



FACULTY OF LAW
University of Lund

Åsa Enström

A Legal Analysis of Copyright
Protection of Music on the Internet

Master thesis
20 points

Supervisor: Ola Svensson

Intellectual Property Law

Spring 1999

Contents

1	INTRODUCTION	5
1.1	Copyright and the Internet	5
1.2	Purpose and problem	6
1.3	Delimitation	6
1.4	Method	6
2	BACKGROUND	8
2.1	Prior conflicts of copyright and technology	8
2.2	Mp3 – a technical background	8
3	COPYRIGHT AND NEIGHBOURING RIGHTS	10
3.1	Two systems of copyright	10
3.2	Copyright world-wide	11
3.2.1	Copyright in general	11
3.2.2	Neighbouring rights in general	12
3.3	The moral and the economic rights of the copyright owner	13
3.4	International conventions and treaties	13
3.4.1	The Berne Convention	13
3.4.2	The Rome Convention	17
3.4.3	The WIPO-treaties	18
3.4.3.1	The WIPO Copyright Treaty	19
3.4.3.2	The WIPO Performances and Phonograms Treaty	20
3.4.4	Protection of copyright within the EU	21
3.4.5	The TRIPS-agreement	23
4	COPYRIGHT PROTECTION ACCORDING TO THREE DIFFERENT COPYRIGHT LAWS	25
4.1	Introduction	25
4.2	The Swedish legislation	25
4.2.1	The copyright owner	28
4.2.2	The duration of copyright protection	28
4.2.3	The moral and economic rights of the copyright owner	28
4.2.3.1	The right to reproduce the work	29
4.2.3.2	The right to perform the work in public	30
4.2.3.3	The right to show the work in public	30
4.2.3.4	The right to distribute copies	30

4.2.4	The restrictions of the economic rights	30
4.2.4.1	Copying for private use	31
4.2.4.2	Public performance	31
4.2.4.3	Distributing copies	31
4.2.5	Neighbouring rights	32
4.2.6	Infringing copyright protected work	33
4.3	The British legislation	34
4.3.1	The duration of copyright protection	36
4.3.2	The moral and economic rights of the copyright owner	36
4.3.3	Neighbouring rights	38
4.4	The copyright protection in the U.S.	39
4.4.1	The duration of copyright protection	40
4.4.2	The moral and economic rights of the copyright owner	40
4.5	Jurisdiction	41
4.6	Summary	43
5	MUSIC AND PIRACY ON THE INTERNET	44
5.1	Protection of audio files	44
5.2	The Swedish legislation	44
5.2.1	Uploading music on the Internet	44
5.2.2	Downloading music from the Internet	45
5.2.3	Performance of music on the Internet	45
5.3	The British legislation	46
5.4	The U.S. legislation	47
5.5	Summary	50
6	A LEGAL DISCUSSION CONCERNING ILLEGAL COPYING OF AUDIO FILES	51
6.1	Illegal music consumption	51
6.2	Conflict of interests	52
6.3	The economic aspect of copyright	53
6.4	Copyright - to be or not to be?	54
6.4.1	Copying for private use?	55
6.4.2	A possible solution	57
7	ANTI-PIRACY MEASURES	59
7.1	What has been done?	59
7.2	Collecting service societies and related organisations	59

7.3	Encryption and watermarking	60
7.4	SDMI	61
7.5	Summary	62
8	THE REALITY	63
8.1	Anti-piracy campaigns	63
9	CONCLUSION	65
10	BIBLIOGRAPHY	67
	Articles	68
	Electronic articles	68
	Official sources	70
	Table of cases	71
	Interview	72

Summary

The global music market is huge. Record companies make their money by exploiting the copyright in the music and lyrics of artists signed to their labels. Now the music industry is taking its first tentative steps into cyberspace and at stake is a potentially lucrative method of distributing music in a new way.

First, however, significant difficulties need to be overcome, not the least concerning the legal protection of copyrights. The record industry is currently asserting that they are under threat from the Internet. Many record companies fear that the consumers will use the Internet to access musical works from an illegitimate source and thereby depriving the record companies of remuneration. What mainly concerns the record industry, the artists, musicians and the collecting service societies is the fact that the mp3 technology and other similar compression technologies enables the audio music files to be extremely easily copied without authorisation from the copyright owner. The illegal copies can very easily be distributed and sold over the Internet. Instead of buying the CD from the record company consumers will be able to download high quality music from the Internet as digital signals directly to their computers.

To make a copyright protected work available on the Internet it is necessary to receive permission from the copyright owner, the artist and the record company holding the copyright. It is also necessary to pay royalties to the copyright owner, the artist and the record company for distributing their music on the Internet. If permission is given there is no legal problem to upload and download music files with protected music on the Internet. It is allowed to download music for private use and other exempted purposes without the authorisation of the copyright owner.

There is no doubt that what is published on the Internet is protected by existing copyright laws and that current copyright law is sufficient to handle the technological advances on the Internet.

The problems remaining are the pirate copying of music files and the copying for private use. The illegal reproduction is a criminal act and can be fought by copyright legislation, while the copying for private use is a question of economic, political and cultural dimensions. The extent of exemptions, such as copying for private use, from the exclusive right enjoyed by the copyright owners must be decided by legislators and politicians. In the society today a balance between the economic and cultural interests is to be preferred. Neither a total copyright system with no exceptions nor the absence of copyright protection would promote the economic welfare or stimulate cultural activities. The current exemption of copying for private use must therefore be considered to be a satisfying solution.

The pirate copying of music can be fought with means other than the law. The new technology available offers very efficient ways of fighting the pirate copying and the illegal copying for private use. The copyright owners have a tremendous possibility to take advantage of the situation and fight the infringements of copyright with new technological means. The copyright owners should also have a lot to gain by adjusting to the situation and instead of fighting the new technology, embrace it and use it to their own advantage.

Abbreviations

Art.	article
Arts.	articles
BPI	British Phonographic Industry
CD	compact disc
C.D.P.A. 1988	Copyright, Designs and Patents Act of 1988
IFPI	International Federation of the Phonographic Industry
EC	European Community
EU	European Union
mp3	Moving Pictures Expert Group 1 Audio Layer 3
PC	personal computer
RAM	Random Access Memory
RIAA	Recording Industry Association of America
s.	statute
ss.	statutes
SDMI	The Secure Digital Music Initiative
STIM	Föreningen Svenska Tonsättares internationella musikbyrå
TRIPS-agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods
UN	United Nations
U.S.C	The U.S. Copyright Act of 1976
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation

1 Introduction

1.1 Copyright and the Internet

Intellectual material is probably going to be the asset of the 21st century and the Internet is one of the most remarkable information technologies yet devised by mankind. Put these great intangible assets together and you have a combination of staggering power. But you also have a great deal of unsolved legal problems and a potential development problem. Copyright is basically an exclusive right and focuses on stopping people from copying. The Internet is, however, the world's greatest copying machine and it enables materials to be reproduced instantaneously and automatically. The Internet is generating and supporting the development of different parts of the society and is therefore considered to be a very important tool in the development of the society as a whole. The instant copying has led many to presume that there is no intellectual property law applicable on the Internet and many assert that the rules are simply the law of the jungle. It is, however, due to the many and nuanced roles the Internet plays in the development of society extremely important to establish the requirements and conditions applicable for the users of the Internet.

Right now the file format mp3 and other formats are causing the copyright owners of music problems all over the world in lost revenues and royalties. Mp3 is a file format which stores audio files on a computer in such a way that the file size is relatively small, but the sound is nearly perfect. It is very easy to download all sorts of music from the Internet using the file format mp3 and other similar formats and it is not always done in a legal way. The illegal copying of music is causing the record companies and the artists to lose millions and they are spending enormous sums of money fighting the piracy of music every year. Therefore the copyright owners, the record industry and the international organisations and associations of copyright owners are trying to persuade their governments to change and to modernise the legislation to give them the protection they need against the piracy of music on the Internet. The society has here a great responsibility and a difficult task in finding the right balance between the parties concerned when making the laws. The final result must be a society using its resources in an efficient way, giving the copyright owners incentives to create new intellectual work and at the same time satisfy the public's need accessing the protected works in a reasonable way.

The legal problems following in the track of technological development for copyright and related rights are the uncontrolled copying of protected works for private use and the piracy of protected works for a commercial purpose. The question is if the law, and not the one of the jungle, is applicable or if it is in need of change to serve the purposes of protection of music when new technology develops.

1.2 Purpose and problem

It is important to clarify the applicability of copyright protection of music on the Internet, due to the new technologies and the increased illegal digital copying of protected musical works they cause. The many false notions concerning the applicable law on the Internet shows that it is urgent to explain the legal situation on the Internet.

It is also important not to take the copyright protection for granted without questioning it and take into consideration the different interest and opinions of different groups in the society. To what extent should the legislators allow exceptions such as copying for private use and how should they handle the problems of pirate and private copying when taking under consideration the views of all interested parties? These are the important legal issues that need to be solved before the use of the audio file formats on the Internet can be considered well functioning.

The purpose of this paper is to investigate the copyright concerning music on the Internet by describing the underlying legislation in a number of important countries and find out if the current law is applicable on the Internet. This paper will also try to explain the problems still existing even if the law is applicable. The purpose is also to try to establish a well-balanced scope of copyright protection considering the exception of copying for private use.

1.3 Delimitation

Illegal copying of music on the Internet poses a big problem to the music industry from an economic and copyright point of view. There are mainly two ways of handling the problem: to fight it or to try to go around it. This paper will discuss the basis for fighting the problem, that is to investigate the legal issues connected to uphold the rights of the copyright owner, but also to test the practical limits to that position. There are also opinions and initiatives taken to try to go around the problem, which mainly means that the music industry adapts to the present technical situation. This will be discussed only briefly since it does not pose the same legal questions.

The reason for the presentation of the copyright laws in Sweden, the U.K. and the U.S. is the possibility this gives in focusing on the differences between a civil law system and the common law system and the fact that a majority of all music originate from the U.K. and the U.S.

1.4 Method

The basis for the description of the problem and the raised questions emanate mainly from an extensive study of different written material and some complementary interviews. The materials studied are laws and legal literature.

These materials are mostly of conventional printed type and are referred to in footnotes and in the bibliography. In addition to that electronic sources, mainly on the Internet have been used. The web sites, as well as the interviews are referred to in the footnotes and in the bibliography.

2 Background

2.1 Prior conflicts of copyright and technology

The discussion on illegal copying of music is not a new one in the history of copyright protection of music. The copyright owners have always been very reluctant to and suspicious of new technologies and inventions threatening their business and legal rights. In one respect, the history of copyright law is a process of legal reaction to the impact of technology. The threatening possibilities that the new technology gives in making it easier to copy and use the protected works illegally have been legally discussed many times, for example, concerning the blank audio cassette, the sound recorder and the video recorder. The current problem concerning copyright and music is focused on mp3 and other file formats compressing the file size of the music. In the future there will for sure be another technology causing a similar legal discussion. The conflict of new technologies and the protection is certainly an ongoing one and concerns the essence of copyright.

2.2 Mp3 – a technical background

An ordinary music file tends to be very large and on the Internet large files means long downloading time. Mp3 is an audio compression format that allows users to download music tracks and save them onto a PC hard drive or a portable mp3 player. It is a non-patented freely available technology, which is able to compress audio by removing some of the inaudible data information without perceivable loss in sound quality. The human ear is unable to hear all audio frequencies. The mp3 model and other similar compression models tries to eliminate the frequencies which the human ear is unable to hear but still keep all the frequencies that the human ear can hear leaving an intact satisfying hearing experience. A mp3 file produces first class sound very close to CD quality when played on a computer. To compress an audio file using the model of mp3 or any similar compressing model is called encoding. There is a possibility to choose the level of compression when encoding and the larger the compression the better the quality of the sound. The majority of the audio files available on the Internet today are encoded with a result of very high audio quality and a size twelve times smaller than the original. The advantage of this format is that by reducing the file size by compressing it with little loss of quality, it takes less time to upload and download the music on the Internet. As a result of the decreased downloading time and the near perfect sound quality a lot of

music are compressed and illegally made available on the Internet and illegally downloaded.¹

The real name of mp3 is MPEG 1 Audio Layer 3. MPEG stands for Moving Pictures Expert Group and originally this is a way of compressing film. MPEG have two different levels of film compressing, MPEG 1 and MPEG 2. Layer 3 is a separate layer in MPEG used to store the sound for the film. This format has been further developed into a new file format now used for storing music very efficiently.²

There is several other audio file formats similar to mp3, such as Windows Audio Media and Dolby AC3. The differences between these audio file formats that flourish the Internet are the ways they are compressed and the size of the encoding. Another difference is the possible protection of copying available in some of the file formats, however not in mp3.

To be able to download mp3 files from the Internet it is necessary to first have access to a special program that can be downloaded from the Internet and it is almost always free of charge. After installing it, it is possible to download mp3 files from the Internet. When the audio file has been downloaded onto a hard drive or a mp3 player, it is necessary to use a program that is able to read compressed audio files, when listening to the file.³

¹ www.stim.se/juridik/inter01.htm Musik på Internet – Arkiv, 1999-05-10, www.law.co.il/articles/music_en.htm The internet and copyright in music, 1999-07-05

² www.medstroms.se, Mp3 – musik industrins död?, 1999-05-14

³ www.mp3now.com/html/mp3_info.html What is mp3, 1999-05-14

3 Copyright and neighbouring rights

3.1 Two systems of copyright

Two different ways of seeing copyright, which has developed in Europe, can now be discerned in the different traditions of law, the Anglosaxian common law system and the French civil law system.

The word copyright is not the accurate translation of the equivalent term used in the countries with civil law tradition. To understand the right meaning of *droit d'auteur* in France, of *Urheberrecht* in Germany, of *derecho de autor* in Spain, *diritto d'autore* in Italy and *upphovsrätt* in Sweden one must use the word author's right. It is not just a difference in legal terms but more a way of dissident views of the common law and civil law approaches to copyright.⁴

The copyright was according to the common law tradition in the beginning a commercial privilege with the purpose of promoting competition among the publishers and the printers and to restrict situations of monopoly and cartels. The copyright owner was primarily seen as the owner of the right to decide about the printing and distribution of his intellectual work.⁵ Copyright in countries with common law tradition means the right to make a copy of an intellectual work and the possibility to stop others from doing so. Common law protects an intellectual work because it can otherwise be copied and reproduced with undesirable results and because the author probably will lose money as a result of the unlawful copying.

The French civil law tradition considers the copyright to rest upon the copyright owner's personal right to decide how his intellectual work shall be used. The basic view within the civil law tradition is that the copyright is an individual human right and not a commercial privilege to promote business.⁶ The civil law systems protect the author of the intellectual work because he has a moral entitlement to control and exploit his intellectual work. The civil law tradition emphasises the author's moral and intellectual right to the work while the common law tradition accentuates the economic importance of copyright and the fact that the right to reproduce the work belongs only to the copyright owner.

⁴ *An introduction to intellectual property law*, by Phillips and Firth, page 124

⁵ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 25

⁶ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 25

Today the differences between the two copyright systems can be seen in the stronger protection of moral rights in the civil law countries and the more detailed opinion of what is protected by copyright law in the common law countries. In reality and in practice there is little difference between the two copyright systems, but of the two law traditions that of the common law nowadays seems to be the less appropriate. Copyright today has less to do with copying and more to do with general protection of literary or aesthetic intellectual work against different forms of infringements.⁷

3.2 Copyright world-wide

Copyright is basically a national and a territorial right protected within the country's geographic area according to each country's legislation. As a result the protection available, for example, according to the Swedish legislation will only protect Swedish copyrights in Sweden and offers no protection against foreign nationals who copies the Swedish copyright works without the author's consent and commercially distribute them abroad.

