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The Admissibility of a Culture Flat-Rate under National and European Law

Short Report

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The Admissibility of a Culture Flat-Rate under National and European Law

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1 Introduction

The digitalisation of data and the wide distribution of computers, as well as CD and DVD burners, has made it possible for individuals to reproduce image and audio media without loss of quality and with little technical knowledge or time expense.[1] The internet additionally makes available an additional generally-accessible distribution channel that serves to make electronic content available worldwide so that it can be exchanged with any number of individuals. In particular, since the advent of such technologies, both classic entertainment media (music and films) and software are being reproduced without the economic participation of the entertainment industry, the artists or the developers. This quickly led to the rise of 'file sharing networks'. The use of specific client software allows peer-to-peer networks to be created on the internet that allow files to be exchanged directly among a virtually unlimited number of participants. From the perspective of the entertainment industry, file sharing networks and the significantly increasing number of copies of media associated with them are the most important factors to which the significant loss in revenue experienced by this sector of the economy over the last few years should be attributed.[2]

Countermeasures adopted by manufacturers of audio and image media include advertising campaigns, the bringing of criminal charges and civil actions for prohibitory injunctions, and the use of digital rights management (DRM) systems. These measures found little acceptance among users, for numerous reasons. For example, the use of proprietary file formats leads to greater use limitations than ever before and there are compatibility problems. The music industry is slowly realising that the fight against unauthorised reproductions is a losing battle.[3]

One conceivable solution to this conflict of interest could be the introduction by law of a 'content' or 'culture' flat-rate. This term describes the approach that would legalise the non-commercial making available and reproduction of copyright-protected digital works, such as music, films, software and e-books,[4] over the internet and as compensation, introduce a flat-rate fee to compensate the rights holders, which would be distributed among them.[5] Flat-rate compensation payments are not unknown for types of usage occurring on such a large scale that individual monitoring is impossible.[6] The specific structure of a culture flat-rate could proceed

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1 *Goldmann and Liepe,* ZUM [Zeitschrift für Urheber und Medienrecht] 2002, 362; *Wolter,* JurPC web essay, 160/2008, Para. 12.

2 See *IFPI* 2009; *Bundesverband der Phonographischen Wirtschaft* 2007; see also the evaluation of the numbers by the music industry in the case of *Haustein-Tessmer,* Welt.de of 26/04/2007. In a current court case in the USA, the judge clearly rejected the arguments of the music industry that the number of downloads is equal to the number of lost sales. Excerpts from the reasoning are available at: http://recordingindustryvspeople.blogspot.com/2009_01_01_archive.html#305009459765726677.

3 The former chairman of IFPI and director of EMI, Per Eirik Johansen: 'But the main thing is that a whole generation already violates copyright, and the only thing we can do now is find better solutions', available at http://torrentfreak.com/former-emi-boss-fight-against-illicit-p2p-is-useless-090212/.

4 See *Johnson,* Guardian Technology Blog of 09/02/2009 for a possible connection between the lack of success of e-book readers and the low level of 'piracy' seen in the e-books market.

5 e.g. *Runge,* GRUR Int. 2007, 130.

6 As in *Flechsig,* beck-blog of 12/08/2008.

in quite different directions with regard to various individual aspects. For example, its introduction is conceivable as a voluntary business model or as legally binding for all cultural objects that can be digitalised, or only for certain types of works, at the national, European or even, if necessary, the international level. For several years, the culture flat-rate approach generally has been the object of heated discussion in the media[7] and jurisprudential literature.[8] Rights holders, however, reject it.[9] They consider it an 'expropriation'[10] and even speak of a 'Sovietisation' of copyright.[11]

This expert legal report has been created in response to efforts to introduce a culture flat-rate by law at the European level or, should it not be possible to reach consensus, at least in Germany. The minimum prerequisite for a national introduction of the culture flat-rate is the enactment of a corresponding law in Germany that is consistent with European copyright law. The point of departure for the enactment of a law is always the current legal situation, since only in this manner can a solid statement be made regarding whether a previously unregulated area is affected or whether existing laws must be modified (2). The second step is to evaluate consistency of the culture flat-rate to be introduced by law with national and European provisions (3 and 4). The expert report incorporates an examination of other EU Member States. The approaches being pursued in Poland, Sweden and the United Kingdom will be explored through examining the state of the discussion in those countries (5). Finally, aspects of the specific structure of a culture flat-rate will be examined, such as the fee schedule and role of copyright associations, in terms of their compatibility with other affected valuable rights, such as the right of internet users to informational self-determination and freedom of competition; suggestions conformant to the law will also be developed in respect of these areas (6).

2 Necessity of Modifying Copyright Law

It will be necessary to modify the law in order to introduce the culture flat-rate if the non-commercial making available and reproduction of copyright-protected works in digital form are inadmissible despite the flat-rate compensation obligation pursuant to the version of the Copyright Act currently in effect. This is the case if the copyrights of *affected* rightholders are thereby impaired and no law providing for an exemption legitimises the infringement. Since pursuant to § 11(1), Copyright Act *[Urhebergesetz – UrhG*], the copyright of authors of works of literature, academic works, and works of art should protect the authors in respect of their intellectual and personal relationship to the work and its use, while also providing for appropriate compensation for use of the work by third parties.

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7 cf. *Moldenhauer*, Spon.de of 22/07/2004; *Initiative privatkopie.net*, Open Letter of 26/04/2006; *Hillebrand*, ZDF.de of 19/12/2008; *Krüger*, Telepolis of 22/06/2004; *Züger*, WDR.de of 28/11/2008; *Winsemann*; Telepolis of 21/02/2005; *Deutschlandradio Kultur* of 21/02/2009, 4.46pm.

8 cf. *Grassmuck*, ZUM 2005, 107ff; *Rösler*, GRUR Int. 2005, 995ff; Ibid. MMR 2006, 510f.; *Runge*, GRUR Int 2007, 130ff.; *Flechsig*, beck-blog of 12/08/2008.

9 See e.g. *Krempl*, heise-online of 13/11/2007.

10 As in *Gebhardt*, Spon.de of 06/09/2004.

11 As asserted by the French copyright association SACEM, cited in *Rösler*, MMR 2006, 510. *Blocher*, cited in *Löwe and Schnabel*, in: Roßnagel 2009, 51, who considers this 'polemical criticism' to be unwarranted and sees in a culture flat-rate rather an example of 'fair use'.

2.1 Protected Works and Rightsholding

The past has demonstrated that internet file sharing networks are used mainly to distribute digitalised music and films are distributed. Increasingly, however, audio books, e-books and images are distributed over the internet. In principle, all digitisable content can potentially be the object of exchange. There is generally a conflict with the copyright law since these data are almost always protected works pursuant to § 2, Copyright Act. According to the non-exhaustive listing in § 2(1), Copyright Act, these include works of speech and music, static images and film works, as well as computer programs.[12] Other works are protected by the Copyright Act, if they represent personal intellectual creations pursuant to § 2(2), Copyright Act. Jurisprudence requires that the work must exhibit a sufficiently high degree of distinctiveness to differentiate it from triviality in the given area, thereby exhibiting a certain originality.[13] Should a work fall within the protected scope of the Copyright Act, protection extends to all of the work's (technical) forms, and thus also the digital format.[14]

According to § 11, Copyright Act, the rights to copyright-protected works are held in principle by the author, i.e. the creator of the work. In the case of many media, for example music recordings, this must be differentiated exactly. Since the authorship of melody and lyrics may be different, if independently-authored works are at issue and potentially, the version of the piece of music performed by an interpreter may be protectable in its own right as an independent modification of the work.[15] In the case of films, the script author, producer, director, leading actors and editors are, in common, the author.

