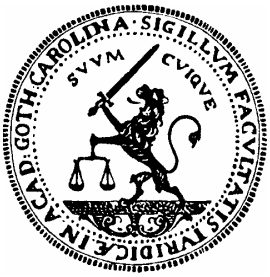

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The Big Ones of Music Industry: Copyright and Human Rights Aspects of Music Business

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Preface

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Finally, I wish to dedicate this work to all true and dedicated musicians, whose talent and professionalism in putting out the works of their genius has been of great help during long and exhausting reading and typing sessions - keep up the good work, real music will never die!

Abbreviations

UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
WCT	WIPO Copyright Treaty
WPPT	WIPO Performance and Phonograms Treaty
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
RIAA	Record Industry Association of America
Sony Music	Sony Music Entertainment Inc
BMG	Bertelsmann Music Group
Universal	Universal Music Group
Warner	Warner Music Group
EMI	The EMI Group
MNC	Multinational Corporation
MAP	Minimum Advertised Price

1 Introduction

When most of us walk into the record store and purchase the CD, I bet quite few are actually trying to trace the name of the recording company, which produced the sound recording. Even fewer folks will actually pay attention to the fact that copyright notices on the books usually state the name and surname of the author, while the music recordings state the name of the recording label or company.

If one would pay more attention to the aforesaid facts, it would turn out that most of the music we buy is produced by very few. No surprise, since the world music industry today is dominated by five corporate music giants, namely, Time Warner Inc., Sony Music Entertainment Inc., EMI Music Plc., Universal Music Inc., and Bertelsmann Music Group. In total, they release about 85% of all music recorded and produced worldwide. Owing to the striking similarity of the business practices of these five and their unchallenged oligarchy in the world of music business, it would be easier to refer to them collectively as the Big Ones, although other collective nicknames were developed too, such as “Majors” or “the Big Five”. But, whatever the title, their unrestricted monopoly over the music market is an established fact. Quite effectively, they maintain the control on the music we hear most often from the radio, TV and our own CD player.

This being so, does this mean that they produce the best music available? While recognizing that this question is extremely subjective and of course will raise different opinions, I would nevertheless maintain that monopoly in any industry has the power to disable ultimate quality control, since the source of the latter is competition; by the agreement of many, whether the modern pop music is good or bad, it is recognized that modern music is in a stale position – the current trend of remixing, covering and recycling older tunes is more than illustrative of the fact that the fresh air is needed.

However, as any monopoly, the music oligarchy is ultra-conservative and will fight till death to maintain its grip. Therefore, I decided to contribute to the process of change in the way the human rights law student can do, and the symbolic contribution to the battle for the freedom of music is the following analysis. The modest effort is better than doing nothing, right?

Have a nice reading and thank you for your interest.

2 General issues

2.1 Introductory remarks

This chapter is intended to be of general reference for the following ones, which will, in turn, focus on specific corporate, copyright and human rights issues in the music industry.

The first part, entitled "Human Rights Accountability of Multinational Corporations", is an attempt to briefly outline the applicability of human rights norms to multinational corporations. The general conclusions reached in this part will be used to support the arguments made for and/or against inclusion of human rights-inspired corporate concerns in the ongoing debate on issues of corporate behaviour of the Big Ones, going outside purely antitrust, labour law and copyright/intellectual property aspects.

The second part, entitled "Copyright and Human Rights – General Overview" is intended to be a source of reference for all related human rights/copyright issues, where the relations and strains between the two come into play in the course of music business. The conclusions reached in this part will be of general use for the further analysis of the copyright claims made by the authors of musical works against the Big Ones and vice versa, and also for resolving some issues, which have been dealt in primarily copyright/contract law point of view, in the light of certain human rights guarantees.

2.2 Human Rights Accountability of Multinational Corporations

2.2.1 Introduction

As illustrated in the Supplement A, each and every of the Big Ones, through ownership of many labels, is literarily stretched over the number of the countries and even continents. They incorporate many affiliates and subsidiaries in many countries, and themselves are a part of bigger corporations, which have a stunningly diverse background. Therefore, they naturally fall into the category of multinational corporations (MNCs), which are often referred to as MNEs (multinational enterprises) or TNCs (transnational corporations).

The human rights obligations and liability of private corporations, especially multinational corporations, as well as the general status of the latter in international law, are truly a global "headache" for today's international and human rights lawyers. Many books, articles, studies and a bulk of discussion

at various levels – from student organizations[1] to the UN[2] - has focused on this topic, and the formation and gradual rise, since the 1990's, of the field of law nowadays generally known as Human Rights and Business, illustrates the growing awareness of the need for certain legal regulation in this field.

2.2.2 Definition of multinational corporation

In academic literature, multinational corporation is usually described as "a cluster of corporations or unincorporated bodies of diverse nationality joined together by ties of common ownership and responsive to a common strategy"[3]. The necessary elements, therefore, include the operation of the said legal entity outside the borders of its home state and the existence of certain network in the form of ownership or common economic strategy. The forms of incorporation of subsidiaries under the municipal laws of the host states usually play no role in the defining the parent corporation as multinational.

The recent Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,[4] which, although at their drafting stage, are highly relevant to the topic of the current analysis, provide for the following definition, which, except for the different terms used, is not, as to its meaning, very different from the one cited above:

"The term "transnational corporation"[5] refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively."[6]

In the light of these definitions, taken in conjunction with the profiles of the Big Ones provided in the Supplement A to current paper, there should not be any difficulty of classifying each of the Big Ones as truly multinational corporations or, at least, as a part of parent MNCs.

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[1] E.g. Generation Europe, http://www.generation-europe.eu.com.
[2] The most recent one being The Global Compact, an initiative by the UN Secretary general, Mr. Kofi Annan, http://www.unglobalcompact.org/Portal.
[3] D. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, cited at: Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in "Liability of Multinational Corporations under International Law", Kluwer Law International, 2000, p. 75.
[4] To be considered by the UN Commission on Human Rights in July-August 2003.
[5] The UN bodies primarily use the term "transnational corporation", which is completely interchangeable, for the purposes of this analysis, with the term "multinational corporation" or "multinational enterprise".
[6] Source: http://www1.umn.edu/humanrts/links/NormsApril2003.html.

2.2.3 Status of multinational corporations in international law

Under the classical international law doctrine, the main actors in the international relations are the states.[7] It is equally argued that the international relations nowadays are not governed *exclusively* by the states,[8] though they still remain the major subjects of international law, being the main creators of international norms and also primary bearers of responsibility for their enforcement. As a matter of rule, the States reluctantly accept restrictions of their relative monopoly in international relations and jealously guard their primary status in international law.

Nevertheless, other actors, such as international organizations, insurgents, belligerents, peoples fighting for self-determination, individuals and perhaps even MNCs[9] are actively emerging along the states on the international plane and are increasingly being recognized as subjects of international law. Individuals, for example, are nowadays recognized as subjects of international law, not only in the capacity of bearers of international responsibility, but also as the persons entitled to certain action on an international scale, the most spectacular being a right to sue the States before the international tribunals for the breach of international human rights obligations, at universal[10] and regional levels.[11]

On the face of recognition of multiplicity of non-state actors in international law, a serious gap exists so far in relation to the recognition of MNCs as subjects of international law.[12] This omission becomes particularly alarming at the current stage of economic development and the ongoing process of globalization. Nowadays, the economic power of several industrial conglomerates is far exceeding the economic potential of many states with relatively small population and developing economies, presumably giving such corporate entities enough economic and even political power to interfere in the internal affairs of the state.

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[7] Malcolm N. Shaw, *International Law* (fourth edition), Cambridge University Press, 1997, pp. 139-159.
[8] *Ibid*, p. 139; please also note Ignaz Seidl-Hohenveldern, *Corporations in and under International Law*, Cambridge - Grotius Publications Limited, 1987, p. 1.
[9] Shaw, pp. 176-177.
[10] Optional Protocol to the International Covenant on Civil and Political Rights, Art. 1; Optional Protocol to the Convention on the Elimination of Discrimination against Women, Art. 1 & 2; International Convention on the Elimination of All Forms of Racial Discrimination, Art. 14; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 22.
[11] European Convention on Human Rights, Art. 34, American Convention on Human Rights, Art. 44 and African [Banjul] Charter on Human and Peoples' Rights, Art. 55.
[12] For the notes of stunningly slow development of international regulation of MNCs in the UN, see Peter T. Muchliski, *Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD*, in "Liability of Multinational Corporations under International Law", pp. 97-117.

2.2.4 Are human rights binding on multinational corporations?

Much of the currently ongoing debate on the human rights accountability of multinational corporations builds on a growing public awareness that the MNCs can and *do* violate human rights in the course of their business. Several examples, such as Shell activities in Nigeria, Bhopal disaster in India, complicity of Unocal in forced labor and other human rights abuses in Burma, Nike "sweatshops" in South-East Asia, among many others, triggered the creation of the whole movement for so-called "Corporate Social Responsibility" on academic, consumer and recently business levels.

A number of efforts to find a proper solution to the growing problem of multinationals' accountability have been undertaken both on national[13] and international level. On the latter, it is noteworthy to mention ILO Tripartite Declaration of Principles Concerning Multinational Enterprises, OECD Guidelines for Multinational Enterprises, European Parliament's Resolution on EU Standards for European Enterprises Operating in Developing Countries, and lastly, the Global Compact, an initiative by the current UN Secretary General, Mr. Kofi Annan.[14]

In general, these efforts are pursuing several directions, separately or simultaneously. First of all, the possible regulation by the host States is considered to be the theoretically the most effective, since MNC subsidiaries, operating in host States, are usually incorporated under their laws and therefore are bound by domestic legislation, in particular, human rights obligations. This solution seems to be, however, rather ineffective for the reasons of unequal position of economically and politically weak host States versus powerful multinational conglomerates.[15] Secondly, the regulation by home States is considered to be more effective in this regard, but much depends on the will of the domestic courts of such State to provide effective jurisdictional link, which would enable overseas victims to sue MNCs in such courts; the occurrence of this is quite rare.[16] Thirdly, self-regulation is encouraged, in the form of adoption of voluntary Codes of Conduct for MNCs, a measure that is becoming growingly popular, but still raises some questions as to actual compliance with such self-imposed standards. Fourthly, independent monitoring, by specialized audit companies or NGOs, is practiced; the Global Compact specifically encourages and promotes the practice of such monitoring.[17]

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[13] For example, *The Alien Tort Claims Act* of the United States; for the relevant practice under this Act, please refer to Beth Stephens, *Litigation against MNCs: the US*, in "Liability of Multinational Corporations under International Law", pp. 209-229; also, Jennifer Green and Paul Hoffmann, *US Litigation Update, ibid*, pp. 231-240.

[14] It should be noted that all these documents are non-binding declarations.

[15] Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in "Liability of Multinational Corporations under International Law", pp. 78-79.

[16] Ibid, pp. 79-80.

[17] http://www.unglobalcompact.org/Portal.

In addition to the international texts referred to above, one of the most recent texts, namely, the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights of April 2003 (to be considered by the UN Commission on Human Rights in July-August 2003)[18], is of particular interest. It is probably the first, although yet-to-be-seen, effort on a universal level to impose certain human rights, labor and environmental standards directly on multinational corporations. Par. 1, under the heading "General Obligations", states:

" … States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognised in international as well as national law, including assuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law. …"

The Norms list several human rights guarantees, namely, right to equal opportunity and non-discriminatory treatment, right to security of persons and rights of workers, and obliges multinational corporations to respect national sovereignty and human rights, as well as to ensure consumer and environmental protection. Under the heading "General Provisions on Implementation", the Norms place innovative and far-reaching obligations both on multinationals and on the States for the adoption of internal regulations, effective monitoring and reparation to victims of human rights abuses. Unfortunately, this draft text is still to be considered by the UN Commission on Human Rights and it is hard to predict the final outcome of this process.

2.2.5 Do corporations have certain human rights?

First of all, one should note that, at the current stage, there is no clear-cut answer to this question. In the light of classical human rights theory, it is to be presumed is that legal entities in general are legal constructs ("a fiction of law") and are not intended as such to be the bearers of the human rights.[19] The term "*human* rights" can be thought as itself implying possession of those by individuals, rather than legal entities. Naturalist approach to international law in general and in human rights theory in particular, placing inherent rights of an individual in the center of legal regulation, also justifies such line of argument.

However, the outright denial of all human rights guarantees to legal entities would not make much of sense at the contemporary stage of both human rights and economic development. With recognition of the legal entities'

[18] Source: http://www1.umn.edu/humanrts/links/NormsApril2003.html.
[19] Stephen Bottomley, *Corporations and Human Rights*, cited at "Commercial Law and Human Rights", Ashgate Darmouth Publishing 2002, p. 62

freedom of commercial speech, as a freedom of expression guarantee, by the Supreme Court of the United States[20] and the European Court of Human Rights[21], as well as direct reference to legal persons in the Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, establishing the right to the enjoyment of possessions[22], it is becoming difficult to argue that at least some human rights guarantees can be claimed by the legal entities. First example that springs to mind would be a right to a fair trial, recognized in all major universal and regional human rights instruments, also forming a part of customary "core" of human rights. Indeed, it is hardly justifiable why individuals can be entitled to a fair trial while leaving the legal entities vulnerable to arbitrariness in the proceedings. Right to privacy as a fundamental human right can be the next in the list of candidates for such rights, as much as inviolability of business premises and, perhaps, protection of undisclosed information of commercial nature can be concerned. And finally, the right to property, though arguably not universally recognized[23], is also of certain relevance in this context. A number of social and economic rights, supposedly the right to work and the intellectual property rights, can also be claimed by the corporations.

Although it is to be noted, that so far the legal entities mostly bear human rights obligations, rather than rights themselves, since the trend of legal regulation has been going in the direction of imposing certain duties/obligations, expressed in consumer boycott campaigns, calls for voluntary self-regulation or attempts to legislate certain standards of ethical behavior.[24] The reasons for reluctance of recognizing the human rights of corporations are surprisingly hard to find spelled out clearly, but nevertheless some general conclusions can be drawn. First of all, it would be particularly difficult to vest with human rights such diverse and multi-faced legal persons as multinational corporations, composed of hundreds or thousands of individuals (often of different nationalities) and run by no less number of decisions at various levels, across the borders. Second argument would be more on the moral side of the issue, as much as fears are expressed that MNCs will of course use and frequently abuse such an additional power tool, if the latter is kindly put in their hands. And last but not the least would be a certain revolution in the human rights philosophy, by virtue of entitling "artificial" members of society if not to human rights themselves, then at least to the use of certain corresponding guarantees; there can be a legitimate fear that the consequences of such radical step would immediately spin out of control and add even more difficulties to already complex human rights regime.

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[20] Bottomley, p. 61; see also the famous judgment in *Virginia Pharmacy Board v. Virginia Citizens Customer Council*, 425 U.S. 748 (1976).

[21] The case of *markt intern Verlag GmbH and Klaus Beermann v. Federal Republic of Germany* of 20 November 1989, Series A165.

[22] "Every natural or legal person is entitled to the peaceful enjoyment of his possessions…"

[23] On the right to property, see below, at 2.3.3, p. 14.

[24] Bottomley, pp. 63-64.

Having these considerations in mind, it is to be noted that nowadays there are arguably no serious legal grounds for outright rejection of suggestion that corporations and, among them, MNCs have certain rights, at least those enumerated above. Placing a bulk of obligations on the business (especially trans-border business), without corresponding basic rights, creates a risk of inevitable skepticism on the account of the latter in acceptance and compliance with such obligations. Ambitious as it sounds, I am nevertheless convinced that, perhaps, the classical human rights doctrine, with its exclusive focus on a human being, should be revisited and re-assessed in the light of present-day requirements.

2.3 Copyright and human rights – general overview

2.3.1 Introduction

Serving a general aim of the current analysis, namely, to view the music industry practices in human rights perspective, it is worthwhile to proceed with the analysis of the relationship between intellectual property rights – copyright, in particular – and human rights.

2.3.2 Direct references to intellectual property in human rights treaties

In the context of the above paragraph, one question that arises immediately is the use of the word "between", since nowadays it would have been more appropriate to use the word "part of". More specifically, there is sometimes a point made that the copyright and, in general, intellectual property rights are themselves part of the human rights regime. The supporters of this point of view[25] point out, *inter alia*, to the Article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights, thereby calling for the interpretation of intellectual property protection in the light of human rights obligations of the States.[26] It is argued that the human rights approach to intellectual property plays a crucial role in determining that the intellectual property is

[25] See, for example, the article by Audrey R. Chapman, *Approaching intellectual property as a human right: obligations related to Article 15 (1) (c)*, published in UNESCO Copyright Bulletin, Volume XXXV, No. 3, July–September 2001, available online at http://unesdoc.unesco.org/images/0012/001255/125505e.pdf; also, some interesting findings as to the music as a human right in the article by Karen Hald, entitled *Music – A Human Right*, available at http://www.freemuse.org/01whatis/music.html.

[26] Oddly enough, the pronouncements that lead to such conclusions are contained in the instruments adopted many decades ago, but the serious debate on this issue has been initiated only in the end of 1990's.

not seen only as an economic tool – it also takes into account the expression of human dignity and creativity.[27]

Being a usual argument in claiming human rights nature of the intellectual property rights, the Article 27 of the Universal Declaration of Human Rights is often invoked.[28] It reads:

" 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

Siding with the broad interpretation of this article, especially of its second part, it is relatively easy to draw the conclusions on the inherent nature of intellectual property rights and, in particular, copyright as a human right. However, the closer scrutiny would probably reveal that these two paragraphs, being adressed to different categories of beneficiaries - namely, "everyone" in the first, as opposed to the "author" in the second - have a certain inherent strain between them. In classical copyright doctrine, it is agreed that the intellectual property rights are monopolies – although limited in time and subject to certain restrictions and exceptions, but still monopolies, and the implicit recognition of such monopolies is rather clear from the wording of par. 2 of Art. 27. However, given the wording of the first paragraph, which calls for the recognition of the contribution to the common good and welfare of the rest of the society, it is difficult to reconcile it with the "full and unrestricted monopoly property rights"[29] of the authors and creators, as second paragraph presupposes.

Audrey Chapman, in this regard, notes:

"In order for intellectual property to fulfill the conditions necessary to be recognized as a universal human right, … intellectual property regimes and the manner they are implemented first and foremost must be consistent with the realization of the other human rights, particularly those enumerated in the Covenant [on Economic, Social and Cultural Rights]."[30]

This point of view is particularly interesting, since it makes the human rights "eligibility" of the intellectual property rights expressly dependent on the respect for other economic, social and cultural rights provided for in the ICESCR. Extending the meaning of the cited paragraph, the implementation of the intellectual property regimes, including copyright, should not be an impediment for the exercise of those. However, this argument lacks sufficient clarity, since it fails to take into account civil and political rights,

[27] A. Chapman "Approaching intellectual property as a human right: obligations related to Article 15 (1) (c)", UNESCO *Copyright Bulletin*, Volume XXXV, No. 3, p. 14.
[28] *Ibid*; also, Hald, *Music - A Human Right*, http://www.freemuse.org/01whatis/music.html.
[29] *Ibid*.
[30] *Ibid*.

some of which, like the right to privacy and freedom of expression, will be especially relevant here.

