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Univ. Prof. DDr. Mag. Erich Schweighofer

Univ. Ass. Dr. Doris Liebwald

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Intellectual Property and File Sharing Networks

Alexander Czadilek

Daniel J Staudigl

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Creativity and innovation always builds on the past.

The past always tries to control the creativity that builds upon it.

Free societies enable the future by limiting this power of the past.

Ours is less and less a free society.

Lawrence Lessig

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Preface

„Copyright is a socially constructed discourse that has become a powerful social myth.“
Debora J. Halbert

Sharing of files has become one of the most important and band width consuming uses of the Internet and has drawn much attention so far.

Arguments used by the various groups are often not very objective, therefore we decided to do some research ourself.

We began this paper during our Erasmussemester at the Norwegian Research Center for Computers and law, Oslo, Norway, which was made possible by Prof. Erich Schweighofer and Univ.Ass. Dr. Doris Liebwald.

We did not primarly focus on the Austrian Law, but on the international legal developments which find their ways into Austrian legislation.

Alexander Czadilek

Daniel J Staudigl

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Chapter 1 File Sharing technology

"No one writes from nothing. 'We all take the world as it is and use it, remix it." - Yochai Benkler (Professor at Yale Law School)

1.1 Peer-to-peer networking

Peer-to-Peer computing (hereinafter P2P) is not new. In the last 30 years many different methods of file sharing architectures, which would now be labeled as P2P, have been developed[1]. In a P2P network the content is being served not by a single central server, but by equal („peer “) machines linked across the network. Users can connect to each other directly, without need for a central point of management, computer resources and services are shared by direct exchange between systems. These resources and services include the exchange of information, processing cycles, cache storage and disk storage for files. This was the original architecture of the computers on the Internet, instead of central servers that the machines connected to, there was a set of end user protocols[2] that let data be shared among the machines. This changed, when the Net became interesting for commerce. When the World Wide Web became more and more popular, the architecture altered, web servers grew and the P2P structure was replaced by the hierarchical structure of client and server[3].

1.2 Technological background / details / different models

Today, due to the development of a number of advanced P2P file sharing applications, the reach and scope of peer to peer networks has increased dramatically. The two main models that have evolved are the centralized model and the decentralized model.

The Centralized Model of P2P File-Sharing -The Server-Client Structure

[1] Examples are FTP, WWW, IRC, OpenNap, Gnutella etc.
[2] „end to end“ or „e2e“.
[3] Lessig, Lawrence, The Future of Ideas, New York, 2001, p. 134.

One model of P2P file sharing is based on the use of a central server system which directs traffic between individual users. This is the model used by certain P2P networks (and was used by Napster). The central servers maintain directories of the shared files stored on the respective PCs of users of the network. These directories are updated regularly, e.g. every time a user logs on or off the server network.
Each time a user of a centralized P2P file sharing system submits a request or search for a particular file, the central server creates a list of files matching the search request, by cross-checking the request with the server's database of files belonging to users who are currently connected to the network. The central server displays that list to the requesting user.
The requesting user can then select the desired file from the list and open a direct connection with the individual computer which currently posses that file. The download of the actual file takes place directly, from one network user to the other.

Advantage of this structure is its central index, which gives quick access to the shared files of the other users, the disadvantage is, rather obvious, that the whole structure is down if the server (or several of the servers, if there are more than one) is incapacitated.

From a legal point of view this model deprives the service provider of the possibility to evade liability by stating, that they could not know what the users where actually sharing. This circumstance made Napster and Audiogalaxy loose in the corresponding trials[4].

The Decentralized Model of P2P File-Sharing

This other model does not have, as the name indicates, a central server. In this structure, the single users are not only client, they act as servers at the same time[5].
That means, to find a certain file, a user connects to other users, if they do not have the desired file, the request is sent on to more users . If the file is found, it is downloaded directly, from one user to the other.
As a result, the search process is much slower and can fail, even if the file would be available somewhere on the network. On the other hand the network keeps working (like the Internet), if some or even most of the users are offline.

[4] For further details see chapter 5.
[5] In the Gnutella protocol, the users are called therefore “Servents“.

1.3 Historical background / development & figures

Although the recent growth of user-friendly file-sharing applications has only recently brought Peer-to-Peer (P2P) networks and file sharing into the public eye, in fact methods for transferring files and information between computers have been around almost as long as computing itself, as already mentioned above.

Until of late, however, systems for sharing files and information between computers were exceedingly limited; they were largely confined to Local Area Networks (LANs) and the exchange of files with known individuals over the Internet. LAN transfers were executed mostly via built-in system or network software, while Internet file exchanges were mostly done over a FTP (File Transfer Protocol) connection or one of several other pieces of software such as Hotline or Carracho. The reach of this Peer-to-Peer sharing was limited to the circle of computer users an individual knew and agreed to share files with. Users who wanted to communicate with new or unknown users could transfer files using IRC (Internet Relay Chat) or other similar bulletin boards dedicated to specific subjects, but these methods never gained mainstream popularity because they were somewhat difficult to use.

Nevertheless, P2P itself has gone through a short, but rapid development.
Napster went online in the summer of 1999, founded by the 19-year-old Shawn Fanning, was based on a simple premise: to allow members of a "community" to share computer files on the Web. Napster software allowed users to log onto its servers and make their personal MP3 collections available for download by other users.

The application was an incredible success, so big that the Record Industry Association of America (RIAA) filed suit against Napster Inc., operators of the Web site Napster.com, accusing them of violating US- federal and state laws through contributory and vicarious copyright infringement. The actions were augmented by metal group Metallica and rap artist Dr Dre.

After Napster was closed other programs and possibilities of filesharing were developed and quickly filled the gap Napster had left.

Audiogalaxy was one of them, but as it worked on a centralized model too, it was closed in a similar law suit, which did not attract that much public attention.[6]
Filesharing won a temporary victory over the RIAA, as Grokster[7], a decentralized P2P service, got confirmed by a US- american Court of First Instance, that they are not, unlike Napster, responsible for the wrongdoings of their users.

Right now, the most popular P2P tool is KazaA (and its various offsprings), which works on a decentralized model. Normally there are over 4 millions of users online, sharing over 6 millions gigabytes of information, ranging from Acrobat Reader Files over music, software, images to videos. Estimations are that over 140 million people use KaZaA.
The various P2P applications are starting to interlink, too. So one can use the Kazaa software to download files from Grokster- Users, and the Grokster- Users can do vice versa.
Rumours have it, that there are plans to make Kazaa, which until now is financed by advertisment- banners, a service which the user have to pay for, and there are trials against all major filesharing providers in progress or in preparation.
Even if some will be closed, users will just adapt a new favourite program, as they did after the closing of Napster and new applications will emerge, nowadays even faster than before, thanks to open- source- programming and the broad public attention.

[6] Audiogalaxy was later reopened, as unsucessful pay- service.
[7] For further details see chapter 5.

Chapter 2 Intellectual Property in the Information Society

„If you have an apple and I have an apple and we exchange these apples then you and I will still each have one apple. But if you have an idea and I have an idea and we exchange these ideas, then each of us will have two ideas." George Bernard Shaw

2.1 The construction of IP

„Intellectual Property"[8] is a 20th century term which used to refer to a group of different legal regimes which existed independently all over the world. These were complex systems of privileges, royal decrees and monopolies granted[9] by governments, which emerged after the invention of printing technologies. Those systems were used as legal mechanisms for the ordering of social and cultural life where the world of ideas was linked to the world of commerce[10]. While there is nothing universal about intellectual property rights, different societies have given different answers to questions like „How can intellectual creativity best be promoted?" or „To what extend should the author of a literary or artistic work be protected?". Before intellectual works became an economic factor, they did not belong to the creator but to the community and to society. So when did the creator of such a work gain a personal right over his creation and how was this right justified?

With the introduction of the printing press in the 15th century several innovations were made possible. Literary texts and their illustrations became easier and more accurate to reproduce and thus mass distribution became viable. The storage, retrieval and the usage of information was revolutionized.

At once there were two important consequences: First, printing industries arose, employing a large amount of people and becoming an important factor for the local economy and secondly,

[8] In this paper we will focus on the Copyright regime, although we will continue to use the notion of Intellectual Property because it indicates the controversy on the discussion on the ownership of intangible forms of creation.

[9] *Drahos, Peter*, A Philosophy of Intellectual Property, Dartmouth, 1996, p. 14.

[10] Ploman/Hamilton, Intellectual Property in the Information Age, London, 1979, p. 1.

state authorities became aware that unacceptable material could easily be made available to the public. The latter called for censorship of the new medium of communication to ensure a system of control. In European states a variety of legal measures have been adopted to deal with the new threats.

The easiest and simplest way to control the distribution of printed material and to protect the local printing industries against piracy[11] and imports, was to introduce control of the printing press itself[12]. The state authorities would so perfectly know what was printed and by whom. The right of printing and thus the right to grant permission to print was taken by the state authorities themselves. „Privileges" based on royal decrees and given to particular persons authorised them to print, sell and copy books and particular works (e. g. maps). Copyright as a controllig mechanism for the government was more a matter of censorship inhibiting publication than a matter of protection for author's rights[13]. But when we speak of author's rights, where do these rights emerge from, when in the beginning neither the crown nor the printing trade was interested in the rights of the author, or the value of a right of copy to the economy or to culture?

In 16th century England laws[14] were passed which required all books to be licensed with the Stationer's Company, a Foundation of London booksellers, binders and printers based on a royal decree and established by the Crown to censor printed material. By registering a work it became the „copy" of the Stationer's Company which had a virtual monopoly on printing and publishing for more than 150 years. This „copyright" approved more of the Stationer's right to copy rather than the author's right to own. When authors sold their books to printers for a flat fee they gave up rights of publication and any further royalties. The copyright was respected within the guild (the Stationers) and could be sold and bought by its members even hundreds of years after the creation of the work.

