**Copyright in the future and the implications of file sharing services such as The Pirate Bay**

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**1. Introduction**

The technology of file sharing has certainly had a great impact on the consumer market, not just in relation to how products can be digitally transformed and distributed, challenging scope of copyright protection, but also on how we as consumers perceive and choose to consume such content. Consumers currently demand to be able to consume online content with multiple devices in everyday life, which challenges the “old” business model of distributing such products and services. Further, the value of copyright in relation to said content has been somewhat diminished as a lot of consumers do not perceive downloading of pirated material as illegal activities, but rather regard all content on the Internet as being free for each and everyone.

This essay seeks to examine the legal development in the copyright law area as affected by the file sharing services from the new perspectives described above. It will be argued that when examining the file sharing case law the technology used online seems to a great extent not to be prohibited to use per se. It appears from the cases that it is rather the technology in connection with other factors, as how it is used, that creates a liability to arise for file sharing tool providers. The high profile Swedish The Pirate Bay case will be specifically examined and criticised in this regard.

Further, the essay moves on to critically examine the actual effects of file sharing on the market, with a detailed look into the Swedish market, to see if there is a correlation between the file sharing conducted and declining record sales or if it might be the case that file sharing result in raising sales of digital content. In relation hereto, it is argued that research providing evidence in both directions must be handled cautiously as it, one the one hand, is hard to estimate and calculate the actual revenue loss for the entertainment industry, and on the other hand, is difficult to establish that there is such a thing as average file sharers who adequately can convey general information about increased spending due to file sharing.

The essay then moves on to examine and evaluate proposed and implemented legislation in the EU as a response to deal with the threat file sharing proposes to copyright. The essay hereby argues that it is a proportionate measure to enable rights holders to identify infringing users by court order through the EU IPRED legislation, but that difficulties will be encountered when applying the three strike approach. *Inter alia*, it is proposed that, it might be questionable to restrict or suspend Internet access if it is hard evidence wise to establish that it is the same person behind the IP-address infringing copyright at the relevant times.

Lastly, the essay turns to look at ways to deal with the file sharing issue for the future looking into alternatives for rights holders to get remuneration such as through new business models, taxes, etc. It is thereby concluded that creative payment or non-payment business models as Laila or Spotify are favoured as constructive ways forward over mass litigation aimed at the users or going after the ISPs. Finally, it is pointed out that, when dealing with peoples’ attitudes towards file sharing, education on legal protection of IP-rights is important.

**2. Copyright in the digital world**

2.1 Copyright protection

The digital technology enables, *inter alia*, reproduction of exact copies, distribution and storage of digital content. This means that a private person in principle can act as a commercial player facilitating spreading of enormous amounts of content which, qualitatively and quantitatively, is at the same level as the original works. Such new possibilities of copying and spreading content naturally entails problems for the scope of protection for copyrighted works and adds to the uncertainty of value of copyright as such.

The legislation applicable to address such issues in the EU includes the Infosoc directive where the scope of copyright provides the rights holder, *inter alia*, with the exclusive right to reproduce, distribute and communicate or otherwise make available his protected work to the public (with some exceptions).[[1]](#footnote-1) The IPRED legislation that followed suit is focussed on enforcing the intellectual property rights protection within the European Union. The IPRED requires all member states to apply efficient remedies and penalties for those engaged in piracy.[[2]](#footnote-2) All of the mentioned rights are, logically, of great importance in relation to the file sharing- and infringement debate. How the rules are applied in reality is another question and the rules have been implemented to various extents in the different member states. Many countries have chosen to implement the rules as part of their existing copyright laws. The UK for example, has implemented the Infosoc Directive by the Copyright and Related Rights Regulations (2003) and the IPRED by The Intellectual Property (Enforcement etc.) Regulations 2006, complementing the Copyright Act (1988).[[3]](#footnote-3) In the US the general copyright legislation corresponding to the Infosoc Directive is the Copyright Act of 1976, and the Digital Millennium Copyright Act is the equivalent to the IPRED legislation.[[4]](#footnote-4)

2.2 Problems with digital piracy

To start with it is worth noting that a lot of peer to peer technology used in Europe is used for legitimate purposes and not for illicit file sharing.[[5]](#footnote-5) It is also fair to say, however, that probably a majority of the file sharing uses will to some extent concern unlawful material. For the purpose for this essay a file sharer will refer to a parson sharing both lawful and unlawful content.