However, in reality copyrights are international, especially when having in mind the immediate distribution of copyright work over the Internet and other media. International protection of copyright is demanded and the need for protection has increased over the last few years, much because of the Internet. There are a few international conventions, presented below,⁸ protecting copyrights and related rights from an international perspective.⁹ These conventions are very important since they affect and harmonise copyright laws all around the world and many copyright legislation rests upon the international conventions and treaties.

3.2.1 Copyright in general

The following presentation of copyright and neighbouring rights is not specific for any country. The rules presented here are a general overview and applicable in most countries and are based on international conventions and treaties.

The term copyright describes the protection that is granted the author of a work to control how his work is used. The subject matter of copyright is usually described as literary and artistic works, i. e, original creations in the field of literature and arts. The form in which such works are expressed may be, for example, words, music, pictures or symbols.

⁷ *An introduction to intellectual property law*, by Phillips and Firth, page 124

⁸ See below Chapter 3.4

⁹ *ens@mrätt.på.internet?* by Petter Rindforth, page 25

Copyright protects the work in terms of the form in which it is expressed rather than the underlying idea of the work and generally vests in the author of a work. The protection grants the author a bundle of rights, which only the author is entitled to exercise. Copyright protection is by definition, a monopoly right and that generally means that certain uses of the work are lawful only if they are done with the authorisation of the owner of the copyright. Once a work is copyrighted, the author may sue and receive compensation from any person who unlawfully uses the copyright protected work.

3.2.2 Neighbouring rights in general

The actual copyrights protect intellectually created works based on ideas but there are also works very much like the copyrights but performed by artists, singers, musicians and actors. The general opinion is that these rights should be legally protected according to the same basic principles as copyright.

These rights are, because of the close relation with the copyright protected works often referred to as neighbouring rights, derivative works or related rights. The owners of neighbouring rights are, for example, the performer of a performance or the producer of an intellectual work. The performances will normally incorporate literary or artistic works and the performer or producer must obtain permission from the copyright owner to be able to perform the work. The neighbouring rights will in no way eliminate the protection of copyrights underlying the performance of the neighbouring right.

The owner of a neighbouring right has just like the owner of a copyright, economic exclusive rights and moral rights.

Both copyrights and neighbouring rights are of importance in a legal analysis of the protection of audio files and music on the Internet. For posting an audio file format on the Internet the music first have to be encoded from a CD. Each recorded piece of music embodies at least two different legally protected works, the underlying musical composition and the sound recording. Copyright in the musical composition with or without words is initially owned by the author of that composition, but that copyright can be assigned, exclusively licensed or transferred to another person. In the music industry that right is generally transferred or licensed to a music publishing company, which in turn sublicenses the copyright in various ways. The actual sound recording is also legally protected, in some countries under the law of copyright and in some countries under the law of the neighbouring rights. The owners of the right in the sound recording are usually the sound recording producer or a record company. If the musical work is performed by an artist or musician that artist or musician is legally protected and has his own legal right to the performance. All these legal rights are concerned when audio file formats are flourishing the Internet.

3.3 The moral and the economic rights of the copyright owner

Both the European copyright legislation, based on the French civil law tradition and the Anglosaxian copyright legislation based on the common law tradition take into consideration the strong emotional connection that very often occur between a creator and his intellectual work. The authors will according to these legal systems, have the moral right of his production and this right will always belong to the individual creator of the intellectual work. The author is viewed as being entitled, by virtue of the fact that he has created the work, to control all facets of that work. The basic principle of the moral right is that the copyright owner have the right to be identified as the author of the work - the right of paternity - and the author also have the right to gain respect for his intellectual work - the right to integrity. This right includes the possibility for the author to object when the work is distorted or mutilated in any way that harms the author's reputation.¹⁰ The moral right of an intellectual work can never be separated form the original copyright owner as a protection against the author selling or assigning the work when in need of money and risking the work being mutilated.

The neighbouring rights are protected according to the same legal principles.

The copyright owners also have an exclusive right of disposition, the economic right, to use his intellectual work for economic profit. The owners of the copyright have the right to decide if, how and by whom the work will be used. The economic right can be sold or assigned. To satisfy certain demands from the society concerning the use of the works, exceptions from the monopoly right are allowed, such as the right for the public to copy the work for private use or perform the work under certain circumstances.

The owners of neighbouring rights are protected according to the same legal principles.¹¹

3.4 International conventions and treaties

The following presentation will focus on the most important international conventions and treaties that have played a decisive role for the creation and development of most copyright laws.

3.4.1 The Berne Convention

In the nineteenth century the major industrial countries entered into a number of bilateral agreements with each other for the protection of intellectual properties of

¹⁰ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk 3§, C. D. P. A. 1988 ss. 77-79 and 80-83, Berne Convention art 6 bis

¹¹ www.ordval.se/ur/intro.html Upphovsrätt, 1999-01-02

their nationals in each other's countries. After a while and some experience later it was apparent to most countries involved that a far better solution was to ensure the protection of copyrights in each other's country by way of an international convention. In 1886, several countries signed the Berne Convention for the protection of literary and artistic works.

The Berne Convention has been revised several times since 1886.¹² The Berne Convention was last revised in 1971 in Paris and many countries have now signed and ratified the Paris Act of the Berne Convention including all EC Member States and the United States of America.¹³

The two fundamental principles of the Berne Convention are the principle of the non-discriminatory protection and the principle that the Berne Convention guarantees a minimum protection of copyright. The rules in the Berne Convention are written in a less detailed way than the domestic legislation of the contracting states. By signing and ratifying the Berne Convention the contracting states guarantee to follow these guide lines that leaves a lot to the domestic legislation but functions as rules of minimum protection.¹⁴ Another principal objective set out by the Berne Convention is to harmonise the copyright laws of the contracting states.

The Berne Convention seeks to protect the copyrights of authors of literary and artistic works in all countries that have signed and ratified the Berne Convention.¹⁵ Literary and artistic works are deemed to include every production in the literary, scientific and artistic domain, whatever the form of its expression.¹⁶ A literary or artistic work must, however, be fixed in some material form to enjoy copyright protection according to the Berne Convention.¹⁷ The protection of literary and artistic works under the Berne Convention is applicable to the works of those who are nationals¹⁸ of one of the contracting states, whether the work has been published¹⁹ or not. Literary or artistic works will also be protected if the author is

¹² There has been an additional Act of Paris in 1896, a revised Berne Convention of Berlin in 1908 and further revisions at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971.

Intellectual property in Europe, by Guy Tritton, page 187

¹³ *Intellectual property in Europe*, by Guy Tritton, page 188

¹⁴ For example, art. 9 (2) in the Berne Convention, that explains that it is a matter of domestic law to permit reproduction, but then presents the minimum rights connected with the reproduction right.

¹⁵ Article 1 and 2 (6) in the Berne Convention

¹⁶ Article 2 (1) in the Berne Convention

¹⁷ Article 2 (2) in the Berne Convention

¹⁸ Equivalent to *nationals* of a member state of the Berne Convention are the authors who have their habitual residence in a member state, according to article 3 (2) in the Berne Convention.

¹⁹ The legal definition of a *published work*, according to the Berne Convention article 3 (3), is a work published with the author's consent and made available to satisfy the reasonable requirements of the public.

a foreigner if the work was first published in a country part of the Berne Convention or simultaneously published²⁰ in a country not part of the Berne Convention and in a country belonging to the Berne Convention.²¹ No formal registration is necessary to enjoy copyright protection under the Berne Convention.²² In accordance with the principle of non-discriminatory protection, the Berne Convention provides authors with copyright protection and a guarantee that they will have the same rights in a contracting state as the latter's nationals and in this way the member states are prevented from discriminating against foreign authors.²³ Claimed protection in a contracting state may not be dependent upon the existence of protection in the country of origin of the work and domestic laws govern the protection in the country of origin.²⁴ The cumulative effect of the non-discriminatory principle being applicable in all the member states of the Berne Convention is that the protection afforded to a work will depend upon the domestic copyright law of the contracting state where protection is sought and will not be dependent upon the national origin of the work or the author.

According to the principle of reciprocity, a contracting state may, where a non-contracting state fails to provide adequate protection for the intellectual works of an author of a contracting state, restrict protection conferred under the Berne Convention to the works of authors who are nationals of that non-contracting state. For instance, where an author of a non-contracting state first publishes his work in a contracting state, such a work would normally qualify for protection under the Berne Convention. However, any contracting state may restrict protection to such a work if the non-contracting state does not provide reciprocal protection for the author of a work of that contracting state. If the contracting state where the work was first published avails itself of the principle of reciprocity, other contracting states can similarly restrict protection to such a work and not grant a wider protection than that granted to the work in the country of first publication. This regardless as to whether or not works of their own nationals are protected adequately in the non-contracting state.²⁵ In this way the contracting states are supporting each other and in a way omitting the states that not signed and ratified the Berne Convention.

The Berne Convention provides that the term of copyright is the life of the author and 50 years after his death.²⁶ Contracting states may grant a longer term of protection.²⁷

²⁰ A work shall be considered as having been *simultaneously published* if it has been published in two or more countries within thirty days of its first publication, according to article 3 (4) in the Berne Convention.

²¹ Article 3 (1) in the Berne Convention

²² *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 280

²³ Art. 5 (1) and 5 (3) in the Berne Convention

²⁴ Art. 5 (2) and 5 (3) in the Berne Convention

²⁵ Art. 6 in the Berne Convention

²⁶ Art. 7 (1) in the Berne Convention

²⁷ Art. 7 (6) in the Berne Convention

The author has the right to claim authorship of the work and to object to any mutilation, modification or other derogatory treatment of the work, which will harm the author's honour or reputation.²⁸ This moral right is independent of the economic rights and applicable even after the transfer of the economic rights. The moral right can be enforced after the death of the author, at least until the expiry of the economic rights, by those responsible for the enforcement of copyright protection.²⁹

According to the Berne Convention authors have the exclusive right to authorise reproduction of their works in any manner throughout the term of protection of their rights in the original work.³⁰

Musical works are protected under the Berne Convention and are afforded exclusive rights but contracting states are permitted to allow reservations to an exclusive right provided that the authors are not denied the right to obtain remuneration for the exploitation of any sound recording incorporating a protected work. In the absence of an agreement a competent authority shall fix the remuneration.³¹

There are certain exceptions to the exclusive rights conferred on the copyright owner. The exception with the greatest relevance for the musical works is the possibility for the contracting states to permit reproduction of works in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not harm the legitimate interests of the copyright owner.³² This provision is also known as the three-step test and must be applied cumulatively, meaning that all three requirements must be fulfilled for the reproduction right to be exempted. The three-step test³³ also appears in the WIPO Copyright Treaty³⁴ and the WIPO Performances and Phonograms Treaty³⁵.

In order for the author of a work to have his work protected by the Berne Convention and to bring infringement proceedings in a member state, his name must appear on the work in accordance to fair practice. This rule is applicable even when the name is a pseudonym.³⁶ According to the Berne Convention all infringing copies shall be liable for seizure in any member state according to the domestic law in each member state.³⁷

²⁸ Art. 6bis (1) in the Berne Convention

²⁹ Art. 6bis (2) in the Berne Convention

³⁰ Arts. 8 and 9 in the Berne Convention

³¹ Art. 13 (1) in the Berne Convention

³² Art. 9 (2) in the Berne Convention

³³ 1. Only in special cases 2. The reproduction must not be in conflict with a normal exploitation of the work 3. The reproduction must not harm the interests of the copyright owner

³⁴ Art. 10 in the WCT

³⁵ Art. 16 in the WPPT

³⁶ Arts. 15 (1) and (3) in the Berne Convention

³⁷ Arts. 16 (1) and (3) in the Berne Convention

3.4.2 The Rome Convention

The convention for the protection of performers, producers of phonograms and broadcasting organisations was signed at Rome in 1961 in order to protect the rights of the performers, producers and broadcasting organisations. Their work will normally incorporate literary or artistic works which may be protected under copyright and for which the performer, producer or broadcasting organisation must obtain permission from the author. The neighbouring rights are expressed so as to be without prejudice to the protection of copyrights.

The Rome Convention seeks to prevent from discriminating against nationals from other contracting states and to provide harmonising measures.³⁸ Each contracting state must grant national treatment³⁹ to a performance, which originates from another contracting state. National treatment will be granted to the performers⁴⁰ under certain circumstances. The performance must take place in a contracting state⁴¹ or the performance must be incorporated in a phonogram, where the producer of the phonogram is a national of a contracting state. National treatment will also be granted if the first fixation of the phonogram was in a contracting state or the phonogram was first published in a contracting state.⁴² Performers have the right to prevent the broadcast and the communication to the public of their performance, the fixation of their performance and the reproduction of a fixation of their performance.⁴³ The term of protection lasts for 20 years from the date of the performance or if fixed in a phonogram, 20 years from the date of fixation.⁴⁴

Each contracting state must treat phonograms⁴⁵ produced by the national of another contracting state or first fixed in another contracting state or first published in another contracting state in the same manner as phonograms made by their own nationals and first fixed or published in its own territory.⁴⁶ The

³⁸ *Intellectual property in Europe*, by Guy Tritton, page 194

³⁹ *National treatment* is defined as the protection that a contracting state would give a performance which took place in its own country and was performed by its own nationals according to article 2 (1) a in the Rome Convention.

⁴⁰ *Performers* means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works, according to art.

3 (a) in the Rome Convention

⁴¹ Art. 4 (a) in the Rome Convention

⁴² Arts. 4 (b) and 5 in the Rome Convention

⁴³ Art. 7 in the Rome Convention

⁴⁴ Arts. 14 (a) and (b) in the Rome Convention

⁴⁵ *Phonograms* are legally defined as any exclusive aural fixation of sounds according to art. 3 (b) in the Rome Convention and accordingly also includes CDs etc.

⁴⁶ Arts. 2 and 5 in the Rome Convention

producers of phonograms⁴⁷ have the exclusive right to authorise the direct or indirect reproduction of their phonograms.⁴⁸ To be protected by the Rome Convention the copies of the phonogram must bear the symbol **O** accompanied by the year of the first publication, the name of the producer or owner of the phonogram rights together with the name of the principal performer and the owner of their rights. This must be placed in such a manner as to give reasonable notice of a claim of protection.⁴⁹ The term of protection is 20 years from the date of fixation of the phonogram.⁵⁰

3.4.3 The WIPO-treaties

WIPO⁵¹ is an international body under the UN responsible for promoting the protection of intellectual property throughout the world. In doing this, WIPO collaborates with states and related international organisations, such as collecting service societies. In December 1996 a Diplomatic Conference was held in Geneva and two new international WIPO-treaties were signed to regulate some of the problems concerning the copyright and related rights in relation to the new digital technology. The Treaties were the result of several years of complicated negotiations and efforts to make the copyright laws applicable in the digital world and to safeguard and increase the international protection of performing artists and producers of phonograms. The two Treaties are based on existing treaties, namely the Berne Convention and the Rome Convention.⁵² The Treaties will enter into force when 30 countries have signed them and the EU will be accorded full contracting party status to the Treaties and will be able to represent the EU Member States as a whole.⁵³

While many country's copyright laws already protected the copyright owners and owners of related rights against the illegitimate uses of musical works on the Internet, the WIPO-treaties filled many remaining gaps. The treaties' provisions must be seen as minimum rights but clarified the distribution right and the right of making works available over interactive networks and ensured the authors', the performers' and the producers' legal rights in cyberspace.

⁴⁷ *Producers of phonograms* are defined as the legal entity or person who first fixes the sound of a performance or other sound according to art. 3 (c) in the Rome Convention.

⁴⁸ Art. 10 in the Rome Convention

⁴⁹ Art. 11 in the Rome Convention

⁵⁰ Art. 14 (a) in the Rome Convention

⁵¹ WIPO stands for World Intellectual Property Organisation

⁵² According to the WCT Art. 1, must the Contracting Parties comply with Arts. 1 to 21 and the Appendix of the Berne Convention.

