The World is Going Flat(-Rate)

A Study Showing Copyright Exception for Legalising File-Sharing Feasible, as a Cease-Fire in the "War on Copying" Emerges

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A landmark study by the Institute of European Media Law (EML) found that a levy on internet usage legalising non-commercial online exchanges of creative works conforms with German and European copyright law, even though it requires changes in both. The German and European factions of the Green Party who had commissioned the study will make the "culture flat-rate," as the model is being called in Germany, an issue in their policies. The global debate on a new social contract between creatives and society is getting more pronounced by the day. Two models are emerging: a free-market approach based on private blanket licences and voluntary subscriptions, and a legal licence approach based on exceptions in copyright law and mandatory levies, that now has been proven legally feasible and appropriate by the EML study.

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"When in politics one is confronted with two options that both don't work one should look for a third one," said Helga Trüpel, Green MEP and vice-chair of the Committee for Culture and Media in the European Parliament, at the press conference on 3 April in Berlin where the legal feasibility study [pdf, in German, English translation is being prepared] by the EML was introduced.

"In my view two positions don't have a future," continued Trüpel. "One is the 'everything for free' attitude towards creative works on the internet. It does not answer the questions of how to appropriately remunerate authors in the digital age and how a knowledge society based on creative content can reproduce itself. But I am equally opposed to the French model in which, without judicial due process through a new government agency, after two warnings users' internet access will be suspended. This is, in my view, not an appropriate response to the technological revolution."

Trüpel here referred to a bill entitled "Création et Internet" that the Senate of French Parliament had passed, in the small hours of the day of the press conference in Berlin, with the votes of the ruling conservative party UMP. The law proposal envisaged establishing a new government agency named HADOPI (Haute autorité pour la diffusion des œuvres et la protection des droits sur internet). This agency would receive IP addresses from media corporations from which their works were allegedly offered for unauthorised download. It would then instruct the ISP to send first an email, then a registered letter warning the customer whose IP address was used at the time. At the third level, the ISP would have to disconnect the customer from the internet from three months up to one year. Entry into a national black-list would prevent a customer from getting internet access from another provider. The most controversial part of the bill known as "double peine", or "double penalty", provided that users whose internet access is cut would still have to continue paying their internet subscription bill.

In a surprising turn-about the Second Chamber, the French National Assembly, whose rubber-stamping of the bill was considered only a formality, a week later rejected it. French government is expected to resubmit the law shortly, probably without the contentious double trouble amendment. "Whatever the outcome might be, today's vote will certainly weigh in the balance during the forthcoming debates of the European Parliament on the Telecoms Package which contains provisions relating to filtering and the graduated response," Anne-Catherine Lorrain, Intellectual Property Policy Project, TACD in Brussels said of the 9 April rejection on the A2K mailing-list. Right she was. On 6 May the European Parliament voted on an amendment to the Telecoms Package that clearly rejects the French three-strikes model and confirms the fundamental right of the access to the internet.

The French "Olivennes" or "three strikes" model, as it is known, is not an acceptable solution, said Trüpel. "Instead, we have to devise a new social contract for solving the issues raised by this revolution. It means finding a new balance of interests between authors, consumers and the affected industries, including the ISPs."

Her colleague Grietje Staffelt, Green MP and media-political speaker of the federal parliamentary faction of Bündnis90/Die Grünen, said the main advantages of a culture flat-rate in her view are that it would decriminalise P2P users, remunerate creatives and relieve the judicial system and the ISPs from mass-scale prosecution. It would do so, she continues, in a way that ensures the basic rights enshrined in German constitutional doctrine of a citizen's right to informational self-determination and of the privacy of telecommunications.

The Greens have already included the culture flat-rate in their campaign platform for the upcoming 7 June European elections [pdf, in German]: Under the heading "Remunerating artistic

contributions on the internet" their first point is getting money to creatives. The second emphasis is on consumers. "We clearly reject the ongoing massive flood of lawsuits, the intrusions of the private sphere, deployment of DRM or filtering of data traffic. They are disproportionate intrusions into the rights of users."

A triangulation of those two points automatically leads the Green Party, like many other observers today, to the levy-remunerated file-sharing permission. While in the European election platform the culture flat-rate is still a bit cautiously positioned as an option that "might be a right way forward," the EML study is the first concrete step taken by the Greens, in fact, the first study in this field commissioned by any political party. It confirmed the legal feasibility and strengthened the politicians' commitment. A similar passage will be included in the German election programme as well, as Oliver Passek, speaker of the federal working group media of Bündnis 90/Die Grünen, told the press conference. Meanwhile, the Social Democrats, the SPD, have followed the Greens' lead and included the culture flat-rate as a model to be assessed in the draft for their national election platform [pdf, in German].

Prof. Dr. Alexander Roßnagel, scientific director of the Institute of European Media Law (EML) and vice-president of Kassel University, then introduced the minimum requirements for a culture flat-rate: 1.) a legal licence permitting private individuals to exchange copyright works for non-commercial purposes. 2.) a levy, possibly collected by the ISPs, flat, possibly differentiated by access speed; and 3.) a collective management, i.e. a mechanism for collecting the money and distributing it fairly. As the expertise of Roßnagel's team has shown, it requires legal changes but these are feasible within the framework of existing German and European law. Furthermore, the study concludes: "The legal introduction of the culture flat-rate ... is nothing less than the logical consequence of the technical revolution introduced by the internet." (p. 63)

The Issue

Solid knowledge about peer-to-peer file-sharing is still rare. Only that much has become clear: In the ten years since its inception, file-sharing has become a normal everyday media activity for a significant portion of citizens.

A recent study from the Netherlands commissioned by the Ministry for Economic Affairs ("Ups and Downs. Economic and cultural effects of file sharing on music, film and games," January 2009 [pdf]) showed that 44% of the Dutch internet population use P2P, with the majority downloading music (40%), 13% films and 9% games (p. 63). In a Canadian study (Angus Reid Strategies, March 2009 [pdf]) 45% of respondents agreed to the statement "People who use peer-to-peer file sharing services to download music and movies are regular internet users doing what people should be able to do on the internet." An additional 27% said these people are "doing something they shouldn't be doing, but it's not a big deal." (pp. 3-4)

A UK study from spring 2008 commissioned by industry organisation British Music Rights (BMR) and conducted by the University of Hertfordshire ("Music Experience and Behaviour in Young People" [pdf]) confirmed the pattern. Here 63% admitted to downloading music using P2P file-sharing networks (69.1% in the 18 – 24 age group) and 42% to uploading (p. 11 ff.).

The most recent study from France conducted by market researchers TNS Sofres and Logica for the newspaper Metro ("Les Français et le Téléchargement Illégal sur internet," March 2009 [pdf]) showed similar figures. 37% of all French internet users and 45% of those who connect daily stated

that they have illegally download content or used content that was illegally downloaded. Among the total population the rate is 26% (p. 8). It decreases sharply with age and is strongest among 18-24 year-olds with 64% and among 25-34 year-olds with 54% (p. 9). The most frequently downloaded content is music (57% of 18-24 year-olds), films (42%), TV series (22%) and video games (21%) (p. 12).

For Germany the most recent official statistics are from 2007. They found that only 11% of internet users use P2P. The same percentage was found in the 2005 survey, adding that among those younger than 25, P2P usage was 21% (Statistisches Bundesamt, Wirtschaft und Statistik 7/2006 [pdf]).

German official data are, of course, collected according to European law, i.e. the Directive on Statistics on the Information Society of 2004, but when aggregated mysteriously lose another 3% of file-sharers. According to Eurostat 2007 ICT's survey question on "specific internet related activities" a European average of 13% but only 8% of German households use it for "peer-to-peer file sharing for exchanging movies, music, etc." At the top of the pack are the Netherlands and Luxembourg with 24%, followed by Iceland and Norway with 23%, Estonia 22%, Spain and Slovenia 20%. France is only slightly above European average with 14%. (Eurostat Data in focus: internet usage in 2007 [pdf]). With four academic and market research studies showing that about half the internet population uses P2P, the official statistics look like significant under-reporting.

The numbers are far from conclusive but it's safe to assume mass-usage of P2P. By the current rules of law much of that file-sharing activity is illegal and creatives are not receiving any remuneration for it, but factually it has become part of everyday media practice of a significant portion of the population. Popular practice and the law are out of sync. The tension can be resolved by either stronger enforcement to make reality conform to the law or by changing the law in order to adapt it to reality.

Repression has not shown any tangible effect. As Staffelt reminded us, neither technical approaches like DRM or internet filtering, nor mass-scale legal actions against P2P users, nor "awareness" campaigns like "pirates are criminals" by the German movie industry have had any measurable impact on file-sharing.

A software gadget released at the end of March presents the issue in a nutshell. BarTor is an application for the Android, Google's GNU/Linux-based mobile phone. The app lets a user scan a bar-code with the phone's camera, e.g. on a DVD. It then retrieves the connected information and presents two choices: a web-search for cheaper offers to buy or rent or get second-hand, and a torrent search that allows one to instruct the bittorrent client on one's computer to download the movie. Paying for recorded culture has become voluntary, as knowledgeable people like Jim Griffin have been saying for years.

The music industry blew it. Music was the first non-alphanumeric medium thanks to MP3 to circulate freely on the internet and is still the most popular medium on P2P networks. When university student Shawn Fanning released Napster in June 1999 music companies could have embraced the new private file-sharing protocol instead of going after it with all their might. They could have licensed Napster like they licence YouTube and FaceBook today. And indeed the indie labels did so only a month before it was shut down. Bertelsmann was the only major that attempted to seize the opportunity, and had to pay dearly for it. Music was the avant garde. And they blew it. Result: P2P is prevalent. Half the population and likely more enjoy sharing creative works but – even though there is a declared and proven willingness to pay – creatives get nothing out of it.

