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Copyright in the Music Industry

„For whom the bell tolls“

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OMNIS ENIM RES,
QUAE DANDO NON DEFICIT,
DUM HABETUR ET NON DATUR,
NONDUM HABETUR,
QUOMODO HABENDA EST¹.

Aurelius Augustinus (354-430)

I. Introduction

Copyright protection in the media and especially in the music industry is a widely discussed topic since several years. In fact new technologies based on Internet changed the situation for the classic business model of the music labels dramatically. CDs become more and more superfluous with the advent of digital media and thus the traditional business model producing and selling them. The music industry of course makes these new technologies responsible for their decline in sales while others argue that the new technologies moreover offer great opportunities for the industry to expand their markets. However I will not join the discussion whether online file sharing is responsible for the decline in record sales². I rather will show that the new technologies being introduced offer great chances for new ways of producing and distribution of music, no matter the impact it has on the old and out-dated business models by selling CDs. In my thesis I try to give some insights into the current dilemma, discuss the most appealing proposals advanced by legal and economic scholars and, finally, provide my own suggestions without

¹ "For if a thing is not diminished by being shared with others, it is not rightly owned if it is only owned and not shared."

² There are studies which say that file sharing has is detrimental to the music business, others which say that it is beneficial and those who see no impact of file sharing on the music industry; pro negative impact see Enders Analysis - Europe March 2003 or Forrester Research - Europe January 2003; for no negative impact of file-sharing see CNET.com http://businessweek-cnet.com.com/Study+Falling+CD+sales+cant+be+blamed+on+P2P/2100-1027_3-5746291.html (OECD study) or a study by Felix Oberholzer and Koleman Strumpf The Effect of File Sharing on Record Sales - An Empirical Analysis 2004 which suggests that file sharing might even boost record sales http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

neglecting the current political circumstances. Therefore I will give some background information of what is actually going on right now in the markets for music in the second chapter. Then I will shed some light on the basic foundations of copyright, its economic impacts and of course its inefficiencies according to the music business. After having analyzed the economic consequences of current copyright laws I will introduce and comment on some recent suggestions to ameliorate the inefficiencies. This will be proposals from single changes of particular parts of copyright to radical abandonment of copyright law at all. In order to ameliorate the dilemma given I will give some suggestions for the short respectively the long run. Unlike the existing literature I will therefore consider current copyright policies in major markets which I will shortly introduce. Furthermore I will argue that copyright might be seen differently in different markets. These are the end-consumer market, the intra-business and the extra-business market as being introduced in the following.

II. The current dilemma

In case the reader has not realized so far: there is a “terrorist war” on the file-sharers going on right now, as Jack Valenti³ martially stated. In the following I will try to explain this disturbing news.

1. Pirates⁴ v. Business

In 1987 the Fraunhofer Society⁵ invented the so-called MP3 audio encoding and compression format. It was created to significantly reduce⁶ the size of

³ Jack Valenti was the president of the Motion Picture Association America (MPAA) until August 2004. see Lawrence Lessig on FT.com *End the war on sharing*.

⁴ Rather so-called pirates; since the early inventions like Eastman’s flexible film or Armstrong’s FM radio technology modern entrepreneurs introducing revolutionary technology which were likely to threaten the traditional market models were always accused of pirating copyrighted goods by the old fashioned business. However should the legislators these days have forbidden these path breaking technologies? Not only for the sake of the development of our societies they wisely decided to do not so. [see Lawrence Lessig *Free Culture* Chapter 4].

⁵ Fraunhofer Institute for Integrated Circuits in Erlangen, Germany; on 14 July 1995 Germany’s Fraunhofer Institute chose to use the .mp3 extension for files holding audio data encoded using the MPEG standard’s Audio Layer 3 specification [http://www.theregister.co.uk/2005/07/14/mp3_tenth_birthday/ last visited 3.8.2005]; on July 14 2005 it mp3 celebrated its 10th anniversary.

⁶ 10:1.

space needed for a digital file representing audio while ensuring the quality of the song to the listener. With around 3 MB an average song can be saved on any digital memory device such as hard disks while ensuring an equal quality as the audio source. Assume the common hard disks nowadays come in sizes of 80 GB, one could save up to 27306 songs or 1950 albums⁷ on it. By far more than the average music fan will ever possess in his life. With the invention of the first popular MP3 encoder in 1994 it was able for the then still rather advanced computer user to encode his or his friends' music CDs into this digital format. So far still a rather non public thus private activity which cost a lot time for the so called "rippers"⁸. However the development of computer speed and capacity made it more and more feasible for the average computer user to rip his or her own audio music. So far no real threats to the music industry, since digital copying was no mass phenomenon and CD sales have still been up. Possessing a MP3 music collection on the PC was simply cool on private parties and for most people practical, since their music collections now needed much less space than in tangible form and have been available via one click on the screen like a modern jukebox.

In 1999 Shawn Fanning, then a student from Boston's Northeastern University, released *Napster*; the first popular peer-to-peer file sharing network. This service actually enabled its users to share their digital MP3 music files and thus made music freely available online for those who joined the community. Simply download *Napster* for free, install, log in and up- respectively download music from / to the *Napster* community. However in fall 1999 the *Recording Industry Association of America* (RIAA) filed a law suit against *Napster* accusing it to facilitate music piracy⁹. Unlike earlier when people already copied CDs on cassettes for instance *Napster* significantly increased the amount of copies shared by decreasing the transaction costs for users to get the music. The advent of broadband access and increasing computer power aggravated this development in the eyes of the music industry. Consequently the almost logical argument by the RIAA was that these file sharing activities heavily infringe copyrights and threatens the music industry

⁷ 80 GB = 81920 MB : 3 MB = 27306 songs = 1950 albums with an average of 14 songs each.

⁸ "To rip music" = to encode audio into MP3.

⁹ A&M Records Inc. et al v. Napster Inc., No. 00-16401, U.S. Supreme Court.

as well as the recording artists, since neither of them gets compensated by these *pirates*. Since 1999, they claim, the balance was gone and Napster is responsible for around 30% decline in music sales¹⁰. After failing an appeal to the Ninth Circuit Court *Napster* had to shut down and cease its service¹¹. However this was not the end of file sharing activities via the internet. The Ninth Circuit Court held *Napster* liable for copyright infringement, because it offered a centralized server system which at least temporarily stored the music on its server. This did in the first place not apply to peer-to-peer networks that are in opposite to *Napster* decentralized. Such services as *Gnutella* or *BitTorrent* who followed the path *Napster* has already taken provided users all over the world even more easily with freshly encoded music. Finally more and more people connected to these peer-to-peer communities and shared more and more music online¹². On the other side the MPAA as well as the RIAA supported by some musicians such as the band *Metallica* filed one suit after another and turned their legal guns on users and lately owners of websites providing peer-to-peer services. Most of the claims were approved by the courts or ended in settlements¹³. Recently the *Metro-Goldwyn-Meyer Studios Inc.* won his appeal in its law suit against *Grokster*, an online peer-to-peer service¹⁴. The court held that a peer-to-peer service provider might be liable for copyright infringing behaviour of his users if he “*promotes its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, ..., regardless of the device’s lawful uses*”¹⁵. Thus for now it can be assumed that in the near future avalanches of law suits against other peer-to-peer providers will be filed and the stars of online file sharing might fall. Hence the *terrorist war*

¹⁰ See for recent numbers the website of the *International Federation of the Phonographic Industry* http://www.ifpi.org/site-content/antipiracy/piracy_watch_current.html.

¹¹ *Supra* 8.

¹² After the RIAA filed the lawsuit against Napster the file sharing community grew to more than 57 million users in opposite to nearly 200.000 before the law suit - Lawrence Lessig *The Future of Ideas* 2001 p. 130.

¹³ The average file-sharer has to pay around \$ 4000.

¹⁴ *MGM Studios Inc. et al v. Grokster Ltd.*, No. 04-480, U.S. Supreme Court.

¹⁵ Syllabus of the case, p. 2, <http://www.copyright.gov/docs/mgm/syllabus.pdf> (last visited 01.07.2005)

will go on between those who want free access to music and those employing any legal means available to protect their property.

2. Constraints of Copyright and its Enforcement

Beyond the contradicting claims of the two parties involved there are actually legal and technical constraints of copyright and its enforcement. While music labels employ questionable methods in order to protect their copyrighted works, *pirates* seek for shelter in non-copyright-enforcing countries, since the internet is everywhere but laws face geographical constraints.

Recently one can find signs on CDs which say that any copy is prohibited. By this the media industry tries to establish a contractual clause - additionally to the existing copyright laws - to the purchase of a CD or DVD in order to claim compensation on the grounds of the breach of a contract, if a CD is copied anyway. Normally copyright laws allow several¹⁶ copies for private use either justified by the doctrine of *fair use* or the *right to make a private copy* of a purchased CD¹⁷. This practice of course provoked heavy reactions by consumer associations which brought this to court. Among other courts the court of appeal in Paris ruled in favour of the consumer associations that a note on a DVD “copie prohibée” infringes the fundamental right to make a private copy¹⁸. By this the court clearly confirmed the legal boundaries of copyright protection. Unlike the industry would like to, copyright holders simply can not determine every single possible use of their works. They have to respect at least fundamental rights of the consumers. Hence this questionable legal practice of music labels is likely to be not successful in the long run.

Furthermore if copyright holders want to enforce their rights globally they face problems in finding legal partners. A lot of jurisdictions especially in former communist countries in Eastern Europe do not respect copyrights as western countries do such as the U.S. or the EU¹⁹. For instance Russian *prosecutors had decided not to pursue [AllofMP3.com] with legal action*

¹⁶ Around 7 according to German case law.

¹⁷ For instance one can think about creating a copy for the car or the portable disc player and the like.

¹⁸ 01net.com 22.04.2005 *La justice interdit de protéger les DVD contre la copie.*

¹⁹ This is due to the fact that they rather have problems in granting private property anyway since they followed a philosophy of state or public “owned” property.

because Russian copyright laws only cover physical media such as CDs or DVDs and not digital files such as MP3s although it would have obviously been a copyright infringement under western laws; the Russian server offered and still offers mostly western music for discount prizes to its international customers without having valid licences²⁰. However the claim by the western music industry was rejected which shows that due to the still regional constraints of copyright laws they are useless in terms of enforcement as soon as infringement takes place in not “cooperating” countries with nevertheless world wide impact. The message for “pirates“ is to establish servers in these non-cooperating countries in order to peacefully run their business. The message for copyright holders is to face the reality and give up the dream of a globally enforceable copyright. In worst case all the commercial copyright infringers will sit in non cooperating jurisdictions and thus are out of reach for legal claims.