Digital piracy is most commonly described as digital infringement of copyright. That there is no specific legal definition of digital piracy is illustrated by the different approaches to copyright infringement in the member states as the different jurisdictions have, as shown above, their own exceptions to the exclusive right of the rights owner for, *inter alia*, fair use, fair dealing and private use.[[6]](#footnote-6)

The difference between digital piracy and a normal market of supply and demand is that the users, as noted above, can turn into suppliers within the peer to peer networks where the low cost of copying and transmitting the works makes digital products attractive for the consumers.[[7]](#footnote-7) Further, such “new suppliers” of content may not be driven by monetary objectives but perhaps recognition within the file sharing community. In the peer-to-peer network heavy up loaders of content may be also be rewarded with better services capacity wise. Studies have further shown that the users normally have awareness of the infringing nature of the content shared.[[8]](#footnote-8) In this regard the unlawfulness of the file sharing is perceived as “ethical” as there normally are no monetary reasons behind the content exchange. A survey from British Music Rights on music consumption in 2008 showed that Internet users perceived the most natural and habitual way of consuming music to be through the exchange of pirated digital products.[[9]](#footnote-9) In conclusion, it is understandable that online content suppliers that require payment for their services are facing difficulties when competing with the “new suppliers” of online content.

As the market for pirated digital content have rapidly expanded over the last few years, and thereby also the number of illegitimate content suppliers, the problems of enforcement of actions against digital piracy also arise in the different jurisdictions. Commonly, the legislation in place don’t distinguish between digital and physical copyright infringements, which may mean that civil proceedings may be designed for more general copyright infringement matters. Countries with strong copyright protection legislation tend to show lower rates of copyright infringement, however appropriate repercussion is also important: Should there be no threat of enforcing the provisions the pirates are quick to move to a jurisdiction with weak enforcement mechanisms.[[10]](#footnote-10) The recent legislation proposed or implemented in the EU in relation hereto will be outlined in Section 3.3 below.

2.3 File sharing case law

*2.3.1 The “Sony Betamax” case*

From the early “Sony Betamax” case it was clear that the fact that a device can be used for illicit purposes, such as to infringe copyright, is not enough for contributory liability to arise for the supplier of the device selling it.[[11]](#footnote-11) In the case Sony had introduced the VCR on the market, making it possible for consumers to copy films without the permission of the right holders. The US Supreme court held that as the VCRs could be used for a significant number of legal purposes as well, the mere risk that the device could be used for unlawful activities, couldn’t make Sony liable for its consumers’ copyright infringements.[[12]](#footnote-12)

*2.3.2 The Napster case*

The file sharing service Napster was the first large scale file sharing case that become known worldwide. In 2001 a US court ordered Napster to shut down due to that almost all the files exchanged by the users on the Napster site were copyright infringing material which the court asserted Napster to have knowledge of. The Napster network was constructed on a peer to peer basis but included a central index server which enabled downloads directly from the different users. Through the presence of the central server it was rendered that Napster had the ability to prevent the copyright infringements facilitated on the site by its file sharing tool. The court therefore held that Napster had contributed to the infringement by providing the software, search tools and server capacity for the exchange of the users’ files as well as failing to control and prevent the unlawful activities even though Napster had the possibility to do so.[[13]](#footnote-13) Hence, it may be concluded that technology itself wasn’t prohibited in this sense; it was rather the technology structure of Napster, making policing of all infringements impossible, which brought it to its fall.