One point should always be borne in mind – the Declaration, being undoubtedly the standard-setting document for the whole human rights movement, is still reagrded as a mere and non-binding political proclamation. Therefore, the arguments based solely on Article 27, regrettably, lack firm legal basis. It can be, nevertheless, submitted that the Universal Declaration of Human Rights has attained the status of international customary law, thus being binding, in accordance with public international law, on every state. However, it is equally argued that only *some* of the articles of the Declaration have so far reached the customary law status. Determination of the customary character of Article 27, in this respect, is clearly going outside the scope of this analysis.[31]

Article 15 of the ICESCR basically repeats the formula provided for in the UDHR, with some minor changes:

"… 1. The States Parties to the present Covenant recognize the right of everyone:
(a) To take part in cultural life;
(b) To enjoy the benefits of scientific progress and its applications;
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. …"

In contrast to Art. 27 of the UDHR, Article 15 of the ICESCR is undoubtedly a part of the binding international treaty and possesses, as such, certain legal weight, compared to the general statement of the Universal Declaration. Nevertheless, the current practice seems to be going in the opposite direction. As the Covenant specifies in Article 2:

"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. …"

Such wording is far from imposing direct obligations on the Member States to enforce the rights enlisted in the Covenant. The point is often made that the rights enlisted in the ICESCR are "welafre" ("second-generation") rights and thus stand on a lower level of protection compared to "classical" (civil and political) rights. "Second generation" rights are deemed theoretically as being legally unenforceable. Without stepping into the debate on this issue, it is noteworthy that such distinction is strongly challenged by the new school of human rights scholars, who rightly argue that, at the current stage of development of international human rights law, there is no hierarchy of rights. This point of view finds strong proof in the Vienna Declaration and

[31]. Though, of course, any alternative and founded research on this subject could significantly help to clarify the issue.

Plan of Action, adopted by the World Conference on Human Rights on 25 June 1993, par. 5 of which solemnly proclaims:

"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis …".[32]

Even if we leave the framework of legal enforecability of economic and social rights – intellectual property rights forming a part of them - the shaky human rights nature of the intellectual property rights is rendered even weaker by the statement by the Members of the WTO in the preamble to the TRIPS Agreement, which recognizes "that intellectual property rights are private rights".

2.3.3 Indirect link - right to property

It can be argued, of course, that the intellectual property rights form a part of a human right to property, which encompasses both tangible and intangible property and does not, as such, distinguish between the levels of legal protection afforded to either of them. However, this should not immediately lead to the conclusion that both are the same. Although generally agreed that intellectual property is undoubtedly a part of property, it will be an over-simplification to decide on intellectual property issues by analogy with the tangible property assets. Tangible property, simply speaking, implies better-controlled monopoly over it. When the person is deprived of the tangible property asset, he or she is able to perceive it, immediately or later, but at a material time anyway. Intellectual property infringements, however, can occur on a massive scale and still, in the absence of proper enforcement mechanisms, go unnoticed. Today's borderless and universal nature of the World Wide Web provides particular support for this point of view: tangible assets, like cars or clothing, cannot freely surf from one state to another; digitally compressed music files, without the prior consent of the copyright holder, can.

Following this line of argument, it is hard to argue, on the reverse, that tangible property assets can become, in the language of UDHR and ICESCR, an object of the right of "everyone" to "enjoy" or "share" it. Of course, it may happen if the State takes certain authoritative steps to ensure such restrictions – by nationalizing certain property for public purposes or creating natural reservations, for example; however, such measures, if imposed, are of exceptional character, rather than a rule. In contrast, both UDHR and ICESCR expressly place inherent limitations on the exclusive enjoyment of intellectual property rights by the persons authorized by the author in favor of "everyone". It is hard to explain this outstanding

[32] It seems that every important and groundbreaking statement in international human rights law is taking is destined to linger in a form of non-binding, political declaration; the Vienna Declaration of 1993 is no exception.

difference if not prompted by the specific (read: intangible) nature of the intellectual property rights.

It should not be also forgotten that the right to property is not a *universally* recognized right; though it has appeared first in Article 17 of the UDHR, it did not find its way into any of the Covenants. Instead, it has been *indirectly* recognized in regional human rights systems[33]. In such state of affairs, even if the intellectual property is actually covered by the right to property, linking the intellectual property rights to human rights protection through the right to property is, to my belief, not a very valuable legal argument to stand a strict human rights "eligibility test".

2.3.4 Indirect link - freedom of expression

There is quite interesting and equally controversial human rights/intellectual property link between the freedom of expression and copyright has been established by some judicial authorities. The American courts, in cases involving the First Amendment[34] challenges to copyright monopolies, have consistently held that copyright itself contains some built-in freedom of speech guarantees. In the recent decision by the United States Supreme Court in *Eldred v. Ashcroft*, which basically confirmed the established practice of the court, the majority of the judges affirmed:

"…copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression. …".[35]

One of the reasons for such firm belief of the judiciary stem from the very roots of the American doctrine of copyrights, which, being quite "utilitarian" (as opposed to the European "naturalist" approach), considers the encouragement by allowing the reaping of personal benefits from the copyright monopolies as the best way to advance the overall public welfare.[36] Therefore, the "incentives" awarded to the author serve the final

[33] The right to property, with immediate restrictions, is recognized in the African Charter on Human Rights - Article 14, American Convention of Human Rights – Art. 21, and Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. These provisions, however, are carefully constructed as to avoid the direct entitlement to property, and concern more with "guaranteeing" the right to property, "right to use and enjoyment" or "right to peaceful enjoyment of possessions".
[34] The First Amendment to the United States Constitution is concerned with the freedom of speech. It states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances" – at http://www.law.cornell.edu/constitution/constitution.billofrights.html.
[35] Part III, page 28 of the judgment.
[36] Lucie M.C.R. Guibault, *Copyright Limitations and Contracts – An Analysis of the Contractual Overridability of Limitations on Copyright*, published by Kluwer Law International, 2002, p. 11.

aim of "achieving a certain result for the benefit of society".[37] One passage in support of this conclusion is of particular interest:

" … The determination of the form of the author's "incentive" to create new works may also serve as a tool in the hands of lawmakers for example in the maintenance of free competition, *the defence of freedom of speech values*, the elaboration of an information society, and the enhancement of democracy. …".[38]

Therefore, it is generally claimed that the copyright, in addition to promoting several liberal and democratic values, helps to defend the freedom of speech. Sheer inconsistencies of this approach are analyzed below, in chapter on music censorship, at 6.3.[39]

2.3.5 Moral rights doctrine

The moral rights doctrine is nowadays firmly established in some European states[40] and on the international level[41]. In particular, Article 6bis (1) of the Berne Convention for the Protection of Literary and Artistic Works provides:

"… Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation. …"

Art. 6bis, indeed, is very progressive in separation of economic and moral dimensions of copyright. Although the moral rights have been already mentioned both in UDHR and ICESCR, a "second life" was injected to these rights by virtue of specifically defining their content – which would have otherwise remained, as opposed to already well-developed economic dimension of intellectual property protection, rather unclear. In my point of view, the permanent attachment of moral rights to the creator, even in the case of formal agreement to assign the economic exploitation of copyrighted work to anyone else, brings the moral aspect of copyright interestingly close to human rights, giving it a necessary legal weight and specificity in addition to direct references in the UDHR and ICESCR. However, at the current stage of the development of copyright law, it would be premature to state, beyond purely theoretical assumptions, that the author's moral rights do constitute a part of human rights law *per se*; such statement should be backed by the express pronouncement of the relevant judicial authorities – and, as far as my knowledge goes, this hasn't been done yet.

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[37] *Ibid*.
[38] *Ibid*, p. 14, footnotes omitted; emphasis added.
[39] P. 66.
[40] E.g. France, United Kingdom and Germany.
[41] Art. 6bis of the Berne Convention for the Protection of Literary and Artistic Works, http://www.wipo.int/clea/docs/en/wo/wo001en.htm.

So far, this provision firmly establishes the right of authorship and expressly grants the author the right to claim his/her authorship over the work. It should be noted, at the same time, that the protection of the other part of moral rights afforded by Art.6bis, namely, the right to object to derogatory treatment of work, is made conditional on the premise that derogatory action in relation to the work "would be prejudicial to [author's] honour or reputation." This limitation somehow waters down this side of the moral rights protection, making it dependent on the existence of detrimental effect to author's honour or reputation. It is not clear, either, what criteria are to be applied in determining the existence of prejudice to author's honour or reputation: both of these terms inevitably have very subjective meaning. Therefore, it is to be presumed that the courts should decide this issue on a case-by-case basis.

The judiciary in some states, like the United States' courts, has consistently refused to apply the moral rights doctrine.[42] This distinguishes the economic argument-based intellectual property protection in the United States from the European model, where the rights and personality of the author and creator are central for the copyright protection regime. This fact, frankly speaking, is quite surprising in the light of the ratification by the United States of the Berne Convention for the Protection of Literary and Artistic Works.[43]

[42] This can be deduced, first, from the persistent silence of the American judiciary on this point and, secondly, supported by the fact that the US copyright doctrine is based on utilitarian approach. For the general attitude of the United States judiciary towards the moral rights doctrine, please note to the article by Jed Rubenfeld *The Freedom of Imagination: Copyright's Constitutionality* in Yale Law Journal *(*non-paginated version*)* and Lucie M.C.R. Guibault, *Copyright Limitations and Contracts – An Analysis of the Contractual Overridability of Limitations on Copyright*, pp. 8-11.

[43] Source: http://www.wipo.int/treaties/documents/english/pdf/e-berne.pdf. Under the public international law, if the State is a party to an international treaty, it should perform the obligations arising from the treaty in good faith. Therefore, the United States' judiciary, in violation of its international obligations, expressly neglects Article 6bis of the Berne Convention, which provides for the moral rights of the author.

3 Battle For Copyright

3.1 Introduction

The magic world of free music is as real as never. Moreover, as all kinds of true magic, it is available for all. Whether some minor technological preparations are necessary, they do not deprive the magic of its magnificence. After all, all you need is just a computer with stable Internet connection – the thing that is as common in the modern household as a TV some decades ago.

To begin with, you can go to www.download.com and click on "All popular downloads" link for the most frequently downloaded software applications. Almost invariably, the first list of 25 most popular software, among useful file-handling and not-so-useful Internet-chat applications, would contain KaZaa (first place), iMesh (4th), Morpheus (7th), Grokster (12th), WinMX (22nd) – all of them being P2P file-sharing applications[44]. Also present on this list would certainly be the Download Accelerator Plus (presently 10th place), which is often used in conjunction with the above applications in order to boost downloads, and Nero Burning Rom (25th) - the popular free software that allows the users to burn the downloaded MP3 files directly to the CD-R.

The current popularity of the peer-to-peer networks is simply phenomenal. For example, this week KaZaa was downloaded 2,6 million times (!), while iMesh was downloaded circa 500,000 times and Morpheus – around 230,000 times. The total number of new warriors in the hunt for the free music files, using dozens of other applications, will probably amount to several millions of newcomers every week. The amount of files that these people may be trading over peer-to-peer networks is hard to give even an estimate; however, the count will be on hundreds of millions, probably.

Such activity of "criminals" and amount of songs transferred and downloaded is overwhelming, which is hardly understandable on the face of the growing awareness that they can be held individually liable – sometimes criminally liable - for copyright infringement. In the era following judgments in *Napster* and *Verzion* cases, it is hard to argue file-sharing enthusiasts are unaware of the consequences of their actions, since we are assured everyday that downloading digital music files without the permission of the author is illegal. However, this does not seem to be a good enough cause to shy away the free music warriors, who persistently refuse to surrender and presumably hope for the "peaceful resolution" of the whole process.

[44] http://download.com.com/3101-2001-0-1.html?tag=pop. The list was last accessed on 10 May 2003.

Confrontation between the giants of recording industry and peer-to-peer network operators and users in so-called "copyright wars" attracted massive media coverage and, surprisingly, little of academic analysis. This Chapter, in the whole, is an attempt to analyze still ongoing online piracy battles in both copyright and human rights perspectives, and will try to prove that the results of already rendered judgments would have been different, if human rights considerations would have been introduced and taken seriously.

3.2 Legal and economic justifications for the copyright protection

The existence of the copyright is not a fact of axiomatic value. There are many questions that arise in connection with the nature and justifications for the existence of copyright protection, which force us to assess and re-assess, from time to time, the appropriateness of copyright in serving the aims it claims to achieve.

There are several theories for justifying the copyright regime, which can be theoretically divided into three categories, namely, "naturalist" approach, "reward" theory and "incentives'" approach.[45]

Naturalist school justifies the existence of copyright by linking the creation of the mind to the personality of the author. It is thought that such expressions of author's talent and personality are to be recognized as an exclusive property of the creator.[46] The "naturalist" approach is very characteristic for the European doctrine of copyright, especially for French and German legal systems.[47]

The "reward" theory supposes that the copyright is a legal expression of public gratitude to the author for the creation of his/her work.[48] It can be equally argued that this theory has somehow merged with the "naturalist" approach and represents an economic side of the latter. In other words, the personal relationship of author with the creation of his/her mind entitles the author to the economic remuneration for his/her work, while pure "naturalist" approach finds its best expression in the doctrine of moral rights, which permanently links the authorship and integrity of the intellectual creation to the personality of its author.[49]

[45] Lionel Bently, Brad Sherman, *Intellectual Property Law*, Oxford University Press, 2001, p. 32.
[46] *Ibid.*
[47] Lucie M.C.R. Guibault, *Copyright Limitations and Contracts – An Analysis of the Contractual Overridability of Limitations on Copyright*, Kluwer Law International, 2002, p. 9.
[48] Bently & Sherman, p. 32.
[49] Guibault, pp. 8-9.

The incentives doctrine is opposite to the "naturalist" and partially "reward" theories. Instead of placing the interests and personality of the author in the center of legal protection, the "incentives" approach places public interest at the forefront.[50] A good example, until recently, was the American doctrine of copyright, which, being quite "utilitarian" (as opposed to the European "naturalist" approach), considers the encouragement of authors by allowing them to reap personal benefits from the copyright monopolies as the best way to advance the overall public welfare.[51] Therefore, the "incentives" awarded to the author serve the final aim of "achieving a certain result for the benefit of society".[52]

There are also certain economic considerations that are sometimes invoked to give additional weight to the above-mentioned justifications for copyright protection. Developed by mega-influential Chicago School of Economics, economic theory of copyright implies that copyrighted works, due to their intangible nature, are non-excludable and non-rival goods, having, in theory, the same characteristics as public goods. This means that, by analogy to public goods, since the resulting social cost of intangible copyrighted assets is zero, there always will be under-production and over-consumption of such good. Copyright has the effect of overcoming this problem, by allowing the authors to reap personal benefits from their works and thus making their private production possible. Therefore:

"… copyrights are economically justifiable since they give authors incentives to create while maintaining the public's access to their works".[53]

Such line of argument, from the economic point of view, underlines and strengthens the "incentives" approach, while adding to it some "reward" theory elements. However, this theory is at odds with the naturalist approach, since it presupposes that copyrighted works are produced exclusively for individual profit and, in theory, also contribute to overall public welfare; thus, economic theory of copyright protection fails to take other personal, non-commercial considerations of the individual authors into account, who are very often, luckily, not driven by the aim to maximize their profits.

3.3 Copyrights regime in music industry

The copyright regime applying to music is as complex as any legislative attempt to stretch the protection of the law to the abstract creations of the human mind. The variety of intellectual property protections involved in the case of musical works forms an elaborate network of rights, which are often owned by different persons and attract different levels of protection and enforcement.

[50] Bently & Sherman, p. 32-33; Guibault, pp. 10-11.
[51], Guibault, p. 11.
[52] *Ibid*.
[53] *Ibid*, p. 14, footnotes omitted.

First distinction that is to be drawn is the ownership of copyrights in musical works themselves and the rights subsisting in their fixations in material form, namely, sound recordings. As much as the notion of copyright has a direct connection with the notion of authorship, different authorship in those two cases presupposes two different copyright holders. In the first case, it will be the creator of the musical work, the composer and lyricist.[54] In the second, it will be the producer of the sound recording.[55]

The picture is further complicated by the fact that a modern musical work, which is put into circulation on the market, contains many different values protected by different copyright laws. For example, if the melody of the song is written by one person (the composer) and text by the other (lyricist), it attracts two different copyrights – one in musical work and second in the literary work, and will most probably result in joint authorship, as much as the final result of joint efforts is an integral, whole piece of work.[56] The fixation of musical work in the form of sound recording is protected as such (entrepreneurial work), with the copyright owner in this case being the producer; and, quite often, the cover, layout and design of the material sound recording contain an artistic work, in which the copyright is owned by the author of that work. However, for the purposes of the current analysis, we have to narrow ourselves only to musical works and sound recordings, and analyze the relevant protections that they attract.

To summarize the recognized intellectual property rights owned in a musical work or sound recording, the following should be noted:

> The right to copy the work (**reproduction right**); this right implies that the author of musical work has an exclusive right reproduce the work in whatever form or medium;[57] in relation to sound recordings, the producer of the recorded work has an exclusive right to authorize reproduction of the fixed sound recording.[58] The right to reproduction is found in the Berne Convention for the Protection of Literary and Artistic Works,[59] the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms,[60] the Rome Convention for the Protection of Performers, Producers of Phonograms and

[54] Bently & Sherman, p. 110.
[55] *Ibid*, pp. 112-113.
[56] *Ibid*, pp. 115-116.
[57] *Ibid*, pp.126-127.
[58] *Ibid*, p. 128.
[59] Article 9, par. 1 stipulates that the author has an exclusive right of reproduction "in any manner and form";
[60] Article 6 of this Convention equalizes the protection of "duplication right" of producers with the copyright protection granted to authors of musical works, with some limitations, however.

Broadcasting Organizations,[61] the WIPO Phonograms and Performances[62] Treaty,[63] and, finally, the TRIPS Agreement.[64]

Being a more contemporary development on the international scale, the right to issue copies to the public (**distribution right**); this right means that the owner of copyright either in musical work or in sound recording has an exclusive right to issue copies of such work or recording to the public, or, to say it otherwise, to put the copies on the market.[65] The distribution right is provided for in the WIPO Copyright Treaty[66] and the WIPO Phonograms and Performances Treaty.[67]

The right to rent or lend the work to the public (**rental or lending right**); in this case, the copyright owner has the right to control the rental and lending of the work, the distinction between the two being the certain commercial advantage in the first and no such profit in the second case[68]. The rental right is provided for in the WIPO Copyright Treaty[69] and the WIPO Phonograms and Performances Treaty.[70] In addition, Article 11 of the TRIPS Agreement provides for the possibility to extend the application of this right to musical works, by requiring its Members to "provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works", and to do so "in respect of at least computer programs and cinematographic works". Thus, under TRIPS, there are a number of possibilities to afford copyright protection to musical works, beyond the required minimum.