Besides these legal approaches to control the use of a musical work, there are several technical efforts made in order to keep control over the use of music. So called *Digital Rights Management* approaches try to secure files by copy-protection tools or watermarks. However these technical attempts become rather soon out-of-date since they are quickly hacked or circumvented by specialized groups²¹. Thus technical protection in the fast changing world of the internet is a rather useless and hence costly fight like the one of Don Quixote against the windmills. Furthermore technical copy-protection is likely to upset the customers since there are a lot of cases where accordingly manufactured CDs are not playable for instance with older CD players.

To sum up, copyright holders face legal constraints in designing contractual clauses as well in enforcement of their rights as well as a never ending competition in employing technical means to protect their works.

²⁰ BBC of 8.3.2005 'Legal okay' for Russian MP3 site.

²¹ Even Apple's iTunes was hacked twice although it claimed to have the most secure copy protection available. See Peter Cohen in PCWorld *PyMusique Author Hacks Apple's iTunes Fix* <http://www.pcworld.com/news/article/0,aid,120146,00.asp> [last visited 4.8.2005].

3. Uncertainty

Additionally to the weak points of copyright and its enforcement as said above legal uncertainty in substantive law plays an important role as well. From my own experience with German copyright law I can say that most cases of music down- or uploading are difficult to subsume under the code even for specialists. Before the reform of the German copyright code in 2003 there have been some scholars that said even the process of encoding audio into digital format infringes copyright since it changes the consistence of the original work. Of course this is a rather unreasonable claim and has been clarified lately by stating that private copies on any feasible device are allowed based on fair use²². Then it was discussed whether the service provider infringes copyrights by granting two parties to send MP3 files over their servers. It was argued that the technique of cutting one MP3 file in fragments and partially saving these fragments on the respective servers is an illegal change of the original work and thus infringes copyright. This claim however was as well not approved by any courts and hence belongs to academic legal history. However it shows the bizarre way of trying to approach these evolving challenges due to the new technologies by legal scholars.

Since the reform of the German Copyright Act due to the EU Copyright Directive²³ in September 2003 it is much more likely for copyright infringers not only to be liable by civil law but under criminal law. These possible legal consequences are of course much more severe than under former copyright law since they allow imprisonment as well. However until now state prosecutors and enforcement authorities did not make use of these laws since they are still not sure in what cases they apply. Instead they prefer applying rather standard criminal or civil laws to the cases²⁴.

²² See § 53 par. 1 UrhG; this shows again that the contractual clause of “copy prohibited” is legally questionable.

²³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

²⁴ In March 2004 there have been dozens of nationwide house searches including confiscations of several PC systems of users connected through a music and movie sharing network. Although the state prosecutors could have easily accused them of infringing copyright law they founded their claim on ordinary computer crime laws of the German Criminal Code.

For users on the other hand the situation is not much clearer. Dozens of forums in the internet try to shed light on the often raised question whether up- or downloading of MP3 files is legal or not. Most of them conclude that uploading is illegal. However when it comes to the many times more raised question of downloading the answers are not able to clarify the current mess. The law says in § 53 section 1 German Copyright Act that copies of a work for private use is allowed as long as the initial work is not an “*obviously illegal created sample*”. What is meant by *obviously*? Is it every MP3 file which does not stem from the official webpage of the artist e.g. his label? How about the music file a friend received by a friend. In general this exchange between friends falls under *fair use*. However should users now be suspicious about the legal circumstances of files sent by a friend? Quite comprehensible there is uncertainty among users which will in doubt rather deter them from music swapping than the other way round.

Of course there are fields in legal policy²⁵ where the law maker prefers to have a certain degree of uncertainty in order to deter people from doing this or that. In copyright law however uncertainty in the scope of *fair use* is simply no longer fair to the user. Furthermore it raises the transaction costs of implementing and enforcing the laws due to unsuccessful trials by state prosecutors. Trial and error is a rather costly affair which is superfluous with well designed and easy to understand laws.

4. Summing up

The dilemma given above shows that there are due to legal and technical constraints as well as uncertainty many weak points in current copyright policies. *Terrorist wars* are never efficient since they come along with a huge waste of resources. Should copyright holders instead join the ones they can not beat anyway? In the following I will analyze, whether copyright laws themselves are efficient or not. This might help the copyright holders and policy makers to come to better decisions.

²⁵ For instance in criminal law in order to deter people from committing a crime.

III. The Notion of Copyright and its Economic Aspects

In order to mitigate the dilemma I have to investigate its sources first. Therefore I recall basic theories why we have copyright at all and then analyze the current copyright law regarding the music industry. In other words I will trace the roots of copyright and see, if there are other ways to reach the same goals copyright exists for maybe even better and at lower costs for the society.

1. Basic foundations²⁶

The notion of Copyright is a comparatively rather young one. Its roots trace back to the Statute of Anne in 1709 England. After abolishing the royal printing monopoly, the so called Stationer's Company, in 1694, the way was cleared for this first copyright law. Various interests had to be considered. Those of the author's to commercialize their works; those of the former monopolists to exclusively bind the former through their exclusive author's right and of course those of the crown to participate financially in the trade with printed goods. The initial copyright term was 14 years, once renewable by the author for another 14 years. After the expiration of either the first or the renewed term the work fell into the public domain for everybody's use²⁷. In the U.S. the basis of copyright is already written down in Art. I, sect. 8, cl. 8 of the Constitution. It says "*the Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries*". Thus the main reason for copyrights in the U.S. is granting the artist an exclusive right to exploit his or her work in order to set financial incentives to create more respective artistic work. Basically this is influenced by the labour theory of John Locke²⁸. According to this theory property should be a reward of useful labour. Only the one who invested labour in his or her work should be assigned the property of a certain good²⁹. A utilitarian

²⁶ For a good overview on the philosophical background see Peter S. Menell *Intellectual Property: General Theories* Levine's Working Paper Archive 2003.

²⁷ Copyright in a Historical Perspective - Chapter 7 Statute of Anne.

²⁸ John Locke, *Second Treatise of Government* rev. in 1963 3d ed. 1698.

²⁹ See for instance Lord Mansfield's statement in *Sayre v. Moore* [1785] 102 Eng. Rep. 139a: "We must take care to guard against (...) that men of ability, who have employed their time

influence is however not deniable as well. The author has to be fed since his creative work is useful for the community. Therefore copyright in the U.S. is mainly a commercial right and no personal right. Consequently it is completely transferable³⁰. In the music business that happens for instance to young performers, who transfer their complete copyright on their songs to the producer as an asset to finance the album.

In Europe on the other hand copyright is seen as a natural right. Additionally to the economic reasoning of granting the author reasonable royalties of the use of his work it follows a personality approach. Already the technical terms like the German “Urheberrecht”, the French “droit d’auteur” or the Spanish “derecho de autor” indicate that it does not only imply a right to copy, but focuses on the creating author. This *author’s right* protects “*the author in his intellectual and personal relation to his work*”³¹.

Thus the two major philosophical foundations of copyright are first to provide a reward for useful labour and second to acknowledge the personality of the creator.

2. Economic Rationale of Copyright

The economic rationale of copyright law lies in providing financial incentives to the artist to *create and disseminate* his or her work³².

Art. 1, sec.8, cl. 8 of the U.S. Constitution³³ already indicates that a copyright is an exclusive right to the author in order to exploit his creation. Economically speaking a copyright grants its owner a - temporary - monopoly. This enables the holder of the copyright to exploit his creation by charging

for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour;”

³⁰ § 101 U.S. Copyright Act: “A “transfer of copyright ownership” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.”

³¹ See Art. 11 German Copyright Law: “*Copyright shall protect the author with respect to his intellectual and personal relationship with his work, and also with respect to utilization of his work.*”

³² See for instance Raymond Shih Ray Ku - *The creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 2001 or Akerlof et al. *The Copyright Term Extension Act: An Economic Analysis*, May 2002.

³³ To recall “*the Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries*”.

prices through a licensing system. Basically any use of the work has to be authorized and paid. Since this rather generous gift of the respective intellectual property regime to the author guarantees him a *reward* for his efforts it is argued that he therefore has an incentive to create at all. Without this ability to exploit his work through a copyright less would be created, since there is simply no financial incentive to do so.

Besides this incentive to create - argument the second justification of copyright policy is to give a financial incentive to disseminate the piece of creation. It is argued, that without the copyright - the right to copy - nobody would invest in establishing a costly distribution system including the production of the CD, the necessary marketing and last but not least creating, maintaining and expanding the network of retailers (the so called 'middlemen') who sell the CDs to the customers. Namely without a copyright the initial distributor would have to invest a lot money while the others just free ride on his efforts and simply copy and sell the same CDs for an accordingly lower price, since they did not have to spend money on advertising and recording the music etc..

However in the following it will be shown, if we actually need copyright in order to set the incentives given above.

3. Major Economic Impacts of Copyright Laws

In order to analyse economic impacts of copyright laws to the music industry I will differentiate between three different markets³⁴. There is at first the market of the fans; those who buy CDs and listen to the music. I will call this market the end-consumer-market. Second, there is the intra-business market. This is the market from artist to artist, where performers ask others for licenses to perform, cover or use in any possible way their original work in order to create something new. Third there is the extra-business market. This is the market where radio and TV stations for instance ask for licenses to commercially broadcast an artist's music.

³⁴ Unlike the typical literature on this which does not differentiate between different markets. However since I think that there are different impacts of copyright in the different markets I employ these three market models.

a. Monopoly Costs of Copyright

As already said a copyright is in economic terms nothing else than a state backed monopoly³⁵. However there are two respective types of costs associated with a monopoly regarding the music business.

At first - of course - there is the primary cost resulting from the so called dead weight loss (DWL) a monopoly evokes. Second, there are the secondary costs - as I characterize them - as a consequence of a monopoly, which may be associated with anticommons cost and the like.

In the following I will analyse these monopoly costs in greater detail.

aa. Primary Monopoly Costs (DWL)

Neoclassical theory associates a monopoly of course with the dead weight loss it causes. Basically this means that due to the exclusivity of the monopolistic supply the monopolist is able to charge higher prices³⁶ to the disadvantage of the consumer. The consumer now has not only to pay higher than competitive prices, but demand in general will decrease and some of the consumer surplus is shifted to the monopolist (triangle R and quadrangle Q). Finally the deadweight loss corresponds to triangle B which demonstrates the loss of consumer surplus, since the price of the respective good is not located at the competitive level P_C , but at the monopoly level P_M .

³⁵ An overview and criticism on the neoclassical as well as the Austrian monopoly theory is given in D.T. Armentano *A Critique of Neoclassical and Austrian Monopoly Theory*, <http://www.mises.org/etexts/armentanomonopoly.pdf> [last visited on 16.07.2005].

³⁶ In opposite to the competitive firm the monopolist is a price maker and not a price taker. See also Hal R. Varian 2003 *Intermediate Microeconomics*, p. 425 *et seq.* .

