



UNIVERSITY OF GOTHENBURG
SCHOOL OF BUSINESS, ECONOMICS AND LAW

Copyright and its Place in the Information Society

Johan Engdahl

Graduate School
Master of Science in
Intellectual Capital Management
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Supervisor: Kristoffer Schollin

ABSTRACT

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This thesis addresses the ongoing downloading debate and clash between the copyright system and the technological advancements that are made in terms of means for communication that are ever so present in our society focused on communication and information sharing.

Somewhere along the way the products of our communication became carriers of economical value which have had the effect that these products have been the primary focus rather than communication itself. However, in the advent of the Internet this focus stands at a crossroad as the products of our communicative efforts now stands against the continuing advancements for new means of communication where communication instead is the main focus. Can these two different focuses live side by side or does one of them have to give in?

The inquiry in focus relates to if the copyright system is actually hindering new means for communication as some of the new technologies that facilitate easier and more effective ways to communicate are in certain specific aspects held to be illegal to make use of.

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1. Introduction

1.1 Preface

After have come across the many difficulties and uncertainties considering how different technologies and the uses of the same should be addressed and regarded from a strictly legal standpoint during the master program of Intellectual Capital Management I was very intrigued by the case concerning the Pirate Bay that was brought before the Swedish District Court of Stockholm (hereinafter termed the District Court) in 2006 as this case served as a good example of the ambiguousness that I have experienced in the ongoing illegal downloading debate. The Pirate Bay case stirred up quite a turmoil in which I found myself lost as I did not know how to best address my friend's and colleague's arguments on either side of the debate. However, when digging a little bit deeper into the issues dealt with in the debate I saw that the Pirate Bay and its followers are only a small part of the entire discussion and that there are other dimensions that are somewhat lost in the media coverage in regards to the debate.

During a lecture in the Intellectual Capital Management Master program one of our lecturers went through the legal area concerning digital rights management and unfortunately I did not stop to think why these legal rules had emerged and what these would do to my possibility to make use of works, I simply acknowledged the legal ramifications if these regulations were breached. After have acknowledged the different dimensions concerning illegal downloading, or better yet, the spirit of freedom that to a large extent still surrounds the Internet, the focus of this thesis has shifted. My initial starting point, which was to only look into the Pirate Bay and similar sites and their position from a legal perspective, have been broadened a bit and I will thus try to in part also look into the bigger issues in the debate rather than only addressing the issue of whether or not copyrighted works should be able to be exploited free of charge. I believe that the issue concerning the ways we are able to exploit works are for more important than whether or not it has a price tag connected to it. After all, copyrighted material is property and even if it is intellectual property I feel that it is quite safe to say that most people would not give away their property for free.

It should though not be forgotten that illegal downloading of copyrighted material on the Internet has become, more or less, an acceptable behavior among a considerable amount of the Swedish population during the last decade and I believe that it is important to try to determine why this is. As the behavior of you and I actually have great impact on the future and how it should look it is important to stop and think about the effects that our activities can and will have.

In the history of mankind we have experienced a countless number of advancements and developments in numerous different fields. When I started to look into the developments that have

occurred in regards to communication I found that scholars usually list the same things as being the most important and that have had the greatest impacts on our lives. We as a species started out with the development of communication through the spoken languages. Later we experienced the birth of the written language that provided a possibility for information to be shared, more or less, independent of time. Gradually we have also seen the light of day of better and more effective distribution methods. All in all these developments and advancements have provided us with effective tools for duplicating literary and artistic works as well as other related works and also distributing these works over greater geographical areas.

It is interesting to note that somewhere along the long and winding road of mankind some of the products of our communication i.e. literary and artistic works, which I hold as means of communication, became carriers of great financial value. These financial values over time have in many instances become more important than communication itself. As I look upon the present situation, with the Internet as a powerful tool for communicative efforts between people and all the questions concerning how these methods and technologies that are being used should be regarded and dealt with, I see that the interest for communication in itself in some aspects are being restored. The question that then should be answered is if whether the situation with the different interest can be resolved in a way that will allow for continuous developments of means of communications without endangering the great economic values that lies in the products of our communicative efforts. I strongly believe that the situation can be resolved and with that that the copyright system can survive and this without hindering the progress of technologies for communication and you will find out soon enough why this is my belief.

1.2 Purpose and Main Inquiry

Even as intriguing it might seem to try to analyze and dissect the District Court's verdict in the Pirate Bay case, which in some aspects provide interesting assessments of some of the key points in the ongoing illegal downloading debate, I will not go about this as I feel that it will not serve me any greater purpose, especially as the case will be brought before the Swedish Court of Appeals this summer (2010). Instead I will in part try to touch upon what consequences a standpoint like the one the District Court took in its decision against the Pirate Bay can have for our society and furthermore in part investigate the different arguments that copyright supporters have for ensuring a strong copyright system as well as the arguments that non copyright supporters have for the abolishment of the same.

In order to be able to address these issues and to be able to provide a good starting point I will start out by briefly describe the main debate before I start describing the underlying purpose and

quintessence of the different *institutions* of both the information society, with the internet at its core, and the copyright system as such. By having the historical background of the different phenomena sorted out and by understanding the purpose behind and the interests that have traditionally been regarded as in need of protection I believe that I will be far more equipped and prepared to reason and discuss the issues at hand.

Through the work in this thesis I aim to answer the following questions;

- ***Is the copyright system actually hindering the technological advancements for more efficient means of communication?***

With this question my purpose is to look into whether or not the exclusive rights provided for the creator of a work can be argued to stretch so far that technologies designed for easier communication are actually limited in use by these rights provided to the copyright holder through the copyright system.

- ***Is the copyright system on the verge of a total collapse?***

There exists a large group of people that want to see a total abolishment of the copyright system and as the respect for the copyright system is declining can the recent developments with more far reaching rights for the creators be the first steps to a collapse of the copyright system. If the general public has little or no respect for the copyright system and a large number of the population take part in something that can be regarded as civil disobedience are there any effective means for adjusting this behavior among the general public so that the copyright system can prevail?

- ***Can the copyright system prevail even though technological advancements are made that allow for easy copying and distribution of copyrighted material?***

This question is to a large extent connected to the previous question and with that in mind can the underlying interests that are sought for with the copyright system be protected as new and more effective technologies to circumvent the copyright system see the light of day?

- ***Can the developments that we see in our society, with a declining respect for copyrighted material, be changed somehow?***

What are the underlying reasons for the declining respect of the copyright system and what is needed to make this declining respect change?

- ***What consequences can the standpoint that the District Court took in its verdict in the Pirate Bay case have for our society, good or bad?***

Does the standpoint/verdict in the Pirate Bay case actually have any consequences for our society? Can the consequences only be regarded from an international perspective and then only from an international law perspective?

1.3 Method

I have in this thesis tried to use a traditional judicial method of addressing my inquiries which means that I to a large extent have examined legal text, preparatory work, case law and judicial doctrine. Due to the fact that the inquiries are more appropriate to discuss from a political and a philosophical approach this methodology have though not been the best to make use of on all levels. I want to make it clear that the issues at hand have troubled me as I feel that there is no red thread in the arguments used in the ongoing illegal downloading debate and with the wide variety of questions that are bundled together under the same *roof* of this debate. Therefore my purpose is to try to bring some order and try to make the situation somewhat clearer so that the issues that I believe are important are given its proper attention.

In short it can furthermore be stated that as the debate is still ongoing and the fact that legislative changes are considered continuously in regards to the copyright system some of the questions that I will raise are from my perspective unclear meaning that certain of the questions are in need of finding answers and solutions for. My aim is perhaps not to present final answers but rather to provide some needed clarification and hopefully interesting view points for the topics of discussion.

The main sources of information for my master thesis have come from literary sources. The largest part of this thesis is descriptive and my purpose with this is to make sure that the argumentation that follows in regards to the presented questions can be answered on the basis of the information provided. Some parts of this thesis are more descriptive than other and this especially applies for the chapter concerning copyright.

1.4 Disposition

In this following section I will briefly state the main takeouts of the descriptive parts of the thesis.

Chapters 2-5:

In these chapters a considerable part of the basis for the analysis are laid down. By presenting some of the arguments provided in the ongoing illegal downloading debate I believe that it will be easier to follow the rest of the descriptive parts as these will mainly focus on matters that are discussed in the debate. I will also try to briefly describe the history of communication which hopefully will give some

needed insight on how the products of our communication have come into focus rather than communication itself. I will also briefly describe different file sharing sites and how they have been structured and how they are structured today and this is because I want to make it clear what technologies that have been used and why these sites are being attacked by copyright holders. In order to get an understanding on how the general public feels about computing and Internet usage I will also present certain key figures in relation to this. These chapters will serve as a good background before entering into the legal area of intellectual property and then foremost the copyright system.

Chapters 6-9:

These chapters relate to the legal aspects of the debate and the questions that I raise. The understanding of these chapters is crucial in order to be able to grasp the analysis as a whole and furthermore the importance of the questions that I ask. Chapter 6 addresses intellectual property and how trademarks and patents are utilized in our time which I believe is very important to have a little bit background on in order to fully grasp the concept of that the business world is moving towards an approach to making use of an intellectual value chain thinking rather than a material value chain thinking. I believe that the brief run-through of these other intellectual properties is useful to fully grasp the concept of copyright as a commodity and property. Chapter 7 is very text heavy and provides quite a detailed picture of the copyright system and my aim with this is to convey what rights are provided to the rights holder and furthermore what possibilities the general public has in regards to exploiting works. It is necessary I think to describe it rather detailed to see what consequences the limitations that has been presented the last few years actually have. I will also provide information concerning certain legal areas that will be helpful in understanding the passage concerning the Pirate Bay case and the court's discussions.

Chapters 10 -12

Even though I feel that the Pirate Bay case is not perhaps something that represents the most important issues I still believes it is important to discuss the case as it at least to the general public is in the center of attention in the illegal downloading debate. I will therefore go through some aspects of the case in chapter 10. In the chapters that follow I will review different business models that are being used and that to a large extent make use of an intellectual value chain thinking and thus are a very important backbone to the final analysis. As piracy is discussed throughout the thesis but from quite different approaches I think it is valuable to take a closer look at a differentiation that an influential American professors does when addressing the issue of piracy.

As certain chapters are very technical I will in some instances try to provide some reflections and this because I do not want the focus of my main inquires to be lost. So instead of bundling these passages

together with the main text I will present these under separate headings termed *Personal Reflections*.

1.5 Delimitations

As the laws and regulations that govern both the copyright system and the services provided through the Internet are vast and not all relevant for what I aim to investigate in this thesis I have decided that I will only regard the issues, laws and regulations that will help me in my reasoning and I will therefore not provide an exhaustive review of e.g. the copyright system.

Even though the copyright system and with that the laws and regulations that upholds the system can look quite differently around the world the main purposes behind the system as such are rather homogenous and as the issue at hand is rather global in that it touches upon an area that is highly debated and where the main points are rather similar I feel that, even though I will only regard the Swedish legislation, that the main takeouts are not limited to apply only for Sweden and for Swedish conditions.

More concretized delimitations will, when I deem it necessary, follow in the introduction to every new chapter in the thesis.

1.6 Definitions

1.6.1 Definitions relating to technological process and Internet culture

Caching -	Cache is the term used to describe a computers rapid memory. Caching refers to actions performed by ones computer to make certain internal transfers of information become faster. ¹
Communication –	With the term communication, which is widely used in this thesis, is meant any and all means through which information of any kind can be shared between people.
Free -	In many instances when using the term <i>free</i> it is done describing a situation where users are free to make use of and exploit a work rather than traditional meaning of free as in <i>free of charge</i> .
Information -	Information includes work of literary and artistic nature and do not confine to only include e.g. news.
Leeching -	When people download files and immediately disconnect without allowing others to obtain files from their system it is to be considered as leeching.

¹ Berti, Valentino, 1999, p.297

Peer-to-peer -	Peer-to-peer is a file sharing structure in which you make use of a software program rather than a web browser to locate computers that have the file that you want. Because these computers are similar to your own, as opposed to servers, they are called peers.
Seeder -	A seeder is someone who, after have downloaded a file, keeps connected to the network so that other peers can make use of your file as well in their downloading process as opposed to being a leecher.
Server -	Is a central computer that serves other computers within a network e.g. holds the web page and the file you want to download
Swarm -	The term is used to describe computers that are connected to a network and which have all of or a portion of a file and that are in the process of sending or receiving it.
Tit-for-tat -	This means that in order to receive files, you have to also provide files
Tracker -	A central server that in the case of BitTorrent technology contain information of the whereabouts of torrents

1.6.2 Swedish Legal Acts (Author's translation)

Copyright Act -	Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk
E-Commerce Act -	Lag (2002:562) om elektronisk handel och andra informationshällets tjänster
Patent Law -	Patentlag (1967:837)
Penal Code -	Brottsbalken (1962:700)
Trademark Act -	Varumärkeslag (1960:644)

1.6.3 Terms relating to judicial terminology (Author's translation)

Aiding and abetting -	Used as equivalent to the Swedish term <i>medhjälp/medverkan</i>
Communication-	Used as equivalent to the Swedish term <i>överföring</i> in regards to making available a work in respect of the Copyright Act
Intent/Intentionally -	Used as equivalent to the Swedish term <i>uppsåt</i>
Offence -	Used as equivalent to the Swedish term <i>brott</i>
Together and in concert -	Used as equivalent to the Swedish term <i>tillsammans och i samförstånd</i>

2. A brief description of the illegal downloading debate²

In this chapter I do not aim to provide an exhaustive picture on all arguments provided but merely present some arguments provided by the *two sides* of the debate and that they make use of in an attempt to justify some of their actions. As the different sides to the debate are not that well defined I will make an effort to point out the different sides to the debate and with that I will also try to make a distinction between the parties to one side as some have been bundled together even though they do not advocate the same things.

2.1 The different sides in the debate

During the process of this master thesis it has become clear that there are a lot of misunderstandings and questions discussed under somewhat wrong pretenses which creates a situation where several different questions, that do not necessarily relate to each other, are tangled together into one and the same topic. An example of this is that the Free Software movement, to some extent, is bundled together with the supporters of file sharing that, more or less, want different things. The reason for why they are bundled together is probably because they both advocate their own position by making use of the word free. The word free can evidently have a lot of different meanings which though have not been acknowledged properly. Before continuing with presenting some of the arguments made in the debate I wish to make the situation a bit clearer.

2.1.1 The supporters of file sharing (Pirate Bay supporters)

The supporters of file sharing and thus in general supporters of the Pirate Bay do not really belong in the free atmosphere of the Internet dialogue as the people behind it and a large part of the followers talk about free as meaning free of charge which is not what the Free Software movement is all about. There is a great difference between wanting something without paying for it, as the supporters of file sharing want, and to be able to exploit a work freely, as the Free Software movement want. However, some aspects of file sharing and the services provided through these websites also relate to the core of the Free Software movement which perhaps is why they often get mixed together as all wanting the same thing.

2.1.2 The supporters of the Free Software movement

The supporters of the Free Software movement want to be able to exploit works more freely and with that also be able to build upon existing works without being restricted by the exclusive rights

² Even though the term *file sharing* certainly also can be used to describe this specific debate I believe that the term downloading is more suitable as this is the term used by the general public. However, I will term the supporters of illegal downloading as supporters of file sharing which perhaps make the situation rather confusing but as file sharing is a better description to use for the obtaining of information as this is mainly done through peer-to-peer technology, which structure better fits with the notion of sharing I will use this term when describing the supporters.

provided through the copyright system to the creators of works. The Free Software movement charge for what they create but do not make use of all the proprietary tools that are available in order to hinder someone from exploiting the works i.e. the software code, other than making sure that no one else will be able to make the software code provided into proprietary software code. The Open Source movement does, to some extent, also belong to this category of supporters. However, the Free Software movement's front figure Richard Stallman explains that there is a great difference between these two movements as well, even though they in some aspects fight for the same thing. It is a matter of philosophical differences which makes Stallman wanting these two movements to not be confused with one another.³ However, in conclusion the Free Software movement is about the freedom to utilize works rather than wanting to utilize works free of charge, which file sharing supporters, to a larger extent, put emphasis on.

2.1.3 The supporters of the copyright system

The supporters of the copyright system are to a large extent communicated to be only large corporations and companies with great financial interests in having wide spread rights provided for creators of works. It is of course so that not all supporters of the copyright system want the same thing but for the sake of simplicity I will not go further into the different standpoints communicated on the behalf of this group. In conclusion it should be noted that this group want a copyright system that focus on the rights provided for creators as the system then provides them with even more legal reassurance of their investments in the creative industries.

