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PEER TO PEER FILE SHARING IN MUSIC WORKS; IS IT AN INTRUSION TO COPYRIGHT? CASE STUDY OF TANZANIA

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DEDICATION

To my son, Ruaika and my daughter, Aika.

Without their patience, understanding and most of all love, the completion of this work would not have been possible.

LIST OF ABBREVIATIONS

AHRA	Audio Home Recording Act
CD	Compact Disc
CD-ROM	Compact Disc – Read-only Memory
COSOTA	Copyright Society of Tanzania
DMCA	Digital Millennium Copyright Act
DPRA	Digital Performance Right in Sound Recording Act
DVD	Digital Versatile Disc or Digital Video Disc
E.U.	European Union
GATT	General Agreement on Trade and Tariffs
ISP	Internet Service Provider
MP3	MPEG-1 Audio Layer 3
P2P	Peer to Peer
RIAA	Recording Industry Association of America
SA	South Africa
SABAM	Société d’Auteurs Belge – Belgische Auteurs Maatschappij. The Belgian Society of Authors, Composers and Editors
SOCAN	Society of Composers, Authors and Music Publishers of Canada
TRIPs	Trade-related Aspects of Intellectual Property Rights
U.S.A.	United States of America
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WPPT	WIPO Performances and Phonograms Treaty

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ABSTRACT

The dissertation critically analyses the effect of peer to peer file sharing in music copyright. Traditionally Copyright law was meant for material or physical works, however, with the development in Information and Computer technology and later digital technology, copying has been made simple and more efficient. As a result, people can now get copyrighted works through peer to peer file sharing, regardless of whether such practice infringe or does not infringe owners exclusive rights.

Various countries have taken various steps including amendment of relevant copyright laws and through case decisions in order to balance between users' interests and interests of copyright holders for purposes of making such laws up to date.

This study analyses various approaches undertaken by the United States of America and European Union in order to find out how their copyright law developed and addresses issues of digital copyright infringements of music through peer-to-peer file sharing and draw lessons for Tanzania.

The interest to carry out this study was intensified by the extent of the problem after discovered that currently music is easily and freely transferred through peer to peer file sharing and at times owners of copyright are not considered through such music transfer.

This study assessed the current legal position of Tanzania in respect of peer to peer file sharing and assessed whether it provides for music copyright infringement through peer to peer file sharing. The study further reviewed the position of United States of America and European Union in order to make out how their legal framework addressed the problem of peer to peer file sharing in music copyright. The finding of this research was obtained through library research.

Findings of this research revealed that the Copyright and Neighboring Rights Act, No 7 of 1999 of Tanzania does not specifically provide for electronic copyright infringement and consequently for music copyright infringement through peer to peer file sharing.

At the end the study it was identified that Tanzania is lacking modern copyright law to keep pace with the current technological developments especially digital technology because the current copyright law was enacted before digital technology existed and necessary amendment was not made. The law further does not specifically provide for electronic copyright infringement, its penalties and for liability of Internet Service Providers (ISP) and for software end users, neither does it provides for contributory and vicarious infringement of copyright. Such provisions are necessary for copyright protection especially with advancement of digital technology.

Consequently, the study suggests possibilities of the Tanzania to amend the Copyright and Neighboring Rights Act, No 7 of 1999 in order to provide for digital copyright infringement hence music copyright infringement through peer to peer file sharing.

CHAPTER 1

INTRODUCTION

1.1 Introduction

This chapter lays down the foundation of the study by contextualising the problem and giving the significance of the study.

1.2 The background to problem

Copyright law was invented after the advent of the printing press and subsequent widening of public literacy. As a legal concept, it originated from Britain from a reaction of printers' monopolies at the beginning of the eighteenth century. In Britain, the King of England and Scotland was concerned by the unregulated copying of books and used the royal prerogative to pass the Licensing Act of 1662 which established a register of licensed books and required a copy to be deposited with the Stationers Company, essentially continuing the licensing of material for the benefit of printers that had long been in effect. The Statute of Anne in 1709 was the first real copyright Act which gave the author in the new state of Britain rights for a fixed period, after which the copyright expired.¹

In 1774, the court² in England brought disagreements on the length of copyright to an end. The outcome of the case resulted in the decision that Parliament could, and had, put a limit on copyright length. This decision reflected a shift in English ideas of copyright. The English lords who made the decision in 1774 decided that it was not in the public's best interest to have London publishers control books in perpetuity, particularly as English publishers commonly kept prices high. There were some notions that this was a cultural or class issue. Works in perpetual copyright were seen to have limited access by some citizens to the cultural history of their own land.³

Copyright was later expanded to include photography, phonography, film, broadcasting, photocopying, computer programs, Internet and digitized works in general as those technologies

1 http://en.wikipedia.org/wiki/History_of_copyright_law, accessed on 16th September, 2009.

2 In the case of *Donaldson v Beckett*, 2 Brown's Parl. Cases 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257 (1774).

3 *Ibid.*

became widespread. These expansions were at first controversial but over time became stable components of commerce in the relevant industries.

1.3 International copyright protection

Internationally copyright is protected by international instruments. The Berne Convention for the Protection of Literary and Artistic Works of 1886 (the Berne Convention), the Paris Convention for the Protection of Industrial Property of 1883 (the Paris Convention) which protects various forms of industrial intellectual property including patents, designs and trademarks and the Patent Co-operation Treaty of 1970, are international instruments which grant right to authors, performers and phonogram producers' to authorize or prohibit copyright of their works and other protected materials.

However, the Trade-related Aspects of Intellectual Property Rights (TRIPs) Agreement is the most recent and comprehensive international arrangement affecting intellectual property rights. Members of the World Trade Organization (WTO) are further required by the Agreement on the TRIPs Agreement to adopt a high standard of protection and enforcement. TRIPs was designed to strengthen and harmonize worldwide intellectual property rights protection. It requires member countries to implement and enforce minimum standards for protecting those rights.

In 1996, WIPO Treaties achieved to clarify and confirm the broad scope of production right, particularly in its application to works and phonograms in the digital environment. Both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) re-state the Berne Convention requirement that the reproduction right must cover reproductions in any manner or form. Furthermore, the WPPT explicitly protects direct and indirect reproductions as provided by the Rome Convention.

The full scope of this right is further clarified in an agreed statement that was adopted unanimously in the treaty negotiations. The agreed statement confirms that the right of reproduction fully applies in the digital environment, in particular to use of phonograms in

digital form. It is however understood that storage of a protected phonogram in a digital form in an electronic medium constitutes a reproduction.⁴

1.4 National Copyright Protection

Copyright is protected nationally by national law whereby, different approaches have been followed in granting such rights. Some laws entitle authors to general rights, specifying in varying degrees the different ways in which a work may be utilized. In those circumstances author's consent must be obtained. Example would be reproduction by various processes, public performance, broadcasting and transaction.⁵ It can however be argued that the early copyright law and the international copyright law influenced enactment of copyright law of various countries including Tanzania.

1.5 Statement of the Problem

Copyright Infringement will occurs where a person who is not the copyright owner does or authorize someone else to do, without license, any of the acts within copyright owner's exclusive rights.⁶ In the context of uploading video and music to a sharing website, for example, the person uploading it without a license will be infringing the copyright owner's exclusive rights to communicate and the right to make a copy of the work and communicate it to the public.⁷

The current Tanzania copyright law was influenced by the early copyright law of Britain which was intended to protect analogue or physical works. At that time digital technology was not invented and therefore the law did not intend to protect digital works.

Digital technology came up with copyright issues such as digital copyright infringement in music. Such issues are not addressed by the Tanzania copyright law a situation which causes infringement to holders of digital works or of physical works which can be transformed to digital format for example music works. Lack of adequate legal provision to protect copyright infringement occurring in peer to peer file sharing necessitated this study. This study also poses the following questions:-

⁴ WPPT, Article 7, 11 and 16 and Agreed Statements; WCT, Agreed Statement Concerning Article 1(4).

⁵ Collier D., Basic Principles of Business Law,(2006) (SA) page 27.

⁶ See the South Africa Copyright Act No. 98 of 1978 as amended, section 6(a)-(g)

⁷ Ibid.

- i. Is the current Tanzania copyright law intended for digital copyright protection?
- ii. Does the Tanzania copyright law provide for copyright infringements occurring through peer to peer file sharing

The study attempts, to critically analyze the current Tanzania copyright law to find out whether holders of digital works in particular music copyright holders are protected by the current copyright law. The analysis helps to identify weakness in the law in order to propose recommendations in the copyright law. The issues to be raised in this study may also form a basis upon which further research may be carried out. It is also hoped that the study will foster critical thinking and promote a socially conscious debate and encourage the development of strategies which will advance reasonable, democratic and equitable law.

1.6 Significance and Purpose of the Study

A number of writers and scholars have written a lot in copyright issues. Most of them have concentrated on copyright generally, digital copyright and music copyright, just to mention a few. Although in Tanzania there is a copyright infringement occurring in peer to peer file sharing, no scholarly work in Tanzania has been done in this area, hence a need to undertake this study.

The purpose of this study is four-fold. Firstly, it gives a basis and historical account of the information on the extent of the problem regarding music copyright infringement occurring through peer to peer file sharing.

Secondly, the findings of the study provide knowledge of the inadequacies of the Tanzania copyright law and propose possible measures for reforms in order to come up with comprehensive and up to date copyright laws which take into account technological advancement of digital technology.

Thirdly, the comparative aspect from other jurisdiction which shows how they dealt with the issue of protecting digital copyright, act as an eye opener to the government to appreciate the need of having provisions for digital copyright protection in the Tanzania copyright law.

Fourthly, the conclusion and recommendations of the study provides a practical guidance to the general public, Non-Governmental Organizations (NGOs), practicing lawyers, government authorities entrusted with the mandate of administering copyright holders' rights, researchers, scholars, expert and students who are interested in this area. This is partly so because, as already said, not much has been written in the copyright infringement of music in peer to peer file sharing in Tanzania.

1.7 Objective of the Study

This study aims to achieve the following objectives;

- i. To identify gaps in the Tanzania copyright law that hinders copyright protection of music works through peer to peer file sharing.
- ii. To propose recommendation for the amendment of the Tanzania copyright law in order to provide for copyright protection of digital works including music copyright through peer to peer file sharing.

1.8 Hypothesis

This study is guided by the following hypothesis:-

- i. That the existing Tanzania copyright law is outdated as it was enacted for the purposes of physical or analogue works
- ii. That, consequently, the Tanzania copyright law does not provide for copyright of digital music occurring through peer to peer file sharing.

1.9 Research Methodology

This study was conducted through library research. Various books, articles, legislations, cases, publications and relevant literatures pertinent to the subject were studied.

1.10 Study Limitations

Copyright is a wide area; this study therefore, only considers music copyright infringements specifically occurring through peer to peer file sharing. The findings and recommendations will be determined by availability and accessibility of relevant information.

1.11 Chapters Layout

This study comprises five chapters. Chapter one is an introduction chapter. This chapter contextualizes the topic by giving an overview of intellectual property and purpose of the study.

Chapter two provides for the concept of peer to peer file sharing and its impact on copyright infringement. This chapter base on the general concept of file sharing in music works and its development. In this chapter the author also analyzes how peer to peer file sharing causes copyright infringement in music works.

Chapter three is about development of copyright law towards protection of digital music and movie. This chapter analyze changes occurred in other jurisdiction such as the United States of America and the European Union. The analysis basically focuses on the development of copyright law through legislation, various case decisions, international instruments and various directives.

Chapter four analyzes whether file sharing of music works facilitate music copyright infringement in Tanzania. In this chapter the author analyzes the current trend in Tanzania in so far as file sharing in music work is concerned. The aim is to assess whether in actual fact, file sharing in music work happens and if it does, how big is the problem in the Tanzania music industry.

Chapter five is a concluding chapter. This chapter draws conclusion and provide recommendations for legal reform for Tanzania from lessons learned from the United States of America and the European Union.

1.12 Literature Review

Peer to peer file sharing as a concept has been written by various scholars. However, most of the available literatures have based on the effect of peer to peer file sharing in copyright generally and music copyright as a concept.

Unlike other countries where there are several literatures in the area of peer to peer file sharing and its effect to copyright, in Tanzania there is limitation of scholarly work relating to the subject.

Furthermore, even the available literature does not discuss specifically the effect of peer to peer file sharing in music in music copyright in Tanzania the gap which this study intends to fill

Julien Hofman (2009) in his book *Introducing Copyright, A Plain Guide to Copyright in the 21st Century* discusses the effect of copyright both in analogue and in digital where he argues that there is a tendency of ordinary people to produce works which are protected by copyright without permission of the right holders. In the past such works used to be in analogue format but now such works also includes works which are in digital format.

Hofman further add that the digital forms of copyright works were made possible by computers and internet. But computers and the internet have also made it possible to copy and distribute the work of others and so infringe their copyright. Some of the infringers do not realize that through such practices they may be preventing copyright holders from making a living, depriving them of their right to be recognized as authors of their works or committing crimes. According to Holfman, other infringers simply do not care, or do not believe that they are entitled to copy without permission. Holfman further argue that many original works are created, used and abused as most people know very little about the copyright that protects these works.

Mark Halloran, Esq (1996) in his book *Musician's Business and Legal Guide* provides understandable information on vital legal and business issues which are necessary to keep pace with changes in the music industry.

Mark, among others provides for issues such as music copyrights owners agreements, contracts and relationships between them and other parties such as major labels and other users of music works and other important practical legal issues and guidelines which are important to be known by music copyright holders.

Kohn Bob Kohn (2001) in his book Kohn on Music Licensing provides accurate and authoritative information on music licensing in America. Kohn narrates necessary procedures and how the process of licensing should be conducted in terms of relevant forms to be filled and other necessary information such as duration of copyright, assignments of copyright and licenses. According to Kohn music licensing can be viewed from two perspectives first being the considerations used by music publishers and songwriters in earning the living from the music and second, the clearance of music right by those desire to use copyrighted music for commercial purposes.

Gerald Faulhaber in his article File Sharing, Copyright and Optimal Production of Music argues that much economic, political, judicial and legal attention has been shown on the significant changes currently taking place within music production and distribution business forced by the use of the internet for both file sharing of unauthorized copyrighted materials and more recent online legal music distribution. The strong demand for music coupled by the low cost of distributing illegal copies through peer to peer systems is unraveling the business model by which music has traditionally been created, developed and distributed. According to Faulhaber, application of the tradition copyright law has been ineffective in stopping the loss of business in the traditional channels. Producers have implemented forms of Digital Right Management in an attempt to protect their property through technologically self enforcing contracts. Past DRM effort has alienated consumers resulted into defective product and in some cases been laughably easy to defeat by "hackers". Producers assert that if the problem is not solved, music production will be curtailed. The cost of free music through peer to peer file sharing is less music produced and fewer choices the outcome that all seem to agree is bad.