Also being a recent development, more in response to technological challenges to copyright regime, the right of communication to the public (**communication right**) is provided in the WIPO Copyright

[61] Article 10 of the Convention assigns producers a right to authorize "direct or indirect" reproduction of sound recordings.
[62] As a general note, the rights of performs are not intended to be discussed in the current paper, in order to keep the discussion to be focused on the issues of specific relevance.
[63] Article 11 of the Treaty basically repeats similar provision of the Rome Convention, but strengthens the protection by granting producers an "exclusive right" to reproduce the work "in any manner or form".
[64] Article 14(2) repeats the corresponding provision from the Rome Convention.
[65] Bently & Sherman, pp. 130-131.
[66] Article 6 of the Treaty grants authors the exclusive right to make available to public the original or copies of their works "through sale or other transfer of ownership".
[67] Article 12 of the Treaty, which repeats the wording of the WIPO Copyright Treaty.
[68] Bently & Sherman, pp. 132-133.
[69] Article 7(1) of the Treaty grants the authors "the exclusive right of authorizing commercial rental to the public of the originals or copies of their works".
[70] Article 13 of the Treaty gives the producers of sound recordings, alongside with exclusive right to authorize the rental of the work, additional control over the use of work even after distribution of the recording.

Treaty[71] and the WIPO Phonograms and Performances Treaty.[72] This right secures the exclusive rights of the author of musical work and the producer of sound recording to control the access of public to their respective works, "by wire or wireless means".

Other rights in musical works and sound recordings, which are not expressly related to the topic of this analysis, such as the right to perform, show and play the work in public (**public performance right**); the right to broadcast the work (**broadcasting right**); the right to include the work in a cable-program service (**cable right**); the right to make an adaptation of the work, or to do any of the above acts in relation to adaptation (**right of adaptation**); and, finally, the right to authorize other person to carry out any of these activities.[73]

3.4 Technical aspects of file-sharing networks

Peer-to-peer networks, which started their existence in more or less simple and uniform pattern, are now of multiple types and sometimes quite complex software applications. Technically speaking, they can be singled out into two main categories, namely, centralised (currently mostly defunct) P2P networks such as Napster, MP3.com and Audiogalaxy, as opposed to more recent Gnutella-style networks, namely, KaZaa, BearShare, WinMx, Morpheus, LimeWire, iMesh, Grokster and many others, which are completely decentralised.

3.4.1 Napster

Napster has certainly become a slogan for the free music, and is often associated with MP3 downloading as such. "Inherently unequal" legal battles between the giants of music industry and Napster raised the latter into the category of "the free music hero" or even "the free music martyr". Some contemporary file-sharing applications are even using the "good name" of Napster for the description of their services and sometimes adapt it even to their titles, like Neo Napster, New Napster, Napster Music Replacement and so on.

Napster started as peer-to-peer file sharing service in 1999. It succeeded where central servers had failed, by relying on the distributed storage of objects not under the control of Napster. This moved the injection, storage, network distribution, and consumption of objects to users.

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[71] Article 8 of the Treaty.
[72] Article 14 of the Treaty gives the producers of sound recordings, alongside with exclusive right to authorize the rental of the work, additional control over the use of work even after distribution of the recording.
[73] Bently and Sherman, p. 124.

However, Napster retained a centralized database with a searchable index on the file name. The centralized database itself became a vulnerable target for legal attacks. Not going into the content of the related judgments so far, technically, Napster was first enjoined to deny certain queries (e.g. "Metallica") and then to police its network for all copyrighted content. As the size of the network indexed by Napster shrank, so did the number of users. This illustrates a general characteristic of file-sharing networks: there is positive feedback between the size of the object library and aggregate bandwidth and the appeal of the network for its users.

Other popular services, like AudioGalaxy and MP3.com, also were using the centralised databases. When they were forced to shut down[74], the massive network of their users, much like Napster, abandoned them in a blink of an eye.

3.4.2 Post-Napster – Gnutella, KaZaa and others

The next technology that sparked public interest in peer-to-peer file sharing after the demise of Napster and that is very widely used today is Gnutella. In addition to distributed object storage, Gnutella uses a fully distributed database. Gnutella does not rely upon any centralized server or service – a peer just needs the IP address of one or a few participating peers to (in principle) reach any host on the Gnutella network. Second, Gnutella is not really "run" by anyone: it is an open protocol and anyone can write a Gnutella client application. Finally, Gnutella and its descendants go beyond sharing audio and video files and, as evidenced, have a substantial number of non-infringing content on the network. Technically speaking, its decentralized structure puts such network in a category similar to email, on which both infringing and non-infringing uses can occur.

Similar software applications, operating almost identically to Gnutella, have been developed by the top-popular P2P services, such as KaZaa, LimeWire, DirectConnect and others. As the centralized services are unable to stand for a long time and are vulnerable to legal attacks, fully distributed services are becoming a popular pick for the most of the free music riders.

3.5 Copyright infringement involved by online piracy

The operation of the above-mentioned networks, as noted above, arguably attracts infringement of certain copyrights either in the musical work or the sound recording. First of all, the description of sharing and downloading process on such networks can be of some help.

[74] RIAA won the lawsuit brought against MP3.com in 2000, and the service disabled its infringing content shortly after. AudioGalaxy has shut down voluntarily in July 2002, in response to the litigation threats from the RIAA.

3.5.1 The process

In order to be able to effectively share a file, the owner of the original sound recording or its copy should undertake several steps, first of which is "ripping". This means that the audio tracks on the sound recordings are first compressed (usually to the size not exceeding 10% of their original size)[75] into digital format with the extensions like MP3, ogg, MIDI or other formats. So far, files with MP3 extension are enjoying overwhelming popularity, though they are not regarded as the highest quality media files.[76]

After the process of compression, the resulting digital media file is stored (in this particular case – uploaded) in the computer memory, usually on the hard drive, as much as the size of those files, although handy enough for transfer through Internet, is too large to allow saving them on conventional removable devices, such as floppy discs. What is important about saving a file on a hard drive, is an end result, namely, there is a perfect digital copy of the original sound recording, which in most of the cases is maintaining the quality of the original sound recording.

File-sharing applications make it possible for the creator of the above-noted digital media file to make it available to others via Internet connection. As a matter of rule, the owner of the computer on which the digital music files are stored is asked to indicate the folder(s) that he/she would like to share. Therefore, making the content of specific folders/drives available online is a result of a genuine choice of the owner of the computer, which he/she presumably makes in full capacity of doing so. In such circumstances, the defence of lack of will or knowledge will not have much impression on the court, if the case ends up there.

After the file or files are made available online (shared), any user of the same network having the same file-sharing application can download such media file to his/her own computer. Usually the file-sharing applications incorporate sophisticated search engines with a number of options, so it is nearly always possible (depending on the size of actual "online library") to locate and download specific musical work of specific file extension, size and quality. Downloads within a file-sharing network usually do not require filling out of any forms or any other formalities – the end-user can just download the media file with a click of the mouse. Download speed

[75] Gillian Davies, *Technical Devices as a Solution to Private Copying*, at "Perspectives on Intellectual Property, Volume 8: Copyright in the New Digital Environment", Sweet & Maxwell 2000, p. 168.

[76] http://www.epitonic.com/help/downloadingstreamingmusic.html. Other file extensions of the same size, namely, WMA files and Liquid Audio, are of better quality, but less popular, allegedly because of the opportunities of copy-protection measures, which can be embodied in such files and present a couple of "unpleasant surprises" to online pirates.

depends on the size of the file and connection speed, and can range between 1-10 minutes.[77]

Once the download process is finished, the person has a perfect – that is, absolutely identical – digital copy of the original sound recording.

3.5.2 Copyright implications

The copyright dimensions of online piracy, as the process described in the preceding paragraph is often referred to, is still being a headache for intellectual property lawyers to classify and provide for settled answers to the questions raised by such practice. The matter is complicated by the fact that "copyright wars" are still raging and it will presumably take a number of years until an authoritative and established judicial interpretation of legal implications of this phenomenon is firmly set and followed.

Therefore, this part of the current analysis is a modest attempt to single out possible violations, or, putting it in usual intellectual property language, infringements of copyright, resulting from the use of P2P file-sharing networks.

3.5.2.1 Reproduction right

Plainly speaking, as much as the author of the musical work has the exclusive right to reproduction, that is, to make the copies of the work, the copying occurred without his/her permission theoretically infringes the exclusive reproduction right of the author. By analogy, producer's corresponding right in the sound recording is similarly infringed. Having this simple presumption in mind, we should be nevertheless vary of the fact that the new technology always puts a certain "test" on copyright regime, and the digital environment brings is exactly one of those innovative and revolutionary challenges, of the power unseen and unheard before.

With regard to reproduction right in the world of digital music, several important distinctions are to be drawn. First of all, as a preliminary matter, we have to establish the presumption that "ripping" of an original sound recording from analogue or digital carrier of signal (such as CD, vinyl disc, Mini Disc, or even master tapes used in the recording studios) is, in fact, a reproduction. Secondly, there is a need to analyse the practice of "pure" sharing. And finally, we have to look at the actual copying of already existing compressed music files over the peer-to-peer networks, where the user downloads the media file from another user and therefore obtains a perfect digital copy of the existing media file.

[77] http://www.epitonic.com/help/downloadingstreamingmusic.html.

3.5.2.2 File conversion

As a preliminary remark, it should be noted that MP3 and other digital compression formats are not deemed to be illegal as such. The RIAA, for example, states that "[MP3s'] use has had a very positive impact in terms of allowing the music industry to discover consumer interest in online music."[78] The technology itself cannot be blamed for its allegedly illegal use, as accepted for long time in the US courts.[79] However, this does not fully resolve the problem, as much as the question is not about the nature of the file compression method, but rather about the practice of copying the audio files in this medium, i.e. the end result of the use of such format. The WIPO Copyright Treaty provides some helpful guidance in this respect, as much as Agreed Statement concerning Article 1(4) provides:

"The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."[80]

The same statement, but with regard to the rights of producers of sound recordings, is also found in WIPO Phonograms and Performances Treaty.[81] Although the legal status of the Agreed Statements is uncertain,[82] it is nevertheless a clear pronouncement to the effect that storage of musical works in digital format represents an act of reproduction and requires, in each case, the permission of relevant copyright holders; to do otherwise is an infringement of the reproduction rights.

However, the case of "ripping" for private use, that is, storage of a musical work in an internal memory of a personal computer, without an intention to share it through P2P network or upload it to website, can possibly fall into one of the "permitted uses" category. What it means is that such reproduction, done without the permission of the copyright owner, does not constitute copyright infringement. This point of view is supported by the Directive 2001/29/EC of the European Parliament and of the Council

[78] http://www.riaa.com/Music-Rules-2-FAQ.cfm.
[79] See, for example, *Sony Corp. of America v. Universal City Studios Inc*, 464 U. S. 417, 104 S. Ct. 774 (1984), a landmark case in the Supreme Court of the United States, where it was held that the home recording appliances did not infringe the copyrights in works, since they could have been used for both "infringing" and "non-infringing" ends.
[80] Source: http://www.wipo.int/clea/docs/en/wo/wo033en.htm#P82_10437.
[81] Agreed statement concerning Articles 7, 11 and 16: "The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles." Source: http://www.wipo.int/clea/docs/en/wo/wo034en.htm.
[82] Jérôme Passa, *The Protection of Copyright on the Internet under French Law*, at "Perspectives on Intellectual Property, Volume 5: The Internet and Author's Rights", Sweet & Maxwell 1999, p. 31.

of 22 May 2001 "On the harmonisation of certain aspects of copyright and related rights in the information society", Article 5(1) of which provides:

"…Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
(a) a transmission in a network between third parties by an intermediary, or
(b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2. …".

The recital 33 of the same Directive, in relation to the quoted provision, states that "the acts of reproduction concerned should have no separate economic value on their own". This leaves a possibility to argue that storing in the internal memory of the computer may fall within this required exception.[83] Although such approach is not universal, the logic and reasoning behind it, which strike the necessary balance between copyright considerations and the right to privacy of an individual user, can be invoked in support of general assumptions on this topic.

Therefore, having in mind the aim of the current analysis and the current stage of judicial developments, the storage of media in digital form on the hard drive of the isolated personal computer, without the intention to share the file through Internet or other networks, can be deemed as non-infringing use of musical work. Nevertheless, we should be also careful to predict such conclusion as a general outcome of the court proceedings, since the absence of express universal consensus on this issue is to result in different outcomes in different judicial systems.

3.5.2.3 File sharing

In contrast to the previous sub-chapter, much has been written about the copyright implications of file sharing on the Internet and it has been the central topic of a number of recent court decisions.[84] Despite this fact, it is still far from clear what constitutes infringement of the right to reproduction in various cases, since the judgements seem to contradict each other expressly.

As much as file-sharing is used as a collective term to embrace a complex of different acts, it is better to consider each of them separately. Namely, we can single out: 1) uploading of the musical work on the personal website; 2) sharing the musical work in the P2P service; 3) downloading the media file on a hard drive.

[83] Bently & Sherman, p. 143.
[84] A line of judgments in *Napster* case, which is still far from completion; also, see latest judgments in the US, namely, *Atlantic Recording Corporation et al v. Daniel Peng*, District Court of New Jersey, civil no. 03-1441, 03.04.2003; *RIAA v. Verzion Internet Services*, District Court for the District of Columbia, 24.04.2003; *MGM Studios Inc, et. al. v. Grokster*, California District Court, 25.04.2003 and others.

3.5.2.3.1 Personal websites

According to the Recording Industry Association of America, the main actor in "copyright wars", it is illegal to upload music from the CD to a personal website; such acts amount to copyright infringement.[85] At the same time, the RIAA does not give any hint as to whether it is actually an infringement of reproduction right or other rights, which fall within an exclusive prerogative of copyright owner in the musical work or the sound recording.[86]

Closer examination of the issue can lead to conclusion that uploading music on the personal website, without the permission of the copyright owner, can qualify either as reproduction or communication, and more remotely the distribution too.

Strictly speaking, there is a difference between actually uploading the file to the Internet and just making it available through hypertext link (in the latter case, the file remains stored on the hard drive or on another website). Reproduction will be taking place in the first case. The matter is that by uploading the media file to the personal website, the media file is stored on the online server of the provider of the web space. It means that it is constantly and freely available on the Internet, with the actual possibility that the users can access and download it. Therefore, since the media file is fully put on the Internet, the musical work is reproduced on the Internet.

Following this line of argument, linking the file to the website, namely, providing the hypertext link to the media file, which is actually stored on the hard drive of an individual user or on another website, with such availability depending on the times when such user or website is available online, may be deemed to constitute an infringement of the communication rights of the respective copyright holders.[87] However, we should be careful in making such assumptions with regard to hypertext links to media files, stored in internal memory of the computer. It can be equally argued that once the computer is set online, with the media files stored in its internal memory becoming, accordingly, available online, it does constitute, in itself, an unauthorised act of reproduction. After all, the Internet is a network of networks;[88] each and every computer, which is set online, is to be deemed to be a part of the Net, not only the powerful servers of web space providers.

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[85] http://www.riaa.com/Music-Rules-2-FAQ.cfm.

[86] Quite a troubling pattern for me is persistent ignorance and carelessness with which the modern music industry delivers its statements. It seems that such ambiguous statements are used deliberately. Of course, it is easier to speak about "copyright infringement" rather than to discuss all dimensions of the issue, in the face of the danger that such open discussion may expose certain weaknesses in a number of arguments invoked.

[87] For a detailed analysis of the communication rights' infringement, see below at 3.5.5, pp. 34-35.

[88] Makeen Faoud Makeen, *Copyright in a Global Information Society - the Scope of Copyright Protection under International, US, UK and French Law*, Kluwer Law International 2000, p. 282.

In this case, it does not matter whether the storage of media files in internal memory has taken place before the computer has accessed the Internet or during Internet session – the content of the media file is reproduced online.

The RIAA seems to have no distinct position on the issue. In its usual obscure way, it deems the "file-trading" to be "the equivalent of publishing", leaving the question as to actual type of infringement open. In the absence of guiding answers, we should presume that the distinction between uploading the media file on the website and merely providing a hypertext link leads to two different acts, the first being reproduction and second – making the work available to the public. Therefore, in the first case the right to reproduction is infringed, and in second – right to communication to the public.

3.5.2.3.2 File-sharing in P2P networks

With the technical methods of work of P2P networks discussed above,[89] it is reasonable to proceed directly to the legal implications of the matter.

Once the user in the P2P network puts his/her collection of media files online or, to put in another way, shares it, such user is presumably infringing the copyrights of the author of musical work and producer of sound recording.[90] The RIAA does not even deem it as "sharing" – it states that this is "unauthorized, illegal file duplication – on a massive scale".[91] However, certain care should be exercised with regard to such straightforward statements. Though it is hard to actually discover such pattern, it is not to be excluded that some users are sharing without downloading, i.e. simply posting their collections online, without the intention of downloading music from other users.[92] "Pure" sharing and actual downloading are hence not the same, and, to my belief, raise different copyright considerations; thus, putting both under the same heading of "illegal duplication" may have certain adverse effects on the legal clarity of the issues involved.

A simple act of sharing media files, which embody certain musical works in the form of sound recordings, without the permission of relevant copyright owners, is certainly an infringing act – but not an infringement of the right of reproduction. It is the right to communication to the public, namely, an exclusive right to make the copies of work available to the public, which is being infringed. Accordingly, it will be considered in more detail below, under the corresponding heading.

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[89] At 3.5.1, pp. 25-26.
[90] http://www.riaa.com/Music-Rules-2-FAQ.cfm.
[91] *Ibid*.
[92] This can be a useful tool for fans of certain musicians, who wish to promote the latter by spreading his/her music online for a large amount of users.

3.5.2.3.3 Downloads

Finally, downloading the media files from another user in file-sharing networks or from the website is the easiest case to classify, and should not raise any theoretical difficulties as to its qualification as unauthorized duplication of the musical work embodied in a sound recording. The perfect digital copy of the media file is made and stored on the hard drive of the computer, thus turning such act into direct copying of a musical work from another person. There is, correspondingly, no authorisation from the copyright owners. Therefore, the reproduction right, under classical copyright doctrine, is undoubtedly infringed.

3.5.3 Distribution rights

In fact, P2P file-sharing networks, regardless the fact whether they are centralized or fully distributed, are distributing an enormous amount of media files with embodied musical works in the form of sound recordings. The process of file distribution is, as a matter of rule, carried out without any authorization of either of the copyright holders. By analogy with the above arguments in the case of reproduction of musical works, it can be argued that such distribution almost certainly infringes the exclusive rights of authors and producers of sound recordings. However, this question is more complicated than it seems at a glance, since the issue of applicability of distribution rights to computer networks raises serious problems at international and regional levels. During the negotiations on the WIPO Copyright Treaty, the majority of delegations present refused the proposal to stretch the concept of "distribution" from tangible methods of distribution, involving tangible assets, to the digital environment.[93] This approach found its expression in the Agreed Statement concerning Articles 6 and 7 of the Treaty, which upheld that "as used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution … under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects".[94] The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 "On the harmonisation of certain aspects of copyright and related rights in the information society" follows the same logic.[95] Although it can be tempting to go further and elaborate on theoretical implications of the right to distribution in the environment of file-sharing networks, it seems more appropriate, for the reasons of coherency of current chapter, to omit this issue in a forthcoming human rights analysis.