*2.3.3. The Aimster case*

In the Aimster case the court took the Napster reasoning even further. The court held that the file sharing service Aimster was liable for contributory copyright infringement due to that Aimster had the possibility to control the illegal file sharing facilitated by the tool on its site, regardless of the fact that Aimster used encryption technology that precluded it from knowing what content its users shared online. The judgment in Aimster thereby meant that also willful blindness would amount to knowledge for the sake of liability to arise. Aimster was accordingly ordered to shut down the website.[[14]](#footnote-14)

*2.3.4. The Grokster case*

In the Grokster case that followed suit the file sharing site Grokster, as in the Napster case, operated on a peer-to peer basis but unlike Napster with no central server controlled by Grokster. The US Supreme Court held that Grokster by its software was facilitating massive copyright infringement and was liable for contributory as well as vicarious copyright infringement. In relation to contributory infringement the court held that Grokster had knowledge of the infringements and contributed thereto and in relation to the latter the US Supreme Court adopted the inducement rule found in patent law and found that Grokster had failed to act on and filter out unlawful material:

“one who distributed a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties” [[15]](#footnote-15)

The Grokster outcome meant that that peer to peer services may be liable for contributory copyright infringement if they distribute its file sharing tool with the object to encourage users to use it in acts of copyright infringement even thought it might not technology wise be able to control the uses (in contrast to the Napster case). In line with the previous case law accounted for above it appears from the ruling that still technology of the file sharing tool in itself isn’t prohibited as such.

The cases accounted for in the above all used the “Sony Betamax” defense, that the device is capable of a significant number of non-infringing uses and thereby should preclude liability for contributory infringement for service providers, without success. The dismissal of the “Sony Betamax” defense is reasonable as the file sharing service providers in comparison have a closer relationship to its users. In the “Sony Betamax” case the only interaction with the users was when they bought the device in a store which is a profound difference in relation to the file sharer controllers who might have knowledge of the users’ individual activities and also through a filtering system potentially could prevent such activities.[[16]](#footnote-16) In the following case law the criteria of “filtering possibilities” will be further elaborated on.

*2.3.5. The Kazaa case*

In the same vein, as the cases outlined above, the Australian Kazaa case was decided. The file sharing network Kazaa was held liable for contributory copyright infringement by knowingly authorizing Kazaa users doing of the infringing acts that Kazaa had the power to prevent or at least substantially reduce. The court further held that the measures taken by Kazaa, through warnings on the website prohibiting file sharing of illegal content, as well as user agreements containing a clause where users agreed not to infringe copyright, had proved to be ineffective to prevent user copyright infringement. The court ordered that Kazaa should install filters in order to prevent future infringements. It is worth noting that the case was later settled between the parties whereby Kazaa adopted a payment model.[[17]](#footnote-17)

It has been argued that file sharing service providers might find it difficult to rely on the argument that they have no possibility to police infringements technically through use of filters, as a filter installment was one of the components in the Kazaa settlement.[[18]](#footnote-18) To the contrary it is argued that it is not technically possible to develop a filtering tool that will effectively filter out all infringing content and that a contributory copyright infringement liability for failing to police infringements hence cannot arise as such liability requires the ability to be able to hinder the illicit behaviour in the first place.[[19]](#footnote-19) The question seems to be unclear technology wise but the latter standing point seems most reasonable if it is questionable if it is possible to develop such a filtering technology. So far this essay hence argues that it seems that even though file sharing technology is not prohibited in itself this could be the effect in practice if it is possible to police and prevent all infringing uses by the use of the filtering technology and the file sharing service fails to do so.

*2.3.6. The Pirate Bay case*

The most recent file sharing case on a large scale service is the Swedish The Pirate Bay Case. The Pirate Bay site was founded in 2003 and is reported to have app. 20 million users and 3, 5 million subscribers.[[20]](#footnote-20) The site provides an indexing and search function for torrent-files, enabling site users to share content or bits of content in a faster way and on a larger scale than by the ordinary peer to peer technology.[[21]](#footnote-21)

The main questions of the case concerned the legality of running a torrent tracker search engine which contains torrents that point to unlicensed copyrighted content. The prosecutor brought criminal charges in 2008, claiming inter alia that the persons behind The Pirate Bay site were aiding and abetting to copyright infringement.[[22]](#footnote-22) There was convincing evidence found by the Stockholm District court supporting that a considerable amount of the torrent files did point to almost exclusively infringing material. The court found that a contribution to the copyright infringement was committed by the defendants by; enabling the users to search and download torrent files and by offering the tracker functionality that enabled file sharers to contact each other. The court thereby made clear that the services facilitated by the bit-torrent tracker objectively furthered the copyright infringement as a communication to the public of illicit material.[[23]](#footnote-23) The court further held that it was clear that the defendants were aware of the infringing material on the site and that they despite their knowledge had not taken any measures at all to prevent the offences. Therefore, the court concluded that their intent was proven. Accordingly, as there had been no measures taken in order to police infringements neither could The Pirate Bay defendants benefit from the host exception from liability under art 14 of the E-commerce Directive.[[24]](#footnote-24)