2.1.4 Summarization of the different camps in the debate

As have been presented the illegal downloading debate does not consist of two well defined sides as one might have thought from coverage in media. However, despite better knowledge, I will also bundle the different camps within the two different sides of the debate together and it should be duly noted that I have tried to simplify the statements as either belonging to the supporters of the copyright system or to the non-supporters of the same. Unfortunately, as you now hopefully recognize, this does not convey an entirely accurate picture as some of the arguments made against the copyright system are actually given by firm copyright supporters but who feel that the system should change for various reasons. As the thesis is not concentrating on to clarify the different sides to the debate but rather to concentrate on some of the main issues in the debate instead I do not see that this will create a major difficulty when later analyzing and discussing the issues. It should be further noted that the debate is ongoing on many different levels in our society and thus also something that is being discussed on a high political level which directly also influences legislators and thus the law.

³ Stallman, Richard M, 2002, p.55-60

2.2 Some arguments provided by the *two sides in the debate*

The Pirate Bay case became the prime subject of discussions in the struggle between people looking for a *free* world on the internet and those who want to see to it that the internet is not left without any restrictions. The main judicial focus and as such the main debate concerned the copyright system which tries to provide effective measures to control and stop the large amount of copyright infringements that take place on the Internet. The legal systems have had a hard time keeping up with effective measures to handle new technologies, in the perspective of keeping the old balance prior to the wide spread of the Internet, which leaves the legal system with quite toothless means of preventing certain actions in an effective manner. As a result of this the scope of the rights provided, through the copyright system, have become more extensive in order to try to remedy the situation which is not something that is left without notice for the followers of the Pirate Bay.⁴

In general it can be said that the ones that support the Pirate Bay are all for a free movement of information on the Internet and by free in the context of Pirate Bay supports is meant free of charge. The supporters of the Pirate Bay convey that they are against what they see as greedy corporations and as such do not feel that they are creating any harm towards artists or creators as such. Some of these supporters do not even agree with the system of providing creators of works with exclusive rights to exploit these as they feel that whatever is being created, in a cultural sense, belongs to all mankind as the creations somehow stem from the collective collection of cognition.⁵

However, many of the copyright supporters, especially in Europe, recognizes what can be described as an inherent right for the creator in his/her work which includes rights for the creator to decide how and where his/her work should be made available and furthermore in what quality. Non-supporters do not necessarily, as mentioned, acknowledge this inherent right but rather see that the deal that politicians have made under the pretenses of securing a cultural growth have lead to a system that focuses on copyright holder's interest rather than seeing to the public's interest i.e. ensuring that works of cultural value are distributed to the general public together with substantial opportunities to exploit the works.⁶

As certain uses of technologies are to be regarded as illegal the non-supporters feel that the law and thus the copyright system is hindering effective means and ways of communication. Furthermore, as

⁴ Lessig, Lawrence, 2005, p.136-173 (Even though Lessig discusses conditions mainly applicable in the United States of America certain aspects of his discussion concerning the increasing scope of the rights for copyright holders provided through the copyright system are also applicable in Sweden) The notion that the increased rights for the copyright holder is a result of trying to remedy a somewhat stressing situation for the rights holders is my personal reflection.

⁵ Copy Me, Piratbyrån, 2005, p.64

⁶ Lessig, Lawrence, 2005, p.133-173

certain structures of e.g. file-sharing sites are not actually providing any copyrighted material as no material is being stored on the servers the non-supporters perceive the active persecution of their activities as somewhat unjust as, in their view, companies providing e.g. search engines then also should be held countable.

It is furthermore conveyed by the followers of the Pirate Bay that the legislators and so forth do not understand the culture that resides in the Internet as such and furthermore that there is a lack of understanding of how the different technologies work which creates a feeling of frustration as these who lack understanding will be the ones that judge their activities and furthermore determine what they can and cannot do on the communication platform that is the Internet.

As the debate often boils down to the issue concerning remuneration reference is made by the non-supporters of the copyright system to that free culture on the Internet does not necessarily mean that the generating of revenues cannot be met, which can be said to be the general perception when something is described as being free. The Free Software movement generates money as they charge for distribution of content but on the other hand do not limit the possibility to exploit the content as such which to a large extent is the case with content as e.g. music and movies.⁷ The copyright supporters however tries to make a point by trying to convince the other side that without the copyright system creators of works, that all agree are important for our society's progression in a cultural aspect, would be left without any compensation for their work, which in the long run would lead to that no new work would be created as no one could actually make a living from it as the incentives would be few if any.⁸

The non-supporters of the copyright system does however see this situation rather differently as they make a case stating that copyright is only benefitting large corporations and companies as the large revenues created by the rights provided through the copyright system ends up with these companies and corporations rather than with artists and creators.⁹ The non-supporters to some extent do not think that artists and creators should make money on their works in digital format but instead try to make money on selling merchandise and giving concerts. Some even believe that money should not have anything to do with creative efforts and are not convinced that cultural expression would die just because artists and creators could not make money on their efforts on the basis of the copyright system.¹⁰

⁷ Stallman, Richard M, 2002, p.18-22

⁸ <http://www.antipiratbyran.com>

⁹ Copy Me, Piratbyrån, 2005, p.18-19

¹⁰ Copy Me, Piratbyrån, 2005, p.40-41

The large industries that make use of portfolios of copyrights can more or less all be said to believe that they provide good opportunities for artists and creators to reach out to an audience which they otherwise would never reach without their help. This view is of course not shared by the non-supporters as they try to convey that the Internet as such and the illegal downloading of e.g. music have greater possibilities to reach out to a greater audience than a physical CD ever can do and that they actually have promoted artists through their downloading and wide spread of content which in the end have generated a lot of money which would have not been generated by only making use of the traditional distribution channels.¹¹

The non-supporters also strongly believe that the copyright system somewhere along the way have become something else than an institution that enable cultural growth in the society through providing possibilities for the society to be able to exploit works of cultural interest. As the scope of protection for works have increased the possibilities to make use of works have been limited, something that is regarded as nothing else than as a result of greedy corporations putting pressure on the political arena which in their turn make sure to broaden the scope on the legislative arena.¹²

2.3 Personal reflections

It should be noted that whatever argument provided there are laws that govern certain of the aspects presented which means that certain actions taken are, whether or not one believes them to be good or bad, actually illegal. It is one thing to discuss an issue that one feels should be changed for the better and then make use of the political arena to try and make the changes and another thing to commit a crime proving a point. Of course committing a crime on the grounds that there needs to be a change i.e. civil obedience can be regarded as a political tool to be used to shed light upon a situation but the question is whether the situation concerning file sharing are acts of civil obedience or something else.

3. Communication

As we live in the information society and as the Internet has come to play a major role in our daily lives I feel that it is important to present some background on how communication has evolved during the lifetime of humankind as well as how the Internet came to life and what kind of culture permeated the Internet at that time. As the Internet is such a complicated tool in respect to the different technologies that governs it I also feel that it is important to briefly touch upon and shed some light on these as I believe that this will broaden my personal understanding of the entity that is

¹¹ Copy Me, 2005, p.40-41

¹² Lessig, Lawrence, 2004, p.139-147

the Internet. I will also in this chapter provide information concerning file sharing and the different technologies that enable file sharing. I feel that it is very important to have at least some knowledge on what file sharing really is and how the technologies that enable the file sharing work in order to credibly be able to discuss issues in relation to these activities.

3.1 A short glimpse at the history of communication

The communication age and information sharing world we live in is, according to communications scholars, the result of a few critical developments in the history of man.¹³ The Canadian media and communications professor Harold Innis (1894-1952) declared that one could identify three phases in the history of man that stands out in regards to communication.¹⁴

The first phase was the birth of the spoken language, which enabled individuals to share information and communicate with each other. The second phase was the birth of the printed language which made it possible for people to share information with others, independent of time. The third phase was the birth of the electronic language which allowed people to share information over wider geographical areas.¹⁵ As a result of the last decades of developments of means for communication, scholars suggest that a new era should be added to Innis' mapping, a fourth phase consisting of the birth of the digital language, but first thing first.¹⁶

For approximately 200 000 years ago man developed the spoken language which enabled people to share information and communicate with each other in an *effective* manner. The creation of the spoken language is the basis for all communication but communication was further advanced through the knowledge and art of writing.¹⁷

Writing as a means for communication did not come to life until around 3000 years before Christ. The knowledge of writing has long been a tool of power and the skill was not spread to the masses until much later but never the less provided a means for storing information for following generations and for people not present at the exact moment of the uttering or writing of whatever information that was communicated. The skill of writing enabled a situation that allowed for communication between people to take place even though situated far apart from each other.¹⁸

Gutenberg's printing technology made it simpler for people to access information as written texts now could be copied more efficiently and thus be spread to larger audiences. Several other means of

¹³ Sturmark & Brandén, 2001, p.19

¹⁴ Innis, Harold, 1972, p.7-9

¹⁵ Sturmark & Brandén, 2001, p.19-20

¹⁶ <http://www.uta.fi>

¹⁷ Sturmark & Brandén, 2001, p.19

¹⁸ Sturmark & Brandén, 2001, p.19

communication have come to life after Gutenberg's invention such as e.g. the radio and the telephone which also have facilitated easier ways for communication and sharing of information. In our time we have witnessed the birth of a very important means for communication and furthermore a tool for wide sharing of information in the Internet.¹⁹

The methods and technologies for communication have, along their developments, also created institutions in various legal systems in which the outcome, or product to use a better description, of the different means of communication have been awarded protection. The author of a text or a book and the creator of an artistic work are provided with exclusive rights to exploit these literary and artistic works financially through the copyright system (see chapter 7). The products that come from making use of the means of communication have become carriers of economic value.

As the development and advancements of communicative tools have kept a very high pace we can nowadays experience a situation where we are provided with very effective means of communication and information sharing. This fact does in some aspects challenge some of the systems that provide protection for works of communication as we are also provided with effective means to make use of works without respecting the rights provided for the rights holder given by the systems which leads to that the institutions that protect the carriers of economic values e.g. the copyright system are diluted.

3.2 A short description of the history of the internet

The Internet is the creation of the American Defense Advanced Research Project Agency (DARPA) which wanted to create a way for communication that would be operational even if the telephone lines would be disabled. The aim was to create a system where no computer was dependant on another computer, meaning that the loss of a single computer could not harm the function and operational status of the entire system. Through this project within DARPA a considerable amount of the network technologies that we today make use of on our computers were created and the project gave life to two different networks, the ARPA internet and Milnet. The ARPA internet is the network that we know as the Internet. The Internet was primarily first used for sending electronic mail and for allowing communication between different people on different platforms.²⁰

¹⁹ Sturmakr & Brandén, 2001, p.19

²⁰ Lundqvist, H, 1997, p. 274-275

3.3 Technologies on the Internet - enabling faster and more effective means for communication and information sharing

In order to be able to grasp the structure of the Internet and the World Wide Web I believe it is important to be presented with a brief overview of certain specific technologies that have great impact on the day-to-day transactions of information. The following technologies described aims to provide a general understanding of how these work and how they can be utilized. There are of course a great amount of other technologies that are equally important but here follows the selection that I have chosen.

3.3.1 TCI/IP

The technology behind the ways we send and receive messages today is known as TCI/IP which stands for Transmission Control Protocol/Internet Protocol. This method made it possible to transfer messages between the computers in the network Internet by dividing a message into several smaller parts that each has the instructions to choose the most appropriate route to take, in regards to traffic, and also to make sure to be delivered to its designated receiver without recurring any damage. When the receiver collects all the small parts of the original message these are all put together forming the original message that had been sent.²¹

3.3.2 HTML – The enabler of the Internet as we know it

The internet was originally not that user friendly in regards to the wider masses as the system was rather complicated to use. The structure with websites and homepages that we take for granted today and which we nowadays think of when we talk about the Internet were the result of Tim Berners-Lee attempt to make it easier to present and make available research results on the Internet. Berners-Lee came up with the idea to combine the internet with hypertext. Hypertext can be written by making use of a marking language called HyperText Markup Language (HTML). With the HTML language one could easily map sources to an exact position on the Internet. The HTML could therefore be said to be the enabler of the World Wide Web²² which also is the name that Berners-Lee gave it.²³

3.3.3 File sharing

There exist a lot of different technologies that enable safe and fast downloading of information. In the following section I will start out by giving a description of two different types of networks for information sharing. After have given a brief description I will provide a few examples of different

²¹ <http://www.uta.fi>

²² It is often perceived that the Internet is the World Wide Web but this is not all true as the World Wide Web is only a small part of the Internet as such. However, in order to not create any confusion in the following chapters I will despite of this fact make use of the term Internet when also describing the World Wide Web.

²³ <http://www.uta.fi>

types of protocols²⁴ for downloading as well as providing a more detailed description of the protocol and program BitTorrent.

3.3.3.1 Client/Server network

The client/server network can be said to have been a construction that came to life in the advent of the Internet and the World Wide Web and where mainframe computing was instead shifted to the use of personal computers, PCs. A client/server network works in such a way that a computer, a server, works as a central to many PCs, clients, who are connected to the server. The server stores information that the clients can download information from onto their own PCs. This construction requires that the server is rather powerful in order for the network to be operational in an efficient manner. The client connects to a server and downloads the data that it wants and then disconnects from the server. The downside to a client/server network is that the server might become overloaded with requests from clients wanting to download the same file, making the speed of the downloading very slow.²⁵

3.3.3.2 Peer-to-peer network

The idea behind peer-to-peer technology is to share information through a network of computers instead of relying upon a single server. Peer-to-peer technology is mainly used for sharing information such as movies and music but can be used for sharing of information of any kind. Peer-to-peer technology can rather simplified be described as allowing for two or more computers to share information and files on the Internet.²⁶

In a peer-to-peer network one can request or provide information as well as do both. The term client is used for an individual that requests information and the term server is used for an individual that provides information. A servent is an individual that simultaneously requests and provides information. Peer-to-peer technology can be used for a number of different kinds of networks. There are centralized, decentralized and controlled decentralized networks. Each network has different ways for finding the information or files that the individuals are looking for. BitTorrent, Gnutella and FastTrack/Kazaa are a few examples of protocols that utilize different networks. In addition to these different file-sharing network protocols there are also a number of different file-sharing services which are programs or software applications that has been designed to execute a predetermined task. LimeWire and BitTorrent are two examples of file-sharing technologies but there exist a large number of other file-sharing services as well.²⁷

²⁴ A protocol can be described as a certain set of given rules that are followed. (Govanius, Gary, 2000, p.23)

²⁵ Minar & Hedlund, 2001, p.3-15

²⁶ Gordon, Sherri Mabry, 2005, p.7-9

²⁷ Gordon, Sherri Mabry, 2005, p.18-23

The file sharing technologies can easily be frowned upon by copyright supporters as they enable easier illegal file sharing but it is important to remember that many of these technologies also have created easier and faster ways for legal communication of information. As the technologies can be used for both legal and illegal activities one should not be so fast to draw conclusions considering that in many instances it is up to the individual user of the Internet how the technologies actually are utilized.

3.3.4 File sharing protocols

As the exchanging of information is one of the main purposes with the Internet it is not hard to understand the existence of so many and different ways for downloading of information as well as technologies that allows for this. There are a number of different technologies that are used for enabling sharing of information and there are different types of information that can be shared. The meaning of the word information has in this thesis a very broad meaning and in regards to the Internet information can come in the form of e.g. text on a website, files containing movies or books to just mention a few.

When speaking about file sharing and downloading the general perception, and the one that I refer to in this thesis, is that a user on the internet can make a file available for others to edit or download that specific file to his/her own computer which then can be utilized whenever the user wish to do so. There are different protocols used for downloading of a file and that are much dependent on the type of file that one wish to share and the size of the file itself. The following protocols and systems are often used to share information on the Internet;

- Apple Filing Protocol (AFP): Is a system designed to make possible file sharing over networks.²⁸
- File Transfer Protocol (FTP): Is a protocol for file sharing over the Internet. FTP is a protocol often used to upload web pages on servers by website owners.²⁹
- Server Message Block (SMB): Is a protocol that enables communications between computers in a computer network for sharing files and printers.³⁰

²⁸ <http://developer.apple.com>

²⁹ <http://windows.microsoft.com>

³⁰ <http://www.techterms.com>

- HyperText Transfer Protocol (HTTP): Is the communications protocol that is used to transfer web pages on the information network World Wide Web.³¹
- Network File System (NFS): Is a file system that allows for computers to allocate information stored on hard drives on other computers on the same principle as if they are all a part of the same computer network and this independent of which kind of computer.³²
- BitTorrent: Is a file transfer protocol that is very effective when downloading large and popular files.³³

3.3.4.1 A closer look at BitTorrent

The main purpose with the creation of the BitTorrent protocol made by Bram Cohen in 2001 was to create something that would make file sharing of large and popular files faster. Cohen developed the BitTorrent protocol as well as a program, also named BitTorrent, to go with it.³⁴ The program works in such a way that it identifies the file that you would like to upload and transforms it into a torrent, which means that the original file is divided into several equally sized smaller parts. For each and every one of these smaller parts a number is created by the program. The number consists of a control figure which is added to the torrent file and the torrent is then uploaded to a tracker.³⁵

The BitTorrent protocol does not in itself contain or provide any search tool for torrents so users that wish to download a torrent have to make use of a torrent search engine or a torrent index. There are search engines that in themselves are trackers and there are those that link to tracker servers from which the torrents can be collected from. The torrent contains information of whom has the file i.e. seeders and also information on whom are also downloading the torrent at the present time i.e. peers. When an individual wants to download a torrent the BitTorrent program collects the mentioned information from the tracker and simultaneously sends out multiple requests for random pieces of the torrent to peers and seeders in a swarm³⁶ which enables a downloading of different pieces from different users within the swarm. To make the protocol and program even more effective a number of different principles are used for different pieces of the file sought for.³⁷

³¹ Berners-Lee, Fielding, Frystyk, May 1996, Chapter 1

³² Govanis, Gary, 2000, p. 145-146, Berti, Valentino, 1999, p. 193-194

³³ <http://www.bittorrent.com>

³⁴ <http://www.wired.com>

³⁵ Cohen, Bram, May 22 2003, p.2

³⁶ Other BitTorrent users that also would like to download or upload a specific torrent (see 1.7)

³⁷ <http://www.howstuffworks.com>

With BitTorrent no single server is overloaded which allows for more speed as the total load is spread over a number of different computers. The downside to BitTorrent is that it is dependent on that people actually provide an opportunity for others to also download by distributing the file that has been downloaded, a principle commonly known as tit-for-tat.³⁸

To put it simple it can be said that BitTorrent provides a protocol and program that contains a map of where the different pieces of a specific puzzle can be collected as well as where they go in the puzzle. By not making use of only one source for an entire file BitTorrent divide the file so that one will not be dependant on one single server. The more people that are downloading and uploading torrents the faster the downloading and uploading process is. Today there exist a lot of different torrent protocols and programs of which BitTorrent is merely one. Many of these protocols and programs are easily downloadable on the internet and furthermore often free of charge.