In 1709 the Statute of Anne was passed, said to be the first Copyright Act in the world. It replaced the privilege system and its preamble linked copyright to the „Encouragement of Learning". But the Act of Anne was intended more as a trade regulation act than a real copyright protection act and basically regulated the book trade by preventing monopolies. But for the first time statutory copyright protection was available to anyone, especially for the author, not just for the Stationers. The statute reduced the copyright term to 14 years, with a possible renewal for

[11] Which by the way appeared almost simultaneously.
[12] J. A. L. Sterling, World Copyright Law, London, 1998. p. 7.
[13] *Halbert*, Deborah J., Intellectual Property in the Information Age: the politics of expanding ownership rights, Westport, 1999, p. 3.
[14] Licensing Act 1529, repealed in 1694.

another 14 years available to the author. Copyrights in already published materials were extended for another 21 years, but after this time the work finally entered into the public domain. Though the right protected by the act was not a creative or moral right but a property right and to the author it was still customary to sell his work to printers who reprinted it at will, whereas they could not change the words or add text.

During this period the concept of the rights of authors was emerging. In order to realize an intellectual property system, according to *Halbert* and *Rose* three criteria needed to be met. First there had to exist „a sufficient market for books to sustain a commercial system of cultural production“, second, „the concept of the author as the originator of a literary text rather than as the reproducer of traditional truths had to be more fully realized“ and third, there had to be a theory of property in which the idea of the proprietary author could be elaborated.

The market necessary for the first criteria was created by the printing technology and the corresponding expansion in literacy. Next the author had to be linked to the text as the owner of the text.

In his work „Two Treatises on Civil Government“ from 1690, John Locke had postulated a theory of an intellectual property right in the author. The theory corresponded with similar ideas on the European continent and saw the basis of such a right in the labour that the author expended in the creation of the work. One of the basic principles of the Lockean approach is that the author's rights are not created by law but always existed in the legal consciousness of man[15], thus copyright was a right growing out of natural law.

Creating a link between tangible and intangible property was a crucial aspect of the discourse over proprietary authorship and many metaphors have been used to make the unfamiliar familiar. The author often was depicted as the vessel of divine inspiration or as a magician. During the 18th century the landed property metaphor was used to make people understand how one could „own“ ideas as well as land. This metaphor brought to intangible property the characteristics of tangible property and promoted authorship as proprietary.

The London booksellers used the legal argument that copyright was a natural right of the author under common law and the right to print, publish or sell the work could be conveyed to another in perpetuity, to foster their position after the expiration of of the statutory copyright terms from the Act of Anne. This campaign became known as the „Battle of the Booksellers“. In the 1740's Scottish publishers started reprinting classics and where trying to get into the London market. The London book cartel called them villains and pirates and it was told that piracy „was ruining

[15] Ploman/Hamilton, Intellectual Property in the Information Age, London, 1979, p. 13.

the lives of honest businessmen and their families“[16]. The language does not differ very much from the language that is used on the RIAA or IFPI websites today. In 1769 the London publishers won a victory in one of the most famous cases in copyright history in Millar v Taylor. Even though the booksellers failed to establish a perpetual copyright, they succeeded in establishing the natural right of the author as proprietor. This right transferred to the publisher on purchase of the copyright.

The second landmark case was Donaldson v Beckett. In this case the House of Lords held that an author of a literary work enjoys a common law right of copyright in such work in perpetuity, so long as the work remains unpublished. Upon publication of the work, the author's copyright becomes subject to the terms and conditions of whatever statute governing copyright is then in force[17]. So the decision unequivocally stated that copyright was a state-granted privilege that should last for a limited time, „not a perpetual natural right that flows magically from an author’s pen.“[18]

Allthough copyright had been transformed from a publisher’s right to an author’s right, the publisher still was the beneficiary. Nevertheless the Battle of the Booksellers helped creating the proprietary author and the literary work as legal concepts and the Donaldson v Beckett decision led to the development of „intellectual property“ as a creation the author’s intellect. While the author’s rights were the London publisher’s tool to maintain control over copyrights, the result had an immense impact on how literary works and intellectual property were perceived. Apart from that the way society perceived the ownership of knowledge was transformed.

In the United States the founders of the US constitution were less willing to confer a natural rights philosophy to intellectual property. Thomas Jefferson strongly believed that there were no natural rights in inventions or ideas, writing that „...ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition...“, explaining why nature made ideas „...like fire, expansible over all space,..., and like the air in which we breathe, move,..., incapable of confinement or exclusive appropriation“, saying further that „inventions then cannot, in nature, be a subject of property.“

Because here a natural law philosophy was not of great importance, copyright protection became exclusively statutory. Authors had a statutory right to protection in order to provide incentive for innovation. Those rights were not based on moral or natural rights but on a

[16] *Halbert*, Deborah J., Intellectual Property in the Information Age: the politics of expanding ownership rights, Westport, 1999, p. 6.
[17] At that time the Statute of Anne.
[18] *Vaidhyanathan, Siva*, Copyrights and Copywrongs, New York, 2001, p. 43.

constitutional copyright clause[19], which should encourage innovation by granting a limited form of monopoly to authors and inventors. Although the United States rejected what later became an author's moral right, it affirmed the economic importance and basis for copyright law[20]. When the US joined the Berne Convention in 1989, it explicitly rejected the the moral rights position on copyright in favor of utilitarian rights of authorship. According to the Enlightenment ideal the natural rights philosophy was rejected because of the belief in exchange of ideas for the promotion of a better society, whereas today the US is concerned with protecting an economic system. The present American intellectual property system uses the author as justification for continued support of copyright law. The traditional story of copyright as protecting the individual creative author is endlessly repeated in order to foster the common vision of copyright. US industries perpetually claim that without strong copyright protection authors would lack incentive to produce creative work. The repetition of the copyright story ensures its continued acceptance among ever new generations of government officials as well businesspeople who uncritically accept the assumptions of intellectual property without knowledge of its specific historical context. What some refuse to see is the fact that for thousands of years people have been creative without any legal copyright protection.

2.1.1. Copyright tradition and Droit d'auteur tradition

The main difference between the copyright tradition and the Droit d'auteur tradition can be found in the position and connection of the author towards his work.

In the copyright system the emphasis on the protection relates to the work, whereas in the author's rights system the emphasis is on the author. Thus legal persons can be the first owners of a copyright in the copyright system, while in the author's right system the right will generally originate in the individual.

In the copyright countries it is possible and common that all copyrights are transferred to collecting societies, while in author's rights countries a bond between the creator and his work still exists after a complete sale of rights of use. Droit d'auteur, respectively Urheberrecht regimes differentiate between rights of the author on his intellectual creation and derivative rights of collecting societies or other entities who obtain these rights from the creator. Droit d'auteur or Urheberrecht is an alienable right.

[19] US Constitution Article 1 Section 8 Clause 8.
[20] *Wheaton v Peters* 1834.

2.2 Legal issues raised by the Internet

„The whole WWW is based on copyright infringements." Jon Bing

The impact of new technology and of new methods for the production, duplication, storage and dissemination of information and cultural materials on societies is obvious. Since the emergence of computer networks the flow of information and ideas within and between societies have reached new levels. New forms of communication have always expressed and contributed to the transformation of the international system and changes in social and cultural values have always been reflected in new policies for culture, education and communications.

Is intellectual property or copyright law as a 200 year old conceptual tool adequate for governing new technology, especially the exchange of information?

The concept of copyright and the notion of originality deriving from a person's intellect are neither natural nor have they been universally embraced. Basically they are the outcome of economic interests and legal definitions within a specific context. This context, as outlined above, is the 18th century struggle over copyright ownership and the development of a concept of a proprietary authorship. Further, especially copyright, is designed to benefit the publishers or any other entities who hold the copyrights, not the authors themselves. Whenever a new technology is emerging, such as television, photography, photocopying or computer programming, the whole system of intellectual property is challenged because of the new relationships made possible.

Especially the Internet provides the possibility for almost uncontrolled exchange of information and new ways of distributing books, music or art. Because of the ease of in which products are copied it is difficult to control copying. Property owners are trying to establish new property boundaries by legal and technological means to safeguard their economic interests. By campaigning and by public relations industries try to convince the public that „behaviour that seems natural, like sharing an article with a friend, is illegal"[21] and thus try to criminalize „natural" forms of behaviour, like the exchange via the Internet.

Nowadays, in the digital age, in a digital environment, sharing information is copying information. Those interested in protecting intellectual property rights are lobbying lawmakers to

[21] *Halbert*, Deborah J., Intellectual Property in the Information Age: the politics of expanding ownership rights, Westport, 1999.

make the exchange, sharing and creation of new of new artistic expressions more difficult and the punishments for not complying with the law more severe. In the last few years, due to the digital revolution, there has been an enormous drive in legislative effort to expand intellectual property to include all aspects of a creative product.
Is, concerning new technology, copyright as an obsolete concept still able to ensure the balance between innovation as a social good and private benfit by using the language of ownership?
The Internet provides a place for unlimited exchange of information and a place to creatively develop new ideas. Technology based on the notion of copying can be used to develop new methods for sharing knowledge and making progress in the arts and sciences, thus benfiting everyone.

2.2.1 P2P – a threat or a value?

„The Intenet is a giant copying machine.“ social myth

Some have called P2P the next great revolution of the Internet. As outlined in chapter one a P2P network is a class of applications that takes advantages of the resources at the edges of the Internet, similar to the original architecture of it. This architecture was not a set of central servers but a set of end-to-end protocols that enabled data to be shared among the machines.
Tim Berners-Lee, the inventor of the World Wide Web, wanted a peer-to-peer web and his html-technology enabled that. For several reasons that was not the way it was deployed.
With the coming of Napster a trend has occured which has been changing the architecture of the Net since. P2P services are returning to the Net as computers become more powerful and are permanently connected to the Internet.
In the 1990's the SETI@home project started to use thousands of home computers with the permission of their owners to process recorded data (radio waves) because it was too expensive to rent machines. The researchers facilitated the distribution of packets of recorded data to computers across the Net and then enabled those machines to send back the processed data to the Berkeley laboratory. In four months this project had more than a million users. SETI@home turned out to be one of the first large-scale cooperative projects on the Internet. In this example can be seen that P2P computing reaches far beyond simple file transfer or the

sharing of computing power. As Lawrence Lessig[22] points out, P2P technologies could be used as more efficient caching technologies when content is kept close to the user thus less time is needed to get access to the content. Besides by sharing space at the edge of the network content can be served more efficiently, e. g. the cost of streaming technology could be significantly decreased.