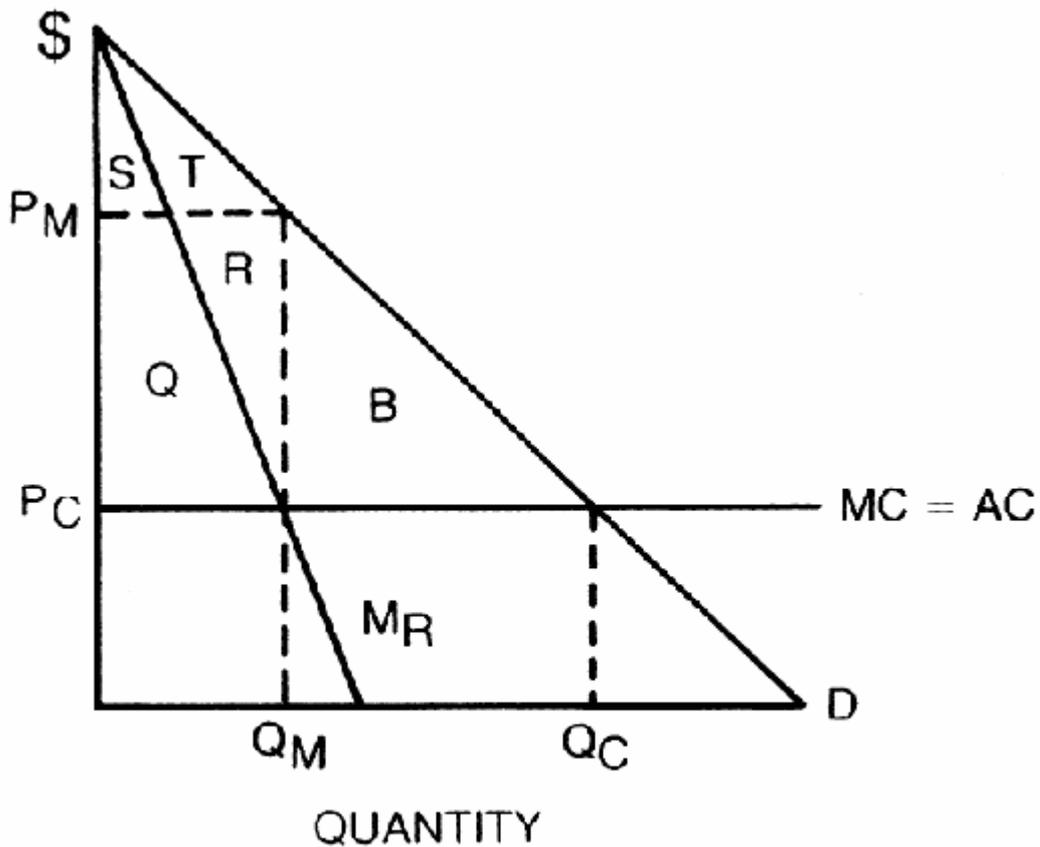


Figure 1. Economic Impact from Granting Copyright.

[source Liebowitz, COPYRIGHT LAW, PHOTOCOPYING, AND PRICE DISCRIMINATION.]

Translated to the music business this model holds that there is less musical output at higher prices, thus less music available for the consumer and hence the society. If there would not be such an exclusive right to exploit everybody could freely copy and trade musical works. The outcome would be that music is sold at a much lower competitive price and more people would be able respectively willing to pay; hence more culture would be available.

bb. Secondary Monopoly Costs

The story of secondary monopoly costs is the one that takes place in the intra-business market and is about sampling and covering musical works, hence the production of derivative works based at least in part on copyrighted material. Assume for instance that somebody, *especially DJs and Hip-Hop performers are likely to belong to this group*, wants to use somebody else's work in order to create a new one. Might his or her wish be to use a fraction of a song

(sound sample like the refrain) or the whole song to create a new compilation like for instance a soundtrack for a movie. Then at first he has to clear the rights, i.e. asking every single copyright holder for permission to use his or her work. Since there is no central copyright registry³⁷ he first needs to find the actual copyright holder. This might be the artist. However there might be several copyright holders, as for instance one for the lyrics and one for the music. In most cases in fact the copyright belongs to the producer, the music label, of the performing artist. Most artists, at least under the U.S. American completely transferable copyright, transfer all copyrights on their work to the producer as an asset in the beginning of their career in order to finance their album. So the one who wants to use this work will have to ask the music label for permission. The music label on the other hand often wants to keep the song exclusive and of course denies permission until the price is high enough. In worst case they simply reject the request since they want to publish the same song at a later date for instance on a “Best Of” album. Cover versions at the same time published might be unwanted competition for this plan. Thus the monopolistic position of the music label leads to strategic behaviour which excludes other artists and by this prevents new creations and therefore new cultural goods. If permission is granted and the DJ is allowed to use the different samples or songs, the aggregated costs of all licenses are likely to be very high if not prohibitive³⁸. Either simply because of the fact that he has to pay as much as licenses as different copyrighted works or copyright holders³⁹ are involved, or because of strategic holdout behaviour by copyright holders who think their work is the most important contribution of the new work being created.

Especially the latter case is related to the so called *Tragedy of the Anticommons*⁴⁰ in which a scarce resource is under-utilized due to the fact that too many individuals have rights of exclusion, i.e. property rights. In terms of this model introduced by Michael Heller in 1998 the state-backed

³⁷ The U.S. Copyright Act abolished this requirement in 1976 in order to align with the Europeans who never had a duty to register, since they see copyright (author’s right) as a natural right which does not require a formal act to exist but only the creation itself.

³⁸ Lawrence Lessig, *Free Culture* (2004).

³⁹ 10 permissions from one holder are likely to be cheaper as a bundle than 10 permissions from 10 copyright holders.

⁴⁰ Heller, M. A. (1998): *The Tragedy of the Anticommons* and Depoorter, Ben, Parisis, Francesco *Fair Use and Copyright Protection: A Price Theory Explanation*.

monopoly called copyright leads to an under-utilization of music and thus culture, since it creates scarcity⁴¹ by granting the exclusivity mentioned above.

b. Transaction Costs

aa. Lack of a Central Registry

As already indicated above neither U.S. nor European law have a central registry for copyrighted works. In Europe this is due to the natural rights view which implies that copyright comes with the creation itself and does not need any further formal requirements. In the U.S. this formality was abolished in the 1976 copyright act, since one wanted to align to the Europeans.

However this lack of a central registry increases the transaction costs⁴² for the one who wants to use copyrighted works. As long as copyright exists and use of copyrighted works requires a licence by the copyright holder he has to be found first. Imagine one has to clear several copyrights with several copyright holders he first has to search them in order to negotiate with them. However if there is no central registry, the transaction costs associated with the search are likely to be significantly higher.

bb. Long Copyright Terms

Additionally to the transaction costs caused by the lack of a central registry there are higher transaction costs associated with the growing length of copyright terms.

Nowadays in the U.S. and in the EU the copyright terms last up to 70 years after the death of the author or 95 years⁴³ after the first publication of the work. If an author especially in the young music business publishes a work at the age of 20 and dies at the age of 85 his work is copyright protected for 65 plus 70 years, since the copyright is transferred to his heirs *mortis causa*. Hence copyright leads in this case to a 135 years exclusive monopoly.

⁴¹ Neoclassical justification for granting private property is to solve the problem of scarcity and not to create it though.

⁴² Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

⁴³ See Articles 302 U.S. Copyright Act; § 64 German Copyright Act.

Apart from the increasing cost of monopoly with longer copyright terms one can say that finding the copyright holder will in general not become easier the older the copyright is. The copyright might have been transferred with the years to several holders which is not easy to find out for the one who has to clear this right. Of course this problem could be mitigated by a registry as well. However one can easily imagine that it is easier to find the creating author after a short period than tracing the several transfers from one to another after several decades of copyright protection.

c. Résumé

To sum up, one can conclude that copyright causes several costs to the society. There are the costs of the monopoly itself and of course the transaction costs associated with the lack of a registry and the very long copyright terms. Whether this is in Kaldor-Hicksean terms outweighed by the benefits it grants to the authors and thus to the creation of music ought to be doubted. Moreover one has to understand that there are major economic impacts of copyright protection which are completely counterproductive to the goals pursued by it. Especially with respect to the intra-business market and thus the creation of new cultural works by other artists one can say that copyright rather leads to less than more music. Sceptic voices fear that long copyright terms lead already to less musical output by one musician since he could rest on the success of his first hit for a lifetime⁴⁴. Whether the latter is true or not it can be concluded that there are seriously doubts on the efficiency of copyright advisable and copyright policies should be changed as soon as ways out of the dilemma stated above are in sight.

IV. Adjustments of Current Copyright Laws

So far I showed the main inefficiencies of the current copyright laws including the legal and technical constraints of its enforcement.

However how can future policy makers ameliorate this *status quo*? Can we get out of this calamity by simply changing the enforcement of copyright laws or

⁴⁴ Or should one rather pose the questions why bands like the Rolling Stones still produce music although they do not need any more money since decades already? Probably they are not motivated by *extrinsic* financial rewards.

the underlying social norms? Should we rather change the length or the scope of existing copyright laws? Moreover can we question the need for copyright protection in the music business at all, if we can reach the economic rationales given without copyright law?

In the following I will examine prominent adjustments of copyright laws and their probable impacts to the current situation. Furthermore I will introduce alternative models by authors like William Fisher and Lawrence Lessig. Finally I come up with own suggestions taking into account the economic analysis of copyright law regarding the music business without neglecting the current political and legal developments in the main markets like the U.S. and the Common Market of the EU.

1. Optimizing Copyright Enforcement

One could think about changes in the way of copyright enforcement in order to get out of the current dilemma.

However this is a rather not promising approach. It would not solve the problem at his roots, since the inefficiencies as stated above result mainly out of the design of copyright laws itself and not out of their enforcement. Wasteful enforcement efforts are only the - huge - top of the iceberg. One has to change its foundation and thus the inefficient copyright laws in order to solve the problem in the long run.

Moreover studies like the one by *Depoorter, Vanneste and van Hiel*⁴⁵ show that optimizing copyright enforcement is a complex task. Apart from the enforcements constraints given by geographical borders or legal uncertainties law enforcement, especially in the field of illegal file sharing is, challenged by *a lag between copyright and social norms*⁴⁶. Hence lawmakers have to take into account that increasing either severity of punishment or the probability of detection - or both - has different impact on moderate users on the one hand and frequent users on the other hand. In worst case, too harsh sanctions are likely to have countervailing effects on the norms of frequent users and might even induce them to introduce even more copyright circumvention

⁴⁵ Depoorter, Ben, Vanneste, Sven and Van Hiel, Alain, "*Gentle Nudges v. Hard Shoves in Copyright Law: An Empirical Study on the Conflict Between Norms and Enforcement*" (June 2005). <http://ssrn.com/abstract=740184>.