⁵³ *Guide to Intellectual Property in the IT industry*, by Baker & McKenzie, page 21

3.4.3.1 The WIPO Copyright Treaty

The Copyright Treaty is concerned with the protection of literary and artistic work in a digital environment and the protection applies to expressions and not to ideas.⁵⁴

Prior to the Copyright Treaty, authors had no express general right of distribution under international agreements.⁵⁵ The Copyright Treaty introduced an exclusive general right of distribution but with the freedom of the Contracting States to provide for exhaustion of the right after the first sales or publication of the copies as they see fit.⁵⁶ The Copyright Treaty also introduced a general right of communication to authors of works. This right of communication to the public covers all ways of making a work available to the public by any means or process other than by distributing copies. It explicitly covers interactive on-demand acts, such as viewing works on a web site and downloading a file from the Internet. The Copyright Treaty do not contain a new definition of the reproduction right, but the provision concerning the reproduction right in the Berne Convention is considered fully applicable on digital works in a digital environment. This caused, however, a continued uncertainty regarding the status of temporary electronic copies.⁵⁷

The Contracting Parties may, in their domestic legislation, provide for exceptions to the rights granted to the authors of literary or artistic works in certain special cases that do not conflict with a normal exploitation of the work and do not prejudice the legitimate interests of the author.⁵⁸ This provision may certainly cause uncertainty with regards to the terms normal exploitation and legitimate interests.

The Contracting States must provide adequate legal protection and effective legal remedies against circumvention of effective technological measures, such as encryption and watermarking, used by authors to exercise their rights and to stop infringements of their works.⁵⁹

⁵⁴ Art. 2 in the WCT

⁵⁵ The Berne Convention established in Art. 10 a right of distribution only in respect of cinematographic adaptations of a work.

⁵⁶ Art. 6 in the WCT

⁵⁷ Contrast the approach taken in Art. 2 the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97)628 final

⁵⁸ Art. 10 in the WCT

⁵⁹ Art. 11 in the WCT

3.4.3.2 The WIPO Performances and Phonograms Treaty

The Performances and Phonograms Treaty protects certain rights of performers⁶⁰ of literary or artistic works and of phonogram producers⁶¹.

The performers have several exclusive rights according to the Performances and Phonograms Treaty. The Performances and Phonograms Treaty establishes a right that allows the performer to claim to be identified as the performer of his performance and to object to any distortion, mutilation or other modification of his performances that would harm his reputation.⁶² The performers are granted several economic rights with relevance to the protection of music on the Internet. The performers have an exclusive right to authorise the broadcasting and communication to the public of their unfixed performances and the recording of their unfixed performances⁶³ and a right to authorise the direct or indirect reproduction of their performances fixed in programs⁶⁴. The performers also have an exclusive right of distribution and the Contracting Parties may decide about the exhaustion of the right after the first sale of the fixed performances.⁶⁵ The economic rights include a right for the performers to make fixed performances available to the public.⁶⁶ This provision is of special interest in regards to works on the Internet. It is an exclusive right conferred upon the performer to decide when to make a performance fixed in a phonogram available to the public, where people can access the work from a place and a time individually chosen by them, such as the Internet.

The producers of phonograms enjoy, except for the moral rights, similar rights as the performers.⁶⁷

Some provisions are common to both performers and producers of phonograms and these rights concern the right to remuneration, the exceptions of the exclusive rights and the term of protection of performances and phonograms. The right to remuneration guarantees the performers and the producers of phonograms an equitable remuneration for commercial use or communication to the public of the work.⁶⁸ The limitations of the economic rights may be decided by the Contracting

⁶⁰ *Performers* are according to Art. 2 in the WPPT, described as actors, singers, musicians, dancers and other persons who act, sing deliver, declaim, play in, interpret, or otherwise perform literary or artistic works.

⁶¹ Producer of phonograms is according to Art. 2 in the WPPT, defined as the person, or legal entity, that takes the initiative to and has the responsibility for the first fixation of the sounds of a performance or other sounds.

⁶² Art. 5 in the WPPT

⁶³ Art. 6 in the WPPT

⁶⁴ Art. 7 in the WPPT

⁶⁵ Art. 8 in the WPPT

⁶⁶ Art. 10 in the WPPT

⁶⁷ Arts. 11,12 and 14 in the WPPT

⁶⁸ Art. 15 in the WPPT

States if they are confined to special cases and do not conflict with the normal exploitation of the work and the legal interests of the performer or producer of phonograms.⁶⁹ Both performers and producers of phonograms will be legally protected for 50 years from the end of the year in which the performance was fixed or the phonogram published.⁷⁰

Just as in the WIPO Copyright Treaty the Contracting Parties must provide protection and remedies for the technological measures that performers and producers use in order to protect their rights.⁷¹

3.4.4 Protection of copyright within the EU

A considerable interest for the protection of intellectual property was early appreciated within the European Union, much due to the impact the intellectual property rights have on the trade on the Internal Market. The Commission presented a Green Paper concerning copyrights in the beginning of the 1990s. Since then a number of directives have been established by the Council and the Member States are obliged to harmonise their copyright laws in order to achieve the objectives of the European Union, such as the removal of barriers to the free movement of goods. The duration of copyright protection have been changed through a directive and copyright works now enjoy protection for 70 years after the author's death instead of 50 years as before. Neighbouring rights enjoy legal protection for 50 years after the performance or production was made.⁷²

Another example of the legal work concerning copyright protection within the European Community is the proposed directive on harmonisation of certain aspects of copyright and related rights in the Information Society.⁷³ The proposal of the directive is to a great extent identical with the international obligations in the WIPO-treaties from 1996. There is obviously an increased need, due to the achievement of technology, to create a general and flexible legal framework at Community level in order to foster the development of the Information Society in Europe. Copyright and related rights play an important role as they protect and stimulate the development and marketing of new products and services and the exploitation of such products and services. The harmonised legal framework on copyright and related rights will hopefully lead to an increased investment in creativity and innovation and in turn lead to growth and an increased competitiveness of European industry. Without harmonisation at Community level,

⁶⁹ Art. 16 in the WPPT

⁷⁰ Art. 17 in the WPPT

⁷¹ Art. 14 in the WPPT

⁷² Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, OJ L290

⁷³ Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97)628 final

the national legislative activities might result in significant differences in protection and thereby cause distortion and restrictions of the Internal Market.⁷⁴

The proposal mainly contains regulations concerning the right of reproduction, the right of communication to the public, the right of distribution and exhaustion of these rights and the exceptions allowed.

The proposal defines the scope of the reproduction right since there is a considerable legal uncertainty concerning exactly which forms of reproduction that are legally protected. Many Member States still have a legislation adjusted only to the material reproduction and the law does not apply on digital reproduction. A broad definition of the reproduction right is needed to ensure legal certainty within the Internal Market. The Member States must provide an exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part for authors, performers, phonogram producers, film producers and broadcasting organisations.⁷⁵

There are certain exceptions from the exclusive reproduction right of the owner which allow the copying of the work without the copyright owner's permission. For the reproduction of musical work on the Internet the exceptions will allow a temporary act of reproduction which is an integral part of a technological process for the sole purpose of enabling the use of a work and having no independent economic significance.⁷⁶

The harmonisation at Community level will reduce the legal uncertainty regarding the nature and level of protection of acts of communication to the public. This is especially the case concerning the level of protection for acts of on-demand transmission of copyright works where the members of the public may access the copyright works from a place and a time individually chosen by them. The Member States must provide all authors with an exclusive right to authorise or prohibit any communication to the public of copyright works, including the making available to the public by way of interactive on-demand transmission over networks.⁷⁷ This provision applies equally for neighbouring rights. Member States

⁷⁴ Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97)628 final, page 1

⁷⁵ Art. 2 in the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97)628 final

⁷⁶ This provision take into account the fact that many copies are made as a part of a technical process, without the direct intervention by a person, such as in the case of temporary storage in the working memory of a computer. *A Successful Step toward Copyright and Related Rights in the Information Age: The New EC Proposal for a Harmonisation Directive*, by Silke von Lewinski, page 137

⁷⁷ Art. 3 in the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and

may prescribe limitations of the exclusive right of communication to the public, for example, for the purpose of education and reporting current events.

The proposal confers an exclusive right of distribution upon the owner of the copyright. The Member States must provide authors, in respect of the original and copies of their works, with the right to control the distribution to the public by sale or otherwise. The proposal also clarifies the rules concerning the exhaustion of the right of distribution and after the first sale by the owner of the original or copies, the right to control the resale of that object is exhausted.⁷⁸

The proposal also deals with the protection of technological measures and rights and obliges the Member States to provide adequate legal protection against the manufacture and distribution of devices that circumvent the protection of copyrights or related rights.⁷⁹ This provision corresponds with the provision laid down in the WIPO-treaties of 1996.⁸⁰

This proposal was transmitted to the Parliament and the Council from the Commission in January 1997. The Economic and Social Committee gave its opinion on the proposal in September 1998. The European Parliament was consulted under the codecision procedure, examined the proposal in its committees and gave its opinion in February 1999 in favour of the proposal but with some amendments. The amendments wanted by the Parliament are, however, of little importance and will not change the general principles of the proposed directive or the directive's relevance to the protection of music on the Internet. The Commission will take Parliament's opinion concerning the present amended proposal for a directive into account as far as possible.⁸¹

3.4.5 The TRIPS-agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods was concluded in Geneva in December 1993.

related rights in the Information Society, Brussels, 10.12.1997
COM(97)628 final

⁷⁸ Art. 4 in the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997
COM(97)628 final

⁷⁹ Art. 6 in the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997
COM(97)628 final

⁸⁰ Art. 11 in the WCT and Art. 14 in the WPPT

⁸¹ Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, <http://europa.eu.int> Community preparatory acts, Document 599PC0250, 1999-08-01

The TRIPS-agreement is concerned with copyright and related rights and it sets the standards for the Member States of WTO⁸² concerning the availability, scope and use of intellectual property rights generally. It includes provisions for the enforcement of intellectual property rights and dispute prevention and settlement measures. The Member states must apply national treatment concerning all rights and exceptions allowed by the international conventions concerned. The Member States must also grant all advantages, favours, privileges or immunities that it is granting its own nationals to nationals from other Member States. However, an exception should be made in accordance to when the Berne Convention is allowing protection according to the principle of reciprocity instead of national treatment.

Members of the TRIPS Agreement are required to legislate to provide the standards of protection for the property right owners. Members of the TRIPS-agreement must comply with articles 1-21 of the Berne Convention.

⁸² WTO stands for World Trade Organisation

4 Copyright protection according to three different copyright laws

4.1 Introduction

The protection of music follow the same legal principles as protection of literary and artistic works and in order to give a closer presentation of the protection of music a general presentation of protection of intellectual work is necessary.

Most Western countries base their copyright protection on international conventions and the EC Member States are bound to harmonise their legal rules according to the regulations from the EC. The result is a very similar protection of copyright in a majority of the countries in Europe and in many countries around the world. Some differences are obvious, however, and are an effect of the various traditions of legal systems in the different countries.

4.2 The Swedish legislation

The Swedish rules of law concerning copyright is based on the French civil law tradition and is governed by one law, Upphovsrättslagen (1960:729) and two appurtenant regulations, Upphovsrättsförordningen (1993:1212) and Internationella upphovsrättsförordningen (1994:193). Upphovsrättsförordningen regulates among other things the rules of copying of intellectual works in archives and libraries. Internationella upphovsrättsförordningen contains regulations concerning the legal protection that foreign intellectual works enjoy in Sweden. The Swedish copyright legislation has its background in international conventions and it is mostly the Berne convention⁸³ and the Rome convention⁸⁴ that influenced and made an impact on the Swedish law. The Swedish legislation has also been harmonised to correspond with the EC law concerning copyrights and neighbouring rights.

The copyright protection in Swedish law is divided into two parts in the law,

⁸³ See above Chapter 3.4.1

⁸⁴ See above Chapter 3.4.2

the protection of the copyright⁸⁵ and the protection of neighbouring rights⁸⁶.

The intellectual works protected by copyright in the Swedish law are literary and artistic works⁸⁷. The legal definition of work is; an intellectual creative activity that fulfils certain requirements of independence and originality.⁸⁸ It is very difficult to define what literary and artistic works are. Literary works are primarily considered works mediating information in some way and artistic works are generally said to be works created for an artistic purpose, for example, pictures or music. The legal definition of literary and artistic works must be interpreted in a very wide sense, to make it possible for the law to be able to protect all intellectual creations.⁸⁹ There is a comprehensive list of examples of literary and artistic works in the law.⁹⁰ A work can also be a mixture between a literary and an artistic work.

The idea or the underlying facts remain unprotected and only the way the idea is expressed will be protected. The essence of the work or the inner form of the work will be legally protected when the idea is transformed into an intellectual work by a human activity.⁹¹ It is important to stress that the Swedish legislation protects any literary or artistic work no matter how it is expressed.⁹²

To be protected according to Swedish law the works has to attain a certain criteria of distinctive character and individuality. The literary or artistic work must reach a certain level of originality and independence and must be a result of human intellectual creativity and activity.⁹³ This is very difficult to characterise in practice and it is not defined in the law. Generally it is considered that the work must contain such originality and personal touch that two people working independently of each other would be unable to express the work in the exact same way.⁹⁴ When determining if the work has reached the required level of originality and independence there is no need for literary or artistic evaluation or

⁸⁵ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, Chapter 1

⁸⁶ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, Chapter 5

⁸⁷ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 1§

⁸⁸ *Nätjuridik. Lag och rätt på Internet*, by Thomas Carlén-Wendels, page 37

⁸⁹ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk 1§, *Nätjuridik. Lag och rätt på Internet*, by Thomas Carlén-Wendels, page 58

⁹⁰ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 1§

⁹¹ *ens@mrätt.på.internet?*, by Petter Rindforth, page 17

⁹² *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 39

⁹³ *ens@mrätt.på.internet?*, by Petter Rindforth, page 17

⁹⁴ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 54

claims of quality.⁹⁵ In other words the work can be ugly or really bad and still be considered to be a literary or an artistic work.