Gnutella, one of the first alternatives to Napster uses a P2P algorithm which makes the central server unnecessary. That means that the content being served is much more difficult to control. The value of Gnutella is not to serve dangerous or questionable content, but to expand the power of searching technologies beyond their known scope. As websites become more and more dynamic, a large amount of content is missed by search engines. Search engines „adapted to use Gnutella could become the union of all searches provided by all sites“[23] by pluging the user's search string into a database query.

This innovation at the edge of the Internet could be able to advance the function of the Internet by moving it from a centralized to a decentralized architecture again.

While posing threats to copyrights owners, where their main concerns are the two key aspects of digital technology: ease of copying and ease of distribution, peer-to-peer technologies can in turn be of great value to the common.

[22] *Lessig, Lawrence*, The Future of Ideas, New York, 2001, p. 136.
[23] *Oram, Andy*, The Value of Gnutella and Freenet, www.webreview.com.

Chapter 3 International Treaties

"In Cyberspace, the First Amendment is a local ordinance." John Perry Barlow

Barlows's ironic comment was meant to be a reminder, that cyberspace can be resistant to regulation by any particular local sovereign. There is no great need to explain, why the World Wide Web was supposed to be that uncontrollable. Nevertheless the power of the lawgivers over the users of the internet is not as negligible as the hacker community would like it to be, as, among others, Graham Greenleaf has shown.

Besides the regulation via architecture, in the scientific discourse made popular mainly by *Lawrence Lessig*, it is due to international treaties, that cyberspace is no more (or maybe has never really been) a place free from law.

As filesharing is about sharing files, international treaties which interest us here in the first place are those dealing with copyright.

Laws about free speech, privacy and alike, are not very likely to become a topic in this connection (and are not the subject of this paper).[24]

3.1 Berne Convention

The conclusion of numerous bilateral copyright treaties between states during the 19th century led to a complex web of relationships. Consequently, the standards of protection varied considerably from country to country. With the increasing growth in trade and flow of goods, including printed material, from one country to another, it was clear that protection could be more effectively established if common rules applied.

On this wish the Association Littéraire et Artistique Internationale (ALAI) was founded in 1878, on the proposal of Victor Hugo[25]. The ALAI organized some congresses; which results were well received by governments and led to diplomatic conferences, which lead to the signing of the

[24] Of course we are aware of the sad fact, that child pornography is, regrettably, about getting a big issue of P2P and similar networks.

[25] Although his works are already in the public domain, they are not to be found on the popular P2P networks, but the musical adaptions are, of which the copyright has not expired (research by the authors).

Berne Convention in 1886[26]. It has been revised repeatedly, last time by the Paris Act of 1971 and far over 100 countries are members until today[27].
The aim of the Convention was to establish the Berne Union, to protect the rights of authors. To do this, the signatories shall provide protection of the rights of authors, by making the Convention part of the law of the country or by introducing appropriate laws to provide for the rights.

What is protected[28]?
Rather broadly formulated, it is “literary and artistic works” (Art 2 (1)), which shall include every production in the literary, scientific and artistic domain, whatever may be its mode or form of expression. There are also a number of examples (writings, musical compositions, cinematographic works), the list is not exhaustive. Such works are very often shared in P2P networks.

Art 2 (2) gives the national legislator the possibility, to require the work to be fixed in some material form, but a computer file is a material form[29] (and very often just another copy).

Which rights derive from the Convention?
Firstly, the so called moral right of the author to claim authorship and object to distortion, mutilation and alike.
In the absence of proof to the contrary, the author is the person, named as such on the work (Art 15).
These rights last at least as long as the economic rights are not exhausted, and they even remain if the economic rights are given away. (Art 6bis (1) + (2)[30])
This right is not very surprising, but in our research in some P2P networks, we found often (mostly music) files, in which a wrong author was asserted[31].

[26] By Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland and Tunisia.
[27] World Copyright Law, J.A.L. Sterling, p455ff.
[28] A precise discussion, about exceptions of political speeches, the exact procedere of protection of non- union nationals and associated mechanism to guarantee implementation and alike are of no relevant influence to our topic – therefore we will not discuss them here.
[29] Maybe even more than ink on a paper would be.
[30] The original text was long time only in French, and the numbering is still today.
[31] We have 2 explanations: The first is, that before CDDB people tended to mix up similar singers and just named the files wrongly, due to lack of proper care and better knowledge. The more sophisticated is the following: Napster and also Audiogalaxy blocked the downloading of certain artists’ music files before they were shut down. To safeguard further distribution, many just renamed their files. The files remained in circulation, even after they changed to other filesharing tools.

Besides that this would be very impractical, each author could claim his right against everyone, having such a wrong titled file, using the implementation of the complain mechanism of the Berne Convention.

With Art 9[32] we come to the core of copyright: Authors shall have the exclusive right of authorising reproduction. (Art 9 (1)).
We think by teleological interpretation, that the reproduction in the computer's memory, needed to view or listen to a file (or transfer it) is not included in the notion of reproduction, especially when thinking that at the time the Convention was drawn, computers were mechanical devices for calculations (if such machines can be called computers, at all).
Nevertheless, the sharing of a file in a P2P network, leads necessarily to reproduction of the file and therefore to reproduction of the artistic work. This would need the author's compliance.
However, as (future) jurists, we know that (nearly) every rule has its exceptions. And the appropriate ones follow in Art 9 (2):
The countries of the Union may permit reproduction, if it does not conflict with normal exploitation and does not unreasonably prejudice the legitimate interests of the author.
The elaboration is left to the national legislator; examples are the fair use principle or the right to private copies[33].

Art 10 gives the right to quote from lawfully published works and to use works for teaching purposes, when source and author are specified. Many P2P users subsume sharing of e.g. single tracks of a whole album under the right to quote, but this can hardly be justified, as it would interfere with the often mentioned requirement of fair practice and the author of the convention had not such "quoting" in mind.

Art 11 et sqq gives the rights to the authors of dramatic, dramatic-musical and musical works (Art 11) the exclusive rights of authorising public performance and any communication to the public of the performance of their works.
As the sharing of a file is definitely no performance, as it is only a distribution of a record, we examine the second point more closely:

[32] We will not discuss every single Article and every Copyright provision, only those which seem to us to have a specific impact on filesharing will be more closely scrutinized. E.g. provisions about the period of protection are questionless very important, but do not have any significant relevance to P2P.
[33] Exemptions, like the private copy, will be discussed below.

The copying of a file is clearly communication, the question remains, whether it is public. The internet can be regarded as public as anyone can log on, required they have a computer and a telephone line or a network connection.
Against publicity of P2P one could argue, that you still need to get the program. However, P2P applications are usually freeware and can be downloaded from various websites.
In our opinion P2P is as public as watching TV: You still need to buy a TV, have electricity, get acceptable reception or make a contract with a cable-TV-provider, tune in on the right station at the right time and so on. Anyway, nobody would doubt that a TV- show is public.
So the authors of such works could prevent the including of their computerized works on P2P networks, using this paragraph.

Art 11bis makes it a little more complicated. It deals with the exclusive rights of authors of literary and artistic works and differentiates between broadcasting to the public by any other means of wireless diffusion of signs, sounds or images and communication by wire or by re-broadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one[34].
The internet is wireless (Satellites) and wired communication at the same time, so maybe it can be subsumed under both provisions.
Whether filesharing is broadcasting needs discussion. We understand “broadcast” as the communication from one to many, over some technical, mostly wireless device. The common understanding would only include TV and radio shows, but clearly internet- radio and –shows fulfil the requirements, as well. The difference between P2P and broadcast is that the second one is real-time – the recipients see/hear at the same time as it is broadcasted. P2P is consequently not real-time. That brings us to our conclusion, that P2P is not included in “broadcasting”.
Nevertheless, this Article respectively its implementations gives the authors another possibility to prevent sharing of their works in filesharing networks.
The recitation of literary works[35] and the rights of the authors are subject of Art 11ter.

[34] Further “public communications by loudspeaker or any other analogous instrument transmitting, by signs, sound or images, the broadcast of the work” is included, but of no pertinence to our topic.
[35] At first sight, one would not think, that recited literary works have any occurence in P2P networks, but our research showed, that they actually do. For example, the audiobook version of Diether Bohlens book “Nichts als die Wahrheit” (Nothing but the truth) is a very sought-after file in various filesharing networks.

Again the communication to the public needs the authors consent. In (i), the public recitation of their works requires the authors' consent too but the sharing of a recorded recitation does not qualify a public recitation itself.

Authors also have, due to Art 14 the privilege to allow cinematographic adaptation and reproduction, as well as their distribution and public performance as well as communication to the public by wire of those adaptation or reproductions.
Filesharing networks have been used in the last years, because of the increasing number of broadband- internet- connections, to share films of all kinds and genres. This includes film versions of books, plays, ballets and so on. It is not only the filmmakers (see next paragraph), who can stop the distribution, but also the authors of the original work, on which the film is based.

Art 14bis directly addresses films. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work.
The Convention does not tell, who actually the filmmaker is and who shall enjoy these same rights. Script authors, actresses, actors, camera(wo)men, directors, producers, cutters? The decision is left to the Union members.
Art 14bis (2)(b) limits the rights of contributing authors to object the distribution of the film (Art 14), but this provision can be modified by national legislation and contract.

The period of protection is 50 years after the death of the author (Art 7), in case of several authors 50 years after the last survivor[36].
The Union states can grant the authors greater protection, but not less.

So far our research has shown that a number of shared files in the momentary P2P networks might be infringing authors' rights. How the authors can claim their privileges is left to the national legislator, but the Convention takes care of what shall happen to such infringing copies: They shall be seized, in accordance with the legislation of each country.
A US- Senator[37] proposed in the mid of June 2002, that the personal computers of filesharers, which violate copyright law, shall be destroyed. This proposal was too radical even for the RIAA

[36] For more details e.g. Pseudonyms see Art 7.
[37] Representative Howard Berman (D-Cal.) introduced a bill, H.R. 5211, in the House of Representatives that would give copyright owners the right to violate the law in their efforts to stop the unauthorized circulation of their works on peer-to-peer networks.

and has not yet found its ways into US- American legislation. Nevertheless, it shows a disquieting radicalization against copyright- infringers[38], who do not do more than copying something illegal. Even the argument that it would damage the whole worldwide economy is not true for the single filesharer, as one does not cause more damage than some Cents, if they share some Gigabytes, maybe a few uro. Although it seems it would be preferred by some, that the whole computer would be confiscated, it is clear from the wording of Art 16, that only the specific file is to be seized, as the file is the infringing copy, and not the computer. We would even go that far, that if the file is on an external, re- writeable medium, like a CD-R, that it is not the CD-R which should be seized (and probably in this case later destroyed). Again we understand the Article in that way, that just the file has to be removed and the CD-R, which is just the carrier, has to remain property of its owner.
Against this we expect the argument that no reasonable person would claim, that if it is an infringing paper copy, the ink shall be scratched off the paper. Maybe even that would be defensible, but it appears even to us a little farfetched, as it would be, economically and practicably seen, simply not reasonable.