⁴⁶ *Ibid.* p. 13.

technologies which raises the impossibility of copyright enforcement⁴⁷. Current policies of the music industry to sue frequent users of peer to peer networks and the hosts of file sharing communities contribute to the copyright aversion of users and rather worsen than improve the dilemma. One can raise the question, whether suing your - future - customers is really the best idea⁴⁸. Concluding one can say that due to the given constraints of copyright enforcement policy makers and music industry should rather concentrate on reforming the inefficient copyright laws than on worsening the dilemma by making resource wasting efforts in enforcing flawed laws.

2. Changing in the Length of Copyright

a. Finding the Optimal Copyright term

As I already said current copyright laws allow terms of easily more than 100 years. This is quite a long time and studies have been made, in order to find the optimal length of copyright⁴⁹.

Basically they all come to the conclusion that the longer the copyright term the higher the social cost of the monopoly granted as discussed above. This of course has to be balanced to the associated gains of longer protection, hence any financial incentives to the artist to create and thus more culture.

According the *Copyright Term Extension Act* (CTEA) of 1998 - where the term of 50 years after the death of an author was prolonged by another 20 years - an economic analysis by George Akerlof *et al.*⁵⁰ shows that it is *highly unlikely that the economic benefits from copyright extension under the CTEA outweigh the costs*⁵¹. Furthermore the prolongation *reduces innovation by restricting the production of new creative works that make use of existing materials*⁵². The main argument is the following. The major economic justification for copyright protection is to provide financial incentives to create as discussed above. In order to determine the added monetary value of

⁴⁷ Ibid.

⁴⁸ Fred von Lohmann *Is Suing Your Customers a Good Idea?* <http://www.law.com/jsp/article.jsp?id=1095434496352> [last visited on 21.07.2005].

⁴⁹ Landes & Posner 2002.

⁵⁰ Akerlof *et al.* as amici curiae in support of the petitioners in *Eldred et al. v. Ashcroft The Copyright Term Extension Act - An Economic Analysis*, 2002.

⁵¹ Ibid. page 3.

⁵² Ibid. page 12.

future protection, one has to calculate the *present value* of additional benefits provided by the extension. Assuming an interest rate of 7 % and a constant stream of royalty revenues the authors conclude that the present value of year 81⁵³ through 100 of copyright protection is 0.33 % of the present value of year 1 to 80⁵⁴. Hence one can indeed question any additional incentives created by this prolongation.

Additionally if one tries to balance this very small benefit with the associated social cost, one has to come to the conclusion, that such a policy is detrimental to consumer welfare since it increases the stream of resources from consumers to copyright holders by providing at most very small additional incentives to the creators⁵⁵. Thus the cost-benefit analysis is clearly negative.

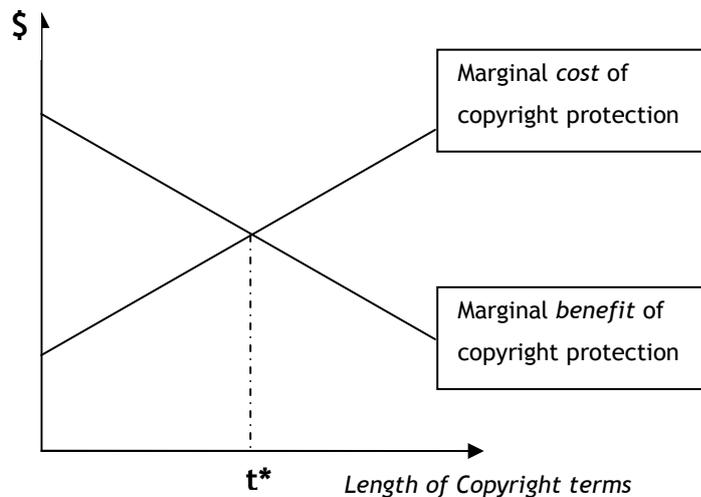
As one can see these calculations are based on assumptions as any economic model. The authors assume a constant interest rate and a constant revenue stream in order to calculate possible future benefits of copyright. Furthermore if one wants to calculate possible harms to society one needs to know a lot of other factors. Especially predicting the future value of an artist's work seems in general impossible, since most works probably never gain any additional value while few's value increases dramatically by circumstances which are not foreseeable. In economic terms one has to equal the marginal cost curve with the marginal benefit curve of copyright.

⁵³ Assuming the author dies after 30 years of publishing his work plus an additional 50 years of protection *post mortem* as before the CTEA.

⁵⁴ Akerlof *et al.* above, page 6.

⁵⁵ *Ibid.* page 15.

Graph: Determining the optimal copyright term



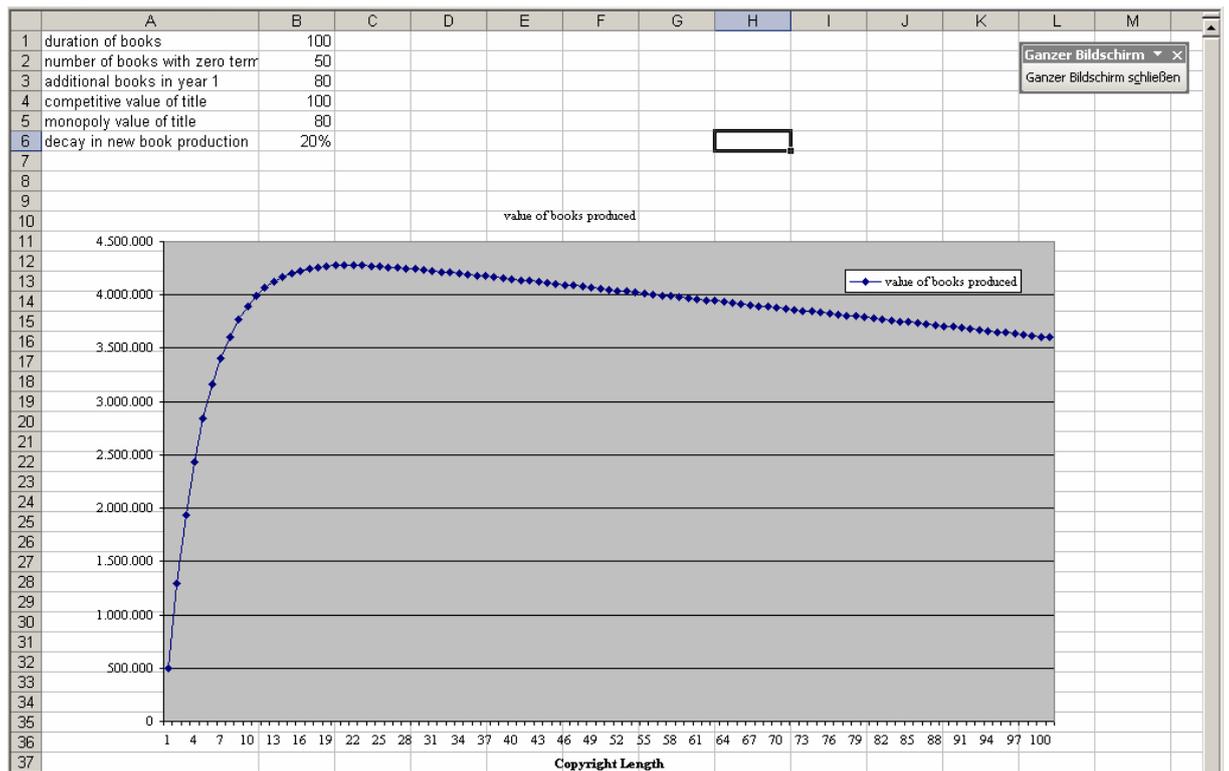
If one knew the correct equations, one could set t^* as the optimal term for copyright protection. However as with the Austrian School of Economics we are likely to face a knowledge problem⁵⁶. How can we determine for sure the respective equations? How can we treat cases which are likely to be quite different the same with one stiff term? Is the calculus for an evergreen like The Beatles' *Yesterday* the same as for a literally one summer hit like Ricky Martin's *Livin da vida loca*? It seems obvious that these unequal examples should not be treated equally since one creates significant royalty revenues for a period less than 2 years while the other already accompanied generations of fans. Thus the respective interceptions of both graphs and hence the optimal durations of copyright would differ significantly.

However scholars like Stan Liebowitz tried to make up interactive models in order to *play god with the copyright length*⁵⁷. In his example one can trigger the duration of books, *the monopoly value of a book or its competitive value*⁵⁸.

⁵⁶ See for instance Israel M. Kirzner in *Economic Planning and the Knowledge Problem* <http://www.cato-institute.org/pubs/journal/cj4n2/cj4n2-4.pdf> [last visited 19.07.2005].

⁵⁷ Stan J. Liebowitz <http://www.pub.utdallas.edu/~liebowit/intprop/main.htm#god> last visited July 19th 2005.

⁵⁸ *Ibid.*



[screenshot of the spreadsheet example provided by Liebowitz⁵⁹]

One has to admit that the author himself states that this model is *not completely general, but fun to play around with*⁶⁰. However attempts of calculating the value of copyrighted works - here books - according to the respective copyright term are rather flawed. One important message one can derive from these models though is, that the *optimal copyright term* depends on the actual use of the *copyrighted work*. Hence if one takes this model for granted one has only one reason more to come to the conclusion that there is no such thing as *the optimal copyright duration*.

⁵⁹ One can derive from this graph that the value of the book increases until 20 years after its publish and from the 21st year on decreases. However how do we know that this increase in value is only based on the fact of its copyright protection?

⁶⁰ Ibid.; in another example regarding the optimal length of patents William Nordhaus confessed as well that determining this is *very complex and there are many unknown relationships involved*, hence one can not say exactly what the exact term is, William Nordhaus in *Invention, Growth and Welfare*, M.I.T. Press 1969, see also in Hal R. Varian 2003 supra, p. 429.

b. Renewable Copyright Terms

Among others scholars like William Landes and Richard Posner propose alternatively to fixed copyright terms indefinitely but renewable terms⁶¹. The idea of course is not that new, since the Statute of Anne already followed a system of renewable copyrights. However its economic analysis differs significantly from stiff copyright terms as existing.

The main point is, that the overwhelming majority of copyrighted music will never have an active life of 70 to 135 years⁶². So why do these works need costly copyright protection for over a century?

Only a very little percentage of published songs will ever make it into the *golden halls of evergreens*. However any longer copyright protection than really necessary is superfluous and hence imposes mere cost without any gains to society. There is for instance the problem of abandoned works. Still under protection, but not used any more by the copyright holder. Any other artist who would like to work with the respective song and create something new is likely not to use this work for two reasons. First - again - the older the work the harder to locate the initial artist and thus the copyright holder. Imagine a song which was composed 65 years ago. For a documentary or sampler of songs of the summer of 1940⁶³ somebody needs to use this song and others. However since the artist already died and his heirs are spread over the country it needs a lot of time and hence money to acquire the copyright holder. Thus the transaction cost are likely to be very if not prohibitively high, since the value of the single contribution might be rather low while the associated costs of locating the copyright holder are high⁶⁴. Furthermore it is rather unlikely that the one who wants to use the respective song uses it without having cleared any rights, since he still faces the risk to be sued by the unknown copyright holder. Therefore he will publish his work without the song or probably not publish anything, since all the songs he wants to use face these kinds of problems. In the end new works are not created since due to

⁶¹ Landes & Posner 2002, p. 210 et seq. .