There is no need to register the literary or artistic work to obtain copyright protection. An intellectual work is automatically protected as soon as it fulfils the condition of originality. The copyright symbol © has no legal meaning in Sweden.⁹⁶ However, the symbol can have a psychological effect and can be a useful reminder and warning that the work is legally protected. It is of no importance if the literary or artistic work is fixed or not to gain legal protection. A work can be protected even if it is not recorded, written or fixed in any material way.⁹⁷

As long as an intellectual work is not yet made available to the public or is still unpublished the copyright owner has an exclusive right to the work. This means that the work absolutely not can be exploited or used by someone else without the copyright owner's consent. As soon as the work is made public or published, other people have some limited rights to use the work, and the legal rights generating from the unpublished work are in some ways abolished. This is referred to as the right has been exhausted, and this legally means that the copyright owner, as soon as he makes the work available or publishes the work, loose the exclusivity to the work. The legal consequences of the exhaustion of the copyright owner's economic rights are defined as exceptions from the economic right.⁹⁸

Legal definitions of the terms made public or published are stated in the law. A work is made public when the work has been made available to the public with the copyright owner's consent or by the copyright owner himself.⁹⁹ A work is considered made available to the public by being sold, published, exhibited or performed to the public, for example, on the Internet, on the television or on the radio. When a work has been made public, certain limitations of the copyright owner's complete protection emerge and it is possible, for example, to make copies of the work for private use.¹⁰⁰ For a work to be legally classified as published according to the law, a certain number of the work must have been published or copied in some way and released for sale on the market or in some other way distributed to the public with the copyright owner's consent.¹⁰¹ When

⁹⁵ *ens@mrätt.på.internet?*, by Petter Rindforth, page 17

⁹⁶ *Nätjuridik. Lag och rätt på Internet*, by Thomas Carlén-Wendels, page 58

⁹⁷ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 69

⁹⁸ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 2§ and Chapter 2

⁹⁹ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 2:3 and 8:1

¹⁰⁰ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 12§

¹⁰¹ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 8:2

published the work is of course made available to the public and the legal restrictions following from making the work public are applicable. But the publishing of the work result in further legal restrictions of the copyright owner's rights than the exceptions emerging when the work is just made available to the public.¹⁰²

4.2.1 The copyright owner

Originally the copyright of a work always belongs to the person that created the work. The author of the work can assign the right of disposition and the person buying the intellectual work then owns the copyright. Only the economic rights of the work can be assigned, the moral rights can never be owned by someone else but the author of the work.¹⁰³ Legal persons can not be the original owners of a work. People that not yet reached lawful age obtain copyright protection of their intellectual work, if the work fulfils the conditions of independence and originality.¹⁰⁴

4.2.2 The duration of copyright protection

The duration of copyright protection lasts for 70 years after the original copyright owner's death. If the work was created by several persons the work is copyright protected for 70 years after that the last one of the creators died. If the creator of the work was unknown the work is protected for 70 years after the work was first made public.¹⁰⁵

4.2.3 The moral and economic rights of the copyright owner

There is often a strong emotional connection between the copyright owner and the intellectually created work and it is this emotionally charged side of the creativity that the moral right set out to protect. The moral right of the author is expressed in the law and offers author certain guarantees.¹⁰⁶ The creator of the work have the right to be identified as the originator of the work and he must be named when the work is copied, performed or exhibited, in accordance to fair practice.¹⁰⁷ The creator also have the right to gain respect for his work and he has

¹⁰² See below Chapter 4.2.4

¹⁰³ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 3§, *Nätjuridik. Lag och rätt på Internet*, by Thomas Carlén-Wendels, page 62

¹⁰⁴ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 74

¹⁰⁵ *ens@mrätt.på.internet?*, by Petter Rindforth, page 20

¹⁰⁶ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 3§

¹⁰⁷ *Nätjuridik. Lag och rätt på Internet*, by Thomas Carlén-Wendels, page 66

the right to object to any distortion or modification of the work if this is prejudicial to his honour and reputation and the work is mutilated or subjected to similar derogatory treatment.¹⁰⁸ Even when the economic right of the work have been sold or assigned to someone else or are being used according to the defences allowed, the copyright owner still have the possibility to prevent undesired changes of the work. The moral right can, however, be waived.¹⁰⁹

The copyright owner also has an economic right; an exclusive right of disposition of the work which is expressed in the law.¹¹⁰ This legally means that he has an exclusive right to dispose of the work by making copies and by making the work available to the public in original or in a revised edition. The fundamental economic rights of the copyright owner are the right to reproduce the work, the right to publicly perform the work, show the work to the public and distribute copies of the work to the public.¹¹¹

The rights to allow or forbid the use of a protected work can be assigned and they have an economic value. According to a fundamental principle in the Swedish law the economic right will always first belong to the creator of the work. The economic right can not be assigned without an explicit or implicit contract describing carefully which parts of the copyright that will be assigned.¹¹² According to the principle of specification the parts not described in the contract will still be in the possession of the prior owner. An assignment of the copyright can concern the whole copyright but also a part of the copyright, for example the right to publish a book or the right to publicly perform a work. The latter form of assignment is licensing and a licensing can be exclusive, meaning the acquirer will have the sole right of using the work. A license can also be non-exclusive and that includes the right to use the work in certain respects.¹¹³

4.2.3.1 The right to reproduce the work

The copyright owner has an exclusive right to reproduce the work and the work can not be reproduced without the copyright owner's authorisation.¹¹⁴ The legal definition of reproducing must be seen in a wider sense than just copying. A work is considered reproduced as soon as the work has been reproduced in another material form.¹¹⁵

¹⁰⁸ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 109

¹⁰⁹ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 3:3

¹¹⁰ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 2§

¹¹¹ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 82

¹¹² Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 27§

¹¹³ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, pages 213-214

¹¹⁴ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 2§

¹¹⁵ *Nätjuridik. Lag och rätt på Internet*, by Thomas Carlén-Wendels, page 63

4.2.3.2 The right to perform the work in public

The legal definition of public performance includes both live performances and the use of already recorded performances. The work is considered performed in public when anyone can see or hear the performance. The copyright owner have the economic right and the authority to decide about the performances in public but not when the work is performed in private, among friends and family.¹¹⁶

4.2.3.3 The right to show the work in public

The copyright owner has the exclusive right to show the work to the public as long as the work is unpublished.¹¹⁷ The work can be shown directly to the public or indirectly through technical means.¹¹⁸

4.2.3.4 The right to distribute copies

This right gives the copyright owner a possibility to control the distribution, of his unpublished work, to the public.¹¹⁹ The copyright owner can decide when to first publish and make the work available to the public. If the work have been illegally published without the copyright owner's consent, the copyright owner can invoke his right of distribution and stop the distribution of the illegal copies.

4.2.4 The restrictions of the economic rights

The purpose of copyright according to Swedish law is to protect the copyright owner's interests and the rights to control the use of the intellectual work. The copyright protects the moral and economic rights of the copyright owner.

The copyright owners have, according to Swedish law, very generous and far-reaching rights to control their works. However, the society and the public have other interests, in being able to use the intellectual works, that must be weighed against the interests of the copyright owners. Restrictions of the copyright monopoly are necessary to make it possible for the society to satisfy its need of distribution of information. This adjusting have been manifested as exceptions from the copyright owner's economic rights and infringement of copyright cannot

¹¹⁶ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 2§, *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 89-90

¹¹⁷ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 2§ and 20§

¹¹⁸ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 101

¹¹⁹ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 2§

be a result when taking advantage of these exceptions.¹²⁰ The moral rights of the copyright owner can never be exempted.¹²¹

4.2.4.1 Copying for private use

The public have the right to make copies of a protected work for private use when the protected work lawfully has been made public or been published.¹²² The legal definition of private use implies that it is allowed to make separate copies of a work made public for private use. It is very difficult to establish a judicial definition of separate copies and it depends very much upon the media involved. The copies made for private use can never be used commercially and it is generally said that they can only be used within the closest family and friends.¹²³

4.2.4.2 Public performance

A work can always be performed in private, among family and friends, without the consent of the copyright owner. Religious and cultural interests of the society makes it preferable to allow work to be freely performed in public. This legally means that no authorisation from the copyright owner is needed and that no royalties have to be paid.¹²⁴ When a work have been published it is also allowed to perform the work in public if the purpose is non-commercial, the entrance is for free and the performance is not the main attraction.¹²⁵

4.2.4.3 Distributing copies

As soon as the copyright owner assigned or transferred a copy to someone else the right to distribute it is exhausted and the copies of the work are free for anyone to distribute.¹²⁶ The right to control the distribution of copies is still applicable when the work has been published or made public concerning the letting of copies.¹²⁷

¹²⁰ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, Chapter 2, *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 134

¹²¹ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 11§

¹²² Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 8§ and 12§

¹²³ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 12§, 45§ and 46§, *Nätjuridik. Lag och rätt på Internet*, by Thomas Carlén-Wendels, page 68

¹²⁴ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 186

¹²⁵ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 21:1

¹²⁶ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 19:1, *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 169

¹²⁷ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 19:2, *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 99

Except for the above mentioned exceptions there are a lot of other restrictions of copyright in the law, but none of them of immediate interest for copyright concerning music on the Internet.

4.2.5 Neighbouring rights

The Swedish copyright protects a number of achievements that can not be described as work in the sense of copyright, but still have a very close relation to the intellectual copyright protected work. The neighbouring rights with relevance for the protection of music on the Internet are the legal rights belonging to performing artists¹²⁸ and the producers of phonograms¹²⁹.

When a performing artist is participating in a recording, he will have his own legal right to the performance and this right is separated from the rights of the composer and producer. The performing artist has strong reasons for being able to control how the performance is being used and to try to get remuneration. A performing artist interprets and brings life to an intellectual work and the Swedish law protects performances based on literary and artistic works.

The performing artist has moral rights according to the same principles as copyright.¹³⁰ The neighbouring right of performances contains exclusive rights for the owner to authorise the recording, the transmission, the reproduction and the distribution of the performance. Certain exceptions from the exclusive rights of the performer have been considered necessary due to the interest of the society and these restrictions are following the same principles as for copyright.¹³¹

As soon as the performance has been assigned or transferred to someone else with the consent of the performing artist the exclusive right of distribution is exhausted and the performance can be distributed freely.

The right of the performer enjoys legal protection for 50 years after the performance was performed, published or made public.¹³²

The producer of phonograms is the person producing a phonogram, for example a gramophone record, a tape-recording, a CD or the sounds for a film. These works are considered to be neighbouring rights and enjoy protection no matter what the produced phonogram contains, for example literary or artistic work but

¹²⁸ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 45§

¹²⁹ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 46§

¹³⁰ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 3§ and 45§

¹³¹ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 45§

¹³² Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 45§

also baby talk or bird song.¹³³ The producer of phonograms has moral rights according to the same principles as for the performer's right and the copyright.¹³⁴ The producer enjoys exclusive economic rights in being able to authorise the reproduction and distribution of the phonogram. These economic rights are restricted in the same manner as for the performer's right and the copyright and certain exceptions are allowed.¹³⁵ The exclusive right of distribution is exhausted as soon as a copy of the phonogram has been assigned or transferred with the producer's consent. The duration of the legal protection for the producer of phonograms is 50 years after the phonogram was recorded, published or made public.¹³⁶

4.2.6 Infringing copyright protected work

Copyright law is mainly a matter of private law and it is therefore primarily the copyright owner and the collecting service society¹³⁷ concerned that see to the interest of the copyright owner in situations of infringement of the protected work.

There are also cultural, economic and trade political interests to consider in terms of the society's interest in copyright and therefore private legal actions are not reckoned to be enough. The Swedish legislation therefore contains a system of legal actions against copyright infringements.¹³⁸ Infringement of copyright is a criminal act and punishable with fine or imprisonment for a maximum of two years if the act is committed intentional or in gross negligence.

Injunction of penalty, tort and ordinance of destruction of illegal copies are other actions that can be applicable when infringing copyrights.¹³⁹ Compensation must always be paid when a copyright has been infringed and damages shall be paid if the infringement was intentional or done in negligence.¹⁴⁰

¹³³ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 257

¹³⁴ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 3§ and 46§

¹³⁵ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 46§

¹³⁶ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 46§

¹³⁷ See below Chapter 7.2

¹³⁸ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 229

¹³⁹ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 53§

¹⁴⁰ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 54§

4.3 The British legislation¹⁴¹

The U.K. copyright is based on the common law tradition and is governed by the Copyright, Designs and Patents Act from 1988. The law of copyright was substantially reviewed in the mid-1980s, which resulted in the copyright legislation of today. The C.D.P.A 1988 came into force on 1 August 1989 and is applicable to all copyright works created after that date. The previous copyright law of 1956, amended in 1985, continues to govern the protection of intellectual work created before the C.D.P.A 1988 came into force and the infringements of such works, which took place before that date.¹⁴²

Under the C.D.P.A 1988 copyright subsists in original literary works, dramatic works, musical works, artistic works, the typographical arrangement of published editions, sound recordings, films, broadcasts and cable programs.¹⁴³ Musical works are defined as meaning works consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.¹⁴⁴ A sound recording is defined as a recording of sounds from which sounds may be reproduced or a recording of the whole or part of the literary, dramatic or musical work from which sounds reproducing the work or part may be produced.¹⁴⁵

Copyright is not concerned with the originality of ideas, but with the expression of thought. A single idea or concept is not protected by British legislation but the implementation of the idea expressed and fixed in a material form may be protected.¹⁴⁶

No formalities such as registration are required in order to obtain copyright protection for a work. Copyright arises as soon as the work is created, subject to the requirements for fixation.¹⁴⁷ For literary, dramatic or musical works copyright does not exist until the works are recorded in "writing or otherwise".¹⁴⁸ The precise means of fixation is irrelevant and could include, for example, a computer

¹⁴¹ Only the British copyright legislation with relevance for legal protection of music and audio files on the Internet will be presented here.

¹⁴² *International Information Technology Law*, edited by Dennis Campell, page 175

¹⁴³ *Joynton-Hicks U.K. Copyright*, by David Lester and Paul Mitchell, page 1

¹⁴⁴ C. P. D. A. 1988, s. 3 (1)

¹⁴⁵ C. P. D. A. 1988, s. 5 (1)

¹⁴⁶ *Joynton-Hicks U.K. Copyright*, by David Lester and Paul Mitchell, page 111

¹⁴⁷ *Guide to Intellectual Property in the IT industry*, by Baker & McKenzie, page 10

¹⁴⁸ C. D. P. A. 1988 s. 3 (2) Writing is defined as including: "Any form of notation or code, whether by hand or otherwise and regardless of the method by which or medium in or on which it is recorded..." according to C. D. P. A. 1988, s.178

memory. The underlying causes for demand of fixation is the nature of copyright as a monopoly and a certainty that fixation of the work is preferable in order to avoid injustice when claiming copyright.¹⁴⁹

The author of an intellectual work is defined as the creator of the work and can be an individual, company or other incorporated body.¹⁵⁰ The author of a work is generally the first owner of the work and the copyright subsisting in it, and will be the owner of the moral rights that may be waived but not assigned.¹⁵¹

A work qualifies for protection according to the U.K. legislation if the qualification requirements are satisfied.¹⁵² There are two alternatives by which a musical work can qualify for protection. The first alternative is if the author of the work, at the time the work was created, is a qualified person. The author is a qualified person if he is a British citizen or subject, an individual domiciled or resident in the U.K. or a body incorporated under the laws of parts of the U.K..¹⁵³ The second alternative for a musical work to qualify is if the work first is published in the U.K. or in another country to which C. P. D. A. 1988 extends.¹⁵⁴ The copyright qualification provisions are applied to work originating from the countries of the Berne Convention.¹⁵⁵

For an intellectual work to be protected according to the U.K. legislation it also has to be original and the concept of original work refers to mental labour or creation.¹⁵⁶ The legal definition of original assumes that the work originates from its author and that the creation involved an effort of a substantial independent skill and labour.¹⁵⁷ It does not matter if the created work is not new and based upon earlier works as long as the work was created independently of earlier works with a certain amount of the author's own skill and knowledge and not merely copied slavishly from elsewhere. The precise amount of skill and labour required

¹⁴⁹ *The modern law of copyrights and designs*, by Laddie, Prescott and Victoria, page 35

¹⁵⁰ *Guide to Intellectual Property in the IT industry*, by Baker & McKenzie, page 11

¹⁵¹ *The modern law of copyrights and designs*, by Laddie, Prescott and Victoria, page 10

¹⁵² *Intellectual property and the Internet*, by Jonathan Cornthwaite, page 5

¹⁵³ C. D. P. A. 1988, s. 154

¹⁵⁴ C. D. P. A. 1988, s. 155

¹⁵⁵ *Guide to Intellectual Property in the IT industry*, by Baker & McKenzie, page 12

¹⁵⁶ *The modern law of copyrights and designs*, by Laddie, Prescott and Victoria, page 38

¹⁵⁷ In *Ladbroke (Football) Limited v. William Hill (Football) Limited* (1964) 1 W.L.R. 273, HL, per Lord Devlin at 289 the requirement of originality was defined as: "...the product must originate from the author in the sense that it is the result of a substantial degree of skill, industry, or experience employed by him."

to claim originality can not be defined but must be a question of degree to be determined on the facts of each case.¹⁵⁸

4.3.1 The duration of copyright protection

Copyright in a musical work subsists for the life of its author plus 70 years. Where the author is unknown, the work will be copyright protected for a period of 70 years from the end of the calendar year in which the work was created or first made available to the public.¹⁵⁹ Rights in a performance last for a period of 50 years from the end of the calendar year from which the performance took place.¹⁶⁰ Copyright in a sound recording expires after 50 years from the end of the calendar year in which it was made or released.¹⁶¹

4.3.2 The moral and economic rights of the copyright owner

According to the moral rights of the British copyright law the author have the right to be identified as the author of the work¹⁶² and he also have the right to gain respect for his work¹⁶³ and hereby object to having his work mutilated or subjected to similar derogatory treatment. The author also has the right to prevent false attribution of a work to him.¹⁶⁴ A number of exceptions are applicable to each of these moral rights, for example, concerning the right to be identified as the author certain permitted types of fair dealing are accepted. Another example is that a work may be subjected to derogatory treatment if it is for the purpose of reporting current events.¹⁶⁵

The British copyright protection requires the creator to assert the moral right before it can be exercised.¹⁶⁶

The owner of a work has the exclusive right to do certain acts in the U.K. in relation to his work. Should any of these acts be done while the work is under protection of copyright without the consent of the copyright owner, this will constitute an infringement of the owner's copyright. The restricted acts belonging to the copyright owner are, for example, the copying of the work, issuing copies of the work to the public, broadcasting the work or including it in a cable

¹⁵⁸ *The modern law of copyrights and designs*, by Laddie, Prescott and Victoria, page 47

¹⁵⁹ C. P. D. A. 1988, s. 12

¹⁶⁰ *Joynton-Hicks U.K. Copyright*, by David Lester and Paul Mitchell, page 425

¹⁶¹ C. P. D. A. 1988, s. 13

¹⁶² C. D. P. A. 1988, ss. 77-79

¹⁶³ C. D. P. A. 1988, ss. 80-83

¹⁶⁴ C. D. P. A. 1988, s. 84

¹⁶⁵ *The modern law of copyrights and designs*, by Laddie, Prescott and Victoria, page 10

¹⁶⁶ *An introduction to intellectual property law*, by Phillips and Firth, page 249

programme service and making an adaptation.¹⁶⁷ The economic rights of the copyright owner can be assigned and transferred unlike the moral rights of the copyright owner.