3.4 Internet Culture

Manuel Castell, in his book *The Internet Galaxy*, presents interesting input on the formation of the cultural structure of the Internet. Castell divides the cultural structure into four different layers, the techno-meritocratic culture, the hacker culture, the virtual communitarian culture and the entrepreneurial culture. These four layers of different cultures are what all together contribute to the freedom ideology that can be said to be embedded in the world of the Internet.³⁹

The techno-meritocratic culture comes from the sphere of academia which is greatly affected and permeated by the philosophy of spreading knowledge freely as this will benefit society. In this culture it is very important to get recognized by one's peers which are mainly done through the publishing of individual work in the context of the development of the Internet as such.⁴⁰

The hacker culture plays a central role in the development of the Internet, according to Castell, as these provide new and progressing technologies through culture-internal exchange of information which is shared freely. Furthermore the hacker culture is the culture that makes sure that the knowledge stemming from the techno-meritocratic culture can reach and take off in entrepreneurial attempts.⁴¹

The hacker culture has contributed with the technological backbone of the Internet, and still is, whilst the virtual communitarian culture have made an impact on shaping the social layer of the Internet. Not long after the introduction of the Internet people sought for social interaction in

³⁸ <http://www.howstuffworks.com>

³⁹ Castells, Manuel, 2001, p.36-38

⁴⁰ Castells, Manuel, 2001, p.39-40

⁴¹ Castells, Manuel, 2001, p.41-52

different communities and the culture that had been primarily in focus in the computing world before, which according to Castell was an extension of the 1970's counterculture, lost its foothold. The social world of the Internet has become as varied as the world in itself. According to Castell, the Internet communities however have two common features which are, free communication and the freedom to find your own route on the Internet and if there is not a route that is optimal for ones use, one can create an own route.⁴²

The wide spread of the Internet and its applications was managed and executed by the Internet entrepreneurs which made the Internet to take form from a perspective of commercial interests and the entrepreneurial layer of the Internet is all about money as money, on this layer, is used as a measure of success. The entrepreneurs have created a new economy centered on the creation of technological ideas that can be utilized in the world of the Internet rather than in our physical world.⁴³

By contemplating on this four layer structure of the Internet it is quite evident that a large part of the Internet culture as such stems, according to Castell, around the notion that everything should be free even though not necessarily free of charge. Freedom of communication and freedom of speech are essential parts of the initial stages of the development of the Internet as well as of the cultures that are permeating the Internet.⁴⁴ It is not hard to see the large conflict when phenomena that traditionally have not been distributed freely takes a hold on the Internet and are not distributed freely on the Internet either. However, even if one would like to try to keep the Internet and the initial cultural emphasis alive a lot has happened since the initial launch of the Internet. As traditional institutions such as e.g. the copyright system now have found even greater space on the Internet it is not hard to see that there is great discrepancy between these institutions and the sought for free culture.

3.5 Personal reflections

The Internet has provided the society with a great tool for communication and also a great means for exchanging of information in a number of different ways. The possibilities that the Internet provides can seem endless and the fast technological developments give us better and more efficient ways for communication on a regular basis. Even though the opportunities are great and the means make it

⁴² Castells, Manuel, 2001, p.52-55

⁴³ Castells, Manuel, 2001, p.55-61

⁴⁴ The claim that the Internet was created in an atmosphere of freedom for everyone is not something that all agree upon. Lundblad in his book *Teknotopier – Den nya tekniken och rättens framtid* expresses that he believes that this notion is wrong as the Internet was created by an elite that worked under what Lundblad calls *rough consensus*. However, as no one could really foresee the impact of the Internet it is hard to state what permeated the construction as such, which Lundblad also makes evident. (See Lundblad, Nicklas, 2000, p.36)

possible to download an entire movie in only minutes not all exchanging of information and communication on the Internet are legal. Just because we are provided with technological measures that enable certain actions does not mean that all uses of these measures are legal.

The endless possibilities that we are provided with makes it hard for legislators to keep up with creating effective rules and regulations that can see to it that some of the institutions that traditionally have been protected in a more or less effective manner are given the same protection that it traditionally have been provided with. The fast and vast technological advancements that to a large extent are available for ordinary people has in some aspects had the effect that some laws are more or less toothless in respect to protecting specific interests and products of economic value in our societies in regards to activities that occur on the internet.

I think it is fairly safe to say that the most valuable commodity in our day and age is information. The value of information can be said to be reflected in our concentration around the phenomena of information sharing on the Internet. Information is the basis for almost all transactions that are made today which means that the internet is a very powerful tool in that it is a platform for communication of information. The people and the companies that supply the tools for communication have become the most powerful and influential people in our day and age.

4. The Pirate Bay site and other file sharing sites

There exist various different websites on the Internet that provide different kind of services. The websites that will be presented below are only a few examples of sites that somehow enable people to download material of whatever sort from the Internet. The descriptions provided does not aim to give an exhaustive picture of the websites but merely give an idea of how different services are structured and also how they have been regarded from a legal perspective. The section concerning the Pirate Bay is a bit more detailed and this is because this is an actual case that has been brought before the Swedish legal system and thus is perhaps most interesting in terms of the boundaries of this thesis.

4.1 Napster

Napster is the name of the program and of the company that both were created by Shawn Fanning in 1999. Fanning wanted to make it easier to find music files on the Internet and for this purpose he created a program that allowed for searching of music files that were available on the computers of the ones that made use of his Napster program.⁴⁵ The listing was made possible through a central

⁴⁵ Vaidhyathan, Siva, 2001, p.179, <http://www.howstuffworks.com>

server which in itself did not store any material but instead had information regarding where sought for material was stored.⁴⁶ The services provided through Napster created a lot of fuss as none of the rights holders to the songs that were distributed using the Napster program were compensated. All traffic that occurred was free of charge which meant that one could obtain songs and music albums without paying for them. Napster was initially sued for copyright infringement by a famous rock band and later encountered several lawsuits from major companies within the music industry which ultimately led to that the services provided by Napster was shut down in 2001.⁴⁷

4.1.1 How Napster was structured

The digital format of MPEG-1 Layer 3, commonly known as MP3, makes it possible to compact quite large files into smaller files and this without any major loss in quality. This format has made it possible for easier sharing of e.g. music files over the Internet as the files do not require as much time to download and upload due to their small size. In the advent of this format the Napster program was created. The program made it possible for the users of the same to share music files, MP3 files, with each other which made it easier to locate songs and music albums than instead having to randomly search for them on the Internet. The technology that was used for Napster and the services that were provided through the company Napster was a centralized peer-to-peer network. The network consisted of a central server that kept track of all shared files in the network i.e. that were stored on each user's/peer's computer. The server in itself did not contain any of the files and instead merely showed an index of the files that could be found within the network. When someone wanted to download a file through Napster the request from a client was sent to the central server which revealed to the client the matches for the specific request. When the client decided what file that was to be downloaded from the displayed matches the client downloaded the file directly from the person in the network that had the file i.e. from the peer.⁴⁸

4.1.2 How Napster dealt with copyrighted material

Through the Napster network anyone that made use of the Napster protocol could download files that were copyrighted and as such the services provided a means for committing copyright infringement. As a result of this and the wide use of Napster it eventually led to that Napster became subject to several lawsuits which eventually led to that Napster filed for bankruptcy. Napster has been re-launched under the ownership of a software company named Roxio and the services provided under the name Napster are now legal and supported by the music industry.

⁴⁶ Oram, Andy (Editor), 2001, p.28-29

⁴⁷ <http://www.howstuffworks.com>, Vaidhyanathan, Siva, 2001, p.179

⁴⁸ Gordon, Sherri Mabry, 2005, p.15-21

Napster now makes use of a digital music distribution system that holds certain rights to a number of music companies' copyrighted material.⁴⁹

4.2 Gnutella

In the late 1999 Gnutella was developed by a company named Nullsoft, which is a subsidiary to AOL-Time-Warner. Gnutella is a file sharing protocol and thus the Gnutella network is made accessible by making use of a software program in connection to the Gnutella protocol. There exist a number of different compatible software programs for Gnutella and one of these is LimeWire. Even though Gnutella was shut down by AOL-Time-Warner shortly after its release the code for the protocol had already been distributed which lead to that the protocol as such was not able to be stopped.⁵⁰

4.2.1 How Gnutella is structured

The Gnutella protocol does not make use of a server, making it a decentralized peer-to-peer network. The decentralized structure of the protocol makes it very hard to identify who has downloaded and uploaded what material. Every peer to the network has the same status and every peer is a server i.e. both a server and a client. It is necessary, in order to be able to download using Gnutella, to have the protocol installed on ones computer. The decentralized structure i.e. by not having a central server makes it possible for the network to be very large. The downside is that without a central server searches for a specific file can take a considerable amount of time as a lot of peers' computers could have to be searched in order to allocate a stored file.⁵¹

4.2.2 How Gnutella deals with copyright material

As the Gnutella protocol does not make use of any central server it has been hard to somehow shut down the system as this could only be done through shutting down all computers that are a part of the network. The material that is distributed through the network comprise of copyrighted as well as non-copyrighted material. So even though the Gnutella system has been used for copyright infringement no one has been brought before justice and this probably because there is no company or organization that can be sued and as it is hard to identify individuals making use of the system no individual has neither been sued on the grounds of making use of the system.⁵²

4.3 FastTrack/Kazaa

Napster was limited to include music files in its distribution but FastTrack/Kazaa that came to life after Napster was shut down allows for sharing of nearly all digital material. The software Kazaa and its FastTrack protocol were created by Niklas Zennström and Janus Friis in 2001. In its beginning one

⁴⁹ Gordon, Sherri Mabry, 2005, p.17

⁵⁰ Oram, Andy (Editor), 2001, p.95, Gordon, Sherri Mabry, 2005, p.21 and 25

⁵¹ Oram, Andy (Editor), 2001, p.96-100, Gordon, Sherri Mabry, 2005, p.21

⁵² Oram, Andy (Editor), 2001, p.117-119, <http://www.howstuffworks.com>,

were able to, free of charge, download all files available in the network. However, due to legal issues and court cases the system as such has now changed so that a difference is made between what they call blue and gold files. Gold files are material that are overseen by companies holding the rights to the material and for which users can pay a fee to be able to download. The downloading of gold files is done by making use of another peer-to-peer network called Altnet. Blue files contain material that are controlled by the Kazaa users themselves and in order to make use of the material usually a license is signed in which one undertake to give credit to the creator of the material.⁵³

4.3.1 How FastTrack/Kazaa is structured

The FastTrack protocol can be described as a controlled decentralized peer-to-peer network i.e. a mix of a centralized and a decentralized network. The protocol makes use of a technique in which it chooses a couple of *super peers*⁵⁴ which can be described as specific selected powerful computers within the network. A user does not know if he/she has been selected as a super peer. The ones that are not selected as super peers are simply ordinary peers. Some of the super peer's computer capabilities are made use of in the network as a whole to make the network run smoother and faster e.g. indexes are stored on these computers which show where requested files are stored.⁵⁵

When the software Kazaa is installed on ones computer the software as such contains information of super peers. When making use of the software the computers connects to a central server and from there identifies which super peers that are active. When a user of the software wants to obtain or upload a specific file and when this request is made the request is then channeled through the system by making use of the super peers. These super peers start to communicate with other super peers in the network and which channels the request to ordinary peers with the objective to carry out the request. When the requested file is found it is transferred directly from the peer that has it to the one that has requested it and this without having to go through the network of all the computers that have channeled the request.⁵⁶

4.3.2 How FastTrack/Kazaa deal with copyrighted material

Through making use of the Kazaa software and the FastTrack protocol one can obtain both material that are copyrighted and material that is not. As such the system makes it possible to commit copyright infringement. Kazaa was in a dispute with an authors' collective organization named Buma/Stemra in the Netherlands regarding licensing and the organization furthermore claimed that

⁵³ <http://www.howstuffworks.com>, Gordon, Sherri Mabry, p. 25-26

⁵⁴ These super peers are often termed nodes in relation to FastTrack/Kazaa but for the sake of simplicity among all the technical terms I have chosen to term these nodes super peers, which can be said to be a fair description of the nodes.

⁵⁵ <http://www.howstuffworks.com>, Gordon, Sherri Mabry, p. 25-26

⁵⁶ <http://www.howstuffworks.com>

Kazaa had infringed upon their members copyrights in the Netherlands. Kazaa was found by the Amsterdam Court of Justice to be in breach of copyright law as its software and protocol made it possible for users of the same to download copyrighted material. However, this decision was revised by the Amsterdam Court of Appeals on the grounds that Kazaa could not control what files was exchanged within the network. This revision was later affirmed by the Supreme Court.⁵⁷

In a later case in Australia instigated by Universal Music Australia a number of companies and individuals connected to the services provided by Kazaa software was brought before justice for promoting, facilitating and authorizing illegal downloading of music files protected by copyright through the network Kazaa. The case was eventually settled by the parties which included that Kazaa paid damages of US \$100 million and to include a filter for copyrighted material in the services, which was also decided by the court as an injunction.⁵⁸ The filter can be said to be the distinction that is made between blue and gold files which have been described above.

4.4 The Pirate Bay

The Pirate Bay site and the people behind it have during the lifetime of the site created quite a debate in regards to whether or not their providing of a torrent index should be regarded as illegal. The attitude of the owners have also created quite an upset amongst lawyers and companies that have tried to make them cease and desist with their index listing as the letters and claims from lawyers and companies have been published on the Pirate Bay website as well as being publically ridiculed on the website.

4.4.1 The structure of the Pirate Bay

The Pirate Bay site is structured in such a way that it provides the visitors to the site with an extensive index of different torrents. The look and feel of the website is much like a small electronic library index where one can search for different torrents. Many of the indexed torrents concern files that are protected by copyright but this does not necessarily mean that every torrent concerns copyrighted material. One can find torrents to music, movies, computer games, books and much more.⁵⁹ Through the providing of the torrent index a user is equipped with a search engine for whatever files the visitor would like to download. When a visitor/user of the site has found what he/she is looking for he/she is given the possibility to start downloading the torrent which contains information where the different parts of the original file can be found. At a first glance one might draw the conclusion that the original file actually exists on the site as such as the torrents in the

⁵⁷ Strowel, A, 2009, p.24-25, No.KG 01/2264 OdC (29 November 2001), No.1370/01 (28 March 2002), No.C02/186HR (19 December 2003)

⁵⁸ Strowel, A, 2009, p.28-29

⁵⁹ B 13301-06 p.51-52

index often have the same name as the original file (movie titles, song and album titles etc.), but on the contrary, the Pirate Bay site and the organization behind it does not store any copyrighted material on their servers or in their database. What the Pirate Bay provides is merely different maps of where different pieces of original files can be found and collected.⁶⁰

According to the District Court in the recent case against the Pirate Bay it is established that the Pirate Bay, which makes use of BitTorrent technology, provides a website where it is possible for users/visitors to the site to upload and store torrents, make use of the database of the website to search for torrents and to download these. The website also provides a tracker which enables users, whom wish to share files, to come in contact with each other in order to be able to share files. Through the tracker function available on the website a peer-to-peer network was created. A peer-to-peer network makes it possible for an indefinite number of users to be provided with the original file that a torrent refers to.⁶¹

4.4.2 How the Pirate Bay deal with copyrighted material

Even though the owners of the Pirate Bay before the District Court tried to convey that their objective never was to break the law and that they never have known what their index consisted of in terms of what the torrents mapped, the court found them to all have been aware of what the index have contained and furthermore that their main objective with the website have been to make it easy for individuals to come across and download material that to a large extent have been copyrighted material. What they more concretely then have done is to provide a map that not only show the program installed on ones computer where to find the pieces to the puzzle but also, by the click of a button, activates the program for you. The Pirate Bay has, in short, provided a means to enable downloading of copyrighted material.