In this article Gerald try to answer the question whether or not a reduction in music choice, is in fact bad. Gerald argues that there is overproduction in music industry which is lowered by peer to peer file sharing. Gerald further argue that displacement of CD sales by peer to peer file sharing actually increases welfare by constraining the overproduction of music that

results from its unique market structure. The very tentative policy conclusion is that legitimizing file sharing under the doctrine of fair use is likely to be welfare enhancing.

CHAPTER 2

P2P FILE SHARING AND ITS IMPACT ON COPYRIGHT INFRINGEMENT

2.1 Introduction

This chapter provides for the concept of copyright protection as well as peer-to-peer file sharing and its impact on copyright infringement. This chapter discusses the general concept of file sharing in music works and its impact on copyright. The chapter further, analyzes how peer-to-peer file sharing causes copyright infringement in the music industry.

2.2 International copyright protection

2.3 Features of international agreements

Internationally, copyright is regulated by international agreements. To be party to international agreements countries need to negotiate and agree to the agreement before the agreement becomes binding. The country then needs to domesticate the agreement by enacting a legislation to give effect to the international agreement. After the domestication, it is the domestic legislation which will bind the citizen of a particular country and not the international agreement.⁸

2.4 Copyright international agreements

The Berne Convention for the Protection of Literary and Artistic Works of 1886 (the Berne Convention), the Paris Convention for the Protection of Industrial Property of 1883 (the Paris Convention) which protects various forms of industrial intellectual property including patents, designs and trademarks and the Patent Co-operation Treaty of 1970, are international instruments which protect copyright.

The Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement of 1994 is the most recent and comprehensive international instrument affecting intellectual property rights. Members of the World Trade Organization (WTO) are required by the TRIPS Agreement to

⁸ Julien Holfman (2009) 'A plain language guide to copyright in the 21st century' Commonwealth of Learning: Vancouver 25-26.

adopt a high standard of protection and enforcement. TRIPS was designed to strengthen and harmonize worldwide intellectual property rights protection. It requires member countries to implement and enforce minimum standards for protecting those rights.

In 1996, World Intellectual Property Organization (WIPO) Treaty achieved to clarify and confirm the broad scope of production right, particularly in its application to works and phonograms in the digital environment. Both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) re-state the Berne Convention requirement that the reproduction right should cover reproductions in any manner or form. Furthermore, the WPPT explicitly protects direct and indirect reproductions as provided by the Rome Convention.

The full scope of reproduction right is further clarified in an agreed statement that was adopted unanimously in the treaty negotiations. The agreed statement confirms that the right of reproduction fully applies in the digital environment, in particular to use of phonograms in digital form. It is understood that storage of a protected phonogram in a digital form in an electronic medium constitutes a reproduction.⁹

2.5 National copyright protection

Copyright is protected nationally by national laws. Copyright legislation varies from one country to another although most of them have similar provisions with minor differences. Generally copyright laws provide authors with rights specifying in varying degrees the different ways in which copyright works may be utilized. In those circumstances before exploiting the work, author's consent must be obtained. Example would be reproduction by various processes, public performance, broadcasting and transaction.¹⁰

2.6 Requirements for copyright protection

There are some requirements to be considered before the work can qualify for copyright protection. In most countries¹¹ it is required that the work must be original, and authors must use own skill labour or judgment in producing the work; the work must further be reduced to a

⁹ WPPT, Article 7, 11 and 16 and Agreed Statements; WCT, Agreed Statement Concerning Article 1(4).

¹⁰ Collier D., Basic Principles of Business Law,(2006) (SA) page 27.

¹¹ For example South Africa, Copyright Act No. 98 of 1978 as amended section 2(1).

material form such as writing or a recording or other such tangible form. In other words, the utterance of a mere idea for a work is not protected by copyright, although it may be protected by other laws such as competition laws.¹²

Furthermore, in order for a work to be protected¹³ under copyright law, the author must qualify, that is he has to be a citizen of or a person domiciled in the particular country or any other country that is a member of the WTO or the Berne Convention or juristic person dully incorporated in a member country of the WTO.¹⁴ Copyright is also conferred in a work that is firstly published in a particular country.¹⁵ These requirements are applicable in almost every country with minor disparities.

2.7 Duration of copyright in literary, musical and artistic works

In many countries¹⁶ the duration of copyright in literary or musical works is the life of the author and fifty years from the end of the year in which the author dies, unless, before the death of the author, the work was published, performed, broadcasted or offered for sale for the public, in which case the term of copyright shall continue to subsist for a period of fifty years from the end of the year in which the work was published, performed or broadcasted.¹⁷

2.8 Economic rights of authors of music

Economic rights of authors are those rights that enable the author to earn from the work. The revenues the authors receive are simply the payment for the work of their mind. All copyright laws reflect the guiding principle that the author is entitled to a reasonable share of the economic returns from public use of their works.¹⁸

¹² Ibid section 2(2).

¹³ For example in South Africa.

¹⁴ See for example the South Africa Copyright Act No. 98 of 1978 as amended, section 3(1).

¹⁵ Ibid.

¹⁶ For example South Africa.

¹⁷ the South Africa Copyright Act No. 98 of 1978 as amended, section 3(2)(a)-(f).

¹⁸ Collier D., (2006) 'Basic Principles of Business Law (SA)' Page 371 at page 26.

2.9 Online music

Gaining access to digital music on the World Wide Web¹⁹ has become relatively easy due to rapid advancement of computer technology. Music are made available online through various ways and in a number of formats such as streaming and MPEG-1 Audio Layer 3 formats commonly known as MP3. Some if not all music available online are copyrighted and they are available either when the author or copyright holder of the music upload them in order to reach a broad audience or when someone else upload the music and make it available to the Internet.²⁰ To access music online users only need to have a computer with internet connection.

2.9.1 Streaming and MP3 formats

Streaming and MP3 are digital formats in which digital music can be available online. Streaming involves the transmission in real time of audio over the Internet.²¹ Streaming is normally used in the context of webcasting or live distribution of music and it does not allow easy making of permanent copies by users²² therefore reducing the risk of unauthorized distribution of music.

Apart from streaming, perhaps the most industry-transforming technology in digital world is compression technology of MP3 which allow audio data previously occupied a large amount of space to be compressed into files that are smaller in size therefore easy to transfer across the Internet and downloaded into users' computers. MP3 files retain CD- quality sound regardless of the number of times the copy are made and they can be copied and played in various devices such as computers and various audio devices the user wishes to use. The invention of MP3 and availability of faster modems consequently decreases the amount of time required to download a song from hours to minutes.²³

MP3 software applications has enabled users to download and upload songs easily and quickly and efficiently hence many users upload and download MP3 music and share with friends and peers through peer-to-peer file sharing. Music in MP3 format unlike in streaming

¹⁹ The World Wide Web is a series of digital information files, or web pages, that are maintained on thousands.

²⁰ Kevin Davis (1994) 'Fair use on the Internet: A fine Line Between Fair and Foul, 34 U.S.F.L. Rev. 131 (1999).

²¹ W. Kopp & Tracy A. Suter (1994) 'Development in Copyright Policy and Network Technologies: The First Generation 17 J. Pub. Pol'y & Mktg. 305-06.

²² With the rapid development of technology there might be a mechanisms to copy streaming to the computer hard drive.

²³ Heather Rafter 'Streaming Into the Future: Music and Video on the Internet, 547 PLI/Pat at 615.

may be retained on users' computer hard drives for their own archival and listening and other purposes.²⁴ As most of these download and copying are not authorized by copyright holders they amount to copyright infringements.

2.10 Music copyright

Copyright laws²⁵ grant copyright to original literary and artistic works of authorship. Musical works are among the protected works.²⁶ Usually the copyright of musical works are shared between joint authors, consisting of the musical artists and music producers.²⁷ Therefore musical copyright protects the sound of the music as well as lyrics of the music.

Music copyright consists of various rights such as the right to reproduce copies of the original work, the right to prepare derivative works, the right to distribute copies for musical works, the right to publicly display the work and the right to publicly perform the work.²⁸ The law thus serves to ensure that music copyright owners are compensated for exploitation of their works even those distributed by digital transmission online. Consequently, any person downloading unauthorized music online commits copyright infringement.

2.11 Types of copyright infringement in music works

There are three basic types of copyright infringement in music works; direct infringement, contributory infringement and vicarious liability.²⁹

Direct infringement occurs when a person violates one or more of the copyright owner's exclusive rights. To succeed on a direct infringement case of music, the copyright holder need to prove that he has a valid copyright and the defendant copied the music without permission from

²⁴ It is estimated that in the first six months of 1999, three billion MP3 files were downloaded from the Internet, equaling seventeen million MP3 each day see Vito Peraino, *The Law of Increasing Returns*, *Wired*, Aug. 1999, at 144. Additionally, MP3.com, a popular MP3 web site, sold \$106,000 worth of CDs and music related merchandise in the first quarter of 1999. See Brenda Sandburg 'The Online Freeway Jam.

²⁵ Of most signatory countries to Berne Convention.

²⁶ The Berne Convention article 2.

²⁷ Tomlinson & Timothy Nielander (1998) 'Unchained Melody: Music Licensing in the Digital Age' 6 *Tex. Intell Prop. L.J.* 227, 313-14 (discussing payments schemes attempting to protect electronic properties).

²⁸ The Berne Convention article 3.

²⁹ Jefferey Cunad & Albert Wells (1997) 'The Evolving Standard of Copyright Liability Online, 497.

the copyright holder.³⁰ For example, a university student uploading a song without permission from the copyright holder to his home page in order to make that song available to the internet is directly infringing copyright in that music.

As it is difficult to trace individuals who transfer files online in order to recover loss, copyright holders normally sue ISPs and peer to peer technology manufactures as they are easy to reach and likely to pay the damages than individual users. ISPs are sued under the contributory infringement theory where copyright holders need to prove whether the infringement occurred, whether ISP knew or had reasons to know of the infringing activity and whether ISP substantially participated in the infringement by inducing, causing or materially contributing to the copyright infringement.³¹ Although contributory infringement theory is not expressly provided for by statutes, courts have tried to apply it in order to find copyright infringement liability.³²

Vicarious liability enables copyright owners to hold third parties liable for the copyright infringing acts committed by others people. This theory applies when the third party is in a position to supervise the infringing activity and that third party has a financial gain in the infringement activity.³³ Unlike contributory infringement which focuses on the third part's knowledge and behavior with respect to the infringement, vicarious liability depends on the relationship between the direct infringer and the defendant.³⁴ Third party liability theory is attractive in the Internet setting because of the difficulty of identifying single direct infringers.³⁵

³⁰ A plaintiff may prove copyright infringement by giving evidence showing that the defendant had unauthorized copyrighted music similar to the plaintiff original work.

³¹ *Sega of America Ltd v. Maphia & others* 948 F Supp 923; 1996 U.S. Dist Lexis 20385.

³² See *Sony Corp. of Am. V. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) where the Supreme court noted that "the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.

³³ David Weiskopf (1998) 'The Risks of Copyright Infringement on the Internet: A Practitioner's Guide' 33 U.S.F.L. Rev. 1, 9-10

³⁴ *Ibid.*

³⁵ See *Religious Technology Center v. Netcom On-line Communication Services, Inc* 907 F. Supp. 1373-75 where Netcom was held contributory liable for the infringement done by its internet subscribers.

2.12 Justification for compensating copyright holders of music works

Apart from entertainment, music is useful for other numerous activities including attraction in businesses. For instance music is useful in helping sell of different products,³⁶ such as commercials in radio stations where popular music are used to draw listeners' attention during the air of advertisements,³⁷ movies and television shows utilize music to attract viewers interest and capture viewers attention,³⁸ bars and nightclubs play music to create a sense of privacy, thus encouraging people to hang about in those places.³⁹ Furthermore, retail stores hire psychologists to carefully select must that increase consumptions of various goods.⁴⁰ There are therefore a lot of benefits derived from the use of music as a business asset hence, a need for imbursement of music like in any other capital investment.

2.13 P2P file sharing

2.13.1 Definition of peer-to-peer file sharing

A peer to peer file sharing is a distributed network architecture composed of participants that share digital works with other online participants without the need of central coordination. Peers are both suppliers and consumers of material available online.⁴¹

In the last few years peer to peer file sharing has become a common phenomenon for unauthorized exchange of music freely online a situation which has caused concern for music copyright holders as in the majority of cases, music exchanged are protected by copyrights. Peer-to-peer file sharing has consequently transformed the Internet into a vast network where one can exchange music from one computer to another easily.

³⁶ Charlotte Goddard, Market Sales Promotion, What's in Store for Music Promotion? Marketing, Dec. 9, 1999, available at 1999 WL 8318375.

³⁷ Radio as Narrowcasting: Finding a Niche and a Format to Fit, Broadcasting, June 12, 1989, at 41.

³⁸ Video Geared to Students Aims to Curb Drinking, Houston Chron., Sept. 7 2001, available at 2001 WL 23626632.

³⁹ Study shows Levels of Restaurants Noise are on the rise, Knight Ridder Trib. Bus. News, June 16, 2000, available at 2000 WL 22622361.

⁴⁰ Helen Jones, Human Traffic: the Smell of new Mown Grass, the Subliminal Sound of White Noise, Guardian, March, 9 2000, available at 2000 WL 15586647.

⁴¹ Pee-to-peer available at <http://en.wikipedia.org/wiki/Peer-to-peer> (accessed on 14 May 2010).

Accessing copyrighted music for free, apart from affecting economic right of the right holder, also discourages authors from creating or producing music works which are not likely to return profit, a situation which is likely to reduce music production. There are however studies which argue that file sharing actually increases legal music consumption.⁴²

2.14 Impact of P2P file sharing on the music recording

2.14.1 Invention of digital technology

Prior to digital technology, music was distributed using vinyl disks and magnetically encoded tape. Compact disks, introduced to consumers in the 1980s, were the first element in the industry's shift to digital technology. A compact disk player uses a sequence of 0's and 1's to produce sound waves. As a result many consumers were able to use computers to play compact disks, as well as transfer songs from compact disks for storage and replay on their computer. Still, the files were generally not shared with large numbers as the transfer required long substantial drive storage space and an enormous amount of time and bandwidth to transfer music across the internet.⁴³

Inventions of various peer to peer applications such as Napster⁴⁴ made music downloading and uploading so easy, and brought nearly the entire community of online music collection to one place. Napster's access to free music eventually attracted millions of registered users.⁴⁵

Napster could not have succeeded without the groundwork laid by previous technological breakthroughs such the compact disc commonly known as CD. CDs were the first digital music product widely embraced by consumers. Although some record initially believed that CDs could

⁴² For example the study on the impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada, Commissioned by Industry Canada, a ministry of the Canadian federal government, 2007 among others found that for every 12 P2P downloaded songs, music purchases increase by 0.44 CDs and that about 50% of all P2P downloads were to preview before purchase or to avoid buying an entire CD. The study on the Consumer Culture in Times of Crisis conducted by the BI Norwegian School of Management found that illegal file-sharers purchase ten times more than what they download for free.