The court handed down its verdict in the The Pirate Bay case on 17 April 2009 where the four defendants were equally found liable of contributory copyright infringement to 33 protected works and sentenced to one year in prison each. In addition they were ordered to pay damages to the rights owners amounting to app USD 3,6 million.[[25]](#footnote-25) Of the four prosecuted, two were the administrators handling the actual technical operations of the site (Neij and Svartholm-Warg), one was a the spokesman and ad-seller (Sunde) and one an ad-seller and a financer (Lundström). On the joint liability the court stated that: “the defendants have acted and in other respects operated as a team, with the common aim to develop the Pirate Bay both technically and business wise”, which enabled liability also for the mere financer to arise in the case. The reasoning could be questioned but is in accordance with previous Swedish criminal law on joint liability.[[26]](#footnote-26)

The Pirate Bay site was not taken down after the verdict and the case was appealed. The founders of The Pirate Bay were on 28 October 2009 ordered by a Swedish Court to immediately shut down the site, sanctioned by a fine of approximately 50 000 euro each should they fail to comply with the court order. The decision was upheld by The Court of Appeal on 21 May 2010. The site has however still not been taken down.[[27]](#footnote-27) The case is currently pending before the Svea Court of Appeal and will presumably be heard in September 2010. The Pirate Bay defendants presently raise new questions on the procedure of the case. Firstly, the defendants claimed that there should be a mistrial due to the presiding judge in the Stockholm District Court was a chairman in a non-profit copyright association. However, the Court of Appeal has concluded that there were no grounds for such a mistrial. Then the defendants raised a claim that two of the judges in the Court of Appeal were biased, and the Supreme Court responded on 12 May 2010 that the judges were not biased. [[28]](#footnote-28)

The Pirate Bay decision has been criticised for being a policy decision. It is widely recognised that the Pirate Bay site was from the start intended to circumvent copyright legislation to enable sharing of legal as well illegal content. The founders of the site have never expressed that they had the aim to prevent illegal content being shared, neither have they put any effort into promoting the legal content shared on the site. However, they have stated that they didn’t know that illegal material in fact was being shared, which could be argued as a bit contradictory to the name and the logotype of the site. Also, the founders have posted answers to cease and desist letters online ridiculing the rights owners in a very rude manner and currently, as noted, seem to use procedural measures to prolong the court proceedings. [[29]](#footnote-29)

From the ruling it seems like the actual bit-torrent technology, used in the copyright infringements, in itself is prohibited provided that the other requirements for liability to arise are fulfilled, (the knowledge of the infringing content and failure to remove such content). At least it appears to be very unclear whether such technology use is prohibited as the court didn’t satisfactorily elaborate on the defendants’ connection to the technology or the method of using the technology, for the sake of the contributory liability to arise. The reasoning in the case certainly needs clarification and explicitly on the question if the use of the bit-torrent technology constitutes an illegal activity per se. A thorough judgement on the standard of proof, elaboration of the intent and policing duty is greatly wished for. Hopefully the judgement of the Court of Appeal will bring clarity to the questions in autumn 2010.

*2.3.7. The OiNK case*

The operations of the OiNK Pink Palace site, founded in 2004, resulted in the first file sharing service case in the UK. The OiNK service was an invitation only bit-torrent site that required a membership to access the site. Once a member the membership enabled downloading of app 21 million music files in a file sharing community of app. 120 000 users. No fees were taken for joining the community but the members could donate money to the site on a voluntary basis. The site was shut down by Dutch and British Police in 2007 and five of the former community members were charged of copyright infringement and the administrator of the site was charged with conspiracy to defraud. In December 2008 four of the charged members pleaded guilty of copyright infringement and were charged to community service or fined. [[30]](#footnote-30) The court found Alan Ellis, the administrator behind the site, not liable for conspiracy to fraud on 15 January 2010 as the jury found that the prosecution failed to show that Ellis had been dishonest.