The BMR/Hertfordshire study sums it up nicely: "For today's youth, access to music has been blown open. Technology has made the entire global music catalogue available for them to test, try out, and to own. [...] And they can do all this … for free. Music is now global and plentiful. This astonishing availability of music has arguably stimulated the passions of even more young people more fervently than ever before. The question is: how do we take their desire to engage with music – monetise it fairly – and take everyone with us in the process?" (p. 2)

The Study

Before this background, the task of Roßnagel and his team was to test the culture flat-rate model against existing law, against the intricate, yet flexible system of balancing of interests into which copyright law has evolved.

Flexibility is indeed much needed in a set of law that regulates a media environment that over the last 200 years has seen one fundamental technical innovation after the other, culminating in the digital revolution. Each of them has opened up new opportunities for information and communication processes. Each was also disruptive of the whole environment, complementing and sometimes replacing incumbent media technological configurations.

Innovation and creative destruction are essential elements of a free market, as Austrian economist Joseph Schumpeter taught us in his 1942 book "Capitalism, Socialism and Democracy." In a free market there can be no legal entitlement by businesses to a preservation of the status quo, as both the scientists and the politicians pointed out at the press conference.

Copyright law in the past has proven to be able to adapt. Yet at the same time law is inherently conservative. If the suggested divergence from the existing norms and regulations is too radical, the likelihood of such legislation being passed is decreasing. Therefore Roßnagel and his team from the EML and his project group Constitutionally Compatible Technology Design at Kassel University, provet, had to explore how the model measures up against existing German and European law.

The German Constitution

A culture flat-rate needs to conform to the basic rights of affected parties – of authors and exploiters, of providers of commercial download services and of internet users – enshrined in the German constitution. Opponents have called it "expropriation" and a "Sowjetisation" of copyright. The constitution protects property. Copyrights are not property, the EML study reminds us, but according to German legal doctrine are conceived as "property-like rights." (p. 11) Nevertheless, the financial returns on creative achievements are covered by the constitutional protection of property whereas the moral rights are covered by the general personality rights.

Assuming that a culture flat-rate does interfere with basic economic rights, the question arises whether this interference is permissible. The study points out that the property-like protection of copyrights "does not imply that a specific exploitation model is irreversibly predetermined on constitutional grounds." (p. 12) Business models are subject to the competition of the market that regularly displaces companies and business models. "When a business model has become dated due to changed technological or social circumstances it would even be inadmissible to protect and artificially keep it alive through massive lawmaking intervention." (p.13) The protection may just as well take the form of ensuring a lump-sum remuneration. Economically this would be an

improvement for authors and exploiters over the current situation in which they regularly receive no compensation at all for P2P file-sharing.

A culture flat-rate would take away the possibility to enforce copyrights against individual file-sharers. But this theoretical possibility, Roßnagel and his team point out, currently often fails. Despite a significant burden on law enforcement authorities only 0.1% of prosecutions lead to a conviction (p. 19). Several German attorneys general are already recommending not to prosecute infringing online copying below a minimum threshold. A culture flat-rate would unburden law enforcement and courts and avoid targeting innocent people.

"The constitutionally guaranteed protection of property does not mean an absolute guarantee of preservation of the status quo in the sense that all achieved legal positions are sacrosanct," as the German Supreme Court has argued on several occasions (p. 14). A culture flat-rate would not constitute an expropriation but rather a determination in substance and a limitation of a right which is already subject to the existing exceptions and limitations of copyright law.

A copyright exception has to conform to the principle of proportionality, meaning it has to serve legitimate purposes, be adequate, necessary and appropriate.

The purpose of a culture flat-rate is to cure a collision of basic rights by both ensuring remuneration to authors and respecting the right to informational self-determination and the privacy of telecommunications. Since the large number of reproductions and the nearly limitless number of participants prevents authors from enforcing their remuneration rights the purpose is not only legitimate but constitutionally necessary, finds the study.

For mass-scale uses that make it practically impossible to control, the lawmaker has regularly devised legal licenses as the adequate means for protecting basic rights. An objection raised against the culture flat-rate is that an exact distribution of the proceeds of the levy would be difficult because decentralised file-sharing networks are difficult to monitor. Nevertheless it is possible to establish the number of exchanges and the works involved at least roughly as P2P market researchers like BigChampagne have shown. A similar problem, write the authors, arises in the distribution of current proceeds of collecting societies. The German Supreme Court has argued that collective management leads to typification, consolidation into a lump sum and approximations, and found these to conform to the constitution.

Another objection is that measuring downloads would be vulnerable to gaming in order to unduly increase pay-outs. Again, the study points out, this is not a problem specific to the culture flat-rate, since manipulations regularly occur also in the offline world where record labels buy up their own CDs in order to artificially raise collecting society pay-outs. Methods for dealing with this issue can be devised, therefore the culture flat-rate is an adequate means. It is also necessary because it is the only means for ensuring remuneration after attempts by means of prosecution and DRM have failed (p. 18).

File-sharing has become a mass-phenomenon especially among young people. "This means that a whole generation of children and youths are growing up acting illegally nearly on a daily basis." (p. 19) This observation, cited from Lawrence Lessig, has profound consequences not only for those directly affected but for society as a whole. The German Ministry of Justice acknowledged this when it proposed to introduce a de minimis threshold in order to keep the schoolyards free of police. It failed but, argues the study, a culture flat-rate would serve to fulfil this goal.

In concluding its test of the constitutional rights of authors the study cites the explanatory statement to the most recent copyright law reform that says that "copyrights in contradistinction to material property are in the final instance not intended to exclude others from the use of works but to enable authors to generate earnings from their exploitation." Thus Roßnagel and his team find a culture flat-rate to be adequate and proportionate.

As to the constitutional rights of commercial download providers protecting their occupational freedom they conjecture that legalising P2P file-sharing would diminish their revenues. But they also assume that the risks and problems associated with files shared by unknown individuals would maintain the competitive advantage of commercial providers. A measure that diminishes the scope of their business does not constitute an interference with their occupational freedom. Here it is justified by public interest and therefore proportional. (p. 22)

Internet users would also be affected by the mandatory levy in their constitutional right of general freedom of action but interferences by law with that right is permissible. Critics of the culture flat-rate, says the study, argue the injustice of people having to pay the levy who do not make use of the possibility of file-sharing. This issue can be mitigated by making the rate of the levy dependent on the speed of the internet access. If the correlation between high-speed access and broadband content such as music and movies claimed by the rights industry is true then a graduated levy would be a fair solution. Furthermore, the authors point out, the same issue arises for the levy on recorders and recordable media and for the public broadcast fee. In both cases the requirement to pay is not derived from actual usage but from the possibility to make private copies and the possibility to perceive public broadcast. In the latter case the German Supreme Court has regularly ruled that the financial burden on those who do not make use of the possibility to perceive public broadcast is justified by the public interest (p. 23 f.). One might add that even those who personally don't download will gain from an environment of rich interactions of sharing and remixing.

The study concludes that none of the interferences with constitutional rights of the parties affected would be inadmissible.

Copyright Law: The EUCD

Roßnagel explained during the press conference that two copyrights are affected by the culture flat-rate: the making available right by uploading (i.e. making available) and the reproduction right by downloading. The latter would be covered by the existing exception for non-commercial private copying. For the former currently no exception exists. It would require changing the German copyright law which, being ruled by European law, would require changing the EU Copyright Directive of 2001. The EUCD prescribes a finite list of permissible exceptions and makes their application subject to the three-step test, the limitations-limitation, as it is being called, derived from the Berne Convention.

Introducing a file-sharing exception would need to pass this test which stipulates that an exception shall only be applied in certain special cases which do not conflict with a normal exploitation of a work and do not unreasonably prejudice the legitimate interests of the rightsholder. Specifying that the culture flat-rate shall benefit only private individuals and only for non-commercial personal purposes would constitute a "certain special case" and thus pass the first step (p. 27).

The second step depends on what is considered a "normal exploitation." As co-author Silke Jandt pointed out during the press conference this is not a purely legal question but would have to be complemented with market research to draw concrete conclusions. From the fact that despite the

existing prohibition of file-sharing industry laments a decline in revenues the study infers that legalising P2P would not have an additional dramatic impact. Thus the normal exploitation would not be diminished.

The interests of authors and exploiters of the third step have to be weighed against the interests of the general public and against possible alternatives. Assuming an appropriate remuneration the study concludes that the prejudice would not be unreasonable (p. 28).

The second main category of copyright next to economic rights are moral rights. The most important of which is the right of the author to determine the first publication of his or her work. The study states that the first publication of music, films and books still overwhelmingly occurs on physical media, first publication in digital form over the internet still being the exception. Therefore file-sharing of these works does not violate the moral rights of the author because she has regularly already exercised her right by deciding in which way to publish her work (p. 7). Internet distribution then constitutes a secondary use affecting primarily the ancillary copyrights of producers of sound carriers, film and TV production companies and publishers (p. 8). What harm is done by legalised file-sharing would be cured by a lump-sum compensation.

Thus, given the political will, nothing stands in the way of changing the EUCD and German copyright law in order to implement a culture flat-rate.

A Dissenting Opinion

The Roßnagel study favours implementing the culture flat-rate as a copyright exception. But it does mention an alternate position in the literature that suggests to make the new making available right introduced by the WIPO Copyright Treaty of 1996 subject to mandatory collective management (p. 26). Precedents for mandatory collective management in many jurisdictions include the public performance of musical and literary works and broadcasting and cable re-transmission. This solution would keep the exclusive author's right in place and only limit the exercise of this right. Since it is not an exception or limitation, such a solution would not have to meet the Berne three-step-test nor would the finite list of permissible exceptions of the EUCD apply.

Silke von Lewinski from the Max Planck Institute for Intellectual Property, Munich, was the first to analyse a mandatory collective management provision for the making available right in Hungarian copyright law (Mandatory Collective Administration of Exclusive Rights – A Case Study on its Compatibility with International and EC Copyright Law, UNESCO e.Copyright Bulletin, No. 1, January – March 2004 [pdf]). She affirmed that the Hungarian transposition of the making available right conforms with international and European copyright law.