⁴³ Ibid.

⁴⁴ Napster is an application that gives individuals access to one another's MP3 files by creating a file sharing system through the internet. Napster allows users to view and download contents of MP3 directories from other Napster users' hard drive.

⁴⁵ Joseph Menn, *All the Rave: The Rise and Fall of Shawn Fanning's Napster* (New York, NY: Crown Business, 2003), page 1.

not be copied it was inevitable that people would make perfect copies from CDs. Even content with substantial copy protection technology has ended up being freely distributed, and CDs did not employ any encryption for their data. By the mid 1999's consumers could transfer music tracks into their computers using a standard CD-ROM drive or create physical copies of CD with an affordable CD burners.

2.15 The innovation of MP3; did it foster P2P file sharing?

The internet did not play a major role in the distribution of music until the spread of the MP3 technology⁴⁶ which did not contain any security features. Development of MP3 file format dramatically changed these storage and bandwidth requirements. MP3 is an audio compression format that generates near compact disk quality sound at approximately 1/10 to 1/20 the size.

This made it more appealing to developers because it was easier to work with, and to consumers because there were fewer restrictions on the use of their contents. A three-minute song in CD audio format for example can be 32 megabytes. The same song in MP3 format can be compressed to about three megabyte with little loss in quality. It takes two to three hours to download a CD audio song from a 56k modem operating a peak capacity.⁴⁷ The MP3 format cuts this time to twelve to eighteen minutes.

Clearly, MP3 technology has made digital file distribution more efficient. The increased efficiency is amplified by the fact that more and more computers are connection to the internet via cable rather than modem, which significantly improves the speed at which files can be transferred.⁴⁸

2.16 The Impact of peer-to-peer file sharing in music copyright

Prior to the introduction of peer-to-peer file sharing technology, for someone to have music, he was required to purchase or to borrow the physical object such as music tape or CD containing music. The object itself was valuable as without the physical medium there was no possibility of having the music. With the introduction of digital technology and consequently peer-to-peer file

⁴⁶ MP3 created by engineers at the German Company Fraunhofer Gesellschaft, is a short hand for Motion Picture Expert Group-Layer3.

⁴⁷ <http://www.How MP3 works>. (accessed on 19/05/2010).

⁴⁸ Ibid.

sharing, the traditional notions connecting the tangible medium to the music work diminish with time as the technology enables copying and sharing of music among friends and other peer-to-peer participants digitally. Peer-to-peer file sharing without authorization, however, has been widely practiced and accepted among the society despite its apparent illegality under copyrights laws.⁴⁹

Various efforts have therefore been taken by copyright holders in order to minimize economic exploitation of music work through peer to peer file sharing.⁵⁰ The most notably methods being institution of lawsuits for copyright infringement against individual file sharers, internet service providers and developers of infringing technologies. Regardless of the institution of such cases, it is not evidenced that the music sharing through peer-to-peer file sharing has been reduced.

2.17 Reproduction right of music on peer-to-peer file sharing

Peer to peer file sharing enables numerous unauthorized music works to be accessible online easily, quickly and widely. Such production has profound impact on the right of authors as it infringes authors' right of reproduction and distribution.⁵¹

Article 9(1) of the Berne Convention provides that authors of literary and artistic works in member states shall have the exclusive rights of authorizing the reproduction of their works in any manner or form. Therefore, unauthorized reproduction and distribution of music through peer to peer file sharing amount to copyright infringement.

2.18 The right to perform music in public

The public performance right is one of the exclusive rights granted to the author of music works. Providing music online through peer to peer file sharing amount to public performance and

⁴⁹ Army Harmon & John Schwartz, *Despite Suits, Music File Sharers Shrug Off Guilt and Keep Sharing*, N.Y. Times, September 19, 2003, available at <http://www.nytimes.com/2003/09/19/business/despise-suits-music-file-sharers-shrug-off-guilt-and-keep-sharing.html?sec=technology&&fta=y> (accessed on 19/05/2010).

⁵⁰ See Army Harmon, *In fight Over Online Music Industry Now Offers a Carrot* N.Y. Times, June 8, 2003 1 at 1 available at <http://www.nytimes.com/2003/06/08/us/in-fight-over-online-music-industry-now-offers-a-carrot.html?pagewanted=all> (accessed on 19/05/2010).

⁵¹ Angela Browne 'Trade Marks and Copyright on the Internet' (1997) 2 *Media and Arts Law Review* 135 at 135.

hence, unauthorized sharing of such music in peer to peer networks amount to copyright infringement.

Music can be performed directly or by means of any device or process tape cassette players, CD players as or computers. The Berne Convention protects authors' rights of performance.⁵² It is however not easy to know what exactly constitutes a public performance. Some countries hence enact detailed legislation that tries to define exactly what amount to public performance.

2.19 Right holders battle against music copyright infringements

As the number of exchanges of music through peer to peer file sharing continues to increase, the right holders are no longer willing to wait and are now demanding justice in respect of their copy right. However the challenging question is then who should be sued, the software manufacture, the internet service provider or the Internet user who perform the downloading?

In the beginning, due to the desire to find a party capable of paying sufficient damages and to vilify the users of peer-to-peer programs, claims were brought against software suppliers. This strategy at first appeared effective, with for example the Napster case leading to the condemnation of the software company.⁵³ However, this victory could not last for long as Napster software was based on a centralized system, therefore difficult to determine works exchanged on it. Napster held an index of music files on their own services and directly linked the user searching for a file to the user making the file available. However, with the advent of decentralized systems this approach lost all relevance. Presently, due to advance in digital technology the computer of each peer-to-peer user acts as a sort of server on which the works are stored and made available to third parties. Thus the system is truly decentralized and the software supplier no longer acts as an intermediary.

⁵² The Berne Convention article 11.

⁵³ A&M Records v. Napster, 239F. 3rd 1004 (9th cir. 2001).

2.20 Legal action against the software supplier

Due to the desire to find a party capable of paying sufficient damage and to vilify the users of peer to peer programs, claims were brought against software suppliers. This strategy at first appeared effective, with for example Napster case leading to the conviction of the software company.⁵⁴ However, this victory could not be survived for long. Indeed, as the Napster software was based on a centralized system, it was difficult to prove that protected works were exchanged on Napster. Napster held an index of music files on their own servers and directly linked the user searching for a file to the user making the file available. However, with advent of decentralized systems, this approach lost all the relevance.

Currently peer to peer file sharing operates in decentralized systems where software suppliers no longer act as an intermediary. A good example of this scenario is the American case of Grokster.⁵⁵ When the case was decided, it was noted that the software supplier did not participate directly in the copyright infringement. Furthermore, the software supplier had no method of preventing the exchange of protected works as the supplier was unable to identify files which were in the system. The argument developed by the advocates of peer to peer was that the work was not stored on these sites but the site only directed to the location of the work. However, it could have been an argument to bring an action against the software supplier. It is without doubt for this reason that nowadays information on the location of the file is no longer centralized on a server but exchanged directly between the different users.⁵⁶ In effect, peer to peer services are not illegal per se as they are even used for other uses such as accessing and exchange of public domain works.

⁵⁴ Ibid.

⁵⁵ Case of 19th August 2004 : MGM Studios, Inc et al. v. Grokster Ltd et al., 259 F. Supp. 2d 1029, 2003, US Dist. Commentary by A. Lucas : *propr. Intell.* oct. 2004, p.920. See also Supreme Court of the Netherlands, case *Buma-Stemra v. KaZaA*, 19 December 2003 (software company not held liable).

⁵⁶ R. LeMay, P2P : BitTorrent donne du fil à retordre aux majors : www.zdnet.fr.

2.21 Legal action against internet service providers

Attempts were made for Internet Service Providers (ISPs) to supply names of their subscribers suspected of copyright infringements. This type of demand, which appeared in Canada⁵⁷ and the United States⁵⁸ for example, was not very successful before the courts.

ISPs are further confronted with other type of demands. For instance in Canada the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed an action against the association of Canadian ISPs claiming the payment of royalties for copyright infringements of various music occurred in their sites.⁵⁹ This approach was based on the idea that the ISPs contribute to the illegal dissemination of protected works. It was held by the Supreme Court of Canada that the ISPs could not be held liable because the ISPs merely allowed for transfer of data without knowledge of the content, which for the law of Canada⁶⁰ does not constitute an offence.

The same type of action was brought by the Belgian Society of Authors, Composers and Editors (SABAM) in Belgium against ISP.⁶¹ In this case the court reached the conclusion that since Tiscali, the ISP, had almost 4% of the Belgian market, it was inevitable that among its customers were users of peer to peer services and had infringed the rights of members of SABAM. The wording of the court was fairly clear on this point:

⁵⁷ Federal Court of Canada, 31 March 2004 *BMG Canada Inc. et al. C. John Doe* : 2004 FC 488. See Y. Gaubiac et T. Moreau, *Peer-to-peer : chronique du Canada* : *Comm.com. élect.* 2004, chron. 34.

⁵⁸ ⁵⁸ Court of Appeal Federal Circuit, District of Columbia, 19 Dec. 2003. See: Y. Gaubiac, *Logiciels et distribution de musique peer-to-peer* : *Comm.com. élect.* 2004, chron. 7. In this case the association that represents the major record companies were unable to obtain a judgment under the Digital Millennium Copyright Act (section 512 h) because the Act was held not to apply to ISPs which simply provide a transmission service, without saving data on their own servers. This leads to the representatives of the right owners to bring an action against an unnamed individual (given the name John Doe) in order to ask the judge to order the ISP to reveal the real identity of the individual.

⁵⁹ *Ibid.*

⁶⁰ Article 2. 4(1) b, Copyright Act : an ISP 'whose only act in respect of the communication of a work or other subject matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public'.

⁶¹ See *SABAM v. Tiscali*, Brussels Court of First Instance, 26 November 2004.

“there is no reason to believe that SA Tscali would be excluded from the phenomenon, in the sense that users of their services would not use peer to peer programs to exchange musical works in an illegal manner”

The court therefore held that there was an infringement of the copyright of musical works under the ownership of the members of SABAM by the unauthorized exchange of computer files using peer to peer services, and the Internet service provided by SA Tiscali.⁶² Thus, the ISP was held liable for copyright infringement.⁶³

With the uncertain outcome of action brought against copyright infringement occurring online including in peer-to-peer networks, copyright holders have now resorted to bring actions directly against Internet users who exchange works using peer to peer services.

2.22 Legal action against users

The number of cases against Internet users has increased with time whereby some users have been held liable for copyright infringement on peer-to-peer file sharing.⁶⁴ It can however be argued that condemning users for such infringements is often unfair, contrary to the freedom supposed to apply to the Internet and ignoring the rights of the public to access various works including music online.

2.23 Problem with suing users

Suing peer-to-peer and other internet users for making copyright works such as music available online, may sometimes be perturbing as online investigation mechanisms which is normally used may not be a reliable way of identifying infringers.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ From 2003, the RIAA (Recording industry association of America) has engaged in legal action against users and has recently stated its intention to engage in 753 new actions, which will bring ‘the association to a sum of 9000 actions in total’ (See : comm.com.électr. mai 2005, p.4). In France, see for example: TGI Vannes, 29 April 2004: Comm.com.électr. 2004, comm. 86, comment by C. Caron : Propr. Intell. 2004, no. 12, p. 779, See P. Sirinelli : D. 2004, jurispr. p. 3132, see J. Larrieu, and in the same case : CA Montpellier, 10 Mars 2005 : Propr. Intell. 2005, no. 15, p.168, see P. Sirinelli : comm.com.électr. 2005, comm. 77, see C. Caron – TGI Châteauroux, 15 Dec. 2004 : Propr. Intell. no. 15, see P.Sirinelli. – TGI Pontoise, 2 Feb 2005 : Propr. Intell. no. 15, p.168, see P. Sirinelli – TGI Meaux, 21 April 2005 : www.juriscom.net.

In 1998 for example, in America, Gill Murdoch and her husband Ken MacKinnon, 56 and 68 years respectively, received a letter from Davenport Lyons Law Firm demanding them to pay £ 500 damages for making available a copy of a computer game Risk II and made it available on peer-to-peer network. The couple was shocked by the letter because neither of them plays computer games and they only used their Internet for searching information.⁶⁵

On enquiring on the basis of the allegation, the couple was told by Davenport Lyons that it did not matter whether they are the ones who committed the offence or not because they might have allowed someone else to use their internet or they must have failed to protect their computer with Norton both of which were not true. After several months of hostile correspondences the claim was fought off and a year later Atari, a copyright holder of Risk II game sent an apology letter to the couple and other wrongly targeted customers saying that it regretted the distress it has caused.⁶⁶

Murdoch's case and others like it demonstrate the problems inherent in trying to suppress internet piracy by identifying individuals who have supposedly engaged in the illegal file sharing of music and other digital works and mechanisms for legal redress. The indication is that there might be many people who have been wrongly identified on the basis of flawed evidence. Some of those people may be guilty but there will also be incidents where people are wrongly identified. Some might even pay the sum demanded because they want a quick resolution and avoiding causing tension and embarrassments in the family.

With the enactment of the new Digital Economy Act⁶⁷, the targeting of house hold copyright infringers will be more likely. The new Act could mean that suspected pirates like Gill Murdoch and Ken MacKinnon will have their Internet connection disconnected if they could be accurately identified.

In 2003, in America, Brianna Torres a 12 years gild was sued for unauthorized music downloading. Brianna's family signed up for the music swapping service which they paid for its service charges. Through this service the Brianna listened music, consequently she was sued for

⁶⁵ Digital Economy Act likely to increase household targeted for piracy available at <http://ceedee.co.uk/digital-economy-act-likely-to-increase-househ> (accessed on 22/05/2010)

⁶⁶ Ibid.

⁶⁷ The Digital Economy Act is an Act of the United Kingdom Parliament regulating the area of digital media. It was issued Royal Assent on April, 12, 2010 and become operational on June 12, 2010.

unlawful downloading of music. However, the plaintiff dropped the case against Brianna in exchange of \$ 2000.⁶⁸

On another incident Recording Industry Association of America (RIAA) sued a dead person for unauthorized downloading of music. In this incident a suit was filed in the United States District Court on ground that the 83 years old Gertrude Walton downloaded 700 songs onto peer-to-peer network. It was later discovered that Gertrude passed away sometimes ago before the intuition of the case.⁶⁹

These incidents therefore shows how difficult it is for music copyright holders to seek damages against people infringing their copyright and how difficult it is to identify guilty individuals. It can further be noted that this process is complicated expensive and less like to give returns.