5. Computing and Internet usage

The way we make use of our computers and furthermore how we decide to communicate on the Internet is important to understand in order to be able to among other things map the spread of certain specific activities such as e.g. illegal file sharing. It is also important to get a feel for what the attitude in the general public is towards certain activities and what they value and look for in the Internet. In the following chapter you will be presented with a brief summary over some important key figures relating to computing and Internet usage in Sweden.

⁶⁰ B 13301-06 p.51-52

⁶¹ B 13301-06 p.51-52

5.1 How does the usage of computers and the internet look like in Sweden?

As the computer and Internet usage have become more common the downloading and file-sharing activity has increased. Sweden is the runner up internationally in regards to household's access to broadband in their homes. Nearly 83 percent of the households in Sweden have access to the Internet through broadband.⁶²

According to Statistic's Sweden nearly 40 percent of the men in the ages between 16-24 years old have used a file-sharing program for the purpose of exchanging music, movies and videos during the spring of 2008. In total almost 10 percent of all participants in the study, both men and women, between the ages of 16 and 74 had made use of a file-sharing program in the year 2008. This amounts to almost 700 000 persons. The use of computers and Internet is higher among younger people and the use declines the older the group gets.⁶³

5.2 How do Swedes feel about E-commerce and file sharing?

A great amount of the Swedish population has made use of the Internet in order to purchase goods or services. The numbers collected by Statistic's Sweden show as much as 3 million made use of the Internet for E-commerce in the period of January to March 2009. The most common precondition for purchasing goods and services on the Internet is convenience according to the survey performed. Other preconditions are lower prices and easily manageable websites.⁶⁴

According to another study performed by Statistic's Sweden almost 30 percent of the men between the ages of 16 and 74 years old rather download music than purchasing a physical CD. The study also shows that the interest for downloading decreases with higher age.⁶⁵ An interesting notion is that according to another study performed the increasing number of people file sharing and downloading material such as e.g. music and movies has reached a stand-still.⁶⁶

6. Intellectual Property

In order to be able to grasp the entity of Copyright in good manner it is useful to put this entity in a perspective of other intellectual properties and how they are utilized in our day and age. The following sections does not aim to provide an exhaustive description of patent law or trademark law

⁶² Statistic's Sweden, *Privatpersoners användning av datorer och internet 2009 (Use of computers and the Internet by private persons 2009)*, p.14 and 75

⁶³ Statistic's Sweden, *Informations- och kommunikationsteknologi (Information Tehnology)*, Statistic Yearbook 2010, p.252

⁶⁴ Statistic's Sweden, *Privatpersoners användning av datorer och internet 2009 (Use of computers and the Internet by private persons 2009)*, p.25

⁶⁵ Statistic's Sweden, *Informations- och kommunikationsteknologi (Information Tehnology)*, Statistic Yearbook 2010, p.252

⁶⁶ World Internet Institute, *Svenskarna och Internet*, 2009, p.25

but rather to briefly describe these entities from a perspective of usage so that the following copyright chapter also can be regarded from a similar point of view.

6.1 Patents

As a part of being given a patent on an invention come the part of disclosing the invention as such which is something that should not be forgotten as this is a vital step in our societies' progression. The disclosing of revolutionary technological developments help our societies to grow as there in certain aspects is no need to over and over again invent the wheel which in most cases saves companies from investing money in areas that already have been explored.⁶⁷ The process of obtaining a patent for ones invention is very complicated and very much a legal task as the framework provided in the legislation for patents are very technical which requires great legal understanding as well as rather high investments.⁶⁸ On the other hand if a patent is granted one is more or less provided with a monopoly to financially exploit the patented invention for a period of 20 years, even though the rights provided through the patent legislation does not provide exclusive rights to exploit the patented invention but instead the rights to prevent everyone else from making use of the patented invention.⁶⁹

As an intellectual property, patents can be transacted with and this is much the case and has become a business in itself as firms in certain aspects have let go of the traditional material value chain thinking and instead started to focus on more of an intellectual value chain thinking. The traditional approach towards patents however were that, from the monopoly granted, one made sure to set up production for a product that vested the invention and the business models revolved around how many physical products embodying the invention that was sold. In other words everything surrounded the physical product vesting the patented invention. This is today not entirely an accurate picture as businesses increasingly have started to recognize the value that lies in the patents as such rather than selling physical products. Numerous different business models have been designed in an effort to make the most out of these properties. Patents are being used as building blocks for business undertakings in corporations and companies. Instead of having to set up production for physical products as the only way to make money from patents these are transacted with i.e. licensed out, sold, exchanged and so forth. The way of thinking about patents as building blocks and commodities rather than stepping stones to a physical product have sprung completely new businesses that make use of patents in the same ways as other commodities and tangible assets.

⁶⁷ Levin, Marianne, 2007, p.32, Maunsbach & Wennersten, 2009, p.160-161

⁶⁸ Levin, Marianne, 2007, p.228-229, 236

⁶⁹ Patent Law (1967:837) Articles 1 and 3, Maunsbach & Wennersten, 2009, p.169

The usability and economic value of patents are becoming higher and higher as more and more businesses recognized the value that can be extracted from them.⁷⁰

6.2 Trademarks

There are different ways for obtaining the rights to a trademark e.g. it can be done through applying for it through governmental organizations and international organizations or by the mark being established on the market.⁷¹

When looking at a financial balance sheet certain companies that have great and recognizable trademarks in their intellectual property portfolio will often have a very high number connected to the financial post of goodwill. In many cases this can be traced back to its trademarks. Trademarks, if managed correctly, can be worth a lot of money and in some cases these can be worth more than the annual profit.⁷²

As an intellectual property a trademark can be transacted with i.e. licensed and sold which of course can be recognized as being conducted through for e.g. franchising. The revenues stemming from licensing of a trademark can for some companies be one of the largest revenue streams, of course depending on the specific trademark.⁷³ Traditionally though the trademarks were rather used to secure that ones names and logotypes were not copied by someone else so that one's investments in advertising and product development could not be used by someone else i.e. that no one would be able to free ride on your trademark or brand name and your invested money in building these. This of course is still the case but trademarks are also being viewed from an intellectual value chain approach by which the making use of a trademark in a commercial setting can be much more than simply putting a label on a physical product. Trademarks as well as all other intellectual properties are starting to get recognition for being very valuable commodities to be used as a central part of companies and corporations businesses.⁷⁴

6.3 Personal reflections

As been conveyed in the previous sections intellectual property is increasingly being regarded as commodities that are a part of the day-to-day business transactions and undertakings, and even still some businesses deal solely with trying to capitalize on these properties. Even though certain aspects of the legal areas traditionally have been set up as a means of ensuring progression in society it should not be neglected that the legal systems have also taken into consideration the needed

⁷⁰ Petrusson, Ulf, 2004, p.15-20

⁷¹ Trademarks Act (1960:644) Articles 1 and 2, Levin, Marianne, p.380-389

⁷² Levin, Marianne, 2007, p.361

⁷³ Levin, Marianne, 2007, p.361, 389-391

⁷⁴ Petrusson, Ulf, 2005, p.43-45

security that companies have been in need of in order to be able to invest money in research and development as well as trademark and brand building. I think that everyone would agree with me that when stating that few companies, if any, would invest billions in developing e.g. a drug if they did not know that they had legislative measures to make use of to protect their investments. The legal systems provide means for these investments to be made.

When moving on to the quite text heavy chapter on copyright below I feel that it is important to recognize copyright as property and not only just as something provided to ensure cultural progression. The corporations and companies that provide opportunities for artists and creators to reach an audience would not do this if the legal system did not provide them with certain security in that their investments will not be up for grabs for anyone who sees it fit to do so.

7. Copyright

Even though I concentrate on the Swedish legislation in this thesis it should be noted that the rules and regulations that govern copyright are greatly harmonized when it comes the European Union and the European Economical Area and work is being conducted to make them even more homogenous. Furthermore, as a large number of countries have signed and are a part of international conventions such as the e.g. Bern Convention the rights given to a creator of a literary and/or a artistic work through the copyright systems are in general much alike as the ruling general principals that permeate the systems are the same.

The following sections will only enlighten the most important articles in relevant laws and regulations and as such the text to follow does not aim to give an exhaustive picture of the entire copyright system and the Copyright Act. However, the reason why this chapter, in comparison to other, is so heavy in text is that I want to show just how far the copyright of today stretches in relation to user's possibilities to exploit copyrighted material as well as how far the rights for the rights holders reaches. When I generally speak of copyright I also include the rights described as neighboring rights to copyright and this for the purpose of making it easier to follow the reasoning and to not having to distinguish between what set of rules are applicable in every instance. However, for the sake of the matter I will shortly describe the neighboring rights below (see 7.3.1).

I will start out by giving a brief description of the history of copyright which will hopefully shed some light on why the system is structured in the way that it is. I will then move on to describe the international influences on Swedish copyright in our day and age which I believe is important to get a

feel for in terms of how much power is actually left to the Swedish legislators. After these brief sections I will describe the boundaries laid down in the Swedish Copyright Act.

As this chapter is rather heavy in text I will provide several *Personal reflections* sections in order to make sure that the focus of this thesis will not be lost in all legalese.

7.1 A short history of copyright

Even though the copyright system can seem well established the exclusive rights that are awarded to creators of literary/artistic works and for related works by the copyright system have not always been given. The reason for this is of course that literary and artistic works not always have had a great financial value. Before there were any effective means for duplication and wide-spread distribution channels it was to a large extent unnecessary to have copyright protection for ones artistic or literary work. In the beginning of the 16th century the art of printing made this all change as the art of printing allowed for easier duplication of literary works.⁷⁵

A book could with the art of printing be easily duplicated which made the books as such carriers of financial value. The copyright system, as we know it today, did however not come to life until the beginning of the 19th century. As many countries from the 16th to the 18th century were governed by sovereigns a creator would have to seek permission, a privilege, to obtain something that could be regarded as similar to the exclusive rights that are awarded today. It was not until the beginning of the 18th century that the copyright system as a system came to life in England through the Statute of Anne, which was a creation of the old laws and regulations that had been created in the common law system from the beginning of the 17th century in England.⁷⁶

As the industrial revolution took its hold during the 19th century the laws and regulations concerning intellectual property became very important as the society now was presented with means to duplicate and replicate goods in a fast pace as well as distributions channels were getting better and could cover more extensive ground. These means together with better distribution systems made e.g. books carriers of financial value. Books and other literary works could be distributed to the general public creating a market that had not been present before. Even though the world experienced the fast technological pace and large changes during the industrial revolution the laws and regulations in regards to copyright could cope with this in an efficient manner and in 1886 the Bern Convention was formed. The Bern Convention included many of the today ruling principles concerning copyright.⁷⁷

⁷⁵ Levin, Marianne, 2007, p.24-26, Davies, Gillian, 2002, p.19-23

⁷⁶ Levin, Marianne, 2007, p 25-27, Davies, Gillian, 2002, p.9-11

⁷⁷ Levin, Marianne, 2007, p.27-28,

The main objective with providing exclusive rights to a creator of an artistic or literary work was to ensure that the society would be provided with cultural works by giving creators an incentive to present the works to the society and the general public in exchange for exclusive rights to commercialize on them.⁷⁸ As the technological development have advanced and as the Internet have come to life which enables people to communicate and share information very easily around the world the laws concerning intellectual property and copyright have had a hard time keeping up or at least make available effective means to ensure that the traditional rights of the creators are adequately protected.⁷⁹ However, this situation has ultimately lead to that the creators rights have become more extensive as a way of making sure that the traditional rights are not ignored even further.⁸⁰

It is perceived as more or less a natural state that who ever creates something intellectual also should be the proprietor of the same.⁸¹ This order is proclaimed in the Universal Declaration of Human Rights in which it is stated that “everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author”.⁸² This standpoint takes into consideration the economic and moral rights that individuals have. These interests have to be weighed against the interests of the society as such in regards to being able to make use of and learn from intellectual creations which is also to some extent proclaimed in the Universal Declaration of Human Rights in which it is also stated that “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.⁸³

7.1.1 Personal reflections

The historic background of copyright is important to be aware of as it is the traditional values that lead to the creation of the systems that still actually permeate the systems. It is not hard to see that the balance between the interests have shifted back and forth as a result of new technological innovations. The traditional sought for balance is something that is still in focus but the question however is whether or not balance should be sought for with other means than legislative ones as certain other means might be much more effective in actually creating a good balance between the interests of the rights holders and the society’s interest in being able to exploit works.

⁷⁸ Maunsbach & Wennersten, 2009, p.16, Davies, Gillian, 2002, p.12-19

⁷⁹ Levin, Marianne, 2007, p.24-30, Davies, Gillian, 2002, p.290-293

⁸⁰ Prop. 2004/05:110 p.1-2

⁸¹ Levin, Marianne, 2007, p.25, Davies, Gillian, 2002, p.13-14

⁸² Universal Declaration of Human Rights, 11 December 1948, Article 27.2.

⁸³ Universal Declaration of Human Rights, 11 December 1948, Article 27.1, Levin, Marianne, 2007, p.30-31

7.2 International influences on the Swedish copyright system

The most important international conventions that Sweden has entered into, in relation to copyright, are described in the following sub-sections and aim to give a feel for what have had major impacts on the Swedish copyright system. The general principle for Swedish copyright is that the rights provided for the copyright holder ends at the Swedish border, which is furthermore expressed in the Swedish Copyright Act.⁸⁴ However, it is furthermore stated in the Copyright Act that the boundaries can be extended by the government which has been done in a decree to the Copyright Act in which the international conventions and the fact that Sweden is a member to the European Union are taken into consideration.⁸⁵

7.2.1 The Bern Convention

The Bern Convention was the result of wanting to establish mutual guiding principles concerning protection for literary and artistic works between countries.⁸⁶ The most crucial principles that are laid down in the Bern Convention are the ones concerning equal rights to all members of the convention meaning that Swedish works are awarded copyright protection within all member states of the convention and works that are created outside of Sweden and in states that are a part of the convention, are awarded copyright protection in Sweden.⁸⁷ Along side these principles the convention awards creators of literary and artistic works a minimum set of rights.⁸⁸ Furthermore the principle of that a work should be awarded protection on the basis of constituting a work and not by a registration process is laid down. All member states of the convention form a union and Sweden has been a member of the convention since 1904.⁸⁹ The convention currently has 184 member states and the convention is administrated by the World Intellectual Property Organization (WIPO), which is a specialized agency under the United Nations.⁹⁰

7.2.2 The TRIPs Agreement

The fact that a large amount of states have become members to the Bern Convention is not entirely something positive as the work for needed reforms have become harder as the tension between industrial countries and developing countries have come to play a significant role. This have led to that states have tried to take certain important aspects out of the discussions made before the WIPO and instead negotiated these issues before other large international organizations. Within the General Agreement on Tariffs and Trade (GATT) discussions were held concerning intellectual

⁸⁴ Copyright Act, Chapter 8, Articles 60-61

⁸⁵ Levin, Marianne, 2007, p.67, Internationell upphovsrättsförordning (1994:193)

⁸⁶ Maunsbach & Wennersten, 2009, p.20

⁸⁷ Bern Convention for the Protection of Literary and Artistic Works, Article 5.

⁸⁸ Bern Convention for the Protection of Literary and Artistic Works, Articles 6bis-9

⁸⁹ Levin, Marianne, 2007, p.39-40

⁹⁰ <http://www.wipo.org>

property which led to that a new and extensive agreement was formed, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). GATT was at the same time reformed into a new international organization, the World Trade Organization (WTO).⁹¹

The TRIPs agreement rests on two important principles, the first being that states that have signed the agreement should provide rights for creators of works, that are citizens of states that have also signed the agreement, and the second being the principle of most favored nation, meaning that all rights that are awarded to another party to the agreement should also be provided to all other parties to the agreement.⁹² The articles in the TRIPs agreement take into consideration all intellectual property and primarily regulated trade related aspects of these.⁹³ Unfortunately the WTO is now experiencing the same difficulties as WIPO in regards to effective negotiations and possibilities for reforms, probably because of the large number of members to the organization; as many as 153 states are members of the WTO.⁹⁴

7.2.3 Personal reflections

It is important to acknowledge that even if we are a part of a sovereign nation we are heavily influenced by other sovereign nations in a broader perspective as we are a part of the international community. We can no longer as a nation decide for ourselves what is best as we are very dependant on other countries as well. The lack of actual power to change our society in the way that we see fit is evident as we have entered into international treaties as well as we are a part of the European Union. It is important to realize that the Sweden in its legislative measures is not acting all by itself but rather is acting as a part of something bigger i.e. the international community. It is furthermore important to recognize that we are only one small part of this international community.

