace an enforcement system based exclusively on the prohibition of unauthorized uses - would still compensate copyright owners for the use of their works by the file sharer, without however imposing harsh sanctions against the latter and chilling his freedom of expression. That is another reason why Danay believes that enforcing copyright against file sharers - and the subsequent restriction of freedom of speech - cannot be considered necessary in a democratic society.

10) Recommendations to reconcile copyright holders' interests with freedom of speech concerns in the digital environment

How to reconcile copyright holders' interests with the right to free speech of file sharers'users?

Two sets of recommendations are here highlighted.

[65] For example, the song Crazy from the artist Gnarls Barkley was available as an illegal download since Autumn 2005, but it was so popular that – when it became available for legal downloads in 2006 – the song went at the top of the charts. See Robert Clark, *Sharing out online liability: sharing files, sharing risks and targeting ISPs*, in Alain Strowel (edited by), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Edwar Elgar (2009), pp. 196-228, p. 196.
[66] See *The Economist*, 19 July 2008, p. 18.

(i) The first set relates to the thorny issue of who should decide Internet disconnection of unauthorized file sharers. (ii) The second group of proposals aims at identifying possible areas of freedom for unauthorized file sharers.

(i) As shown above, enforcing copyright against file sharers – especially if this involves disconnection of users' Internet access – might jeopardize their right to free speech.

First of all, as also suggested by the French Constitutional Court, any decision regarding Internet disconnection should be taken exclusively by a judicial body. Indeed, terminating users' Internet access affects individuals' right to free expression and we deem it fair that such an encroachment of a fundamental right be sanctioned by a court (rather, *e.g.*, than an administrative agency).

Moreover, should we accept such an important decision be taken by ISPs in their role as copyright owners' agents? In other terms: should we accept that a private cooperation agreement between right holders and an ISP let the latter act as copyright "policeman" and terminate alleged infringers' Internet connection, by solely relying on DMCA take down notices (or other similar notices) from right owners?

The author does believe that such private cooperation agreements giving ISPs the power to terminate users' Internet access could be accepted provided said users have been adjudicated to commit copyright infringement by a judicial body. When it comes to deciding to encroach a fundamental right such as the right to Internet, private contractual negotiations cannot replace judges. Public law here should retain its exclusive competence. We cannot run the risk of letting market forces deal with such a sensitive issue, also in view of the fact that DMCA take down notices (or other similar notices) – on which these agreements often rely – might be flawed and can lead to blame users in good faith and not liable of any actual infringement[67].

(ii) Would it be possible to adopt a more libertarian approach, i.e. to guarantee people (especially authors and artists) more freedom to share copyrighted material on the Internet?

Several proposals have been put forward to guarantee file sharers some areas of freedom and are all based on a "compensation right" approach. These solutions should substitute the traditional copyright paradigm exclusively based on the unconditional enjoyment of hollow exclusive rights[68]. They basically aim at saving the benefits of file sharing technologies while at the same time guaranteeing authors' compensation[69]: a kind of solution which might be labeled – by using Lawrence Lessig's words [70] - as "*compensation without control*". It is

[67] For cases of flawed take down notices see Murtagh, above note 54, pp. 254-255.
[68] Jane C. Ginsburg, *Copyright control v compensation: the prospects for exclusive rights after Grokster and Kazaa*, in Alain Strowel *(Edited by), Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Edward Elgar (2009), pp. 110-123, at p. 123. See also Philipp Wittgenstein, *Die digitale Agenda der WIPO-Vertrage*: *Umsetzung in den USA und der EU unter besonderer Berucksichtigung der Musikindustries*, Stampfli (2000), p. 162; Artur-Axel Wandtke, *Copyright und virtueller Markt in der Informationsgesellschaft*, *Gewerblicher Rechtsschultz und Urheberrecht (GRUR) 1* (2002), p. 7.
[69] Alexander Peukert, *A bipolar copyright system for the digital network enviroment*, in Alain Strowel (Edited by), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Edward Elgar (2009), pp. 148-195, at p. 154.
[70] Lawrence Lessig, *The Future of Ideas: the Fate of the Commons in a Connected World*, Random House (2001), pp. 201-202 (Lessig speaks about "*compensation without control*" when dealing with cable industry).

believed that transforming copyright from a proprietary right to a compensation right would better serve freedom of expression[71].