2.24 What should be done

There has been no attempt to create the possibility of an authorized peer to peer service than only to condemn this method of exchange, the eradication of which seems unlikely. Consequently, it is serious doubted that these action really have deterrent effect as there is it is not proved whether such legal actions against individuals has reduced music copyright infringement in peer-to-peer file sharing.

Due to this trend it is sometimes suggested that peer to peer services should be legalized or that they should be a question for legislative reforms. The discussions in Spain regarding a modification of their Penal Code for instance serve as a good example. It is argued that such reform in Spain will now bring an end to all actions against peer to peer users. In effect, the new provision will now only punish copies made in a commercial context which are defined as copies made for profit in prejudice of the right of the third party. However, the situation seems less clear. As it was emphasized, it is difficult to argue that the downloading of a work does not necessarily include the intent to harm the interests of the rightful owners. In addition, downloading can be seen to a way of realizing a profit.

⁶⁸ 12 years old sued for music downloading available at <http://www.foxnews.com/story/0,2933,96797,00.html> (accessed on 22/05/2010)

⁶⁹ I sue dead people available at <http://arstechnica.com/old/content/2005/02/4587.ars> (accessed on 22/05/2010)

It is therefore appears that a dead end has been reached. Consumer associations denounce actions against users, and the representative of the rightful owners are divided, some agree with legal action and favour developing authorized services for payment whereas other want to find an alternative solution.

2.25 Conclusion

The foregoing discussion has shown that peer to peer file sharing of music works has an impact on copyright law as it causes copyright infringement in the music industry. The chapter further set a ground for analysing how other jurisdiction deals with the problem of copyright of music in peer to peer file sharing.

CHAPTER 3

DEVELOPMENT OF COPYRIGHT LAW TOWARDS PROTECTION OF DIGITAL MUSIC AND MOVIE INDUSTRY; EXPERIENCE FROM UNITED STATES OF AMERICA AND THE EUROPEAN UNION

3.1 Introduction

This chapter is about development of copyright law towards protection of digital music. The chapter examine changes occurred the United States of America and European Union. The analysis basically focuses on the development of copyright law through legislation, various case decisions, international instruments and various directives in order to learn how those countries deal with the issue of copyright in p2p file sharing so as to draw lessons for Tanzania.

3.2 The United States of America

3.2.1 The Copyright Act of 1976

The American Copyright Act of 1976 and subsequent amendments protect copyright of music among other things.⁷⁰ The copyright Act gives copyright holder the exclusive rights to reproduce works, prepare derivative works, distribute the work to the public, perform the work publicly, and display the work. Under the Act, music recordings generally contain two distinct copyright works: the musical work and the underlying musical composition and words created by the composer and the sound recording that result from the recording by the performing artists. In practice these copyright are often held by different owners i.e. a musical work copyright owned by the composer or a music publisher and the sound recording is typically assigned by the performer to the record label through contracts. Therefore an individual wanting to make use of a copyrighted piece of music must obtain the applicable rights from both the musical work holder and the sound recording holder.

⁷⁰ See Eleanor M. Lackman, *Slowing Down the Speed of Sound; A Transatlantic Race to head off Digital Copyright Infringement*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1161, 1164(2003) (“[t]he term copyright actually refers to a bundle of exclusive rights retained by the author or owner of the copyright”).

The Act also lays out protections for consumer use that were prevalent at common law, enabling consumers to use copyrighted material in a restricted manner⁷¹ such as traditional fair use right which allows a person or organization to use a copyrighted work for teaching, research, news reporting, comment or criticism and various other non-profit uses⁷². There are four factors to determine whether someone other than the copyright holder can use protected material: the purpose and character of use that is whether commercial or non-commercial, the nature of the copyrighted work, the amount of the work used in respect to the whole and the effect of the use on the potential market of the work or the value of the work⁷³. In this way, the Act created a balancing test between protection of copyright holder and consumer's rights to the material.⁷⁴

3.2.2 The Audio Home Recording Act of 1992

The first Congressional addresses to the threat of digital music piracy come with the Audio Home Recording Act (AHRA) of 1992.⁷⁵ The AHRA addressed the conflict copyright law and new technologies by establishing a royalty fund to compensate copyright owners for expected digital infringement⁷⁶ and mandating incorporation of copyright controls into digital audio recording devices to prevent serial copying.⁷⁷ The AHRA purported to balance the right of consumers and copyright holders by ensuring consumer's ability to make analog or digital audio recordings of music for private, noncommercial use while providing a royalty payment system to compensate copyright holders.⁷⁸

While the AHRA was a step in the right direction as far as acknowledging the problems developing technology presented to copyright owners⁷⁹ the AHRA provided no protection to

⁷¹ See 17 U.S.C. 1007 (2001) (codifying fair use rights that were historically protected by common law). these protection are also discussed further in the analysis of the MP3.Com and Napster cases.

⁷² Jeffrey L. Dodes, *Beyond Napster, Beyond the United States: the Technological and International Legal Barriers to online Copyright Enforcement*, 46 N.Y.L. SCH. L. REV. 279, 287-88 (2002).

⁷³ *Ibid* at page 292.

⁷⁴ See also Lackman, *supra* note 42 at page 1199, (arguing that before the digital age legislative and judicial goals included "balancing copyright against the advancement of technology and protection of the public's rights to access the work, protect their privacy and express themselves freely").

⁷⁵ See 17 USC 1007, Codifying fair use rights that were historically protected by common law.

⁷⁶ U.S.C. 1003-1007 (1994&Supp.IV 1998).

⁷⁷ 17 U.S.C 1002 (1994).

⁷⁸ See David A. Hepler, *Dropping Slugs in the Celestial Jukebox: Congressional Enabling of Digital Music Piracy Short-Changes Copyright Holders*, 37 SAN DIEGO L. REV 1165, 1173 (Fall 2000) (citing H.R. Rep. No. 102- 873, pt. 1 at 12 (1992)).

⁷⁹ See Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 379 (2003). Yu notes that the AHRA may be a model for future compromise between copyright owners and manufactures in that it protect the copyright

copyright owners from personal computer downloads.⁸⁰ In fact, the AHRA exempted personal computers from the category of digital recording device by providing coverage only to devices whose primary purpose is to make digital audio copies of recording for private use.⁸¹ Moreover, the AHRA defines a digital music recording as a material object in which are fixed in a digital recording format, only sound and material statements or instructions incidental to those fixed sounds.⁸² These two provisions serve to exempt personal computers from the sphere of control of the AHRA, thereby preventing copyright owner from receiving compensation for recordings made through a computer.⁸³ In the wake of court decisions upholding this interpretation of the Act,⁸⁴ copyright owners were in need of additional protection for digital downloading activity through computer and Internet applications.

3.2.3 The Digital Performance Right in Sound Recordings Act of 1995

Until 1995, ownership of a musical work copyright in United States of America included exclusive right to perform and display the copyrighted work publicly.⁸⁵ With the Digital Performance Right in Sound Recording Act (DPRA) copyright owners were further granted an exclusive right to perform sound recording publicly by means of a digital audio transmission.⁸⁶ The DPRA attempted to give musicians limited protection in sound recordings performed over the Internet. The DPRA essentially forces Web Site owners wishing to webcast music over the Internet to obtain a license authorizing the public performance of the recording from the owner of the copyright in the sound recording, in addition to obtaining a license from the owner of the musical work copyright.⁸⁷

owners by requiring manufacturer to pay compensatory royalties for use of digital technology, while simultaneously allowing distributors to focus on selling their products without interference.

⁸⁰ *Ibid* at page 386.

⁸¹ 17 USC §1001(3).

⁸² *Ibid*.

⁸³ David A. Hepler, *Dropping Slugs in the Celestial Jukebox: Congressional Enabling of Digital Music Piracy Short-Changes Copyright Holders*, 37 SAN DIEGO L. REV. 1165, 1173 (Fall 2000) (citing H.R. Rep. No. 102-873, pt.1, at 1182. See also *Recording Indus. Ass.'n of Am. V. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999).

⁸⁴ See *Recording Indus. Ass.'n of Am. V. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999).

⁸⁵ Digital Performance Right in Sound Recordings Act, 1995, Section 2.

⁸⁶ *Ibid* section 3.

⁸⁷ See David A. Hepler citing Heather D. Rafter, *Streaming into the Future: Music and Video on the Internet*, 547 PLI/Pat. 605,618 (1999).

While the DPRA recognized a new type of right held by copyright owners, allowing royalties to be collected from Internet performance of music where no such right was provided for radio broadcasting,⁸⁸ the DPRA was focused on digital copying by those who make files available on the Internet to others, and not by those who access available music for themselves. File sharing and Internet music and movie download services were still not within the boundaries of the regulation.

3.2.4 Digital Millennium Copyright Act of 1998

In order to implement two World Intellectual Property Organization (WIPO) treaties,⁸⁹ Congress passed the Digital Millennium Copyright Act (DMCA) in 1998. The DMCA contained amendments and additions to the Copyright Act in an effort to bring the law up to date with digital technology and copyright capabilities. The DMCA includes anti circumvention provisions to prevent users from breaking codes to encrypted files and safe harbour provisions for Internet Service Providers (ISPs) to keep them from liability for illegal piracy activities of users as long as certain conditions are met.⁹⁰

The main focus of the DMCA is to protect copyright holders against the circumvention of built-in protection found in digital works.⁹¹ Known as black box provisions, these requirements prevent users from interfering with standard technical measures designed to identify or protect copyrighted works.⁹² Examples of these technological methods include watermarking and encryption methods. Watermarks are inaudible additions to music that inform playback devices of the authenticity of the recording.⁹³ Watermarks provide a trail that owners can use to trace the distribution of sound recording through the Internet. Moreover, the watermarks cannot be removed from the recording without degrading the sound quality.⁹⁴ Encryption devices serve as

⁸⁸ Erick Boehlert, Record Companies: Save us From Ourselves, Salon.com, at http://www.salon.com/ent/feature/2002/03/13/indie_promotion/index.html (last updated March 13, 2002) (showing that almost all airplay on commercial FM radio is paid for by 5 major record labels).

⁸⁹ Of 20th December, 1996.

⁹⁰ David Balaban, The Battle of the Music Industry: The Distribution of Audio and Video Works via the Internet, Music and More, 12 FORDHAM INTELL. PROP MEDIA & ENT. L.J. 235, 258-59 (2001).

⁹¹ Digital Millennium Copyright Act, Pub. L. No. 105-3004, 112 Stat. 2860 (1998).

⁹² David Balaban, The Battle of the Music Industry: The Distribution of Audio and Video Works via the Internet, Music and More, 12 FORDHAM INTELL. PROP MEDIA & ENT. L.J. 235, 258-59 (2001) at page 258.

⁹³ David Balaban, Music in the Digital Millennium: The Effect of the Digital Millennium Copyright Act of 1998, 7 UCLA ENT. L. REV. 311,321 (2000).

⁹⁴ Ibid.

an electronic lock, preventing users that do not have the correct password from listening to the sound⁹⁵. However, once a correct password is found that password can be passed along with the recording, making the encryption useless⁹⁶. The DMCA thus prohibits users from circumventing measures like watermarking and encryption (or any other technological measures that may be devised in order to gain access to protected music files. Violations of the DMCA subject the violation party to civil liability for copyright infringement.⁹⁷

The compromise in the DMCA comes from its safe harbour provisions, which serve to limit the circumstances under which ISPs can be found liable for infringing the copyrights of sound recordings.⁹⁸ The DMCA also does not require ISPs to police their own sites. Although the DMCA provides strict liability for infringement of copyrights, four categories are given that serve to limit the circumstances under which infringement occurs. These safe harbour categories include; conduit functions, system caching, user storage and information location tool.⁹⁹ These provisions ultimately laid the groundwork for the record industry's recent attach on individual file sharers as they opened the door for initial subpoenas on ISPs by the RIAA.

These four safe harbour categories provide ISPs with protection against copyright infringement liability. The conduit function provision limits liability for routing sound from one point to another. Under the DMCA, transmission that occurs automatically and without any material selection by the ISP will not subject the ISP to liability. System caching allows ISPs to make temporary copies of sound recordings in order to provide quicker access for users. The DMCA requires ISPs to limit access to the sound recording to those who meet the conditions imposed by the person who posted the recording. Users storage, perhaps the most far reaching of the provisions protects ISPs from liability for storing a copy of an infringing sound recording on its system at the direction of a third party. An ISP faces limited liability as long as it has no actual knowledge, or reason to know, that a sound recording is infringing a copyright and it may not receive a direct financial benefit from the infringing material residing in its system. Finally,

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ David A. Hepler citing Heather D. Rafter, *Streaming into the Future: Music and Video on the Internet*, 547 PLI/Pat. 1186 -87 (1999).

⁹⁸ Digital Millennium Copyright Act of 1998, section 512.

⁹⁹ Ibid section 512 (b).

the Information Location Tools provision limits an ISP's liability for providing search engines, hyperlinks, and directories that link a user to unauthorized copies of musical recordings.

With the enactment of the DMCA, the USA brought added protection for copyright holders in a digital world. The progression of copyright law, from the Copyright Act to DMCA, thus evolved from acknowledged form of private consumer uses¹⁰⁰ towards a more restrictive position on digital piracy.¹⁰¹ The DMCA provides a significant increase in the protection afforded to copyright owners from Internet trading activity with the addition of anti-circumvention provisions. However, the provisions in the DMCA limiting liability for Internet Service Providers left room for copyright liability to pass into individual users and music consumers.

3.3 The European Union

The European Union, much like the United States, has struggled to secure copyright protections in the ever changing digital age. While both systems ultimately expose individual to attack by the recording industry, European Union copyright protections evolved along a separate path from those of United States. Considering the expansive and continuously developing nature of the European Union,¹⁰² it is useful to look at the history of international copyright legislation to observe how the United States of America legislation described above shaped European Union directives. While the legislative copyright control in the United States consists mostly of additions to existing law, the European Union copyright system requires member states to conform their laws to the directives laid down by the European Council.¹⁰³

¹⁰⁰ Peter K.U., *The Copyright Divide*, 25 *CORDOZO L. REV.* 331, 379 (2003). Yu notes that the AHRA may be a model for future compromise between copyright owners and manufacturers in that it protects the copyright owners, by requiring owners and manufacturers to pay compensatory royalties for use of digital technology, while simultaneously allowing distributors to focus on selling their products without interference.

¹⁰¹ Matthew C. Mousley, *Peer to Peer Combat: the Entertainment Industry's Arsenal in its War on Digital Piracy*, 48 *VILL. REV.* 667, 681 (2003). Many consumer organizations argue that the DMCA's anti-circumventions and other provisions, severely undermine consumers' fair use right which were historically protected in common law and codified in the Copyright Act.