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[93] Makeen, p. 286.
[94] Source: http://www.wipo.int/treaties/ip/wct/statements.html.
[95] Recital 28 of the Directive states that "copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a *tangible* article" (emphasis added).

3.5.4 Rental and lending rights

The picture is equally complicated with regard to rental or lending rights. The right to rental seems not be in fact infringed by file trading on P2P networks, since the media files are shared and downloaded without any costs related to the amount, quality or types of music downloads[96], and, what is most important, without any payment for the service. File-sharing software, in its turn, is usually readily available for free download. Thus, the requirement for the existence of "commercial advantage" is not satisfied.[97] In addition, there is at least a pronouncement on a universal level as to the inapplicability of, at least, rental rights in a digital environment, embodied in the Agreed Statement concerning Articles 6 and 7 of the WIPO Copyright Treaty[98].

Infringement of lending rights is more difficult to qualify. It is to be noted that lending rights are not so far recognized internationally, but are in fact effective on the level of the European Union[99], which led to incorporation of EC law into the legislation of the EU Members.[100] For example, the Copyright, Designs and Patents Act of the United Kingdom (1988), section 18A (2)(b) provides:

"… "lending" means making a copy of the work available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public. … "[101]

Therefore, lending is considered to be an exclusive right of copyright owner in musical work or sound recording, if it is done "through an establishment which is accessible to the public" and does not represent a private loan between private individuals.[102] It can be questioned, whether peer-to-peer networks actually represent "an establishment which is accessible to the public" or are to be considered as means of private contact between two individuals – a person who shares the digital copy of the musical work and a person who downloads it. Although the search for any relevant answer of

[96] Except for having a computer with Internet connection, which is clearly outside the degree of responsibility of file-sharing networks and is more an obvious matter of fact rather than legal requirement.
[97] See above, at 3.1, p. 22.
[98] "As used in these Articles, the expressions "copies" and "original and copies," being subject to … the right to rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects". Source: http://www.wipo.int/treaties/ip/wct/statements.html.
[99] European Union Rental Rights Directive, cited at Bently & Sherman, p. 133.
[100] Bently & Sherman, p. 133.
[101] http://www.jenkins-ip.com/patlaw/cdpa1.htm#s18A. This definition is copied from the EU Rental Rights Directive, as noted above, with the exception of the words "for a limited time", which meant that the loan should in fact occur within a specific period of time. This distinction is crucially important. It means the UK law, as opposed to the language of the EU Directive, is in fact allowing for a vague and therefore indefinitely long-time term of lending.
[102] Bently & Sherman, pp. 132-133.

this controversy has been fruitless, I presume that the answers to the question will differ depending on the type of network involved. In Napster-styled networks, with the central searchable database of digital media files, the answer would be that lending rights of the copyright owner in the musical works or sound recordings can be theoretically infringed, since such service is although "virtual", but anyway "an establishment … accessible to the public"[103] through Internet connection. However, the answer in case of, for example, Morpheus, KaZaa or other Gnutella-styled P2P networks is not so straightforward. It can be, in my opinion, rightly argued that file-sharing on such completely distributed networks represents, technically, a private contact between two individuals or a group of users through the use of search-and-download Internet applications. Therefore, such P2P networks, in general, are not "accessible to the public" at large; rather, they represent a net of isolated bilateral or multilateral contacts between individuals with the aim of sharing and downloading the files available at their individual hard drives. Comparison to email services comes to mind again.

Examining the possibility of existence of practice of lending on file-sharing networks, we should not be, at the same time, blind to the core legal meaning of the term "lending", which means "to part with a thing of value to another for a time fixed or indefinite, yet to have some time in ending, to be used or enjoyed by that other; the thing itself or the equivalent of it *to be given back* at the time fixed, or when lawfully asked for, with or without compensation for the use as may be agreed upon".[104] This means that lent musical work should be *returned* to the rightful owner after use or enjoyment of work; file-sharing, on the other hand, takes the form of *copying* the original media file to the end-user's hard drive. The downloaded file does not need to return to the first owner, because the latter still has it. As noted above,[105] the digital copying is a perfect process, where it is technically impossible to find *any* difference between original and copied file. Therefore, it is highly questionable, even in centralized peer-to-peer networks, that lending of musical works actually occurs. The situation could have been significantly different, if the music has been in a streaming format (which brings it closer to the web broadcasting, so-called "webcasting") or that the copied media file would contain a certain encryption, which would enable the file to delete itself automatically after passage of certain period of time. However, to my knowledge, such P2P networks are not in existence, at least for the time being.

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[103] "Public" in this context does not necessarily mean the general public or society at large; in file-sharing networks, the net of users having an unlimited access to music files, with a number of such users reaching tens of millions, does in itself fall within a notion of "public". On reworking of the concept of public in a digital environment, see Ysolde Gendreau, *Intention and Copyright*, at "Perspectives on Intellectual Property, Volume 5: The Internet and Author's Rights", Sweet & Maxwell 1999, pp. 18-19

[104] *Black's Law Dictionary*, sixth edition, West Publishing Co. 1990, p. 901 (emphasis added).

[105] At 3.5.1, p. 25.

As a conclusion, the existence of practice of lending of musical works on the P2P networks is, at best, a controversial issue. Since actual copying of the media files takes place, it would be more logical to argue that the files are not being "lent" but rather reproduced or made available to the public; this means that the lending rights' infringement action would be groundless in the case of online trading of musical works. Hence, this topic will not be revisited in forthcoming human rights analysis.

3.5.5 Communication rights

The right to communication, in its contemporary understanding, is undoubtedly an answer to the technological challenges to the copyright posed by the Internet; accordingly, it has been recognized only recently, namely in the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, both adopted in 1996. Although the right to communication to the public was partially recognized in Berne Convention, in Article 11^{bis}, it was not meant at the time to embrace Internet technologies.[106]

There is a slight difference between the texts of two Treaties, where they confer the rights respectively on authors of musical works and producers of sound recordings: authors' exclusive rights to authorise "any communication" is secured, while the producers of sound recordings are granted the right simply to authorise making of their recordings available to public. Regardless this difference, they basically confirm that both categories of copyright owners have the same degree of exclusive control over the flow of their respective works on the Internet ("by wire or wireless means").

The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 "On the harmonisation of certain aspects of copyright and related rights in the information society", in Article 3, also confers the rights upon the authors of the musical works and producers of sound recordings by closely following the texts of WCT and WPPT. Recital 25 to the Directive further explains that the communication to the public should take the form of "on-demand transmissions".

There are several instances where the right to communication to the public can be infringed on the file-sharing networks. One example, already noted above,[107] is placing online the hyperlink to the media file available at the hard drive or another website, on the condition that such file (or files) is available online temporarily.[108] In such case, we should determine whether

[106] Makeen, p. 290.
[107] At 3.5.2.3.1, pp. 29-30.
[108] In case of permanent online availability of such file, even though it stays at the individual hard drive, there will be no practical difference between such linking and actual uploading of the file on the personal website (i.e. on the online server of the web-space provider).

"members of the public may access these works from a place and at a time individually chosen by them". Such formulation undoubtedly puts the burden of searching on the Internet users wishing to access such work; in this case, it does not matter that the owner of the website makes file available only for his/her personal use or for the narrow circle of friends.[109] Free availability of powerful search engines, which can display thousands of responses on the Net in a matter of second, makes the defence of "private use" or "private copying" even more unconvincing. Therefore, the infringement of the right to communication to the public in case of hyper-linking can be established.

Second case of possible infringement of the communication rights, also mentioned above,[110] is "pure" file-sharing in P2P networks, whereas the persons make media files, stored at their computers' hard drives, available to the users of the network, without the further intention to download the files from other users. This case is very close to the one discussed above, namely, placing hyperlinks to the media files on the personal website; the differences that exist – there is actually no personal website, but just a shared folder on an individual hard drive with media files in it – do not make it radically different from the copyright law perspective, however. Assuming that the intra-network users' community does constitute a "public",[111] it is rather easy to conclude that acts of "pure" file-sharing amount to infringement of the right of communication to the public, held both by author of musical work and the producer of sound recording.

It should be also noted that the digital environment is capable of blurring the distinction between the acts of reproduction and communication to the public, as well as related concepts of rights and infringements.[112] Nevertheless, certain acts, as demonstrated above, can be singled out to establish an infringement of either of the rights involved, which makes the life of the lawyers, judges and finally us, students, a little bit easier.

3.6 Human rights online

3.6.1 Introduction

The copyrights in the musical works and file trading on peer-to-peer networks have been at the heart of recent "copyright wars" in various US courts. Several groundbreaking and precedent-setting judgments have been

[109] Several cases in French courts can be indicative of this argument, for example, the decision of Paris Court of first instance in *Brel* and *Sardou* cases, where the court confirmed that the availability of copyrighted works on the personal websites of the defendants "encourage[s] the *collective use* of their reproductions", cited at Jérôme Passa, *The Protection of Copyright on the Internet under French Law*, p. 39.
[110] At 3.5.2.3.1, pp. 29-30.
[111] Note that both WCT and WPPT, as well as Directive 2001/29/EC speak about "members of the public" rather than "public" as such..
[112] Makeen, p. 292.

handed down.[113] While the court copyright battles are not anymore hitting news headlines, as they did a couple of years ago, they certainly are far from the final completion. It may take several years before all the issues will be answered clearly and authoritatively.

Despite this fact, several guiding principles can be extracted from those judgments. First of all, they confirmed that, in general, sharing and downloading of copyrighted music on the Internet is a copyright infringement, committed by, at least, individual users.[114] Secondly, the fair use defences in such cases were subject to an unusually strict test, in which the judicial branch blindly relied on the "wisdom" of the legislative branch, which extended copyright protection on account of public domain resources.[115] However, no serious discussion on relevant human rights has been initiated by the defendants, which is quite surprising, since a successful trial defence strategy requires pursuing all possible avenues, unless denied by the court of law. Except rather half-hearted attempts to introduce First Amendment challenges to the constitutionality of certain measures and orders, rather obvious (for me personally) human rights arguments did not appear before the court.

In modern jurisprudence, there is a widely recognized trend of penetration of human rights into each and every sphere of law, wherever they may be applicable. This of course does not guarantee the immediate success in all relevant or irrelevant proceedings; rather, the balance can be tilted more easily towards the party in the proceedings, which invokes human rights considerations for the purposes of prosecution or defence. However, the reasonability should also play its role: the human rights cannot be simply stretched beyond the limits they impose by themselves.

The reluctance to introduce the human rights considerations before the courts in "copyright wars", perhaps, was the intentional strategy of defence counsels, who should have realistically evaluated the thinking of the judiciary of a specific forum where those battles took place. The United States is generally opposed to the modern concept of indivisibility of human rights, and thus does not recognize the economic, social and cultural rights as legally enforceable. The "second generation" thinking, despite universal

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[113] A line of judgments in *Napster* case, most importantly *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litigation*, United States District Court for the District of Illinois, 04.09.2002; *Atlantic Recording Corporation et al v. Daniel Peng*, District Court of New Jersey, civil no. 03-1441, 03.04.2003; *RIAA v. Verzion Internet Services*, District Court for the District of Columbia, 24.04.2003; *MGM Studios Inc, et. al. v. Grokster*, California District Court, 25.04.2003, and several others.

[114] The most recent *Grokster* judgment recognized that provision of services by fully distributed Gnutella-style networks does not attract copyright infringement liability on account of service providers; at the same time, individual users are not shielded from direct liability for copyright infringement on such networks - *MGM Studios Inc, et. al. v. Grokster*, California District Court, 25.04.2003.

[115] The trend, recently confirmed by the Supreme Court of the United States: "… The wisdom of Congress' action, however, is not within our province to second guess…", *Eldred v. Ashcroft*, 537 U.S. (2003), p. 32.

consensus to the contrary, embodied in the Vienna Declaration and Plan of Action of 1993, is still strong in the United States. However, purely strategic reasons do not save these arguments, since, in addition to "second" and even "third generation" rights, such "classical" human rights as privacy, non-discrimination, freedom of expression[116] and presumption of innocence are being affected by the process of adjudication on those seemingly private law issues.

The general human rights understanding of copyright and its common implications were already discussed above.[117] I am personally convinced that the human rights approach to the intellectual property in general and, in this particular case, to the copyright protection in the music industry, is very valuable, as much as it manages to exercise very careful and balanced approach to the interests at stake. It does so, on the one hand, through paying equal share to the author, by granting him/her the right to remuneration for his/her creation as a manifestation of one's human dignity, and, on the other, through benefiting society at large, by ensuring that the final aim of copyright protection is contribution to the cultural development of the general public. With those conclusions in hand, we proceed to the current analysis of the forgotten human rights dimensions in the recent expansions of copyright protection in music industry.

3.6.2 Authorship in human rights perspective

The interesting debate has been raised by the defendants' motion for a stay in Napster case, which argued that corporate plaintiffs, representing mostly the Big Ones of the music industry, did not actually *own* the copyrights they were going to enforce.[118] The main strategy, chosen to demonstrate that the suing companies lack authorship of the musical works that they deem to be infringed, was to indicate the inconsistencies in copyright certificates granted to those corporations. Another point made was that the musical works made by the musicians on corporate artist roster were not "works for hire" and were not properly assigned to the record labels. Thus, only procedural issues were raised, which finally led to the partial grant of the motion to stay by the court.[119] To my personal belief, the human rights approach to the issues involved could have significantly helped the Napster lawyers to obtain a full motion for a stay in this case and may even have changed the course of the proceedings into the opposite channel.

Both human rights instruments that contain references to copyright, namely, UDHR and ICESCR, emphasise that it is the *author* who has the right to reap material benefits from his/her intellectual creation. It is hard to presume that the original intention of the drafters of both UDHR and ICESCR was to grant this right – as a human right - to *legal persons*.

[116] See below, Chapter 6.
[117] See above, at 2.3.
[118] *In re Napster, Inc. Copyright Litigation*, 191 F. Supp. 2d 1087 (N.D. Cal. 2002).
[119] *Ibid*, p. 29.

Human rights weren't and, arguably, still aren't thought as being rights attached to legal persons, except for a number of clear-cut cases or even theoretical assumptions, many of which had been untested in practice.[120] Applying such line of interpretation, it is hardly presumable that the corporations, as legal persons, and especially such huge multinational conglomerates as Big Five, can claim that they actually posses, from the human rights point of view, copyrights in the musical works they publish and distribute; it is different to argue that they build their businesses on the copyright protection enjoyed by the author and perform purely economic functions for the production, distribution and public promotion of copyrighted works. The human rights approach to copyright thus invalidates their claim to the copyrights in the musical works.

Perhaps, the honest argument on behalf of the music industry would have been that its exclusive economic interests deriving from copyright monopolies, rather than the *music* itself, are put at stake by the use of file-sharing technologies. But if it comes to copyrights, it should be authors, as classical human rights approach requires, who have the last say as to authorise the use and sharing of their works.

3.6.3 Public domain and human rights

Although all of important online file-trading cases were heard in the United States courts, the different courts reached different conclusions and the general picture right now is, to my opinion, quite confusing. Nevertheless, one troubling similarity that underlines these judgements is the blind belief with which the courts felt themselves compelled to uphold the protection of *copyright interests* of the music industry, which was largely represented by the Big Ones and their loyal RIAA attorneys. I emphasise the statement about *copyright interests* because I respectfully disagree with this particular aspect of the delivered judgments. Instead of upholding the careful balance that is struck between the private interests of the copyright holders and the interest of public at large, the courts went on the leash of controversial domestic legislation,[121] and effectively stretched the copyright protection onto the territories that lingered in the public domain for a long time. This authorises the private corporations to stake the territories that originally represented the common cultural property.

It is relatively easy to establish the human rights support for the existence of the public domain, since the final aim of the human rights pronouncements on intellectual property rights, as already discussed above, is to ensure the flow of useful and creative information to the public. This is not to say, however, that in case of the conflict between private and public interests in intellectual property, the latter should always prevail. What is required is rather a careful balancing of interests, which would not fail to recognize the

[120] For the debate on the human rights of legal persons, see above, at 2.2.5, pp. 9-11.
[121] WCT, WPPT, TRIPS, and EU Directive on Information Society, as discussed above.

interest of both private individuals (protection of their dignity by rewarding for their intellectual creations) and the general public (free flow of information and cultural development). It seems that, however, that such balancing of interests has not been done in the latest judgments on the issues of online piracy, in which the courts afforded high priority to private commercial interests of large actors in copyright industry over considerations of public good.

3.6.4 File-sharing networks as digital libraries and fair use – a right to cultural development?

Following the line of argument in the preceding sub-chapter, where the main aim of copyright - to serve the final aim of enriching cultural development of the general public - is argued, there is one particularly interesting aspect of "copyright wars", which deserves closer consideration here.

The fair use doctrine, either in common law or in continental systems, recognizes one important exception from the copyright monopoly, namely, the library use.[122] The library use attracts the right to perform a number of acts with regard to the copyrighted work without the prior permission by the initial copyright owner, namely, to make copies for research or private study, lend the works for non-profit purposes and make a number of reproductions for inter-library use.[123] Although it is recognized that libraries should be "prescribed, non-profit" public institutions,[124] the modern technologies can challenge such presumption as being an out-dated and nostalgic reflection of the brick-and-mortar world. Indeed, today the Internet is regarded as the biggest and most exhaustive library in the world, and the absence of the physical "librarian" should not lead us to the conclusions on the contrary – in the digital environment, such librarian is simply not needed. The Internet is the most widely used reference tool for both private and academic research, and with the rapidly growing amount of distance-learning courses also establishes itself as a quasi-educational institution.

If we were to realistically suppose that centralized file-sharing networks of Napster keen can be regarded as digital libraries of the media files (although not "prescribed" officially), the human rights approach to intellectual property gives additional support for the existence of practice of file-sharing in such networks. Indeed, the wording of Article 27 of the UDHR provides for the right of "everyone to freely participate in the cultural life of the community, to enjoy the arts and *to share* in scientific advancement and its benefits". Given the assumption that "sharing in scientific advancement" is a human righ, it is to be percieved that practice of unauthorised leding of the

[122] Bently & Sherman, pp. 211-212.
[123] *Ibid.*
[124] *Ibid.*

copyrighted copies of various cultural works to individual users in public libraries is aimed at the realization of the aim of "overall" participation in the cultural life. However, the Internet boosts such participation beyond imaginary limits, allowing the users of P2P networks, in particualr, to *share* the scinetific (i.e. digital technology) advancements and, with their help, to disseminate the cultural items, which can include not only musical works, but also their own litrary and artistic works. Though it is understandably controversial to elevate the decentralised or even centralised netowrks of peer-to-peer users in a largely unregulated Internet cyberspace to a level of conventional libraries and extending to them the fair use limitations granted to the latter, one point should be always borne in mind. Putting aside the copyright law arguments as to the legality or illegality of file-sharing, the file-sharing technology has enabled hundreds of millions of individuals to access and enjoy the works that they presumably could not enjoy if forced to pay for it; the cultural advacement is thus taking place on an unprecedented scale, regardless of nationality, ethnic origin, race, sex or other distictive factors.