In the framework of the French Alliance Public-Artistes in 2005 the collecting societies ADAMI and SPEDIDAM commissioned a legal study from France's most renowned copyright scholar. (Carine Bernault & Audrey Lebois under the supervision of Professor André Lucas, Peer-to-peer File Sharing and Literary and Artistic Property. A Feasibility Study regarding a system of compensation for the exchange of works via the internet. French original, June 2005 [pdf], English translation, March 2006 [pdf]. See also the open letter [pdf, in German] on the occasion of the release of the English translation).

Here again the model of mandatory collective management was tested and found to be feasible within French, European and international copyright law. The authors conclude that P2P downloading is covered by the private copying exception provided that the existing system of

remuneration is adapted. The internet service providers would have to pay a levy, just as the manufacturers and importers of blank media do today. For uploading, they envisage subjecting the making available right to mandatory collective management. Here the authors point to the precedents of collective management for reprography introduced in France in 1995 and to cable broadcast for which collective management was imposed by a EU directive in 1993. In short, "compulsory collective management is not perceived as reversing the fundamental principles of copyright, but instead ‘reinforcing and (…) organising the protection granted to authors against infringements of their fundamental rights, as consecrated in French law since 1793.‘" (p. 48)

Roßnagel at the press conference called this approach an extremely interesting legal question. They would have liked to intensively delve into it but their task was not an academic paper but juridical policy advice. In this context it sufficed them to point out that this opinion exists but that it is a minority opinion. Adversaries to a culture flat-rate would have much more literature to cite for the contrary position. Should the German lawmaker chose such a path they expect it to be challenged before the European Court of Justice. Nobody can predict the outcome, but Roßnagel and his team see much better chances for modifying the EUCD than for a model based on a minority opinion. Changing the Copyright Directive would also have the advantage of creating legal certainty in the entire internal market and further European harmonisation.

Privacy

Current approaches to regulating P2P file sharing require massive invasion of privacy. They also interfere, argues the EMR study, with constitutional rights of informational self-determination, of the secrecy of telecommunications, the professional freedom of ISPs and the information freedom of users. "Introducing a culture flat-rate would eliminate these problems." (p. 19) For a fair distribution of proceeds only the number of reproductions needs to be determined. Who downloaded the works is irrelevant for a fair distribution of the levy.

The study draws a comparison to DRM that promises to let customers pay precisely for the works they use and the extend to which they use them and reminds us that these systems have often proven to be highly problematic with respect to privacy and security. Last year, the German Supreme Court introduced a new basic right that guarantees the confidentiality and the integrity of information technological systems. This raises the requirements for DRM even further, making aggressive systems like Sony's rootkit clearly illegal (p. 30).

Thus assuming that the privacy fundamentals of data avoidance, data parsimony and limitation of data use to specified purposes are taken into account in implementing the culture flat-rate this model would be the most privacy friendly solution.

A New Collecting Society?

Collecting societies are part of the solution. They are also a problem. To mention just one collecting society, GEMA, and a few problems: GEMA does not permit its members to free-licence songs under Creative Commons. Bands that put their own music onto their homepage have to pay the standard fee to GEMA and as the beneficiaries of the payment will receive it back ... after two years and minus 14% administration fee. The "GEMA assumption" that it is in charge of each and every piece of music on the planet leads the society to require venues that only play GEMA-free music to nonetheless fill in forms with playlists in order to prove that their music is in fact GEMA-free.

The management of the culture flat-rate could in principle be taken over by the existing collecting societies, says the EML study (p. 32). "The collecting societies in any case have the advantage that because of their lack of economic self-interest they would guarantee to strive for a distribution of the levy that is fair and supportive of culture. Therefore not only authors and exploiters but also the levy-payers and in the end society would trust in them." (p. 62) But the study also hints at the possibility of setting up a new collecting society for managing the culture flat-rate.

During the press conference Roßnagel commented that this question was not part of the task for their study. It is of no concern for the principal feasibility of the culture flat-rate but rather the third or fourth step after the system has been agreed on and moves to the concrete implementation. That is also when the thorny issue of negotiating rates will have to be dealt with.

The Study in Context: A Global Movement on two Roads to Blanket Licensing

That the world will go flat has been the conviction of many cognoscenti since file-sharing saw the light. By now even government representatives like the Norwegian Minister of Education publicly state that there is no future in fighting against file-sharing and that non-commercial file-sharing should be legalised.

The EML study starts out by stating that lump-sum levies are a well-established instrument for uses that occur on a mass-scale and therefore defy individual control. But the concrete design of a culture flat-rate may vary considerably from voluntary business models to a legal obligation, covering all digitisable culture objects or only specific types of works, on a national, European or international level (p. 4).

Indeed two schools begin to emerge for the file-sharing flat-rate. One proposes an explicit exception in copyright law and a redistribution from society to creatives via collective management. The other is a voluntary market solution based on contracts among companies and between companies and consumers.

The earliest contributions to the debate came from the US, and they favoured models based on law, copyright office and collecting societies. E.g. Bennett Lincoff, former Director of Legal Affairs for New Media at ASCAP, proposed to create a new 'online transmission right' that would combine the existing reproduction, performance and distribution rights for online purposes and make this new right subject to a statutory license, administered by a single rights collective. It would require a system for registering and marking works and for monitoring their online transmissions. licence fees would be paid by service providers and by users of P2P file-sharing networks. (A Full, Fair And Feasible Solution To The Dilemma of Online Music Licensing [pdf], November 2002)

Neil Netanel, Professor at the University of Texas School of Law, also proposed permitting non-commercial P2P file-sharing of not only music but any kind of digitisable work in exchange for what he calls a "Noncommercial Use Levy." It would be imposed on consumer products or services that are substantially enhanced by file-sharing, including copying devices, blank media and MP3 players but also internet access and P2P software and services. Interestingly, Netanel also suggested to include non-commercial remixing both in the legal permission and in the remuneration (Impose a Noncommercial Use Levy to Allow Free P2P File-Swapping and Remixing [pdf], November 2002)

William Fisher, Director of the Berkman Center for Internet & Society of Harvard Law School, was the first to give a book-length treatment of the issues involved and of a spectrum of alternative compensation systems to solve them ("Promises to Keep," 2004). Fisher favoured paying the compensation through the income tax as the most fair, arguing that greater income allows one to buy more and better entertainment equipment and take greater advantage of the new distribution technologies, but saw it as politically not feasible. Fisher therefore followed Netanel's proposal of a levy on devices, media and services, calculating a levy of USD $5.36 per month on top of ISP charges. He discussed all the elements of such an alternative compensation system, from registering works with the Copyright Office, to marking them and tracking the frequency with which they were listened to or watched, to measuring and compensating underlying works of remixes and methods for fraud prevention. His overall goal is enhancing 'semiotic democracy,' "enabling the public at large to participate more actively in the construction of their cultural environment." (p. 241)

Part of that system is, of course, already in place in continental Europe: a non-commercial private copying permission with a mandatory levy on devices and media. The private copying exception was invented by the German lawmaker in 1965 and turned into a highly successful export product that was quickly copied – good that legislation is considered to be in the public domain – in Continental Europe and beyond (see Bernt Hugenholtz, Lucie Guibault & Sjoerd van Geffen, The Future of Levies in a Digital Environment, IvIR, University Amsterdam, March 2003, p. 11 ff. [pdf]). It now serves as model for the culture flat-rate. The logical next step would thus be to extend that time-tested model to the internet and possibly to remixing as well.

Such a system was first established in Hungary by making the new WCT making available right subject to mandatory collective management. As mentioned before, this implementation that was later abolished was reported on by von Lewinski, and served as the legal model in the French flat-rate movement in 2005. The Alliance Public Artistes, a broad coalition of 15 organisations of musicians, photographers, designers, internet-users and consumers proposed a 'licence globale.' It commissioned studies on its legal, technical and economic feasibility, and gained parliamentary support from Socialists as well as Conservatives. And one night in December 2005, their amendment to the French copyright law implementing the global licence was actually passed into law. As soon as the rights industry found out, they raised hell at Midem 2006, and the decision was reversed.

When in January 2008, a commission instituted by French president Sarkozy and headed by Jacques Attali issued its final report [pdf] on policies to overcome restrictions to economic growth, the broad range of 316 proposals also included a levy on internet use. In the objective leading to Action 57 it is defined as a reconciliation of economic development and free legal downloading. The report argues that introducing controls of individuals' internet use like filtering and monitoring would be a major impediment to growth and conflict with constitutional rights of privacy and individual liberties. Thus a lump-sum levy paid by ISPs to the various collecting societies would ensure a fair compensation for artists without penalising internet development.

[-> Philippe_Aigrain.jpg]

Philippe Aigrain at the Goethe Institute conference The future of intellectual property in Brussels, 23 April 2009 © Volker Grassmuck under CC BY SA

The second book-length exposé of a legal flat-rate also comes from France. In "Internet & Création" (October 2008, pdf. Short English summary), Philippe Aigrain develops detailed

proposals for each of the building blocks of such a system, including an empirically-based modelling of its impact on cultural diversity and measuring usage of works by means of a statistical panel. His core concept is that of "creative contribution," i.e. creatives contributing their works to society and society in turn contributing remuneration back to creatives.

This proposal is receiving broad support both from the creative community and from MPs in France. Socialist MPs had tabled an amendment to this effect in the debates on the Creation and internet bill. A new coaltion "création public internet" has recently been formed by founding members La Quadrature du Net, UFC Que Choisir, ISOC, SAMPU, an association of artists from music, dance and drama, and Pour le Cinema, a group of movie directors, producers and actors set up to speak out against HADOPI.

Aigrain discusses different possible legal solutions, including a third alternative next to a copyright exception (Roßnagel) and mandatory collective management (von Lewinski / Lucas): an extended collective licence. This instrument is widely used in Nordic countries since the early 1960s for broadcasting and cable re-transmission and has recently been applied to the reproduction of works for educational purposes and the digitisation of works in libraries, museums and archives.