¹⁰² Eleanor M. Lackman, *Slowing Down the Speed of Sound: A Transatlantic Race to Head off Digital Copyright Infringement*, 13 *FORDHAM INTEL. PROP. MEDIA & ENT. L.J.* 1161, 1164 (2003) (the term copyright actually refers to a bundle of exclusive right retained by the author or owner of the copyright).

¹⁰³ *Ibid.*

3.3.1 GATT and the TRIPS agreement (1986)

Prior to 1986, there was little in the way of uniform global standards for the protection of copyright in the modern age. The General Agreement on Trade and Tariffs (GATT) and Trade Related Aspects of Intellectual Property (TRIPS) represented a significant effort to formulate a global protectionist system¹⁰⁴ TRIPS, passed in 1986, provided internationally accepted minimum standards for intellectual property enforcement and protection.¹⁰⁵ It obligates members of the World Trade Organization (WTO), including European Union countries to make provisional measures available in disputes involving intellectual property.¹⁰⁶ Although TRIPS tries to maintain broad copyright protection, it was not developed in view of the emerging online world, so Internet technology was ignored.¹⁰⁷

3.3.2 The European Union Copyright Directives (2001)

Acknowledging the need for stronger enforcement of copyright protections by its member states in the face of developing digital technology and Internet file sharing, the European Union issued a Directive on Copyright and the Information Society (Copyright Directive) in 2001.¹⁰⁸ The Copyright Directives provides for WIPO's anti-circumvention prohibitions and gives copyright owners exclusive rights to authorize or prohibit communication of their work to the public.¹⁰⁹ These rights include the ability of owners to make works available to the public in a way that allows individuals to access them from a place and time chosen by the individual.¹¹⁰ Commentators interpret the Copyright Directive's right of availability to include all methods of transmitting music online¹¹¹. Reproduction rights of copyrighted materials under the Copyright

¹⁰⁴ Joshua S. Baunchner, *Globalization and Democratization: The Reclaiming of Copyright* 4 TUL. J. TECH & ENTELL. PROP. 93, 104 (2002).

¹⁰⁵ Ibid.

¹⁰⁶ Ibid at 108-109.

¹⁰⁷ Francine Cunningham, *Music Industry Calls for Better Enforcement of Rights on 10th Anniversary of TRIPS*, June 23, 2004, at <http://www.ifpi.org/site-content/press/20040623.html> (last visited Oct. 2004). The recording industry is urging European Union to take action to strengthen enforcement of Intellectual property rights including the TRIPS agreement.

¹⁰⁸ Council Directive 2001/29/EC of the European Union Parliament and of the Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167)10.

¹⁰⁹ Ibid art. 2.

¹¹⁰ Ibid art. 3(1).

¹¹¹ Daniel J. Gervais, *Transmissions of Music on the Internet: An analysis of the Copyright Laws of Canada, France, Germany, Japan, the United Kingdom and the United States*, 34 VAND. J. TRANSNAT'L L. 1363,1404, (2001).

Directive follow the same format mentioned above.¹¹² Distribution rights, however, seem to apply only to material objects and not to online delivery of music.¹¹³

These rights described in the Copyright Directive help provide a blueprint for member states for affording protections to copyright owners while simultaneously maintaining exemptions for personal, non-commercial use of copyrighted works.¹¹⁴ While the Copyright Directive does not specifically require private use exceptions, the exceptions are permitted as long as the right-holder receives fair compensation.¹¹⁵ This allows member states to maintain private use privileges in their laws at the same time permitting individuals to reproduce copyrighted work for private, noncommercial purposes. Article 6(4) of the Copyright Directive allows member states to take these measures, unless reproduction for private use has already been made possible by copyright holder in a manner that allows the holder to benefit from the exemption.¹¹⁶ By explicitly allowing for private use exceptions, the directive attempts to provide for some personal use of copyrighted material for Internet users. Moreover, unlike the DCMA, the Copyright Directive does not provide broad protection of liability to ISPs.¹¹⁷

3.3.3 The European Union Directive on the Enforcement of Intellectual Property Right (2004)

Most recently, the European Commission introduced a directive which tightens the reins on digital music piracy and enables the recording industry to attack users in Europe much like the lawsuits in the United States.¹¹⁸ The Directive on the Enforcement of Intellectual Property Rights (Enforcement Directive) applies to any intentional violation of copyright¹¹⁹ which necessarily extends to all types of intellectual property violations including music and movie file

¹¹² Ibid .

¹¹³ Ibid, citing paragraph 18 of the directive preamble, which states that copyright protection under the directive includes the exclusive right to control distribution of the work incorporated in a tangible article.

¹¹⁴ Ibid.

¹¹⁵ Council Directive 2001/29/EC of the European Union Parliament and of the Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167)10, art. 5(2)(b).

¹¹⁶ Ibid art. 6(4).

¹¹⁷ Eleanor M. Lackman, *Slowing Down the Speed of Sound: A Transatlantic Race to Head off Digital Copyright Infringement*, 13 *FORDHAM INTEL. PROP. MEDIA & ENT. L.J.* 1161, 1164 (2003) (the term copyright actually refers to a bundle of exclusive right retained by the author or owner of the copyright).

¹¹⁸ Robin Gross, *European Union Poised to Attack P2P File-Sharers*, IP Justice, Available at http://www.ipjustice.org/CODE/update20040214_en.shtml (Feb. 14,2004) .

¹¹⁹ E.U. IP Enforcement Directive, art. 2.

sharing. Despite the potential for resistance, the Enforcement Directive was approved by the European Parliament in March 2004 on its first reading.¹²⁰ It seems likely that this directive was influenced at least in part, by the recent attacks on Internet music piracy in the USA.

While this new directive has the potential for far-reaching repercussions on music file sharers, proponents maintain that certain limitations prevalent in existing European Union law will continue¹²¹. In particular, the Commission states that the Enforcement Directive aims to strike a fair balance between the interests of right holders and legitimate users of intellectual property, while the protective measures focus on commercial infringements or those which most damage right holders interests.¹²² It also seems to provide more of a burden on Internet Service Providers by allowing courts to impose interlocutory injunction on intermediaries to desist from participating in infringements.¹²³ While the deadline for implementation of the Enforcement Directive is close to two years away, it remains to be seen what impact the new law will have on digital music and movie piracy measures in EU member states.¹²⁴

The different approaches taken by the European Union and the United States of America towards providing rights and protections of copyright holders in the digital age have led to conflicting approaches by their respective court systems. The progression of United States of America lawsuits brought by the recording industry to protect digital rights laid a foundation for the individual lawsuits that followed, both in the United States of America and abroad.

3.3.4 The Digital Economy Act

The Digital Economy Act is an Act of the United Kingdom Parliament regulating the area of digital media. The intention of the Act is to strengthen the UK communication infrastructure as well as equipping UK to compete and lead in the global digital economy. This Act was issued royal assent on 12 April, 2010 and it will come into force on 12 June, 2010. The Act provides for

¹²⁰ If the directive went through a second reading, opponents may have been able to raise substantial issues for debate. Instead the directive was passed on the first try, something usually reserved for un-controversial directives or directives to which there is near unanimous agreement, see Gross at note 91.

¹²¹ See Frequent Asked Questions page from the European Commission press release describing the directive, at <http://europa.eu.int/rapid/pressReleaseAction.do?reference=MEMO/03/20&format=HTML&aged=EN&guiLanguage=en> (last visited September, 17, 2004).

¹²² Ibid.

¹²³ Ibid.

¹²⁴ However, the recording industry began attacking internet music infringers soon after the directive's approval by the Commission.

the online infringement and penalties on copyright infringement, including copyright in music works. Of interest to the subject is the provision which amend the Communications Act 2003 thus requiring internet service providers to disclose details of customers who repeatedly infringe copyright upon production of sufficient evidence with a possible fine of £250,000 for non-compliance. Further the Act requires internet service providers to block access to sites that allow substantial copyright infringements. The Digital Economy Act also oblige internet service providers to temporarily suspend internet connections for users who repeat copyright infringements even after receiving warnings from their internet service providers.

Other provisions in the Act which are relevant to the subject include amendment to the Copyright, Designs and Patent Act 1998 to increase the criminal liability for making dealing with infringing articles and making dealing with or using illicit recordings to a maximum of £50,000, so long as it is done during the course of a business.

Despite its good intention, it can be argued that it is difficult to implement the Act especially on provision which requires ISPs to block internet connections to persons accused of illegal downloading¹²⁵ as it is difficult to identifying individual users. Internet cafes for example may find this exercise difficult as they will be required to obtain detailed information of all those who require internet access. Further it also difficult to identify exact infringers in households as the internet service is normally used by various members in the family.

It can further be noted that suspending access to the internet may limit users' access to other useful information necessary for life. For instance online shopping, banking, education work and other online social and economic activities all depend on availability of internet services hence disconnection of the same is likely to deprive the person from such important services. The Act also imposes a huge and difficult burden to ISPs as many youngsters are likely to continue to continue downloading copyrighted materials in particular music, regardless of the Act.

¹²⁵ The Digital Economy Bill, 2010 section 10.

3.4 Development of digital copyright protection in music and movie works in the United States of America and European Union through decided cases

3.4.1 United States of America

The RIAA represents record companies and recording artists in the protection of copyrighted material.¹²⁶ The recording industry's attack on copyright infringement in the realm of digital music protections proceeded in much the same way federal law incorporated those protections, slowly at first and then with increasing frequency. The RIAA's attempt to gain a foothold on digital rights because as stronger as federal law, provided more protections to copyright holders. The following cases provide historical context of the recording industry's move towards the individual internet users.

3.4.2 The diamond multimedia case

In 1999, the Ninth Circuit Court of Appeals¹²⁷ exposed the loophole in the AHRA which prevented computer hard drive downloading devices from falling under the digital audio recording device provision.¹²⁸ This case was one of the first attempts by the RIAA to pursue legal remedies against MP3 transport devices.¹²⁹ The RIAA sued Diamond Multimedia, a manufacturer of a hand-held MP3 device (the Rio) capable of receiving, restoring and replaying digital audio files stored on personal computer hard drives, alleging a violation of the AHRA.¹³⁰ The court held that the MP3 devices did not record directly from digital music recordings, stating that the devices were not digital audio recording devices under the AHRA because they did not reproduce digital music recordings from transmissions.¹³¹ Specifically, the court noted that

¹²⁶ Peter K. Yu, *The Copyright Divide*, 25 *CARDOZO L. REV.* 331, 332 (2003). Yu notes that the AHRA may be a model for future compromise between copyright owners and manufactures in that it protect the copyright owners by requiring manufacturer to pay compensatory royalties for use of digital technology, while simultaneously allowing distributors to focus on selling their products without interference.

¹²⁷ *In Recording Industry Association of America v. Diamond Multimedia Sys.*, 180 F.3d 1072 (9th Cir. 1999).

¹²⁸ *Recording Ind. Ass'n of Am. V. Diamond Multimedia Sys., Inc.*, 180 F. 3d 1072, 1081 (9th Cir. 1999).

¹²⁹ MP3 transport devices, like portable CD players and walkmans, allow users to download songs onto a device and carry them where ever they go. Examples include Apple's iPod and Gateway's MP3 carrier.

¹³⁰ *Diamond Multimedia Sys.*, 180 F.3d at 1074-75.

¹³¹ *Ibid* at 1080.

computers would not qualify as digital devices because their primary purpose is not to make digital audio recordings.¹³²

The Ninth Circuit's decision had obvious repercussions for copyright protections of digital files. In support of its decision, the court reiterated that the purpose of the AHRA was to ensure the right of consumers to make digital audio recordings for their private, non-commercial use.¹³³ The holding eliminated the electronic manufacture, a key player in Internet piracy, from legal attack under the AHRA.¹³⁴ Consequently, after the decision, the Rio and other MP3 player devices were marketed without possibility of copyright infringement and enjoyed considerable sales.¹³⁵

3.4.3 Napster and peer-to-peer file sharing

Napster was a type of peer-to-peer (P2P) network. With Napster, files reside on user's computers instead of a central computer. Users downloaded and installed a Napster¹³⁶ utility in their computers. Users then, indicated the folder or folders that contained the music files they wanted to share with other Napster users.

The following is what happened when using Napster to download a song or a movie some activities do happen.¹³⁷ The Napster utility logged the user onto a central server. This server kept an index of the Napster users currently connected, but did not store any file; the user typed in the desired artist or the name of the song or movie desired; the Napster utility queried the index server for other online Napster computers that had requested the file, and returned a list of users that were sharing the file; the user indicated which of those files he or she wanted to download; the user's copy of Napster attempted to establish a connection with the computer hosting the file the user selected and if the connection was successful, the file began to download

¹³² Ibid at 1078.

¹³³ Ibid at 1079.

¹³⁴ Tamara Milagros-Woekner, *Karma or Golden Opportunity?: A New Business Model for the Music Industry Launching into Cyberspace*, 30 Sw. U.L. REV. 2995, 304 (2001).

¹³⁵ Ibid (stating that 813,000 players were sold in 1999 alone).

¹³⁶ Napster is a file sharing program that allowed users to copy digital files from other users personal hard drive. This program was created by Shawn Fanning while in the University of Northeastern, Boston.

¹³⁷ Jeff Tyson, *How the Old Napster Worked?* HowStuffWorks
<http://www.dei.isep.ipp.pt/~acc/imd/teoria/napster1.pdf> (accessed on 31/03/2010).

directly to the user's computer, finally, once the file was downloaded, the host computer broke the connection with the user's computer.

Napster's P2P architecture solved many of major problems previously associated with downloading music from the internet. Online storage space and bandwidth cost money and Napster servers did not have to store or transfer much more information than list of users and their files, a tiny amount of information compared to the music or movie files transferred between users. Because Napster had no need to duplicate bandwidth and storage provided by their users' base, it was able to remain a free service.

Since the service was free, the only cost faced by new users was the time invested in downloading the software and learning the well-designed interface. Since each new user brings a library of shared files into the network, the value of the service to all users increased with each new user. This means that the number of users will grow at an increasing rate until total market situation. Napster was able to handle all these users because the marginal infrastructure requirements were slow.

Additionally, Napster was culturally successful at turning its users into a community of digital music and movie traders. Because P2P depends on people being nice enough to upload files, the system cannot work if people disconnect from the service as soon as they done downloading or fail to share files that others might want. Napster attacked the P2P selfishness problem technically with its default settings. The default download directory was automatically shared, so if people did not bother to move their files of out that directory or indicate another download directory, all of the files that the use has downloaded are automatically shared. This did not solve the problem of users logging off as soon as their files finished downloading, but it did serve to promote sharing among even the least experienced of users.