The author of a work is entitled to two categories of rights: moral rights and economic rights, which are, however, closely intertwined.[16] Moral rights encompass the right to publication pursuant to § 12, Copyright Act, the right to recognition of authorship pursuant to § 13, Copyright Act, and the right pursuant to § 13, Copyright Act to prohibit distortion or other impairment of the work. Economic rights govern the claim of the author and economic use of an intellectual work by the author and, pursuant to § 16ff., Copyright Act, encompass in particular the rights to reproduction, distribution, and exhibition, as well as the right to make publicly available, playback by means of image and audio media, and the playback of radio broadcasts. Pursuant to § 29(1), Copyright Act, an author's moral rights may not be transferred by means of legal transactions, however the rightholder may change due to inheritance pursuant to § 28(1),

[12] The following study, however, excludes the application of the culture flat-rate to software. The market situation and distribution structure of software do not correspond to those prevailing for the other copyright-protected works mentioned. There are significant price differences in the case of software, depending on the nature of the software. Currently, licences for add-ons or utilities are available starting at €5, whereas, depending on the type and extent of licence, a full version of Windows Vista can cost several hundred euros. In the case of custom software, in the sense of detail solutions, there is virtually no upward price ceiling. Almost without exception, a new music CD costs 15 to 18 euros, and the price range for film DVDs is almost identical. In the case of software, usage rights may differ significantly in respect of the licence, which is not the case for a music CD. Further, from the beginning, the software industry has had to deal with the problem of pirated copies (Commodore 64 disks were exchanged regularly in school playgrounds as early as the 1980s) and the price calculations have been adapted accordingly. In the case of music and films, these problems first developed over the course of the 1990s. Moreover, special provisions for computer programs have been developed and are contained in § 69a ff., Copyright Act, which must also be investigated. For these reasons, a fundamentally different perspective is appropriate for software.

[13] *German Federal Court of Justice*, GRUR 1998, 533; *German Federal Court of Justice*, GRUR 1983, 377, 378.

[14] *Ahlberg*, in: Möhring and Nicolini 2000, § 2, Copyright Act, margin number 40.

[15] See *Schulze*, in: Dreier and Schulze 2006, § 3, Copyright Act, margin number 27 for the differentiation of interpretations of pieces of music that are not recognised as the author's own work into protectable modifications pursuant to § 3(1), Copyright Act.

[16] German copyright law follows the monistic theory, since ideational and material interests of copyright overlap in the different categories of law, *Schulze*, in: Dreier and Schulze 2006, § 11, Copyright Act, margin number 2; *Ulmer* 1980, 116.

Copyright Act. It is also possible for the author to grant other natural or legal persons the economically-significant usage and economic rights pursuant to §§ 29(2), 31ff., Copyright Act.

When copyright-protected works are distributed over the internet, different rightholders are regularly affected in respect of their copyright. Fundamentally, the author is the one affected, for example, the author of lyrics, the composer, the person interpreting a work, the author [of a written work] or software developer. In practice, the author does not regularly perform the economic exploitation of her protected works, for example, her pieces of music, but rather this task is assumed by a third party. In the music industry, this task is assumed by the manufacturers of audio media,[17] while classical print media are marketed by publishing houses, and cinema films, television films and televisions series are marketed by film and television companies (production companies). This business model for entertainment media developed in a time during which the production of high-quality content on physical media, such as records, cassettes, CDs, books, magazines, DVDs and video cassettes was associated with considerable technical effort and expenditure. These media were distributed either by means of purchase of the data storage media through the classical distribution channels, or the transport of the content over other media, such as television and radio.[18] Copyright law supports this business model[19] by protecting the companies that assume the role of publishing protected works by manufacturing image or data media and marketing such works, by granting them related copyrights.[20] For example, the organisational, technical and economically expense-intensive business activity of the manufacturer of audio data storage devices, which is required to make the acoustic artistic achievements marketable on an audio data storage device is recognised as worthy of protection by § 85(1), Copyright Act, by which the manufacturer is granted an independent usage right.[21]

2.2 Impairment of Copyrights

Closely connected to the question of whose rights – those of the author or those other rightholders, such as the manufacturer of audio data storage media – may be affected by the transfer of copyright-protected works over the internet, is the question of what specific copyrights are being impaired. Although progressive technical development, and the internet in particular, have in recent times significantly decimated the reasons for the business model described, the possibility of accomplishing the initial distribution of artistic works over the internet has hardly been considered. The initial publication of music, films and books takes place, now as in the past, principally by means of physical data storage media, which are then sold to customers. Only in select cases are these works distributed exclusively as digital works over the internet. To this extent, the transfer of protected works does not infringe the moral rights under copyright law, since the author has already exercised her publication right pursuant to § 12(1), Copyright Act by deciding to publish her work and taking the decision regarding the form in which her work is to be published. The details of the form of publication are

[17] Record company, music label or record label are alternative terms.

[18] This has changed in the sense that while the production of the content is still costly, today distribution is possible at a much lower cost.

[19] Licensing models developed over the last few years, such as the creative common licence, which is an adaptation of the open source software licensing model, are not proposed here as alternative business models because, at least in the case of the creative common licence, they do not serve the marketing of protected works, but rather enable the author to make available her works to the public without cost, under particular conditions.

[20] *Runge*, GRUR Int. 2007, 131. Pursuant to § 85(1), Copyright Act, the manufacturer of audio storage media is entitled to the exclusive right to reproduce them, distribute them and make them available to the public. Section 88, Copyright Act, contains a comparable provision applicable to films, and books are governed by comparable provisions in the Publishing Act [*Verlagsgesetz*].

[21] This, however, does not exclude that the manufacturer of audio data storage media may additionally assign the rights of the exercising artists and authors, *Dreier and Schulze* 2006, § 85, Copyright Act, margin numbers 1 and 4.

contractually governed between the author and the company charged with publication. In this contract, the author generally transfers the usage rights to the company and receives compensation as counter-performance.