There are, however, various defences to copyright infringement under British law.¹⁶⁸ There will be no infringement of a work unless the restricted act, done without the authorisation of the owner, has been done in relation to a substantial part of the work.¹⁶⁹ It is clear that no act will infringe the copyright if it is done with the license of a copyright owner. Other defences to infringement is provided by the provisions of fair dealing for the purpose of research or private study and for the purpose of criticism, review or reporting current events when the requirement of sufficient acknowledgement to the copyright owner is fulfilled.¹⁷⁰

The approach adopted by the C.D.P.A 1988 to infringement are divided into two parts, primary infringement and secondary infringement. Primary infringement is committed by doing, directly or indirectly, any of the restricted acts without the copyright owners' authorisation.¹⁷¹ Secondary infringement include acts such as importation of infringing copies, possessing or distributing infringing copies in the course of business, and providing apparatus for infringing performances.¹⁷² The essential difference between committing primary infringement and secondary infringement is that in order to be liable for secondary infringement the defendant must have a guilty mind, i.e. he must have known or had reason to believe that he was dealing with an infringing copy.¹⁷³ Infringement of copyright can lead to both criminal prosecution and civil proceedings. Criminal offences can be punished on conviction by fines and/or imprisonment. For civil offences an infringer may be obliged to pay damages to the copyright owner and the court can forbid any future infringement and/or force the infringer to deliver all infringing copies to the copyright owner. The copyright owner also has the right to seize any infringing copies.¹⁷⁴

¹⁶⁷ C. D. P. A. 1988, ss. 16 (1)-(3)

¹⁶⁸ The defences presented here are the only defences of infringement with relevance for copyright of music on the Internet, according to *Intellectual property and the Internet*, by Jonathan Cornthwaite, page 13

¹⁶⁹ C. D. P. A. 1988, s. 16 (3)(a)

¹⁷⁰ C. D. P. A. 1988, ss. 29-30

¹⁷¹ C. D. P. A. 1988, ss. 16 (2)

¹⁷² C. D. P. A. 1988, ss. 22-26

¹⁷³ *Intellectual property and the Internet*, by Jonathan Cornthwaite, page 11

¹⁷⁴ www.ilcgroup.com/copyright.html *Copyright and the World Wide Web*, 1999-07-22

4.3.3 Neighbouring rights¹⁷⁵

Part II of the C.D.P.A 1988 contains a detailed set of provisions conferring legal rights on performers and persons having recording rights. Part II replaced and extended the provisions in the Performers' Protection Acts 1958 to 1972.¹⁷⁶

Performance means live performances only and the British law seeks to give performers the right to prevent their performances from being fixed or recorded without their consent. The live performance must be given by one or more individuals and it does not matter whether the person performing is a skilled professional or an amateur. In order to be legally protected the performance must be a dramatic or musical performance, a reading or recitation of a literary work or a performance of a variety act or any similar presentation.¹⁷⁷ Part II contains the civil remedies given to a performer to prevent the exploitation of his performances without his consent.

A performance will qualify for protection if a qualified individual performs it.¹⁷⁸ A performer's rights are infringed by a person who, without his consent, other than for his private and domestic use, makes a recording of a performance, plays a performance in public or imports, possesses or deals with illicit recordings.¹⁷⁹

Part II also contains legal rights for the person recording the performances. Before any right can be vested in a person there has to be an exclusive recording contract. This means a contract between the performer and another person under which that person exclusively is entitled to make recordings of the performance with the purpose of commercial exploitation.¹⁸⁰ Commercial exploitation is defined to mean that the recordings should be sold, let for hire, shown or played in public.¹⁸¹ In order to have the recording rights the person must also be a qualified individual and fall under the law of the U.K. or have a company with substantial business activity in any qualified country.¹⁸² "Qualifying country" has the same meaning in this context as in relation to the rights of the performers. The rights of a person having the recording rights are infringed if a recording of a performance, subject to an exclusive contract, is made without his consent, if use

¹⁷⁵ *Joynton-Hicks U.K. Copyright*, by David Lester and Paul Mitchell, chapter 12, *The modern law of copyrights and designs*, by Laddie, Prescott and Victoria, chapter 26

¹⁷⁶ *Joynton-Hicks U.K. Copyright*, by David Lester and Paul Mitchell, page 398

¹⁷⁷ *Joynton-Hicks U.K. Copyright*, by David Lester and Paul Mitchell, page 407

¹⁷⁸ See above Chapter 4.3 and C. D. P. A. 1988, s. 206

¹⁷⁹ C. D. P. A. 1988, ss. 182-184

¹⁸⁰ C. D. P. A. 1988, s. 185 (1), *Joynton-Hicks U.K. Copyright*, by David Lester and Paul Mitchell, page 417

¹⁸¹ C. D. P. A. 1988, s. 185 (4)

¹⁸² C. D. P. A. 1988, s. 206, *Joynton-Hicks U.K. Copyright*, by David Lester and Paul Mitchell, page 417

is made of recordings made without appropriate consent and if illicit recordings are imported, possessed or dealt with.¹⁸³

There are a number of exceptions to the rights of performers and persons having recording rights. The exceptions correspond broadly with the exceptions set out in part I of C.D.P.A 1988 concerning acts not infringing copyrights.¹⁸⁴

4.4 The copyright protection in the U.S.¹⁸⁵

The Constitution of the United States grants Congress the power to legislate federal copyright law.¹⁸⁶ The copyright protection in the United States is governed in the Copyright Act of 1976 and three basic requirements must be achieved to receive copyright protection. The work must be original, the work must be fixed and the work must be an expression rather than an idea. Once these three conditions are fulfilled the author of the work is granted certain exclusive rights and has a cause of action for infringement if the exclusive rights are intruded upon. The requirement of originality is satisfied if the work is original to the author and even if the work is identical to another work it is considered original if the author can prove that it is not a copy. Part of the requirement of originality is a demand for the work to be creative but this requirement will be fulfilled with only the slightest amount of creativity.¹⁸⁷ The law protects original works of authorship, such as literary and artistic works, musical works including any accompanying words and sound recordings that are fixed in a tangible medium of expression but it makes no difference what form, manner or medium the fixation may be.¹⁸⁸ Unpublished works are protected no matter of origin, while published works need to be created by a person, citizen or resident in the United States or in a Contracting State to be protected by the law. No registration of the intellectual work is necessary in order to receive copyright protection. Registration is, however, necessary if the copyright owner want to be able to claim and obtain damages if the copyright is infringed.

¹⁸³ C. D. P. A. 1988, ss. 186-188, *Joynson-Hicks U.K. Copyright*, by David Lester and Paul Mitchell, page 420

¹⁸⁴ C. D. P. A. 1988, s. 189, *The modern law of copyrights and designs*, by Laddie, Prescott and Victoria, page 987

¹⁸⁵ Only the U.S. copyright legislation with relevance for legal protection of music and audio files on the Internet will be presented here.

¹⁸⁶ The Constitution of the United States , Art. 1, s. 8

¹⁸⁷ <http://www.wvjolt.wvu.edu> *Comment Copyright Infringement in Cyberspace: Untangling the Web With Existing Law*, page 2, 1999-05-11

¹⁸⁸ 17 U.S.C. § 102

4.4.1 The duration of copyright protection

A copyright protected work will enjoy protection for the lifetime of the author plus 50 years and this provision correspond with the rules in the Berne Convention.¹⁸⁹ In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first.¹⁹⁰

4.4.2 The moral and economic rights of the copyright owner

The exclusive rights guaranteed by the law are mainly economic rights and the law does not specifically provide for a moral right. The moral right is regulated by case law and since the United States are a Contracting State of the Berne Convention the copyright owners will thereby have a minimum guarantee for protection of their moral right.¹⁹¹

The copyright owner has several economic rights, a right of reproduction, a right to sell and distribute copies of the work, a right to perform the work in public and to create derivative works of the copyrighted work.¹⁹² The exclusive economic rights have several limitations and exceptions, such as that fair use of a protected work will not constitute a copyright infringement.¹⁹³ Fair use includes, for example, the reporting of current events, critical reviews and the use of works for educational and scientific purposes. When deciding if fair use is at hand, the purpose and the character of the use including its commercial nature, the nature of the protected work, the economic impact of the taking and to which extent the work has been used, will be considered.

The right of distribution is limited and a person buying or assigning a copy or a recording of a work may freely distribute it further.¹⁹⁴ It is allowed to perform a work in public without the authorisation of the author, under certain circumstances, such as for educational and charitable purposes and in divine services.¹⁹⁵ Certain rules apply for the use of recordings of musical works.¹⁹⁶

When someone else without permission from the copyright owner exercises the exclusive rights granted to the copyright owner, an infringement occurs. The

¹⁸⁹ 17 U.S.C. § 302

¹⁹⁰ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 323

¹⁹¹ Art. 6bis in the Berne Convention

¹⁹² 17 U.S.C. § 106

¹⁹³ 17 U.S.C. § 107

¹⁹⁴ 17 U.S.C. § 109

¹⁹⁵ 17 U.S.C. § 110

¹⁹⁶ See below Chapter 5.4

copyright owner may establish infringement by direct or indirect evidence. To prove infringement with direct evidence the copyright owner must show that the copyright belongs to him and that the infringer copied the work without his authorisation. The copyright owner showing that the infringer had access to the protected work and that there are substantial similarities between the two works may establish infringement with indirect evidence. The intent of the infringer is irrelevant. It is a federal criminal offence to infringe copyright wilfully and for the purpose of commercial advantage or private financial gain. The courts are authorised to order forfeiture and destruction or other disposition of infringing copies.¹⁹⁷ A prison sentence and a fine may be the punishment for a person infringing copyrights.¹⁹⁸

4.5 Jurisdiction

The digital technology has led to increased possibilities to use and transmit intellectual works not only within a country but also between different countries. It is a widely spread opinion among Internet users that the Internet is governed by anarchy and that no ordinary legal rules are applicable in cyberspace. But the use of the works on the Internet is in fact governed by the rules of copyright. The intellectual works have a territorial and national status in the international conventions regulating copyrights and related rights. The rights for an intellectual work are given in accordance to the legislation in the country of origin. The question of applicable law concerning copyright disputes have been settled in the Berne Convention¹⁹⁹ and the protection shall be governed by the laws of the country where the protection is claimed and where the exploitation and accordingly, where the

¹⁹⁷ 17 U.S.C. § 506

¹⁹⁸ *Guide to Intellectual Property in the IT industry*, by Baker & McKenzie, page 15

¹⁹⁹ Art. 5 (2) in the Berne Convention

breach of the law took place.²⁰⁰

The global nature of a digital, interactive network such as the Internet makes it very difficult to trace the transmissions to a specific geographical area. This may result in the fact that several different jurisdictions can be applicable at the same time. The general rule in the Berne Convention will be applicable even if the work is being used and protection is sought in many different countries.²⁰¹ The Brussels Convention from 1968 and the Lugano Convention from 1988 govern the jurisdiction of copyright protection within the EU. The main principle is that legal action must be brought before the courts of the country where the defendant resides.²⁰²

According to an investigation made by the EC it is inappropriate, at this time, to harmonise the rules concerning the question of applicable law when copyright disputes arises.²⁰³ The harmonisation in this case would entail that the country of origin would be considered to be the country where the transmission took place and the laws of that country would be solely applicable. The reason for this is the character of the digital technology with regards to the fact that it is very difficult to establish a single place, such as the place of origin of the transmission. Another reason given was the risk that the owners of the copyright or related right would find themselves unprotected, if the transmission originated from a third country, or from a country with less protection. The protection could in many cases be unsatisfying also within the Community since many transmissions probably would be transmitted from the country with the least protection of copyright and related rights, unless the laws of copyright and related rights were harmonised completely. This would in turn distort the Internal Market and seen from a greater perspective harm the creation of intellectual works, the competition and the employment within the Community.²⁰⁴

²⁰⁰ The Rome Convention contains no corresponding rule to that in Art. 5 (2) in the Berne Convention, but it can be argued that the rule in the Berne Convention expresses a general principle which applies to neighbouring rights as well. *Internet and the Applicable Copyright Law: A Scandinavian perspective*, by Peter Schönning, page 47

²⁰¹ Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97)628 final, page 10

²⁰² *Internet and the Applicable Copyright Law: A Scandinavian perspective*, by Peter Schönning, page 49

²⁰³ Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97)628 final, page 10

²⁰⁴ *A Successful Step toward Copyright and Related Rights in the Information Age: The New EC Proposal for a Harmonisation Directive*, by Silke von Lewinski, page 135

4.6 Summary

There are some differences between the different legislation's presented here, much due to the different ways of viewing copyright. The copyright laws based on the common law tradition have a slightly different way of classifying copyright and this can clearly be seen concerning the rules governing the moral rights. In the U.K. and in the U.S. the moral rights have a weaker protection than in Sweden. In the U.K. the moral rights have to be asserted before they can be claimed and in the U.S. the moral rights are only regulated through case law and not guaranteed in the law. In the U.K. and in the U.S. it is also necessary to fixate the intellectual work in a material form in order to receive copyright protection. This is not the case in Sweden and accordingly it is easier to instantly protect intellectual work in Sweden. This is a result of the emphasis the common law countries put on the copyright mainly as a right to copy. In the Swedish law system it is more important to focus on the immediate protection of the intellectual creation belonging to the author and not on the possibility to copy it.

Another difference in the U.S. is the way a sound recording is classified as copyright and not as a neighbouring right as in many other country's copyright laws. According to the U.S. copyright law, registration of an intellectual work is necessary to a greater extent when compared to the copyright laws in the U.K. and in Sweden.

Many provisions are, however, seen from a general, over all perspective very similar since they are based on the same international principles. The common development of international conventions has resulted in this harmonisation of the copyright laws, and this is especially the case concerning the copyright laws within the EC. This may be the explanation to why the copyright law in the U.S. differs so much from the copyright in the U.K. even if both countries belong to the common law system. The copyright law in the U.K. has been harmonised to comply with the EC law.