⁶² If the author dies in the year of the creation or creates at the age of 20 and lives another 65 years as two extreme points of the commencement of copyright protection.

⁶³ For the sake of the example let us assume that the existing copyright laws already where enacted in the year 1940.

⁶⁴ Supra Akerlof *et al.*, p. 13.

very long copyright terms associated transaction costs forbid this. This outcome is even worse, when the copyright holder of the respective work does not even think about his copyright any more and hence values his work less than the one who would like to use it. Therefore one should rather give the work to the public domain for everybody's use, since it is more likely that there is someone out there who still values the song more than the copyright holder himself.

This outcome could be achieved with renewable terms. Say one has to register every 5 - 10 years at a central copyright office through a rather simple and not very costly procedure. Then the copyright holder will register as long as he attaches any value to his work. If he does not value their work any more, he just does not renew the copyright and the work falls into the public domain where it can be used by others. High value copyrights like the Beatles' *Yesterday* or Disney's *Mickey Mouse* are likely to stay under copyright protection since they are still of a high value to their copyright holders⁶⁵. Hence although some works - *the few evergreens* - might stay under copyright protection for a long term the average copyright term will significantly decrease, since the vast majority of artists will not renew their respective copyright. Their works will fall into the public domain rather soon und thus decrease the social cost of copyright protection while increasing the social benefit by contributing to the variety of available works for new artistic creations.

c. Concluding Remarks

To sum up one can say that finding optimal and stiff copyright terms will not be successful and should therefore rather be avoided. Instead one should opt for renewable copyright terms as they are at least less detrimental to society than the existing stiff ones⁶⁶. However with renewable terms it is unlikely that one solves the primary monopoly costs namely the dead weight loss, since high value works are likely to get a renewal by their holder and stay protected while low value works will fall into the public domain⁶⁷ after a shorter

⁶⁵ See Landes & Posner 2002, p. 220 *et seq.*.

⁶⁶ Assuming than one favours copyright protection at all.

⁶⁷ See Landes & Posner 2003 *supra*, p. 222.

average term. Secondary monopoly costs on the other hand will well be lowered though, since more works will fall sooner to the public domain and therefore will be available for derivative works increasing the amount of music created. Furthermore it is likely that former original low value works are now re-recorded with a different band or in a different interpretation and contribute more to society than the initial version of the song, since others can experiment with the work freely.

Hence if there is a choice between stiff and renewable terms, policy makers should rather decide in favour of the latter. However triggering solely the length of copyright terms does not seem to solve the problem, since it does not affect all inefficiencies discovered.

3. Changing the Scope of Copyright Laws

Trying to find the right answers to the dilemma given scholars suggested several alternative models to the existing copyright model. Triggering the scope might as well imply the abolishment of copyright regarding the music industry at all as Fisher among others suggests⁶⁸. It might as well imply the change by the artist himself and not by the policymakers. Stanford Professor Lawrence Lessig for instance introduced 2000 his *Creative Commons* model⁶⁹ which enables artists to design his or her own licence ranging from *no rights reserved* to *some rights reserved*. However policy makers of the western societies seem to follow a rather copyright strengthening approach, which means that they rather increase the scope of the respective laws than to decrease it as the alternative models.

In the following I will present the alternative models of Lessig and Fisher and give some insight in current copyright policy later on.

a. Alternative Compensation Model

Fisher proposes in his book *Promises to keep* three alternative ways for a legal and institutional copyright law reform.

⁶⁸ William W. Fisher III 2004.

⁶⁹ www.creativecommons.org.

First he proposes a rather conservative system which suits the audio and movie industry best: copyrights are property rights and should be treated as such. In other words the right to control a song or movie should be identical to the right to use a piece of land.

This claim is with respect to the economic inefficiencies of copyright laws as analyzed above rather detrimental and benefits only the music industry not to be confused with the artists. It would increase or at least strengthen the copyright protectionism and lead to a copyright inflation to the detriment of consumers and artists and thus culture.

The second model he proposes is related to the theory and practice of traditional regulated industries. The entertainment industry is related to those traditional industries, since there is as well a dominance of a few firms, a similar cultural importance of the good they control, a notorious inequality in bargaining power and thus a need for governmental created monopolies.

Consequences would be as one can easily assume a huge regulatory and administrative effort. Record companies were required to license their work to distributors; the fees they charge and the shares of these revenues that go to different artists and groups would have to be regulated.

This approach is interesting but complicated to implement. Furthermore each state regulation faces the danger of state failure. It is foreseeable that in such a system lobbyism would play a major role in determining fees to be paid. Lobbyist of course would mainly come from the already existing few big record companies rather than from new independent labels, since they have less economic force. Additionally the history of heavily regulated industries shows that the state or the administration is always running after the actual development and changing circumstances of the respective market sectors. Especially in a market like the entertainment industry which is significantly influenced by the fast developing technologies like the internet and portable media devices administrative efforts to regulate are rather condemned to fail.

As the best solutions out of the dilemma he proposes an administrative compensation system. Every copyright owner would register his work at the Copyright Office and would receive in return a unique filename which could

be traced up to the end-user. Each distribution, modification and consumption could be tracked. The government(s) would then raise a tax necessary to compensate the respective artists. Like the television rating systems the copyright authorities would estimate the respective frequency with which the works are consumed. According to the respective consumption rates musicians would be compensated out of the tax fund the government raised.

The big advantage of such a system he claims would be the elimination of the current copyright system in the long run, since there is no need for it anymore. Consumers would have free access to cultural goods and the concentration of the music industry could be reversed.

However although promoted as the best solution this model implies tracking of consumer behaviour and thus violates consumer's privacy. One can say that privacy - not only - in the internet is in fact unrealistic, since for instance our shopping behaviour via digital payments and inventions like *myShop* where you get personal recommendations based on your prior purchases when you visit the online-shop the next time is traced anyway. I am not going into the details of the economics of privacy laws⁷⁰, but as far as one can see, *spyware* and other tracing tools are seen with contempt within the online communities. This of course would lead to the development of new circumvention tools and - *again* - to a growing aversion against the music industry. Additionally only files officially published by the Copyright Office are supposed to be traced by this system. What about all the unofficially *ripped* files by the consumers themselves? How do you want to measure that consumption? Most of them do not even have identical names for the same song⁷¹. Even if you would connect to servers of file sharing systems it would be a hard job finding out how often a certain song is downloaded respectively played.

⁷⁰ One can say that the knowledge about consumption preferences of the consumers would enable the sellers to offer well designed products and furthermore a sophisticated price discrimination. The latter of course would make more goods available, but is at first forbidden by law and second would shift the entire consumer surplus to the producer which is not a desirable outcome if one pursues the goal of finding the social optimum.

⁷¹ Robbie Williams' *Feel* might be called *feel - Robbie Williams.mp3* or *O2_escapology.mp3* or simply *O2.mp3*. Moreover some of them will not even be of a good quality and hence will not be listened to after downloading. Then a 2nd or 3rd attempt is needed which counts as a full download too in order to determine the respective shares of the artists.

Of course such a system would invite cheaters, meaning artists or music labels who manipulate the downloading statistics in order to increase their revenue share. There is nothing easier than plugging some PCs online and download frequently own songs. A recent case in Germany during the pre-election of the Eurovision Song Contest showed that managers are even able to purchase loads of CDs of *their* artists in order to push them in the national charts⁷². So manipulating by easy⁷³ downloads is a likely scenario which would falsify the whole statistic and therefore the payment ratios.

Furthermore it is unrealistic to think that implementation of new taxes for the sake of the music business is likely to be successful in our parliaments. Even if they would pass legislation one would face the same concerns as stated above associated with state failure. Calculating the right tax, distributing the right amounts to artists is a huge administrative challenge which is likely to be influenced by lobbyists or flawed due to incomplete information.

Moreover all the suggested solutions only focus on the end-consumer-market and neglect the peculiarities of the business markets although copyright within the intra-business market is a problem too according to the secondary monopoly costs stated above⁷⁴.

b. Creative Commons *or* let the artist decide

In the year 2001 a group lead by Stanford Professor Lawrence Lessig introduced the *Creative Commons* model which helps at first artists to publish their work under the legal conditions they want to and second lowers the transaction costs by installing a central online registry for - not only musical - works. The beauty of the model is that it makes use of the existing copyright laws in more and more countries and allows these changes independently from political decision regarding copyright⁷⁵.

⁷² The manager of the German contribution *Gracia* at the Eurovision Song Contest purchased thousands of CDs of *Gracia* in order to manipulate the Media Control statistics, <http://www.spiegel.de/kultur/gesellschaft/0,1518,350752,00.html> [last visited 21.07.2005].

⁷³ The transaction costs for the cheating artist are lower than with purchasing CDs.

⁷⁴ See supra.

⁷⁵ Countries where Creative Commons is represented: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Finland, France, Germany, Ireland, Israel, Italy, Japan, Jordan, Mexico, Netherlands, Philippines, Poland, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, UK: England and Wales, UK: Scotland as of 22.07.2005.

aa. the licence

The copyright I have been talking about so far knows only one default rule. As soon as the creative work is fixed on a tangible medium of expression it is copyright protected by law: for the whole scope and the whole length written down in the codes. However some artists may be aware of the inefficiencies of the current laws and do not want an “*All Rights Reserved*” printed on their works. Some might want a “*Some Rights Reserved*” or even a “*No Rights Reserved*”⁷⁶ assigned to their music, since they know, file sharing increases their popularity which they can exploit afterwards. Creative Commons gives artists the opportunity to attach a *personally designed copyright* to their work. The licensing models define the spectrum of possibilities between full copyright – “*All Rights Reserved*” – and the public domain – “*No Rights Reserved*”⁷⁷. Publishers have four main options to choose:

Attribution: this licence permits others *to copy, distribute, display, and perform the work and derivative works based upon it only*⁷⁸ if they give the artist credit. This option is very similar to the “*No Rights Reserved*” of the public domain since there are no rights reserved except for the obligation to give credit. It addresses all three markets since it allows commercial use of the work as well as noncommercial use.

Noncommercial: this option *permits others to copy, distribute, display, and perform the work and derivative works based upon it only for noncommercial purpose*⁷⁹s. This licence addresses not only the file swappers who share files for private purposes but as well the artists who want to create new derivative works out of the licensed music (the intra-business market). However they may not sell their works after creating a derivative work since the licence is for noncommercial use only.

No Derivative Works: this option permits others *to copy, distribute, display and perform only verbatim copies of the work, not derivative works*

⁷⁶ See the *Public Domain Dedication* given below.