Should the copyrighted works published on physical data storage media be digitalised to the extent necessary and distributed over the internet, this is economically to be considered a secondary usage, meaning that primarily the related rights of the data storage media manufacturer (§ 85, Copyright Act), publishing houses and film and television companies (§ 89, Copyright Act), are affected. Different usages are to be regarded as distinct when categorising these activities in respect of copyright law. The saving to hard disk of contents of CDs, DVDs, and other physical data storage media represents a reproduction pursuant to § 16, Copyright Act.[22] Should the digitalised entertainment media be made available so that other persons may access it over the internet, the class of right to making publicly available pursuant to § 19a, Copyright Act, as a particular expression of the right to make publicly available pursuant to § 15(1) and (2)(2)(2), Copyright Act, is instantiated: this is known as on-demand use.[23] Should the digitalised works then be downloaded to the hard drive or other storage medium of other internet users, this conversely constitutes an act of reproduction under copyright law.[24]

2.3 Limitations to Copyrights

However, not every impairment of copyrights that satisfies the elements of an offence is illicit. Copyright law does not grant the protected rights without limitation, but rather contains provisions in §§ 44ff., Copyright Act, which serve to balance out the interests of the authors and rightholders, on one hand, and those of the distributors of works and end users on the other.[25] As concerns the transfer of copyright-protected content over the internet, the following are discussed: the right to make reproductions for private and other individual use (the so-called right to a private copy) pursuant to § 53(1), Copyright Act, in respect of the acts of reproduction and the right to make publicly available without receiving permission pursuant to § 52(1), Copyright Act, which concerns the making available of content so that it can be accessed. Should the required characteristics of the regulation of property provisions be fulfilled, the system of a culture flat-rate that does not require approval from the copyright holders would be admissible.

Section 53(1), Copyright Act, permits the production of reproduced copies of a work for private use as an acceptable limitation to the exclusive reproduction right granted in § 16, Copyright Act. The law considers the public interest consideration of not being excessively burdened with the requirement to obtain approval from the rightholder, since this would be inappropriate and impractical in the private sphere.[26] The reproduction is exclusively permitted for private use. The reproduced copies may therefore only be created by the person using them or by a person who stands in a personal relationship to the user and for the purpose of satisfying purely personal needs.[27]

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[22] This can, however, be legitimised by means of the right to private copies pursuant to § 53, Copyright Act. The limitations to usage rights are further explored below.

[23] *Runge*, GRUR Int 2007, 131; *Heckmann* 2007, Chap. 3.2, margin number 23ff.; *Braun*, GRUR 2001, 1107; *Schack* 2007, margin number 420.

[24] *Röhl and Bosch*, NJW 2008, 1416.

[25] *Dreier*, in: Schricker 1997, 139ff.

[26] *Dreier*, in: Dreier and Schulze 2006, § 53, Copyright Act, margin number 1.

[27] *German Federal Court of Justice*, GRUR 1978, 474, 475; *Flechsig*, GRUR 1993, 533ff. Even before the law was modified, jurisprudence was in agreement that music file sharing networks could not be justified by means of the limitation provisions of § 53(1), Copyright Act, e.g. *Munich Regional Court*, ZUM-RD 2003, 607ff., *Schapiro*, ZUM 2008, 273 deals extensively with the question of whether a music file sharing network among

Since the *'Zweiter Korb'* [second basket] amendments of the amended Copyright Act entered into effect, the right to a private copy has been greatly limited. Before the law was amended, it was contested whether the copyright-protected digital works made available for download in online file sharing networks were unequivocally illegally produced documents. The characteristic of the illegally-produced document was regularly affirmed with the reasoning that the reproduction was not motivated by the intention of purely private use.[28] Even if the reproduction originally occurred for purely private purposes and its use was only changed at a later time [*zweckentfremdet*] to make it available on the internet, § 53(6), Copyright Act, was assumed to have been contravened. According to this Section, reproduced copies produced for private use may be neither distributed nor used for the purposes of making [something] publicly available. In any case, there was considerable doubt whether the illegality of the document was obvious to other users of the file sharing network, which means objectively recognisable, clearly and distinctly [*klar und deutlich*].[29] With the amendment to the law, the right to a private copy was limited by a further element of the offence, in order to clarify the legal situation. The reproduction is also illicit if it is based on an [original] document that was obviously made available in an illegal manner.[30] The right to a private copy henceforth does not exist if it is clearly recognisable to the user of the file sharing network that the content made available for download is being offered illegally, i.e. if no approval from the holder of the copyright is available. For this to be the case, it is sufficient to be aware that digital content is marketed in such a manner so as to require payment and that such digital content is made available free of charge in the online file sharing network.[31]

It is further to be taken into consideration that even if the requirements of § 53(1), Copyright Act, were to be fulfilled, the reproduction for private use without obtaining approval pursuant to § 54(1), Copyright Act, is coupled with compensation for devices and 'empty' data storage devices that are recognisably intended for the reproduction of protected works. The potential uses of the devices are decisive and constitute, at least in part, a determination of use consistent with the production of reproductions.[32] Although the authors and rightholders are entitled to the compensation claim, according to § 54h(1), Copyright Act, such claims may only be asserted by copyright associations, which then distribute the revenues to the individual entitled parties according to distribution schedules.

The limitation provision of § 52(1), Copyright Act also does not legitimise the offering of copyright-protected works in online file sharing networks without the approval of the author and the rightholder. The law should only be made to apply, to protect the public interest, to public presentations occurring in the context of events. This means it should only apply to individual events that are limited in time, which are held for a special occasion and which serve the public interest.[33] Online file sharing networks are, however, used by participants from their homes, at any point in time, and they may select individual material for presentation or download, as desired. This description corresponds exactly to the essence of the right to make publicly

'friends' would be permissible.

28 See *Röhl and Bosch,* NJW 2008, 1416; *Braun,* GRUR 2001, 1107, which treat this question extensively.

29 *Röhl and Bosch,* NJW 2008, 1416f.

30 See *Hoffmann,* WRP 2006, 61 for a critical response to this legal amendment.

31 *Röhl and Bosch,* NJW 2008, 1417. This interpretation is becoming questionable at best, considering that even well-known artists are increasingly offering individual songs or whole albums for downloading without cost, for marketing reasons, e.g. the band Radiohead, see heise-online of 08/12/2007, available at http://www.heise.de/newsticker/meldung/100277.

32 cf. official justification of the Copyright Act, German Bundestag printed matter. 10/837, 19; *Stuttgart Higher Regional Court,* CR 2001, 817 for CD burners. For image and audio data storage devices subject to compensation, see *Dreier,* in: Dreier and Schulze 2006, § 54, Copyright Act, margin number 6.

33 *Decision of the German Federal Court of Justice in Civil Matters* 116, 305, 207ff.; *Scheuermann,* ZUM 1990, 72f.

available that is not granted by the legislative authority in the case of public playback in connection with an event.

2.4 Interim Conclusion/Result

The basic purpose of the culture flat-rate is to restructure the offering of cultural products in such a manner so as to take advantage of the advantages of the internet in a targeted fashion. The current situation is unsatisfactory in this respect. As the internet has become more prevalent, the number of illegal transfers and reproductions of digital, copyright-protected works has risen dramatically. It is practically impossible for the rightholder to prevent these infringements of its copyrights or to achieve appropriate compensation by means of legal action under civil law. The intention is therefore to legitimise non-commercial transfer and reproduction of digital, copyright-protected works by means of the internet, by private persons. According to the current legal situation, this form of making publicly available and reproduction of protected works is permissible under copyright law only if the author and the rightholder have granted approval. When protected works are purchased on a data storage device, such as a film on DVD or music songs on CD, the customer acquires neither explicitly nor implicitly the right to reproduce or to make publicly available. An exemption applies only to the extent that digital works are distributed over the internet under open content licences. This approach, however, is associated with the disadvantage that no revenues are (or may be) generated on a regular basis by the copyright-protected works.[34] Therefore, it is necessary to amend the law to enable the introduction of the culture flat-rate, in order to limit the reproduction right of the author or rightholder by a further limitation provision and simultaneously to introduce legally-guaranteed financial compensation by means of a just balancing out of interests.