The Nordic model is also at the core of a Position Paper on File-Sharing and Extended Collective Licensing (March 2009) by NEXA, the Center for Internet & Society at the Politechnic of Torino. The NEXA paper points out that since extended collective licensing is not a copyright exception but a support mechanism for freely negotiated licensing agreements it does not require changing the EUCD which expressly provides for that possibility in recital 1825. It also cites the "Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works" [pdf] by the EU High Level Expert Group (June 2008) which suggested extended collective licensing as a solution to the issue of unknown or non-locatable rights-holders.

Expectations are high regarding the Isle of Man, ever since government official Ron Berry announced at MIDEM 2009 that they will simply go ahead and legalise P2P file-sharing in exchange for a nominal monthly licence fee.

The Roßnagel study stands in this tradition. He is not the first legal scholar in Germany to speak out for a culture flat-rate. Thomas Hoeren, Norbert Flechsig, Artur-Axel Wandtke and Alexander Peukert have done so. In addition, representatives from the music industry (e.g. former Universal Europe CEO, now head of Motor Entertainment, Tim Renner or music advisor Gerd Leonhard) from collecting societies (Alexander Wolf, GEMA) and from activism (privatkopie.net and FairSharing) all have posited the flat-rate as the only meaningful solution (for an overview on the German and global debate s. Grassmuck, State of the Culture Flat-Rate, March 2008).

But the EML's is the first large juridical paper in Germany, at 72 pages considered a "short study". Only now the proposal has picked up enough momentum that the Greens are taking it up, being the first political party to commission academic expertise, as Staffelt had pointed out.

The alternative to a legal road is based on voluntary arrangements and on choice and competition. An early proposal emerged from a group of lawyers, academics, technologists and musicians meeting at the Banff Centre for the Arts and was reported by economist and consumer rights activist James Love. The Blur/Banff Proposal [pdf, March 2003] did envisage compulsory licensing for P2P distribution. But in order to mitigate the 'Britney effect' of most of the money going to a handful of famous artists, it suggested that members of the audience were be required to pay, but could choose who they paid either by allocating their share directly to specific artists or by going through an

intermediary of their choice.

Another voluntary but tax-based system was proposed by Dean Baker, co-director of the Center for Economic and Policy Research in Washington, DC. The artistic freedom voucher [pdf, November 2003] "would allow each individual to contribute a refundable tax credit of approximately $100 to a creative worker of their choice, or to an intermediary who passes funds along to creative workers."

The Electronic Frontier Foundation (EFF) has been most pronounced about voluntary models. In Voluntary Collective Licensing of Music File Sharing [pdf, February 2004 & April 2008] the premise before anything else is that "any solution should minimise government intervention in favour of market forces." The EFF suggests that music industry voluntarily form a collecting society like they did when radio started. Back then three competing organisations, two non-profits (ASCAP, BMI) and one for-profit (SESAC), emerged, representing their particular portion and genres of the total music catalogue.

Membership of creatives and publishers would, in fact, only nominally be voluntary, since not joining would mean waiving the possibility of receiving their portion of the fees collected. File-sharers would not pay as voluntarily as the EFF makes it sound, either, since the alternative would be the ongoing legal threat for unauthorised sharing. As for mechanisms for paying: " That's where the market comes in. ... There should be as many mechanisms for payment as the market will support." Fans could pay directly to the collecting society, or ISPs, universities and P2P file-sharing software vendors could bundle the fee into subscriptions. In return for a US$5 per month fee they would get not a licence but a covenant not to sue.

Given 60 million file-sharers in the US, $5 a month would net over $3 billion – "$3 billion in annual profits to the record labels – more than they've ever made." The EFF talks about remunerating music file-sharing only, because "the music industry is the only industry that appears to be unable to adjust their business models to take file sharing into account," while the movie, software and video game industries continue to show strong growth and profitability. "Of course, if other industries want to form voluntary collecting societies and offer blanket licenses to file sharers, there is nothing to stop them from doing so. Individuals would then be free to purchase the licence if they were interested in downloading these materials from the file-sharing networks."

The EFF's main point: "We could get there without the need for changes to copyright law and with minimal government intervention." And in case the music industry does not voluntarily set up the system the EFF is proposing there is a Plan B: Congress could then enact a compulsory license and create a collecting society. "Government involvement, however, should be a last resort."

Aside from these theoretical contributions to the debate, a number of systems have developed actual technology and negotiated contracts, among them non-profits attempting to broker between major labels and universities. Fisher kept his promise and is pursuing a voluntary free-market approach. At Harvard University he developed a software suite including a web browser with search and recommendation functions, a file-sharing servant, a media player, a counting system and social networking, such as playlists and chat. The module that counts the number of times that a file is played works with other players as well. It periodically sends that information to the service so the fees can be fairly distributed, respecting users' privacy in the process.

Fisher then got venture capital to set up Noank Media Inc. and is focussing its activities on universities and ISPs in China and Canada. In July 2008 Noank launched a beta trial of its legal P2P service together with Hong Kong ISP Cyberport. Participating copyright owners submited works for

inclusion in the system and were given the choice whether to permit or prevent remixing. Cyberport users thus had access to Noank's blanket licensed catalogue of music and educational content. The largest part of the fees collected is to be passed on to copyright owners. Noank plans to keep 15% to pay for its administrative overhead, for dispute arbitration and for media research and support of creatives through a non-profit foundation.

Colleges and universities are a fairly manageable terrain: the institution is the ISP and controls the network, it has paying contracts with the students and can bundle the fee with the tuition or offer it as an extra. Legislative pressure to get a grip on copyright violations by the US Higher Education Opportunity Act enacted in August 2008 creates a powerful incentive for universities to find solutions.

Just like Fisher's Noank, Jim Griffin is catering to this market. Griffin, who ran Geffen Record's technology department and set up his music consultancy One House, early on opted for statutory licensing because "market forces will not resolve the problem." (At Impasse: Technology, Popular Demand and Today's Copyright Regime, April 2001). In March 2008 Griffin was hired by Warner Music Group to develop a system for providing legal P2P to students. For this purpose he set up Choruss LLC in December 2008, a non-profit intermediary between universities and collecting societies, which has the backing of both the EFF of whose Advisory Board Griffin is a member, and of three of the major labels.

Little is known or, for that matter, decided yet about Choruss. In a first public presentation in March 2009 Griffin calls it "a learning experiment." It is about getting all relevant parties to sit down together and learning by doing. Griffin is working with audio fingerprint provider Audible Magic, Cisco and others to advance the state of the art in measuring and improving the metrics. Will it be counting downloads or plays? Will it be based on social surveys or on technical analysis? Will students' payments be mandatory, opt-in or opt-out? Will they get a licence or only a "covenant not to sue", meaning P2P will remain technically illegal, others will still be held liable for assisting in copyright infringement and creatives do not have an entitlement to remuneration from these payments (see Bennett Lincoff's critique of this approach on *Intellectual Property Watch*)? All this is still open.

A legalised P2P system that came close to launching at the beginning of 2009 was developed by UK media service provider PlayLouder in cooperation with ISP Virgin Media. It even had a name already: "Virgin Music Unlimited." Starting out as a music webzine, in 2003 PlayLouder had teamed up with a small ISP to offer broadband internet access bundled with unlimited legal P2P music sharing. It developed technology based on Audible Magic's fingerprinting and deep packet inspection that it then offered on a white label basis to ISPs. In August 2008 the launch seemed imminent, with two of the majors and several indies on board and a deal with a large UK ISP within reach. In January 2009 the project was scrapped. The major labels were now demanding that Virgin block up- and downloads of songs from their subscribers' PCs. Background to this last-minute shift were the UK government-mediated round-table talks on voluntary measures, i.e. three-strikes, that lead to a Memorandum of Understanding in mid-2008. Labels were apparently hoping for more profit from repressing rather than monetising P2P. Government intervention thus blew the private P2P flat-rate.

Qtrax is another service in perpetual beta. It was the hype of MIDEM in 2007 and 2008, when it announced that it now really does have licences from all four music majors. More announcements of deals with Universal, EMI, Sony/ATV and the largest US indie TVT Records followed later in 2008. The service finally did launch in June 2008 but with a very limited repertoire and only in the

US. Version 1.0 of the client software was released in April 2009. No information is available on the size of the catalogue available through the service.

Like Noank, Qtrax requires users to download a software suite consisting of a browser, a player and a P2P client. Qtrax searches the Gnutella P2P network, returns songs registered with Qtrax, filters out adware, spyware and spoof files and then wraps the tracks in Windows Media Player DRM. The DRM requires that a user is connected to the internet and logged in to Qtrax in order to play downloaded songs, and it prevents burning them onto CD and passing them on to others. It also reports how often a title is listened to which allows artists and labels to be remunerated. The money is coming only from advertising proceeds. There is not subscription or other payment by users.

The Swedish music collecting society STIM is also rejecting a legal levy model in favour of contracts that would allow ISPs to offer their customers an optional subscription for legalised file-sharing. STIM would licences the necessary rights, collect the fees from the ISP and distribute it to its members based on measured use of their works. Since March 2008, STIM has been talking to the large ISPs in Sweden and to the owners of music rights that STIM is not administrating itself. It is also testing technology for counting plays and conducted a user survey the results [pdf] of which were published in February 2009. It showed that a brought majority of 86.2% would be interested in paying for a voluntary subscription legally entitling them to file-share music.

While these market-driven approaches are still for the future to see, a number of all-you-can-eat download services are in operation already, either as a bundle with telecom services or as a value-adding separate subscription.

Neuf Cegetel, France's second largest broadband provider, was one of the first to provide unlimited downloads from the catalogue of Universal Music. In August 2007 Neuf Cegetel launched Neuf Music giving the subscribers to its EUR29.90 per-month triple-play offer, which includes high-speed internet, fixed-line telephony and TV, access to all titles from one of nine musical genres in Universal's digital catalogue at no extra charge, and offered access to all nine genres, comprising 150,000 songs and 3,000 video clips, for an additional EUR4.99 monthly fee. Downloads are wrapped in Windows Media DRM making them incompatible with non-Windows devices. It also requires monthly online licence rights renewal and locks up the files when the subscription ends. MarketWatch commented: "The deal also suggests telecom-to-entertainment conglomerate Vivendi is seeking to draw synergies from its varied but increasingly converging businesses. Vivendi owns Universal Music and has a 56% stake in French telecom operator SFR, which in turn holds 40.5% of Neuf Cegetel."