7.3 The Copyright Act⁹⁵

The Copyright Act in its current form was established in 1960 but has been amended a great deal since then and during the last years a lot of changes have been made in order to conform to the directives that have been presented through the European Union.⁹⁶ As the work for making the rules and regulations within the members states of the European Union homogenous the copyright laws can be said to be more or less homogenous in the member states. The changes that have been made

⁹¹ Levin, Marianne, 2007, p.40

⁹² Agreement on Trade-Related Aspects of Intellectual Property Rights, Articles 3 and 4

⁹³ Maunsbach & Wennersten, 2009, p.20

⁹⁴ Levin, Marianne, 2007, p.40-41, <http://www.wto.org>

⁹⁵ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk – (Copyright Act)

⁹⁶ 91/250/EEC, 93/83/EEC, , 93/98/EEC, 96/9/EC, 2001/29/EC, 2004/48/EC, 2006/115/EC

to the Copyright Act have also been an effect of recent year's technological developments that have had to be taken into consideration in the Copyright Act.⁹⁷

The Copyright Act gives the creator of a literary or artistic work protection for that work.⁹⁸ The first article in the Copyright Act provides examples of what literary and artistic work could be, though it should be fairly noted that the listing provided is not at all exhaustive.⁹⁹ The term *work* that is used implies that the creation has to show certain independence in regards to other works and also have a quality of originality to it in order for it to obtain protection.¹⁰⁰

The exclusive rights awarded to a creator of a work are usually divided into economic rights and moral rights which I will go in to in more detail below (see 7.4.1 and 7.4.2). With exclusivity is meant that no one beside the copyright holder, without his/her permission, can dispose of the work in any way that has been exclusively awarded to the creator.¹⁰¹ The exclusive rights are limited by certain exceptions which are phrased in a way that these measures should not be regarded as infringing the exclusive rights of the copyright holder and thus not actual rights for users (see 7.5.1).¹⁰²

The Copyright Act has as mentioned been subjects to many amendments and changes since the establishment of the act in 1960's and this should only be seen as something natural as the technological pace with all its effective means of copying and making available different kinds of work obviously have had effects on the exclusive rights provided for the copyright holder. The question is though if the amendments and changes that have been made have had sufficient focus on balancing the societal needs with the exclusive rights provided for the copyright holder. The European Union of course sets it toll on the work for changing and the modernization of the copyright system but even in this aspect it is important to recognize the underlying interest of the changes that have been made. The actors that benefit the most from strong protection for the copyright holders are mainly large and powerful organizations primarily within the music and movie industry. This fact should not, to be able to grasp the structure of the copyright system, be overlooked.

Before looking closer at the economic rights I think it is appropriate to present a brief passage on the neighboring rights to copyright as when I discuss works in general I also take into consideration works that are protected by these rights as I have mentioned before.

⁹⁷ Levin, Marianne, 2007, p. 65

⁹⁸ Copyright Act, Chapter 1, Article 1, Prop.1960:17 p.50

⁹⁹ Prop. 1960:17 p.41-42

¹⁰⁰ Prop. 1960:17 p.49

¹⁰¹ Maunsbach & Wennersten, 2009, p.63, Prop. 1960:17 s.53

¹⁰² Burell & Coleman, 2005, p.10-11, (The heading of chapter 2 of the Copyright Act is "Inskränkningar i upphovsrätten" which can be translated to *Limitations on Copyright* and not *Rights for individuals*).

7.3.1 Neighboring rights

The neighboring rights primarily aim to provide protection for performances rather than works. This includes a variety of different things such as recordings of sound or moving pictures, radio and television broadcasts and catalogs and photographs. There are no registration requirements in order to obtain protection and instead protection is awarded by the mere manifestation of a performance. The neighboring rights are stipulated in the Copyright Act and are now in many aspects homogenous to the actual copyright protection provided for the creators of artistic and literary works and through the implementation of the directive 2001/29/EC (Infosoc directive) the term for the rights are now *uteslutande* which in English can be translated into excluding rights and should thus be regarded as very close to the exclusive rights provided for copyright holders.¹⁰³ The protection awarded can however in general be said to have a more limited time span than traditional copyright as the protection for neighboring rights are provided for a time period of 50 years from the time of the performance.¹⁰⁴

7.4 Rights provided for the creators of works

7.4.1 Economic Rights

Economic rights are usually the term used to describe the rights given to creators of artistic or literary works and concerns the rights in regards to exploitation of the works by making copies of them or and making them available to the public. The economic exclusive rights are two-fold and concern the actual making of copies and also the making available to the public of the work.¹⁰⁵

7.4.1.1 The making of copies

By the making of copies shall be considered any direct or indirect, temporary or permanent preparation of copies of the work and this regardless of the form or through which method this is carried out and furthermore regardless of whether it concerns the work in part or in whole.¹⁰⁶

When information is shared on the Internet temporary copies of the information shared are created and even these temporary copies are included within the exclusive rights of the copyright holder. There exists different types of activities that create temporary copies and among these are different types of caching. Cache is a component that improves the performance of sharing of information by storing data, either on e.g. the hard drive on a personal computer or on servers. These temporary copies are also to be regarded as falling within the sphere of exclusive rights awarded to the copyright holder.¹⁰⁷

¹⁰³ Prop.1994/95:58 p.34, Levin, Marianne, 2007, p.166

¹⁰⁴ Maunsbach & Wennersten, 2009, p.46

¹⁰⁵ Copyright Act, Chapter 1, Article 2, Prop.1960:17 p.53-54

¹⁰⁶ Copyright Act, Chapter 1, Article 2, Section 2, Prop.1960:17 p.51-64

¹⁰⁷ Maunsbach & Wennersten, 2009, p.66-67, Prop.2001/02:150 p.21

The exclusive rights apply even for adaptations of the work, as long as the core of the work could be considered to be intact and it is furthermore so that even parts of the work fall within the copyright holder's exclusive rights, as long as the part in itself could be said to fulfill the criteria of originality and independence and thus in itself constitute a work.¹⁰⁸

7.4.1.2 Making the work available to the public

In the second article of the Copyright Act it is stated in its third paragraph what should be regarded as making the work available to the public. The work is considered to be made available to the public;

- 1) When it is being communicated to the public,

This includes any making available of the work to the public by wire or by wireless means that occurs from a place other than that where the public may enjoy the work. Communication to the public also includes acts of communication that occur in such a way that members of the public may access the work from a place and at a time individually chosen by them.¹⁰⁹

The Swedish term *överföring* (*author's translation - communication*) is used because it is neutral in terms of what technology is used for the act of communication, which has been the purpose and aim of the legislators as they wanted the paragraph to include all existing and future means of communication.¹¹⁰

As communication to the public, should be regarded acts that e.g. concerns deep linking, which means that a user/visitor to a website believes that what is posted on the site stems from that specific website and not from somewhere else, which it though in fact is.¹¹¹ This procedure was regarded as a matter of public performance in a Swedish Supreme Court case¹¹² in 2000. However, after the implementation of the Infosoc directive this procedure should now be considered to be a matter of communication to the public.¹¹³

The Court of Justice has in one of its cases interpreted the phrasing *communication to the public* in which it says that communication in the form of television broadcasting through television sets in hotel rooms, which was the circumstances that was at hand in the specific case, were to be regarded as communication to the public. The private nature of a hotel room did, according to the court, not

¹⁰⁸ Copyright Act, Chapter 1, Article 1, Prop.1960:17 p.48-49, Maunsbach & Wennersten, 2009, p.64-65

¹⁰⁹ Copyright Act, Chapter 1, Article 2, Section 3, Paragraph 1, Prop.2004/05:110 p.69

¹¹⁰ Prop.2004/05:110 p.69

¹¹¹ Maunsbach & Wennersten, 2009, p.71, Prop.2004/05:110 p.70-71

¹¹² NJA 2000 s.292

¹¹³ Prop.2004/05:110 p.70-71, Directive 2001/29/EC

rule out the fact that a signal was to be regarded as falling within the scope of communication to the public.¹¹⁴

2) When the work is publically performed,

Public performance in this aspect only includes such cases when the work is being made available to the public, with or without the use of a technical device, at the same place as the one where the public may enjoy the work.¹¹⁵ This paragraph aims to leave out performances that occur in the comfort of the private sphere.¹¹⁶ In respect to this it could be valuable to note that the private sphere is defined to include activities that takes place within the own home, in the close circle of friends and acquaintances.¹¹⁷ A public performance is e.g. considered to take place when a store plays a CD that is aired from the loud speakers in the store.¹¹⁸

3) When copies of the work are publically exhibited,

Public exhibition includes only such cases where a copy of a work is being made available to the public, without the use of a technical device, at the same place as the one where the public may enjoy the copy. If a technical device is used, the act should instead be regarded as a public performance.¹¹⁹ Public exhibition occur when e.g. a book, or its cover, is put on display in a shop-window.¹²⁰

4) When copies of the work are put up for sale, leased, lent or otherwise distributed to the public.¹²¹

The exclusive right to put copies into circulation is to be regarded as a complementary rule to the right to make copies for the copyright holder. Through the above mentioned action of making copies of the work available the copyright holder gets a possibility to manage how the copies of his/her work are distributed. So even if copies have been made by the copyright holder he/she still has the exclusive rights to decide whether or not these should be made available to the public, and if so, in what way.¹²²

¹¹⁴ C-306/05 - 7 December 2006,

¹¹⁵ Copyright Act, Chapter 1, Article 2, Section 3, Paragraph 2, Prop.2004/05:110 p.379

¹¹⁶ Prop.1960:17 p.62-63

¹¹⁷ SOU 1956:25 p.104

¹¹⁸ Levin, Marianne, 2007, p.138

¹¹⁹ Copyright Act, Chapter1, Article 2, Section 3, Paragraph 3, Prop.2004/05:110 p.379

¹²⁰ Maunsbach & Wennersten, 2009, p.73, Prop.2004/05:110 p.380

¹²¹ Copyright Act, Chapter 1, Article 2, Section 3, Paragraph 4

¹²² Prop.1960:17 p.56-57, Maunsbach & Wennersten, 2009, p.74

It is furthermore stated in the Copyright Act that acts of communication to the public and acts of public performances, that in the framework of commercial activities occur to or for a comparatively large closed group of persons, also shall be deemed as acts of communication to the public and public performances.¹²³

7.4.2 Moral rights

The moral rights that are provided to the copyright holder have to do with that the work in itself should not suffer disrespectful use and that the creator should be proclaimed as the creator in connection to his/her work.

7.4.2.1 Droit de le paternité

The creator of a work has the right to be mentioned/proclaimed in connection with a copy of his/her work and furthermore when the work is being communicated to the public in any of the ways mentioned in the previous sections.¹²⁴ As this right can be quite hard to observe for every type of work it is much dependant on the customs within the specific category of works how this right is observed more concretely.¹²⁵ The moral rights given to the creator is to provide a possibility for the creator to be recognized for his/her work and as such this could of course have financial consequences but foremost this right should be regarded as giving the creator recognition.

7.4.2.2 Right to not have the work to be subject to offence

It is stated in the Copyright Act that a work may not be changed in a manner that is detrimental to the creator's reputation or his/her individuality. The work may not be made available to the public in any such manner.¹²⁶ If a work is considered to be in violation of this moral right of the creator, the creator has a right to stop the actions.¹²⁷ These possibilities that the copyright holder has does not apply for acts of parody or travesty, which is something that the creator has to cope with. The actual boundary for what can be considered to be in violation of the moral rights in this perspective is up for the courts to decide in a specific case.¹²⁸

7.4.3 Protection of technological measures

The Copyright Act has been subject to quite dramatic changes recent years and this as a result of among other the 2001/29 EC Directive (Infosoc directive) as the technological measures of protecting artistic and literary works and related works now also are subject for protection.¹²⁹ The new chapter in the Copyright Act regarding protection for technological measures was implemented in 2005. The

¹²³ Copyright Act, Chapter 1, Article 2, Section 4, Prop.2004/05:110 p.380

¹²⁴ Copyright Act, Chapter 1, Article 3, Section 1, Prop.1960:17 p.64-65

¹²⁵ Prop.1960:17 p.65, Levin, Marianne, 2007, p.159-160

¹²⁶ Copyright Act, Chapter 1, Article 3, Section 2, Prop.1960:17 p.65-66

¹²⁷ Levin, Marianne, 2007, p.161

¹²⁸ Levin, Marianne, 2007, p.161-166

¹²⁹ Directive 2001/29/EC, Copyright Act, Chapter 6a, Maunsbach & Wennersten, 2009, p.98-101

articles can in general be described as providing additional protection for copyrighted work as well as for related works and this because that now measures of protection for works are also protected and not just the work in itself. The term technological measures refers to *“any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorized by the right holder of any copyright or any right related to copyright as provided for by law...”*¹³⁰

It is prohibited to circumvent any digital or analog technological measure that prevents or limits the possibilities to make copies of the work without the permission of the rights holder. It is furthermore prohibited, without the consent of the rights holder, to circumvent any technological measure that prevents or limits the possibility of making available the work to the public or any other such measure that prevents or limits the possibility of making the work available.¹³¹ However, this does not apply for a situation where one has acquired a copy of a work that legally has been put on the market and the technological measures are circumvented in order to view or listen to the work.¹³²

It is furthermore stated in the Copyright Act that it is prohibited to make, import, transfer or otherwise spread and in line of business activities have in ones possession products, devices or components or to offer services that is marketed as being able to circumvent technological measures or that only has limited usability other than circumventing technological measures or that are mainly designed, constructed or developed for the purpose of enabling or facilitating a circumvention of technological measures.¹³³

It is however important that the rights holder sees to it that the technological measure that is going to be used is actually effective for its purpose. The protection sought for with technological measures has to have a purpose that can be said to be inline with protecting ones rights. If a rights holder would make use of a technological measure that go beyond this purpose the technological measure is not to be regarded as a technological measure in the context of the Copyright Act and as such will not be subject for the protection described. In order for an action to be considered to be a circumvention of the technological measures these measures would have to be removed or otherwise made ineffective so that the technological measures no longer serve their purpose.¹³⁴

¹³⁰ Directive 2001/29/ EC, Chapter III, Article 6, Paragraph 3

¹³¹ Copyright Act, Chapter 6a, Section 52d, Paragraph 1, Prop.2004/05:110 p.301-306

¹³² Copyright Act, Chapter 6a, Section 52d, Paragraph 2, Prop.2004/05:110 p.303-304

¹³³ Copyright Act, Chapter 6a, Section 52e, Prop.2004/05:110 p.306-310

¹³⁴ Prop.2004/05:110 p.416-417, Maunsbach & Wennersten, 2009, p.98-101

7.4.3.1 Digital Rights Management¹³⁵

In addition to protection for technological measures, the rights holder has also been provided with protection for what is called Digital Rights Management (DRM). It is perceived that as a result of the fast technological changes which allows for more and better ways to copy copyrighted material there is a need for the rights holders to be able to digitally mark copies of their work with certain information that will enable easier identification of the specific rights holder of the work as well as how the copy of can be utilized. This kind of marking, termed Rights Management Information (RMI), can be described as being only one part of the whole DRM concept.¹³⁶

The information that protection is sought for under the concept of DRM is mainly information regarding the identity of the rights holder and under what terms the work can be utilized in terms of e.g. how many copies of a digital work that can be made.¹³⁷ The protection provided for digital rights management prohibit any removal of the information described as well as making use of copies of works for which this information has been removed.¹³⁸ The purpose of extending the rights holder's rights further than the traditional copyright protection is to make it easier for the rights holder to maintain his/her copyrights in respect of a specific work in a digital environment.¹³⁹

7.4.4 Personal reflections

As the above presentation displays the rights provided for the rights holder are rather extensive and as a result of the developments we have seen the last years with effective technological means on the Internet for the digital exploitation of works these rights have become even more extensive. Even though I just briefly touch upon the concept of DRM it is very important to acknowledge that this concept have major impacts on how you and I make use of works and in many cases far beyond the legal realm of the concept as such. In general I think it is important that one take a second to reflect on what kind of exceptions to these rights provided to the rights holders that should be made available to the general public in order for the rights provided for the copyright holder to be evened out and balanced in a good manner. In the following sections the exceptions to the rights holder's rights are presented and it could be interesting to see whether the idea that you have, from your minute of reflection, of what is needed to balance these rights correspond to the actual situation set out in the Copyright Act.

¹³⁵ The concept of DRM is quite controversial. For a deeper analysis see e.g. Schollin, Kristoffer, 2008.