3.6.5 The reversal of "incentives theory" - human rights support

The most disturbing trend in *A&M v. Napster* and *RIAA v. Verzion* was the blind faith of the judges that sided with the music industry on the assumption that, by enforcing the strict rules of copyright protection on the Internet, they were actually protecting "music". It is sad but absolutely necessary to acknowledge that gone are the days when the *music industry* really represented *music*. The incentives to create do not find their expression in final remuneration, the lion share of which musicians actually never see. The courts thus followed the logic of "mechanic manufacturing" of music, while not paying well-deserved attention to the creative process, which is supposed to benefit the public more than conveyor production of material copies of sound recordings. It is very logical that authors create music because they want their message to be heard, rather than for making some more money (although having some wouldn't be bad).[125] This argument, though copyright is supposed to be "content-neutral", puts under question the justification for music, the sole purpose of which is to generate maximum profit through CD sales and top-chart positions.

It seems almost ironic to argue that Napster and the rest of online file-sharing gang, extensively labelled as "pirates" and "thieves", were and are actually upholding the human rights understanding of the copyright regime. More ironic is to recognize that this may be true. By providing the environment where artists can approach the end listeners directly, offer them to "taste" their work, and to convince them that purchasing the product which contains the musical work is necessary for the full enjoyment of the intellectual creation, leads to the creation of nearly perfect intellectual

[125] An interesting statement in this regard by Josh Silver, a keyboard player in the popular American rock band Type O Negative, at http://www.typeonegative.net/likm/dream.html.

property marketplace. On such market, sharing and wide distribution of media files carrying the original musical work, rather than being "theft", is strengthening the dignity of the authors and assuring, at the same time, certain degree of "quality control" through tough competition, which sorts out the works that deserve to be enjoyed, thus finally enriching the cultural life of the society. The composers, logically, are not supposed to be the automatic breeders of standard top-selling hits – they are supposed to express fully their creativity, benefiting the society by their talent.

The environment of digital networks has challenged the usual economic assumptions of incentives as justification for copyright protection.[126] Paradoxically, the "incentives" argument is no more the main justification for the creative activity of authors. Rather these are the incentives of *producers* and *distributors*, who claim to be granted the most protection, since the circulation of perfect digital copies in the file-sharing networks harms the market of tangible fixations of sound recordings.[127] And, since contemporary digital technologies offer the authors an opportunity to produce their own high-quality sound recordings at low cost[128] and file-sharing networks – to distribute (communicate) such recordings in digital format at no cost[129], the authors of musical works are given a direct contact with their potential customers. Moreover, it is becoming common understanding – among musicians themselves – that days when the material fixations of musical works were the main source of income for the artists, are gone. The role of sound recordings, therefore, shifted towards promotional items (merchandise) and attraction of public to live performances.[130]

One remark, summarising the points made above from the perspective of musicians themselves, is particularly interesting in this regard:

" … **Question**: The promo that Earache [the recording label – *note by the author*] sent out is copy-protected. You can't even play it on a PC CD drive. Is the band worried about mp3s?

Answer: Not at all! The whole thing played out as we suspected; immediately after the promo was sent out, MP3s were on the Internet. We think it's just another way to distribute our music. And, what the band and label has realized is that the metal crowd is an enthusiastic collector crowd. The metal fan will buy the music because they want the booklet. So, now, it becomes our duty to make the packaging as cool and extensive as possible for them. I think the people that are really hurt are the Christina Aguilera's of the world. There are only one or two big songs on the album, so people download those and don't buy the album. I mean, do you know

[126] See above, at 3.2, pp. 19-20.
[127] Raymond Shih Ray Ku, *Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, published at the University of Chicago Law Review 2002, p. 299.
[128] *Ibid*, p. 306.
[129] *Ibid*, p. 300.
[130] Ibid. pp. 308-310; see also David Maizenberg, *The Cultural Future of Copyright Monopolies*, available online at http://practice.findlaw.com/feature-0503.html.

anyone who has a complete Aguillera album? Like the Stuck Mojo shirt says, "Friends don't let friends listen to Puff Daddy" (laughs)… "[131]

By analogy with the above sub-chapter, the reversal of "incentives" theory is fully consistent with human rights obligations flowing from the Articles 27 and 15 of the UDHR and ICESCR, respectively. It was already discussed how those provisions place *author's* interests at the centre of legal protection. As illustrated above, however, the classical economic "incentives" theory, with the arrival of digital environment of direct artist-consumer contacts, is no more representative of the interests of the *author* of the musical work. Instead, such "incentives" arguments are meant to protect the financial interests of producers and distributors of sound recordings, who are moreover corporate entities[132] and use (or misuse) their marketing power to create a certain monopoly in the music business.[133] Therefore, the "incentives" theory, in the modern digital environment, is no more valid to justify the continued expansion of the copyright protection.

3.6.6 Promoting inequality and discrimination

One of the issues that "copyright wars" revived and exposed was the fact that artists did not become much poorer because of the online piracy. The producers of sound recording, the big corporate actors in copyright business were the ones who were losing profits. This partially explains the reasons why the Big Ones and RIAA were and are the ones who make the most resounding claims against the online pirates, while musicians, in the best case, are mildly supportive or neutral in giving their blessings for legal actions.

Several lawsuits, testimonials before the legislative bodies and media battles also indicated that musicians are not very happy with what they are getting from their record labels. Sheryl Crow,[134] Bing Crosby,[135] Courtney Love,[136] Dixie Chicks[137] and other top-selling artists are certainly not satisfied by royalties that they are getting from their well-established labels, all of them owned by the Big Ones. Although the unfair contracting practice of Big Ones is to be discussed in greater detail below, in Chapter 4, it is to be noted that the existence of fraudulent practices of not paying artists what they deserve adds more strength to the arguments made against the concentration of bargaining power in the hands of the Big Ones. The human rights approach, by striking the balance between the material interests of authors

[131] A fragment of the interview with Marco Aro, vocalist of the popular Swedish metal band The Haunted; source http://www.digitalmetal.com/interviews.asp?iID=3888.
[132] Again, human rights of corporations come to mind. In the context of this analysis, I already illustrated that it is not possible for legal entities to claim possession of certain human rights, except some clear-cut and narrowly defined cases.
[133] More extensively on monopoly of the Big Ones in music industry, see below, chapter 5.
[134] http://www.house.gov/judiciary/crow0525.htm.
[135] http://news.bbc.co.uk/1/hi/entertainment/music/1606190.stm.
[136] http://www.eonline.com/News/Items/0,1,7885,00.html.
[137] http://news.bbc.co.uk/2/hi/entertainment/1514747.stm.

of musical works versus the public interest, is irreconcilable with the position that such bargaining shifts into another, private domain, namely, between the artists and the corporate giants of the music industry. Sheer inequality and ensuing discrimination between established artists and newcomers that are inevitable consequences of such bargaining, are possibly of the gravity to violate the international human rights norms on non-discrimination, as embodied in Article 26 of the ICCPR.

Digital technology and the Internet can greatly help to return the aforesaid balance into its rightful and natural place. By providing the environment, where the artists can contact their customers directly and distribute their works electronically as wide as they never could, bring the tool of control and power back to the creators of the musical works, regardless their established or beginner's status. Facing the threat that the musicians, by having such tool of control, will be able to give the consent for the digital communication of their works to the public for no costs, for the attraction of much more valuable live performance audience and merchandise distribution, the Big Ones can be undoubtedly less selective and discriminative in their relations with the artists. It means, for the sake of argument, that the existence of file-sharing networks can be a strong case for the prevention of discrimination.

3.6.7 Fair use, presumption of innocence and privacy

The music industry makes extensive arguments that MP3 technology, resulting in enormous unauthorised reproduction of copyrighted works on the Net, had significantly hurt CD sales and gravely endangered the music industry.[138] The District Court in *A&M v. Napster* seemed to be fully convinced by this argument. However, it is equally argued in response that simply the modern music, especially produced by the Majors, is becoming very standard and flat, thus creating less interest and demand from the public. Other factors, such as general recess of US and world economy, filling out of the CD collections of classics, used to replace old vinyl collections, challenge of music by other forms of entertainment (PC games, DVDs and movies) are not given due consideration; instead, the music industry prefers demonising the file-sharing networks for all ills that are happening. An "image of the enemy" is actively promoted and seems to be a significant impact on the judiciary.

The logical follow up of such hard line of argument has been to prohibit any software of the kind which is used to share files (completely disregarding the possibility of their fair use) and, after extensive lobbying, such prohibition has found its way at least into American legislation, namely, the controversial Digital Millennium Copyright Act of 1998 (DMCA), which prohibits circumvention of the technologies that effectively control access to

[138] See IFPI Music Piracy Report 2002, pp. 9-10, available online at www.ifpi.org,

copyrighted work.[139] This means that the development and use of such technology attracts criminal responsibility, without prior determination as to its infringing or non-infringing use.[140]

From the classical copyright law perspective, such strict rules of liability, without leaving any room for non-infringing use of digital communication technologies (file-sharing applications squarely falling within this category) are to eliminate the long-established defence of "fair use" in copyright proceedings with regard to file-sharing networks. This raised strong concern of certain citizens' groups in the United States, who feel that it deprives the public of certain rights it possessed with regard to copyrighted works and gives it to "publishers".[141]

I am of the opinion that, along with the fair use defence concerns, no lees important human rights concerns are involved in the attempts by the music industry to enforce the "net" ban on sharing technologies. One of the often invisible but absolutely fundamental human rights, namely, the presumption of innocence, is endangered.

The presumption of innocence, expressed in UDHR,[142] ICCPR[143] and recognized as a part of customary international human rights law, and forming, moreover, the "core" of human rights protection, presupposes that no one is to be presumed guilty before the court of law for committing a criminal offence, unless proven so in accordance with all indispensable judicial guarantees. However, as much as music industry, represented by RIAA, is taking its own measures to fight against file-sharing software applications[144] and, as a result, taking justice in its own hands by calling for hacking of the computers of suspected "offenders" and by preparing to plant damaging software on their computers,[145] the presumption of innocence is as relevant as never.

Human rights understanding of this issue, apart from "fair use" argument, is especially helpful for the developers and users of digital communication technologies to defend their rights. As already demonstrated, the file-sharing technology, especially Gnutella-style decentralised networks, has substantial non-infringing use.[146] Developers and users of such software, as presumption of innocence requires, should not be presumed to be guilty of

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[139] U.S.C. § 1201, (a) (1) (A); source: http://www.copyright.gov/title17/92chap12.html.
[140] For the critique of this aspect of DMCA, see Hiba Modar Al-Bitar, Nicola Bottero and Francesca Crosetti, *The WIPO Copyright Treaty and its implementation*, Collection of research Papers from Post-Graduate Specialization Course on Intellectual Property, WIPO 2000, pp. 145-146.
[141] http://www.petitiononline.com/nixdmca/petition.html.
[142] Article 11.
[143] Article 14(2).
[144] See for example http://www.wired.com/news/conflict/0,2100,47552,00.html., also http://news.com.com/2100-1023-946316.html.
[145] http://www.zeropaid.com/news/articles/auto/01142003d.php.
[146] *See MGM Studios v. Grokster*, US District Court of California, 25.04.2003 (non-paginated version).

the crime of infringement, until found so by the court of law in accordance with the principles of fair trial.

The aforementioned efforts and technologies for "legal" hacking of users' personal computers tend to be at odds with one more classical human right of fundamental importance, namely, the right to privacy.[147] The application of such technologies will greatly endanger the privacy of the individual users, as much as many of the file-encryption systems and destructive software are not only capable to be non-discriminative in the process of destruction of media files stored on a hard drive of a personal computer, but also to enable the owners of the copyright to effectively plant some "spy" software and observe the customer behaviour. With the increasing use of Internet for everyday purposes, such as business, online shopping, personal communications and research, the right to privacy, being a fundamental right, requires the copyright owners and enforcers to take very careful approach in avoiding unlawful and unconstitutional interference with persons' privacy in the course of their lawful activities.

3.6.8 Developing countries and the right to development

Finally, it is to be noted that there is a sense of certain "centrism" in the arguments put forward by the music industry in its fight against the free circulation of copyrighted works over the Internet. The industry majors and, seemingly, the courts tend to forget one unique feature of the Internet: it is universal and recognizes no national frontiers. Therefore, they see the music market from the perspective of developed countries exclusively, where the normal individual economic actor is supposed to have enough financial resources to pay for the sound recordings, which they otherwise download for free. Even given all the strains and controversies of such approach, the reality in the developing world is certainly different.

As already noted above, the Internet and file-sharing networks facilitated the spread of knowledge and culture on a scale that was never possible before, at virtually no cost. And, certainly, an overwhelming majority of the inhabitants of the developing countries are unable to purchase the CDs that, as Chapter 5 will attempt to illustrate in more detail, are overpriced due to unlawful monopoly held by the Big Ones in the music business. Therefore, the only possible way to "enjoy cultural life" in the developing world is to download the music for free from the Internet.[148] Accordingly, the decisions

[147] Recognized, on the universal level, in UDHR, Art. 12 and ICCPR, Art. 17, and by all regional human rights systems.

[148] It should be noted that for the most of the developing world downloading music is not entirely free: availability of computer with Internet connection is a prerequisite. However, as the prices for the computer hardware and software continue to fall, and many educational and non-profit institutions in the Third World begin the practice of provision of free access to the Internet, not to mention broadband-connection Internet cafes, such material prerequisites do not constitute a serious impediment anymore.

taken in the developed world and shutting down of online P2P networks seriously affects access of developing world to the global culture.

The right to development, being a "third-generation" right, has been recognized so far in one universal document, namely, Declaration on the Right to Development, adopted by the UN General Assembly resolution 41/128 of 4 December 1986. Article 1 of the Declaration states:

"… The right to development is *an inalienable human right* by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, *cultural* and political development, in which all human rights and fundamental freedoms can be fully realized. …"

The right to development has not been yet recognized by any binding international treaty, thus putting it on a lower status that "classical" or even "second generation" rights. Thus, the problems with its judicial enforcement are inevitable. Nevertheless, though it is hard to presume that the industry and the courts would be concerned with taking into account the needs of the people living outside the borders of the forum State, still, adding such aspect to ongoing "copyright wars" can provide for more cautious and balanced approach to the issues, since the interests involved in the particular case can go far beyond the material interests of the music industry, artists and P2P network owners and operators.

3.6.9 Is the argument of "human rights of corporations" also applicable to copyrights?

As examined above, the struggle of music industry for maintaining its grip on copyright monopoly can involve several opposing human rights considerations and actually violate some of them. However, to pay the justice to the industry itself, we should examine, in the light of recent development in the field of Human Rights and Business, whether they posses certain human rights in the battle for copyright.

The question of possession of human rights by legal persons and especially multinational corporations (in this case – the Big Ones), as well as to the binding character of human rights norms for multinationals, has been already examined above.[149] Therefore, there is no need to go deeper into the questions of, for example, fair trial guarantees for multinationals (in our case – the Big Ones) or whether they are obliged to respect human rights in their daily activities, since the general conclusions reached in Chapter 2 are fully applicable to the specific circumstances of our case.

However, one issue of fundamental character deserves special attention in the light of the subject matter of current Chapter, namely, do really the Big

[149] See Chapter 2.2.4, pp. 8-9.

Ones, from the human rights perspective, possess the copyright in musical works done by artists they sign on their roster?

Although such question, put in this way, may appear over-strained, superficial and or even "futuristic", the reality of modern human rights jurisprudence of does not allow for dismissing the serious discussion on the issue. In the European context, for example, in the case of *Smith Kline and French Laboratories v. Netherlands* (application no. 12633/87, 4 October 1990), the former European Commission held that patent represents a "possession" in the sense of Protocol 1, Article 1.[150] It is important to note that the applicant in this case was a corporate person, moreover, a multinational; despite this fact, the Commission had no virtual problem to declare the case admissible, as it has strictly followed the wording of the Article 1, which grants the right "to peaceful enjoyment of … possessions" both to individuals and legal persons.

Therefore, if we extend the implications of this admissibility decision to the heart of our debate, it may seem reasonable to argue, by implication, that the companies - in our case, the Big Ones - can claim to possess the human right to copyright. The issue of the actual ownership of copyright in musical works, which was discussed above in the current chapter,[151] can be partially relevant here. As demonstrated above, the human right approach requires that *authors* of musical works own the copyrights in their creations. However, what is more relevant here, is the right to property, or at least, to "peaceful enjoyment of … possessions", with regard to *neighbouring* rights, namely, the copyright in the sound recording owned by the producer, which may very well be (as it is usually the case) a corporate entity. Therefore, in this sense, the human rights claim to the enjoyment of property can be absolutely valid, at least in the European context.

This puts a certain strain on the line of human rights considerations enumerated above, since there are no more "industry interests" involved, but another human right, which is partially recognized and legally enforceable. However, such balancing of human rights against each requires a very careful analysis of the values protected and involved. It is nearly impossible to predict the results of such balancing of legitimate interests on the level of the judiciary; what is possible at this stage, is to make some theoretical assumptions.

First of all, the human rights claim to the right to property should be accepted by the relevant court/tribunal. In the light of aforementioned *Smith Kline* decision, such claim predictably has a considerable degree of being successful the European system, with the obligatory character of the judgments of the European Court of Human Rights and the former European Commission, which, until recently, was a first-instance tribunal for the

[150] Cited at: Clare Ovey & Robin C.A. White, *Jacobs and White European Convention on Human Rights*, (third edition), Oxford University Press 2002, p. 303.
[151] At 3.6.2, pp. 37-38.

admissibility of cases. However, this may not be true in other contexts, namely, in the United States courts.[152]

Second aspect will inevitably arise, if the argument of "human rights of corporations" will be admitted in the case of copyrights. The fundamental character of rights involved, if presented correctly, will influence the balance of legitimate interests of parties. In the end, it is highly improbable that the courts will give a right to property, which is not a universally recognized right and is not binding on a State as a written treaty obligation, priority over such unquestionably fundamental rights, such as right to privacy, presumption of innocence and non-discrimination, backed up by a number of social and economic rights involved. However, much will depend on the degree of certainty of the relevant court/tribunal that such human rights concerns really exist and are applicable in the case of music industry; this inevitably places on defence (or prosecution) counsels a burden of proof of actual human rights violations or threat of such violation.

3.7 Conclusions

Summing up the aforesaid, it should be noted, first of all, that there exist several infringements of copyright on the Internet and in file-sharing networks. However, as much as the acts committed in the digital environment are complex and different in nature, they attract different types of infringement, namely, the right of reproduction in the case of uploading the media files to a personal website and downloading a file from such website or file-sharing network; and the right to communication to the public in case of hypertext links to media files on a hard drive or a third-party website and acts of "pure" sharing on peer-to-peer networks.