In Denmark the former state telco TDC launched a new service named Play in March 2008, giving its broadband and mobile customers unlimited free music – for no extra cost. TDC secured the rights of three of the music majors and of a large number of Danish labels providing their customers with a repertoire of over a million tracks. Downloads are wrapped in DRM. "Under the terms of the deals, the ability to play the downloaded tracks will expire automatically if the customer terminates their subscription. TDC will also offer music fans the opportunity to purchase their favourite tracks for 8dkk (approx. €1) per download." (TDC press release) The company explains the rationale for internalising the licensing costs with the fact that both the mobile and broadband market are more or less saturated and telcos have to find new ways to attract customers. Play, which in April 2009 was reported to have had 42 million downloads, was acclaimed for offering new hope for music industry.

Omnifone originally targeted mobile operators and handset makers when it launched at the end of

2007 on Vodafone and with the catalogue of Universal at a subscription price of £1.99 per week. The London-based company provides the shopfront and library application MusicStation including mobile and Windows DRM. At the beginning of 2009 Omnifone has secured international licensing agreements with all four major music labels and thousands of independents for MusicStation Desktop Edition, covering 5 million tracks, and is now also talking to ISPs like the UK satellite broadcaster BskyB.

Similar music flat-rates are operated by mobile and wire-based broadband providers like French telecom Orange and Swedish TeliaSonera which is offering it to its 13.3 million customers across the Baltic countries.

The most talked-about B2B flat-rate so far is Nokia's 'Comes with Music.' It is the sole survivor on the ruins of Universal and Sony's 'Total Music' which was finally dissolved in February 2009. Nokia's service launched in October 2008 in the UK, the start in Germany is announced for May 2009. For roughly $90 for one year of unlimited downloads to keep it is bundled with certain mobile phones like the Nokia 5310 XpressMusic that has sold more than 10 million units globally. Comes with Music allows users to download to their phone or PC and keep an unlimited number of tracks from the catalogues of all four major labels and a number of indies, i.e. millions of titles. The files are wrapped in DRM but just as iTunes announced to go DRM-free, Nokia is publicy thinking about it too. At Midemnet 2009, a Nokia representative reported on usage behaviour: Some people download 10 songs per month, others 100, yet others do not make use of the service at all. Remuneration rates are not disclosed but so far everyone seems to be happy. After Apple it is again a stranger to traditional music business leading into its future.

Or rather into the market-based version of the future. Business-to-business flat-rates seem to be much easier to achive than a comprehensive social contract expressed in law. Intermediaries like PlayLouder, Omnifone, Noank and Choruss are building solutions by combining existing technology (for the online shop infrastructure, for identifying and tracking works and DRM for controlling user behaviour) that they then offer to culture industry on the one hand and telecom providers on the other. Companies have a common culture, their business departments that can sit down and work out the numbers and their legal departments that can work out the contracts.

B2B flat-rates are motivated by the desire to counter illegal file-sharing by offering a paid alternative for unlimited listening that feels free to consumers because the cost is bundled into the price for other products and services.

In fact, they are entirely unrelated to the cultural practice of P2P file-sharing. None of them allow sharing, i.e. uploading. The are not user-driven, open and decentralised systems, but industry-driven closely guarded walled gardens. The music – and it is only music at this point – is hosted on central servers and with a front-end that has the look-and-feel of a regular download shop. The active user of P2P is reduced to a consumer, their behaviour controlled by DRM and deep packet inspection. They include only music, ignoring all other media formats that are shared on P2P networks. And they apply only to specific islands. When a user leaves the island, a terminator DRM makes sure that she has to leave all her culture goods behind. The deals are clouded in NDAs making remuneration nontransparent to both creatives and to the paying users.

The most important point that these B2B flat-rates make is this: The content business is going flat, moving away from sales of individual copies to licensing of complete catalogues and from per unit to flat-rate payments. They show that the public condemnation of flat-rates as "expropriation" is no more than propaganda. In fact, the music industry is already going flat, they just want to do it their

way.

Considering the shortcomings of B2B flat-rates, a comprehensive legal solution for all digital media, collectively managed by the democratically organised community of creatives and under public oversight seems like the better way forward.

From Here: a Political Decision

For both roads the problem is how to bootstrap the system. For the public version the first step is to establish the legal feasibility, for which the EML study is another important landmark. It then has to build public consensus and eventually find a majority in parliament.

The market version has to match a willingness to buy and a willingness to sell – either B2B or B2C. For bootstrapping it has to find a favourable market niche like a university campus to develop a workable proof of concept, in the hope to then scale it to a vast global market. A petri dish setting might be useful for the legal solution as well. Territories like the Isle of Man, Iceland and Norway have been discussed, Luxembourg might be another candidate for launching a first legal flat-rate.

For the market version one would think that no state intervention is asked for. In fact, there was strong pressure for the legal protection of the privatisation of copyright law by means of DRM. Now even dedicated anti-statist, extra-legal "voluntary cooperation" projects in France and the UK involve the state. Starting from the Olivennes Agreement that is now about to turn into a law establishing a new government office, HADOPI. In the UK, government urged industries to come to voluntary agreements, then it stepped in and mediated round-table talks on three-strikes. British telecommunications minister Lord Carter is planning to establish a new office, a rights agency similar to HADOPI, under the regulating authority Ofcom.

And also in the US, it is a law that provides the market opportunity for Fisher's Noank and Griffin's Choruss. The US Higher Education Opportunity Act, enacted in August 2008 requires universities to offer students alternatives to popular P2P networks and implement technology to block unauthorised distribution of copyright works. Until recently, Ruckus was the only service catering to the universities' needs. After Total Music which had acquired the Ruckus Network failed in early February and Ruckus with it, Choruss is now the only remaining contender for filling the gap.

Thus the content flat-rate in any case has to be a political decision. Politics is consensus building, regulation, lawmaking. The first step was therefore, said Passek at the press conference in Berlin, to clarify the legal chance for implementing a content flat-rate. Changing laws sets a high hurdle. "It is something we as Greens can't do on our own." This summer both the European Parliament and the German Bundestag will be elected resulting in new responsibilities and budgets. Afterwards, said Passek, the Greens will take the next steps, conducting studies on concrete models, on the technical and organisational operations of a culture flat-rate.

Trüpel added that now that we have resilient expertise the Greens will discuss the model more broadly within the party and in the public. After the EP elections there will be a general debate on how to deal with these issues in the future, including on the Content Directive and the Telecoms Package. In this debate her party will position the culture flat-rate as the most green option.

Trüpel: "My goal is not an expropriation of authors but on the contrary a betterment for them. Given the current forms of contracts, e.g. in the music industry, authors are not the ones earning the most.

If one politically pursues a road towards a knowledge society, which is our decided programme, one must have a political and economic interest in the betterment of those who produce creative content."

Therefore, the decisive question at the end of the day is: how much money will creatives get from a culture flat-rate?

The Money

This maybe all good and well in theory, but in the end, it all comes down to one question: how much do I get out of it, and how much will it cost? Depending on who is asking, the fears and hopes vary.

And they change. Olaf Zimmermann, CEO of Deutscher Kulturrat, welcomed the Green Party's study at the press conference. It will enhance and speed up the discussion, which is urgently needed, he said.

The Kulturrat is a peculiar beast. It is the umbrella organisation of German culture associations. Set up in 1981, it serves the information and opinion making among its members and transporting of such opinion into German and EU politics in issues of culture policies, including, of course, copyright. The Kulturrat consists of 226 culture associations in a wide area of cultural activities, among others, music schools and choirs, theater and dance, architecture and design, documentary film and TV productions, music publishers, labels and their collecting societies. It is funded by the German federal government. The state paying the lobbyists to lobby it, sort of.

Only half a year ago "culture flat-rate" was a non-word for the members of the Kulturrat. Now they have a working group on it and its spokesperson praises the Greens for speeding up the debate on it. Zimmermann's question after his praise was: what will be the economic impact?

Concrete knowledge about culture economics is scarce, reliable numbers are patchy at best. While this is true of the analogue media environment, for the culture flat-rate it is no more than crystal ball rubbing. The official statistics are getting more sensitive to media culture. Also the number of academic studies on P2P is slowly growing. The overwhelming impression one gets from them: things ain't what they seem.

Intuition: (1) the CD is clearly in decline. (2) This decline coincides with the rise of P2P file-sharing. The intuition implies a causal relation between (2) and (1).

The decline of the CD is a complex multi-factor process. Not just changing entertainment spending (games, mobile phones). Quite frankly, I feel the CD is simply losing its plausibility. I belong to those who still buy CDs, but only to play them once, when my player rips them to hard disk. I'm annoyed about it every time but can't resist when I discover something I like in a shop or at a concert. With Gigabyte-USB-sticks for a few Euros, the CD as a storage medium is dated, just like the floppy-disc. Although there is no reason that it will vanish any time soon. Even the vinyl record is back and growing.

The causal relationship that intuition implies has never been proven. Academic studies did show a replacement effect, but they also show the contrary effect: "music discovery." Both the Dutch and the Canadian studies consistently say that those who downloaded from a free file-sharing networks

are significantly more likely to buy a CD or a game, go to a concert and go to a movie than non-file-sharing internet users.

That is what the B2B flat-rates have learned from P2P. "Music discovery" was the core selling point when Nokia launched 'Comes With Music.' The culture-consumer wants to eat both buffet and à la carte. She wants a buffet to sample it all. Not just a cake but the whole fucking bakery, as we used to say in the 1970s. And through discovery she learns to like what she will then order à la carte: in form of a concert, a deluxe-box, on the big screen, in hard-cover.