Being the oldest of the multilateral copyright agreements does not make it the least influential. As it is incorporated into the TRIPS Agreement and others (see below) it is exactly the opposite.

3.2 Universal Copyright Convention

In the years after the Berne Convention has been adopted, it was hoped, the United States of America would join it. However, a number of factors prevented the USA to do so (with these we will deal in the section about the USA.) Although the USA joined the Berne Convention later in 1971, the Universal Copyright Convention (UCC) was signed in 1952 in Paris, France. Main force behind the drafting of the UCC was the UNESCO, which saw the necessity of harmonization of copyright on an international level; even if the granted protection would not be much more than the "lowest common denominator"[39] in relation to the Berne Convention.

On this background it is no big surprise, that the UCC does not include much innovation.

[38] To give a very melodramatic example: The gun, which was used to kill someone, is rather likely not destroyed after the trial, but kept in storage by the police.
[39] World Copyright Law, J.A.L. Sterling, London, 1998, p488.

Art I obliges the Contracting States to provide for adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works. The following list is, again, not exhaustive, just exemplary.

To claim the same protection under the UCC as a work published in a Signatar state, a work has to be published, too (Art II, Paragraph 1). In Art VI is the definition of publication: It requires the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived. Clearly this would include files in a P2P network, which are just digital copies of a tangible original like books.

Although it makes us open to the attack of hair splitting, we had a hard time discussing, whether a computer program (or any other computer file, which is the original work) and its reproduction has a tangible form.

A hard disk can be touched, but it can be as well if there is no program on it. Perceivable to the human without technical assistance there is no change if a file is stored or not. Besides we came to the next problem:

If a musician records a piece of music on a CD, which otherwise only existed in his/her mind, the CD is as tangible and visible as before. Eventually, when we were quarreling about the tangibility of ink on a paper, we realized we lost track:

Any material manifestations of any kind qualifies as tangible form.

The UCC protects in Art I explicitly cinematographic works, where the same problem would occur. We just interpreted the requirements too narrow. Further the work still gets the same protection of an unpublished work in the other states, if it is not published.

Art III deals with the formalities of copyright, as required in the USA. While the Berne Convention protects works just by the requirement, that they are material, US- Law demands the (c) - sign. In the UCC they made a compromise between legal systems of both alternatives.

The basic rights ensuring the authors economic interest are invoked in Art IVbis. These include the exclusive right to authorise reproduction by any means, public performance and broadcasting. The provisions even extend to works protected under this Convention either in original form or in any form recognisably derived from the original.

This very broad formulation makes it easy for us. P2P of copyrighted works is definitely reproduction by any means, even if one would doubt this, it still would be caught be “any form recognisably derived from the original”.

The second paragraph entitles the states again to make exceptions to the above “that do not conflict with the spirit and provisions of this Convention”, again we think of e.g. the allowance to use copyrighted works for scientific or artistic purposes.

The UCC contains no provisions concerning so-called moral rights: Consequently, Contracting States are not obliged by the terms of the Convention to introduce such rights. Nevertheless, rightowners entitled to claim national treatment will be entitled to the same moral rights as are available to nationals of the State where the protection is claimed.

As in the Berne Convention there are certain simplifications for “developing countries”.

Overall the UCC is not of great importance. With 98 states signing it, in comparison to 127 of the Berne Convention, the latter has greater influence. Only Saudi Arabia, Nicaragua, Laos, Cambodia, Belize, Andorra, Azerbaijan and the Republic of Kazakhstan joined the UCC and without being or becoming signatar to the Berne Convention[40].

3.3 Rome Convention

Technical innovation brought many changes, for every aspect of human life, including copyright.
The dawning of cinema and of sound recording changed art and business patterns. Although film and public broadcasting had earned a place in everyday life already between the World Wars, this international copyright instrument was not completed before 1961. Negotiations proceeded already during the 1950s between 3 organisations: The International Federation of Musicians (representing performers), the International Federation of the Phonographic Industry (representing producers) and the European Broadcasting Union. Also involved were the Unions of Actors and Variety Artist. 3 governmental organisations promoted and sustained the progress: The ILO (International Labour Organisation, the UNESCO and the United International Bureaux for the Protection of Intellectual Property (BIRPI, the administrative arm of the Berne Union, later to become WIPO).[41]
Dealing with the rights of performers, phonogram producers and broadcasting organisations, the Rome Convention was signed in 1961.

[40] World Copyright Law, J.A.L. Sterling, Table A, p795 et sqq. The Table was made in the mid of 1998, maybe some changes we failed to notice in our research have occurred since then.
[41] The Rome preliminary draft Convention, A. Baum.

The first articles deal with the requirements of nationality to grant national treatment, definitions and alike.
According to Art 7 the performers have the possibility of preventing broadcasting and communication to the public without their consent of their performance, except where the performance used is itself already a broadcast performance or is made from a fixation.
Further fixations are only allowed with the consent of the performer (Art 7 1. (b)) and reproduction of fixation, made without consent is forbidden (Art 7 1. (c) (i)). So far, filesharing would be perfectly illegal. However, there is one further exception:
Performers may prevent reproduction if it is made for purposes different from those for which the performers originally gave their consent. This point needs discussion.
What is the purpose of a file in a P2P network? Just to be shared. To give other users the chance to consume it, i. e. to hear, watch or read it. In fact that is the very purpose, the work was fixed. Nevertheless, we do not think, we could easily interpret the original consent of the performer that far without denying their free will.

As we came above to the decision, that P2P is as public as watching TV, we grant performers the right to sue for royalties under Art 12, if the phonogram was published for commercial purposes, which is nearly always the case.

Art 15 gives the usual exception, for journalistic, scientific and teaching purposes. Additionally Contracting States may provide exceptions for private use. Private use will be discussed detailed in other context below.

Although it has no direct impact on our topic, we consider Art 19 worth mentioning: Performers who consent to the incorporation of their performance into a film cannot invoke Art 7 anymore.

3.4 TRIPS Agreement

During the 70ies of the 20th century two developments affected the perception of the importance of international protection of intellectual property. First, there was the development in international dissemination of protected materials, brought about by the advent of new technological means, including satellite transmission, internationally linked computers and the IT- development in general.

Secondly, there was the growth of piracy, primarily of sound recordings, films and books.
Consequently, the right owners, respectively their business partners were concerned to ensure that their exploitation rights were acknowledged at effective levels, and that piracy was eradicated or at least sustained reduced.
While the existing international Conventions (Berne Convention, UCC, Rome Convention, Phonograms Convention) required their Contracting States to provide certain rights, they did not contain any provisions obliging members to introduce specific enforcement measures, or assisting in resolution of disputes, sprung from the Conventions' application.
Furthermore the above mentioned instruments did not deal specifically with the new technical developments, like computer programs and satellite transmissions.
Copyright means, among others, business and trade. Therefore it was included in the negotiations for revision of the General Agreement on Tariffs and Trade (GATT). To this aim, the Uruguay round began in 1986 and after long and detailed negotiations the World Trade Organisation Agreement ("WTO Agreement") was concluded in April 1994. As part of it, the Agreement on Trade related Aspects of Intellectual Property Rights (TRIPS) was adopted.
WTO members are bound by the TRIPS Agreement. It establishes international standards in the scope and application of intellectual property rights, and introduces obligations concerning protection, trade marks, geographical indications, patents, semiconductor topographies and so on. Further it imposes obligations concerning the enforcement of these rights, and introduces dispute prevention and settlement procedures.

Already in the beginning of Art 1 are the contracting states called upon to "implement in their law more extensive protection than is required by this Agreement".

The first articles deal with the correlation of the Agreement with other multilateral Copyright instruments, like the Rome, Berne or Paris Convention, with the WTO- typical provisions about Most-Favoured-Nation and National treatment, further the usual exception of public health and nutrition, public interest in sectors of vital importance to their socio-economic and technological development and alike.

Art 9 and 10 enjoin members to comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived there from.

With Art 10 computer programs, as source and object code alike, are protected under the Berne Convention as literary works.
Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Although data collections are normally not traded in P2P networks, we like to add, that everything written on paper is machine readable, too. There is hardware and software to make even handwritten notices computer data within minutes, as we learned from Prof. Jon Bing.

In Art 14 artists have the rights to prevent unwanted fixation and communication of such fixations to the public, phonograms producers may forbid the direct or indirect reproduction of their phonograms, Broadcasting organizations shall have the right to prohibit when undertaken without their authorization: the fixation, the reproduction of fixations, and the re- broadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same.

So far the TRIPS Agreement has not brought much new to our topic, besides the definite notion of computer programs. That changes rapidly with Part III, where Enforcement Procedures are expatiated.

Besides various procedural provisions, the Members shall enable their judicial authorities to order parties to desist from infringements and to order infringers to pay damages.
The authorities shall even be entitled to order provisional measures to prevent infringing copies to occur *inaudita altera parte*. In proceedings against P2P filesharers, which occurred recently increasingly, those might range from prohibition of logging on to the internet to confiscation of the equipment.
In Section 5, Art 61 the TRIPS requires criminal procedures and penalties at least for wilful trade mark counterfeiting and copyright piracy on a commercial scale. Fines and imprisonment shall be the remedies, in appropriate cases seizure and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.
The single filesharer is of course not on a commercial scale, but Members are prompted to make stricter provisions. In this case the filesharer's computer would be really included, but we doubt in such a case its appropriateness.

The parts of the Agreement we have not discussed, include transitional agreements, least developed countries, dispute settlement, prohibition of reservations and alike.