However, these infringements should not attract automatic civil or even criminal liability; rather, they should be balanced against certain human rights concerns, which are affected by ongoing "copyright wars". First of all, human rights understanding of copyright urges us to re-assess the notion of authorship in the musical work and, on the other had, opposes the extension of corporate copyright monopolies on the account of the public domain, which is actually made richer by the existence and use of file-sharing networks. Due to the fact that economic considerations for copyright monopolies have been seriously undermined by the digital environment, where artists can contact their listeners directly and, in theory, do not need the intermediary services of publishers and distributors – namely, the Big Ones – there is correspondingly a greater equality and non-discrimination between emerging and established artists, and this also improves a quality of cultural information flowing into the public domain.

[152] Stating that, we should however have in mind the recognition of the freedom of commercial speech as a freedom of expression of commercial enterprises (see above, at 2.25, p. 10) by the judiciary of the United States; it cannot be ruled out that the entitlement of corporations to property as a human right will be recognized with regard to intellectual property rights.

In addition, the “net” ban on file-communication technologies and recent threats by the music industry and its legal representatives to infect the file-sharing networks with “spy” and destructive software raise serious questions of the presumption of innocence for the developers and users of file-communication technologies, as well as a serious concern over the privacy on the Internet. Extending and enforcing corporate copyright monopolies can also adversely affect the right to cultural development of inhabitants of developing countries, who are obviously benefiting culturally from file-sharing technologies.

On the other hand, the Big Ones can claim possession of copyright in sound recordings, thus turning the copyright court proceedings into human rights trial; however, the degree of their success in such proceedings is questionable.

4 The Deal

4.1 Introduction

Regardless if you are an emerging or established artist wishing to enter big or small music business, you have to sign a form provided by the record label, known in a daily life as a contract. This contract is the source of rights and obligations between the artists and the company, and will play a major role in regulating any frictions between the parties.

Thanks to Napster and peer-to-peer networks, the ethical and legal validity of these contracts has resurfaced and became an object of public attention - although to a lesser degree than the file-sharing itself.

4.2 The contract

As a matter of rule, the recoding companies and labels they own are very secretive about their contracts with artists and try to cover them with the "confidentiality" exception.[153] Usually these documents are quite lengthy and include many obsolete clauses.[154] However, there are sample contracts available for free legal advice, and one of those, which I was able to download from the Internet, is reproduced in Supplement B. Although one would note that this is a contract form for the United States' recording artists, it can still serve as a source of guidance, since the US music industry is the biggest producer and exporter of musical works, and all of the disputes considered in this Chapter arouse on the basis of such contract.

There are many clauses in the recording contracts that deserve closer examination. However, I would like to draw a special attention, among many technical clauses, to the following: "Production" (1), "Assignment of exclusive rights by artist" (9), "Copyright" (12), "Royalties" (14), "Option to purchase" (18), "Right of Inspection" (22) and "Miscellaneous – Independent contractor" (23(f)).

4.2.1 Production

Under the heading "Production", the agreement between the artist and company expressly divides the "songs" (musical works composed and

[153] In the recent motion for stay in Napster case, *In re Napster Copyright Litigation*, United States District Court for Northern California, a contract with artist (Bruce Springsteen) and certificates of transfer of ownership were filed before the Court under seal. See respectively pp. 14 and 6 of the judgment.

[154] Source http://www.recordingartistscoalition.com/rip.html. On this website, the Recording Artists' Coalition states that recording contract can be so lengthy that it can make up to 80 pages of text.

performed by the artist) and the "recording" (the master tape of the sound recording). Therefore, the contract in the beginning maintains the long-established difference between the musical works and their fixations, i.e. the sound recordings; this is fully consistent with the classical copyright doctrine. It is therefore to be presumed that the exclusive rights, arising with regard of each of the items, are accordingly divided between the author of the musical work and the producer of the sound recording. However, as demonstrated further, this is not simply so.

4.2.2 Assignment of exclusive rights by artist

This provision states that, as soon as the recording is completed, the artist "assigns all of his/her rights, title, and interest" to the company with regard to his musical works, performance and titles of the songs.[155] This is rather surprising provision in the light of already noted "Production" clause (see above). What is the use of separating the concepts of musical works and sound recordings, if all the intellectual property rights in the former are anyway given away to the company? One possible answer can be that such assignment is temporary and the copyrights will return to the author after the expiration of contract. However, it is established that recording contracts are, by some strange twist of fate (or, more realistically, successful lobbying) exempted from the "seven-year rule"[156], effective in California where the most of the contracts are signed. It means that the contracts are effectively concluded for a lifetime. Additionally, the rights in the musical work do not return to the author after expiration of contract. Therefore, the "temporary" argument should be refused, and, perhaps, a "showcase" one introduced: sadly enough, the preceding clause on the division of the concepts of musical work and sound recording, attracting different authorship under classical copyright doctrine, is nothing more than a dead letter.

One thing should be noted, however. "All … rights, title, and interest" are assigned, as it is stated, for "distribution and commercial exploitation" of the musical work and sound recording. However, even such reservation fails to secure the necessary balance, since under the heading "commercial exploitation" can come any act in relation to the musical work or sound recording (reproduction, rental, lending, communication) which not only brings direct profit to the artist or a third party, but forms an act of non-

[155] Of course, the related (neighboring) rights in the sound recording itself are initially secured by the company as a producer of the sound recording and an exclusive owner of the master tapes.

[156] The "seven-year rule" is applicable in California for all personal services contracts, which means that the contract cannot be binding on parties for more than 7 years from its conclusion. When this legislation was introduced, the music industry lobbied for and obtained the exemption form seven-year rule. Source: http://www.recordingartistscoalition.com/rip.html, see also http://msl1.mit.edu/ESD10/docs/seven_year_02_billboard.pdf.

commercial character, which leads to loss of profits by the recording company.[157]

However, since moral rights cannot be assigned, the exclusive paternity and integrity protections stay permanently attached – at least in theory[158] – to the artist. "All" rights, therefore, cannot be assigned. This does not, despite all, bring necessary relief to artists, who, by virtue of this and other provisions, turn, to put it simply, into the full-time employees of the company for a lifetime, without any commercial control of the personal property they create "in the workplace".

4.2.3 Copyright

This unusually brief (in the light of the title) provision deals with obtaining copyrights (read: copyright certificates from the Library of Congress) of each and every song of the sound recording. However, the second sentence is more interesting: the copyrights in each song are deemed to be "the *sole property* of the Company". Therefore, this provision follows suite to the "Assignment" clause and effectively makes the company (the legal person, not to be forgotten) a sole owner of all copyrights in both musical work and sound recording.

4.2.4 Royalties

This clause is important in several respects. First of all, it assigns all collecting duties with regard to royalties[159] to the recording company. This means, in the spirit of the preceding clauses, confirmation for the switch of full control of commercial exploitation from artists to recording companies. Secondly, royalties are divided between the recording company and the artist – and, as much as these percentage rates are negotiated, much will depend on how established is the artist. Moreover, the artists' "piece of the royalties' cake" is meant to "satisfy costs incurred and paid by Company pursuant to Sections B.3, and B.6, herein". Section B.3 refers to production costs of the sound recording, and section B.6 refers to the costs paid to session musicians.[160] This means that the artist has to recover, in addition, all costs arising from the production of the sound recording, which is solely owned by the producer – the company itself! The resulting situation is even more bizarre in the light of artists' waiver of *all* rights related to the commercial exploitation of the work.

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[157] See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), sec. V(A).

[158] The refusal of moral rights theory in the United States has been already discussed above, at 2.3.5, p. 17.

[159] Royalties are explained as "any compensation received by Company, or promised to Company, which directly or indirectly results from the use, exploitation or existence of the Recording, or any reproduction applied" – please refer to Supplement B.

[160] These are musicians who are not the permanent members of the signed band, but merely assist in performing the songs for the sound recording.

4.2.5 Option to purchase

This is quite saddening clause, which leaves the "opportunity" for the musicians to "buy out" their copyrights in musical works they created and sound recordings for which they performed. An interesting provision is subparagraph (c), which requires, above all, the payment of percentage of revenues received form sales, and effectively leads to the creation of the "vicious circle": established artists who sell well and receive bigger revenues, are thus more capable to buy out their rights - but the more the revenues, more they have to pay; while other artists with poor sales and, accordingly, poor revenues, are practically in the same difficult position to buy out their rights as established ones. Debt slavery is a next step, one would comment.

4.2.6 Right of inspection

This clause gives the artists or their representative to conduct inspection on accuracy of financial statements by the recording company, particularly in respect of royalties. Although being a very welcomed approach, in reality such right is also a dead letter for the most of musicians. As Recording Artists' Coalition reports, only very few successful artists can afford costs of such inspection, amounting to about 5% of all artists signed.[161]

4.2.7 Independent contractor

Finally, in a bit of dark humour tradition, the contract solemnly affirms that the "Artist shall be deemed an independent contractor". While all of the cited provisions affirm the existence of factual full-time job – very poorly paid job, moreover - status of an artist, this provision makes an illusion that we have here is a mere provision of services. The word "independent", in the light of the whole contract, is therefore very questionable.

4.3 Recent disputes over unfair practices

Of course, the recording industry contracting practices – especially those of the Big Ones, who are responsible for the 90% of the music produced in the United States and around 80-85% worldwide – has not bypassed the attention of the recording artists themselves. However, surprisingly, it was not until "copyright wars", in which the challenge to the notion of "authorship by corporations" was challenged, that the signed artists began speaking out on the issue. For sure, all of them have signed the contract and many of them – with the help of the legal representative. Perhaps the new communication technologies in the end of 90's or recent corporate scandals have brought the issue of corporate fraud in the music industry on the surface.

[161] http://www.recordingartistscoalition.com/rip.html.

Pioneered by famous country artist Sheryl Crow and Don Henley, the Recording Artists' Coalition has been established. This non-profit organization, which suspiciously limits its membership to artists signed to "a label with national distribution that includes but is not limited to the top ten retail accounts in the U.S. at the time of release", claims to fight for the rights of artists and for the end of unfair contract practices of the major recoding companies.

On the wake of the Napster call, several lawsuits hit the Big Ones, namely ones by the heirs of the late legendary crooner Bing Crosby against Decca/Universal,[162] rock artist Courtney Love, also against Universal,[163] and country band Dixie Chicks against Sony Music.[164] All of the suits alleged the fraud on royalties from the recording companies, and provision of inaccurate statements. One of them, namely, Courtney Love lawsuit, ended in out-of-court settlement.

Nowadays, the main battle for fairness in music industry has concentrated on the seven-year rule exemption for the recording business. Negotiations have been held with the Big Five on account of various musicians' unions to repeal this rule,[165] also pursuing the road to more transparent royalties' accounting practices, which ultimately led to a major breakthrough, namely, the introduction of Copyright Royalty and Distribution Reform Act in Congress this year.[166]

4.4 Freedom of contract – a human right?

In a free market economy, the contract between individuals plays a crucial role. Correspondingly, one of the cornerstones of the modern contract law is the principle of the freedom of contract. The principle implies that everyone has the liberty to decide whether or not to enter into a binding agreement, to choose his/her contracting partner, and to determine the content of the legal obligation.[167]

The freedom of contract is sometimes regarded as a fundamental right, an argument partially supported by the Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, which provides for the "peaceful enjoyment of [one's] possessions", and, therefore, implies the right to contract freely in order to make this right,

[162] http://news.bbc.co.uk/1/hi/entertainment/music/1606190.stm.
[163] http://www.eonline.com/News/Items/0,1,7885,00.html.
[164] http://news.bbc.co.uk/2/hi/entertainment/1514747.stm.
[165] http://www.aftra.com/resources/negotiations2002/update110002.html.
[166] http://thomas.loc.gov/cgi-bin/query/F?c108:1:./temp/~c1088BVD2J:e875: This legislation provides for the appointment of Copyright Royalties Judge by the Librarian of Congress.
[167] Guibault, p. 115.

along other rights,[168] a reality.[169] Article 10 of the United States Constitution and Fourteenth Amendment have also been interpreted to afford constitutional protection to the freedom of contract.[170]

However, even if we elevate the freedom of contract to, at best, unrecognised human right of fundamental value, it is the right which often carries certain restrictions on its scope. One of such restrictions is a protective public order, the main purpose of which is to protect the weaker party of the contract, especially when a powerful party imposes an obligation with the use of the standard contract form (e.g., the recording contract).[171] One of the main protections granted to the weaker party of the agreement is the *contra proferentem* rule, under which the risk of ambiguity of the contract clause is placed on the party who drafted or imposed it, and the weaker party, accepting this obligation, is put in more favourable position.[172] Some European states, like France and Germany, have even drafted special legislation aimed at the protection of authors against their powerful publishers; French legislation imposes very strict criteria for contractual clarity and accountability on the publishers.[173] American judiciary, in contrast, is very reluctant to interfere into the private sphere of contracts between private persons.[174]

Therefore, the success of litigation questioning the validity of grossly restrictive and unfair contracts in the music industry will heavily depend, along with the factual circumstances of the case and terms of the contract itself, on the judicial forum where such case may be heard, namely, on the belief of such forum, as to how fundamental is the principle freedom of contract in such agreements.

4.5 Human rights dimensions

As argued above, the human rights approach to intellectual property rights, in this particular case – in the music industry, can significantly challenge the validity of seemingly established norms and judicial support for the copyright monopolies' expansion. Therefore, the aim of this sub-chapter is to re-examine the recording contracts from human rights point of view.

The human rights understanding of the authorship, discussed above, can be again applicable in this particular case. As demonstrated, the human rights approach requires the author to have a control over the use of his/her work. Restrictive music industry contracting practices tilt the balance between these considerations and economic interests of large corporate producers

[168] Right to free association and right to freely choose one's profession.
[169] Guibault, p. 115.
[170] *Ibid*, p. 116.
[171] Guibault, p. 143.
[172] *Ibid*, p. 144.
[173] Ibid, p. 146.
[174] Generally on this issue, see Guibault, pp. 111-196.

and distributors almost completely in favour of the latter. In case the original authors of musical works claim the control of the creations of their mind as a human right, there is a high probability that such claim can be taken more seriously by the judiciary.

Secondly, the considerations with regard to human rights of corporations should apply. It has been demonstrated that, except some strictly limited cases, legal persons, as of now, cannot generally claim the possession of human rights. Since the intellectual property rights, at least to some extent, are recognized as human rights, the claim of "contractually agreed assignment" of all such rights simply will not be valid. Again, this demonstrates that human rights approach to seemingly private issues gives artists one more tool of control, enabling them to tilt the balance into position where the original justice prevails.

4.6 Conclusions

The Big Ones of the recording industry, setting the example for the rest of the pack, use standard contract form for recording artists, many clauses of which upset the balance between the rights of the author of the musical work and economic interests of corporate publishers and distributors very far in favour of the latter. Moreover, by signing such contract, the artists effectively give up all of their copyrights (except for the moral rights) with regard to the music they create and perform.

Recording industry contracting practices have been put on trial by several musicians, who are trying to pursue several avenues to put an end to unfair recording contracts. However, the success of such actions is heavily dependent on, first, how fundamental is the freedom of contract for the legal system concerned, since the freedom of contract may be considered as yet unrecognised human right, and, secondly, how eager is the court to interfere into private relations between individuals.

Human rights approach to recording industry's contracting practices helps the recording artists to claim the original authorship over the music they create in two ways: on one hand, by following the line of argument of human rights approach to copyright, which places the author of the work in the centre of legal protection, and, on the other, by denying the claim of corporations for the assignment of "all" rights to them, since, if copyrights are considered as human rights, they cannot effectively assigned to the legal person.

5 Antitrust

5.1 Introduction

Looking back and evaluating my personal CD collection, which contains many of the rare titles, I am sometimes trying to figure out what else could have been done if the funds were channelled into something else. I usually reach different conclusions, but one thing is for sure - the amount of money that I spent for it is simply fantastic. The price range for each title lies between 15-20 Euros, and it has always been a hard blow for my personal budget. But was it really worth that money?

My relatively late acquaintance with copyright regime supported the belief that I pay not only for a round piece of plastic with some encoded information, but for something intangible, unique and worth to pay for. However, the recent online piracy boom has literarily turned everything upside down. Am I supposed to believe that there is no more need for the plastic discs, jewel cases and extensive layouts, if that something intangible and unique can be delivered to me in a matter of minutes – without any charge?

So, if this is already a reality, then, why the price is so high?

5.2 Real costs of the Compact Disc

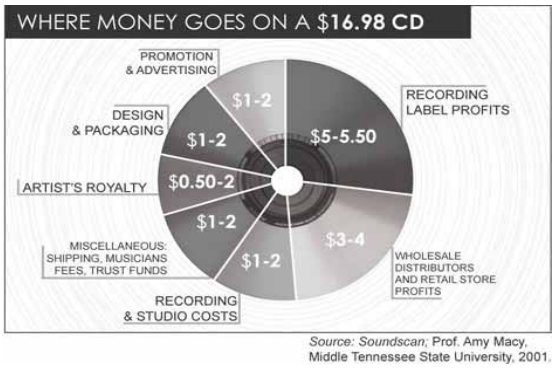
Compact Disc (CD) is the most popular conventional, brick-and-mortar carrier of sound recordings, which outweighs any other previous or even later sound signal medium in sales figures.[175] Nearly everyone agrees that CD is stable, reliable, limitless and high-quality medium for storing and reproducing music, which can be used almost indefinitely without the loss of quality. However, there are differing opinions – or, better to say, completely opposite opinions - as to the real costs of the CD.

The RIAA states that the current cost of the CD is actually lower than it should have been.[176] It states that the rate of inflation of consumer prices have been about 60% over the period of 1983-1996 (in 1983, the first CD was manufactured), while CD price dropped by more than 40%; however, it fails to provide the figures after this period. Moreover, this estimate is particularly defenceless in the light of the current low prices for producing a CD, with a general value being less than 1 $ for one.[177] The devices that has been able to manufacture a CD back in 1980's and even beginning of 90's have been many times expensive as of now. For example, in 1993, the price

[175] Source: www.ifpi.org.
[176] http://www.riaa.com/MD-US-7.cfm.
[177] http://www.recordingartistscoalition.com/rip.html.

of the cheapest CDR recorder was about $4500 (taking into account *lower* consumer prices as of then). Today, even with inflated consumer price index, one can buy a cutting-edge CDR recorder for less than $200.[178]

Below is a popular reproduction, which the music industry uses in order to demonstrate the allocation of costs incorporated into a modern CD:



It is to be noted that this reproduction, used by the music industry, raises a number of doubts. First of all, most of CDs, especially new releases or rare items, cost much more than 16.98$ - my personal experience is that quite a few ”discounted” CDs carry that price tag. Secondly, as already discussed above,[179] the costs of the sound recording are deducted from the artists' royalties (which, as reproduced here, are leaning more towards lower edge rather than to the higher, the latter being a privilege of very few established artists). Thirdly, with the wide use of Internet technologies, like extensive web pages, streaming audio clips and web videos, promotional pop-ups, free digital magazines (so-called ”webzines”) and ability of direct Internet contact with tour promoters and online ticket services, the promotion and advertising costs can be significantly reduced, contrary to the statement of the RIAA about the high costs of such services.[180] Online distribution services and online retail stores can also be used as a substitute for the wholesale distributors and retail stores, leading to reduction of prices under this heading. Finally, digital technologies give a boost in quality and quantity in printing and design of the CD cover and booklet, while significantly reducing the costs of the packaging.