¹³⁶ Schollin, Kristoffer, 2008, p.149-150

¹³⁷ Prop.2004/05:110 p.319, Schollin, Kristoffer, 2008, p.150-151,

¹³⁸ Prop.2004/05:110 p.421-422, Maunsbach & Wennersten, 2009, p.98-101

¹³⁹ Prop.2004/05:110 p.285

7.5 Possibilities provided to the individual to exploit works

7.5.1 Copyright Exceptions

To the economic exclusive rights granted to the creator of a work follows certain exceptions that have been set in place in order to establish a balance between the interest of the creator and the interests of the society. Without having these exceptions the exclusive rights given to the rights holder would have reached too far, making certain day-to-day activities much more troublesome and cumbersome for the general public. As have been stated in the beginning of this chapter the exclusive rights provided to the copyright holder has to be balanced with the societal interest of making use and exploiting works that are a part of the cultural progression in society. The description of the exceptions does not aim to be exhaustive but I believe that the ones I will go through below will provide a sufficient picture on what interest the government want to protect and also give an idea of how far the exclusive economic rights actually goes.

7.5.1.1 The making of temporary copies

As the technological advancements have created new means in our society in which we are able to exploit information and material there are certain parts of these technological solutions that would not work so good if temporary copies were not created and used as a means for speedy exchanging of information on servers and routers .

The making of temporary copies is to be regarded as being outside the scope of the copyright holder's rights if certain criteria are met.¹⁴⁰ Temporary copies must not have any independent financial importance, which is crucial for the making to be outside the scope of the copyright holder's exclusive rights. The prerequisites are that the making of temporary copies has to be transient or have to play an inferior part of the action taken that created the temporary copy. Furthermore the making of the temporary copies have to be an integral and crucial part of a technological process. The sole purpose of the copying should also be to make possible a transaction between third parties in a network through an intermediary or a lawful use of a work. In addition to these three prerequisites a fourth is also expressed which states that the copying in itself should not have any economic value.¹⁴¹

7.5.1.2 The making of copies for private use

In general it can be said that anyone is entitled to make a copy of a copyrighted work as long as it is for private use. However, there are a few prerequisites that have to be fulfilled in order for the copying to be legal. First of all the copying has to be for private use, which means that the copy has

¹⁴⁰ Copyright Act, Chapter 2, Article 11a, Prop.2004/05:110 p.90

¹⁴¹ Prop.2004/05:110 p.91-92

to accommodate a personal need.¹⁴² The work that is being copied has furthermore have to have been made public and the copy that is being copied has to have been put on the market legally i.e. it is not legal to make a copy of an illegal copy of a work. It is not allowed to make as many copies as one sees fit, instead the article only provides a possibility to make only a few copies. An exact number has not been determined which means that it will be up to the courts to decide in a specific case what should be considered to be appropriate.¹⁴³

When it comes to literary work it is not accepted to copy an entire book or an entire work but instead it is accepted that one copies only limited parts of a work.¹⁴⁴ Under no circumstances does it follow by the Copyright Act that it is allowed to make copies of works of architecture, computer programs¹⁴⁵ or make copies in digital form of compilations in digital form.¹⁴⁶

The copying for private purposes includes in certain specific cases that one make use of a third party for the making of the copies. However, to make use of a third party for the making of copies is strictly prohibited when the copying concerns musical works or cinematographic works, objects for everyday purposes or sculptures and through means of artistic reproduction make a copy of a work of fine art.¹⁴⁷

7.5.1.3 The distribution of copies

When a copy of a work has been put on the market within the European Economical Area with the consent of the copyright holder this copy may be further distributed. This means that the rights provided to the copyrighted holder are exhausted in regards to specific copies which have the effect that the owner of a copy of a work, that has been put on the market with the consent of the copyright holder, can freely sell, lend, rent out or otherwise make use of his/her copy as he/she sees fit.¹⁴⁸ The possibilities provided do only confer to the specific copy of the work. However, this right is limited and does not include making available to the public, by any means, copies of work through rental or similar acts (with the exception of buildings and articles for everyday use) or copies of computer programs in machine-readable form or cinematographic through lending.¹⁴⁹

The exhaustion of the copyright holder's rights in this aspect means that the copyright holder will not be able to control every transaction that concerns his/her work and as thus the principle of

¹⁴² Prop.2004/05:110 p.101

¹⁴³ Copyright Act, Chapter 2, Article 12, Sections 1 and 4, Prop.2004/05:110 p.101, 110-113

¹⁴⁴ Copyright Act, Chapter 2, Article 12, Section 1, Prop.2004/05:110 p.103

¹⁴⁵ Certain limited possibilities are provided in the Copyright Act, Articles 26g and 26h, for making of copies by the purchaser of a computer program. Marianne, Levin, 2007, p. 196.

¹⁴⁶ Copyright Act, Chapter 2, Article 12, Section 2, Paragraphs 1-3, Prop.2004/05:110 p.101-102

¹⁴⁷ Copyright Act, Chapter 2, Article 12, Section 3, Paragraphs 1-3, Prop.2004/05:110 p.112-114

¹⁴⁸ Copyright Act, Chapter 2, Article 19, Maunsbach & Wennersten, 2009, p.90-91, Prop.2004/05:110 p.184-189

¹⁴⁹ Copyright Act, Chapter 2, Article 19, Section 2, Paragraphs 1 and 2. Prop.2004/05:110 p.1884-189

exhaustion of rights limits the exclusive rights provided to the copyright holder to quite a large extent.

7.5.1.4 The exhibition of copies

The possibility to exhibit copies of a work that has been made available by the copyright holder are also connected to the principle of exhaustion of rights for the copyright holder and have the effect that copies of a work can be displayed in shop-windows and through similar means.¹⁵⁰

7.5.1.5 Public performances

Three prerequisites shall be fulfilled in order for public performances of works can take place without having the permission of the copyright holder and without having to pay remuneration. The prerequisites include that the performance in itself cannot be the main event of the venue where it is being performed, that no admission fee is charged and that the event is not organized for commercial purposes.¹⁵¹

7.5.1.6 Quotations

One can, without the permission of the copyright holder and without having to pay remuneration, quote a work that has been made available to the public by the copyright holder. However, the quotation has to be in accordance with proper usage and cannot exceed the extent necessary for the purpose.¹⁵² A proper usage in terms of quotation can be described as the quotation should be made as a step in furthering the own work. The length of the quotation is not regulated and it is therefore up to the courts to decide, in a specific case, the quotation made and if it is in the boundaries of what can be argued to be within the extent of necessity.¹⁵³

7.5.2 Collective licenses

Within the Nordic countries the construction with collecting societies for copyright holders are rather well established in regards to overseeing and enforcing its member's rights.¹⁵⁴ One of the largest Swedish collecting societies, STIM (Sveriges Tonsättares Internationella Musikbyrå), has the rights to collect remuneration for the use of its member's works as well as offering the works for public exploitation to users for a fee. This order is facilitated by having the creators sign a power of attorney for which they sign over all transferring and performing rights exclusively to STIM.¹⁵⁵

By having certain boundaries set up in the Copyright Act regarding collective licenses it has become much easier for users to enable usage of copyrighted works by signing an agreement with a collecting

¹⁵⁰ Copyright Act, Chapter 2, Article 20, Prop.2004/05:110 p.189-192

¹⁵¹ Maunsbach & Wennersten, 2009, p.92, Prop. 2004/05:110 p.200-201

¹⁵² Copyright Act, Chapter 2, Article 21

¹⁵³ Prop.2004/05:110 p.215-217

¹⁵⁴ Prop.2004/05:110 p.243-244

¹⁵⁵ Levin, Marianne, 2007, p.128-129

society. Even though a specific creator is not a part of the collective society a user is still provided with rights to make use of works, under the same conditions as for other works protected through the collective society, and this is possible due to that creators rights are considered to an extent that he/she still have the opportunity to stop the usage retrospectively.¹⁵⁶

The collective licenses provide the society with a possibility to make use of copyrighted material without having to address the right holder directly as long as a license agreement with one of the collective societies are signed and as long as the usage is within the boundaries set within the framework of the licenses.¹⁵⁷

7.5.3 Personal reflections

As the passage above have displayed the individual are actually provided with possibilities to make use of works without violating the exclusive rights provided to the rights holder. The question is though if these possibilities create a balance in the perspective that the rights holder's interests are not taking overhand over the individuals and thus the society's interest in being able to widely exploit works. The amendments that have been done in terms of providing protection for technological measures is a result of making sure that activities occurring on the Internet and through the digital possibilities are not leaving the rights holders without control over their works. The protection of DRM and its consequences are hard to foresee in terms of what they will actually be and furthermore how these will demonstrate themselves. It is however important to recognize that the DRM protection provides possibilities to quite rigorously control the behavior of the individual's possibilities of making use of digital content and perhaps even further than what was intended.

8. Aiding and abetting

It is not only the one committing an actual copyright infringement that can be held responsible for the crime but also the ones that instigate, contribute and benefit from the crime can be held liable. It is stipulated in the Swedish Penal Code¹⁵⁸ that anyone that gives advice or otherwise help to perform a crime should be held liable for aiding and abetting the crime.¹⁵⁹

The instigated crime needs to be punishable by imprisonment in order for the crime of aiding and abetting in accordance with the Swedish Penal Code to be applicable. It is though not necessary that

¹⁵⁶ Copyright Act, Chapter 3a, Section 42a, Maunsbach & Wennersten, 2009, p.101, Prop.2004/05:110 244-247

¹⁵⁷ Prop.2004/05:110 p.244

¹⁵⁸ Brottsbalken (1962:700)

¹⁵⁹ Swedish Penal Code, Chapter 23, Article 4

the person or persons that have committed the primary offence can be held responsible in order for a person that have aided that crime can be held liable. It is though necessary that the primary offence strictly objectively has taken place and that all objective prerequisites stipulated for the crime to have taken place are fulfilled.¹⁶⁰ Regarding the actual aiding of a crime, the aiding as such does not have to be something that is a prerequisite for the actual crime to have taken place but instead even aiding to an extent that is to be regarded as insignificant of a crime can constitute liability as aiding and abetting that crime.¹⁶¹

A group of people that, together and in concert, commits a crime can furthermore collectively be held responsible if they all respectively fulfill the objective prerequisites of the specific crime. As such it is also possible for a group of people that, together and in concert, aids a crime to collectively be held responsible for aiding the crime.¹⁶²

In the US a difference is made between contributory liability, vicarious liability and inducement liability. In terms of copyright infringement contributory liability is regarded to be actions where a third party knowingly of the infringing activity induces, causes or materially contribute to the actions of infringement by another. Vicarious liability refers to a situation where a third party controls the actions by an infringer and financially benefits from the infringement and inducement liability regards the situation where a third party distributes a device with the purpose of having it used for copyright infringement. The inducement liability was something that the US Supreme Court made used of in a case against a company distributing free software that made it possible to easily download copyrighted material from the Internet through peer-to-peer technology as the defendants were convicted of copyright infringement on the grounds of inducement liability.¹⁶³ Grokster Ltd., which were among the defendants, had more or less tried to make use of the loopholes presented in the Napster case by making sure that they did not store any information concerning what files and so forth that was shared by people that made use of their software. The US Supreme Court felt that this kind of behavior, where a company consciously had tried to get around the law by its technological structures, could not be accepted. The US Supreme Court therefore stretched the secondary liability by stating that Grokster Ltd. could be held liable on the grounds of inducement liability.¹⁶⁴

¹⁶⁰ Holmqvist, Leijonhufvud, Träskman, Wennberg, 2007, p.23:49

¹⁶¹ Holmqvist, Leijonhufvud, Träskman, Wennberg, 2007, p.23:53

¹⁶² Holmqvist, Leijonhufvud, Träskman, Wennberg, 2007, p.23:62-63

¹⁶³ Strowel, A, 2009, p.15-16, MGM Studios Inc. v Grokster Ltd. S. Ct. No. 04-480, 545 U.S. 2005

¹⁶⁴ Choi, Bryan H, 2006, p.392-398

8.1 Personal reflections

As the actions of you and I can, in a context of making use of technologies on the Internet whether or not we are aware of it, be regarded as aiding and abetting copyright violations I think it is important that we at least reflect on the actual activities we take part in on the Internet. In regards to the extended rights provided for the rights holders recent years it is perhaps hard to overlook the actual implications of certain activities but as this brief passage on aiding and abetting makes evident is that a lot information sharing in certain aspects are on the border line of aiding and abetting copyright offence. This chapter has been included in this thesis in order for the closer look on the Pirate Bay case to become a bit easier to follow and understand.

9. E-commerce

The Swedish E-commerce Act¹⁶⁵ is the result of the EC directive 2000/31 (The Electronic Commerce Directive) and was implemented in 2002. The purpose with the directive was to contribute to a well functioning internal market by securing the free movement of services for the information society between member states.¹⁶⁶

As previously have been described even temporary copies of works are to be considered to be within the scope of the copyright holder's exclusive rights.¹⁶⁷ However, if this fact were to be drawn too far then our communication with the help of the Internet would be rather difficult and slow which is why e.g. temporary copies, that are created with the sole purpose of facilitating a transfer between third parties through a middleman, does not constitute infringement, in accordance with the Copyright Act. When, in a specific situation, in a matter concerning temporary copies of a work it is advisable to first take into consideration if the exception in the Copyright Act is applicable.¹⁶⁸ If it is, then there is no need to consider what is stated in the E-commerce Act in regards to the liability of a service provider. However, if the copies are not of the sort described in the Copyright Act, one should take into consideration what is stated concerning freedom of liability for service providers in the E-commerce Act. The E-commerce Act provides some space for the information society to be able to operate smoothly which is why the use of certain actions concerning temporary copies, that e.g. are created only with the purpose of making certain services offered by service providers to run faster and smoother, are exempted from liability.¹⁶⁹

¹⁶⁵ Lag (2002:562) om elektronisk handel och andra informationssamhällets tjänster

¹⁶⁶ Directive 2000/31 EC, Chapter 1, Article 1.

¹⁶⁷ Prop.2004/05:110 p.91-92

¹⁶⁸ Copyright Act, Chapter 2, Article 11a

¹⁶⁹ Maunsbach & Wennersten, 2009, p.83

The articles in the E-commerce Act regarding freedom of liability for service providers take certain specific situations and circumstances into consideration which have to be fulfilled in order for the service provider to be free from liability which are described in the following three sections.

9.1 Mere Conduit – *Strict Forwarding*

The conditions expressed stipulate that a service provider, that transfer information that has been provided by a service recipient within a communications network or that provides access to such a network, shall not be held liable for the transfer of information as long as the service provider; does not initiate the transfer, selects the recipient of the information and furthermore do not select or amend the information that is transferred.¹⁷⁰ The type of *transfer* and *providing of* described above also applies for automatic, intermediate and transient storing of information that is a result of performing the transfer, as long as the information is not stored for a longer period than is reasonably needed for the transfer i.e. these actions are also exempted from liability for the service provider.¹⁷¹

9.2 Caching

In the EC directive 2000/31 difference is made between mere conduit and caching. Caching comprise more than strictly forwarding and as such includes that information is temporarily stored. There are different types of caching but the one that the E-Commerce Act concentrate on is the server-caching/proxy-caching, which means that information are stored on servers to enhance speed and performance while surfing the Internet.¹⁷²

When a service provider is transferring information that has been provided by a service recipient in a communication network that concerns automatic, intermediate and transient storing of information that is being performed with the sole purpose to make the transfer to other service recipients more effective, it is stipulated that the service provider shall not be held liable. This provided though that the service provider; does not amend the information, meet the requirements on access to the information, complies to the industry specific regulations in terms of updating the information, does not interfere with the lawful use of a technology that is widely used and recognized within the specific industry to obtain data concerning the use of the information and acts expeditiously to prevent or to remove access to the information that has been stored upon receiving actual knowledge of the fact that the information at the initial source for the transfer has been removed

¹⁷⁰ E-Commerce Act, Article 16, Section 1, Paragraphs 1-3.

¹⁷¹ E-Commerce Act, Article 16, Section 2

¹⁷² Prop.2001/02:150 p.21

from the network or has been made inaccessible, or that a court or an administrative authority has ordered such removal or inaccessibility.¹⁷³

9.3 Hosting

A service provider, that stores information that has been provided by a service recipient, shall furthermore not be subject to reimbursing or to pay damages on the account of the content of the information provided, under the conditions that the service provider; does not know that the illegal information or the illegal activity occurs and, in regards to the obligation to pay reimbursement, is not aware of factual or other circumstances that make it obvious that the illegal information or illegal activities occurs, or as soon as the service provider obtains such knowledge or awareness concerning the information and activities expeditiously prevent further spread of the information. However, these exceptions from liability do not apply if the service recipient that has provided the information act under the effect of the service provider.¹⁷⁴

9.4 Personal reflections

This chapter concerning the E-commerce Act is included in this thesis to make it evident that there are certain legal areas that in fact take into consideration activities that occur on the Internet and are important for the operational status of the Internet and as such should not be regarded as infringing anyone's copyright even though copying is actually taken place. It is furthermore so that this chapter is important to grasp, much like the chapter concerning aiding and abetting, to fully understand the Pirate Bay case and the discussions held by the District Court.