A specific proposal has been put forward by Neil Netanel, and it is based on the so-called Noncommercial Use Levy (NUL)[72]. Such levy would be imposed on the sale of any consumer product or service whose value is substantially enhanced by P2P file sharing, the amount being determined by an *ad hoc* Copyright Office Court. These products or services could include consumer electronic devices (*e.g.* MP3 players, CD burners and digital video recorders) used to copy, store, send or perform shared and downloaded files. The levy should be paid by the providers of these products and services, and the distribution of the proceeds to copyright holders should be carried out taking into consideration the popularity of the works and the actual use of the contents as measured by technology tracking and monitoring such use. As a consequence of the payment of this levy, users could freely copy and circulate any works the right holder has made available on the Internet: of course the use of the works should not be a commercial one. As Netanel points out, this system would give users and creators more freedom to explore, transform and adapt existing works (in such a way boosting freedom of expression), while at the same time rewarding copyright holders and thus maintaining the main essence and purpose of copyright[73].

The proposal from Netanel has its merits. Generally speaking, several commentators stress that copyright holders in the Internet age will be soon rewarded by mainly using levies and taxes[74]. It is believed that either the exclusive rights traditionally granted by copyright are not easily enforceable in the Internet world or their enforcement would jeopardize the free exchange of information on the Internet. That is why levy-based proposals might soon become reality in the Internet environment.

A regime of government compensation to right holders paid out of general tax revenues (with subsequent freedom to share and copy copyrighted material available on line) has also been proposed[75]. Generally speaking, recommendations to substitute IPRs regimes with systems of government compensation have been debated for a long time. Such proposal would not be very different from the above NUL, except that right holders would be paid from a body funded by general tax revenues rather than by levies imposed on certain products and services.

Some commentators have also proposed compulsory licences to authorize and regulate the P2P distribution of copyright protected works on the Internet. As is known, compulsory licenses are usually granted by governments, or governmental bodies, and oblige IPRs owners to licence the protected asset to third parties willing to use it. Lawrence Lessig believes that the US Congress should empower file sharing by recognizing a system of compulsory licencing similar to that used in cable retransmission, and the amount of the relevant fees would not be set by right holders, but by policy makers keen on striking a fair balance[76].

[71] Netanel, abobe note 6, p. 208.
[72] Netanel, above note 17.
[73] *Ibidem*, p. 6.
[74] Peukert, above note 69, p. 154.
[75] Netanel, above note 17, pp. 80-81.
[76] Lessig, above note 70, p. 255.

In principle compulsory licencing schemes – by permitting users to access and share works on the Internet - would aim at favoring the circulation of copyrighted works on the Internet and thus boosting freedom of speech. Yet, other commentators are skeptical about the feasibility of implementing such a system, as they believe that compulsory licences have proved to be unsuccessful in implementing public policy goals[77]. This opinion is buttressed by the fact that so far no compulsory licences have been granted to authorize the P2P distribution of copyrighted works on the Internet.

All the above proposals have common features and purposes, i.e. they all aim at making the digital environment and particularly the Internet a virtual place where public debate, artistic creativity and cultural diversity should coexist with commercial transactions[78]. Therefore such recommendations do not tend to wipe out copyright (which is still an "engine to free speech"), but try to strike a balance between the latter and the right to freely access copyrighted works available on the Internet, which is ancillary to the fundamental right to free speech.

[77] Michael Botein – Edward Samuels, *Compulsory Licences in Peer-to-Peer File Sharing: a Workable Solution?*, *30 Southern Illinois University Law Journal 69* (2005), pp. 69-83, at p. 69.
[78] Deborah Tussey, *From Fan Sites to File Sharing: Personal Use in Cyberspace*, Vol. 35 *Georgia Law Review* (2001), pp. 1129-1193, at p. 1132.