5 Music and piracy on the Internet

5.1 Protection of audio files

Musical works are used in many various contexts and therefore is the copyright protection of music very well regulated. Both copyright of music and adherent neighbouring rights are protected against illegal recordings, copying and performances.

There is a lot of music available on the Internet as background music on web sites, radio stations broadcasting over the Internet and web sites with downloadable music archives.

5.2 The Swedish legislation

The music is considered copied as soon as the music is reproduced in any material form, temporary or permanently. The music is reproduced when stored onto a computer's hard drive as well as when the music is copied between computers and from a CD to a computer and authorisation is needed from the copyright owner as long as the copying is not for private use.

5.2.1 Uploading music on the Internet

Since uploading and posting an audio file format on the Internet entail the reproduction of the music in another material form, it is equivalent of copying. Without the authorisation of the copyright owner it would constitute a copyright infringement. The reason for this is that the copying can never be a matter of private use since the musical product is posted on the internet where an undefined number of persons immediately have access to the copy. To make the copy available on the Internet in this way is equivalent of distributing the material to the public, which is an exclusive right of the copyright owner.²⁰⁵ When uploading music on the Internet, the proprietors of the web sites and music archives must have authorisation from the copyright owners, the performing artist and where necessary the record companies of the musical works, otherwise they risk

²⁰⁵ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 2§, 45§ and 46§ When the copyright, a recorded performance or a phonogram etc has been assigned or transferred by the copyright owner the work can be further distributed without the prior copyright owner's consent.

copyright infringement. Copyright infringement is very common when music is frequently illegally posted, on the Internet in audio file formats, for example with mp3 technology. If the copyright owner himself has given authorisation to distribute the music with mp3 technology on the Internet it is not illegal to post it on the Internet.

5.2.2 Downloading music from the Internet

When the musical material is downloaded, it is copied onto the computer's hard drive, where it can be listened to via the computer's speakers or transferred onto a recordable CD or a portable mp3 player. This is only allowed as long as the copying is done for private use and if the music lawfully has been made available to the public.²⁰⁶ The music is considered lawfully made public when it is made available to the public by the copyright owner or with his consent.²⁰⁷ If the music copied has not been officially released to the public and published it will constitute an infringement of the copyright to download the music, since unreleased music cannot be copied even for private use. If the musical material being downloaded is protected by copyright and the downloading is not authorised by the copyright owner, the material may only be used for private use or the downloading will constitute copyright infringement. It is very important that the person downloading the music does not spread the music outside of his private sphere. If the downloader only as much as offers a copy of the downloaded music to someone not part of his family or closest friends it would constitute copyright infringement.²⁰⁸

5.2.3 Performance of music on the Internet

According to the Swedish law music is considered performed when it is made available to the public on a web site, for example, when making copied audio files available on the Internet.²⁰⁹ The right to perform the musical product is an exclusive right and authorisation from the copyright owner is needed. It is, however, legitimate to perform the music in public on a web site if the purpose is non-commercial and the performance of the music not is the main purpose of the web site.²¹⁰ The difference between commercial and non-commercial web sites is mostly theoretical since in both cases authorisation are required from the

²⁰⁶ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 12§, 45§ and 46§

²⁰⁷ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 8 §

²⁰⁸ *Praktisk IT-rätt*, by Agne Lindberg and Daniel Westman, page 88

²⁰⁹ *Upphovsmännens Internetkonvention – med tvekan godkänd*, by Margita Ljusberg, page 7

²¹⁰ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 21:1

copyright owner to copy and post the music on the web site since it is not copied for private use.²¹¹

5.3 The British legislation

According to the C.D.P.A. 1988 the doing or authorisation of acts restricted by copyright, directly or indirectly, in relation to the whole or substantial part of the work constitute infringement if the authorisation of the owner is lacking.²¹²

Copying is such a restricted act and the legal definition of copying a work means reproducing the work in any material form. Of particular relevance to the reproduction of copyrights on the Internet is the fact that storage of the work in any medium by electronic means and the making of copies which are transient are included in the definition of reproduction.²¹³ As soon as the owner have not given his consent to the reproduction it will constitute an infringement if the copying is not excused and allowed by any of the defences of infringement, such as fair dealing.²¹⁴ When uploading a musical work on the Internet the work is reproduced in another material form and issued to the public and for that authorisation is needed from the owner, otherwise an infringement may be constituted.²¹⁵

²¹¹ *Nätjuridik. Lag och rätt på Internet*, by Thomas Carlén-Wendels, page 70

²¹² C. D. P. A. 1988, s. 16

²¹³ C. D. P. A. 1988, ss. 17 (1), (2) and (6)

²¹⁴ The defence in C. D. P. A. 1988, s. 29 may prove to be of wide applicability to the Internet, particularly as much of the Web is still used for academic purposes. However, it must be noted that it can be difficult to argue the defence of copying for private use even for the purpose of study when posting a digital musical work on the web since the musical work when it is copied and posted on the web is available to a large number of people. In the first French case on copyright infringement on the Internet, *Société Art Music France v Ecole Nationale Supérieure des Télécommunications et al*, the Tribunal de Grande Instance de Paris rejected the arguments of the defendant, a student, that he had copied the plaintiff's musical work for private use only. The student had placed digitised musical works on the web, and the court held that this could not constitute a copy made exclusively for private purposes, due to the fact that third parties could access and copy the uploaded music and the site functioned as an encouragement to use the reproductions. *Art Music France v Ecole Nationale Supérieure des Télécommunications*, Tribunal de Grande Instance Paris [1997]EEC97.

²¹⁵ In May 1997 three British journalists published a police report concerning child abuse on their web site. A few days later Nottinghamshire County Council, the owner of the copyright in the report, applied to the High Court of Justice for an injunction restraining infringement of literary copyright. The injunction was granted and the text of the report was removed from the web site. This case concerned literary copyright but it would be very likely for the same principle to be applied for the protection of musical works and this principle has

The issuing of copies to the public is another restricted act and includes the act of putting a, not previously put, work into circulation in the U.K. or elsewhere. This procedure may constitute an infringement of the copyright.²¹⁶

The same principles of reproduction of a musical work are applied when downloading the audio files from the Internet. Without the permission of the copyright owner this is only allowed when in accordance to the defences of infringement, for example, fair dealing.

The playing of a sound recording in public and the performance of a musical work in public can infringe the copyright in the work.²¹⁷ Of particular relevance to the Internet is the provision that performance includes “any mode of visual or acoustic presentation, including presentations by means of a sound recording...”²¹⁸. It is arguable that the acoustic presentation of musical material on a web site could constitute public performance of that material and without the authorisation of the copyright owner this may be an infringement of the copyright of the musical work or sound recording.²¹⁹

5.4 The U.S. legislation

The copyright protection of musical works in audio file formats on the Internet follow the same premises as in the Swedish and British legislation. Authorisation of the copyright owner is needed for reproducing the musical work and accordingly uploading and downloading the work without the permission of the copyright owner may constitute an infringement. The downloading of the music may be excused, if the downloading is done for the purpose of reasons falling within fair use.

Other rules apply to the copyright of a sound recording. The copyright owner of a sound recording have the exclusive rights to perform sound recordings publicly by means of a digital audio transmission, reproduce the work in copies or phonorecords and distribute the work by sale, rental, lease or lending.²²⁰

been followed in a number of jurisdictions, for example The Tribunal de Grande Instance de Paris, ruled in 1997 that the digital reproduction of poetry on a web site was an infringement of the copyright since the reproduction took place without prior authorisation of the copyright owner. *Nottinghamshire County Council v Gwatkin*, 1997, unreported. *Intellectual Property and the Internet*, by Jonathan Cornthwaite, page 6

²¹⁶ C. D. P. A. 1988, s. 18

²¹⁷ C. D. P. A. 1988, s. 19

²¹⁸ C. D. P. A. 1988, s. 19 (2) (b)

²¹⁹ *Intellectual property and the Internet*, by Jonathan Cornthwaite, page 10

²²⁰ The Copyright Act of 1976, 106§ (1),(2),(3) and (6)

The copyright owner of a sound recording has no exclusive right concerning the right to publicly perform the work.²²¹ Until passage of the Digital Performing Act in November 1995, the copyright owner in a sound recording had no right to receive royalties for the performance of a sound recording and no ability to control the public performance of his work. The U.S. copyright owners of sound recordings, for example, record producers are not entitled to receive payment from radio airplay of the sound recordings, as a result of this exclusion. The new Digital Performing Act granted copyright owners of sound recordings the limited right, under certain circumstances, to authorise or receive compensation for Internet sound recording transmissions as a public performance. This Act was a result of the record industry's concern that they had no control and no possibility to restrict the unauthorised digital copying and transmission of their sound recordings over the Internet, with sound quality equal to that of the original.²²² The limitation of the right are the following; the right of performance only applies to digital audio transmissions, so record producers are still not entitled to receive compensation for radio airplay or their sound recordings. Certain types of performances are completely exempted from the public performance right and the exemptions are based on the manner in which the transmissions are made available. The most important is the exemption of any non-subscription transmission as long as it is not part of an interactive service.²²³ The owners of copyright in a sound recording have a right of remuneration for non-interactive subscription transmissions and an exclusive right to control interactive transmissions. Statutory licensing schemes were created, in the Digital Performance Act, for certain types of transmissions and these licensing schemes limit the sound recording owner's ability to negotiate freely for compensation even for transmissions covered by the public performance right. The owner of the sound recording does not have an absolute right to license or the right to refuse to license the transmission but he is bound by a compulsory license scheme that guarantee the owner a right of remuneration.²²⁴ But without the licensing system, every webmaster would have to negotiate individually for permission to play every song and sound recording and this would be a very ineffective and time-consuming way of handling the problem. As a result of these limitations, the owners of copyright in sound recordings enjoy the broadest performance right in respect to digital interactive services where they have an absolute right to license or refuse to license of their works. The reason for this is the threat interactive

²²¹ 17 U.S.C. § 114

²²² *The U.S. Recording Industry and Copyright Law*, by Espinel, page 54

²²³ A subscription transmission is a transmission that is controlled and limited to particular recipients and for which consideration is required to be paid, according to 114§ j in the Copyright Act of 1976. So accordingly a non-subscription transmission would be a transmission that is not controlled and not only sent to certain recipients and no compensation is required to be paid.

²²⁴ *The U.S. Recording Industry and Copyright Law*, by Espinel, page 57

services impose to the record industry. When consumers use an interactive service they can at any time download their favourite music and thereby eliminate the need to purchase the traditional sound recordings distributed and sold by the record companies.²²⁵

The copyright owner has an exclusive right to reproduce the copyrighted work in copies or phonorecords. A copy is, according to the U.S. legislation, defined as a material object in which a work is fixed by any method and from which the work can be reproduced.²²⁶ In order to be infringed the work has to be reproduced in whole or in substantial part and the reproduction must be sufficiently permanent for a period more than transitory duration.²²⁷ The legal issue of whether sending sound recordings over the Internet, without the authorisation of the copyright owner, constitutes an infringement of the reproduction right even if it is a transient copy has been the subject of considerable debate. According to recent U.S. case law²²⁸ electronic storage of a copyrighted work may constitute an infringement of the reproduction right.

The U.S. copyright legislation grants record producers an exclusive right to distribute their sound recordings.²²⁹ The legal issue here is whether transmissions of copyrighted works will be considered distributions of such works. The U.S. case law²³⁰ indicates that transmissions legally should be seen as a form of distribution. The U.S. copyright law was recently amended to provide the right to a compulsory mechanical license applicable also to the distribution of a phonorecord by digital transmission. Once a musical work has been recorded and distributed anyone may make another recording of the musical piece if paying a fee to the original record company and the author of the musical composition. The first recording company must grant a compulsory mechanical license to the subsequent recorder and once this license is granted no further authorisations from the copyright owner is needed in order to distribute it with digital transmission.

²²⁵ *The U.S. Recording Industry and Copyright Law*, by Espinel, page 58

²²⁶ 17 U.S.C. § 101

²²⁷ 17 U.S.C. § 106

²²⁸ In *MAI Systems Corp. v. Peak Computer Inc.*, 991 E 2d 511 (9th Cir. 1993), the court held that an infringement of the reproduction right occurs when software is loaded into RAM even if it is accomplished merely by switching on the computer.

²²⁹ 17 U.S.C. § 106

²³⁰ In *Playboy Enterprises Inc., v. Frena*, 839 F. Supp 1552 (M.D. Fla. 1993), the court found that the unauthorised uploading of a picture on to a web site and the unauthorised transmission of the picture could be held to violate both the reproduction right and the distribution right.

5.5 Summary

Today music is being compressed into handy audio files and easily transferred all around the world and the normal average music consumer cannot hear the difference between the copy and the original. All this points in the direction that piracy of music on the Internet is very difficult to stop and will keep on flourishing the Internet.

The legal rules are in spite of the problematic situation quite clear and determined. When music is legally posted with the authorisation of the copyright owner, there is normally less legal problems concerning the protection of music. The copyright owner is aware of the existence of the music being posted on the Internet and the music can be sold for commercial purposes or downloaded for private use. The illegally posted music is, however, a problem of greater concern. If the music is illegally posted on the Internet without the copyright owner's consent, the copyright owner will have no possibility to control the further use of the music. It is of course forbidden to sell the music with a commercial purpose when the music is illegally uploaded on the Internet. It will normally not be allowed to download the music even for private use, if the music is not lawfully made public. The copyright protection in different countries are very much the same, much due to the fact that the laws originate from and are harmonised to correspond with international conventions and within the EU, with the EC law.

6 A legal discussion concerning illegal copying of audio files

6.1 Illegal music consumption

There are in general two different groups of people distributing illegal mp3 files and similar files of music on the Internet and therefore two different situations when music is made available on the Internet; a commercial situation and a non-commercial situation.

The first group distributing illegal mp3 files has a commercial aim in view, trying to sell sound files on the Internet. The consumer pays the proprietor of the web site to be able to download the musical material. This is clearly a criminal act, since the uploading is done without the authorisation of the copyright owner and with a commercial purpose.

The second group is mostly people ripping their favourite tracks and putting them on their private web sites. This category is causing the copyright owners a problem of growing proportions when they upload unauthorised copies in mp3 file format on their web sites, which other consumers can download with the result of depriving the copyright owners of their royalties. This is clearly a criminal act as well.

There are different views of the problem concerning downloading for private use. Seen from a legal point of view it is questionable that the possibility to download the music for private use must be dependent on the legality of the uploading. It is allowed to download music from the Internet provided that the music has been lawfully made public. It is a question of interpretation concerning the legal term lawfully made public and it is necessary to decide the meaning of the term. It must be established how the music should have been lawfully made public, to affect the legality of the downloading. Is it the specific copy that is downloaded that must have been lawfully made public by being legally uploaded or is it enough that the music has been lawfully made public and released in any media? If the requirement is that the specific copy of the work on the Internet must have been lawfully made public it is my opinion that this rule is unrealistic and must be further discussed. The difficulties for the Internet users of knowing if the music is legally uploaded on the Internet or not is decisive when determining if the copying for private use is legal or not. It can be argued that it should be presumed that the user downloading an illegal piece of music for private use did know that it was illegally posted on the Internet and that he was committing a crime. But considering the difficulties for the average consumer to know the legal status of

the posted music, it is according to my opinion, better to provide the prosecutor with the burden of proof so he has to show that the user knew that the music he downloaded for private use, was illegally uploaded.

If it is only necessary to make the music lawfully public in any media, to fulfil the requirement of a lawful publication, the responsibility of knowing about the publication should to a greater extent rest upon on the Internet user. It can then be presumed that he knew the legal status of the uploading and he can therefore be held fully responsible for any illegal downloading.

This is, however a question of theoretical value, since it in reality does not exist enough resources and means to control and investigate the copying for private use and in which state of mind it is done.