Even if the above scheme displays the real division of profits, then it is still irreconcilable with the human rights approach to copyright, since the author of the musical work, being exclusively entitled to reaping of profits from his/her creation, seems to be the most disadvantaged party in the process of distributing profits from CD sales.

[178] http://www.boycott-riaa.com/cdprices.php.
[179] At 4.2.4, p. 52.
[180] http://www.riaa.com/MD-US-7.cfm.

5.3 Investigations into price-fixing deals

There is no surprise that the unusually high price of the CDs has spurred a lot of public concern, especially in developed countries, and even led to series of investigations by the Federal Trade Commission[181] and Department of Justice[182] in the United States and the European Commission[183] on the level of the European Union. Apart from the results of these investigations, which speak for themselves,[184] the most interesting thing is that they were initiated against the Big Five *collectively* (plus a couple of large retailers), thus indicating the recognition of the fact that these companies hold, lawfully or unlawfully, an effective monopoly over music market and follow the same practices in upholding their domination. As a result of several antitrust litigations in various federal courts, alleging the unlawfulness of Minimum Advertising Price practices with regard to forcing the retailers to accept overpricing of CDs, the Big Ones filed for the settlement in Portland, Maine, on September 30, 2002, agreeing to pay $143 million in compensation to consumers and charity organizations.[185]

At the same time, similar concerns were raised and investigations are still underway against Pressplay[186] and Duet/Music Net,[187] joint ventures between the Big Five that provide ”legitimate” (read: paid) online on-demand music distribution services. This, as argued, effectively reduces already powerful Big Five oligopoly to even more controversial online Big Two duopoly. [188]

Additionally, the Big Five were hit by the lawsuit from a group of consumers who complained that their copy-protected CDs (which the industry uses to prevent “ripping” and subsequent sharing on the Internet) led to several major dysfunctions, of which they were not warned.[189] Los Angeles Superior Court ruled on the admissibility of the consumers’ petition and dismissed objections raised by the music industry.

The above trends vividly show how much of government and consumer distrust is directed nowadays against the music market, which seems to be one of the most concentrated and monopolistic markets in the world

[181] http://www.ftc.gov/os/2000/05/cdstatement.htm.
[182] http://www.usdoj.gov/atr/cases/f0000/0052.htm.
[183] http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_253/c_25320021022en00120012.pdf.
[184] See Federal Trade Commission, file No. 971-0070, in which the Commission unanimously found that the Minimum Price Advertising (MAP) practices by the Big Ones violated antitrust laws by entering into unlawful price-fixing agreements with retailers. Source: http://www.ftc.gov/os/2000/05/cdstatement.htm.
[185] http://www.kohnswift.com/cd-settle_2k_10_11.htm.
[186] Pressplay, the joint venture of Universal and Sony Music, was sold to Roxio Corporation, which, interestingly, earlier acquired and plans to re-launch Napster, source: http://www.roxio.com/en/company/news/archive/prelease030519.jhtml;jsessionid=HTD0EZCHCRWWZLAQAMFR3KVMCACAYIV0.
[187] www.musicnet.com.
[188] http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_253/c_25320021022en00120012.pdf.
[189] http://www.iht.com/articles/82965.html.

economy. So far, with control of 85% of all music released, most of it being the most popular titles, combined with powerful distribution/promotion capabilities, the Big Five are true world dominators of the music we hear and buy – accordingly, for the price they want us to pay for it.

5.4 Are there any human rights defences against monopolies?

As a preliminary remark, the business transactions, as a matter of rule, are not subject to the state scrutiny from the human rights point of view. This has a foundation in the classical human rights doctrine, where the rights are granted to the individuals against the actions of a state, which has a monopoly over public relations. In contrast, private relations between individuals are mostly regulated by special legislation and are exempt from the human rights litigation.[190] However, in recent years, the increasing trend of applying human rights ”horizontally” has emerged.[191] This means that private actors are also bound to respect human rights of other private actors.

It is long recognized that governments have the competence to regulate the market through introducing compulsory anti-trust legislation, thus defending competition and protecting consumers from monopolistic practices. Such protection forms a part of consumer rights for centuries, which are the classic example of state interference in the field of private relations by means of specific legislation. But can consumer rights be considered as human rights?

Prof. Sinai Deutch suggests that consumer rights, at the current stage of development, can be recognized at least as a part of “soft” human rights law,[192] which is itself a suspicious concept. It would be more correct, to my belief, to suggest that consumer rights can be seen as *emerging* human rights, as much as there is a consensus among all free-market economy-based States on the necessity of existence of such rights. However, the human rights eligibility test is a strict one; in this respect, although there were recently some interesting non-binding pronouncements on the UN level, namely, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (with amendments of 1999 and 2000),[193] there is still no direct recognition of consumer rights as human rights.

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[190] Sinai Deutch, *Are consumer rights human rights?*, Osgoode Hall Law Journal 1995, pp. 538-539.

[191] About the “horizontal” working of human rights in the context of copyright protection, see Guibault, pp. 153-164.

[192] *Are consumer rights human rights?*, p. 577.

[193] Adopted by the General Assembly in its resolution 35/63 of 5 December 1980 under the auspices of UNCTAD and approved by the United Nations Conference on Restrictive Business Practices; source: http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm.

Therefore, the monopolies as such do not violate human rights. However, there's nothing to refute the point that monopolies pose certain *danger* that human rights will not be respected by monopolistic business. Indeed, the examples of Shell in Nigeria, Nike and GAP sweatshops in Southeast Asia, complicity of Unocal in human rights abuses in Burma, all support the point of view that once the private corporation, especially multinational corporation, has the exclusive ability to control the market, the human rights violations are more likely to occur, since the factor of overwhelming market influence adds to the feeling of "impunity" by such corporate heavyweights.

One thing should not escape our attention, however. The human rights concerns involved in the music industry, as demonstrated above, do not account to most gross human rights violations. It is impossible to imagine that the right to life or freedom of torture to be endangered. Nevertheless, such rights as freedom of expression (as discussed below, Chapter 5) or the privacy of individuals on the Internet undoubtedly constitute a core of fundamental human rights, the cornerstones of the democratic society. Therefore, the danger that effective monopoly in the music industry will overstep such serious human rights concerns, poses some questions as to the validity of Big Five monopoly in the music business. Probably, it is time for private petitioners to uphold their human rights through private litigation, alongside the government and supranational bodies' investigation, which sometimes can be quite lengthy and, in many cases, does not lead to satisfactory results.

5.5 Conclusion

The analysis of the real cost of the Compact Disc shows that, on one side, it is unreasonably overpriced and, on the other, the costs integrated therein are not fairly distributed. The reason for this is actual monopoly over the music market, effectively enforced by the Big Ones through suspicious price-fixing practices, which became a subject of various insights, investigations and even court decisions.

In response, the consumers, although entitled to certain protection from competition-stifling practices and unreasonable prices through consumer rights law, cannot claim, as far as the law stands, to be the victims of human rights abuse on account of such practices. Nevertheless, serious human rights concerns raised by such monopoly, such as but not limited to censorship in music and threats to individual privacy, can and should be used to protect the consumers from effects of the domination of the Big Five in the music industry.

6 Censoring Music

6.1 Introduction

The phenomenon of censorship has been known to humanity for quite a long time. Many communities for centuries tried to impose certain standards against the minority voices: the "unwanted" truth or lie was suppressed in many ways – be it anathema, witch hunting, book burning or plain execution of the "enemy elements". Though not having reached the level of bloodshed (yet), the same applies to music, which is one of the forms of human expression and can contain a strong, inciting message to the listeners. In the modern times music plays an important role in this respect, defining not only the ideas and points of views of particular "fan bases", but sometimes even shaping their lifestyle; unsurprisingly, it is one of the most frequent creations of mind ever to fall under the iron fist of censorship.

It is worth to cite a very correct, from my point of view, definition of music censorship:

"… Music censorship is any discriminatory act that advocates or allows the suppression, control, or banning of music or music-related works against the wishes of its creator or the audience. …"[194]

Censorship has consistently followed the evolution of the popular music and provided fast and alarmingly effective responses to the emergence of new musical genres. The "holy wars" against rock'n'roll in 50's and 60's, onslaught on heavy metal in 80's and "gangsta" rap in 90's illustrate this very well. In addition, there is also an unusual trend showing that the numbers and types of censored musical topics have actually increased since the beginning of the century, notwithstanding the general evolution of concept of the democratic society with its connotations of broad-mindedness and tolerance[195], the fact that is capable of being only partially attributed to the actual increase in the production of music recordings.

As a result, the censorship of music – as this Chapter of current analysis will try to reveal – is consistently carried out in the music, especially in the United States of America and, to a lesser degree, in Europe. Moreover, this Chapter is an attempt to demonstrate the involvement of the Big Ones, through RIAA, in the process of censorship, and what artists can do – if they can do anything – about it, both from the copyright and human rights perspectives.

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[194] Eric D. Nuzum, *Parental Advisory: Music Censorship in America*, HarperCollins Publishers, 2001, p. 7.

[195] See, *inter alia*, *Handyside v. The United Kingdom*, European Court of Human Rights, 7 December 1976, Series A24, par. 49.

6.2 Historical overview of music censorship - RIAA, PMRC and the Parental Advisory Label

Although there have been attempts – many of them successful – before and after 1980's to censor certain "controversial" themes in music, such as race relations or sexual images, we should concentrate, for the aims of the current analysis, on the period from 1985 and after, when the RIAA came into sight and played a substantial role in the joint music censorship efforts.

The Parental Music Resource Centre (PMRC), created in May 1985,[196] played a significant role and later became a leading force in the music censorship. Uniting a dozen of wives of influential Washington politicians, the group quickly began to gain weight and popularity and managed to attract the attention of the Capitol Hill. The peak of this growing popularity fell on 19 September 1985, when the Senate Committee on Commerce, Science and Transportation held the first record-labelling hearing.[197]

From many perspectives, the hearing became a landmark case in the regulation of the music industry. This widely televised event involved senators presenting powerful remarks about the need to regulate "the outrageous filth… of rock music"[198], supported by the statements of PMRC activists, as well as several musicians speaking in defence of the freedom of music[199]; although the hearing did not lead to the adoption of any legislative or quasi-legislative measures to be imposed on music industry, it nevertheless attracted massive public attention. Besides all, there was a small and extremely important nuance. Several of the senators of the Committee (whose wives were activists of the PMRC) were subsequently to hear the Home Audio Recording Act, which was heavily lobbied by the RIAA; the major interests of the music producers were at stake. The outcome was quite predictable - on 1 November of the same year, the RIAA and PMRC, joined by National Parent Teacher Association, laid down a deal for the introduction of the voluntary warning sticker on the recordings, which stated "Parental Advisory: Explicit Lyrics".[200]

The Parental Advisory Program began as a voluntary labelling effort, in which the record companies themselves, in cooperation with musicians, decided which recordings should be labelled.[201] The RIAA simply provided (and still provides) guidelines as to the size and appearance of the Parental

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[196] Nuzum, pp. 241-266, too many to mention even the most important of them.
[197] *Ibid*, pp. 25-36.
[198] *Ibid*, p. 26.
[199] Quite obviously, the reader can get a clear picture about the "fair" balance of power at the Senate hearing.
[200] http://www.riaa.com/Parents-Advisory-2.cfm; for critical remarks, see also Nuzum, pp. 33-34.
[201] http://www.riaa.com/Parents-Advisory-2.cfm, also the 2000 Federal Trade Commission report *Marketing Violent Entertainment To Children: A Review Of Self-Regulation And Industry Practices In The Motion Picture, Music Recording & Electronic Game Industries*, pp. 23-24.

Advisory label, with several improvements made during 1990s.[202] However, quite soon Parental Advisory program has outgrown its voluntary character and entered into legislative domains or at least inspired some of the legislative proposals to the certain extent. A number of states[203] have already introduced legislation, which makes it punishable to sell recordings "harmful to minors", establishes "community standards", tries to make "concert ratings" or "diverts the funds" from financing the production of "objectionable" lyrics; the RIAA, strange as it sounds, is currently opposing and struggling with these initiatives both at state and federal levels.[204]

Adding insult to injury, the Federal Communication Commission recently fined several radio stations for airing songs with "profane" content.[205] Moreover, in September 2000, the influential Federal Trade Commission released the report entitled "Marketing Violent Entertainment To Children: A Review Of Self-Regulation And Industry Practices In The Motion Picture, Music Recording & Electronic Game Industries"[206]; the report called for tougher self-compliance of the music industry with its own standards,[207] and was followed by two similar reports in 2001 and 2002.[208] As an additional factor, the events of 11 September 2001 urged many artists and companies to provide "necessary" changes to their musical recordings.[209]

Nowadays, the Parental Advisory sticker has also entered other, private domains, the most popular and troublesome example being the refusal of Wal-Mart, the biggest shopping chain in the United States, to allow any of the Parental Advisory labelled products to its shelves, thus hitting directly the most painful point of the music industry – its pocket.[210]

In response to these challenges, the popular practice in the music industry is to put out "clean" or "edited" versions of some controversial recordings; the edited (clean) versions usually carry different artwork, edited lyrics and sometimes drop the whole songs, in order to avoid the placement of the Parental Advisory label on the recordings. This tactic, which I would personally call nothing else than censorship, is used to reach the wider

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[202] http://www.riaa.com/Parents-Advisory-3.cfm.

[203] Eric Nuzum lists Arizona, Delaware, Florida, Illinois, Iowa, Kansas, Maryland, Missouri, New Mexico, Oklahoma, Pennsylvania and Virginia as having enacted legislation in suppression of "obscene" music. See *Parental Advisory: Music Censorship in America*, p. 189.

[204] http://www.riaa.com/Freedom-Issues.cfm.

[205] http://www.ericnuzum.com/banned/y2k.html.

[206] Available online at http://www.ftc.gov/reports/violence/vioreport.pdf.

[207] *Ibid*, pp. 52-56.

[208] http://www.ftc.gov/reports/

[209] http://www.ericnuzum.com/banned/911_editorial.html

[210] Nuzum, pp. 202-208. According to statistical findings, Wal-Mart chain sells one of ten music CDs sold in the United States. Several other retailers, like Kmart, Super Club Music Corporation, Record World, Fred Meyer music and others implement same or similar policies. For details, please refer to the chapter "The Chronology of Music Censorship in the United States" in Eric. D. Nuzum, *Parental Advisory: Music Censorship in America.*

sector of consumers, since a large part of the population usually buys music records at Wal-Mart and other retailers, which refuse to sell Parental Advisory labelled products. Quite the reverse, statistics shows that sales of "dirty" (original) versions of the records usually outnumber the sales of edited ones several times.[211]

In Europe, in contrast, there were no concerted efforts to outlaw or censor the popular music. Although the CDs with Parental Advisory labels can be found in all big stores, there is no consistent policy of outlawing the sales of such recordings to minors. Many independent European labels issue the recordings, which do undoubtedly contain "controversial" items, but do not generally follow any rating system.

6.3 Does copyright protect the freedom of speech?

This sub-chapter is an attempt to analyse several solutions, in which the judiciary in the United States and Europe manages to reconcile the copyright and freedom of speech concerns, and the way in which the resulting balance affects the music industry.

It is to be noted that the judicial battles for the freedom of music have been rare either in the United States or in Europe. The most famous American cases include trial of Jello Biafra, leader of the punk band Dead Kennedys (controversial artwork of album *Frankenchrist)* and obscenity proceedings against the rap band 2 Live Crew (for the sexually explicit references in their album *As Nasty As They Wanna Be*), as well as a number of cases, where the state legislation prohibiting the sale of "obscene" music was struck down as unconstitutional. In all cases, freedom of expression and free speech guarantees under the First Amendment were raised; although, no copyright related issues were discussed at those trials.[212]

In most European States, in contrast, there are, with notable exceptions of Germany and Sweden, no constitutional clauses relating to copyrights as opposed to the freedom of speech.[213] In the disputes that arouse on the frictions between the two, Article 10 of the ECHR has often been invoked, but the cases so far have been quite few.[214] In most of these cases,

[211] My personal comment will be that the free expression of ideas is highly valued by the listeners of music. On some interesting conclusions on the issue of "banned fruit is sweet", the article by Dr. Ronal Stein entitled *Fascinating Censorship: Mundane Behaviour in the treatment of Banned Material*, at http://www.mundanebehavior.org/issues/v2n1/seim.htm.
[212] See, generally, the chapter "The Chronology of Music Censorship in the United States" in Eric. D. Nuzum, *Parental Advisory: Music Censorship in America.*
[213] P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, appeared in "Innovation Policy in an Information Age", Oxford University Press 2000, p. 3.
[214] *Ibid.*

nevertheless, the national courts[215] and the former "gate-keeper" of the European Court of Human Rights – the Commission[216] - generally upheld the thesis about in-built checks and balances for the freedom of expression in copyright regime. Some of these decisions were also leaning towards US-based idea/expression dichotomy, though this trend has been somehow altered in recent years towards greater independence of freedom of expression concerns from copyright protection.[217]

With regard to idea/expression dichotomy, it is quite surprising to note, how two general concepts in this field, elaborated by the United States' courts, expressly contradict each other. The United States courts' argument that the freedom of speech is best protected by the copyright, runs contrary to the next argument, made by the judiciary itself, that copyright protects only expression of an idea, not an idea itself. This notion strips the idea, embodied in the work – in the musical work, for example – of the protection by copyright rules, and by such extraction makes it vulnerable for censorship. Indeed, it is the *idea* underlying the work that needs protection as a free speech, and copyright does not address that. The argument of the protection of the freedom of expression through copyright is, accordingly, rendered expressly invalid.

However, this does not mean that the expressions of authors' ideas in musical work are left entirely without copyright protection. As much as the American doctrine focuses exclusively on the economic aspect of copyright, it can be argued that the idea/expression distinction, protecting only the expression, still leaves the underlying idea of the copyrighted work under the protection of the moral rights of the author. However, the American courts are reluctant to address the existence of moral rights of the author, therefore denying *effective* copyright protection for the ideas embodied in the works.

First possible course of resolution of this controversy will be to make a strong and coherent pronouncement on the clear nature of the protection of the freedom of expression by copyright. Such way of argument will inevitably undermine the absolute character of idea/expression dichotomy. Quite naturally, if the copyright is supposed to *effectively* protect the freedom of speech, it should extend its protection to the idea embodied in the copyrighted work. However, one question inevitably arises: does such extension mean that all economic aspects of copyright extend to the protection of an idea? In other words, does the economic exploitation of the musical work protect the freedom of speech?