Napster attacked selfishness problem socially with its chat rooms. By displaying the number of MP3 shared when browsing chat rooms, Napster created social pressure to be generous with shared files. Current P2P systems use other devices to promote sharing, such as minimum requirements for megabytes shared, download queue priority for high shares, or only letting people download while they simultaneously uploading. However, none of these devices solves the problem of users logging on to get a specific file for a music or movie, and then

logging off as soon as it had completed downloading. Napster's chat rooms provide a reason to use the software beyond downloading, and thus encouraged people to remain logged on with their libraries available.

3.4.4 The demise of napster

Although Napster was extraordinarily successful in dealing with the technological and cultural problem of file sharing, it could not overcome the legal problem. Napster claimed not to infringe copyright because it did not actually store any of the music that was transferred through its network, but Napster's popularity was rooted in copyright infringement. Almost all the music and movies shared over the Napster network was made publicly available against the wishes of the copyright owners. Napster's services went live on June 1st, 1999, on December 7th 1999, the RIAA sued Napster for copyright infringement, asking for damages of \$100,000 each time a song was copied. On July 11th 2001, a district court ruling shut down Napster because it could not block 100% of the content expressly designed by copyright holders.¹³⁸ In its two years of existence, Napster changed the music and movie business and its relationship with consumers.

Today there are many more P2P services than there were in the time of Napster. But these new services cannot be quashed as easily as Napster because they are entirely P2P. Because Napster ran a central service that indexed its users and file titles, a single court order against the company had the power to shut down the whole service. The new generation of P2P software does not rely on a central indexing server. Once the software is downloaded onto individual's computer, the network would still function even if the company provided that software ceased to exist. Although it is still an open question as to whether or not a company can legally distribute P2P software provided that it has no control over the ensuing network, its resolution will not significantly bear on the future of free P2P downloads. All that is required for a network is the distribution of some software, which can be written either by a business or by a small group of computer programmers. Even if the RIAA were successful in removing all possible profit from the creation of a P2P network, the current networks would continue to exist and grow so long as the client software was available on the internet.

¹³⁸ Sandra Marcus, "The History of Napster and Peer to Peer Music Exchange" 6th December, 2001 accessed <http://web.utk.edu/~smarcus/History.htm> on 31/03/2010.

3.4.5 The aimster

The Aimster¹³⁹ technology differed from that of Napster. Aimster's server searched the computers of those users of its software who were online and so are available to be searched for files they were willing to share, and if found the file that had been requested instructed the computer in which it was housed to transit the file to the recipient via the Internet for the person to download into his or her compute. Aimster did not make copies of the exchanged files. The court found that constructive knowledge was sufficient to satisfy the knowledge element required for contributory infringement. The court in this case did not perform an analysis of the material contribution element of contributory infringement. For Aimster was not able to adequately prove its product's non infringement purpose therefore the court held that its conduct consisted of contributory infringement. The lower court in the same case held that Aimster had the right and ability to supervise its users by removing copyrighted material from the site, and had received profit by charging users a monthly fee to use the software. Aimster therefore used the copyrighted material as a marketing tool to attract users to use its service and therefore vicarious liable.

3.4.6 Grokster

Grokster technology differed from Napster and Aimster. Grokster's P2P software emerged using supernode technology, where a chosen group of nodes on a network were used as indexing servers. Grokster users searched files by connecting with the easiest accessible supernode, which conducts the search of its index and supplies the user with the results.¹⁴⁰ The user was then able to transfer the resulting file onto his computer. The court held that Grokster is capable of substantial non infringing uses, then the copyright owner must demonstrate that the defendant had reasonable knowledge of specific infringing files and failed to act on that knowledge to prevent infringement.

Grokster did not maintain a central index of available files, hence, material contribution did not exist. Further, the defendant did not provide the site and facilities for infringement because file index did not rest on Grokster users' accounts. The court therefore did not find

¹³⁹ Aimster II 334F.3d at 650.

¹⁴⁰ Grokster II 380 F 3d at 1159.

Grokster liable for contributory infringement or vicarious liability. However, in June 2005, the United States of America Supreme Court held that Grokster could be secondarily liable for the copyright infringement of its users even if the software was capable of substantial non-infringing uses.

3.4.7 The Decision in *Sony Betamax*

When considering whether fair use defenses could be successful in a number of instances in which unauthorized copies are made of computer programs, the most important precedent is the *Sony Betamax* case.¹⁴¹ This case was brought by Universal City Studios and Walt Disney Productions charging Sony with copyright infringement for selling Betamax machines knowing that customers would use them to make unlawful copies of copyrighted television programs, including broadcasts of Universal and Disney movies. Some of Sony's advertisements for the Betamax machine influenced prospective customers to buy the machine in order to copy programs. Only when customers got home and opened the box would they find a cautionary note about possible copyright infringements.

The principal charge against Sony was that of contributory copyright infringement, for it was providing the instrumentality by which customers were able, in Universal's view, to infringe copyrights and Sony knew they will do so. Sony's principal defense was that since the principal use of Betamax machines was to make copies of programs for time-shifting purposes which Sony argued was fair and non infringing, Sony could not be found liable for contributory infringement.¹⁴²

The Supreme Court in this case¹⁴³ was not persuaded. The Court observed that there were many copyright owners who had no objection to the use of Betamax machines for copying their programs off the air. In addition, some programs broadcast on television were un-copyrighted. It was also argued that Betamax machines could also be used for other things besides copying copyrighted programs. These, along with copying for time shifting purposes, seemed to the Court to be substantial non infringing uses of the Betamax machine. It was said in this case that, to rule in Universal's favour would interfere not only with the interests of Sony, but also of all non

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

objecting copyright owners as well as the interests of owners of Betamax machines. It would, in effect, give Universal the exclusive right to control the sale of Betamax machines.

When analyzing whether copying programs off-the-air for time-shifting purposes, the Supreme Court decided that the first fair use factor favoured a finding of fair use because the copying was private and non commercial. The Court said that courts should presume private non-commercial copying to be fair, and only if there was some demonstrable harm to the market for the copyrighted work, would the presumption of fairness tend to be overcome.¹⁴⁴

Regarding the second fair use factor, the court noted that Universal had chosen to have its copyrighted movies shown on broadcast television and it had been handsomely compensated for doing so. It had known that this would mean viewers would get to see the movies for free. The fees which Universal could get for broadcasts of its movies in fact depended on having large audiences. Time-shifting simply allowed those who could not view a movie scheduled for broadcast to see it at another time. Although the fact that viewers would copy the whole of a broadcasted movie would ordinarily disfavour a finding of fair use, the Court pointed out that the copy itself was temporary, for once the time-shifted program had been viewed, owners of Betamax machines typically taped over the program the next time they wanted to make a time-shifting copy of another program.

Concerning the harm factor, the Court observed that Universal and Disney had admitted that no harm to the market had yet occurred. Although they had offered evidence about the prospects for future harms to their markets, this evidence was quite speculative. This was not enough, the Court decided, to overcome the presumption of fairness that arose from the private non-commercial purpose of the copying.

Those who engage in private non-commercial copying found comfort in the presumption in favour of fair use that the Court announced in the Sony Betamax case. It is important to realize that the Court did not rule that all private non commercial copying was fair use. In particular, the Court did not address the question whether copying copyrighted movies off the air for librarying

¹⁴⁴ Ibid.

instead of just for time-shifting purposes was fair use. Given that the Court was deeply split over the time-shifting issue.¹⁴⁵

The reason why the Court decided that copying the whole of movies was not harmful to copyright markets in the Sony case was that the copy was temporary. A library copy for example would, of course, have a more permanent character. Although the Sony Betamax case was decided before there was a substantial market in video cassettes and even video CDs, as in the market today. A library copy made off the air might now displace a sale of a video CD. This would make Universal's argument for harm to their market stronger today than in the Sony case.

3.4.8 The controversy in the sonny doctrine

Despite the significance and expediency of Sonny doctrine there can still be raised some debates regarding the applicability and practicability of the doctrine. Software by its nature is a kind of work that is very vulnerable to illicit copying and violation. For example shrink-wrap license agreements usually inform consumers that they are entitled to load the software on only one computer. Suppose, for example, someone purchased a Microsoft office program and loaded it into his or her home computer and to an office computer would that second copy amount to unlawful copy? The amount copied would be the whole thing which always cuts against a finding of fair use. At the same time it is for personal use and also not practical to buy two same CDs so that one can be installed at office and the other one at home.

An alternative analysis might commence with a description of the copying as a private non-commercial act which under the Sony Betamax case is presumptively fair. The nature of the work could also be argued to favour fair use, for software is a funny sort of product. Unlike a book which one can readily carry back and forth between one's office and home so that one does not need to buy two copies to have one at home and one at the office, it is simply impractical to expect someone to carry the software in a similar way. As a realistic matter, it makes no sense to load the software onto one's office computer in the morning, erase it before going home that night in order to take a copy of it home so that it can be loaded onto the home computer that evening, and deleted from the home computer the next morning so it can be taken back to the office computer. Yet, these acts are what would be equivalent to taking a book back and forth

¹⁴⁵ the vote in the case was 5 in favour of fair use and 4 opposed.

from home to office. As to the shrink-wrap license restrictions, they are often unavailable to be read until after the software is purchased and consumers tend not to read or take them seriously anyway. One might also argue that the home copy of the program was one's backup copy of the program which copyright law regards as permissible.¹⁴⁶

3.4.9 The pirate bay decision

In the Pirate Bay case¹⁴⁷ defendants were jointly accused for organizing, administrating, systemizing, programming, financing and operating the site and thereby aided and abetted the copyright infringements committed by the users of the web site in the form of making copying works available to the public through the Internet in connection with the file sharing among the users.

The prosecution in this case was concerned with 33 works, including albums, films and computer games, which according to the prosecutor, together were downloaded a total of 435,000 from 1st July, 2005 to 31st May, 2006.

The defendants' argument was that they could not be held responsible because the Bit Torrent technology¹⁴⁸ in itself does not involve dealing with copyrighted material on the Pirate Bay Servers. The Pirate Bay site stores, index and list digital files in a searchable data base and contains tracker, which find users that are online and ready for upload and allow users to see what content is available and from which servers.

In essence the Pirate Bay does not host the copyrighted content, but allow users to advertise content for download and search for information regarding content held for download by others. Users search the site to find the torrent files they want and they download music, video or software files directly for other users' computers. During downloading each user also contributes with up loads of those pieces of the copyrighted material that they downloaded.

¹⁴⁶ Section 19B (2) (a) of the Copyright Act No. 89 of 1978.

¹⁴⁷ On 31 January 2008 Swedish Prosecutors filed charges against Fredrik Neij, Gottfrid Svartholm, Peter Sunde and Carl Lundstrom for promoting copyright infringements with the torrent tracking website, the Pirate Bay.

¹⁴⁸ BitTorrent is a peer-to-peer file sharing protocol used for distributing large amounts of data. BitTorrent is one of the most common protocols for transferring large files.

In this case the court¹⁴⁹ found that some Pirate Bay users had copyrighted material stored on their computers and that by placing the Torrent files concerning such copyrighted material on the Pirate Bay website said users made such material available to the public. The court found further that by providing a site, a search engine for simple up load and download procedures and by administrating contracts between the users by its tracker of torrent files the defendants had aided and abetted the violation of the copyright.

Facts of the case provided sufficient evidences for proving that defendants were generally well aware of infringements taking place. The court said that it is not necessary that the defendants had knowledge about each specific file and infringing activity, but sufficient that they knew that copyrighted materials as such were shared in violation of copyright law. Through the evidence it was obvious that defendants had such knowledge.

In this case it was held¹⁵⁰ that because, extensive copyright infringements has taken place and the site was considered a commercial project, defendants are liable and they were sentenced one year imprisonment each and liable to pay substantial damage¹⁵¹ caused by them.

In the judgment the Court also dismissed the defendant claim for protection under the safe harbour provision of Sweden.¹⁵² It was noted by the court that Pirate Bay per se qualified for the protection under the said legislation but that its services included storage of files for the users and that it had not fulfilled the requirement for actively taking action against infringement when put on notice by right holders. Further, the court in an *obiter dictum* noted that Torrent files could qualify as instrument specifically suitable for committing crime, meaning that the handling of such files with the intention of copyright infringement can be punishable as preparation to commit such infringement.

3.4.10 Pirate bay: rebelliousness the sonny safe harbour

Unlike the decision in Sony Betamax which established safe harbour; in Pirate Bay, in my opinion, it is not shown whether the Pirate Bay has other substantial non infringing uses. In Sony Betamax developers of technologies are accorded the necessary freedom to innovate and

¹⁴⁹ The District Court of Stockholm Sweden.

¹⁵⁰ On 17th April, 2009.

¹⁵¹ amounting to SEK 30 millions equivalent to approximately EUR 2.7 millions.

¹⁵² Sweden legislation implement the EU E-Commerce Directive (2003/31/EG).

to develop new technologies that relate to the copying or distribution of material as long as the technologies have substantial non infringing uses. This aspect is missing in the Pirate Bay case. In this point the court¹⁵³ specifically made a clear statement that copyright legislation is not dependent upon specific techniques used to make the infringements or to contribute to copyright infringement. Furthermore, facts of the Pirate Bay indicates that founders of the Pirate Bay were also actively involved in a political campaign to encourage copyright infringement in Sweden and set out to provoke copyright holders. These facts therefore indicate that defendants involvement in the copyright infringements was considered to be extensive in this case compared to Sonny Betamax case where there was substantial non infringing uses. This was an important factor in the decision of Pirate Bay case.

It is appealing, however to make out the repercussion of the Pirate Bay decision and whether it has augmented copyright infringement cases.

3.5 The European Union

Courts of the European Union's member states, unlike those in the United States of America, seem to disfavor broadly insulating ISPs from liability.¹⁵⁴ Uniform regulation for digital music protection in the European Union is relatively recent, and there are few decisions that touch on music and movie downloading. More recent cases in Europe, however, discuss copyright protection in the face of digital technology. The E.U. Directive on copyright of 2001 provides an outline for Member States to regulate and many European Union Member States have operative systems by which liability for digital copyright and file-swapping of music may be determined.¹⁵⁵ The courts in Europe have shown more flexibility with interpreting these copyright protections.

3.5.1 Munich Court of Appeals (2001)

In March 2001, the Munich Court of Appeals interpreted Germany's copyright provisions (which accord with E.U. Directives) regarding the liability of Internet Service Providers for making

¹⁵³ Supra note 23.

¹⁵⁴ See Lackman, note 90 at page 36.