To the contrary of the verdict in the The Pirate Bay case Alan Ellis was not held liable for the running of the site but it remains somewhat unclear as to specifically why that was the case. Unlike in The Pirate Bay case, though, Alan Ellis had complied with a number of requests from rights holders to remove infringing content. It has been argued that the case should have been tried as a civil case rather than a criminal case as that would have meant a reasoned verdict as to if use of the bit-torrent technique itself is in breach of the copyright legislation. [[31]](#footnote-31) It is fair to say that also this case would benefit from clarification, as argued previously in relation to the The Pirate Bay case.

**3.  File sharing as a threat to copyright**

3.1 Effects of file sharing on the market

After outlining the recent case law, one might wonder how such file sharing affects the market? Is file sharing like the industry representatives say detrimental to the sales of CDs? Or are file sharers actually also big consumers of media content and might in the end file sharing actually increase consumption?

A lot of the studies conducted on the file sharing issue have concluded that due to file sharing the sales of CDs have in general declined since app. year 2000. IFPI has estimated that the UK music industry lost 180 million pounds per year and that the film and televising industry lost 152 million pounds for the year of 2007 due to file sharing.[[32]](#footnote-32) App. a forth of the record music industry’s global revenue came from digital sources in the year of 2009.[[33]](#footnote-33) IFPI has further pointed out that the UK’s economy on digital technologies is increasing. It is estimated to account for nearly one pound in every 10 pounds in value produced by the whole economy each year.[[34]](#footnote-34)

To the contrary of the IFPI figures on how much the industry loses out on the illegal file sharing, Oberholzer & Strumpf in a study in 2004 concluded that file sharing has a small insignificant positive effect on sales for less popular albums but a large positive effect on popular albums, with a turn to a small insignificant positive effect also in regards to the popular albums in later studies.[[35]](#footnote-35) Oberholzer & Strumpf hence points out that it is hard to make a conclusion about a market in transition as regards the actual effects of file sharing. Further, Oberholzer & Strumpf highlighted the fact that the same file sharing consumers may turn to consumption in other competing markets, or the same market examined in the studies, and points out in a study from 2007 that for instance US consumer spending on DVD/VHS and video games have increased.[[36]](#footnote-36) In the same vein empirical evidence that file sharers actually spend more money on buying legitimate media content was acknowledged by the court in the OiNK case.[[37]](#footnote-37) Also the OECD has pointed out in its report that the average infringer also tends to be a major consumer of digital content.[[38]](#footnote-38)

Naturally, the research results of Oberholzer & Strumpf shall be handled with caution as the selection of the surveyed respondents is a problem. Do the respondents accurately represent “average downloaders” and is possible to say that “Once a downloader always a downloader”? But the research results still show that a lost CD sale is not necessarily a corresponding loss in money, as the consumer might turn to other digital consumption. The argument could even be stretched to that the consumer actually, just as well, could turn to a legal digital source and buy an album online, merely choosing an alternative source for the same product.

3.2 A Swedish perspective

In Sweden the issue of digital piracy has been one of the most debated topics over the last few years, and usually in the context of a fierce debate where Sweden has been referred to as a haven for digital pirates. In Sweden it is currently estimated that every fifth person from 16 years of age and above is engaged in file sharing online.[[39]](#footnote-39) Further, research from 2008 suggested that 12% of the population of Sweden (app. 9 million) recently have used a file sharing tool, which would amount to at least one million users. The explanations for such relatively high numbers and rapid expansion in an, in comparison small country, is said to be the well developed technological system with fast Internet access to reasonable prices available all over Sweden.[[40]](#footnote-40)

In 2007 a report from the entertainment industry in Sweden showed that music, film and computer games companies lost app. 620 million Euros due to illegal copying where the industry counts that every downloaded copy matches a physical copy never being sold.[[41]](#footnote-41) But other Swedish studies show, similarly to the above noted research, that downloaders also are huge consumers of other media and entertainment content and turn to spending in such alternative markets. For instance a Swedish study showed that file sharers go twice as much to the cinema and 2 out of 3 file sharers that download records online will then proceed to buy the same record.[[42]](#footnote-42) As previously noted both such sources of research needs to be handled with care, as regards the positive effects of file sharing, as is it remains unclear if the file sharers examined are representative for file sharers in general and in relation to the numbers of declining CD-sales, since the counting by the entertainment industry of its revenue loss is questionable in relation to the argument that consumers turn to spending in other markets.