3 Statutory Introduction of the Culture Flat-Rate

It is not to be expected that authors and the media industry will (voluntarily) switch to open content licences to distribute copyright-protected entertainment media. The associated revenue concessions can neither be absorbed by the authors and media industry, nor would such concessions serve the public interest in a diverse and extensive media and cultural landscape. On the contrary, the increased use of digital rights management technologies[35] indicates that the media industry is committed to both the technical implementation of copyright protection and the prevention of cost-free distribution of copyright-protected works over which it has no control. However, this frequently means that the media industry curtails the usage rights acquired by the customer together with the purchase of copyright-protected works on data storage devices to such an extent that, considering the deployment of DRM technologies and the introduction of § 95b, Copyright Act, usage possibilities permitted by law, such as the production of a private copy, are no longer technically possible and additionally, are illegal.

For their part, consumers react against these limitations by attempting to undermine the technical protection measures.[36] To reach a sustainable and legally unified solution to this conflict of interest, the culture flat-rate must be introduced by the legislative authority and made binding on all parties.

It is necessary to amend the Copyright Act in order to make the introduction of the culture flat-

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[34] cf. with regard to open content licences in general *Jaeger and Metzger*, MMR [Multimedia und Recht] 2003, 431ff.

[35] See *Braun*, in: Roßnagel 2009, 56f. for advantages and disadvantages of DRM systems.

[36] The legislative authority has already reacted to this problem and with the introduction of §§ 95a to d, Copyright Act, has attempted to devise an equitable arrangement in respect of all interests concerned; see *Blocher*, in: Roßnagel 2009, 43ff.

rate legally permissible. One possibility in keeping with the spirit of the Act would be to introduce a regulation of property provision [*Schrankenbestimmung*] allowing the non-commercial making publicly available and reproduction of works, in conjunction with a compensation obligation modelled on §§ 44ff, Copyright Act and § 54, Copyright Act. In addition to compatibility with the German Basic Law, the enactment of a law must consider aspects of European law. Further, the legal requirements developed according to the principle of composing law compatible with the Basic Law[37] must be formulated in language. Where eminently technological matters are concerned, the formulation of the law should thoroughly consider the possibilities for technical implementation.

3.1 Admissibility under the Basic Law

The introduction by law of a culture flat-rate would have to be compatible with the Basic Law. In the following, the admissibility of a culture flat-rate under the Basic Law is investigated with regard to the holders of the copyrights (3.1.1). In each case, it must be evaluated whether a culture flat-rate is an infringement of the protected scope pursuant to Article 14, Paragraph 1, Clause 1, Basic Law [*Grundgesetz – GG*] (3.1.1.1), and in particular, whether a particular distribution model is provided for under the Basic Law (3.1.1.1.1) and whether legal protection exists for legal positions once they have been adopted (3.1.1.1.2). It is further to be investigated whether a culture flat-rate constitutes an expropriation (3.1.1.2) or whether the introduction of a culture flat-rate is permissible as a form of regulation of property [*Inhalts- und Schrankenbestimmung*], and in particular, whether it would be proportional (3.1.1.3). Finally, the effects of the introduction of a culture flat-rate on the basic rights (i.e. rights under the Basic Law) of those offering music download services (3.1.2) and the effects on internet users (3.1.2) will be examined.

3.1.1 Authors and Rightholders

Although copyrights are not properly 'intellectual property',[38] they may fundamentally fall within the protected scope of property pursuant to Article 14, Paragraph 1, Basic Law.[39]

- Right to property pursuant to Article 14, Paragraph 1, Basic Law

The protected scope pursuant to Article 14 of the Basic Law is a norm.[40] The scope of application of Article 14, Basic Law, is defined by regular statutes. The income from property rights of a creative work falls within the protection of property guaranteed by the Basic Law.[41] The moral rights proportion of the copyright is protected as an aspect of the general right to personality pursuant to Article 2, Paragraph 1 in connection with Article 1, Paragraph 1, Basic Law.[42] The rightholder's ability to agree individual compensation for the use of her copyright-protected works would be cancelled by the introduction of the culture flat-rate. Therefore, the

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37 See *Roßnagel, Wedde, Hammer and Prodesch* 1990, 7, on the concept of compatibility with the Basic Law.

38 See *Rehbinder* 2008, § 3, margin number 21ff. on the history of the concept of 'intellectual property', which was already highly contested in the early 19th century. *Hoeren,* NJW 2008, 3101, considers it 'an aggressive term belonging to legal policy discourse'; see also *Hoeren,* 'There is no intellectual property,' Süddeutsche.de of 07/05/2008.

39 German Federal Constitutional Court Decision 31, 229, 238ff.; 79, 29, 40; *Depenheuer,* in von Mangoldt, Klein and Starck, Art. 14, Basic Law [*GG*], margin number 148; thoroughly treated by *Dreier,* in: Dreier and Schulze 2006, Introduction, margin numbers 39ff.

40 See *Pieroth and Schlink* 2006, margin number 894.

41 *Depenheuer,* in von Mangoldt, Klein and Starck 2005, Art. 14 Basic Law [*GG*], margin number 148.

42 *Rehbinder* 2008, § 10, Copyright Act, margin numbers 136ff.; for moral rights under copyright, see above under Chapter 0.

scope of the author protected by the Basic Law is fundamentally infringed. This raises the questions of whether particular exploitation models are provided for by the Basic Law (3.1.1.1) and whether it is inadmissible under the Basic Law to change a level of copyright protection once it has been achieved (3.1.1.1.2).

3.1.1.1 Constitutional protection for particular exploitation models

The circumstance that at least the income from property rights of a creative work enjoys fundamental protection under Article 14, Paragraph 1 of the Basic Law, raises the question of the scope of protection. As concerns the online file sharing networks, the conclusion is drawn in this case that on account of its obligation to protect property, the state must undertake everything in its power to prevent the exchange of digital content among consumers who are circumventing the compensation obligation. A default of protection is asserted, and corresponding demands to be fulfilled by the legislative authority[43] and the courts[44] are formulated.

Rightholders and their representatives demand the complete elimination of the private copy,[45] claims to information under civil law against access providers,[46] and filtering of all internet traffic regardless of suspicion in order to prevent reproductions that are illicit under copyright law.[47] All of these demands are based on the assumption that solely the rightholders are entitled to decide in what way and manner the creative works will be commercially exploited.

The circumstance that copyrights enjoy protection under protection of property does not necessarily mean, however, that a particular exploitation model is irreversibly predetermined on constitutional grounds. The music industry pursues business models based on payment for use of each individual work. This may occur by purchase of a work in physical form (e.g. CD or DVD), or by way of licensed download from the internet (e.g. from the Apple iTunes Music Store[48] or Napster[49]).

Exploitation models are business models and, as such, are subject to the rules of the market. Should it become apparent that a business model is no longer current and has become outdated due to changed technical or social circumstances, it would then even be illicit to protect and artificially maintain this business/exploitation model by means of very extensive intervention on the part of the legislative authority.[50] Proceeding in such a manner would not be permissible in a free market economy.[51] One aspect of the functional conditions of competition is that companies or business models may fall behind the competition and be suppressed by the market.[52] From the perspective of the rule of law by a state, it would be most questionable if infringements of the population's rights to freedom were undertaken in order to protect a particular business model.