Intuition: There are those who download and those who buy culture. It's either or.

The studies indicate that intuition is bunching together the wrong factors. The line must rather be drawn between heavy users of culture and casual ones. The heavies download a lot *and* buy a lot, go to concerts and movies and pay for gaming a lot. The casual ones do all of this less, and might find the learning curve of P2P not worth it.

So it is literally true that by "waging a war on copying" industry makes its best customers its enemy.

Intuition: Younger people have more time and less money therefore file-share more and pay less.

The Hertfordshire study seems to confirm the intuition by finding that young people age 14-17 have the highest proportion (61%) of "not paid-for" MP3 tracks in their collection (p. 22), meaning the tracks are not from an own CD or a commercial download store. They include downloads from P2P, but also copies of friend's CDs which on the continent and elsewhere are covered by the levied private copying exception (p.23).

But looking at the chart on p. 26, the picture shifts. Asking for entertainment spending, among a number of choices headed by "eating out" and "mobile", the 14-17 year-olds spend the highest percentage of their pocket money on music (21.46%). While the bulk of this goes to live music, recorded music spending still goes half to CDs and one third to downloads (p. 28).

It seems that those who are digital natives and have little money and lots of time on their hand discover culture for free and still pay the largest portion of their spending money on it. Considering this, the question is again: is it a good idea for industry to criminalise their best customers? And more importantly: is it a good idea for us as a society to criminalise a whole generation?

Intuition: For-pay can never compete with free.

If a culture product is available for free and for pay, everybody in their right mind would go for the free. Looking more closely at the actual situation one finds that free has its price as well: downloads are dragging, break off, are malware-infested as the Roßnagel study has pointed out. With quite a bit of experience and some more patience these problems can be overcome. But not all of us want to invest that effort. So commercial added-value services are clearly competitive with free. iTunes has managed to establish itself at a time when file-sharing was prevalent already. Many other commercial download services have established themselves, including some based on Creative Commons free-licensing, like Magnatune and Jamendo and new ones are coming up daily. A culture flat-rate for non-commercial file-sharing would not change that.

Intuition: P2P is there primarily to violate copyrights and has little non-infringing use.

For technologists P2P protocols like BitTorrent are simply efficient means for distributing large volumes of data to large numbers of recipients. The power of this technology is being utilised by a range of commercial P2P users already. Hollywood studios and broadcasters use it for distributing popular content from their websites. IPTV providers like Zattoo rely on it. Independent documentary filmmakers use it to deliver their commercial offerings (Online Film AG). So do game companies like Blizzard Entertainment that distributes World of Warcraft over BitTorrent. The EU is funding a consortium to develop the next generation Peer-to-Peer content delivery platform. Not to speak of many major free software projects (see Wikipedia).

Ergo: P2P filtering is out of the question. An ISP that throttles or even blocks P2P protocols makes itself vulnerable to claims of harm from businesses.

Intuition: The digital online environment does more harm than good to culture industries.

While the growth of P2P use continuous unimpeded, commercial downloads were up 25% in 2008 globally to 3,7 billion USD as IFPI reported in its annual report 2009, with peak growth of 45% in the UK. Digital sales accounted for around 20% of recorded music sales in 2008, up from 15% in 2007 (IFPI, Digital Music Report 2009).

Online advertising is also doing very well. Revenues were up an equal 25% to 3,65 billion Euro in Germany in 2008 wrote the Bundesverband Digitale Wirtschaft (BVDW) in its annual report. BVDW projects a growth in 2009 to four billion Euro. Crisis, what crisis?

The German Federal Statistical Office recently reported on another impressive growth rate. internet radio and TV has increased by 38% in 2008. Assuming that a significant portion of that gets money to creatives through advertising, subscriptions or public broadcast fees, that is another positive development.

There are moneys in the network. iTunes, Google and Wikipedia are proof of it. Why include Wikipedia in line with the other two? Wikipedia is free and unpaid but costs as well. And it fundraised more than 6 million USD last year. That is certainly one feasible way to combine free information with a collective willingness to chip in for a common good.

In the end, we all will have to pay. We, the consumers and citizens which includes, of course, each and every creative. Broadband internet access has gone flat-rate. 'Always on' has become an infrastructural element of our media environment. The trend is clearly towards flat payment that makes culture "feel free."

Free is never really free, as the old saying about lunches goes. Free is paid for with the price bundled into a Nokia phone, by the advertising cost bundled into the washing powder we buy in the super-market, and by taxes in the form of public support for arts and media, by public broadcast fees or the private copying levy bundled into the price of devices and media. The latter was, by the way, unbundled in Germany. Since January 2008 copyright law requires that a bill for consumer electronics or blank media indicates not only the actual price of the product and the VAT but also the copyright levy. So why not by a culture flat-rate?

"I actually believe that the legal market has lost at least one generation for good." Eric Garland is probably the man who knows P2P best. And he's a good one at turning old-system derived intuitions on their head. The CEO of P2P market researcher BigChampagne says things like: "The

black-market is ten times as large as that of iTunes. But that is not the problem. Actually, piracy is irrelevant." And "Today, there is hardly any connection between popularity and earnings left." And on a more positive note: "When the price of a song verges on zero, the all-over business will gain in value." (Baseler Zeitung, 13.2.09). Little surprise that Garland's option is a flat-rate, a graduated voluntary free-market version of it.

Trüpel cited GEMA chairman Harald Heker as having said that they would earn a packet if they were to collect such a culture flat-rate.

Having evaded a concrete answer to the question of how much money a legal flat-rate would generate I will end with a back-of-the-envelope calculations, at least: If 30 million broadband subscribers in Germany paid a levy of five Euro that would generate 1.9 billion Euro per year. In comparison the total revenues of the German music industry were 1.575 billion Euro in 2008. Not all of that would be replaced. On the other hand, not only music would have to be remunerated. Dividing up that sum will be a difficult undertaking, no doubt, but that is nothing new.

There's money on the table. Why don't the creatives and their service providers go for it?

If we build it, will they pay?

The culture and creative industries produced a total turnover of 132 billion Euro in Germany in 2008 corresponding to 2.5% of GDP, up 1.8% over 2007 (Federal Ministry of Economics and Technology, Culture and Creative Industries in Germany, February 2009 [pdf]) People do pay for culture. But will they, on top of taxes, broadcast fees, mobile phone, internet and games subscriptions etc. accept another monthly payment?

One can imagine several ways of arriving at the total amount to be collected and at monthly rates for a culture flat-rate. One could attempt to compensate actual damages but establishing those seems exceedingly complex because there are too many unknowns. Alternatively, one could start from willingness to pay. This has the advantage of being measurable with standard marketing tools.

In the framework of L'Alliance Public-Artistes the collecting society SPEDIDAM conducted a survey in October 2005 that found that 75.5% of internet users in France are "ready" and "fully prepared" to pay a monthly optional levy in exchange for legalising peer-to-peer file sharing. (See Lionel Thoumyre in: "Livre Blanc sur le peer to peer," October 2007, p. 54 [pdf])

In a survey released by the Swedish music collecting society STIM in March 2009, 86.2% of respondents said they would be interested to pay for an optional subscription that gives the legal right to download music. Those who have the largest digital music collection (more than 5,000 songs) are the most willing. When asked how much they would be willing to pay 51.8% replied that they would consider paying between 50 and 150 Kronor (5-14 Euro) per month for such a subscription.

In the Hertfordshire study nearly 3 in 4 respondents (74%) were interested in a legal file-sharing service and ready to pay a monthly tariff for it. Interest was highest amongst those who admit to file-sharing illegally (80% vs. 63% of non-downloaders). Of those who supported the idea of a music licence, 90% believed that composers, songwriters, musicians and performers should be the beneficiaries. Interestingly, unprompted, more than 10% of respondents indicated that they did not allow others to download from their hard drive because they felt artists should get paid (p. 30 f.).

Companies, of course, query the market by means of surveys. The UK media service provider PlayLouder found a willingness to pay of £10 per month for unrestricted file-sharing. Nokia came up with an "acceptance value" of 90 USD for one year of unlimited downloads. Market observers have confirmed this price for Comes with Music in principle, adding that the actual price is obscured by a number of factors, varying between low- and high-end phones, by market, carrier, outlet and bundle.

Wolf Richter from the Oxford Internet Institute who did research on Fisher's Noank project in China found an interesting correlation. The psychological price users are willing to pay for a flat-rate is roughly equivalent to the local price of a movie ticket, noting that declared willingness to pay is usually higher than actual willingness. To capture the willingness to pay it is paramount to provide users with convenient methods of paying or even better a 'nudge,' e.g. the bundling of the flat-rate into the monthly subscription fee.

Citing from unpublished data Richter told me that in his survey among undergraduate and graduate students in China 50% declared to be willing to pay a monthly fee for file-sharing. Of those, 50% are ready to pay more than 10 RMB (1.20 Euro). The price of a cinema ticket on campus is 10 RMB, off-campus it is 60-80 RMB. A similar survey among media professionals and graduate students in Hong Kong showed an optimal price point based on self-declared willingness to pay of 100 HKD (9.85 Euro) per month, with 75% of respondents willing to pay. A cinema ticket for an evening screening costs about 65 to 75 HKD while a chart album at HMV is 95 HKD. Taking the self-declared willingness to pay of £10 in the PlayLouder survey, he finds that a cinema ticket in London costs roughly £10, while an album at HMV is between £9 und £12.

BMR's chief executive and Ex-Undertones singer Feargal Sharkey, on the occasion of the release of the Hertfordshire study: "First and foremost, it is quite clear that this young and tech-savvy demographic is as crazy about and engaged with music as any previous generation. Contrary to popular belief, they are also prepared to pay for it too. But only if offered the services they want. That message comes through loud and clear."

The Cost of Repression

After we have got a feeling of how much a culture flat-rate could bring to creatives let us now look at the costs of the alternatives. Take HADOPI, the new government office to administrate France's three strikes. It is marketed as a government-mediated free-market cooperation solution. Its costs as reported to me by Jérémie Zimmerman from Quadrature du Net are slowly emerging.