6.2 Conflict of interests

There is a conflict of interests concerning the view of copyright law and the protection of musical works and information. Different parties in the society have fundamentally different views of, if and for what reason copyright legislation is needed, if the legislation is justified and what level of protection that is necessary. There are a lot of participants in the ongoing debate concerning the justification of copyright, in this case regarding the music on the Internet. Each of the parties is lobbying for their view, how and why to justify or abolish the copyright protection of musical works on the Internet.

The copyright owners, the record industry, the artists, the musicians and the collecting service societies are fighting on one wing to protect the system of copyright and in the long run fighting for their survival. They are trying in any way they can, technically and legally to counteract the illegal distribution of the audio files on the Internet.

On the other side there is people with the opinion that all information on the Internet should be free and legally unprotected. Many of the Internet users all around the world are in favour of a totally free flow of information and they argue that the copyright protection limit the availability of musical works and raise the prices. According to these more radical opinions, there would be an opportunity for everyone to be able to use the music on the Internet, if the legislation were less extensive and comprehensive concerning music on the Internet. The people representing this view also argue in favour for a total and absolute freedom of press and freedom of speech without limitations. They do not want any laws impeding the distribution of information even if this means an obstruction of the copyright.²³¹ According to this view it is a fundamental human right to have free access to information. The upholders of this view are allies of the “information wants to be free” subculture and they argue that the mp3 technology will liberate the musicians from the supposed exploiting record companies.

²³¹ See for example of this view www.piracy.com

Somewhere in between these two fundamentally different views of copyright, the society joins the debate. The society's interest in copyright can be defined as an argument of welfare, trying to reach economic efficiency and at the same time having the opinion that the intellectual work should be available to the public. This must also be weighed against the musician's need for incentives, in the form of royalties and protection, to create new intellectual works. The most important problem with copyright seen from this view is the attempts to find an economic balance between the limited distribution that follows from copyright protection and the society's attempts to create a profitable climate for the copyright holders. The conflict seen from the society's perspective is the will on one hand to legally protect intellectual work and create propitious conditions for the copyright holders and give the incentives that result in new work and in the long run lead to an increased welfare in the society.

On the other hand the society has a will to make the intellectual work available to the public and give the members of the society an opportunity to culturally, intellectually and musically broaden their minds. By making the intellectual work available to the public everybody has an equal chance to enjoy their cultural heritage.²³²

6.3 The economic aspect of copyright

Copyright law is based fundamentally on economic motivations. The cost for creating an intellectual work in need of legal protection consists of two components, the cost for creating the work and the cost for reproducing it. The cost of creating the work, mainly the time and effort spent by the author, is often very high but will not increase due to how many works that are published or copied. The costs for reproduction is often quite moderate but will increase in respect of the number of works reproduced. For a work to be created at all, the expected income of the sale of the copies must exceed the expected costs for creating the work. As soon as the work is available on the market there is also a risk of the work being illegally copied. If the work is reproduced illegally this will lead to more cheap copies of the work and less economic remuneration for the copyright owner. If the copyright owner should reproduce the work at an even lower cost, others would not be encouraged to make illegal copies of the work, but as a result the copyright owner would not receive enough remuneration to cover his expenses for creating the work. The remuneration is necessary as an incentive for the author to create new works and without remuneration the authors will not create new works and this will not further the economic welfare in the society.²³³

²³² www.ipmag.com/monthly, *Cyberians at the gate?*, 1999-07-02

²³³ *An Economic Analysis of Copyright Law*, by R. Posner and W. Landes, page 326

Without a copyright system offering the possibility to control the further use of a work and to stop illegally copying of the work the society will risk losing the incentive motivating the authors to create new works. This will lead to inefficient use of resources in the society.²³⁴ The copyright system encourages intellectual creation by giving those who have developed and created intellectual property certain exclusive, monopolistic rights to their use. By these rights the copyright owners are also encouraged to publish their works, since they know that they will not lose the control of the further use of the works. As a result the exclusive rights promote the effective use of resources in the creation of new works and thereby contribute to the enhancement of the intellectual infrastructure for economic development. The system of copyright protection and the exclusive rights granted to the copyright owners in stopping others from copying their works and limiting the supply will involve costs, for surveillance and enforcement, but will also result in incentives for new works to be created. It is also fair that the author, creating the work by sharing his thoughts, dreams and experiences, will have the possibility to decide about the further use of the work. The system of copyright also protects the major investments in the music business for producing the music. These investments rely on copyright protection and by controlling the use of the protected work the investment will be profitable.²³⁵

6.4 Copyright - to be or not to be?

The problem concerning the copyright owners and the new music file formats on the Internet are the near perfect quality of the sound when copies are made. The outstanding quality of the compressed sound entail in perfect copies and this threatens the sale of the original sound recordings. The artists, the record companies and the collecting service societies do not want perfect copies since this restrain the commercial market of selling the original sound recordings. When copies instead of originals are sold, the copyright holder will not receive any remuneration for his protected work. According to the Swedish collecting service society, STIM²³⁶, the most fundamental problems that must be solved before the problem concerning pirate copying of music on the Internet can be considered solved concern the copyright owner's right to remuneration and the restriction of the private copying by legislation and encryption.²³⁷ The general opinion concerning the necessity of copyright protection according to EU is that copyright and related rights must continue to have a high level of protection if the authors and the performing artists are to continue their creative and artistic work. They must receive an appropriate and reasonable reward for the use of their work,

²³⁴ *Law and Economics*, by R. Cooter and T. Ulen, page 140

²³⁵ *Copyright. Svensk och internationell upphovsrätt*, by Henry Olsson, page 29

²³⁶ STIM stands for Föreningen Svenska Tonsättares internationella musikbyrå. See below Chapter 7.2

²³⁷ www.stim.se/juridik/inter01.htm *Musik på Internet – Arkiv*, 1999-05-

since the investments required to produce the intellectual work are considerable. An adequate legal protection of intellectual works is necessary in order to be able to guarantee the possibility of such a reward and provide the opportunity for a satisfactory return of the investments made.²³⁸ According to my opinion copyright will always be absolutely necessary in order to stimulate the incentives for the authors to create new intellectual works.

The pirate copying for commercial purposes and the copying for private use has always led to an economic loss for the copyright owner. Digital copying puts another dimension to the problem and entail in even greater economic losses for the copyright holder previously unimaginable when perfect copies replaces the originals on the market, in this case the Internet. Pirate copying is, however, a less discussed problem and do not theoretically raise so many questions as the copying for private use, since pirate copying entail copying a protected work without the owner's permission and is prohibited and criminal act in most copyright laws.

6.4.1 Copying for private use?

When taking into consideration the different opinions of the parties interested and concerned in the discussion of the existence of copyright, it is appropriate to question to what extent the different exemptions are motivated and especially the exception for private use. The opportunity to download protected music from the Internet understandably annoys the copyright owners since they have no or little possibility to control the distribution of their work. On the other hand it gives everybody a chance to enjoy protected works in a way wanted by the society. The spokesmen for the free flow of information will probably always be discontent with the system of copyright, since they want to abandon it completely and let all information free. This solution would, however, soon lead to a decreasing number of created works since the lack of the incentives caused by less remuneration for the copyright owners. This in turn would lead to a diminishing economic growth and not at all correspond to the aims of the legislators and society.

Already in 1955 the uncontrolled copying and especially copying for private use, was a problem of great concern. The German Supreme Court stated in the home taping decision that "There is no general principle in copyright that maintains that the claims of the copyright holder should stop short of the private sphere of the individual."²³⁹ The judgement led to the collecting of incriminating information on the persons copying for private use from neighbours and porters. In the years that followed it was soon clear that the actual exercise of the exclusive reproduction

²³⁸ Recital 8-9 in the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97)628 final

²³⁹ Bundesgerichtshof, Judgement of 18 May 1955, GRUR 1955, 492

right of the owner of the copyright, in attempting to monitor the copying for private use that goes on inside the home of the user, was an infringement of the private sphere. The general principle can be said to be that the exercise of an exclusive right must stop at the private sphere of the individual. Another example that raised the question of how to weigh the balance between new technology and the exception of copying for private use was the audio tape recording. The Dutch Government discussed the issue²⁴⁰ and came to the conclusion that they could not prohibit the new technology. That would be politically very unrealistic, and as a result they concluded that the use of the new technology could not be prohibited either, since that could only be enforced by investigating the domestic circle.

Copying for private use is currently allowed in a majority of the EC Member States and the major reason for this exception is that the Community does not wish to invade the privacy of individuals.²⁴¹ Digital private copying is not yet so widespread and its economic impact is still not fully known and therefore the exception for private copying will still be allowed. The Commission will, however, closely follow market developments in digital private copying and will consult the parties concerned, with a view of taking appropriate action at a later stage.²⁴²

The interesting issue here is that the discussion taking place in the Dutch Government in 1972 is almost the same as the discussion taking place in the media and by legislators today, the only thing really different is the technology in question, that of course is further developed today. The response of the owners of the copyright and relating rights of today regarding digital home taping has been to lobby for the abolishment of any copying for private use as far as digital copying is concerned. They use similar arguments as the German Supreme Court did in 1955 and claim that the prior legislators could have no idea of the

²⁴⁰ “Developments in technology and society have come to the point where the purchase of the (...) equipment is within reach of large sections of the population. We see no grounds for a negative appreciation of this development as such. To many people the equipment would lose all attraction, if they were not permitted to reproduce today’s artistic repertoire for their own personal use. A prohibition on such reproduction appears to be too drastic. Moreover, as experience in Germany has shown, the effective control of the observing of this prohibition, will present great practical problems. Proof of infringement can only be found through investigation of activities that usually go on inside the domestic circle, which in our opinion should not be encouraged.” Second Chamber of Parliament 1972, *The future of copyright in a digital environment*, by P. Bernt Hugenholtz (ed.), page 49

²⁴¹ Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97)628 final, page 12

²⁴² Recital 26 in the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97)628 final

technological development and that the exception of copying for private use therefore should not be applicable to digital copying. However, my conclusion is that it is quite clear that the level of copyright protection of today can be considered fulfilling the needs of the copyright owners, the owners of related rights and also the demands from the society. It should not be very realistic and recommendable to prohibit all private digital copying. As a member of the Dutch First Chamber once remarked: "A prohibition of electronic private copying in the narrow sense is impossible to police, will be breached on a massive scale, and may even render the legislator himself ridiculous."²⁴³ It is, however, important to stress that the problem concerning private digital copying must be recognised and one must be very attentive to the needs of the copyright owners and the owners of related rights. If the copying for private use reaches unreasonable proportions this must immediately be attended to.

6.4.2 A possible solution

The experiences of the problem concerning to what extent the exception of copying for private use should be allowed have shown that a levy system is a good option. In order to permit copying for private use a levy will be paid by the manufacturer or importer of, for example home taping equipment and blank tapes. Many countries that have the system of levy compensate the owners for restricting their exclusive right with a right to remuneration.²⁴⁴

I would suggest, if the copying for private use in the future causes unacceptable problems, that the exemption for private copying should follow a model which would guarantee the authors and performers an equitable remuneration for private copying. This seems necessary to be able to avoid a loss of cultural diversity and a possible trend towards a best seller society. If the copyright protection is inferior, the authors and performing artists will only create works that they know will sell and their resources could be attracted to the production of essentially second-rate, but clearly favoured works.²⁴⁵

My opinion is that the record industry should not try to hinder the users of the Internet and the consumers of music who want to copy digital music over the Internet for their own private use. The protection against illegal copying imbedded in the music's digital code, like encryption and watermarking can often be undone by Internet users proficient enough with the technology. My conclusion is that some people will always make pirate copies of music on the Internet for private use and there is too much at stake, by infringing the private sphere, in trying to stop them. The most economic efficient and fair solution, in regards of the parties concerned, would be to allow the digital music to be available and unprotected

²⁴³ *The future of copyright in a digital environment*, by P. Bernt Hugenholtz (ed.), page 51

²⁴⁴ *The future of copyright in a digital environment*, by P. Bernt Hugenholtz (ed.), page 50

²⁴⁵ *The economics of intellectual property rights*, by J. Kay, page 348

for the Internet users to copy for private use and instead go after the really big music pirates who commercially exploit unauthorised copies of music for profit.

7 Anti-piracy measures

7.1 What has been done?

A lot has already been done in the fight against piracy and illegal copying of musical works on the Internet. New legislation improving the protection of digital works has been adopted in the two WIPO-treaties from 1996.²⁴⁶ A new EC Directive concerning the harmonisation of certain aspects of copyright and related rights in the Information Society have been proposed to improve the protection for digital works on Community level.²⁴⁷ Collecting service societies and related organisations are continually attending to the rights of the owners of copyrights and related rights. It is also possible to fight the piracy with technical means, such as digital watermarking and encryption. A number of record companies and technological companies have joined together in the efforts technical means secure the protection of digital music.

7.2 Collecting service societies and related organisations

The organisations dealing with copyrights and related rights are collecting service society, professional organisations and trade unions.²⁴⁸ Collecting service societies acts as clearing houses for copyright protected works to simplify the management and exploitation of the various copyrights in musical compositions owned and controlled by composers, lyricists, publishers and producers. In these way individual negotiations with each copyright owner in order to perform or record their work can be avoided. The collecting service societies are often granted non-exclusive licenses²⁴⁹ from their members to negotiate their rights. These different organisations also make sure that the copyright owner or the owner of the

²⁴⁶ The WIPO Copyright treaty and the WIPO Performances and Phonograms Treaty

²⁴⁷ The Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97)628 final

²⁴⁸ Examples of collecting service societies are **RIAA**, *Recording Industry Association of America*, **ASCAP**, *American Society of Composers, Authors and Publishers*, **BMI**, *Broadcast Music, Inc.*, in the U.S., **BPI**, *British Phonographic Industry*, in the U.K., **STIM**, *Föreningen Svenska Tonsättares internationella musikbyrå*, in Sweden and **IFPI**, *International Federation of the Phonographic Industry*, which is an international organisation representing record producers.

²⁴⁹ Each copyright owner could theoretically enter into individual negotiations with anyone seeking to perform or record its musical composition.

neighbouring right receives their royalties and remuneration when the musical work is used by being reproduced, performed or recorded.²⁵⁰

Another very important task performed by the collecting service societies is the anti piracy activity. The collecting service societies continually search the Internet with the purpose of discover and map out web sites with illegal music and take legal proceedings against the illegal use of the musical works. The reason for infringement of copyrights and related rights is very often ignorance concerning the legal rules protecting the musical works. It is therefore a very important duty for the collecting service societies to inform the public of the legal rules applicable.²⁵¹

7.3 Encryption and watermarking

Musicians, composers, artists and record companies have taken advantage of the world-wide publishing that the Internet provide, but at the same time they are taken advantage of by on-line pirates. Since it is so easy to copy and duplicate audio files it is not a surprise that the musical works are being regularly copied without the owners' consent. New technology can, however, also provide the authors, performers and producers with valuable and effective weapons in the battle against piracy and the enforcement of the law on the Internet.

Encryption technology can be used to encrypt audio files so they can not be so easily pirated. It can also automatically gather royalties from consumers accessing the protected work and provide the copyright owner with detailed feedback on what happens to the work once it leaves the publisher's site. Encryption enables the copyright owners to seal their audio files within a layer of hard encryption and digital signatures, along with details of where they were originally created and where their licenses may be purchased. Illegal reproduction is then no longer a problem, because the file's identity is sealed with encryption. These files can then be released to circulate freely on the open Internet, entirely outside the control of the original owner. Illegal tampering is prevented by the digital signatures, in such a way that altering a single bit renders the entire file useless. Perhaps most importantly, users cannot access the audio file without first purchasing a valid licence.²⁵²

Digital watermarking allows copyright owners to incorporate into their work information invisible to the human eye that can help identifying the work. The term "digital watermarking" has derived from the traditional watermarks that exist in currency and high-quality letterheads.