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43 For example, *Bäcker*, ZUM 2008, 391ff.; *Dreier*, in: Dreier and Schulze 2006, Introduction to the Copyright Act [*UrgG*], margin number 24.

44 For example, *Czychowski and Nordemann*, NJW 2008, 3095ff., who appeal directly to the German Federal Constitutional Court.

45 According to *Braun*, cited by *Löwe and Schnabel*, in: Roßnagel (2009), 73; see also *Ermert*, heise-online of 05/05/2006.

46 See *Hamburg Higher Regional Court*, GRUR-RR 2005, 209ff.; *Czychowski*, MMR 2004, 514ff.; just such a claim to information under civil law has now been inserted in § 101, Copyright Act.

47 See *Bäcker* for this, ZUM 2008, 391ff.; for another perspective, see *Schnabel*, MMR 2008, 281ff.

48 http://www.apple.com/de/itunes/.

49 http://www.napster.de/.

50 'In this connection, the conception in legal studies that copyright does not exist in order to protect business models, should be remembered.' *Grassmuck*, ZUM 2005, 109.

51 See on this *Schnabel*, MMR 2008, 284.

52 German Federal Constitutional Court Decision 105, 252, 265; 110, 274, 288.

This does not mean, however, that rightholders may be accorded no protection vis-a-vis illicit infringements of their legal positions. Article 14, Paragraph 1, Basic Law mandates the fundamental rendering of income from property rights to the author of the work.[53] The author or rightholder must therefore have the freedom to decide to make the use of the protected works dependent upon receipt of compensation, at least those usages relevant to copyright law considerations. This does not necessarily have to take place, however, by means of business models based on the sale of individual physical embodiments on data storage devices (CDs or DVDs) or sale via the internet of electronic works whose functionality is significantly limited by DRM technologies. In principle, it is conceivable to compensate the authors and rightholders by way of a lump sum for copies in which they have no directly financial involvement. In comparison to the current situation and from a purely economic perspective, this would even be an improvement for the authors and rightholders, who currently regularly receive no compensation for reproductions on the internet For example, § 54, Copyright Act establishes the claim of an author to appropriate financial compensation from the manufacturers of equipment, image and audio storage devices that are recognisably intended for making such reproductions for the permissible private copy pursuant to § 53, Copyright Act.

3.1.1.2 Protection of the status quo

A culture flat-rate introduced by law would remove the rightholders' ability to pursue legal action against the reproduction of individual works, which is theoretically possible under the current legal situation.[54] The introduction of a culture flat-rate would therefore place the authors in a worse position than is currently the case, as far as their legal options are concerned. It cannot, however, be concluded from this that such a measure would for this reason alone be constitutionally inadmissible. The constitutionally guaranteed protection of property does not mean an absolute protection of the status quo of legal positions in the sense that all achieved legal positions are inviolable.[55] The legislative authority is not prevented by constitutional concerns from reducing the level of protection or modifying the substance of protected legal positions.[56] The German Federal Constitutional Court has explained regarding this matter:

> The guarantee provided for in Article 14, Paragraph 1, Clause 1, Basic Law, does not mean inviolability of a legal position forever; it also does not mean that every modification to the substance of a protected legal status would be illicit. The specific rights accorded to the owner and guaranteed by the constitution are subject to the disposition of the legislative authority, in accordance with Article 14, Paragraph 1, Clause 2, Basic Law – within limits yet to be established.[57]

3.1.1.3 Expropriation or regulation of property

The question arises whether the introduction by law of a culture flat-rate is an expropriation within the meaning of Article 14, Paragraph 3, Basic Law. As defined by the Federal Constitutional Court, an expropriation exists if specific, subjective, legal statuses protected under Article 14, Paragraph 1, Clause 1, Basic Law, are completely or partially removed in order to accomplish public purposes.[58] The expropriation may be executed by law or by administrative measures based on a statute.[59] The expropriation is identified by four characteristics: it is specific, has individual effect, removes the property and serves public

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53 *Wieland*, in: Dreier, Basic Law [*GG*], 2nd edition, 2004, Art. 14, margin number 59.

54 According to the legal situation, authors do have the legal ability to prohibit reproductions that do not fall under the privileges granted by the Copyright Act, however this approach generally fails due to unenforceability.

55 *Dreier*, in: Dreier and Schulze 2006, Introduction, margin number 40.

56 German Federal Constitutional Court Decision 31, 275, 284f; GRUR 1980, 44, 46.

57 German Federal Constitutional Court Decision 31, 275, 284.

58 cf. German Federal Constitutional Court Decision 104, 1, 9.

59 German Federal Constitutional Court Decision 58, 300, 330.

purposes.[60] The counterpart to an expropriation is the regulation of property by the legislative authority pursuant to Article 14, Paragraph 1, Clause 2, Basic Law. The regulation of property provision establishes the rights and obligations of the property owner in a general sense.[61]

A culture flat-rate introduced by law would determine, abstractly and in general, under what conditions the exchange of a work over the internet without the approval of the author (i.e. act of making publicly available pursuant to § 19, Copyright Act, by the provider, and a reproduction pursuant to § 16, Copyright Act, by the downloader) would be permissible. The culture flat-rate would not remove property in a specific or individual sense. An expropriation in the legal sense cannot be interpreted to exist in this case.

In any event, the author would be entitled to rights to affected by a culture flat-rate only within the limits of §§ 44a ff., Copyright Act. A new law comparable to the provisions of §§ 44a ff., Copyright Act, would have to be introduced. The regulation of the limitations of copyright law is an obligation of the legislative authority, which it has to fulfil pursuant to Article 14, Paragraph 1, Clause 2, Basic Law.[62] Considered in this way, the limitation of the exploitation rights necessary for the introduction of a culture flat-rate would be a governing of property pursuant to Article 14, Paragraph 1, Clause 2, Basic Law.

3.1.1.4 Proportionality of a culture flat-rate

The qualification of possible regulation of property as fundamentally constitutional does not mean, however, that all forms of a culture flat-rate would be permissible.[63] The Federal Constitutional Court has determined the following with regard to the regulation of property in relation to copyright:

> As concerns the fulfilment of the task assigned to it in Article 14, Paragraph 1, Clause 2, Basic Law, namely the regulation of property as regards intellectual property, the legislative authority has the task not only of securing the individual desires of the author, but also to establish the limits to individual entitlements and privileges necessary in the interest of the public good. The legislative authority must establish equitable compensation and a balanced relationship between the constitutionally guaranteed claim to appropriate use of the creative work and those interests of the public good worthy of protection.[64]

A regulation of property pursuant to Article 14, Paragraph 1, Clause 2, Basic Law, must fulfil the principle of proportionality. This means that the measure must accomplish a legitimate purpose and be suitable, necessary and appropriate.[65]

The introduction of a culture flat-rate seeks to serve several purposes. The business of culture should be restructured fundamentally and so that it is constitutional. The objective is to balance the constitutional goals, which should lead to a more equitable balancing of collisions of basic rights. Authors should be entitled to financial compensation for the reproductions made by means of the internet. While the current legal situation provides for a claim to compensation, it can hardly ever be realised without requiring very extensive infringement of the rights of

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60 cf. *Pieroth* and *Schlink* 2006, margin number 923.