¹⁵⁵ See Gervais, note 84 at page 35, for an analysis of copyright law for digital transmissions on the Internet between E.U. Member States of France, Germany and the United Kingdom.

protected music available on the Internet.¹⁵⁶ The Court noted that service providers acting as a host for subscribers who might upload files from their databases, cannot disclaim liability for copyright infringement simply by providing notices informing subscribers that copyright protected files should not be uploaded.¹⁵⁷ The court also made a number of interpretations regarding the liability of ISPs for illegal Internet activity. While acknowledging that the uploading and downloading of proprietary works clearly infringed copyright protections, the court noted that it would be illogical for service providers to escape liability simply because they were unaware of the copyright status of files on their own servers.¹⁵⁸ The court noted that any person who takes part in infringement is liable, provided there is a sufficient causal connection between the conduct and the infringement¹⁵⁹. In this case the infringement of uploading and downloading protected files could not have taken place without the Internet connection of the service provider.¹⁶⁰

3.5.2 LICRA v. Yahoo! (2000)

In 2000, an opinion issued by the tribunal court¹⁶¹ of Paris held that ISPs may be found liable for hosting illegal content or activities on the internet.¹⁶² The court found that Yahoo!, Inc (Yahoo) was required to make efforts to deter users from accessing an Internet auction site for Nazi objects and memorabilia (and make access impossible via yahoo.com¹⁶³). Yahoo argued that it would be virtual impossible to prevent access to the particular website. The Court, however, noted that the company had access to the geographical origin of many user IP addresses and could as other users to indentify nationality in order to indentify the French users and block

¹⁵⁶ Hit Bit Software GmbH v. AOL Bertelsmann Online GmbH, OLG 29 Munich [Court of Appeals], E.C.C., 15 (2001), 325 (340). The plaintiff in this case, a large producer of MIDI files (programs for the digital storage of music) in Germany, claimed damages for the distribution of musical recordings over the Internet by large U.S. and German ISP. A musician was able to reproduce instrumental versions of certain songs for plaintiff, and subsequently uploaded versions of these songs became available for download over the internet.

¹⁵⁷ Ibid at page 342.

¹⁵⁸ Ibid at 335.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ligue contre le racisme et l'antisemitisme et Union des etudiants juifs de France c. Yahoo! Inc. et Societe Yahoo! France (LICRA v. Yahoo!) is a French Court case decided by the High Court (Tribunal de grande instance) of Paris in 2000.

¹⁶² La Ligue Contre Le Racisme et L'Antisemitisme [LICRA] v. Yahoo!, Inc., TCI Paris, Interim Order No 00/05308, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/0020yahoofrance.pdf>.

¹⁶³ Ibid.

access.¹⁶⁴ The ruling which imposed liability on the ISP, stands in significant contrast to the safe harbor provisions of the DMCA.¹⁶⁵ Further, the French court's decision was not enforced in the United States because of First Amendment concern (based on regulation of a website¹⁶⁶).

3.6 Comparing digital protection in United States and the European Union

Although copyright law in the United States and the European Union development along substantially different paths, protections for individual users of Internet files have eroded to the point of virtual nonexistence under both systems. With recent legislation aimed at implementing and harmonizing global copyright law after the WIPO treaties, the United States and the European Union took different approaches to accomplish this goal. The U.S.A. system evolved from the collaboration between the recording industry and ISP lobbying which compromised to push liability onto individual users. The E.U. system, on the other hand, although developed more recently as a reaction to Internet piracy, seems to provide more opportunity for infringement losses to be shared by those in the best position to police illegal activities.¹⁶⁷

3.6.1 European Union copyright law; does it provides less protection for liability from internet service providers

While the DMCA includes specific safe harbor provisions for ISPs to shield them from liability, the European Union Copyright Directive makes no mention of exemptions specifically for service providers.¹⁶⁸ The IP Enforcement Directive allows the court of member states to enjoin ISPs and require the providers to get rid of infringing content on their networks.¹⁶⁹ No such

¹⁶⁴ Ibid.

¹⁶⁵ See Lackman, note 90, at page 36 at 1177.

¹⁶⁶ See *Yahoo!, Inc., v. La Ligue Contre Le Racisme et L'antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Ca. 2001), rev'd, 379 F.3d 1120 (9th Cir. 2004) (finding that personal jurisdiction was not met where the French group did not purposefully avail itself of the United States).

¹⁶⁷ See Jeffrey L. Dodes, *Beyond Napster, Beyond the United States: The Technological and International Legal Barriers to On-Line Copyright Enforcement*, 46 N.Y.L. SCH. L REV. 279-287-88 (2002).

¹⁶⁸ Indeed, the exemptions given in the Copyright Directive apply to individual use. See Lackman *supra* (discussing fair use exemptions specifically listed in the Directive. Recent case law has hinted that service providers may not receive such protections.

¹⁶⁹ Enforcement Directive on the Enforcement of Intellectual Property Rights by the European Commission (E.U. IP Enforcement Directive), which applies to any infringement of intellectual property rights. See Commission Proposal for Council Directive on the Enforcement of Intellectual and Industrial Property Rights, IP/03/144, art. 2, 2004, available at <http://ipjustice.org/CODE//021604.html> (last visited Sept. 26, 2004).

affirmative duty is placed on ISPs under the U.S.A. system. This may be, in part, because of the significant amount of lobbying power used by ISPs to form the DMCA in the U.S.A.¹⁷⁰

The European Union's system of copyright law thus provides another measure which copyright holders can use to protect their rights. Instead of going after individual users, copyright holders can place a burden liability on service providers to provide better police measures and make them responsible for Internet activity.¹⁷¹ The DMCA's safe harbor provisions allow service providers to claim exemption from liability for illegal downloading activity, and those provisions helped pave the way for the RIAA lawsuits filed against individual Internet users.¹⁷² The absence of ISPs protections in the European Union directives might allow copyright holders an addition target for infringement attacks. It remains to be seen whether the recording industry will pursue that route, given their continuing campaign against individual users in Europe.¹⁷³

3.6.2 United States of America and European Union break from traditional protection of private use

Regardless of the approaches taken by the United States and the European Union towards digital rights protection, the recent lawsuits against individual users under both U.S.A. and E.U demonstrate the restructuring and ultimate erosion of private use protection like those found in the Copyright Act of the United States of America. Exemptions for fair use were traditionally applied in U.S.A. common law.¹⁷⁴ Newer legislation under the DMCA and the IP Enforcement Directive makes little to no mention of traditional private use protections,¹⁷⁵ and it appears as though the separate treatment of fair use protection is in European law, compared to the lack of protection in the United States of America be obsolete under the new legislation.

¹⁷⁰ David Balaban, *The Battle of the Music Industry: The Distribution of Audio and Video Works via the Internet, Music and More*, 12 *FORDHAM INTELL. PROP MEDIA & ENT. L.J.* 235, 258-59 (2001). (describing the DMCA as a compromise between ISPs and the recording industry).

¹⁷¹ See for example *LICRA v. Yahoo! Inc.*, supra note 136 page 58.

¹⁷² See Yu supra note 100 at page 38 (discussing the RIAA's newfound subpoena power) under the DMCA and the subsequent lawsuits against file swappers.

¹⁷³ Scarlet Pruitt, *British Music Industry Fights Pirates: U.K. Recording Association Eyes RIAA Tactics in its own Search for File Swappers*, *PC WORLD*, Mar. 26 2004 available at <http://www.pcworld.com/resource/printable/article/0,aid,115395,00.asp> (last visited Oct.2004).

¹⁷⁴ Lackman, supra note 90.

¹⁷⁵ However, the IP Enforcement Directive does make reference to the Copyright Directive and the rights provided therein.

While it is unclear how E.U. courts will apply the new directive, the distinction of private use protections before the directive can be seen in courts' application of the DMCA in the United States of America and the Copyright Directive in the European Union.¹⁷⁶ In the United States of America traditional fair use exemptions, developed through common law and codified in the Copyright Act,¹⁷⁷ have eroded to the point of virtual non-existence.¹⁷⁸ In cases such as *Napster*, U.S.A. courts focus more on whether use diminishes or interferes with the market and less on the public interest.¹⁷⁹ In U.S.A. cases of digital downloading, it seems that the fair use test is less likely to be used as a test that balances public interests than as a basis for finding and affirming liability.¹⁸⁰ In essence, private use protections are shrinking in that they no longer seem to protect individual, non-commercial users. Conversely, case law in the European Union before the new directive seemed to stress protection for fair use.¹⁸¹ The Copyright Directive specifically allowed fair use in teaching scientific research and social commentary.¹⁸² Recently, the Amsterdam Court of Appeal extended fair use principles to absolve Kazaa, a peer-to-peer file sharing program, from liability for copyright infringement.¹⁸³ The court noted that Kazaa was not exclusively used for the exchange of music files and the program was very well suited as a communication tool for business and citizens.¹⁸⁴ This decision is in direct conflict with the Ninth Circuit's analysis in *Napster*.¹⁸⁵

It is too early to tell whether the IP Enforcement Directive will erode private use protection in Europe to the point that they are in line with the legal restriction in the United States. However, judging by the absence of any provisions preserving those protections and the

¹⁷⁶ See discussion of *Diamond Multimedia*, the *MP3.com* cases discussed above.

¹⁷⁷ See discussion of Copyright Act, 1976 *supra* p.24.

¹⁷⁸ Lackman *supra* note 90, instead of emphasizing the importance of fair use and embracing the positive uses of the new technology, [courts] have generally ignored fair use and focused almost exclusively on the negative uses.

¹⁷⁹ *A&M Records v. Napster*, 239, F. 3d at 1021.

¹⁸⁰ Lackman *supra* note 90.

¹⁸¹ *Ibid.*

¹⁸² See E.U. Enforcement Directive *supra* note 145.

¹⁸³ Noot bij *Kazaa/Buma-Stemra*, Hof, Amsterdam, 28 Mar. 2002, no. 1370/01, translation available at <http://www.steptoel.com/publications/196e.pdf> (last visited Feb. 2004).

¹⁸⁴ *Ibid.*

¹⁸⁵ Lackman, *supra* note 90.

recent legal activity of the recording industry against Internet users in Europe,¹⁸⁶ the erosion of fair use in European Union member-states may be well under way.

3.7 Conclusion

This chapter has shown development of copyright law towards protection of digital music. The chapter has examined changes occurred in the United States of America and European Union through legislation, various case decisions, international instruments and various directives

In this chapter, it has been shown further how United States of America and European Union have been dealing with copyright infringement of digital music through peer to peer file sharing. The chapter further draw lessons for Tanzania after learning how America and European Union address the issue of music copyright infringement through peer to peer file sharing.

¹⁸⁶ See Pruitt, *supra* note 149, see the lawsuits, reportedly close to 250 in number, were issued to Denmark, Germany, Italy and Canada. See Record Industry File Sharing Suits Filed in Europe, 5 WARREN'S WASH. INTERNET DAILY 62, Mar. 31 2004, available at 2004 WL 60517581.

CHAPTER 4

LAW AND PRACTICE IN RELATION TO P2P FILE SHARING IN TANZANIA

4.1 Introduction

This chapter examines whether file sharing in music works cause copyright infringement in Tanzania music industry. This chapter analyzes the current trend in Tanzania in so far as file sharing in music work is concerned in order to assess whether peer-to-peer file sharing affects music copyright in Tanzania.

4.2 An overview

Peer-to-peer file sharing is currently rampant in Tanzania like elsewhere. As a result peers exchange various materials online including unauthorized music a situation which cause exploitation of copyright holders' rights. A survey carried out by the Guardian in Arusha Municipality showed that traders in the industry have been selling pirated music openly.¹⁸⁷ The survey reveals further that even those who do not use peer-to-peer file sharing they prefer buying pirated copies of music as they are very cheap compared to original ones and they can even select specific music they want rather than buying the whole album which they might not like all the music in it.¹⁸⁸ One can buy a pirated music CD for Tanzanian Shillings three thousand which is almost equivalent to two United State of America dollars. *My Love – Ultimate Essential Collection by Celine Dion*, for example, is sold at \$ 17.97 currently,¹⁸⁹ the same, but pirated copy in Tanzania is sold for equivalent of \$2.00.

The continuous supply of pirated music sale is a challenge for Tanzania as the practice leaves many music copyright holders empty handed because millions of shillings land in the hands of unauthorized dealers. Selling of pirated music is not only detrimental to the copyright holders but also to the government as unauthorized sellers of music also evade tax a situation

¹⁸⁷ The Guardian (10/05/2010) 'Dar leads in piracy of music and films) available at <http://www.ippmedia.com/frontend/index.php?l=16502> (accessed on 11/5/2010)

¹⁸⁸ Ibid.

¹⁸⁹ <http://www.getcdprices.com/search/?upc=celine+deon> (accessed on 5/03/2010).

which cause the governments to lose million of shillings from music sales.¹⁹⁰ The increase is due to the easy of the technology to make music copies. To make a copy of the CD or DVD for example one only need to have a computer with CD burner, a program such as window Media Player, blank CDs, a favorite CD and a CD or DVD labels for a professional look.

The process of copying is also simple and does not require special knowledge or skill¹⁹¹. It is simply to download the music or import them from the CD, insert the CD into the CD drive or CD-RW, copy from the CD or rip and press 'copy' or 'rip' music. The music can be obtained either online through peer-to-peer networks or from people who got them from peer-to-peer networks or by buying cheap pirated copies which may be obtained from such methods.

The following step is to wrap it up in the box and sell if one so desires. As long as the CD or DVD works well users does not care if they are genuine copies or pirated copies. After all, the certificate of authenticity can also be pirated and the packaging is very presentable and as good as the genuine copy.

Furthermore, the increase of supply and use of pirated music in Tanzania is also accelerated by low income of some music consumers which when varied with gaps in the law hasten such infringement.

4.3 The effect of P2P file sharing in Tanzania music industry

Due to the availability of pirated copies of music in Tanzania, many shops selling music in the country do sell pirated copies produced either from within the country or abroad. This trend has persisted to the extent that consumers are now lured into piracy because they cannot easily get original copies though some of them would prefer to, and at times is also difficult to differentiate between the original and the pirated copies¹⁹².

¹⁹⁰ See the survey conducted by the Guardian available at <http://www.ippmedia.com/frontend/index.php?l=16502> (accessed on 11/5/2010)

¹⁹¹ See How to copy a DVD available at <http://cybernetnews.com/cybernotes-how-to-copy-a-dvd-movie/> (accessed on 1/04/2010).

¹⁹² the survey conducted by the Guardian available at <http://www.ippmedia.com/frontend/index.php?l=16502> (accessed on 11/5/2010)

4.4 Sale of pirated music in Tanzania; is the industry regulated?

4.4.1 The Copyright and Neighboring Rights Act, No 7 of 1999

This is an Act to make better provisions for protection of copyright and neighboring rights in literary, artistic works and folklore and for related matters in Tanzania. Act establishes the Copyright Society of Tanzania (COSOTA)¹⁹³ which is vested with powers among others to administer the Copyright Act and to administer copyright holders' rights on their behalf.