⁷⁷ www.creativecommons.org.

⁷⁸ *Ibid.*

⁷⁹ <http://creativecommons.org/about/licenses/>.

based upon it⁸⁰. If this option is added to the licence the artist can be sure that his initial work remains original.

Share Alike: this last option permits *others to distribute derivative works only under a license identical to the license that governs the artist's work*⁸¹. Combined with the *attribution* or *noncommercial* licence this option ensures that the created derivative work is published under the same licence as the initial work. By this the *spirit* of the initial works licence is kept and the initial artist can be sure that his idea to contribute to the cultural world will be maintained.

Additionally there are special licences such as a Sampling Licence, a Public Domain Dedication, a Founder's Copyright, a Music Sharing Licence and a Developing Nations Licence.

Interesting is the Founder's Copyright since it is related to the Statute of Anne and the first U.S. Copyright Act of 1790. Like these early laws it grants a 14 year copyright term which may be extended once by the author for another 14 years. Furthermore the date the work falls into the public domain is published in the online registry⁸². The Developing Nations Licence is interesting since it considers fairness and distribution aspects among the developed and undeveloped countries in the world.

"The Developing Nations license allows, for the first time, any copyright holder in the world to participate first-hand in reforming global information policy. The fact is that most of the world's population is simply priced out of developed nations' publishing output. To authors, that means an untapped readership. To economists, it means "deadweight loss." To human rights advocates and educators, it is a

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Technically the author transfers his copyright to *Creative Commons* for \$ 1 which grants the author a 14 year - renewable once - exclusive right to exploit. With expiration of the term *Creative Commons* assigns the work to the public domain.

tragedy. The Developing Nations license is designed to address all three concerns."⁸³

By this statement one can easily see the importance of free intellectual goods for less well endowed countries and its people. It allows publishers to grant participants from developing countries more rights to use the respective work.

The *Public Domain Dedication* results in an immediate "No Rights Reserved" by which the dedicator declares that the work is already in the public domain or dedicates the work into the public domain.

For the music business the *Sampling* and the *Music Sharing Licence* are of special interest. While the first refers to the intra-business market the latter refers especially to the end-consumer market since it allows fans and everybody who wants to sharing and listening to the music for free.

bb.the code

The code of the chosen licence comes in three different ways. One written in a *John Doe* version, i.e. understandable for the one who is not a legal specialist. Another one written in legal terms written for lawyers and - if needed - to hold in court⁸⁴.

Additionally there is a digital translation of the licences. This digital version of the code allows search engines as *Yahoo* or *search.creativecommons.org* to find somebody's work by its terms of use. If for instance one needs a picture of the *Eiffel Tower* for a touristic guide one can on the one hand search simply for pictures in the internet. Working with *images.google.com* you get around 37.000 more or less useful results. Then you can choose a collection out of them and start asking one author after another for permission to use the picture. A long and costly undertaking as one can imagine, since one has to locate the author and ask formally for permission to use associated with royalty payments. Or you can search for works published under a *Creative Commons* licensed which already allows you to make - even commercial - use of the picture - Attribution licence. *Yahoo* will give you around 7.000 results

⁸³ <http://creativecommons.org/license/devnations>.

⁸⁴ See Appendix for examples of the licences.

while *search.creativecommons.org* will give you 700 results. Nevertheless the latter results are of a higher value for the searching user since they are already qualified and by the *Creative Commons* licence associated the user can clearly see, whether permission is granted or not. Hence the associated transaction costs of searching and clearing rights including royalty payments are reduced to a minimum - the user still has to type Eiffel Tower into the respective search engine - and access to cultural goods is easier.

cc. The Registry and the Logo

The *Creative Commons* website serves as well as a central registry. If somebody licences his or her work under a *Creative Commons* licence he may register his work in the *Creative Commons* database. This serves not only as an easy promotion tool for his work since it is easy accessible in the online archive, but decreases transaction cost of the one who searches as well as stated above.

Furthermore *Creative Commons* offers a logo for every single licence available⁸⁵. This can be attached to the work online that everybody can clearly see what he or she might do with the work or not. The advantage is that unlike with regular copyright where just the © is visible - if at all - one immediately knows, whether permission is granted or not. One does not need to contact the respective copyright holder in order to find this out and thus saves time and money.

dd. Concluding Remarks

Creative Commons offers two major advantages. First it is flexible and lets the artist decide, whether he thinks, copyright protection is beneficial for his works or not. Second it mitigates the transaction costs regarding the lack of a central registry. Furthermore it is independent from policy development since it makes use of the existing laws and allows easy and tailored use of copyright.

⁸⁵ See Appendix for an example.

V. Towards a “No Rights Reserved”

Given the economic analysis of copyright law as done above we can come to the conclusion that the current situation is not only a practical dilemma. Copyright law itself is with respect to the music industry rather detrimental than beneficial to society since it causes several costs to society while granting questionable benefits to few authors or music labels. Recalling the two main economic justifications for copyright such as financial incentives for the artist to create and financial incentives to disseminate the respective work we can raise the radical question whether we need copyright protection at all in order to reach these goals. Scholars like Ku⁸⁶ and Plant⁸⁷ among others answer this question negatively. Ku for instance concludes that because of the economics of digital technology there is no need for copyright protection in the music industry any more. In the following chapter I will elaborate justifications for this *radical* view.

1. Copyright has little - if any - impact on the incentives for creating music

As I stated above the main economic rationale for granting an exclusive right to exploit one’s work is to provide the author financial incentives to create at all. Generally it is argued that somebody who creates invests time and money into his creation. In order to create an album with a major label one has to invest around \$ 100 000 simply for the recording of the music⁸⁸. Furthermore the distribution has to be paid. The creation of the tangible medium CD itself, the creation and maintenance of a distribution network, marketing to promote the work, the production of videos of the launched singles, marketing to promote an upcoming tour and the like. However the one who

⁸⁶ Raymond Shih Ray Ku - *The creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 2001.

⁸⁷ Arnold Plant (1934) *The Economics Aspects of Copyright in Books* - The argument of Plant that the author of a book does not need an artificial state backed monopoly by a copyright because the temporary actual monopoly he has from publishing before potential competitors is not valid any more since the technology has changed here as well. For instance the latest Harry Potter *Half blood Prince* was online as a PDF available one day after the official release. Therefore a publisher nowadays has no strategic advantage since potential competitors can copy and distribute the same book and especially music within less than 24 hours after the initial release. See <http://www.wired.com/news/digiwood/0,1412,68269,00.html?tw=rss.CUL> [last visited 25.07.2005].

⁸⁸ See Fisher 2004 p. 20.

has to invest that much has to recover his costs by exploiting his creation. Therefore the state grants him the exclusive right to do so for a given time. This ensures that the copyright holder alone can financially exploit his or her work and hence recover his investments. This reasoning has several shortcomings.

First of all the technology has radically changed. To produce an album nowadays is not the same as it was maybe 20 or 30 years ago. Theoretically artists can now purchase high tech equipment for a much lower price than needed these times and produce an own album at home⁸⁹. As one can observe in the music market today at least more and more small independent labels rise and can afford high tech equipment. A lot of them especially in the electronic music business are two-men undertakings. Hence the associated costs to produce an album are still only a fraction of the costs of producing an album with a major label. Furthermore in the digital age the distribution channels of the big labels are no longer needed. Napster and the advent of decentralized peer-to-peer networks have proven that distribution not only online but with the help of huge networks⁹⁰ is much more efficient than the traditional model ever could be. In fact one can say that the costs of distribution are shifted to the one who downloads the respective song. He has to purchase the equipment and pay the broadband access in order to connect to the network. Technologies like the favourite *BitTorrent*⁹¹ oblige the user to upload the same time he downloads. Otherwise the mechanism of file sharing would not work. If nobody would upload files to the network there would be nothing to download at all since there is no central server where files are saved. So the contribution of anyone who connects to the network is crucial to the functioning of the network. The musician on the other hand only has to upload his songs once into the network and his music would be spread virally without any other contribution of him⁹². Hence his costs of disseminating music are probably not zero but comparatively very low. Furthermore since much more people get much easier and faster access to his music his

⁸⁹ Lawrence Lessig *Free Culture* 2003.

⁹⁰ Napster had more than 50 million participants before it was shut down by the courts.

⁹¹ www.bittorrent.com.

⁹² Assumed the fans like his music. However if his music would not be good nobody would buy CDs of him anyway.

reputation is likely to grow significantly without a huge *marketing machine*. Since the internet is global he can discover markets he could never reach with a rather geographically restricted retailer system. Hence one has to understand the internet as an additional market with loads of opportunities and not only as a threat to the regular market. Artists like *Janis Ian*⁹³ or the band *Wilco* prove that one should rather promote these new ways to distribute music than to fight them with more and more restrictions. While *Janis Ian* could observe an increase in popularity and thus increasing prices for her CDs in the second hand market⁹⁴ the band *Wilco* became popular solely with the help of file sharing platforms since they did not have a producing label in the beginning. Economically speaking artists profit immensely from positive externalities file sharing causes⁹⁵. Hence intermediaries like big labels and costly distribution channels are no longer necessary to distribute music.

Moreover artists can earn much more money by using the new technologies than by signing at a big label. Of course they do not get compensated in the first place since fans do not pay for the songs they download. However they profit in the long run from the positive externalities I just mentioned. With increasing popularity of their songs and associated worldwide distribution artists get a free promotion while their only asset is to waive monetary compensation for their song file. Instead they can now exploit their increased popularity and give shows probably even in geographically foreign markets. Thus one can say giving up the short term revenue for immensely increased long term revenues. Secondary markets like giving shows and selling merchandise should not be underestimated. In fact most of the musicians nowadays make their living through shows anyway. When musicians sign with a major label they have to sell up to 500 000 albums⁹⁶ in order to get any

⁹³ Janis Ian 2002 *The Internet Debacle* http://www.janisian.com/article-internet_debacle.html.

⁹⁴ The CDs were not actively sold by her label any more.

⁹⁵ However unlike the classic model where positive externalities are associated with underproduction since the social cost are lower than the private costs of the respective good there is no impact in the case of file sharing. According to this model a file sharer would face higher costs and thus download less. His additional costs - however - are only marginal if measurable at all. On the other hand he benefits from not paying for music which compensates anyway for any potential additional costs.