61 German Federal Constitutional Court Decision 58, 300, 330; 72, 66, 76.

62 German Federal Constitutional Court, GRUR 1980, 44, 46.

63 While it may theoretically be possible to distinguish between the establishing the substance of property and limiting it [*Inhalts- und Schrankenbestimmungen*], in practice these represent only two different aspects of a legal concept that is properly understood as unified.

64 German Federal Constitutional Court Decision 31, 229, 238ff.

65 *Dreier,* in: Ibid. 2004, Preliminary Remarks, margin number 146; extensive treatment of proportionality principle, loc. cit. margin numbers 145ff.

internet users to informational self-determination and private telecommunications.

On account of the elevated number of acts of reproduction and the practically unlimited number of participants, it is not possible for the rightholders to prohibit the use of the protected works or to successfully assert their compensation claims. The purpose pursued is not only legitimate, but rather results compellingly from the Basic Law, which requires that economic rights to the work must fundamentally be allocated to the author. The legitimacy of the purpose pursued is thus established.

The principle of suitability requires that the chosen means be capable of achieving the intended purpose.[66] To fulfil this requirement, the means is not required to be optimal, rather only has to further

the intended purpose.[67] In this case, the means to be evaluated is the culture flat-rate, i.e. the introduction of a legal licence for reproductions made on the internet. On account of the enormous scale of acts relevant to copyright law and the vast number of affected rightholders and users, monitoring to ascertain whether all acts of reproduction are legal and who has performed them is excluded by practical considerations. The legal licence is precisely the suitable means in these cases.[68] A legal licence can accomplish the purpose of giving rightholders financial advantage from the use of their works on a mass scale. The introduction of a culture flat-rate would make private acts of reproduction legally permissible. In this case, there would no longer be any basis for criminal investigations, civil proceedings would also no longer be necessary, and the basic rights of internet users would be better protected.

The objection could be made against the suitability of a culture flat-rate that it does not allow for an exact distribution of the revenues corresponding to the exact distribution of acts of reproduction. Because of their decentralised structure, file sharing networks are difficult to monitor, which also represents the principal reason for the lack of success of taking action against them.[69] There exists, however, a market research company called BigChampagne that investigates and evaluates file sharing networks.[70] The music industry also uses this data.[71] The data exhibits a certain lack of clarity and, for example, the exchange of copyright-protected works in email attachments as MP3 files is not monitored. There are, however, similar problems with the collection of data and distribution of monies by GEMA [Association for Musical Presentation and Mechanical Reproduction Rights] that have not led to the entire GEMA model being considered inadmissible or too inexact for practical use. The Federal Constitutional Court has repeatedly established that collective legal administration by copyright associations leads to typification, lump sum payments and estimates and despite this, continues to regard such structures as constitutionally sound.[72] The regulations of GEMA, which provide for, among

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66 *Dreier* in: Ibid. 2004, Preliminary Remarks, margin number 147, with further references.

67 German Federal Constitutional Court Decision 67, 157, 175f.; 96, 10, 23.

68 *Dreier*, in: Dreier and Schulze 2006, before §§ 44a ff. Copyright Act, margin number 14.

69 *Runge*, GRUR Int 2007, 135, considers the specific collection and evaluation of data traffic to be inadmissible on account of the privacy of telecommunications pursuant to Art. 10, Basic Law. However, in the case of demands for monitoring of the data traffic by access providers (!) regardless of suspicion (!) in order to prevent acts of reproduction, this argument is considered not to apply. cf. *Bundesverband Musikindustrie*, press release of 13/03/2008; as well as *Bäcker*, ZUM 391ff.

70 *Howe*, 'BigChampagne is watching you', wired.com of October 2003. *Initiative privatkopie.net* also makes reference to it, Open Letter of 26/04/2006, 4.

71 'Musikindustrie nutzt Tauschbörsendaten' , Netzzeitung of 11/09/2003, available at http://www.netzeitung.de/internet/2541444.html?Musikindustrie_nutzt_Tauschboersendaten.

72 German Federal Constitutional Court Decision, GRUR 1997, 123; GRUR 1997, 124; NJW 1992, 1303, 1304; cf. further *German Federal Court of Justice*, GRUR 1988, 782, 783; see on this *Dreier*, in: Dreier and Schulze 2006, § 54, Copyright Act, margin number 1 and § 7, Copyright Management Act [*UrbWG*], margin number 6.

other things, that GEMA decide, pursuant to § 315, Basic Law, at its discretion, regarding the distribution of income based on the evaluation of the usage rights managed in trust have also been regarded as legal by the courts.[73] Income from blank media and device purchases is distributed based on fixed percentages determined by airplay and the sales of image and or audio-visual data storage devices.

Another problem is the possibility of manipulating the statistics to receive higher revenues or to make individual songs or albums appear more popular than they actually are. This has real effects since the distribution schedules used by copyright associations are based on airplay and sales of audio data storage devices. In this case also, the problem is not specific to the culture flat-rate. Even offline manipulations are conceivable and actually occur, such as by means of targeted CD purchases commissioned by record companies.[74] The introduction of a culture flat-rate should therefore be regarded as a suitable means.

The means employed must also be necessary, which means that there may not be another, less severe measure equally suitable to reach the intended goal.[75] Under the current legal situation, participation in online file sharing networks is illicit, however the authors and rightholders receive no financial compensation at all for these acts of reproduction. While they could theoretically initiate legal proceedings against individual persons who undertake to make illicit reproductions, the implementation of these claims often fails.[76] Numerous chief public prosecutors are already recommending not to pursue illicit reproductions that fall under a *de minimis* threshold.[77] Authors and rightholders are dissatisfied with the current legal situation and believe that their economic existence is threatened.[78]

In principle, the current legal situation accords the authors more extensive privileges with regard to their rights, since they can theoretically prevent individual acts of reproduction. The primary interest of the authors, however, lies in receiving compensation for the use of their works. Although this claim exists under the current legal situation it can hardly ever be realised in practice. They only receive financial compensation when individual file sharing network users are criminally investigated and successfully prosecuted. An appropriate allocation of the exploitation proceeds from the works to the authors is not currently provided for. It is the case that rightholders may protect their works against unauthorised reproductions by using DRM

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73 *German Federal Court of Justice*, GRUR 2005, 757ff.

74 See *Gollmitzer*, Spon.de of 13/04/2005. According to statements made by a music industry insider, the sales figures were fundamentally manipulated before the introduction of scanner POS in 1997, cf. *Gallach*, Kultur SPIEGEL 09/2008 of 25/08/2008, 16.

75 *Dreier*, in: Ibid. 2004, Preliminary Remarks, margin number 148, with further references.