²⁵⁰ www.riaa.com, 1999-05-18 and www.ifpi.se/pres, 1999-05-18

²⁵¹ www.ifpi.se IFPIs antipiratverksamhet, 1999-05-18

²⁵² www.breakertech.com, 1999-08-14

Watermarks serve as a silent guarantee of quality and digital watermarks serve the purpose of identifying quality and assuring authenticity. The new technology offers tracking services and there are a number of companies that have introduced digital watermarking software and services that allow webmasters and copyright owners to hide information transparent to the ear within audio files. They can later be used to identify the owner's rights in the music files and the owners will be able to find the illegal copies of their music on the Internet and take appropriate legal action against the infringers. A digital watermark hides in the naturally occurring variations throughout a work and functions as a copyright communication device making it possible to know who the owner of the work is. Digital watermarks should be able to survive alteration and should not be stripped without the quality of the work being seriously affected. However, there have been some problems concerning digital watermarks and they may weaken or disappear by the time the works are processed for the Internet but the absence of a digital watermark does not constitute that the audio file is unprotected by copyright.²⁵³ Legitimate users and webmasters of copyright protected works have nothing to fear from digital watermarks and tracking services by using works from the public domain or obtain permission from the owner of the audio files they use.

7.4 SDMI

SDMI stands for The Secure Digital Music Initiative and is a global effort of more than 110 record companies and technology companies to promote Internet distribution of music and to protect copyrighted music in digital format from theft.²⁵⁴ The SDMI will be an open forum for all commercial companies involved in technologies relating to digital music. The participating companies will work together to establish a specification for protecting music. The goals SDMI are trying to accomplish are to provide consumers with convenient access to quality records, ensure copyright protection for the owners of the works and enable music companies and technology companies to build a successful business on the Internet.²⁵⁵ Many of the companies and organisations involved are currently developing approaches and solutions with technical means to secure digital music. The SDMI forum will harmonise these efforts and products and services that conform to compatible and interoperable security features will be certified as SDMI compliant. The SDMI Forum began its operations in early 1999 and the

²⁵³ <http://www.webreference.com/content/watermarks/> *Digital Watermarks: New Tools for Copyright Owners and Webmasters*, 1999-06-11

²⁵⁴ Companies and organisations involved in the SDMI project are, for example, RIAA, AOL, Microsoft, Lucent, AT&T, Liquid Audio, Sony, Warner Bros., EMI, BMG Entertainment.
www.thestandard.net *Too legit to pirate? Record Labels fight back*, 1999-07-02

²⁵⁵ <http://agent.microsoft.com> *Microsoft and Sony Music Entertainment to jointly market and promote music and music videos on the Web*, 1999-07-02

objective was to have a specification completed in time to allow conforming products to be available for the 1999 holiday season.²⁵⁶ The SDMI released its initial version and recommendations of its requirements for the portable digital music players the summer of 1999.²⁵⁷ New SDMI-compliant music devices will according to the so-called “Millennium Trigger” initially play both Mp3 and SDMI-compliant files but in a later phase of the SDMI program users will be able to play Mp3 files on SDMI devices, but not illegal copies of new CDs. The record companies will endow the new CDs with digital watermarks, by the end of the summer 1999. This will allow software and hardware devices to differentiate between SDMI approved and non-SDMI approved files. When the “Millennium Trigger” is activated, hard ware and software devices will stop playing the new SDMI watermarked files until the user upgrades his software. If the software is upgraded the user can still play mp3 files and the new watermarked files but not pirated files created after implementation of the “Millennium Trigger”.²⁵⁸

7.5 Summary

It is quite clear that a lot has been done in fighting the illegal copying of musical works on the Internet, in regards of new treaties and attempts to educate and inform the public of the problem. Some measures are still in the pipeline, for example SDMI, but will make it possible to fight the piracy in a technically more effective way. This is especially the case when there is a huge opportunity of fighting the new technology with new technology, such as encryption and digital watermarking.

²⁵⁶ <http://techlawjournal.com> *Music and Technology Companies Join to Develop Means to Protect Copyrighted Music*, 1999-07-02

²⁵⁷ www.zdnet.co.uk *SDMI releases secure music spec.*, 1999-07-14

²⁵⁸ <http://mp3.com/news> *SDMI Update*, 1999-07-02

8 The reality

8.1 Anti-piracy campaigns

IFPI and RIAA continually lead a world-wide campaign against Internet piracy where automated web crawlers and search engines are used in order to find infringing web sites with illegally posted music. When the web sites are discovered legal action is taken to eliminate the infringing audio files. At the end of 1997, IFPI, the BPI and RIAA were involved in a project to survey and map out the unauthorised use of music on the Internet. The majority of the servers hosting illegal music files were located in the U.S., Australia, Sweden and Canada. The national groups of IFPI in the countries where the illegal sites were located, were alerted and they contacted and notified the service providers that they were hosting illegal music files and what legal implication and action that could follow of their activities. In most cases the service providers contacted the web site operators and ordered them to close down the site or they would block the access to the site. In the remaining cases, cease and desist letters were sent and within weeks most infringing sites containing illegal music files were closed down. This global, educational approach definitely increased the awareness of the problem and decreased the number of infringing sites.

In Sweden, IFPI continually contact mp3 sites with warning letters and as a result most of the site owners close down their sites or erase their illegal material. There have however been an increasing number of sites containing illegal mp3 files for sale in recent time. The situation is made even more difficult, since Swedish computer magazines have been writing about how to make mp3 files and where to find illegal mp3 sites for downloading music on the Internet.²⁵⁹

Currently, approximately 10-15 cases of copyright infringement concerning illegal audio file have been reported to the police with the result of preliminary investigations started by the public prosecutor. Some of the investigations have been closed due to the young age of the criminal. The Swedish police seized a computer hard drive as evidence, suspected to contain illegal mp3 files and to infringe copyright during a domiciliary visit, in July 1999. This was the first time ever in Sweden the police seized a computer hard drive for these reasons. It has previously been done in Belgium and in the U.S.. IFPI in Sweden have recently employed a person occupied only with searching for web sites containing illegal music material and during July and August this year, approximately 300 infringing web sites have been closed down as a result of the pressure from IFPI.²⁶⁰

²⁵⁹ www.ifpi.org *Stepping up the global fight against Internet piracy*, 1999-05-11

²⁶⁰ Interview with Magnus Mårtensson at IFPI Sweden

In the U.S. the legal situation is different and a bit more successful since RIAA have scored a number of successes in reaching settlements with web sites reproducing and distributing copyrighted sound recordings without authorisation. In these settlements the web site operators agree to refrain from any further infringement and to destroy the illegal reproductions. By filing lawsuits against infringing web sites RIAA succeeds in having sites removed and the operators co-operating.²⁶¹

Due to the fact that the infringing technology is new and the law systems often quite time-consuming the cases involving copyright infringement of the Internet has just began to work their way through the court systems. It is difficult to find and present a comprehensive picture of the legal situation and case law.

²⁶¹ www.riaa.com/piracy Recording industry sues two Internet sites for copyright infringement, 1999-05-11

9 Conclusion

The Internet is clearly the future of music distribution and the music industry is very alert to this. However, the Internet and the new technology also means greater difficulties for the copyright owners and the owners of related rights to ensure their legal rights and to receive royalties for the use of their work. The real challenge for the copyright is how the new technology will impact upon the ability of copyright owners to enforce their rights.

It is certainly very difficult to apply laws resting on notions of personal property, especially intellectual such, and territorial jurisdiction on something like cyberspace. Efforts on the international level to regulate intellectual property on the Internet have been somewhat chaotic. Illegal copying of phonograms has flourished for a number of years without resulting in a breakdown of the copyright system but pirates are criminal elements that can and must be fought with the law book in one hand and the copyright notice in the other. In this sense the Internet does not differ from other media. The core foundations for copyright remain undisturbed by the emergence of digital technology. Most legal rules like the concepts of the idea distinction and the right to reproduction are just as applicable on digital copies as they are on physical copies. The owners of intellectual property rights can succeed in protecting their rights from use and abuse on the Internet and doing so with already existing and applicable copyright laws adjusted to the new conditions and technology. The answer is not to create completely new laws to regulate the legal problems and the technologies of the future and it is not the object of the law to try to predict currently uncertain outcomes and impose predictions ahead of time.

In spite of the applicability of existing laws on the Internet, the new technology still causes problems concerning illegal copying and distribution of music. Two groups of people copy the music illegally but with different purposes. The group illegally copying and distributing the music for commercial purposes can be considered quite easy to attend to. If the owners of the web sites uploading and offering downloading of protected music are not granted permission from the copyright owner they are committing a criminal act and infringing the copyright. The other group of music consumers is also infringing the copyright by uploading the music without the permission of the copyright owner. But it is allowed to download the music for private use, as long as the music has been lawfully made public. As long as the copying for private use does not reach unmanageable proportions it should be allowed, as a concession to society's need of making music available to the public.

The new technology and the audio file formats will not cause the end of the musical world. Certainly, the technology of new audio file formats will foster significant changes, but most of these will be in the manner in which music is

distributed and sold. New Internet based record companies will develop, offering customers to purchase songs with instant delivery and customers will also have the possibility to subscribe for music, much like in the way you subscribe for a newspaper.

It is highly unlikely that physical CDs will be completely replaced by direct digital distribution of music in the near foreseeable future. Music consumers will still like to have the physical products that they can touch and feel and retailers know how to categorise and market those products according to consumer's interest. The record companies also provide a significant benefit that would not be available with direct digital distribution, when they filter through the artists and discover the quality artists.

Besides from applying the existing copyright law the copyright owners should also adjust to the new climate and embrace the new technology and take advantage of the possibilities that it gives in new markets and opportunities. The new technologies also bring useful tools in the struggle against the threat from the new audio file formats. There are a number of major initiatives currently underway with the aim of regaining the advantage in the battle against piracy, such as encryption, digital watermarking and SDMI.

There will be some piracy, as there always has been. The prior conflict between copyright and technology did not destroy the music, but enhanced consumer choice, convenience and freedom. The same result is likely in the field of compression technology and audio file formats and whatever technology comes after.

10 Bibliography

- Baker & McKenzie *Guide to Intellectual Property in the IT Industry*,
1st ed., Sweet & Maxwell, 1998
- Cambell, Dennis (ed.) *International Information Technology Law*,
1st ed., Center for International Legal Studies, Intellectual Property Law Series,
John Wiley & Sons, 1997
- Carlén-Wendels, Thomas *Nätjuridik. Lag och Rätt på Internet*,
1st ed., Juristförlaget, 1997
- Cooter, R and Ulen, T *Law and Economics*,
1st ed., Harper & Collins, 1988
- Cornthwaite, Jonathan *Intellectual Property and the Internet*,
1st ed., Monitor Press Limited, 1998
- Hugenholtz, P Bernt (ed.) *The Future of Copyright In a Digital Environment*,
1st ed., Kluwer Law International, 1996
- Laddie, High, Prescott, Peter and Victoria, Mary *The Modern Law of Copyright and Design*,
Volume 1, 2nd ed., Butterworths, 1995
- Lester, David and Mitchell, Paul *Joynson-Hicks on U.K. Copyright*,
1st ed., Sweet & Maxwell, 1989
- Lindberg, Agne and Westman, Daniel *Praktisk IT-rätt*,
1st ed., Norstedts Juridik, 1997
- Olsson, Henry *Copyright. Svensk och Internationell Upphovsrätt*,
6th ed., Norstedts Juridik, 1998
- Philips and Firth *An Introduction to Intellectual Property Law*,
3rd ed., Butterworths, 1995

Rindforth, Petter [ens@mrätt](#) på internet?,
1st ed., PageGallery International AB, 1998

Tritton, Guy *Intellectual Property in Europe*,
1st ed., Sweet & Maxwell, 1996

Articles

Espinel, Victoria *The U.S. Recording Industry and Copyright Law*,
EIPR, Vol. 2, February 1999

Kay, J *The economics of intellectual property rights*,
International Review of Law and Economics, Vol. 13, 1993

von Lewinski, Silke *A Successful Step toward Copyright and Related Rights in the Information Age: The New EC Proposal for a Harmonisation Directive*,
EIPR, Vol. 20, April 1998

Ljusberg, Margita *Upphovsmännens Internetkonvention – med tvekan godkänd*,
Stimnytt, Nr 1, 1997

Posner, R and Landes, W *An Economic Analysis of Copyright Law*,
The Journal of Legal Studies, Vol. 18, 1989

Schönning, Peter *Internet and the Applicable Copyright Law: A Scandinavian perspective*,
EIPR, Vol. 2, February 1999

Electronic articles

<http://agent.microsoft.com>, *Microsoft and Sony Music Entertainment to jointly market and promote music and music videos on the Web*, 1999-07-02

www.breakertech.com, 1999-08-14

<http://europa.eu.int>, *Community preparatory acts, Document 599PC0250*,
1999-08-01

www.ifpi.org, *Stepping up the global fight against Internet piracy*, 1999-05-11

www.ifpi.se, *IFPIs antipiratverksamhet*, 1999-05-18

www.ifpi.se/pres, 1999-05-18

www.ilcgroup.com/copyright.html, *Copyright and the World Wide Web*, 1999-07-22

www.ipmag.com/monthly, *Cyberians at the gate?*, 1999-07-02

www.law.co.il/articles/music_en.htm, *The internet and copyright in music*, 1999-07-05

www.medstroms.se, *Mp3 – musik industrins död?*, 1999-05-14

<http://mp3.com/news>, *SDMI Update*, 1999-07-02

www.mp3now.com/html/mp3_info.html, *What is mp3?*, 1999-05-14

www.ordval.se/ur/intro.html, *Upphovsrätt*, 1999-01-02

www.piracy.com, 1999-08-01

www.riaa.com, 1999-05-18

www.riaa.com/piracy, *Recording industry sues two Internet sites for copyright infringement*, 1999-05-11

www.stim.se/juridik/inter01.htm, *Musik på Internet – Arkiv*, 1999-05-10

<http://techlawjournal.com>, *Music and Technology Companies Join to Develop Means to Protect Copyrighted Music*, 1999-07-02

www.thestandard.net, *Too legit to pirate? Record Labels fight back*, 1999-07-02

www.wvjolt.wvu.edu, *Comment Copyright Infringement in Cyberspace: Untangling the Web With Existing Law*, 1999-05-11

www.webreference.com/content/watermarks, *Digital Watermarks: New Tools for Copyright Owners and Webmasters*, 1999-06-11

www.zdnet.co.uk, *SDMI releases secure music spec.*, 1999-07-14

Official sources

Copyright, Designs and Patents Act of 1988

Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, OJ L290

Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk

Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97)628 final and the amended proposal for a

European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Community preparatory acts, Document 599PC0250

The Berne Convention for the protection of literary and artistic works of 1886

The Rome Convention, International Convention for the protection of performers, producers of phonograms and broadcasting organisations of 1961

The TRIPS-agreement, The Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods of 1993

The Universal Copyright Act of 1971

The U.S. Copyright Act of 1976

The Constitution of the United States

The WIPO Copyright Treaty of 1996

The WIPO Performances and Phonograms Treaty of 1996

Table of cases

Art Music France v Ecole Nationale Supérieure des Télécommunications, Tribunal de Grande Instance Paris [1997]EEC97

Bundesgerichtshof , Judgement of 18 May 1955, GRUR 1955, 492

Ladbroke (Football) Limited v. William Hill (Football) Limited (1964)1 W.L.R. 273, HL

MAI Systems Corp. v. Peak Computer Inc., 991 E 2d 511 (9th Cir. 1993)

Nottinghamshire County Council v Gwatkin, 1997, unreported

Playboy Enterprises Inc., v. Frena, 839 F. Supp 1552 (M.D. Fla. 1993)

Interview

Magnus Mårtensson

IFPI Svenska Gruppen

08-735 97 50