In practice it is interesting to note that Antipiratbyrån (“The Antipiracy bureau”) in Sweden, have experienced that several file sharing networks have shut down after having received cease and desist letters from Antipiratbyrån as a follow up on the judgment in the Pirate Bay case. The sites shutting down have been significantly smaller than The Pirate Bay and only run by Swedish citizens but nevertheless, some deterrent effect is shown thereby.[[43]](#footnote-43) Research from July 2009 show that 60 % of Swedish file sharers had curbed or stopped their activity temporarily, although now piracy is believed to be on the rise again.[[44]](#footnote-44) Further, music sales in Sweden have increased in 2009, after the ruling in The Pirate Bay case and the implementation of the IPRED legislation in April 2009, accounted for in Section 3.3.

3.3 Recent copyright legislation within the EU

The ECJ ruled in the Telefonica case that member states are not required to oblige ISPs to identify individuals who engage in unlawful file sharing, in order for rights holders to bring civil law suits against infringers. However, the ECJ also opened up for the member states to themselves ensure such a right for the right holders in national legislation provided that such legislation strikes a fair balance between the general interests of intellectual property rights and personal data and privacy.[[45]](#footnote-45)

Sweden implemented the Intellectual Property Right Enforcement directive in 2008, thereby introducing the IPRED-legislation. In the IPRED proposal of implementation it was proposed that ISPs should immediately terminate contracts for the use of its broadband service for a customer that repeatedly used the connection to violate copyright if it was shown likely that such infringement will continue to occur should the access not be restricted and disconnection was considered to be a proportionate measure. Such a three strike model was however not implemented in Sweden.[[46]](#footnote-46) The new article 53c of the Swedish Copyright Act, (the IPRED legislation), instead imposes an obligation for the ISPs to, on a court order, release the IP-address to customers who may infringe copyright.[[47]](#footnote-47) The first case on releasing such personal data is currently before the Supreme Court in Sweden as the ISP Telia appealed a decision upheld by the Court of Appeal on 20 May 2010 imposing a duty for Telia to release the data on the persons behind the file sharing community Swetorrents.[[48]](#footnote-48)

As for the UK the “Digital Britain report” was published in 2008 and in the governments Digital Economy Act of 2010, that came into force 8 June 2010, the measures set out in the report are in principle enforced in the Act.[[49]](#footnote-49) The measures are a two stage process to prevent copyright infringement, where the first stage entails Ofcom as an enforcer with an imposed duty to take steps to reduce copyright infringement. Ofcom will, *inter alia*, notify account holders that their accounts seem to infringe copyright, and if a court order has been filed, request ISPs to release data to enable infringers to be identified. There will be a code of practice also for the ISPs in this regard giving Ofcom will the possibility to fine ISPs in breach of the code.[[50]](#footnote-50) If those measures are not sufficient Ofcom could get further powers to enforce technical measures against infringers. The second stage is however only to be used if the goals of a 70% reduction of illegal file sharing are not reached. Then, new legislation giving Ofcom the further powers to place restrictions on ISPs as in a three strike model may be introduced. Such measures could for example be blocking content, reducing speed of downloading or actual disconnection of Internet access.[[51]](#footnote-51)

In France IPRED legislation to upon court request identify for users who unquestionable have infringed copyright have entered into force as well as legislation on graduated responses. The three strike approach was introduced in France under the HADOPI administrative authority, providing criminal courts with the possibility to order the suspension of infringers’ Internet access after two warnings. Taiwan has implemented similar laws and Germany, Australia, Brazil, Hong Kong and Japan are discussing similar laws. In the US deals have been struck by the ISPs and right holders to put in place a system of three strike approach. In southern Korea legislation has been passed in 2009 granting ISPs the right to send users infringement warnings and to suspend accounts after three warnings.[[52]](#footnote-52)