76 Rightholders have long participated in file sharing networks so as to acquire the IP address of an uploader. They have then entered criminal complaints and had the public prosecutor's office acquire from the access provider the name of the person associated with the IP address. The rightholders have then gained viewing access to the investigation files pursuant to § 406e, Code of Criminal Procedure [*StPO*], and then asserted claims under civil law against the person now known to them. Rightholders now have a claim to information under civil law pursuant to § 101(2) in connection with (9), Copyright Act, which however can only be granted by a judge and is limited to cases of commercial scale. Further, the rightholders must now bear the costs for the identification of the person by the access provider, according to *Solmecke*, in: Taeger and Wiebe 2008, 207ff. Taken together, the first decisions on the claim to information under civil law do not yet exhibit any unified line, see *Cologne Higher Regional Court*, MMR 2008, 803f.; *Oldenburg Regional Court*, MMR 2008, 832f; in summary, *Jüngel and Geißler*, MMR 2008, 787ff.; regarding the question of the criminal liability of the exchange of copyright-protected works on P2P file sharing networks, see *Gercke*, JA 2009, 90ff., in summary.

77 See for example the interview by *von Gehlen* with the press spokesman of the Düsseldorf Chief Public Prosecution Agency, Mr Stahl (a senior public prosecutor), jetzt.de of 11/08/2008.

78 See for example *Merholz*, 'Gorny fordert Internet-Verbot für Raubkopierer [Gorny demands internet prohibition for pirate copiers]', Welt.de of 08/10/2008; see further the open letter addressed to the Chancellor on 'intellectual property day' of 25/04/2008; see on this also *Hoeren's* answer, beck-blog of 29/04/2008.

systems.[79] This possibility has not, however, proven itself particularly effective. On one hand, DRM systems are not unfoilable and therefore do not offer absolute protection. Works secured with DRM systems may be easily found on file sharing networks. On the other hand, DRM-protected works have not been able to compete on the market.[80] To place the protection of works completely in the hands of rightholders and to require them to employ DRM systems is therefore not as effective as the introduction of a culture flat-rate. Overall, no less severe means is apparent that is precisely as effective as the culture flat-rate would be. Thus the introduction by law of a culture flat-rate is also necessary.

The measure must additionally be appropriate. This is the case if the severity of the impairment of basic rights stands in an appropriate relation to the public good pursued by the impairment of basic rights.[81]

The impairment of basic rights consists in the introduction of a legal licence. It takes from the author a legal means to achieve appropriate compensation in comparison to the exclusivity right.[82] For this reason, it represents an impairment of the legal status of the rightholder. A range of public interest considerations pursued by the introduction of a culture flat-rate exists as a counterpart to this impairment.

The regulation concept prevailing to date provides for a specific compensation for each individual copy of a work and the prosecution of illicit acts of reproduction. Since these acts of reproduction are undertaken over the internet, this data traffic must be infringed to prevent illicit acts of reproduction, or this data traffic must at least be monitored and analysed in order to prosecute unauthorised usages of works.[83] This requires extensive infringement of internet users' right to informational self-determination (Article 2, Paragraph 1 in conjunction with Article 1, Paragraph 1, Basic Law) and the secrecy of telecommunications (Article 10, Basic Law), even if they do not undertake any activities contravening copyright law.[84] It impairs the access providers' right to freedom of occupation protected by Article 12, Paragraph 1, Basic Law.[85] The users' freedom of expression guaranteed pursuant to Article 5, Paragraph 1, Clause 1, Basic Law, could also be impaired. The introduction of a culture flat-rate would render these problematic issues moot. For the purposes of an equitable distribution of revenues by the culture flat-rate, only the number of acts of reproduction of a work are relevant. Allocations to particular persons are not required, which cancels the data protection problems. [86]

Further, the prosecution of individual offenders places a load on the public prosecution authorities that cannot be justified when weighed against the purpose. The public prosecution authorities generally choose pursuant to §§ 153(1) or 170(2), Code of Criminal Procedure [*Strafprozessordnung – StPO*] not to prosecute the offence if it does not meet a particular *de*

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79 For a technical perspective on DRM, see *Grimm*, in: Roßnagel 2009, 27ff; from a legal perspective, see *Blocher*, in: Roßnagel 2009, 39ff.

80 As the largest provider, the Apple iTunes Music Store has already stated that it wishes in future to sell exclusively unprotected music, see *Lischka and Kremp*, Spiegel-Online.de of 06/01/2009.

81 *Dreier*, in: Ibid. 2004, Preliminary Remarks, margin number 149, with further references.

82 *Dreier*, in: Dreier and Schulze, 2006, prefatory section to § 44a ff., margin number 14.

83 See *Solmecke*, K&R 2007, 138ff. for extensive treatment of the technical background of file sharing networks and the criminal and civil proceedings of rightholders.; *Solmecke*, in: Taeger and Wiebe (2008), 207ff.

84 *Schnabel*, MMR 2008, 283ff.; *Bäcker* also recognises this, ZUM 2008, 393, considering it a 'conflict of basic rights interests par excellence', but nevertheless deals with the interests of data protection in a footnote. See Chapter 0 for extensive treatment.

85 For extensive treatment see Chapter 0. The Berlin telecommunications provider Versatel even obtained a temporary injunction against a company that wanted to seek out 'copy pirates', because the number of requests was noticeably impairing Versatel's business operations; available at http://www.heise.de/newsticker/meldung/66658.

86 Also *Ulmer*, in: Roßnagel 2009, 85.

minimis threshold.[87] Despite the significant load on the public prosecution authorities, only 0.1% of criminal charges end in conviction.[88] The introduction of a culture flat-rate would provide tangible relief to the public prosecution authorities, as well as the courts, if the numerous preliminary proceedings initiated on account of individual usage of file sharing networks were no longer applicable. Also, in this case, more innocent persons would no longer be targeted by criminal investigators, as is currently still the case.[89]

The introduction of a legal licence in the form of a culture flat-rate leads simultaneously to a legalisation of downloads. Although according to the current legal situation, reproductions over the internet remain illicit, they represent a mass phenomenon, particularly among youth. This means that an entire generation of children and youth are growing up committing illegal acts, virtually on a daily basis. Such a situation has serious consequences for society, in addition to the consequences, in some cases severe, for the few youth prosecuted under criminal and civil law.[90] In relation to the 'second basket' copyright reform, German Federal Ministry of Justice copyright experts declared their desire to keep school yards 'free of police'.[91] This goal could be achieved by the introduction of a culture flat-rate. The Federal Ministry of Justice is currently planning to increase the severity of copyright law to improve the situations of authors and rightholders as part of the European Year of Creativity and Innovation 2009.[92] To this end, the Federal Ministry of Justice invited internet providers to a private meeting of top players regarding the 'interests of the content industry' and 'preventing and combating piracy in the digital environment'.[93] Discussions regarding web blocks and a prohibition of internet access for persons who have repeatedly infringed copyright law are planned.[94] These measures to increase severity would be superfluous after the introduction of a culture flat-rate. Also, the discussion regarding the use of internet traffic data saved within the scope of state-mandated data retention for the prosecution of individual offences under copyright law would be irrelevant.[95]

The introduction of a culture flat-rate will lead to financial compensation for undertaken reproductions being allocated to the rightholders. While it is the case that they are already entitled to compensation by law, they rarely receive it. Under the current situation, creators receive no financial compensation for copies made over the internet. The introduction of a culture flat-rate would change this for the benefit of the rightholders. This financial compensation contributes to reducing the severity of the consequences to the authors of the regulation of property. Without compensation of this sort, a culture flat-rate would not be appropriate.