10. The Pirate Bay case

The Pirate Bay case is often used as an example in the illegal downloading debate. The non-supporters of the copyright system often make the remark that as the people behind the Pirate Bay site were held responsible for aiding and abetting copyright infringement then the people behind companies such as e.g. Google with their search engine should also be held responsible for a number of different crimes.

Do the people that make this argument and similar arguments have a point in this or are this argument and similar to be regarded as rather ignorant statements? By giving a brief passage on the District Court's verdict in the Pirate Bay case on the most important issues in relation to this thesis I believe that some needed enlightenment can be found.

¹⁷³ E-Commerce Act, Article 17

¹⁷⁴ E-Commerce Act, Article 18

10.1 A brief passage on the District Court's verdict in the Pirate Bay case

The different counts in the court case were divided accordingly;

1. Aiding and abetting to copyright offence

The prosecutor would have to, according to the District Court make it evident that an actual copyright offence had taken place as well as making it evident that the respondents have aided and abetted this offence.

2. Preparation to commit copyright offence

10.1.1 The main offence

The District Court started by addressing the issue of the main offence as this is a prerequisite for anyone being held responsible for aiding and abetting of a crime. In regards to the primary offence which in this case was about copyright offence the District Court took into consideration the following circumstances;

- Do the rights and works in question have protection in accordance with the Copyright Act?
- Who possesses these rights and works?
- Are the actions performed on the Pirate Bay site to be regarded as *making available* in the context set out in the Copyright Act?
- During what time has the *making available* occurred?
- Is the *making available* punishable by law?

In regards to these questions the District Court found it to be proven that the rights and works had copyright protection and that the right holders have been able to be identified. The actions performed with the help of the Pirate Bay site are to be considered as making available and that the making available has occurred during the time that the prosecutor have argued for and furthermore that the making available in question is punishable by Swedish law.¹⁷⁵

10.1.2 Aiding and abetting

The question that the District Court had to take into consideration was whether or not the defendants could be held liable for aiding and abetting copyright offence as the Pirate Bay could not be charged for the primary offence of copyright offence as the company's servers did not store any copyrighted material. The defendants have through their website made it possible for users to upload and store torrents to the file sharing service on the website by providing a database connected to a catalog consisting of torrents. In addition to this, they have also made it possible for

¹⁷⁵ B 13301-06, p.51-61

the users to search for and download torrents and furthermore made it possible through certain functions provided for the users, whom wish to share files, to make contact with each other through the tracker-function available on the website.¹⁷⁶

The District Court stated that the Pirate Bay through their providing of a website with advanced search functions, easy uploading and storing possibilities and by mediating contacts between file sharers through the tracker connected to the website facilitated and furthered copyright offence. In conclusion the District Court states that Pirate Bay's operations objectively have contributed to copyright offence.¹⁷⁷

10.1.3 Collective responsibility

When it comes to the defendants collective responsibility the prosecutor have claimed that they all, together and in concert, have run the Pirate Bay site. The District Court found it to be proved that all the defendants, together and in concert, had been a part of the operations under the Pirate Bay site. The question then was if it had been established that they all intentionally have made infringement in the rights connected to the works.¹⁷⁸

The District Court found it to be proven that the defendants had the intent to the objective circumstances that constitute the aiding. The District Court furthermore found it apparent that the defendants had knowledge of the fact that copyrighted material could be obtained through the website and furthermore were shared through the tracker that was made available within the services provided by the website. Despite this knowledge the defendants have made no attempt to prevent the copyright infringements and as such the defendants have together and in concert intentionally aided the users of the website's offences against the Copyright Act. The fact that the operation on the website was financed by advertisements furthermore makes the actions taken to be considered as being performed commercially.¹⁷⁹

10.1.4 Freedom of liability in respect of the E-commerce Act¹⁸⁰

After the District Court established that the main offences had occurred and that the defendants have aided these offences the District Court dealt with the issue of whether the defendants could be held free from liability in regards to what is stated in the E-commerce Act. The first issue that the District Court addressed was the question whether or not the Pirate Bay was to be considered as a service provider in relation to the E-commerce Act which it established that it was. The District Court

¹⁷⁶ B 13301-06, p.62

¹⁷⁷ B 13301-06, p.63

¹⁷⁸ B 13301-06, p.69

¹⁷⁹ B 13301-06, p.68-70

¹⁸⁰ For an interesting case that discuss the aspect of freedom of liability for information society services see T 20097013 (TV-Links case).

furthermore established that the services provided by the Pirate Bay were to be regarded as services described in article 18 of the E-commerce Act that regards storing of information. In order for the defendants to be held free from liability they though would have to be unaware of that the content of the material stored were of illegal character and furthermore when becoming aware of that the information stored had this type of content take the needed measures to make sure to prevent any further spreading of the information. As the District Court found it to be established that the defendants were all aware of the content of the material stored and furthermore that they did not take any measures to prevent any further distribution of the information/material the conditions for freedom of liability in accordance with article 18 of the E-Commerce Act were not met.¹⁸¹

Article 19 of the E-commerce Act was also applicable for the services provided by the Pirate Bay but as the defendants intentionally have stored information that has been in breach of the Copyright Act and in any case that they at least had been indifferent to this fact and thus the conditions for freedom of liability in regards to article 19 of the E-commerce Act were not met either.¹⁸² The District Court thus found the defendants liable of aiding copyright offence on the 17 April 2009.

11. Business models used where the physical product is not in focus

In the world of software we have during the last decades experienced new and inventive business models on how to make use of software code. There are quite many different types of licenses that allow for users to make use of software code, which is protected by copyright laws, without having to pay for the actual use of it. However, the possibility to make use of the software code usually comes under certain conditions with these software licenses. In the following chapter I will describe a few of these different licenses which can be said to have come from wanting a more open society and especially when it comes to developments on the Internet. These licenses serve as an example of that there are other ways to make use of the exclusive rights provided through the copyright system other than just concentrating on selling as many physical copies as possible.

I think that is important to clearly state what is actually meant by the term used in *free software* as the word free is usually perceived as meaning free of charge i.e. it does not cost anything. This is not the meaning that lies in the Free Software movement's use of the word free. What is rather meant is that a user is free, under certain criteria, to look at the software code and change it in whatever way

¹⁸¹ B 13301-06, p.73-75

¹⁸² B 13301-06, p.73-75

he/she wants i.e. exploit the work. The term thus means that use of the software is not restricted as the user is free to review it and change it.¹⁸³

I will also in this chapter provide an example of business models that make use of the technological and digital world on the Internet to provide works rather than with a physical copy of a work.

11.1 Software Licenses

11.1.1 GNU General Public License - Copyleft

In the 1970's Richard Stallman worked at the MIT Artificial Intelligence Lab and the work conducted was to a large extent colored by an atmosphere that praised sharing of software. After the collapse and termination of this lab during the 1980's Stallman experienced a change in the computing society. Proprietary software was becoming more and more an issue in the old *free sharing community*. Stallman did not like these developments as one was not able to even look at the software code and much less use it to make it better and one thing led to another and Stallman started to create his own system for computing. A system that would not be subject to user limitations in regards to limitations to review and make use of the software code. The name that Stallman gave the system was GNU and the aim with the system was to provide users with freedom to utilize the system.

Freedom in Stallman's terminology meant that users would be able to review the software code and change it to fit their needs. Furthermore, the software code as such could through the General Public License scheme not be made into proprietary software. Stallman did not want his GNU software to somehow end up as proprietary software and in order to see to this the GNU software was distributed as free software in accordance with the structure of Copyleft¹⁸⁴ which was the distribution system that Stallman had worked on. The GNU software was thus distributed under terms that made it possible for everyone to make use of it and furthermore allowed the users to copy the program, amend the program as well as distribute the amended versions of the program. However, one of the conditions under the license makes it so that the users cannot under any circumstances add any restriction to the amended versions.¹⁸⁵ In 1985 Stallman, together with a group of followers, created the Free Software Foundation, with the goal of financing free-software development.¹⁸⁶

¹⁸³ Stallman, Richard, M, 2002, p.41-43

¹⁸⁴ The term Copyleft stems from a letter that Richard Stallman received in the 1980's from Don Hopkins which according to Stallman had many sayings, including *Copyleft – all rights reserved*.

¹⁸⁵ Stallman, Richard, M, 2002, p.15-25

¹⁸⁶ Stallman, Richard, M, 2002, p.15-25

Stallman created something that was operational and furthermore saw to it that the software code could be utilized by everyone and thus not having a proprietary mindset to the code as such. Even though this freedom is awarded the users of the GNU software this does not mean that Stallman did not charge anything for the GNU software as such. The money that the Free Software Foundation distributes for the creation of free-software comes from sales of copies of free software and services related to this, which includes the sale of CD-ROMs of source code and binaries, printed manuals as well as custom built software for customer's chosen platforms. So even though the software is free it can still generate revenues.¹⁸⁷

11.1.2 Creative Commons

Creative commons was founded in 2001 and is a non-profit corporation. The aim with Creative Commons is to make it easier and more manageable for users to make use of others' works and this by making use of the rights set forth in various copyright systems.¹⁸⁸ The Creative Commons licenses enable creators to offer their work with only *a few rights reserved* rather than *all rights reserved*, which enables more freedom and openness in the otherwise so proprietary order when adhering to all possible rights provided by the copyright system. The Creative Commons Corporation provides copyright licenses that can be used by anyone without having to pay anything for the licenses as such. The Creative Commons licenses was somewhat inspired by the Software Foundation's GNU General Public License (GNU GPL). The licenses can be used for texts, music and films and so forth and allows people to share the work provided under a Creative Commons license under certain specific conditions, which are left to the creator to decide.¹⁸⁹

Even though the creators provide their works under a Creative Commons license, i.e. not all rights are reserved for the work by the creator this does not mean that the works cannot be used to make money. The creator that make use of a Creative Commons license ensure that his/her work can be utilized in more ways and by the use of certain pictures a user is helped in identifying what can be done with a specific work. It is furthermore so that the Creative Commons licenses are not exclusive licenses, which means that creators can provide their works by making use of other licenses or in any way the creators see fit for their works.¹⁹⁰

11.1.3 Open Source and Open Source licensing

The quintessential aim with Open Source and Open Source licensing is to hinder anyone from exploiting a work exclusively. Open Source licenses must see to it that, the works provided under the license can be exploited commercially on a non-exclusive basis, the source code is made available

¹⁸⁷Stallman, Richard, M, 2002, p.15-25

¹⁸⁸ <http://www.creativecommons.org>, Lessig, Lawrence, 2004, p.282

¹⁸⁹ St. Laurent, 2004, p.98

¹⁹⁰ <http://www.creativecommons.org>

and furthermore that derivative work stemming from the licensed work are allowed.¹⁹¹ As such, the Open Source license can seem very similar to the GNU General Public Licenses which they are but there is a significant difference in that, according to Stallman, the two have different approaches toward the society and the world in its underlying philosophy.¹⁹² Open Source is however all about the method of developing software which emphasizes openness.¹⁹³

11.2 Content providers on the Internet

11.2.1 Spotify

Spotify Limited was started in 2006 by the Swedish entrepreneurs Daniel Ek and Martin Lorentzon. The goal that they had was to help people listen to whatever music that might be of interest on a time and place chosen by the listener. Spotify provides a possibility to stream music on demand on your PC and this by having the Spotify program installed on your computer. The way it works is that Spotify provides a mix of both client/server network and peer-to-peer network. By installing the Spotify software on ones computer you enter into an agreement with Spotify and this will allow you to get access to over 8 million songs from thousands of artists as Spotify have entered into licensing agreements with some of the largest record companies in the world. When using the program you can create playlists of songs which you then are able to share with friends that also have the Spotify program installed. You can even post your playlist on e.g. Facebook and make use of the music services on certain mobile phones.¹⁹⁴

In Spotify's initial phase they sent out invites which allowed you to, free of charge, make use of their software and listen to all the music provided. Today it is not as easy to come by these invitations but then the paid for versions are available. However, with the free version setup Spotify air commercials that interrupt between songs from time to time. Without going any further into the setup it should be noted that some of their initial revenues came from advertising.¹⁹⁵

Spotify also provides subscriptions which allows you, for a monthly fee, listen to the music provided without commercial interruptions and with better quality than provided for the free version. They also provide day passes which allows you to listen to the music provided without commercial interruptions for a set price for a day.¹⁹⁶

¹⁹¹ St. Laurent, 2004, p.4-8

¹⁹² Stallman, Richard, M, 2002, p.55

¹⁹³ <http://www.opensource.org>

¹⁹⁴ <http://www.spotify.com>

¹⁹⁵ <http://www.spotify.com>

¹⁹⁶ <http://www.spotify.com>

When using the program there are additional services that one can also make use of as there are search functions and furthermore you can read dossiers on the artists as well as get tips of similar artists that might be of interest.¹⁹⁷

11.2.2 iTunes

iTunes is a media player distributed for free by Apple Inc. and was launched in 2001. The media player can be installed on ones computer and through it you can, among other things, listen to your music and play your videos. Some of the applications work very well with the music players that Apple Inc. provides such as the iPod and so forth.¹⁹⁸

Through the iTunes media player you also have access to the iTunes store from which you can buy music from, be that a specific song or an entire album. Whatever songs and albums you buy you can of course download these to your portable music player. Apple provides a wide variety of music players and mobile phones that allows for making use of iTunes. The customers do not pay for the program as such but instead pay for the content that they want. iTunes has grown from its launch in 2001 and is now one of the largest online music stores.

11.2.3 Voddler

Voddler Group AB, a Swedish company, founded Voddler in 2005 and provides on-demand services for streaming movies. It has certain similarities with Spotify and is often described as being the equivalent to Spotify for movies. The setup that Voddler has is similar to the one Spotify has in terms of that they also provide a free version that is available through invites that allow you to view movies on-demand with commercial interruptions from time to time. They also offer a pay-per-view version which means that a customer *rent* the content for 24 hours.¹⁹⁹

The Voddler website has been constructed in such a way that the focus is web based and as such the library and the functions provided are to a high extent recognizable to people that make use of sites like Spotify for example. The content, the movies, are streamed to your computer by the making use of decentralized peer-to-peer network. Currently the services provided by Voddler are only available in Sweden and Denmark but the company is planning to expand into Norway in Finland during 2010.²⁰⁰

¹⁹⁷ <http://www.spotify.com>

¹⁹⁸ <http://www.apple.com/itunes>

¹⁹⁹ <http://www.voddler.com>

²⁰⁰ <http://www.voddler.com>

11.3 Personal reflections

By clearly stating the purpose that the Free Software movement has I hope that it has become clear that they are far apart from Pirate Bay supporters both in terms of goals and ideology. As they however are bundled together in the debate and as both have certain important points in the debate I believe that it is important that they get their own share of limelight. The sections concerning companies that have started to see the great possibilities that the technologies available on the Internet have and the possibilities that lie in making the most out of these show that there are legal alternatives to listening to music and watching movies digitally.

12. Piracy

I have during the work with this thesis come to understand that the word piracy has many meanings and is not necessarily viewed by everyone as something bad. The term is often used for describing certain activities that perhaps does not deserve this labeling as well as for describing activities that perhaps deserves to be called piracy and maybe even harsher names. One kind of piracy is of course where exact physical copies are produced and sold without the copyright owners' permission. This cannot be perceived as something else than stealing and the labeling piracy would then be an accurate one in the traditional meaning of the term. However, in regards to peer-to-peer file-sharing Lawrence Lessig makes an attempt in his book *Free Culture – The nature and future of creativity* to make a difference between activities that are often labeled as being the same and his view on the matter has helped me to be able grasp the different sorts of piracy in a better way.²⁰¹ Lessig speaks of these different types of piracy in specific connection to peer-to-peer file sharing and divides the making use of the peer-to-peer networks into the following categories;

- 1) The ones who make use of file sharing networks to obtain content instead of buying it.
- 2) The ones who make use of file sharing networks to sample content before purchasing it.
- 3) The ones who make use of file sharing networks to obtain content that are either not obtainable elsewhere or would not have bought the content anyway because of too high costs.
- 4) The ones who make use of file sharing networks to obtain content that is not copyrighted or content that is given away by its owner.

Lessig goes a little bit further than only identifying the types and discusses the balance between all the types and if the end result somehow can be justified through a good level of all of these.²⁰² Even

²⁰¹ Lessig, Lawrence, 2004, p.62-68

²⁰² Lessig, Lawrence, 2004, p.68-79

though that discussion is interesting I will not go further into this and instead I will only state that type 1 file sharing is the type that most followers of for example the Pirate Bay make use of.

13. Analysis

The analysis provided below take starting point in the descriptive sections presented previously. As I will make use of a qualitative approach to analyze these questions my aim is of course to answer the following questions in an easy to grasp manner and hopefully all together provide some needed guidance in the realms of the ongoing downloading debate and some of its key issues.