In Denmark legislation corresponding to the IPRED has been in force since 2001 and the Danish Supreme court ruled in 2006 on the question if it is proportionate for ISPs to shut down access for users infringing copyright. In the case the Danish Supreme Court found that is was justified to disconnect users as the rights holders were found to have a qualified interest of upholding copyright protection and ensure that violations would stop.[[53]](#footnote-53) Further, a Danish court prohibited in January 2008 the ISP Telenor to let its users access the The Pirate Bay site, and the decision to restrict access to the Pirate Bay site was upheld by the Danish Supreme court on 27 May 2010.[[54]](#footnote-54)

For the sake of the right owners to safeguard their rights, the IPRED legislation on releasing data on serious suspicion of copyright violation is justified, as it provides the rights owners with a possibility to raise civil claims against infringers. The three strike process, however, give rise to more complex and difficult questions. Disconnecting or restricting a user’s Internet access is a very severe remedy without having tried the case in court. This must only be done if the evidence is very convincing that the party received the warnings as well as that it is clear that the party behind the IP-address can be identified as one person. When restricting access to sites access is also restricted to lawful material on the sites and hence also lawful uses are restricted. Such censorship is not a preferable solution for the future.

**4. Ways Forward for the Future**

4.1 Technical solutions or levies?

Record companies have spent millions on the lawsuits to chase file sharers which over the latest years have caused substantial detriment to the reputation of the big companies when going after the smaller file sharers.[[55]](#footnote-55) Surely, the litigation might have a deterrent effect when but considering the volume of the mass litigation, regardless; it is just not feasible to go after all file sharers. In addition, there will always be technology that is one step ahead, such as the IPREDator developed by the administrators of The Pirate Bay administrators developed in response to the IPRED-legislation in Sweden. The IPREDator is a service on the site, that would make the users IP-addresses anonymous in order to unable the requesting party to obtain the personal data of an individual user should a court order is issued for the ISP to release such data.[[56]](#footnote-56)

Some authors have suggested that, Internet users as an option should be charged a statutory fee for their broadband connection, and that a 4% levy would fairly compensate copyright owners. The revenue should then be allocated in relation to the popularity of their works measured by digital technology.[[57]](#footnote-57) ­ In some countries such a levy is already in place, as for instance in Germany where an amount of 12 Euro is added to the price of every sold PC to be used for compensation of right owners.[[58]](#footnote-58) Such a model seems problematic in the sense that also uses for non infringing purposes will be affected by the tax, and the revenue to the rights holders will be also be cumbersome to distribute. Rather than punishing the PC- or Internet services providers, creative solutions and constructive business models should be favoured to approach the file sharing problem. For instance ISPs can strike deals with for etc. online music or visual content streaming services to attract customers. Development of new services with payment or non payment models and exchange -file tools are in great demand. Perhaps such business models, as examined in more detail below, could work in a synergy with a smaller levy, co-existing to the benefit of rights holders, assuring different ways for them to secure revenue.

Currently the ISP TDC’s Play service in Denmark is offering unlimited music streaming from a catalogue of app. 6 million tracks and Sky songs in the UK offers a streaming service of more than 4 million tracks. Similarly, Deezer offers streamed music and personalised web radio to 16 million users.[[59]](#footnote-59) In Sweden Telia broadband offered free Spotify for the first three months for new subscribers last year. Spotify now has more than 7 million subscribers with streaming access to 8 million tracks. Research show that 50% of the Swedish Spotify users have stopped or cut down on file sharing since joining Spotify. Some new exchange-files services, like the Laila further outlined below, have been developed as a response to the illegal file sharing. In the same vein IFPI provides free digital file check software to be downloaded on their webpage to check whether files are legal or not. [[60]](#footnote-60)