HADOPI's official budget is planned to be 6.7 million Euro per year. The cost for the ISPs that will be passed on to their customers for setting up the infrastructure to enable them to identify the owners of IP addresses, as estimated by the Superior Council for IT of the Ministry for Economics: 70 million Euro, and for operating that infrastructure as un-officially estimated: 10-20 million Euro per year. Add to that the cost for sending tens of thousands of warnings daily, as estimated by the French Minister of Culture Christine Albanel, the first graduation being an email, the second a registered letter. And add the cost for expanding the capacities of the justice system to handle the wave of appeals that is to be expected once people get cut off the internet.

The new agency and infrastructure in the UK will be similarly costly. But here Communications Minister Lord Carter of Barnes proposed it as a private entity, a 'quango' (quasi-autonomous non-governmental organisation). He is also proposing an internet levy of £20 a year per broadband connection – not to distribute to creatives but to pay for its three-strike administrator against 'serial

copyright-breakers' (sic!).

The infrastructural costs of repression are socialised, either paid for by taxes or ISPs, i.e. their customers. All this under the un-proven assumption that repression will improve sales opportunities for copyright products and with the proclaimed but equally unproven intention to get money to creatives.

A much more likely result of repression is not a decrease in file-sharing but an increase in encrypted and anonymous P2P file-sharing (Wikipedia) and hard disk-copying. Approximately one-quarter of all BitTorrent traffic already uses protocol header encryption as a recent analysis of P2P trends has shown. Already in 2007 deep packet inspection data from a large UK ISP obtained by The Register showed that encrypted BitTorrent traffic had risen 10-fold within a year to 40% rendering P2P surveillance against copyright infringers pointless. The Pirate Bay just announced IPREDator, a VPN service for hardening the privacy of torrenting. The cost as announced: 5 Euros per month. Shutting down the Pirate Bay in turn will promote the spread of decentralised trackerless BitTorrent networks (Wikipedia).

Repression predictably calls in the next round in the technological arms race. It will likely promote a generalisation of cryptography. What will the unintended consequences and collateral damages be? It would certainly make it harder for law-enforcement to go after serious crimes like child pornography, organised crime or money laundering. What will the response be? Prohibiting cryptography? Requiring a backdoor as was tried in the 1990s (remember the clipper chip)?

Piracy is a constant, Garland from BigChampagne argues. The culture industry has to live with it. It spent hundreds of millions of dollars fighting piracy, to no noticeable avail. Why not invest that money and ingenuity into rewarding creatives?

As a society we have two options: investing in an infrastructure for suppressing illegal file-sharing with socialised costs born by taxpayers and internet users. Or investing in an infrastructure for compensating creatives and spending public money on the support for public culture instead.

Individually our choice is: 5 Euros per month to creatives, or 5 Euros per month to privacy-protected file-sharing. People in significant numbers are ready to pay either. Which is it going to be?

Lawrence Lessig

The day before the Green Party's press conference, Lawrence Lessig graced Berlin again with one of his intoxicating media-savvy talks. At re:publica 09 he presented a remix [video] of his most recent Book "Remix."

[-> Lessig_dont-read.png]

Still from video documentation of Lessig's talk at re:publica

A meme that he made stick was this one: "file-sharers don't read Supreme Court opinions." (35:37) Remixing his statement with a graph showing file-sharing growth oblivious to the 2004 Grokster ruling that plainly signalled that P2P file-sharing violated copyright law. Lessig then pointed out the

one effect that the discrepancy between the legal status of amateur distribution and its actual status in every-day, mass-scale media practice does have: an erosion of the trust in the legal system.

Lessig gave the proposal introduced the following day at the press conference his blessing. Pleading for peace in the 'copyright war' he said: "The propsals have existed for the last 12 years from compulsory licences to voluntary collective licenses to the proposal the Green Party is going to propose here tomorrow, all recognise that we have an opportunity to both serve the interest of copyright, meaning to give money to artists, and decriminalise a generation of our kids." (48:00)

In the Q&A, Lessig added that he hadn't studied the Green Party's proposal but that he has been supporting the general form for a long time. "I think if Germany took the lead in setting up an example it would be enormously important for countries around the world. To begin to decriminalise, and to ensure that copyright serves the interest of artists, rather than ensure that it serves the interest of a dying particular industry that made its money by trying to figure out how to extract rents from pieces of plastic that would be sold around the world." (69:30)

He reminded the audience that from the 24,000 lawsuits in the US artists have got not one dime. "All the money goes to fund the lawyers and the RIAA." Had a file-sharing flat-rate been in place a decade ago also businesses would have had the opportunity to competed in finding different ways to spread and profit from culture, many more than just Apple.

"The part that is most important to me is that we would not have produced a generation of these 'criminals' [showing a photo of kids before a computer]. We would not have taken a generation and make them self-consciously recognise their life was a life against the law. We need to consider these alternatives now. When we think of these technologies and what they enable, everyone in this room knows that we can't kill this form of expression, we can only criminalise it. We can't stop kids from being active in ways I wasn't when growing up, we can only drive their creativity underground. We can't make them passive, we can only make them 'pirates.' And the question we have to ask is, is that any good for society? In my country kids live in this age of prohibitions, living life constantly against the law. But that life is extraordinarily corrosive, deeply corrupting of the rule of law and of democracy. You need to work to stop this war now." (51:00)

A new social contract

We are learning. We as humanity. We are learning the hard way. Bhopal, Chernobyl, the melting pole caps, species going extinct made us realise that we have to take responsibility of our natural environment. The current financial melt-down made us learn that we need to take collective responsibility for our global financial environment. Bold steps were taken by the global leaders at the G20 summit in London.

We need to learn to take responsibility of our knowledge environment as well. Information and communications processes keep the world together. They are what makes us *homo sapiens*. They live in an environment of technology, cultural expression and perception, markets, regulations etc. – always contested, of course. The digital revolution shakes this environment to the core.

The digital revolution is a time of fast-paced innovation. Daily we are seeing new ways of communicating and cooperating, of receiving and providing information emerge, bringing new opportunities and creative destruction.

Other things do not change: "When it comes to music and young people, everything is different, and yet everything is still the same. Like generations before them, young people today are passionate about music." (Hertfordshire study, p. 2)

The flood of innovation during the last twenty years was enabled by the open architecture of the PC and the internet, including net neutrality. Let us not destroy this open architecture with DRM, filtering and deep packet inspection. Let us accept what technologists have been saying all along: Published bits can't be controlled, period.

Revolutionary change means going back to basics. Trodden ways lead nowhere. Old intuitions fail to grasp what is going on. In culture the basics are the desire of creatives to create and the desire of audiences to perceive their works and enable them to continue creating.

Media technology, the culture industry and consequently copyright law had delineated particular cultural practices as economically valuable and worthy of protection: that of professionals, trained, accredited by their specific community of artists, confederated in professional organisations and collective rights management societies. The digital revolution brings the means of production, for text, music, video etc., and the means of global distribution into the hands of the rest of us. Regular citizens have become active agents in the knowledge environment. This calls into question the lines drawn so far.

What is commercial and what is non-commercial (a much more tricky question than one would expect. CC is conducting research on it)? What is public and what is private (copying)? What is in the knowledge commons of free-licensed works (GPL, CC) and what is in the public domain? What should be organised by the market and what should be publicly provided for? Trüpel spoke of a co-existence of commercial download services and legally licensed P2P file-sharing.

What aspects of what is market-organised need to be regulated in the public interest? Just as the banking industry has shown not to function in the public interest without regulation, nor the nature-exploiting industry, so also our knowledge environment cannot be left to profit-oriented actors alone. After the collapse of the world economy nationalisation of private companies is no longer taboo. Not a few people have suggested that Google has become an essential infrastructure that should be socialised.

Our society has long provided basic informational services to all: education, libraries, museums, public broadcast, health, the infrastructure of traffic of humans, things and information, funded through societal redistribution by taxes and mandatory broadcast fees. What is to be considered essential goods in the digital age? What is added value and offers business opportunities?

Markets are good at certain forms of allocating goods and services. At others they lousily fail. E.g. the market fails to provide the majority of free-lance creatives with enough income for them to buy health-care and pensions on the market. The failure became so severe that the German lawmaker saw the need to step in and in 1983 established the Artists' Social Welfare Fund (Künstlersozialkasse: KSK). Collecting contributions from copyright exploiting industries, from the creatives themselves and adding to it a public share, the KSK now enables creatives to enjoy the same social security as employed authors.

What should be collective, e.g. in the form of self-organisation by creatives (scientists, free software authors, musicians etc., collecting societies) and consumers?

The 'knowing human' is also *homo faber* and *homo ludens* and *homo oeconomicus*. Bringing these different aspects of our human essence into a new balance is the challenge wer are faced with.

We need a common vision of where we want the digital revolution to go and how we want to shape it, and equally bold steps to avert catastrophes and set the path towards a rich, enabling, inclusive and fair future knowledge environment. These steps need to be bold but most of all knowledgeable and far-sighted.

The knowledge environment has seen major catastrophes before. E.g. in the late 19th century using acid in paper production seemed like a good idea until we catastrophically learned a lesson about unintended consequences. The Millennium Bug was a catastrophe in the digital knowledge environment that didn't happen. These days one expects to open one's favourite blogs and find out the Chernobyl of the info-sphere has happened.

What we do see on a daily basis is a constant flow of crises and conflicts. Cases of systematic surveillance of employees (e.g. the recent case of the German Federal Railways) and customers, mass-scale privacy invasions through illegal address sales, call centre abuses and spam and DDoS attacks as a constant challenge to the very infrastructure of the knowledge environment.

E.g. Google Books: a company commits 'piracy' on an industrial scale and because of its market muscle seems to be getting away with it, re-writing copyright as it does so. Google Books is yet another dramatic demonstration that the freely accessible global all-media library is inherent in the internet. Over short or long we will get there. It can't be otherwise. Only the *modus operandi* is still very much up for debate.