The WTO Homepage[42] informs us, that 146 states are members to the WTO and therefore bound to the TRIPS Agreement, so it has brought the Berne Convention to an even greater "audience".

As the name World Trade Organisation implies (and the homepage confirms our conjecture), the WTO is merely a trade organisation. Therefore the provisions of the WTO treaties have to be seen in that light[43].

The mediocre user of filesharing software does not pursue any commercial interests. As we showed above, the actions of the single user, even if they would share illegally copied material, have no macroeconomic effect. Nevertheless it is very likely, that the Members will introduce legislation which criminalizes every kind of copyright infringing, maybe incorporating a distinction between commercial and not commercial. Especially as some kind of "witch hunt" on P2P networks users has started, severe penalties for them are showing on the horizon.

3.5 WIPO Copyright Treaty

With the coming end of the last century, the WIPO regarded the existing copyright instruments for not sufficient to deal with the new technologies. Although they could have made a revision of the Berne Convention or of the Rome Convention, they decided to create a new treaty. (Reasons were that a Revision Conference for the Berne Convention required unanimity, for a revision of the Rome Convention it was seen too difficult to unite again ILO, UNESCO and WIPO and to balance the various interests, they represented.)[44]

As a result two Treaties were drafted in 1996 in the largest diplomatic conference in the field of copyright held to date: The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

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[42] http://www.wto.org.

[43] We could argue, that copyright serves basically only commercial purposes, and not artistic ones, therefore this statement would be redundant.

[44] World Copyright Law, J.A.L. Sterling, p557-559.

Again the Berne Convention is what the Contracting Parties will have to look at (Art 3 WCT). Art 2 to 6 are to be applied. Like in the TRIPS Agreement computer programs are protected under Art 2 of the Berne Convention due to Art 4 of the WCT.

Art 5 protects Data bases as such and with Art 6 the authors are granted the exclusive right to authorize the making available to the public of original and copies through sale or other transfer of ownership.

The sole right to allow communication to the public goes to the authors in Art 8. Due to a very considerate wording ("by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them"), the P2P networking is definitely included.

In Art 10 the choice to allow exceptions "in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author" is granted as well.

Art 11 deals with the obligatory legal remedies and technical measures states shall provide to secure copyright, Art 12 with special remedies against persons who remove or alter any electronic rights management information[45] without authority or distributing work, where this information was altered or removed[46].

41 states have signed the WCT so far, no one being member of the European Union (but some future members), besides the definite notion of electronic rights management it is "just another treaty" which helps the Berne Convention to gain importance.

[45] As the WCT was drafted in 1996 we were a little surprised to find a specific provision about electronic rights management.
[46] Paragraph 2 includes a definition of rights management information without dealing at all with the „electronic" aspect.

Chapter 4 EU Legislation

The European Union is one global player when it comes to economy and industry. Considering that in a couple of weeks the community will have 10 new members, its influence is only surpassed by the United States of America.
Through the various directives, which we will discuss in this chapter, the copyright legislation in the member states, including Austria, is mainly determined by the EU.

4.1 Directive 91/250/EEC on the legal protection of computer programs

As the name implies the Directive deals with software and its copyright protection.

The member states were supposed to protect them for 50 years as works of literature. Already in 1993 this was incorporated into the Austrian law.[47]

As already mentioned, computer programs (a big share of them being games) can be found in file sharing networks, sometimes in altered versions including viruses.

4.2 Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights

Besides the changes about scientific works and photographs, the most major change was the up rating of the protection period: 70 years was now the minimum.
The most popular (and most hawked) justification was the following:
Copyright was created to ensure that the author can benefit (commercially) from their works. But not only during their lifetimes, should their children profit too, as well as their grandchildren. So the basic idea behind the 50 year protection period of the Berne Convention was that the author and the next two generations should have copyright.[48]

[47] Kuckso, Geistiges Eigentum, pp 1090ff.
[48] Kuckso, Geistiges Eigentum, p 1094.

As the life expectancy grew, the EU felt the necessity to adopt the law to the changes, so the protection period lasts now for seventy years.
Although this sounds plausible, it is only the most ostensible reason: The real money lies in the exploitation rights, and in the majority of cases this will be held by companies, so it appears rather likely to us, that lobbying influenced this decision more than consideration for the retirement care.

4.3 Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society

This directive, among other aims, serves to implement a number if the new international obligations, grounded on the WIPO Copyright treaty and the WIPO Performances and Phonograms Treaty.[49]

As all previous directives in the field of intellectual property and neighbouring rights, it is based on Articles 47, 55 and 95 of the EC Treaty. Germany has successfully challenged the Tobacco Advertising directive, built on the same legal foundation. Bernt Hugenholtz, Professor in Amsterdam, sees a chance for this directive, to be annulled as well. So far the Directive is still in force, nobody is trying to invoke a trial and most EU members have ratified it.

Art 3 deals with the right of making works available to the public. We have discussed this topic in the chapter about the International Instruments.[50]

As discussed before, the transfer or use of files makes it technically necessary to make transient copies in the computers memory or on the server. The Directive now directly excludes these in Art 5, when it happens during a transmission in a network between third parties by an intermediary, so the besides the content provider none of the providers is in conflict with copyright law.
The other exemption is, when this copy is to enable lawful use.

[49] Directive 2001/29/EC, Preamble Art 15.
[50] See chapter 3.

Somehow this leads to overkill, not only the illegal copy is violating the law, even its temporary copy does so, too.
To be allowed, both require having no independent economic significance.

In paragraph 2 of the same article, the member states are allowed to introduce other exemptions, e.g. for the press, science, teaching, religious organisations, disabled people and alike.
The exemption which interests us in the context of filesharing the most is (b):

„In respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned.“

In the context of filesharing, of p2p networking, this is the place where worlds collide: the private copy.
What is it? Who can make it? How harsh does it damage the record industries?

We start in the middle with the notion of „commercial“. If something is commercial, it is no more private.
Merriam-Webster define commercial

“ **1 a** (1) **:** occupied with or engaged in commerce or work intended for commerce <a *commercial* artist> (2) **:** of or relating to commerce <*commercial* regulations> (3) **:** characteristic of commerce <*commercial* weights> (4) **:** suitable, adequate, or prepared for commerce <found oil in *commercial* quantities> **b** (1) **:** being of an average or inferior quality <*commercial* oxalic acid> <show-quality versus *commercial* cattle> (2) **:** producing artistic work of low standards for quick market success

2 a : viewed with regard to profit <a *commercial* success> **b :** designed for a large market

3 : emphasizing skills and subjects useful in business”

In a very broad interpretation, the simple copy of an own music cassette would be commercially too, has a benefit which could be measured in money: there is no more need to buy another cassette. We believe this view will not find wide acceptance.

On any medium includes storage in computers. All ways of reproduction are included, so it applies to P2P networking.

Compensation is guaranteed by various contributions on the sale of cassettes, CD-Rs, DVD-Rs and so on. In some states there are considerations, whether these contribution shall be applied on computer sales in general. The distribution of this money is made by the Artists' Organisations.

The necessity of a legal source of private copies will be discussed in the chapter about the Austrian law.

Art 6 was controversial, too: Briefly and imprecisely subsumed, it forbids circumvention of technological measures to safeguard copyright.
Besides some rather complicated verbal constructs (paragraph 4), of which the sense even eludes university professors[51], it forbids all devices aimed also to break technical copyright protection.
What does this mean to filesharing?[52]
Many programs like these have been in circulation on p2p networks. They are normally open source and nobody would claim copyright on them. When this Directive enters into force, they are forbidden.
In a very broad interpretation, one could argue, that the file sharing program is such a circumvention device itself. Simple example would be that if a CD cannot be ripped[53], one downloads them from the internet. This goes way too far. The Directive intends only to forbid, if the technological measure is somehow affected or the protected carrier medium is reached by bypassing the protection measure. Besides, the p2p tool is not primarily designed, produced, adapted or performed for this purpose or has limited commercially significant other purpose or use.

Other directives, with small, but marginal influence on copyright are the Directive 92/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, the Directive 92/100/EEC on rental right and

[51] Bernt Hugenholtz, Why the Copyright Directive is unimportant, and possibly invalid, p2.
[52] An impact, away from p2p, was that some commercial programs, e.g. CloneCD became illegal.
[53] the tracks downloaded to a computer as files.

lending right and on certain rights related to copyright in the field of intellectual property, the Directive 96/9/EC on the legal protection of databases[54], the so called „Droit de Suite“Directive[55].

[54] There are hardly any databases in the common filesharing networks.
[55] with no influence on filesharing, but this controversial directive should be mentioned.

Chapter 5 US Law

5.1 Introduction

Copyright protection in the United States is written into the Constitution in Article 1 Section 8 Clause 8. This provision empowers Congress to grant authors exclusive rights in their intellectual creations.

Until 1976 the United States had one of the world's oldest copyright laws. The 1976 US Copyright Act preempted all previous copyright law for several reasons. First, US law had to be changed in accordance with international treaties, especially the WIPO treaty, and second, technological developments (e. g. the photocopying machines) and the impact of technology on what might be copyrighted, how works might be copied, and what constituted an infringement had to be addressed.

Further, the Fair Use and the First Sales doctrines were codified for the first time and the copyright protection term was expanded to the life of the author plus 50 years.

In the U.S. legal tradition, copyright law strikes a balance between copyright owners and the public. In order to create incentives for authors, copyright law grants them certain rights (such as the right to make and sell copies). In order to protect consumers and ensure widespread access to culture, other rights to the public (like the right to use VCRs to tape content) are reserved.

Some scholars[56] argue, that Congress broke with that tradition by enacting the DMCA, which makes it illegal to „fiddle with any technology that copyright owners use to „lock up" their works".

It is obvious that digital technology, while it has many advantages, also facilitates copyright infringement. But unlike earlier technologies like radio and television broadcasting, the combination of digital technology and the Internet gives a new means to obtaining copyrighted material on demand. Apart from that international copyright protection is threatened because international boarders do not restrict the Internet. For digital works it is possible to reach every market in the world by almost no effort.