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[215] The German Supreme Court's *Lili Marleen* decision of 1985; *Head-Kaufvertrag,* 17 December 1996, and *Karikaturwiedergabe*, 9 December 1997, decisions by the Austrian Supreme Court; *SPADEM v. Antenne 2* in French courts; cited at Hugenholtz, pp. 10-13.
[216] *De Geïllustreerde Pers N.V. v. The Netherlands,* European Commission of Human Rights 6 July 1976, European Commission of Human Rights Decisions & Reports 1976 (Volume 8), 5; and *France 2 v. France*, European Commission of Human Rights 15 January 1997, Case 30262/96, [1999], cited at Hugenholtz, pp. 13-15.
[217] Hugenholtz, p. 7.

Here, the answer should be, in my opinion, negative. The copyright can be assigned to somebody else for the purposes of economic exploitation; affirmative answer to the above-mentioned question will prevent the authors from at least temporary assignment of their works. This is the turning point where the moral rights of the author come into play. It can be argued that the moral right to "object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work" can possibly encompass the freedom of speech. To my belief, it is particularly relevant here. Where the author of the musical work is objecting to censorship of his/her creation – censorship being nothing more, nothing less than distortion or modification of the work – it can be said that he/she is not only protecting his/her civil rights, but also exercising moral rights as an author of the work, even in the case of assignment of copyright to the record company. Should the artists/record companies alliance work properly, this model can ensure much less friction between the artists and the Big Ones: the economic exploitation of copyright would have been managed by the company, while the artists would get their reward in the form of fair royalties and control over paternity and integrity of the musical work through moral rights.

Even if, for the sake of argument, we suppose that the recording companies are the actual owners of the all rights in the recording, it would be absurd to suppose that economic entities, created solely for bringing profit, are very much concerned with the protection of the freedom of speech. The record companies are business establishments; they will easily sacrifice, as already illustrated by RIAA-PMRC agreement, the freedom of speech values to the possibility of gaining higher profit, in particular, by avoiding negative public (or group) opinion on controversial recording. The moral rights doctrine is thus very logical is resolving this problem and strikes the right balance between pure economic considerations of the companies and dignity of the author, by entitling the latter to maintain some of his non-commercial rights over musical work and, in particular, to object to censorship (as a form of derogatory treatment of the work, which is prejudicial to the honour of the author).

If such argument is upheld, it will possibly raise serious questions to the continued existence of the Parental Advisory Program. Usually the major record companies are the ones who agree to the placement of the Parental Advisory label on the recordings made by artists on their signing roster. As mentioned above,[218] the record companies presumably label the recording with Parental Advisory sticker in co-operation with musicians; however, the reality is quite different. The musicians themselves are usually opposing to the censorship of their works: it is quite illogical to suppose that the creators of the recorded works will be readily censoring their own creations, trying to eliminate the "controversial" messages made by themselves! The recording artists, as already demonstrated, are in less favourable bargaining

[218] At 6.2, p. 63.

position than the record companies, which they are signed to. The artists, to put it simply, have to agree to certain conditions to receive at least some reward for their effort of creativity. However, shifting the tool of control from the hands of music industry executives to the authors of music, as moral rights doctrine presupposes, will probably nullify any effort to "voluntarily" put the Parental Advisory label on their recordings.

There is one point that should be borne in mind. The First Amendment of the United States Constitution, which is the constitutional provision on the freedom of speech, applies only to the government actions that potentially can restrict the freedom of speech. It provides for negative, but not positive, obligations on the part of the government. Therefore, the First Amendment does not protect against direct on indirect censorship by the private actors.[219]

However, the copyright and, in particular, moral rights of the author represent temporary "private monopolies", which are protected from interference by private actors mainly (the government in certain circumstances can restrict the protection of intellectual property). Therefore, the moral right of the author to object to derogatory treatment of his/her work is the most effective tool to prevent the *private* parties (like retailers, industry associations, radio stations, religious groups and, of course, the Big Ones) from censoring the music. As for the governmental level (censorship in the form of legislative acts), the First Amendment in the US and Article 10 of the ECHR are so far readily available effective weapons for the author to defend his/her freedom of speech.

6.4 Conclusions

As opposed to more positive trend in the European judiciary, the moral rights doctrine needs to be introduced and applied in the United States courts in disputes challenging the constitutionality of censorship. Such reform will most probably undermine the existence of the Parental Advisory Program, which is mainly carried in the form of private actors' censorship with regard to the content of the certain musical works. The moral rights doctrine gives the authors, as opposed to the record companies, the necessary power to agree to or refuse the censorship of their works to the detriment of their honour or reputation. The freedom of speech can be best protected by copyright, if the latter is understood and applied strictly in accordance with the text of the Berne Convention.

[219] Nuzum, p. 178.

7 Conclusion

Indeed, the music industry giants are passing hard times these days. Great recession after a period of growth and stagnation; declining CD sales; massive layoff of employees; endless stream of court proceedings and lawsuits – this all is not definitely an indicator of a healthy sector of economy. But the industry, which raises the suspicion from government agencies for its monopolistic practices, lawfully and unlawfully robs its hard workers – artists - of all profits, threatens the privacy of Internet users, and marginalizes its potential customers by unreasonably high prices on its products, is indeed an industry in trouble. The wrath of the government, bitter protest from recording artists and distrust and disobedience from general public, who prefers to switch to free digital media opportunities rather than to pay unreasonable prices for nicely decorated pieces of plastic, is more a harvest that the industry reaps from its old "sins", rather than an attempt to make a free ride on the back of honest workers of entertainment.

The aim of this analysis is not adding an insult to injury, although. The Big Ones, nowadays, do not need an additional kick in the stomach; they've already got plenty. Moreover, they will not react – the arrogance of the Big Ones and RIAA towards public uproar has become almost legendary these days. Rather, the purpose of this study was to demonstrate that once ignored and forgotten human rights concerns can very well boomerang on the industry, if they are to resurface, sooner or later, in seemingly "private law" the court proceedings. In the 21st century, there is no more luxury for continuing ignorance of fundamental rights of a human being, for economic, philosophical, political or whatever reasons.

Nevertheless, as noted numerous times throughout the paper, the human rights approach to recording industry practices and copyright in general is more of a supportive value than of the substantial importance in these issues. With necessary support from human rights doctrine, the good job of current fighters for digital freedom, fairness in contracts and reasonable prices for entertainment will bring its fruits. And the most essential question, which is left open, can be put in the following way: will there be the place for the Big Ones in such imaginary world of freedom, equality and justice?

My modest answer to this question is that, even if the music industry giants face the fate of dinosaurs in prehistoric times, this will not certainly mean the end of music, which will always find its way to reach us even without the million-dollar-worthy promotion efforts of the corporate publishers and distributors. Digital technology unlocked the music and made it free – not only from commercial, but also from idealistic point of view – and the society will hardly give up this freedom in favour of an isolated group of overly well-paid music industry executives.

Supplement A - Rogues' Gallery

Name	Universal Music	Warner Music Group	Sony Music Entertainment	Bertelsmann Music Group	EMI
Country of incorporation	USA	USA	USA	USA	United Kingdom
Parent company	Vivendi Universal, USA	AOL Time Warner Inc., USA	Sony Corp., Japan	Bertelsmann AG, Germany	Thorn EMI Plc., United Kingdom
Labels owned	Barclay, Interscope, Geffen A&M, Island Def Jam Music Group, MCA Records, Polydor, Decca, Deutsche Grammophon, Philips, Verve Music Group, etc.	Atlantic, Elektra, Warner Bros. Records Inc, Warner/Chappell Music, Warner Strategic Marketing Inc., WEA Corp., Lava Records, Music Choice, etc.	CBS, Columbia (home of American, Aware, C2, DV8, Loud, Murmur, Portrait, So So Def, Trackmasters, Xtravaganza), Epic, Kitchenware, Legacy, etc.	Arista Records, Jive Records, J Records, RCA, Provident Music Group, BMG Classics, Zomba Music Publishing, etc.	Abbey Road Studios, Angel Records, Astralwerks, Autonomy Records, Blue Note Records, Capitol Records, Caroline Records, Virgin, etc.
Percentage in music sales (2002)	28.8%	15.9%	15.7%	14.8%	8.4%

The **Recording Industry Association of America** (RIAA) is the trade group that represents the U.S. recording industry. Its mission, as it states, is "to foster a business and legal climate that supports and promotes [its] members' creative and financial vitality". RIAA members, the list of which includes around 1000 recording companies, create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. For the entire world, the estimate of this figure can be put between 75% and 85%. The RIAA claims to work for the protection of intellectual property rights worldwide and the First Amendment rights of artists; besides, it conducts consumer industry and technical research and monitoring and review of state and federal laws, regulations and policies. It also administers the controversial Parental Advisory Program.

Supplement B - Sample recording contract

This **YOUR RECORD COMPANY's NAME HERE** (hereinafter referred to as the "Agreement") executed and effective this _____ day of _____, 20___, by and between _____(Artist) (hereinafter referred to as the "Artist") and _____(Company) (hereinafter referred to as the "Company"):

IT IS HEREBY UNDERSTOOD

a. Company is an organization, which specializes in the management, recording, recording distribution and representation of musical artists;

b. Company is familiar with the musical abilities of Artist and has the expertise, ability, industry contacts and resources to assist Artist in the furtherance of his/her career.

c. Artist performs under the name "(Artist's Stage Name)";

d. Company and Artist wish to enter into this Agreement to provide for the production and distribution of the Recording.

IT IS, THEREFORE, AGREED AS FOLLOWS:

A. TERM. The effectiveness of this Agreement shall commence with its execution by all of the parties, and shall continue thereafter for a period of _____ (#) years.

B. PRODUCTION OF RECORDING. The Recording shall be produced in the following manner:

1. PRODUCTION. Company agrees to produce one master recording consisting of songs written and performed by Artist (hereinafter referred to as the "Songs". The resulting recording (hereinafter referred to as the "Recording") shall include music of not less than forty (40) minutes in playing duration, and shall be of a quality which is equal to master recordings normally produced for commercial distribution.

2. CONTRIBUTION BY ARTIST. Artist agrees to full cooperate with the Company, in good faith, in the production of the Recording; to contribute to such production the music and lyrics embodied in the Songs; to arrange, direct and perform the Songs in such a manner as to facilitate the production of the Recording; and to otherwise strictly observe the remaining duties and obligations of this Agreement.

3. COSTS. Company shall be responsible for all costs incurred in the production of the Recording, including the prepayment of all travel, hotel and meal costs incurred by Artist in attending the recording sessions referenced in Section B.5 herein. Company may recover such receipted expenses pursuant to the production of master recordings or the advancement of the Artist's career. Company's production, promotion, manufacturing and all other bonafide expenses relating to Artist are deemed recoupable from gross income.

4. ARTISTIC CONTROL. Company and Artist shall be jointly responsible for all decisions regarding the artistic content of the Recording.

5. DATES AND LOCATION OF RECORDING SESSIONS. The recording sessions necessary to produce the Recording shall occur at studios and facilities chosen by Company in _____(city) _____(State), commencing on _____, 20___ and ending on _____, 20___.

6. ADDITIONAL MUSICIANS. Company shall provide and compensate sufficient and competent musicians to properly perform the Songs, as arranged and directed by Artist and Producer. Company may recover such costs pursuant to Section B3 herein.

7. TITLE. The title of the Recording shall be chosen by agreement between the Company and the Artist.

8. COMPLETION AND RELEASE. The Recording shall be completed and prepared for release and distribution on or before _____, 20____. Company and Artist acknowledge that time is of the essence in the completion of the Recording, and each agree to exercise all reasonable means to achieve such completion.

9. ASSIGNMENT OF EXCLUSIVE RIGHTS BY ARTIST. Upon the timely occurrence and performance of all material events and obligations required to produce the Recording, Artist shall assign to the Company all of his/her rights, title, and interest in and to the following property, for distribution and commercial exploitation in the United States and Canada:

a. The Songs,

b. Artist's performance of the Songs contained in the Recording,

c. The title of the Recording.

10. LICENSE FOR USE OF NAME AND IMAGE. Upon the timely occurrence and performance of all material events and obligations required to produce the Recording, Artist shall grant to the Company the exclusive license to use the name " _____(Artist)__", and the Artist's photographic image, in the promotion and distribution of the Recording.

11. FORM OF ASSIGNMENT AND LICENSE DOCUMENTS. The form of documents to be executed by Artist, pursuant to Section C. and D. herein shall be identical to the "Assignments" and "License" respectively attached hereto as Exhibits "C" and "D", and incorporated herein by this reference.

12. COPYRIGHT. Upon Artist's assignment of the Songs pursuant to Section C. herein, Company shall proceed to obtain and secure a copyright for each of the said Songs. Each such copyright shall be the sole property of the Company.

13. DISTRIBUTION. Commencing with the completion of the Recording and continuing for the term of this Agreement, Company will diligently use its best efforts to secure distribution of the Recording throughout the world, through one or more major distribution companies (including record companies, film companies, or any other company). Any such contract entered into between Company and any such record distribution company shall be subject to the terms of this Agreement.

14. ROYALTIES. In accordance with the rights granted by Artist to Company herein, Company intends to contract with a record distribution company for distribution of the Recording. Company will be entitled to receive royalties or licensing fees (herein collectively referred to as the "Royalties") as a result of such contract. Royalties shall include any compensation received by Company, or promised to Company, which directly or indirectly results from the use, exploitation or existence of the Recording, or any reproduction applied to satisfy costs incurred and paid by Company pursuant to Sections B.3, and B.6, herein. In the event that Royalties are insufficient to complete such reimbursement, Artist shall not be liable for such costs. The remainder of such Royalties, if any, shall be allocated and distributed between Company and Artist, in the following proportion:

_____ (%) Percent to Company

_____ (%) Percent to Artist

Royalties due Artist hereunder shall be delivered by Company to Artist within fifteen working days from the Company's receipt thereof.

15. B.M.I. MEMBERSHIP. Within a reasonable time after the execution of this Agreement, Artist shall apply for registration and membership with Broadcast Music Inc. (BMI), a music licensing organization. Company shall be responsible for any cost or expense associated with such application or with the Artist's membership in BMI during the term of this Agreement and the Distribution Period. Company may recover such costs pursuant to Section B#. herein.

16. NON-CIRCUMVENTION. Artist shall not detrimentally interfere with the efforts of Company to distribute the Recording through one or more distribution companies or enter into any contract inconsistent with the rights of distribution assigned to Company hereunder. Artist shall not contact any such potential distribution company except through the offices of the Company.

17. ADDITIONAL PERSONAL SERVICES. For the term of this Agreement, Artist agrees to appear at one or more performances to promote the distribution of the Recording. Company shall schedule and arrange such performances, but Artist shall have the right of prior approval of the location, date and time of each such performance. The total number of performances during the term of this Agreement shall not exceed _____. Company shall be responsible for travel, hotel and meal costs incurred by Artist in attending each such performance, Artist shall be paid one-half (1/2) of the net revenues received by Company for such performances. Such compensation shall be received by Artist within fifteen (15) days from Company's receipt thereof. Company may recover such costs (including travel costs and compensation paid to Artist) pursuant to Section B3. herein.

18. OPTION TO PURCHASE. At any time during the term of this Agreement or thereafter, at Artist's option, Artist may purchase all rights assigned and/or granted to Company hereunder or resulting to Company herefrom (including rights of copyright to any and all of the Songs) for the total sum of:

a. _____, plus;

b. Any receipted costs expended by Company hereunder, but reimbursed, as of the date of exercise of such option to purchase, plus;

c. _____ Percent (%) of the gross revenues generated thereafter from the Recording.

Exercise of the option shall be accomplished by the delivery of such amount, in cash or certified funds, to Company or its express designee. In the event of such exercise, Company shall promptly execute all documents reasonably necessary to effectuate such transaction. If and upon the exercise of such option, the obligations undertaken by the parties herein shall be exercised.

19. ASSIGNMENT BY COMPANY. Prior to completion of the Recording, the rights and obligations of the Company existing hereunder are personal and unique, and shall not be assigned without the prior written consent of Artist. Subsequent to the completion of the Recording, Company may assign its rights and obligations existing hereunder without the consent of Artist.

20. ASSIGNMENT BY ARTIST. The rights and obligations of Artist existing hereunder are personal and unique, and shall not be assigned without prior written consent of Company,

21. CONDITION SUBSEQUENT. If Company does not enter into a binding contract for the distribution of the Recording during the Distribution Period, the assignment and license

from Artist to Company granted pursuant to Sections C. and D. hereunder shall be deemed rescinded by the agreement of the parties.

22. RIGHT OF INSPECTION. At any time during the term of this Agreement upon prior written notice to Company of at least seven (7) days, Artist or his/her designated representative shall be permitted unrestricted access to the books and records of Company which in any way pertain to Artist, for inspection and photocopying by Artist or Artist's designated representative.

Such books and records shall include, but shall not be limited to, any documents or records which evidence the receipt or disbursements of Royalties. Company shall maintain such books and records at its principal office.

23. MISCELLANEOUS.

a) BINDING EFFECT. This Agreement shall be binding upon the successors and assigns of the parties.

b) ARBITRATION. In the event of a dispute between Company and Artist regarding the terms, construction or performance of this Agreement, such dispute shall be settled by binding arbitration in _____(city, state)_____, according to the rules of the American Arbitration Association for the settlement of commercial disputes, then in effect. The award or decision resulting therefrom shall be subject to immediate enforcement in a _____(state) court of competent jurisdiction.

c) JURISDICTION/APPLICABLE LAW. Company and Artist hereby submit to the jurisdiction of the courts of _____(state) for the enforcement of this Agreement or any arbitration award or decision arising herefrom. This Agreement shall be enforced or construed according to the laws of the State of _____.

d) ATTORNEY'S FEES. In the event that a party is forced to obtain an attorney to enforce the terms of this Agreement, the party prevailing in such action of enforcement shall be entitled to the recovery of attorney's fees incurred in such action.

e) COVENANT OF GOOD FAITH AND FAIR DEALING. Company and Artist agree to perform their obligations under this Agreement, in all respects, in good faith.

f) INDEPENDENT CONTRACTOR. In the performance of his/her obligations of this Agreement, Artist shall be deemed an independent contractor.

g) INCORPORATION OF RECITALS. The recitals contained at the beginning of this Agreement are incorporated herein by this reference

24. NOTICES. Any notices or delivery required herein shall be deemed completed when hand-delivered, delivered by agent, or placed in the U.S. Mail, postage prepaid, to the parties at the addresses listed herein.

THE PARTIES AGREE to the terms and obligations and so execute on the day and date first above mentioned.

_____ _____

Artist **Company**

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International Convention on the Elimination of All Forms of Racial Discrimination

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

European Convention on Human Rights and Fundamental Freedoms

American Convention on Human Rights

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WIPO Performances and Phonograms Treaty

Agreement on Trade-Related Aspects of Intellectual Property Rights

Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

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

The First Amendment to the United States Constitution

The Fourteenth Amendment of the United States Constitution

Digital Millennium Copyright Act of 1998 of the United States

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