4.4.2 Copyright Society of Tanzania

Copyright Society of Tanzania (COSOTA) is a statutory society which was established in order to administer rights of copyright holders collectively. COSOTA is not unique for Tanzania; various countries have such bodies with similar functions although they vary slightly from one country to another. In Europe copyright societies require their members to transfer exclusive administration right of their works to the copyright society. In United States and Canada they have less restricting rules as members maintain their right simultaneously with the society¹⁹⁴ a situation which is similar to that of Tanzania.

4.4.3 Functions of Copyright Society of Tanzania

Copyright Society of Tanzania (COSOTA) is empowered by the law¹⁹⁵ to promote and protect interests of authors, performers, transistors, publishers and in particular to collect any royalties or other remuneration of copyright holders on their behalf and to distribute to them accordingly.¹⁹⁶ Music copyright holders are COSOTA members.

COSOTA is also empowered to maintain registers of works, productions, and associations of authors, performers, translators, producers of sound recordings, broadcasters and publishers.¹⁹⁷ COSOTA is further empowered to publicize the rights of copyright owners and give evidence of ownership of such owners where there is a dispute or an infringement.¹⁹⁸

¹⁹³ Section 46 of the Copyright and Neighboring Rights Act, No. 7 of 1999.

¹⁹⁴ Copyright collective available at http://en.wikipedia.org/wiki/Copyright_collective (accessed on 24/5/2010)

¹⁹⁵ Ibid section 47.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

The Act further empowers COSOTA to print, publish, issue or circulate any information reports, periodicals, books, pamphlets, leaflets, or any other material relating to copyright, expressions of folklore and neighboring rights and to advise the minister on all matters under the Act.¹⁹⁹

Apart from these functions, COSOTA also represents and defends the interests of its members in Tanzania and abroad, administer on an exclusive basis within Tanzania such economic rights of its members as the Society may determine, collect fees from users of the works on behalf of its members and distributing those fees among those members, assists in the preparation of standard forms of contract for the benefit and use of its members.

Further, COSOTA fosters harmony and understanding between copyright owners and users of copyrighted works as are necessary for the member's economic rights and to make reciprocal agreements with foreign societies for the issue of authorizations in works and for the collection and distribution of copyright fees deriving from those works.

In all its activities, COSOTA aims at making sure that copyrights owners receive adequate remuneration for their work.

4.4.4 Significance of COSOTA

Although copyright owners are legally entitled to exclusive rights over their works, practically, it is not easy for copyright owners or neighboring rights²⁰⁰ owners to monitor and exercise their rights individually. As a result, many countries including Tanzania have established copyright societies as a means of administering copyright owners' rights. COSOTA has been set up therefore to administer collectively the rights of authors, performers, producers of sound recordings and broadcasters. COSOTA act as a link between the owners of the copyrights on the one hand and the users of their works on the other.

¹⁹⁹ Ibid.

²⁰⁰ Neighboring rights are the rights of performers, producers of sound or video recordings and broadcasters.

4.4.5 Collective administration of copyright

The work that an author creates is treated under Copyright Law of Tanzania like elsewhere, as author's property, hence, the author as the copyright owner is entitled to share of the earnings deriving from the use of his work. In this connection therefore unauthorized playing of music in public places such as bars, night clubs, bottle stores, rest houses, motels, restaurants and in like places is gainful use of music copyright holders' hence copyright infringement.

Use of music in such manner, which is perhaps one of the biggest attractions to customers who frequently attend those entertainment places therefore needs to be accompanied by an amount of money, (royalty) paid back to the owner of the copyright in the music.

Individual copyright owners are however, practically unable to go round collecting royalties in the places where their music are used. It is for this reason that COSOTA was set up to collect royalties on behalf of copyright owners, a principle known as collective administration of copyright. This principle simply means that there is a body, for this matter COSOTA, which *monitors* the use of the works concerned, negotiates with prospective users, give licenses against appropriate fees and collect such fees and distribute them among the copyright owners.

4.4.6 Tariffs and licenses

COSOTA is also empowered by the law, among other things, to determine the fees payable in respect of the public use of copyrighted music. In this regards, COSOTA has set up tariffs applicable to the various premises which use works protected by copyright.²⁰¹

4.3.7 Powers to confiscate pirated copies and its challenges

COSOTA is also empowered to search and confiscate copies of pirated music among others. However, at times there are confiscation that takes place on streets where is actually the process was not meant for pirated works, but rather for other purpose for example, selling doing business in an unauthorized places. In such scenarios it is difficult to pursue the matter in favour of copyright holders because legal actions require a complaint from someone who feels that his or her rights have been infringed. Because the creator of the work and source that distribute the

²⁰¹ Section 48 of the copyright and Neighbouring Rights, No. 7 of 1999.

original content have not complained about the infringement in court, relevant authorities cannot complain of copyright infringement.

Another challenge is that COSOTA is only capable to confiscate copies which have been copied into CDS, but due to the digital nature of music and the way peer-to-peer file sharing functions COSOTA does not have mechanisms of detecting infringement occurring in peer-to-peer networks like in United States and Europe. The only useful mechanism which COSOTA has is to take legal actions for those found with illegal copyright music. Even in this scenario in most cases infringers negotiate with copyright holder for some reasonable amount of reimbursement and they settle the matter out of court, a situation which does not deter the copyright infringement as the compensations are normally modest.

4.4.8 Challenges facing digital copyright protection in Tanzania

Tanzania copyright law cannot face the challenges of a digital age; this is due to the fact that the copyright law was not designed for a digital era. Unlike some countries²⁰² the Tanzania copyright law has never been amended to provide for digital copyright protection. For example when the copyright law was enacted there were no advancement of digital technology as it is today, a situation which shows that the law is not fit for digital copyright. It can therefore be argued that digital technology is too complex for the current Tanzania Copyright law as it is archaic. Even though the Act empowers COSOTA to protect owners' right on their behalf, it also experience technological challenges, hence ineffective.

4.5 Conclusion

Peer to peer file sharing is a common practice in Tanzania, however, the Tanzania copyright law does not provide for copyright infringement on peer to peer file sharing as an offence neither does it provide for technological neutral provisions and their liabilities. The act further does not provide for licensing model into authorisation of peer to peer file sharing. The foregoing discussion has therefore shown that the existing Tanzania copyright law has created a wide gap as it does not provide for copyright infringement through peer to peer file sharing.

²⁰² For example South Africa.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Summary

The aim of this work was to determine whether the existing Tanzania copyright law is outdated as it was enacted for the purposes of physical or analogue works and whether the Tanzania copyright law does provide for copyright of digital music occurring through peer to peer file sharing.

This work has examined the effect of peer to peer file sharing of music copyright in Tanzania in order to determine whether there are gaps in the Tanzania copyright law which consequently leave digital music works unprotected under Tanzania copyright law.

The work furthermore, has identified that there are gaps in the Tanzania copyright law as it does not provide for copyright of digital music occurring through peer to peer file sharing.

This work is divided in five chapters. Chapter one is the introductory part which has laid down the foundation of the study by contextualising the problem and giving the significance of the study. Chapter two provides for the concept of copyright protection as well as peer-to-peer file sharing and its impact on copyright infringement. This chapter discussed the general concept of file sharing in music works and its impact on copyright. The chapter further analyzed how peer-to-peer file sharing causes copyright infringement in the music industry. Chapter four is about development of copyright law towards protection of digital music. The chapter examined changes occurred the United States of America and European Union. The analysis basically focused on the development of copyright law through legislation, various case decisions, international instruments and various directives in order to learn how those countries deal with the issue of copyright in p2p file sharing so as to draw lessons for Tanzania. Chapter five is the last chapter and it concludes the study by summarising the study and outlined the observations of problems and finding of the study. The chapter has also listed several recommendations to cure the problem.

5.2 Conclusion

Peer-to-peer file sharing has been widely used in recent years worldwide. It has been argued that it facilitate music copyright infringements. Various mechanisms have been used to deter copyright infringement occurring in peer-to-peer file sharing. Such mechanisms include case decisions among others where large number of cases related to copyright infringement through peer-to-peer software has emerged in many countries. In Tanzania however, although there are such infringements through peer-to-peer file sharing, there are only few of such cases and most of such cases are also settled out of court therefore lack of judgments on the subject.

Tanzania is lacking modern copyright law to keep pace with the current technological developments especially digital technology because the current law was enacted before digital technology existed. The Copy Right and Neighbouring Act²⁰³ further does not specifically provide for electronic copyright infringement, its penalties and for liability of Internet Service Providers (ISP) and for software end users, neither does it provides for contributory and vicarious infringement of copyright. Such provisions are necessary for copyright protection especially with advancement of digital technology.

In America, for example, the Copyright Act of 1976 did not specifically codify sort of secondary liability for copyright infringement, rather, the traditional cause of action for copyright owners against a secondary copyright infringer existed in Common law. In *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*,²⁰⁴ for example, the court held that when one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another may be held liable as contributory infringer. According to the court, knowledge and material contribution were two elements to judge whether peer-to-peer software producers should be held liable for the copyright infringement as the contributory infringer.

It can also be recalled how *Napster*, *Aimster* and *Grokster* shaped the American copyright law especially with peer-to-peer file sharing, a scenario which is lacking in Tanzania. From these cases each court applied the law of contributory infringement and vicarious infringement

²⁰³ No 7 of 1999.

²⁰⁴ 443 F.2d at 1162.

differently. For example, in *Napster* the court held that the defendant had knowledge the music recording industry gave Napster actual notices of the infringing activities occurring through their website and software. In *Groakster*, however, the same court held the actual notices delivered to Groakster were not knowledge, because the element needed has become specific knowledge.

In order for America to modernize their copyright law they also went further to amend their copyright law whenever there was a gap. The American Copyright Act of 1976 weaknesses was addressed by the Audio Home Recording Act of 1992. This Act addressed the conflict between intellectual property law and new technologies by establishing a royalty fund to compensate copyright owners for expected digital infringement and mandating incorporation of copyright controls into digital audio recording devices to prevent serial copying. The Act also permitted users to utilize copyrighted music for private non commercial use as a mechanism to balance copyright holders' rights with that of the society.

The Act however, had some weaknesses. For example it did not provide protection to copyright owners from personal computer downloads as it exempted personal computers from the category of digital recording devices. Copyright owners were therefore in need of additional protection for digital downloading activities through computer and internet applications.

In order to address those weaknesses, America enacted Digital Performance Right in Sound Recording Act of 1995. This Act granted copyright owners exclusive rights to perform sound recording publicly by means of digital audio transmission. The Act in essence, forces website owners wishing to webcast music over the internet to obtain license authorizing the public performance of the recording from the copyright owner of the sound recording in addition of obtaining a license from copyright owner of the musical work. The Act further allowed royalties to be collected from internet performance.

In 1998 America enacted the Digital Millennium Copyright Act (DMCA).²⁰⁵ Enactment of this Act was an effort to make the law up to date with the digital technology and copyright capabilities. The Act enacted new provision which were not enacted in former Acts. In particular, it enacted anti circumvention provisions to prevent uses from breaking codes to encrypted files. It also provided for safe harbor provisions for ISPs in order to keep them from

²⁰⁵ Of 1998.

liability for illegal piracy activities of users as long as certain conditions are met. The DMCA therefore, provided for more restrictive position on digital piracy compared to the other Acts. It further imposes more liability for individual users and music consumers.

European Union like United States of America has also struggled to secure copyright protections in the ever changing digital age by requiring member states to conform their laws to the directive laid down by the European Union Council.

In 2001 European Union passed the European Union Copyright Directive²⁰⁶ which acknowledges the need for stronger enforcement of copyright protection by its member states in the face of developing digital technology and internet file sharing. The directive provides for anti circumvention prohibitions. It also gives copyright owners exclusive rights to authorize or prohibit communication of their work in public, a situation which can be interpreted to include all methods of transmitting music and movie online.

In 2004, European Union enacted the European Union Directive on Enforcement of Intellectual Property Right.²⁰⁷ This directive tightens the reins on digital music piracy and enables the recording industry to attack users in Europe much like the lawsuits in the United States of America. The directive applies to any intentional violation of copyright which necessarily extends to all types of intellectual property violations, including music and movie file sharing especially those which damage right holder interests. The directive further, seems to provide more burdens on ISPs by allowing courts to impose interlocutory injunction on intermediaries to desist from participating in infringements.

Further, in 2010 the European Union has passed a Digital Economy Act in an effort to try to provide more protection to music copyright holders.

5.3 Recommendations

After studying the development of copyright law in United States of America and that of the European Union it is recommended that there is a need for amendment of the Copyright and Neighbouring Rights of Tanzania to address the following:

²⁰⁶ Of 2001.

²⁰⁷ Of 2004.

- 5.2.1 Specifically provides for peer-to-peer copyright infringement as an offence.
- 5.2.2 Provide for technology neutral provisions and impose liability based on circumstances in which the technology is used as it was illustrated in American case of *Sony v. Universal*.²⁰⁸
- 5.2.3 Provide for licensing model into the authorization of peer-to-peer file sharing like the one provided for in the United States of America Digital Performance Right in Sound Recording Act of 1995. Mass licensing, voluntary collective licensing and legal licensing can be used as supplement to common licensing. This approach was used by Apple Computers when it launched its iTunes Music Store in April, 2003. According to this model, copyright holders enter into agreement with big consumers such as universities and ISPs to make use of their copyrighted music after payments. In that respect, users can therefore be allowed to use such materials online. However, this approach needs proper regulation on how to collect the money from end users and distribution of the same to copyright holders.
- 5.2.4 Protect against copyright infringement, at times, copyright holders employs technology protection measures in order to minimize access to copyrighted music. Nevertheless, there is no perfect encryption technology because even the best one performs only like a speed bump that will frustrate those who wants to copy illegally.²⁰⁹ The law therefore, should provide for offences for those who will intentionally circumvents or destroy the technological measures and management information like it was provided for by the American Digital Millennium Copyright Act of 1998 and European Union Copyright Directive of 2001. The law should further impose civil, administrative or criminal liability to people circumventing such technological measures.
- 5.2.5 Provide for safe harbor provisions for ISPs as it is in the American Digital Millennium Copyright Act of 1998.
- 5.2.6 Provide copyright owners expressly with exclusive rights to perform sound recording publicly by means of digital audio transmission like it is provided by United States of

²⁰⁸ 464 US. 417, 419-20 (1984).

²⁰⁹ A Speed Bump vs. Music Copyright, Bus. WK., Jan. 9 2002.

America Digital Performance Right in Sound Recordings Act of 1995 and the European Copyright Directive of 2001.

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