Those concerns had their effect on Congress. The Committe on Commerce, US House of Representatives, held that „the digital environment poses a unique threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine

[56] *Lohmann, Fred von*, on the policy of the Electronic Frontier Foundation, www.eff.org, Aug 2001.

copyright interests. In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works at virtually no cost at all to the pirate. As technology advances, so must our laws."[57]

While facilitating copyright infringements, digital technology may also be used to protect copyrighted material by developing electronic copyright management and protection systems. Those systems have the potential to control the access and the use of digital works. In the public discussion is often forgotten, that digital technology is not only a threat to copyright owners but also can be a tool to protect their interests. Law is needed to establish a balance of the interests of the public and content owners.

5.2 The Digital Millennium Copyright Act

On October 28th, 1998 President Bill Clinton signed the DMCA, a 26 000 word, 50-page codex to the copyright statute setting forth a new series of rights and exceptions for digital copyright in a networked environment[58]. The main goal of the DMCA was to bring US copyright law into the digital age and its intention was to „make digital networks safe places to disseminate and copyrighted materials"[59].

The DMCA represents a new approach to copyright while regulating technology directly instead of regulating the usage of copyrighted material. Of its five titles, title 1, dealing with the circumvention of copyright management systems is the most important. Congress enacted section 1201 to comply with the 1996 WIPO Copyright Treaty and the WIPO Performances and and Phonograms Treaty. The anticircumvention provisions grant copyright owners action against individuals who either circumvent the technological measures that protect copyrighted works or provide the technological means for others to circumvent such measures. Further, section 1201 was also a response to the concerns of copyright owners that their works would massively be pirated in the networked digital world. However, section 1201 went further than the WIPO treaty required.

The two distinct prohibitions are a ban on acts of circumvention, as well as a ban on the distribution of tools and technologies used for circumvention.

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[57] Report of the Committee on Commerce, House of Representatives No. 105-551, pt 2, 1998.
[58] *Litman, Jessica*, Digital Copyright, New York, 2001, p. 31.
[59] Fallenboeck, Markus, On the Technical Protection of Copyright, International Journal of Communications Law and Policy.

The basic prohibition is set out in section 1201 (a) 1 and prohibits the act of circumventing a technological measure used by copyright owners to control access to their works („access control"), e. g. it is unlawful to defeat the encryption system used on DVD movies.

Sections 1201 (a) 2 and 1201 (b) outlaw the manufacture, sale, distribution or trafficking of tools and technologies that make circumvention possible. These provisions ban not only technologies that defeat access controls, but also technologies that defeat use restrictions imposed by copyright owners, e. g. copy protections on music CD's.

Further they create a new, independent prohibition on circumvention that is outside the traditional scope of copyright law because they target at the circumvention of access control and not copyright infringement.

According to the EFF[60], the anti-circumvention provisions have been used to stifle a set of legitimate activities rather than stopping copyright piracy. Three major threats of section 1201 to public policy interests can be oultined: (1) a threat to free speech and expression as well as to scientific research, (2) a threat to the Fair Use principle and (3) a threat that impedes competition and innovation.

(1) Several cases and filed lawsuits showed that copyright owners used section 1201 to stifle free speech and legitimate scientif research. In September 2000 the Secure Digital Music Initiative (SDMI) issued a public challenge encouraging computer scientists to try to defeat certain watermarking technologies intended to protect digital music. When Princeton professor Edward Felton and his team of researchers succeeded in removing the watermarks and tried to present their results at a conference, SDMI threatened the researchers with liability under the DMCA. After long discussions the researchers finally withdrew their paper from the conference.

In July 2001 the Russian programmer Dmitry Skylarov was arrested in the US for several weeks after speaking at the DEFCON conference in Las Vegas. Skylarov wrote a program known as the „Advanced e-book processor" which was distributed via the Internet. The software allowed owners of Adobe e-books to convert the files into the Adobe pdf format, thereby removing restrictions embedded into the e-book files. Skylarov's alleged crime was

[60] *EFF*, Four years under the DMCA, www.eff.org, 2003.

not copyright infringement but working on a software tool with many legitimate uses, just because third parties might use the tool to copy an e-book without the rightholder's permission. The departement of justice permitted Skylarov to return home and a jury acquitted his company Elcomsoft of all charges but this example also shows how the DMCA is used or misused.

(2) The Fair use doctrine[61] is an important element in US copyright law. In its general sense it is any copying of copyrighted material done for a limited purpose such as to comment upon, criticize or parody a copyrighted work. Fair uses include personal, non-commercial uses, whereas four factors have to be considered: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion taken, and the effect of the use upon the potential market (for details see chapter 5.3 on the Napster case).
While stopping copyright infringement is an important and legitimate objective, the DMCA carrys the law to excess. By employing technical protection measures to control access to and use of copyrighted material, and misusing section 1201 lawsuits against anyone who tampers with those measures, copyright owners can unilaterally eliminate fair use. Copy protection technologies may not have a deep impact on online copyright infringement, but they certainly interfere with the fair use expectations of consumers.

(3) The DMCA was used to hinder the efforts of legitimate competitors to create innovative products by several corporations and major players in the market.
Sony Corporation, for instance, has used the DMCA to threaten hobbyists who created software for Sony's Aibo robot dog, e. g. making it dance jazz, as well as competitors, like Connectix, who created software that would allow PC owners to play games made for Sony's Playstation. In both cases the competitors had created their software by legitimate reverse engineering, which in former cases has been recognized as non-infringing fair uses. Connectix were unable to bear the high costs of a lawsuit and had to pull off its product from the market.
Apart from that Sony used the DMCA against vendors of so called „mod chips" for alleged circumvention under the DMCA. Those chips permit games legitimately purchased in one part of the world to run on a Playstation from another part of the world. Although there was

[61] Title 17 Chapter 1 Section 107 US Code Collection.

no infringement of Sony's copyright, the court granted an injunction under the DMCA's anti-circumvention provisions, thus banning the use of a technology that would permit users to use legitmately purchased games from other regions.

Those examples implicate and demonstrate that the anti-circumvention provisions of the DMCA reach too far, threatening a wide variety of legitimate activities in a way that Congress presumably did not intend.

5.3 The Napster case

Copyright law gives the creators of certain literary and artistic works the right to ensure that unauthorized people do not use their work for unauthorized purposes. With the mass use of the Internet and digital environment, the challenge is to determine how copyright protections apply in a time where creative works are widely available in cyberspace and the technology to access such material improves nearly daily. Owners of music copyrights were introduced to a significant technological threat to the legal protection of music by the appearance of Napster[62] in 1999.

The Napster case[63] is one of the most famous lawsuits related to copyright infringement in digital context. Several large companies involved in the record business filed a common lawsuit against Napster Inc., alleging that Napster was a contributory and vicarious copyright infringer, as Napster provided a service for copying, downloading, uploading, transmitting, and distributing copyrighted sound recordings as MP3[64] files without the permission from the rights owner.

To be able to join the system, users had to access Napster's web site and register by creating a user name and password. Once done, the users could download MusicShare software free from charge and install it on their own computers. MusicShare enabled the users to share MP3 files

[62] Napster Inc., the first Internet service providing free downloads of music in a larger scale.
[63] United States Court of Appeals 9th Circuit, No. 00-16401
64 In 1987, The Moving Picture Experts Group set a standard file format for the storage of audio recordings in a digital format called MPEG-3, abbreviated as "MP3"64. Digital MP3 files are created through a process that compresses recordings into small and portable files, without sacrificing quality. The MP3's compressed format allows for rapid transmission of digital audio files from one computer to another by electronic mail or any other file transfer protocol.

with others. The software made it possible for the user to create directories and lists of their MP3 files, which in turn where made available for other users when logged on to the system. The content of the MP3 files remained stored on the user's computer, and could be copied by another user by downloading it directly from one computer to the other over Internet. Napster servers communicated the origin user's Internet address to the requesting user. The system was only displaying lists of available MP3 files from those users logged on to the system. As soon as the user logged off, their files were no longer accessible. Napster did not monitor or log users' activities; only real time information was available.

Napster was founded by 19-year-old Shawn Fanning, and was based on a simple premise: to allow members of a "community" to share computer files on the Web. Napster software allowed users to log onto its servers and make their personal MP3 collections available for download by other users. Since Napster went online in the summer of 1999, millions of MP3 files, representing all sorts of music have flashed across the Web from user to user. The main issue of the Napster case is whether Napster Inc. is facilitating personal use of the music by giving people the means to download music for free, or whether Napster is knowingly contributing to large-scale copyright infringement by its users. Following is an overview of the central legal questions raised in the lawsuit, and the court findings[65].

5.3.1 Direct infringement

Plaintiffs claimed that Napster users were engaged in wholesale reproduction and distribution of copyrighted works, all constituting direct infringement of exclusive rights.

Infringement

The Court of Appeal had to determine whether the plaintiffs satisfied the two requirements to present a prima facie case of direct infringement: 1) show ownership of the allegedly infringed material, and 2) demonstrate that the alleged infringers violate at least one exclusive right granted to the copyright holders under 17 U.S.C. § 106. Both the district court and the court of appeal concluded that plaintiffs had sufficiently demonstrated ownership, as more than 70% of the files available on Napster were owned or administered by plaintiffs. The Court of appeal found that the Napster users infringed at least two of the copyright holder's exclusive rights: the

[65] United States Court of Appeals for the Ninth Circuit, No. 00-16401.

rights of reproduction and distribution. Napster contends that its users do not infringe plaintiff's copyrights because the users are engaged in fair use of the material.

Fair use

The fair use doctrine essentially states that people have the right to use copyrighted material under certain circumstances, i.e. for personal or education purposes. The district court considered factors listed in 17 U.S.C. § 107, which guide a court's fair use determination. These factors are: (a) the purpose and character of the use; (b) the nature of the copyrighted work; (c) the "amount and substantiality of the portion used" in relation to the work as a whole; and (d) the effect of the use upon the potential marked for the work or the value of the work. The court of appeal agreed with the district court that Napster users are not fair users. The overall fair use analysis in short:

a) Purpose and Character of the use

This factor focuses on whether the work merely replaces the object of the original creation or instead adds a further purpose or different character, i.e. whether the work is "transformative". The purpose and character of use element also requires the court to determine whether the allegedly infringing use is commercial or non-commercial. The court found that commercial use was demonstrated by showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies.

b) The Nature of the use

Works that are creative in nature are "closer to the core of intended copyright protection" than are more fact-based works. In the Napster case, the works being copied was creative works – music. The creative nature of the musical compositions and sound recordings "cut against" a finding of fair use.

c) The Portion Used

Napster users engage in "wholesale" copying. Under certain circumstances, a court will conclude that a use is fair even when the protected work is copied in its entity. Those circumstances were not acknowledged here.

d) Effect of Use on Market

Napster harmed the market in at least two ways: 1) “it reduced the audio CD sales among college students” and 2) “it raises barriers to plaintiffs entry into the market for the digital download of music”. The court also found Napster interfered with the record companies’ efforts to legitimately license their sound recordings and musical compositions for Internet-related downloads themselves.