⁹⁶ Fisher 2004 p. 20.

royalty payments since the label first gets all revenues to recover production, distribution and marketing costs of the album. Most of the bands however will not even sell a few thousand albums which means they do not *break even* meaning they will not get any royalty payments from the sale of their album. Finally they depend on giving shows and tour around the country in order to make a living. According to the *Rolling Stone Magazine*⁹⁷ the musician *Prince* earned 2004 more than \$ 56 million by giving shows. The *Red Hot Chilli Peppers* earned \$ 17 million by giving 3 concerts in London's Hyde Park. Of course these acts are superstars and probably less than 1 % of the musicians worldwide are able to earn so much money with concerts. However the fact that most musicians are hardly earning money through CD sales - primary market - and these numbers indicate that secondary markets play an important role in feeding the artist. So the question remains why we stick to copyright as a costly means in order to reward the artist while the artist can not exploit his exclusive right anyway and has to give shows in order to make a living? Consequently Ku argues that we should get rid of copyright in the music industry since it does not fulfil his purpose and the musician can earn more money without it⁹⁸. However I will argue later that I do not agree with this conclusion with respect to all three markets⁹⁹ in the music business. Another more basic but nevertheless important role plays the recognition of so-called *intrinsic motivation*¹⁰⁰. Apart from the comparatively few casted and well designed bands and superstars who keep the veil of the music business filled with blood one has to recognize *intrinsic motivation* of artists to create¹⁰¹. Most artists do not produce in the first place to become a superstar

⁹⁷ Robert Lafranco in *Rolling Stone Magazine Money Makers*
http://www.rollingstone.com/news/story/_/id/6959138/prince?pageid=rs.Home&pageregion=single2.

⁹⁸ Ku 2001.

⁹⁹ Intra- and extra-business market and end-consumer market as introduced above.

¹⁰⁰ Plant [*supra*, p. 167 - 172] argues as well that many authors are not motivated by pecuniary incentives and would publish even if there would not be any forthcoming remuneration.

¹⁰¹ *Intrinsic* and *extrinsic* motivation factors have been analysed for instance with respect to employer - employee or parent - child relationships [Roland Bénabou and Jean Tirole - *Intrinsic and Extrinsic Motivation*, *Review of Economic Studies* (2003) 70 - 489-520]. They conclude that extensive incentive schemes may sometimes backfire by undermining agents' confidence in their own abilities or in the value of the rewarded task [p.516]. With respect to the music industry one could argue that there is a similar relationship between the state and the author since the former rewards the latter with a -temporary - monopoly to exploit his or her work. Too extensive copyright protection does probably not influence the believe of the

and earn money like there is sand at the beach. Most artists in fact create since they want to create something beautiful and enrich the culture of mankind. This does not mean that they do not want to earn money at all. In the end they have to make a living in nowadays society. However earning money, thus extrinsic financial incentives, plays a subsidiary role which might lead to the conclusion, that they do not need these extrinsic factors in order to create since they satisfy their intrinsic motivation und therefore create. Therefore financial extrinsic motivation should not be overestimated and every measure in this direction should be carefully chosen. Hence for copyright in the music industry it means that it should be as small as possible in order to avoid any unnecessary costs to society which are associated with little if any incentives for musicians to create and disseminate their music.

2. Concluding remarks

Generally I agree with the fact that distribution of music is much more efficient with the new technologies than it is with the costly old-fashioned business model of the music industry. Since the purpose of providing incentives to create and to disseminate music is satisfied without copyright we do not need it in the music industry according to the end-consumer market. However I do not agree that copyright is superfluous with respect to the business markets.

The two business markets I introduced above differ from the end-consumer market in one important factor. While fans just enjoy music in the mere consumption the respective players in the business markets make money out of the creation of the artist¹⁰². Hence in opposite of the enjoyment of the fans

author in his abilities. However it was argued that extensive copyright protection might backfire in the sense, that it does rather lead to less cultural output than to more cultural output since the one-hit-wonder songwriter can rest on his revenues of his superhit and hence has less incentive to create new ones since he already earned enough money to make a living. If this were true *intrinsic* motivation would in fact play a minor role than *extrinsic* motivation. This could lead to the conclusion that too extensive rewards in the form of copyright protection combined with million dollar payments for stars probably already turned at least for many musicians the page from intrinsic to extrinsic stimuli. See as well Katherine A. Lawrence *Why be creative? Motivation and Copyright Law in a digital era*. IPCentral Info 2004.

¹⁰² However in the intra-business market it may well bet hat artists among each other simple exchange creations without necessarily being encouraged by pecuniary factors. As stated above they might well create in order to create something beautiful or improve existing ones

artists face especially in the extra-business market players who free-ride on their works and earn money with their creation. If they additionally do not pay the artists for using their creations the latter might get frustrated since they do not participate on the respective success¹⁰³. Unfortunately there is so far no empirical evidence for this negative effect. However several interviews with artists during the research of this thesis have shown¹⁰⁴ that artists react rather sensitive to people who financially exploit their works without paying attribution or any royalties. For instance some simply took pictures of their works and sold postcards or T-Shirts with there creations while giving not even credit to the artists. The consequence was not that they immediately reduced their output of art, but at least, that they are more careful in showing them in public. Especially pictures of their works published online are easy victims of this kind of *piracy* although one should assume that the internet has a rather positive effect on the growing reputation of the author. Whatsoever the message of this story is, that the financial exploitation of works without paying the artist royalties or even credit has a negative impact on the artists incentive to create and disseminate his or her work. Hence we need to guarantee the creating artist that he at least participates at financial exploitation of his work in the business markets.

How can we guarantee this? Generally there are two possible solutions. Either the parties concerned - the artist and the one who markets his work - conclude a contract or we protect the creations of the artist through property rights and hence a copyright¹⁰⁵.

Let me compare these two solutions.

In general one can say that contracts are valid only *inter partes*, i.e. the concluding parties, while property rights have an exclusive character with an impact *erga omnes*. Contractual rights are furthermore only established by interaction between the parties while property rights exist by law.

[intrinsic motivation]. In any case the extra-business market aims to market its goods and thus exploit others creation for their own financial purposes.

¹⁰³ Especially if one assumes that there is not even a duty to give credit to the initial author.

¹⁰⁴ I interviewed the sculptor and painter Francesco Rimondi as well as the painter Angelo Mou [<http://www.angelomou.com>] about their experiences with copyright. When it came to the question of *piracy* they were especially sensitive about people who financially exploit their works without paying them any royalties.

¹⁰⁵ However the contractual solution requires a kind of property right too. Otherwise there would be nothing to sell in a contract.

Consequentially transaction costs in the establishment of respective rights are high in contracts while there are none in a property rights regime. Transaction costs in the enforcement of contracts are as well likely to be higher than with property rights by law, since contractual rights require in general more efforts to be proven in front of the court¹⁰⁶.

Hence in economic terms property rights ought to be preferred in situations where one wants to establish the same rights towards many others since the associated transaction costs both in establishment and enforcement of the right are significantly lower than under contractual regimes¹⁰⁷. However with intellectual property rights like a copyright we have the associated costs as stated above. That means, if we prefer property rights to contractual rights we should balance carefully costs and benefits and probably decrease the scope of property rights protection in order to reduce the evil to a necessary but sufficient level. I will come back later to this point when I give suggestions to ameliorate the current copyright laws according the music industry.

VI. Current Copyright Developments

Up to this point I analyzed the main inefficiencies of the current copyright laws with respect to the music industry as well as the efficiency of digital technology in a copyright-less world. However I do not want to stop here as most of the literature. Moreover I want to give a short overview of the current developments regarding copyright in the media industry in the U.S. and the EU in order to be able to suggest later on *efficiency-enhanced* but *realistic* copyright alternatives for the music industry.

In the U.S. the copyright protection has been increased in length and broadness since its first *Copyright Act of 1790*. The length increased from 28 years to now 70 years after the death of an author as stated above. Furthermore with the omission of the requirement of registering in 1976

¹⁰⁶ Well defined property rights are given by the code while contracts often can be interpreted in either way, show contingencies or in worst case the document gets lost so that witnesses have to be employed.

¹⁰⁷ Compare as well Landes, William M.; Posner, Richard - *The Economic Structure of Intellectual Property Law*, p. 12. They employ the picture of the owner of a pastry who wants to exclude others from this resource and come to the conclusion that a property right serves this purpose best since it is a cost reducing legal institute.

respectively more works are protected since before not every work was registered. In 1998 the *Digital Millennium Copyright Act of 1998*¹⁰⁸ was signed by Bill Clinton. It focuses on the production and dissemination of technologies which can be used to circumvent any copyright protection and increased penalties associated by implementing the WIPO treaty of 1996¹⁰⁹. Lately the *Family Entertainment and Copyright Act of 2005*¹¹⁰ was signed by George W. Bush which allows fines and penalties for copyright infringers and even imprisonment for up to three years.

The European Union took a similar path. In 2001¹¹¹ the *European Union Copyright Directive* was implemented in order to satisfy the WIPO treaty of 1996. Already before Chapter I it states that:

“(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.”¹¹²

German copyright law now became much more stringent and increased accordingly copyright protection¹¹³. It is said that these laws are heavily influenced by the entertainment industry to the disadvantage of the consumer. In Germany for instance the Bertelsmann Foundation *helped* the government to shape the new copyright law¹¹⁴. The Bertelsmann Foundation itself holds the major part of the shares of the Bertelsmann AG which is one of the big players not only in the German media industry.

This being said one can conclude that without being a visionary copyright protection rather increases to the advantage of private property than

¹⁰⁸ DMCA PUBLIC LAW 105-304–OCT. 28, 1998 http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ304.105.pdf.

¹⁰⁹ Ibid. and <http://www.copyright.gov/legislation/dmca.pdf>, p. 2. and WIPO COPYRIGHT TREATY <http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm> [last visited 2.8.2005].

¹¹⁰ Family Entertainment and Copyright Act (P.L. 109-9) signed April 27, 2005 http://www.copyright.gov/legislation/pl109-9.pdf?dbname=108_cong_public_laws&docid=f:publ447.108.pdf#page=585 [last visited 2.8.2005].

¹¹¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

¹¹² http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001L0029&model=guichett [last visited on 2.8.2005]

¹¹³ Even the performance of pieces of folklore is now copyright protected, Country Report on Germany by Andreas Dietl <http://www.fipr.org/copyright/guide/germany.htm> [last visited 2.8.2005].

¹¹⁴ Ibid.

decreases to the advantage of the public domain. Hence one has to be worried about copyright inflation.

VII. Conclusions

So far I was talking about three main points. First, I examined the major inefficiencies of current copyright laws with respect to the music industry. Second, I introduced singular changes of the copyright laws and alternative models proposed by recent scholars. Last but not least I introduced a more radical model of total abolishment of copyright regarding the music industry. Given the political environment as stated above I will try now to pick the *raisins* out of the analysis in order to propose feasible solutions which might ameliorate the current dilemma in the short run and - *with additionally changes in copyright policy* - in the long run.