4.2 The example of the online service Laila

Laila is a Finnish online service that enable consumers to legalize their file sharing in exchange for a voluntary payment.[[61]](#footnote-61) The Laila service provides the consumer with the possibility to buy licenses for the music files the customer has downloaded. This is done by the software scanning the harddrive for unlawfully downloaded music and identifying relavnt files. Thereafter the customer may pay for the music and at the same time as a payment is received a copyright waiver for the infringement is granted. As a post-payment system Laila therefore legalises copyright infringement in the exchange for a payment.[[62]](#footnote-62)

The post-payment system provides the rights owners with a new way of collecting revenues and can be used as a pre trial online settlement tool. In the same vein for example the RIAA are sending file sharers letters with links to web sites where they can enter into individual settlements. The Laila service is said to have some advantages in comparison to such settlement processes as the payments and identification is done voluntarily, meaning that resources are not wasted on contacting infringers. Further, the industry overcomes some of the bad publicity that it has received through its litigation schemes. However, the ISP cannot guarantee proof of innocence of guilt in regard to the copyright violation that has taken place but merely act as an intermediary enabling customers to pay fees to the rights holder. If it later turns out that the ISP had no right to grant a license the ISP is hence cannot be held legally liable, which could be problematic. [[63]](#footnote-63)

There are further weaknesses with the model. Surely the Laila tool seems to be precisely such a creative innovation that should be further developed and that the market is in need of. It seems to be a good way for right holders to collect revenue and for the record industry to handle settlements is a discrete manner and without damaging their brands. However, the granting of a license and of what it shall entail might be a problem. What are the limitations of the license cleared by the Laila payment model? Considering that the clearing license grants of waiver of the civil claim one could wonder what happens in relation to the criminal law liability? The waiver can surely not extend to the criminal offence committed. How many people would then voluntarily exchange their unlawful files also to some extent then labeling themselves as infringers? In compliance with the current IPRED legislation in the EU it appears that such users could accordingly also be identified as infringers. [[64]](#footnote-64)

**5. Conclusion**

“Power is moving away from the old elite in our industry, the editors, the chief executive and, let’s face it, the proprietors. A new generation of media consumers has risen demanding content delivered when they want it, how they want it, and very much as they want it.” (Rupert Murdoch) [[65]](#footnote-65)

Needless to say, Mr Murdoch has a fair point. New consumer behaviour in combination with digital piracy is obviously here to stay and the question of how to best handle the situation is anything but clear.

From the file sharing case law it appears that the file sharing technology isn’t prohibited in itself but that an ISP can be held liable if there is a shown violation of copyright, that the ISP had knowledge of or directly encouraged and without preventing it from happening. Moreover, infringements on a large scale, with an aim to profit will be more difficult for ISPs to avoid liability for. Arguable, adding the ingredients of a bad attitude to the prerequisites above, the file sharing tool itself might actually be prohibited, as illustrated in the above reasoned The Pirate Bay case, which would be unfortunate for the technical development of software. Hopefully the Swedish Court of Appeal will clarify the standing on if use of the bit-torrent technology is prohibited per se. It seems unlikely that the decision of the Stockholm District Court will be upheld as it failed to explicitly account for a description of the contribution made by the defendants making them contributory liable for copyright infringement. Unless such a connection to the technology is shown in an evident way, and the standard of proof is thoroughly elaborated on, it seems more likely that the defendants will be declared innocent by the Svea Court of Appeal in September 2010.

Once establishing the major scale of violations of copyrights through file sharing the response of the market is of relevance to evaluate in order to find a viable solution for the future. The conducted research on the market response in sum don’t reveal evidence convincingly supporting the argument raised by the industry that online file sharing threatens to undermine copyright protection in general. The way forward to approach the file sharing problem would, rather than focusing on censoring and prohibiting, be to further develop new innovative business models, such as mentioned streaming services or online exchange-file systems, in order to secure revenue for rights holders. Naturally, such solutions should also be backed up by efficient legislative measures enabling civil claims and criminal remedies against online copyright infringement. The newly enforced IPRED legislation does address the problem although, as shown, an approach not to implement a three strike model due to the uncertainties remaining for such an interfering remedy, but merely to identify infringers through court order, is favoured. Finally, to deal with peoples’, and in particular the younger generations’ attitudes towards file sharing, education on recognition of IP-rights might also be a good idea, as the deterrent effect from the legislation in general still seems rather insignificant.

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