Alleged fair uses

Napster identifies three specific alleged fair uses: sampling, where users make a temporary copies of a work before purchasing; space-shifting, where users access a sound recording through the Napster system that they already own in audio CD format; and permissive distribution of recordings both by new and established artists.

a) Sampling

Both courts found that sampling was not considered fair use, because the users had access to the entire sound recording and not only parts of it. They also put a question mark on Napster’s theory that this form for sampling actually was beneficial for the record industry as marketing before the users bought the CDs.

b) Space-shifting

For the space-shifting, it was referred to the Sony case[66], holding that “time-shifting”, where a video tape recorder owner records a television show for later viewing, is a fair use. The court held that once a user lists a copy of music he already owns on the Napster system in order to access the music from another location, the song becomes “available to millions of other individuals”, not just the original CD owner.

c) Permissive reproduction

For the final claim of fair use, the permissive reproduction, it was noted that plaintiffs do not challenge these uses.

[66] 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984).

5.3.2 Contributory copyright infringement and vicarious liability

Next, it was alleged that Napster should be liable under a theory of either contributory infringement or vicarious liability. One may be liable for contributory infringement if on "with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another". Contributory infringement also can be found in cases in which one has notice of the infringing activity and does nothing to curtail it. In the Napster case, the plaintiffs alleged that Napster's facilitation of the identifying and downloading of files constituted contributory infringement. Vicarious liability arise when one "has the right and ability to supervise infringing activity and also has a direct financial interest in such activities.". In the Napster case, the plaintiffs claimed that Napster had the ability to control the activity, by allowing or filtering out the music files.

5.3.3 Contributory copyright infringement

Plaintiffs claimed that Napster was liable for contributory copyright infringement. Contributory liability requires that the secondary infringer "know or have reason to know" of direct infringement.

Most of the files moved through MusicShare software were infringing copies and Napster was well aware of that fact. Napster was ignorant of the content moved via its system, and should not be required to change the technology to aid the recording company's enforcement of rights. Plaintiffs demonstrated that Napster had actual notice of direct infringement because the RIAA[67] informed it of more than 12,000 infringing files. The courts concluded with that Napster had actual knowledge of specific infringing material, that it could block access to the system by suppliers of the infringing material, and that it had failed to remove the material.

The courts also agreed with the plaintiffs that Napster provided the "site and facilities" for direct infringement, and therefore could be held liable for material contribution to the infringing activity – and then again contributory infringement.

[67] Recording Industry Association of America.

5.3.4 Vicarious copyright infringement

In the context of copyright law, vicarious liability extends beyond an employer/ employee relationship to cases in which a defendant "has the right and ability to supervise infringing activity and also has a direct financial interest in such activities."

a) Financial Benefit

Financial benefit exits where the availability of infringing material "acts as "draw" for customers". In the Napster case, the court found the use to be commercial. Although there was no exchange of money or sale of the files, the district court's findings that 1) "a host user sending a file cannot be said to engage in personal use when distributing that file to an anonymous requester" and 2) Napster users get for free something they would ordinarily have to buy". Napster's future revenue was directly dependent upon increase in user base, as for advertisement income. The court therefore found that Napster financially benefits from the availability of protected works on its system. Because Napster could get advertising revenue based upon the number of "hits", it, too, was alleged that Napster had a financial interest in the infringement.

b) Supervision

Napster had the right and ability to police of its system, and failed to exercise that right to prevent the exchange of copyrighted material. Even if Napster did not "read" the content of indexed files, it had the ability to locate infringing material listed on its search indices. Failing to do so, combined with a showing that Napster financially benefits from the continuing availability of infringing files on its system, lead to the imposition of vicarious liability.

5.3.5 Preliminary injunction

Napster alleged that two statues insulated it from liability, and therefore would preclude the entry of a preliminary injunction. First, Napster asserted that its users engaged in actions protected by the Audio Home recording Act of 1992, 17 U.S.C., § 1008.[68]

[68] The statute states in part: "No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analogue recording device or an analogue recording medium, based on the non-commercial use by a consumer of such a device or medium for making digital musical recordings or analogue music recordings."

5.3.5.1 Audio Home Recording Act

The district court rejected Napster's argument, and stated that The Audio Home Recording Act was "irrelevant" to the action because: (1) plaintiffs did not bring claims under the Audio Home Recording Act; and (2) The Audio Home Recording Act does not cover the downloading of MP3 files. The court of appeal agreed that the Audio Home Recording Act did not cover the downloading of MP3 files.

5.3.5.2 Digital Millennium Copyright Act

Napster interposed a statutory limitation on liability by asserting the protections of the "safe harbour" from copyright suits for "Internet Service Providers" contained in the Digital Millennium Copyright Act. The district court concluded that Napster "had failed to persuade this court that subsection 512 (d) shelters contributory infringers". The court of appeal did not agree that Napster's potential liability for contributory and vicarious infringement rendered the Digital Millennium Copyright Act inapplicable per se, but recognized that the issue would be more fully developed at trial.

5.3.6 Waiver, Implied License and Copyright Misuse

Napster contended that even if the district courts preliminary determinations that it is liable for facilitating copyright infringement are correct, the district court improperly rejected valid affirmative defences for waiver, implied license, and copyright misuse.

5.3.6.1 Waiver

"Waiver is the international relinquishment of a known right with knowledge of its existence and the intend to relinquish it."[69] In copyright, waiver or abandonment of copyright "occurs only if there is intent by the copyright proprietor to surrender rights in his work."[70] Napster argued that the district court erred in finding that plaintiffs knowingly provided consumers with technology designed to copy and distribute MP3 files over the Internet and, thus, waived any legal authority to exercise exclusive control over creation and distribution of MP3 files. The court found that plaintiffs did nothing more than seek partners for their commercial downloading ventures and develop music players for files they planned to sell over the Internet.

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[69] United States v. King Features Entm't, Inc.,843 F.2d 394, 399 (9th Cir. 1988).
[70] 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright 13.06 (2000).

5.3.6.2 Implied License

Napster argued that plaintiffs granted the company an implied license by encouraging MP3 file exchange over the Internet. The district court observed that no evidence existed to support this defence; “indeed, the RIAA gave the defendant express notice that it objected to the availability of its members’ copyrighted music on Napster”.

5.3.6.3 Copyright misuse

Napster alleged that online distribution is not within the copyright monopoly. According to Napster, plaintiffs have colluded to “use their copyrights to extend their control to online distributions”. The court did not agree. They concluded “there is no evidence her that plaintiffs seek to control areas outside of their grant monopoly. Rather, plaintiffs seek to control reproduction and distribution of their copyrighted works, exclusive rightsofcopy right holders”.

5.3.7 Bond/ Royalties

Napster alleged that a) the court erred in setting a $5 million bond, and b) that the district court should have imposed a constructive royalty payment structure in lieu of an injunction. This paper will not discuss the penal sum, but instead look at the royalties issue:

5.3.7.1 Royalties

Napster claimed that ”where great public injury would be worked by an injunction, the courts might…. Award damages or a continuing royalty instead of an injunction in such special circumstances”. The court did not, however, find any “special circumstances” just because the case required them to apply well-established doctrines of copyright law to a new technology. Neither did the court agree that an injunction would cause “great public injury”. Instead, the court concluded that the Copyright Act provides more than adequate legislative solution and sanctions for copyright infringement. The court’s opinion was that imposing a compulsory royalty payment schedule would give Napster an “easy out” of the case. If such royalties were imposed, Napster would avoid penalties for any future violation of an injunction, statutory copyright damages, and any possible criminal penalties for continuing infringement. The royalty structure would also grant Napster the luxury of either choosing to continue and pay royalties or shut down. On the other hand, the wronged parties would be forced to do business with a company that profits from the wrongful use of intellectual properties. Plaintiffs would lose the power to

control their intellectual property: they could not make a business decision not to license their property to Napster, and, in the event they planned to do business with Napster, compulsory royalties would take away the copyright holders' ability to negotiate the terms of any contractual arrangement.

5.4 Post Napster

Napster was not just one of the first companies that provided software for file sharing but also the first which fought the record companies over their existing business model. After the shutdown of Napster several networks which already existed became more important, such as Imesh or Gnutella[71]. Imesh was based in Israel and therefore out of US jurisdiction, though it also was using a centralized network. Gnutella[72] as a completely decentralized network was almost impossible to terminate. Additionally, OpenNap, a reverse engineered version of the Napster software grew in size. That was the birth of MusicCity, a network of OpenNap servers. Gnutella was found to be too slow for the majority of users and OpenNap was targeted by the RIAA, as they wanted to finish Napster in all of its incarnations. Thus MusicCity decided to sign up to a new budding network and produce its own client – FastTrack, Kazaa and Morpheus were born. The FastTrack network is a completely decentralised one built on a closed protocol[73], but it licensed other companies to create client software which allowed users to connect to the network. The three pieces of software using the FastTrack network, namely Grokster, Morpheus and Kazaa, the software created by the network founders, became the center in the file sharing world. Morpheus, according to FastTrack, failed to pay their license for using the network and was left unable to connect to it. This caused two problems, first, for Morpheus and MusicCity, which had become Streamcast Networks and second, for their users who could no longer share files. Further this showed a weakness of the FastTrack network, for the founders could switch off the connection of users to the network. They now should also be able to comply with RIAA demands and deny all file sharers who distributed copyrighted material via the network access to it. The RIAA filed a lawsuit against FastTrack, which did not

[71] Dickinson, Tim, The History of Filesharing, www.audiomelody.com/index.php/article/articleview/27/1/4 (visited July 2003).
[72] Other programs using the Gnutella protocol are BearShare, Aimster or Limewire.
[73] I. e. not Open Source.

have the financial backing to proceed with a court case and the network was taken over by Sharman Networks, based on an island off the Australian coast.