13.1 Is the copyright system actually hindering the technological advancements for more efficient means of communication?

This question has to be answered from two different perspectives, one that relates to the world of music and movies and one that relates to software.

The copyright system in its traditional viewed upon role have nothing to do with technological advancements concerning means for communication as such. The traditional role of the copyright system have been to make sure that our society will benefit from works so that our cultural growth is secured and this through providing exclusive economic rights to the creator for his/her work. In most cases these economic rights have been transferred by the creator to a company or corporation, either by the grounds of employment or through contracts. In the case that the rights are transferred through contracts this is often done on the grounds that the creator feels that the company/corporation is better equipped to exploit the specific work commercially, distribute it and promote the buying of it.

In regards to works of music and movies the corporations security for the kinds of transactions made with creators have all been made under the pretenses that copying and large distribution of the copies of the work have been somewhat difficult meaning that if someone wants to listen to a music album the best way for me and you to do this is by buying a physical copy and furthermore that the legislative arena have provided exclusive rights for these activities to the rights holder.

With this in mind the technological means that are available today does not as such stand in contrast with the copyright system and does thus not hinder new and more efficient means for communication. It is much more so that it is the way that these technologies have been utilized that stands in great contrast to the business models used by the copyright holders and adhered to by corporations dealing with copyrighted material rather than the copyright system as such. With this I mean that it is not the copyright system per se that limits the use of new means for communication

but instead the business models used even though it is manifested through the copyright system. New technologies and usages of the same have made physical copies of copyrighted material outdated. The easiest and most convenient way for you and I to exploit and take part of e.g. a music album is to listen to it in either portable MP3 players, mobile phones or through our computers and this without the need of the physical copy.

As the business models used by the music and movie industry have been much focused on the idea on selling physical products the new technologies and effective means of communication presented on the Internet have made these business models to suffer which have lead to that the industries have pushed for extended rights through the copyright system in an attempt to slow this development down. The copyright system has been subject to major changes over the last couple of years in a struggle for the industries to keep the old balance alive when perhaps the business models instead should have changed. The large corporations that have great interest in keeping the old balance have seen that their traditional protected and easily manageable control position is challenged by the effective means for communication on the Internet. Instead of trying to change the thinking and let go of the business models that concentrate on selling physical copies of works the corporations have tried to lobby, and quite successfully I should add, for more far reaching rights so that activities on the Internet are restricted in such a way that same balance as they have had on the market for physical copies also is present on the digital market. These developments have had the effect that the utilization of certain technologies has been restricted in a legal perspective, and that is though not the same as saying that these laws and regulations are actually adhered to by the general public.

In conclusion I would say that in relation to e.g. music and movies the developments are not that hard to understand and in this aspect I would not say that the copyright system is hindering technological advancements for more efficient means of communication. The copyright system limits the use of certain technologies in an attempt to see to it that the interests of the rights holders are not violated. In regards to the traditional purpose of the copyright system this have had the effect that the general public's possibility to exploit works have been tried to be kept at a level that traditionally have been provided which can be argued to hinder technological advancements but I would not go that far.

However, when it comes to the world of software the situation is a little bit different as movements such as the Free Software movement and the Open Source movement are advocating free exploitation of software code. Software code is protected by the copyright system and as such is often transacted with as any other type of property. This have lead to that a lot of companies do not

want to share the code with others, meaning that a user of the software is not allowed to view the software code as such and furthermore are not able to make any additions or improvements to it and so forth. As this is the case certain software cannot be improved to fit the needs of the user as the user is not given a chance to review and make improvements to the software code. This means that certain technological advancements are actually hindered by the making use of the exclusive rights provided through the copyright system. Even though one might believe that better and more effective ways will always see the light of day the process is becoming increasingly more difficult as one would more or less have to start from scratch when developing something, which exactly is what Richard Stallman and his Free Software movement had to do. In making a comparison to the patent system one is allowed to build upon what other people have come up with which is a great advantage as one is not left to invent the wheel over and over again which one could say is the case in regards to software code.

The culture permeating the Internet in its first phase was much about free sharing of information and a will to collectively make the Internet and the technologies used better and easier for everyone to make use of. Along the way the Internet became a very important tool for many businesses and the companies that could deliver the best tools to make use of the Internet as such became very powerful. The software code had value that could be packaged as long as it was regarded as a property and this eventually led to that the free sharing that had been the norm on the Internet was somewhat abandoned.

In conclusion I would say that in relation to the world of software, that even though there exists movements such as the Free Software movement and the Open Source movement which advocate the free exploitation of software code and also provides the opportunity to build upon their software code the proprietary mindset is what governs the overall software industry and this fact together with that they make use of the copyright system to claim their proprietary interest, in my mind, are hindering the technological advancements for more efficient means of communication.

13.2 Is the copyright system on the verge of a total collapse?

There exists a large group of people that wants to see a total abolishment of the copyright system and as the respect for the copyright system is declining can the recent developments with more far reaching rights for the creators be the first steps to a collapse of the copyright system? If the general public has little or no respect for the copyright system and a large number of the population take part in something that can be regarded as civil disobedience are there any effective means for adjusting this behavior among the general public so that the copyright system can prevail?

The first question that probably should be answered before actually trying to answer the larger question above is if anybody has actually claimed that the copyright system is on the verge of a collapse. From the research that I have made I have not come across anyone claiming that the copyright system actually is on the verge of total collapse but there are those who want to see the system abolished. The matter concerning the abolishment of the copyright system is probably not the most discussed issue and this probably because many of us realize that the strong creative industries would put up a tough fight before letting go of the most important tool for their success and furthermore because many of us see the law as something permanent. So the actual question stated in the heading is perhaps not so much about whether or not the copyright system will prevail or not but is instead leaning more towards the issue of whether the traditional underlying purpose with having the copyright system will prevail.

Traditionally there has been a sought for balance between certain interest, the exclusive rights provided to creators of works and providing the society and the general public with works continuously as a process in benefitting to the society's cultural growth. However, due to the fact that the large creative industries, during the technological revolution and information revolution that takes place on the Internet, have lost some of its traditional control the industries have tried to push for extended rights ending up in that their traditional control have been somewhat restored. This have had the effect that the balance between the traditional interest/values have tilted in favor of the rights holders and the biggest losers are then the general public as the ways that we can exploit works have become more limited. Of course this is an effect of that the legislative apparatus with the pressure from the large industries, that gain the most from strong copyright, want to make up for their loss in control which they have experienced with the possibilities that the Internet and the technologies vested there have presented. The question is then if the stretched rights, in favor of the rights holders, will be tolerated from the general public and, if not, will that possibly have the consequence that the copyright system will collapse as more and more people do not acknowledge these rights or will it perhaps lead to that the general public will put up a fight that eventually will restore the traditional sought for role of the copyright system.

I believe that laws and regulations should adapt to changes we experience in our society. However, these changes should be made with caution and especially so when the changes relate to a quite new phenomenon and when the changes deprive the general public of certain traditional given rights/possibilities. The balance should be kept between the interests at hand rather than adjusting them to the side that has the strongest voice. The acts of civil obedience, that can be witnessed by the large amount of people not adhering to the laws of copyright, will have an impact sooner or later

and it is hard to say whether or not the traditional balance will be restored as a result of this or whether the traditional sought for role of the copyright system will be overrun.

The massive voice of the general public will in my mind see to it that pressure is instead put on the large corporations to adhere to the changes in the society rather than having the new means of communication hindered to the extent that the old business models used can live on. As the role of intellectual property and its value are recognized more and more I believe that we have not seen the last of that pressure is being put on the legislators to make sure that the role of the rights holder are strengthen. However, as the changes made will certainly have impact on the ways we exploit works I also believe that the general public will not be a silent bystander as they have noticed that their possibilities have been limited. Eventually I see that the tilt in balance in favor of the rights holder's interests will shift back which will lead to that the large industries will have to change their traditional business models so that they are able to make the most out of an intellectual value chain rather than sticking to the outdated material value chain thinking.

13.3 Can the copyright system prevail even though technological advancements are made that allow for easy copying and distribution of copyrighted material?

It can easily be forgotten that we have experienced other technological advancements that have also been seen upon as destroying the copyright system. The cassette tape and recording instruments was also perceived as tools for the destruction of the copyright system when they saw the light of day but the copyright system and the traditional interest have prevailed, the balance has been kept.

The responsibility of seeing to it that the balance can be kept between the right holders interest and the general public's interest in being able to exploit works in certain manners lies in large part on the creative industries as they have to wake up and acknowledge the fact that physical goods is not what people are after, at least not when it comes to music and movies and so forth. There are better and easier ways for people to exploit works nowadays than buying a physical CD or a DVD. I believe that the balance will not be restored until the large creative industries make a shift from a material value chain thinking to intellectual value chain thinking, as I have mentioned in relation to the previous question.

When the creative industries present the society with easier ways of exploiting works and through which the possibilities to exploit works are not limited in a manner that hinder the ways we have grown accustomed to in regards to how we choose to communicate with each other I am of the strong opinion that some of the issues that the industries are experiencing today with a lack of respect of the rights provided to the rights holder will not be as obvious as it is today. The main issue

is not that people are after to make use of works free of charge. People are after the most efficient ways for communication and to a large extent the illegal file sharing sites provide the easiest and most efficient means of communication and until the society are presented with equally efficient or perhaps even better means for communication by the large creative industries there will not be a shift in peoples behavior i.e. making use of legal means rather than illegal means. The copyright system will certainly prevail and benefit the large creative industries when they start to acknowledge that the main responsibility in changing the general public's behavior lies on them more than with anyone else. The threat towards the copyright system is not technological advancements as such but rather instead the focus on inefficient and outdated means of making use of works that the creative industries have.

13.4 Can the developments that we see in our society, with a declining respect for copyrighted material, be changed somehow?

It is a hard question to answer as it depends on so many different parameters. All in all I do believe that the development that we have seen with behavior that can be labeled *lack of respect for rights holders* can be changed in the perspective that the actions taken can be changed i.e. illegal downloading can decline among the general public. Unfortunately I do not believe that an attitude change is possible in the near future because, as I see it, there has not actually been a radical declining respect for the copyright holder by the general public in the recent years. I believe that there never really has been any respect for rights holders in a manner that would manifest itself through the actions taken by the general public. Their respect lies instead on the laws and regulations of our society and as the laws have not yet showed any teeth, in the perspective of abolishing illegal file sharing, the general public will not show respect for the laws and regulations. So creating awareness on the property aspects of copyrighted material is perhaps not the best way to go. Of course a big responsibility lies with the individual in making sure that the proper consideration is taken to the laws and regulations that uphold our society but for intellectual property it is not as easy to claim that the interest of the copyright holder is violated in the sense of that people that download illegally are actually stealing something.

The works that are being illegally downloaded is not regarded as stealing in the traditional sense of the term stealing as no property is actually being taken away from the owner, which one could otherwise say is the case for the stealing of physical copies. It is probably hard for the general public to grasp the fact that the material that they illegally make use of are somebody else's property and that some of the actions taken are only awarded the rights holder. There are not fewer physical copies on the shelf as a result of their behavior. I believe that, again, a big responsibility lies on the creative industries in providing means that are as easily manageable as provided through e.g. web

sites that enable illegal downloading. Of course the legislative apparatus also have its responsibility to make sure that property rights are upheld and with that the rights are given the necessary respect. This is of course not an easy task but there needs to be an understanding that the change in behavior does not come without there being a formative stand from the government and the legislative arena that the behavior of illegal file sharing is not taken lightly. The verdict in the Pirate Bay case is in my opinion a step in the right direction as if the people behind the site were not to be held liable then this would have signaled that the kind of file sharing taken place on the site is something accepted. But as there does not exist any effective ways to go after individuals on a larger scale, even though the law implemented in 2009 as a result of the IPRED directive tried to provide effective measures to be able to go after and prosecute individuals.

So if one let go of the notion that there needs to be change in attitude and rather focus on that there needs to be a change in behavior among the broader public how can the change in behavior be realized? It is my humble opinion that if better alternatives for legal ways to exploit works in a digital setting are constructed then I do not think that it will take long before people see that the downloading through illegal file sharing sites no longer are the easiest and best ways to experience e.g. music and movies. Services that have been provided by e.g. Spotify have been widely recognized and utilized and they now have a great amount of customers and through the services you can listen to music directly rather than waiting for the downloading process to finish. The services provided are easier to make use of for a larger group of people than having to download material illegal. If the services provided by Voddler will take off in the same manner as Spotify the same changes could be possible for movies as well.

Regarding movies, the movie industry has to realize that a large group of people are after the newest thing and the new releases rather than an experience that can be provided by visiting cinemas. The amount of cinema goers will not decline because the movie has been released on the Internet as there exists a large amount of people that are after the whole movie experience rather than only watching the movie and this experience can only be provided in a cinema. But for the people that are not after the cinema experience and that are only after watching the latest movie, and as they often can get a hold of these movies through illegal file sharing sites, their behavior will not change before the industry present legal options that are equally or preferably better and simpler to make use of. It is thus in relation to this issue also a question of letting go of traditional material value chain thinking and moving on to an intellectual value chain thinking which is the key. There can be a change, at least in behavior, and I think it is in the best interest of the creative industries to acknowledge that it is up to them, to create a change as they have all the tools to make this happen, there only needs to be a shift in their business models. They have to let go of models that worked prior to the information

revolution and make use of models that are suitable for the information society. The possibility of change does not lie in stronger copyright legislation and greater awareness of the copyright system but instead in providing effective means of communication.

13.5 What consequences can the standpoint that the District Court took in its verdict in the Pirate Bay case have for our society, good or bad?

The standpoint taken in the Pirate Bay case will have consequences in several different arenas. For the first part the verdict sends a clear signal to the rest of the world that Sweden is not a free haven for illegal file sharing and thus that our country recognizes the property interest that lies in the copyright system.

The verdict is not at all revolutionary as similar verdicts have been seen around Europe and in the US. Even still, the message that have been sent provides a playing field in which financiers within the creative industries can see that their interest will be upheld which means that their investments are secure from at least a legal perspective. If the District Court would have found the activities performed by the people behind the Pirate Bay legal then this would have sent a message to the rest of the world that Sweden does not recognize intellectual property as the institution that it is. This would in the long run have lead to lesser investments in the creative industries in relation to the Swedish market. It would also have meant that Sweden would have become a free haven for illegal file sharing sites. These effects would of course only have prolonged as long as such a verdict would be upheld by the Court of Appeals.

The consequences of the actual verdict also have effects on the file sharing arena in which a clear statement has been communicated in that torrent indexing of the sort that the Pirate Bay have provided cannot escape the long arm of the law. That the debate, in many instances, regarding piracy has been tangled together with the Free Software movement and the issued relating to the freedom to exploit works are unfortunate as in my opinion the questions that this movement present are far more important than the cheap populist approach that the followers and instigators behind the Pirate Bay and similar sites portray. They are only, more or less, after the possibility to make use of works for free which is quite hard to understand as this goes against an important part of the construction of our society. In my mind I do not seriously believe that people actually are advocating a stand against property constructions and protection for property as I believe that the general public's behavior is instead governed by convenience rather than an active political standpoint. However, the instigators behind the Pirate Bay have tried to make it a political issue in order to somehow defend their somewhat questionable behavior. The consequences of the verdict are good in the perspective of Sweden as a country and in terms of the rights holder's interests. As the case

will be brought before the Swedish Court of Appeals this summer it is very interesting to see what the court decide to put emphasis on and furthermore if they will find their way to the same verdict as the District Court did.

14. Concluding remarks

The questions that I have raised are as you see all interrelated and the discussion presented does thus to a large extent intertwine. My aim has been to make the debate a little bit clearer and my conclusion for most parts boils down to that a great responsibility in creating a change in the society for greater respect of the copyright system does not lie so much in changing the thinking of the general public and changing its attitude but rather providing the general public with as effective legal means of communication as the illegal market has provided so that a change in at least behavior can be met. The answer to the problems experienced by the creative industries will not manifest itself through tougher laws and regulations but instead of better and more efficient means of communication provided by the rights holders. It is not until the large creative industries identify the fact that they have to wake up and provide the answers to the general public's needs that a change in behavior will take place. It is important however to recognize that the change in behavior is not actually a change but rather a shift from ways that the creative industries frown upon to ways that they themselves provide. The general public will always make use of the means of communication that are the easiest and most effective to make use of and it is up to the creative industries to make sure to provide the easiest and most effective in order to regain some of its traditional *control*. This can only be done by recognizing the need for a letting go of the material value chain thinking and adhering to intellectual value chain thinking.

When a change in mentality have occurred within the creative industries they will also recognize that they will gain more by providing more possibilities to exploiting works and not by limiting the possibilities to exploit works. The situation will then, in my humble opinion, lead to that the balance will be restored between the interest of the rights holders and the interest of the general public.

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