1. Short Run

“If this war is to end, it needs authentic voices. We have had enough preaching. The outrage is beginning to wear thin. It will take bands like Wilco, who live a different example and whisper an explanation to those who want to hear. Peace takes a practice. One that only artists can make real.”¹¹⁵

Since I gave a short overview of current copyright policies in the U.S. and the EU it is rather obvious that it is highly unlikely that the responsible parliaments will make a u-turn in order to *promote the progress of science and useful arts* as using the words of the U.S. Constitution¹¹⁶. In other words it is rather unlikely that the respective governments will draw back from increasing copyright protection in favour of music industry and lessen the copyright in favour of the cultural society. Hence one should concentrate now to enlighten those who can change something not only for their benefit but as well to the benefit of culture at all and thus the society: the musicians. What should one tell them?

¹¹⁵ Lawrence Lessig in *Why Wilco is the future of music* http://www.wired.com/wired/archive/13.02/view.html?pg=5?tw=wn_tophead_5 [last visited 4.8.2005]

¹¹⁶ Supra.

The best solution available right now is the approach of Lawrence Lessig's *Creative Commons*. As I stated above this model offers a flexible solution for creators to trigger the length and the scope of the copyright protection of his or her work. Given the economics of digital technology¹¹⁷ one should tell the artists that it is more beneficial for them to allow file sharing and thus the private use of their works, since it increases their popularity faster, better and finally more efficient than any of the big music labels could do so far. Bands like *Wilco* have already proven the power of the new technologies in promoting musical recordings¹¹⁸. In the very moment society would benefit of this free access to their works too. The major inefficiency of the respective deadweight loss through a copyright monopoly would be abolished at least in this end-consumer market and thus the dilemma be ameliorated a lot.

Furthermore by this central registry offered by *Creative Commons* including the easy to handle search function for works that are licensed according to one's purposes the transaction costs of copyright would be significantly lowered. Compare simply the long and costly research one needs to find all the possible copyright holders and clear the respective rights with a system like *Creative Commons* which allows you to search exactly what you need in seconds while the license is already granted¹¹⁹. However since the Europeans natural rights approach does not require a registry and the Americans just abolished the registry in 1976 as stated above, a political change in the short run regarding a registry is here as well rather unlikely. So why should musicians not use the registry of *Creative Commons*?

However as I analysed as well it might be a problem to them, if others exploit their works financially without letting them participate. Here musicians could still define their licence by prohibiting commercial use. Hence since one can not say for sure what model would suit for what artist they are free to choose themselves.

¹¹⁷ Supra.

¹¹⁸ After their music label cancelled the contract with Wilco, they simply released their 4th album online for free and proved that the label was wrong: the album was a huge success followed by a sold-out tour. Lawrence Lessig *Why Wilco is the future of music* http://www.wired.com/wired/archive/13.02/view.html?pg=5?tw=wn_tophead_5 [last visited 4.8.2005].

¹¹⁹ Of course the database of *Creative Commons* still has to grow a lot. However that demands even more for new contributions of musicians. This is like the system in file-sharing. If you do not contribute to the community why should the community serve you?

To sum up, musicians could ameliorate the dilemma by abandoning copyright protection in the end-consumer market by using a *Creative Commons* share-alike licence and by registering their works at the online database. This would in the short run decrease associated primary monopoly costs and transaction costs of copyright. Furthermore the clear labelling of their music would solve the problem of uncertainty and of course wasteful enforcement costs associated.

2. Long Run

In the long run the picture might look different. Here we do not have to focus only on the artist, since in the long run, policy changes might be likely.

Major inefficiencies result from the dead weight loss of the copyright monopoly. Hence we should decrease it to the lowest necessary level. Since I said that we probably should not get rid of all copyright protection at least in the business markets, we should trigger the *fair use* doctrine. One should increase the scope of fair use, meaning that file sharing and the private consumption of musical works at all in the end consumer market should be allowed.

However the length of copyright at all should be significantly changed. As Landes & Posner proposed one should change from stiff terms to renewable but infinite terms. This would in the long run lower the average copyright protection and thus decrease the costs of copyright respectively.

Furthermore one should change the current default rule of copyright protection. Like patents, protection should only be given after registering your work at a central register. This would as well lower the amount of copyright protected works, while allowing musicians easily to get the protection if they want it and think that it is worth it. By a central registry of course the transaction costs of *clearing rights* would be significantly lowered as well as stated above. However it might not be easy to convince the U.S. of re-introducing this, after abolishing it in 1976, not to speak about the Europeans who follow the natural rights approach which grants protection by creation.

VIII. Afterword

This paper showed the major problems and developments of copyright law with respect to the music industry. There are of course more approaches than shown above to solve the current dilemma¹²⁰. Compulsory licences to grant access to music or price discrimination in order to reduce the deadweight loss¹²¹ are only two of them. However I am convinced that one should rather concentrate on the notions of copyright, meaning why do we have copyright at all and check whether we can achieve the purposes by less detrimental solutions. Therefore it is not necessary to investigate whether file sharing is a threat to the music industry or not, when we can say, that the current practice of the music industry is anyway out-of-date. Why should one protect old-fashioned business models at high and unnecessary cost?

Furthermore it is not necessary to employ complex administrative solutions which are likely to get lobbied and thus flawed when there are simpler means available. Less regulation and more flexible models like the Creative Commons approach should be promoted by artists and politicians. However I think that copyright and intellectual property in general is not only one big evil as promoted by some scholars. One simply has to make responsible use of these regulatory means in order to find a balance between the different interests associated. In music and thus culture the damage is probably hard to measure. The negative impact of too many patents in the pharmaceutical industry might be more figurative¹²². Nevertheless by this analysis one has an idea of how a world could look like with more and more copyright protection. Already the vocabulary used by the opposing parties give an idea what approach might be better for our societies. Consider the *free culture* approach by Lawrence Lessig and the rather conservative approaches that promote to *monitor users* and to employ *technical shields* to *control* the use of copyrighted material¹²³. However the analysis provided supports the

¹²⁰ See the references for further literature.

¹²¹ To the benefit of the monopolist of course.

¹²² Since for instance Asian or African companies are not allowed to produce patented medicine mitigating AIDS of western patent-holders there is less produced at higher costs and hence the damage lies in the amount of people who suffer unnecessarily of this disease. This can be easily millions for instance in Africa. However research and development costs are as well different and much higher to produce the respective medicine than the production costs of a musical work.

¹²³ See for instance Einhorn & Rosenblatt (2005).

approach towards a freer culture. Besides convincing the people responsible for the respective laws one should now convince especially upcoming musicians to make use of the efficiencies of the new technologies.

However since the content of the Creative Commons is growing and publishers make more and more use of the respective licensing model I am optimistic that clever musicians, smart independent music labels and emancipated fans will make the free culture come true and the big music industry has to rethink its strategies accordingly. Hence in the end the bell tolls already for those who are not flexible enough and stick to their old business model. The Romans had a saying for this: *Qui non proficit, deficit*¹²⁴. Protectionism is surely not the way to the future.

¹²⁴ He who does not advance, falls behind.

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X. Authorship Declaration:

I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I would like to thank Prof. Dr. Pierre Garello and Prof. Dr. Ben Depoorter for their support writing this thesis.

Strasbourg, 11.08.2005



August 2005

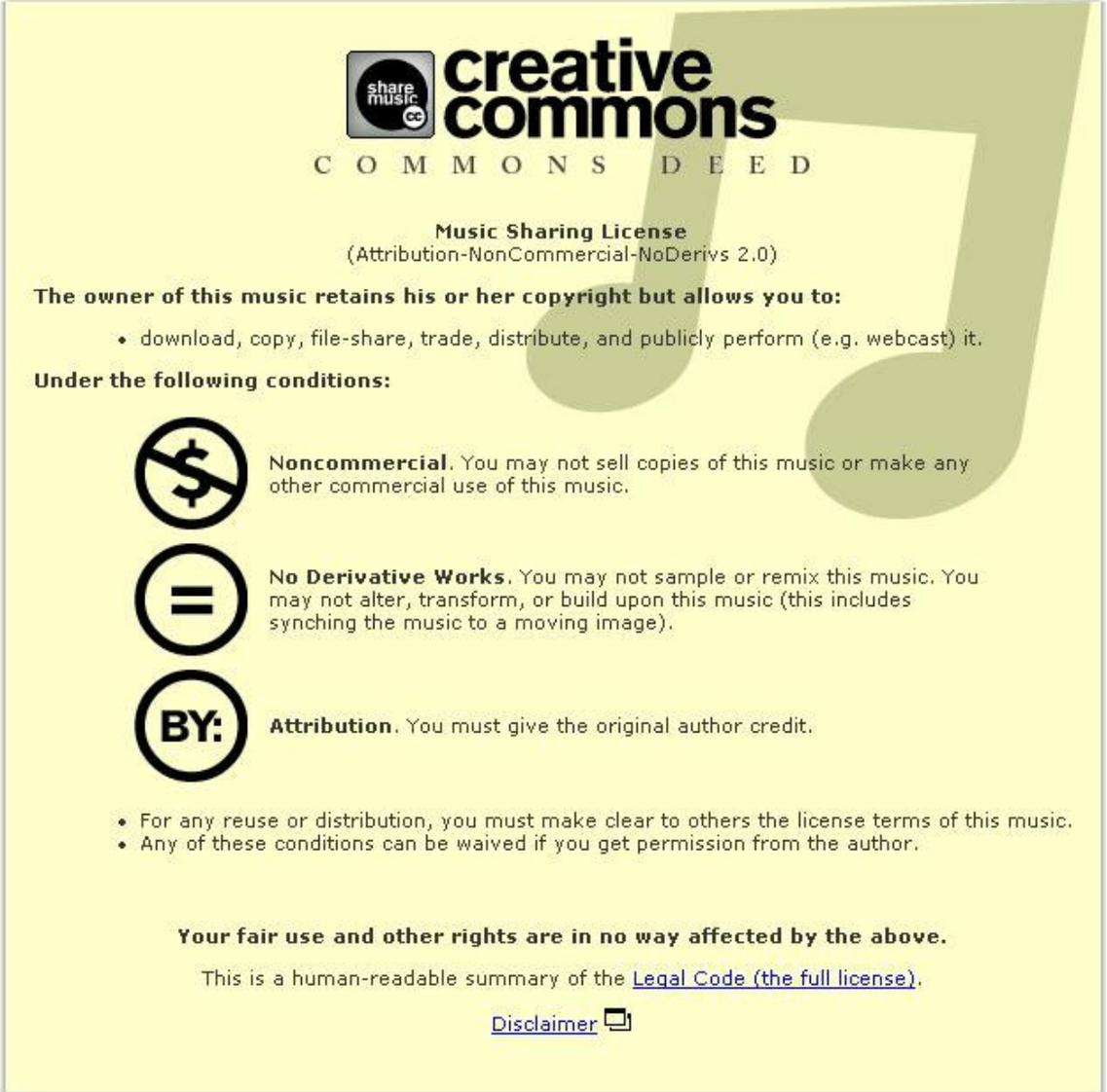
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XI. APPENDIX

I. Example of Creative Commons Licence Logo



II. Example of the According Licence (*John Doe* version)

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