In April 2003, a US district court in Los Angeles decided a case[74] in which more than 20 movie studios, music labels represented by the RIAA, and song writers and publishers from the National Music Publisher's Association filed a law suit against the P2P operators Grokster and StreamCast Networks. The plaintiffs hoped to convince the court that the P2P services should be held liable for copyright infringements occuring on their networks. Judge Stephen Wilson held that they were not liable and ruled, unlike in the Napster case, the P2P operators do not have direct control over the files swapped on their networks. Judge Wilson wrote, that the services, which also serve legally permitted purposes, cannot held be liable without evidence of their active and substantial contribution to copyright infringement. When Wilson ruled in favor of Grokster and Streamcast, he applied the famous Supreme Court's decision of 1984.

In February 2004 a federal appeals court heard arguments in the Grokster case, which is said to be a landmark case „that could decide the future of P2P services"[75]. The entertainment company lawyer Russ Frackman held that the Sony case is not applicable because Sony made money by selling the Betamax VCR without the possibility of controlling its uses, whereas Grokster and StreamCast could filter copyrighted content from their systems, like they do with computer viruses, but „refuse to do, because the free songs and movies are what draw their users and ultimately generate ad profits"[76] and that, if the court does not reverse the district court's ruling „it will gravely threaten any possibility for meaningful copyright protection in the digital era".

Fred von Lohmann from the EFF, who argued on behalf of StreamCast, said that it is undisputed that the Grokster software is capable of substantial non-ifringing uses. Further he explained that the case „is not just a case about P2P. It is a case that will determine whether technology companies are allowed to innovate or whether they have to ask permission from copyright owners before they build new products".

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[74] *MGM v Grokster*, www.eff.org/IP/P2P/MGM_v_Grokster (visited February 2004).
[75] *Dean, Katie*, Court to Hear Landmark P2P case, www.wired.com/news/digiwood/0,1412,62112,00.html (visited February 2004).
[76] File-Sharing: Who's to blame?, www.wired.com/news/digiwood/0,1412,62161,00.html (visited February 2004.

The three judge panel of the 9th US Circuit Court of Appeals could take months to rule. It took about four months to return a decision in an appeal of the entertainment companies' law suit against Napster in 2001.

Because of those „legal obstacles" the record industry changed their strategy. Last year it was given permission by the courts to force ISP's to reveal the names of users thought to be engaged in substantial music uploading to P2P networks[77]. The industry is in the process of bringing thousands of law suits against individuals making copyrighted material available on P2P networks. But bringing thousands of individuals to court will generate much attention and publicity and might risk alienting the record industry's customers.

[77] Liebowitz, Stan, The day the music died, The Cato Institute, www.cato.org (visited in September 2003).

Chapter 6 The Austrian Copyright Law (Urheberrechtsgesetz 2003)

Initially the new law was planned already for 2002, but the dissolvement of the government delayed the amendment. The necessity for a new copyright law emerged, because the European Union issued Directive 2001/29. Further the WIPO- Copyright treaty and the WPPT had to be incorporated, which was done by this amendment. It entered into force on the 1st July of 2003.
Thus the Austrian law is determined in many aspects by the international and supranational legal instruments. Hence we will focus on the differences or additions which are in Austria in force.

The first section (§§ 1 – 9) defines what is protected by copyright. If that kind of language is excused, we would like to say they are the “usual suspects”, compilations and computer programs are explicitly included.

The author is the topic of the second section (§§ 10 – 13).

In the third section the rights of the copyright holder are discussed.

§15: The author has the exclusive right to copy the work, no matter in what way, number or for how long. The government drafts state, that this fulfils the Directive’s article 2. In §41a there is the corresponding exemption for transient copies.

Until § 18 there are the various copyrights of the authors, §19 and 20 name moral rights. The next paragraphs deal with contracts about copyrights, how exploitation rights are transferred and what is done if the right holders go bankrupt.
§§ 38 to 40 discuss movies, §§ 40a to g programs and data bases.

In § 41 the various exemptions start.
§ 42 (4) gives the exemption of private copies.
The question remains what may be copied. While the music industry says, only a legal source may be used, they fail in offering any legal argument.

Most voices in the literature among them *Haller*[78] and *Schmidbauer*[79] say, that everything can be a source for a legal private copy.
A middle position is used by the German legislator: Only if one knows a source is illegal, it prevents a legal private copy. *Kuckso*[80] suggests this pragmatic idea for Austria too.
Not only rules have their exemption, even exemptions have exemptions: According to Nr (5) a private copy is illegal, if it is done for the aim, to make the copy available to the public.
In most P2P networks, files are available to the public, as discussed above. Nevertheless files, which users offer other users for download are normally not made for this aim, therefore this provision (besides it difficulties, to be proved) will not affect filesharing.

A very important exemption follows in § 42a: On request single copies are allowed to be made for the own use, if no compensation is paid (in same cases with no connection to P2P compensation is even allowed.)
In every P2P network files are not downloaded automatically, the user has to send a request via the network.
It might be tempting to say this already is the request demanded by the law, but it is clearly that there has to be some kind of acceptance of such a request.
In most P2P networks, users pick a number of files or directories and allow other users to download them. This is an anticipated acceptance of the request.
In a few, other networks, each request has to be accepted separately.
Although the whole paragraph seems somehow anachronistic, it makes most downloading legal under Austrian law.

Further exemptions follow until § 60, then duration of copyright. §§ 66 et sqq deal with related rights. In § 81 are the civil remedies, in § 91 there are penal remedies. For various copyright-infringements there are jail sentences up to 6 months, 2 years if the are done commercially. § 92 subjugates used devices, excluding buildings, to destruction.
The music industry sometimes claims that if one downloads music, they do not need to spend money on the original and therefore steal the CD.
Franz Schmidbauer gave a good answer on his homepage www.i4j.at, which we would like to modify here:

78 Music on Demand (2001) 138 et sqq.
79 On various places on his website: www.i4j.at.
80 Kuckso, Geistiges Eigentum, p 1209.

As John & Ben Snyder have shown[81], the downloaders would not buy the CD, even if there was not the possibility to download it, or on the other hand, will buy the CD anyway[82]. It is therefore not defendable to make a direct connection between increase of download and decrease of CD-sales[83].

The similarity between downloading music and stealing things is therefore marginal. Intellectual property is non- rivalrous, as we mentioned several times before[84]. There is no material loss, like in § 127 StGB. If one feels the need to compare filesharing with a misdemeanour in the penal law codex, closest would be §149, "free riding". The penalties are significantly lower, 1 month jail sentence. Would the punishment be more severe, this would privilege the record industry. Do the decreasing CD- sales really need help from the criminal courts and the state attorneys[85]?

Bernd Hochwarter claims, without naming sources, that defenders of downloading say, it is some kind of customary law. In Austrian law, such rules take a long time to emerge, they have to be carried out constantly and uniform, supported by *opinio iuris*, conviction that this behaviour is legally binding[86]. Hence we are convinced at best it is emerging customary law (which will likely never come into force at all).

81 John & Ben Snyder, „Embrace file-sharing or die", p 2. John Snyder is an executive for a record industry and makes a stand for downloading music, as in his opinion this is increasing CD sales.
[82] It is easiest to argue with music, as this is the most shared type of file.
[83] Just to name a few examples: Although CD-production got cheaper and the CD is nearing its end (DVD), CDs are on average more expensive. The music industry is getting bigger, which leads to more competition. „New" music is often only a cover version. Entertainment industry includes more sections than before (e. g. videogames).
[84] E. g. the tale by Shaw about the apples and the ideas.
[85] Franz Schmidbauer, „Kampf den ‚Urheberrechtsverbrechern'", p 2.
[86] Koziol/Welser, Bürgerliches Recht Band I, p 37.

Conclusio

„The only constant is change.“ Charles Francis Xavier

There are dozens of different figures on how (or if) P2P influences record sales. Not few of them are financed by the record industries.
We do not need to quote Winston Churchill to elucidate that our trust in all these figures is limited.
What can be regarded as proven is that CD sales have been dropping lately. The reasons are manifold, just to name a few:

- While the costs of producing CDs are sinking, the sale prices are rising[87].
- The number of music producers is rising faster than the number of consumers.
- Several mainstreams have emerged.
- Music is not only on CDs available, there are more and more radio stations as well as music- based TV stations (MTV, VIVA and so on).
- The entertainment sector does not only consist of music and film anymore.

Among all these reasons, if at all, is filesharing just one of many. Some authors[88] even believe the most shared music files are those, which are bought on CD most often. Single artists even released their music on the networks, before the hit the stores.

As long as it is easy and not dangerous, users will download what they want from P2P networks. As electricity, they will follow the path of least resistance.

This entire hunt for copyright- criminals brings Karl Andreas Falschner to his famous quote:
“Imagine I would meet Christina Aguilera in L.A. these days. In respect to the time I would spend in jail, it would better to beat her up in the public than to tell her, I downloaded some tracks of her newest album.”

Time is changing, a new breed of exchange is emerging. In some respect the world is becoming one big democracy. A democracy of users. Still there are the old oligarchs, elected by

[87] As already mentioned above.
[88] Like the Snyders, as we quoted above.

consumers' behaviour, like the entertainment industry, ruling by their financial powers. Instead of adapting to these changes, they try to stop them or slow them down, by legal means.
Law, by doom, can only react.
Right now it seems to us, we are in a phase of blaming.
While the world is economically not in good shape as we were used to, the ones who get blamed for losses in the entertainment sector are the P2P networks.
Recently, as the newer providers have found their way to elude the long arm of the (mainly US American) law, the new „witches" in this hunt are the heavy users.
Time will tell, whether the people or their elected leaders will prevail, if we are moving toward a dictatorship of information and copyright or a free culture, where the community decides.

Alexander Czadilek
Daniel J Staudigl

Oslo/Vienna 2003/04

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„When you steal from one author it's plagiarism; if you steal from many, it's research." William Mizner

"Information should be free and plagiarism saves time." Hacker slogan

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