E.g. YouTube: The 2007 agreements between Google/YouTube and the four majors and collecting societies sent a clear and welcome signal that using music in user-uploaded videos is alright and remunerated. In March 2009 the agreement ended. Since then a dispute over remuneration rates led YouTube to block videos and stop paying to collecting societies.

E.g. the Pirate Bay trial: Four young people receive draconian sentences for something millions across the world are doing. One would have hoped the Swedish judges would have signalled that when an infringing practice becomes widespread for a generation, it is evident that the application of the law is unsuitable and referred the issue back to lawmakers.

The biggest catastrophe we are currently experiencing is the war on copying. 'Capitulation' is the war terminology prescribed by IFPI in response to a culture flat-rate. In war the rules of civility are suspended, but for the fig leave of the Geneva Convention. War is about survival. Us vs. the enemy. It's one thing when this enemy is a brutal dictatorship or groups blowing up thousands of people. But the war on copying – on amateur remixing and amateur distribution – is directed against our kids. As Lessig said, we can't stop amateur remixing and amateur distribution. We can only drive it underground, thereby calling in the next round in the technological arms race.

It seems we are stumbling blindly into the future ahead of us, bumping against walls and into each other as we go along into the unfolding digital revolution. Our actions have more unintended and far-reaching consequences than we had thought, causing more collateral damage than good.

We urgently need a de-escalation, a memorandum on panic-driven short-sighted regulations and space for reflection and debate. In order to take responsibility for what we do we need three things urgently: we need to know what the hell's going on, we need to decide where we want to go from

here and we need to take everyone with us in the process.

Self-Reflection

First of all, we need data, knowledge and understanding of the workings of the digital knowledge environment. It seems that we know more about the smallest particles and the largest galaxies than about ourselves as cultural animals. This requires systemic self-reflection and systematic research, developing a sensorium for the relevant factors and the dynamics in this space.

David Bahanovich, Head of Music and Entertainment Industry Management Programme at the University of Hertfordshire on the release of the BMR study said it clearly: "As we witness the seismic changes to the music industry's landscape, timely and targeted research is not only welcome, but is of critical importance." More studies and a rigorous peer-review are needed, so that the various disciplines involved (technology, law, sociology, cultural studies, economics etc.) can evolve a suitable methodology for getting a grasp on the unknown into which we are currently blindly stumbling. Also much of the primary data are still lacking.

E.g. the Federal Culture and Creative Industries report was another recent mile-stone of self-reflection in Germany. But what it also made clear is that the European official statistics are still very much in the making. E.g. the software and games industry make up one undifferentiated category. We cannot say what part of the figures on jobs, companies and revenues are due to business applications and which to World of Warcraft, Grand Theft Auto and the like. The problem has been recognised, the official parameters adapted. From 2009 on, we will get a more differentiated picture of the state of affairs of digital creative workers and industries.

An issue here is that culture industries are as non-transparent as any industry. Disclosure and reporting requirements are needed beyond those that exist for public companies towards fiscal authorities, that the official statistics are based on. This should also include rules of access to data for scientific research so that public policy is not informed by industry's self-reported numbers alone but also on independent scientific enquiry.

For example, Creative Commons is a great experiment in popular copyrighting, i.e., in setting copyright right. A wealth of knowledge about licence choices by professionals and amateurs, by media and arts, territories, age etc. could have been learned from the rise of CC. Alas no more than sketchy and very rough numbers and anecdotal evidence remains. CC regrets "not encouraging rigorous outside analysis by people who know something about statistics long ago." Also this is fortunately beginning to change.

Metadata are a key element for knowing and operating the knowledge environment. A registry of works and rights, ideally with rich metadata and fingerprints would be highly desirable. It is needed for trading rights, for knowing when a work comes into the public domain and for measuring and distributing levies, including the culture flat-rate. Parts are there (the US Copyright Office, collecting societies, finger-print database provider, numbering systems like ISBN and ISRC, the Google Book registry etc.) but none are comprehensive and they do not interoperate. This is a basic infrastructure. It should be shared and improved by all in the way free software is.

We need as much information about us as knowledge animals as we can get. But in the end we are entering new territory and will have to learn as we go along.

Decision

Neither technology nor law nor economics are determining where we go. Only we can do so. We need a new global and all-inclusive debate about the society we want to live in. A social contract between creatives and society, an agreement over what Philippe Aigrain [pdf] calls 'creative contributions,' i.e. the works that creatives contribute to society and the remuneration that society in turn contributes back to creatives.

Society has to take those decisions. We cannot not decide. Technologies, media practices and markets evolve by the hour. And some are so powerfully appealing that they might be hard to regulate after the fact, like P2P file-sharing or Google Books.

"Only those questions that are in principle undecidable, we can decide." (Heinz von Foerster) Once we know what we want, the experts – the physicists of law, technology and business – can do all the feasibility studies that are needed and make it work.

But whenever we decide upon in principle undecidable questions we are metaphysicians. About which von Foerster brings us the good news: We are free! "The complement to necessity is not chance, it is choice! We can choose who we wish to become when we have decided on in principle undecidable questions." The bad news: "With this freedom of choice we are now responsible for whatever we choose!"

We cannot perceive ourselves to be apart from the knowledge environment, looking as through a peephole upon an unfolding universe. We are part of the knowledge environment. Whenever we act, we are changing ourselves and the universe as well. We are not citizens of an independent universe, whose regularities, rules and customs we may eventually discover, but participants of a conspiracy, whose customs, rules, and regulations we are now inventing.

In this process existing values will have to be translated and new norms and rule-sets will emerge. The highest value of any copyright regulation needs to be the freedom of the arts and sciences. These are embedded in the larger freedoms of citizens and that of markets.

Freedom needs regulation. Markets, for example, can only do what they are good at when they are free from monopolies. These regulations should be empirically founded and constantly checked by feed-back from cultural reality.

Just as our empirical sensorium, also our political sensorium that guides decision making needs to be adapted for the digital age. Democracy is a pretty smart system for societal decision-making. The UNESCO Universal Declaration on Cultural Diversity [pdf] and the UN Millennium Development Goals are examples of it, but at times it leads to exceedingly stupid decisions. Take copyright term extension. Lessig showed that retroactively extending the term of protection makes no sense whatsoever. He fought the Mickey Mouse term extension act all the way to the US Supreme Court and lost. The EU has just done it again by nearly doubling the term for sound recordings, again against all better knowledge. Lessig sees the cause for these kinds of erratic decisions in a systemic corruption of the political apparatus and set out on a campaign to change congress.

The digital revolution brings many chances for improvement, for more transparency, wider circulation of information, more accountability and a much wider inclusiveness of public debate. Considering the tasks at hand – setting the course of society on its way into the man-made but unpredictable future of our culture and knowledge environment – such improvements are much needed.

Inclusion

The regulatory design of our information environment is of vital interest to all of us. Therefore the debate on a new social contract has to be all-inclusive. The 'prosumers' of culture and those who are still excluded, especially in the developing world, need to be part of it.

E.g. Negotiating Rates. The primary beneficiaries of private copying, file-sharing and remixing are citizens, but creatives and in turn copyright industries benefit from open access as well. Citizens are currently missing at the negotiation table over levy rates. The German Ministry of Justice regularly argues that collecting societies and the device and media industry are antagonistic already, the first wanting to get as much as possible, the latter wanting to pay as little as possible. Therefore the interests of consumers to pay as little as possible is automatically represented without needing their own say.

This is a grave error. Culture is not a matter for business contracts alone. It is time for a social contract. Since consumers are paying the bill in the end, they should be at the table. They should be partners in the process not objects to be studied by means of marketing research.

E.g. the Rights Agency that the Digital Britain Interim Report from January 2009 proposes. "It should provide the forum within which all elements in the value chain – content creators, initial aggregators (e.g. studios or broadcasters), theatrical distributors (e.g. cinema chains), networks, ISPs and other parts of the chain – could come together." And again those who pay for the whole value chain, consumers, are missing.

They do feature as one the three winners, but only on the receiving end: "Working together on enforcement and education mean there needs to be clear advantages to all sides – a win/win/win for rights holders, intermediaries and consumers. Rights holders and intermediaries should each reap the economic benefits of delivering a better service to consumers." It is partnership for all corporate actors and carrot and stick for citizens. Better service for those who are well-behaved consumers and enforcement and 'education' for those who are not.

On the issue of 'education' the BMR/Hertfordshire study revealed another highly interesting piece of the puzzle. Half the people who took part in the survey played a musical instrument. More than a third of them have uploaded their own original music to a social networking site. Those who had done so had a measurably higher awareness of copyright issues than those who had not uploaded any of their own works. Knowledge of copyrights comes not from indoctrination a la 'pirates are criminals' but from actively engaging in publishing one's own creations.

That much is clear: P2P file-sharing is a given. The world is going flat and the necessary change will have to be paid for by all of us, one way or the other. We need to connect two points: remuneration for creatives and informational freedoms of citizens. A flat payment is the logical solution, as the Roßnagel study concluded. The writing is already on the wall. The question is only which road will lead us there: the legal one or the free market road? A public solution with transparency and public oversight build into it, or a private contractual solution clouded in NDAs? Or as Wolf Richter [pdf] put it: a shared public infrastructure based on blanket licensing or a fragmented landscape of privatised walled spaces of culture?

The crucial question for the new social contract is where the focus should lie: on the culture industry or on the collectives of creatives and audiences? Do we prefer to see ourselves as

consumers with the choices of products and services the market offers, as objects of advertising and market research and education campaigns? Or do we see ourselves as partners in an arrangement where we all provide creatives whose works we enjoy with decent working and living conditions to create them? What knowledge society do we want to live in?

About us as *homo sapiens* we know (from Wikipedia) that what makes us special is "a highly developed brain, capable of abstract reasoning, language, introspection and problem-solving." Globally networked computers give us the means for truly humanity-wide reasoning, introspection and problem solving. So let's stick our brains together and work this out.