Within the framework of the balancing of interests, the relation to the public interest of the

87 See on this *Solmecke*, in: Taeger and Wiebe (2008), 211ff., with further references; further *von Gehlen*, interview with the press spokesman of the Düsseldorf Chief Public Prosecution Agency, Mr Stahl (a senior public prosecutor), jetzt.de of 11/08/2008; *Strüber*, interview with Ms Junker (a senior public prosecutor) or the Berlin Chief Public Prosecution Agency, Süddeutschde.de of 31/07/2008; Injunction of the chief public prosecutor for Baden-Württemberg, Ms Hügel, reproduced in: 'Massenstrafanzeigen gegen P2P-Nutzer: Bagatellregelung durch die Hintertür' available at http://www.heise.de/newsticker/meldung/67918.

88 See *Röhl and Bosch*, NJW 2008, 1417.

89 cf. *Stuttgart Regional Court*, MMR 2008, 63f. for an example of the prosecution of an innocent person by a number cruncher based on the provision of information from the access provider 1&1 granted by the Duisburg Public Prosecution Agency.

90 See on this *Lessig*, 2008: 'Now I worry about the effect this [copyright] war is having upon our kids. What is this war doing to them? Whom it is making them? How is it changing how they think about normal, right-thinking behaviour? What does it mean to a society when a whole generation is raised as criminals?'

91 cf. *BMJ*, discussion of 16/03/2004.

92 German Federal Ministry of Justice, press release of 29/12/2008.

93 *Zschunke*, NeuePresse.de of 06/01/2009.

94 A speaker for the access provider 1&1 referred to this as a 'digital death sentence', cited in *Zschunke*, NeuePresse.de of 06/01/2009.

95 See on this *Czychowski and Nordemann*, NJW 2008, 3095ff.; *Hoeren*, NJW 2008, 3099ff.

property pursuant to Article 14, which the legislative authority has even emphasised, must be taken into consideration. In the official justification of the enactment of the current copyright law, it is recognised that copyrights, in contrast to property 'in the final analysis [are] not intended to exclude others from using the work,' but rather '[should] provide the author with the legal foundation to monitor the type and extent of the use of his work and to receive revenues from its exploitation.'[96]

Consideration of these circumstances adds credence to the result that the introduction of a culture flat-rate is appropriate. Thus, the infringement of the rights of the authors and rightholders resulting from the introduction of a culture flat-rate is proportional overall.

3.1.2 Music Download Services

As a reaction to the possibilities arising from the internet to digitally transfer and reproduce data, the music industry has constructed its own download portals through which the digital works are offered.[97] These services account for a certain market share; in Germany in 2008, the proportion of digitally sold music was 9%.[98] It is possible that these download portals would experience losses in revenue due to the introduction of a culture flat-rate. Therefore it must be evaluated whether the introduction of a culture flat-rate infringes the basic rights of the operators of such download portals and is therefore unconstitutional.

3.1.2.1 Freedom of occupation pursuant to Article 12, Paragraph 1, Basic Law

The introduction of the culture flat-rate could be measured against Article 12, Paragraph 1, Basic Law, which guarantees freedom of occupation. However, this raises the question of whether the operation of music download portals is an independent occupation or is actually a partial aspect of a music company. In both cases, the protected scope of freedom of occupation is opened.

There would have to be an infringement in the protected scope. The introduction of a culture flat-rate does not pursue the goal of governing the occupation of download portal operators. An infringement can also exist with regard to merely indirect impairments.[99] In this case however, the impairments must be 'closely related to the exercise of the occupation and objectively exhibit a tendency to govern the occupation.'[100] In the case of levied taxes, the Federal Constitutional Court considers there to be an infringement of the freedom of occupation if the contributions have a strangling effect.

As concerns download portals, it can be assumed that they will suffer losses in revenue after the introduction of a culture flat-rate, particularly, the prices, which are already criticised for being inflated, will likely not be maintainable. This does not necessarily lead to the failure of the download portal as a whole, however. Services of this sort have significant advantages over P2P file sharing networks in terms of selection, quality of the products, availability and speed. Users of P2P file sharing networks are informed that at least one other user provides for download the work they are seeking at the time of their search. Should the provider go offline during the

[96] Justification, Part B., prefatory section to § 45ff., Copyright Act, BT-Drs. IV/270; see on this also *Dreier*, in: Dreier and Schulze 2006, Introduction, margin number 39.

[97] The following arguments are in relation to music download services. In terms of substance, however, the same applies to analogous film services, for example (such as Maxdome, the video-on-demand service offered by ProSiebenSat.1 Media).

[98] In the USA, Japan, UK and France, the proportion of digitally sold music is significantly higher. *IFPI* 2009, 7.

[99] *Wieland*, in: Dreier 2004, Art. 12, margin number 85.

[100] German Federal Constitutional Court Decision 70, 191, 204; further, *Wieland*, in Dreier: 2004, Art. 12, margin number 85, with further references.

download, the download will be interrupted. In the case of old or rare works, they may not be offered at all, or only on a very select basis. A further problem is the download rate: in Germany, most private DSL connections are asynchronous DSL (ADSL). This means that the download rate is a multiple of the upload rate.[101] Therefore numerous users must simultaneously upload a particular work at maximum speed in order for another user to download this work at an equivalent rate. Yet a further problem exists in respect of data security. Works offered on P2P file sharing networks are not monitored. It is not unlikely that files originating from a file sharing network are incomplete or are infected with malware. Every download exposes a user of a P2P file sharing network to the risk of compromising his entire system. None of these problems and risks exist with regard to the download portals operated by the music industry. It can therefore not be assumed that the introduction of a culture flat-rate will necessarily mean the end of the download portals. Rather, these will have to adapt their business model. Should merely the business volume of a company be reduced because of measures taken by the state, or other earnings possibilities are blocked, this does not regularly constitute an infringement of the freedom of occupation.[102]

Even if an infringement of the occupation freedom did exist, it would merely be a regulation of the exercise of an occupation, since the operators of the download portals are not denied access to their occupation. Regulations of occupations can be justified by reasonable interests in the public good.[103] The de-criminalisation of internet users, the relief of the public prosecution authorities and the financial compensation of the authors for reproductions made over the internet fulfil the requirements to be met in respect of interests in the public good. Thus an infringement of the freedom of occupation of download portal operators would also be justified.

3.1.2.2 Right to property pursuant to Article 14, Paragraph 1, Basic Law

An infringement of the right to property of download portal operators cannot be interpreted in the introduction of a culture flat-rate. In the final analysis this impairs the possibility of future income and the assets of download portal operators. These, however, are not protected by Article 14, Basic Law.

There is also the figure of the right to established and exercise commercial activities. According to it, everything contributing to the economic value of an operation should be protected pursuant to Article 14, Basic Law.[104] The German Federal Court of Justice has expressed scepticism vis-a-vis this figure.[105] It has, however, bindingly established that the protection of established and exercised commercial activities cannot extend further than the protection enjoyed by its economic foundations.[106] This means that even if the figure of the established and exercised commercial activities is recognised, no farther reaching fundamental protection can be derived from it than that guaranteed by Article 12 and Article 14, Paragraph 1, Basic Law. The introduction of a culture flat-rate infringes neither the freedom of occupation nor the right to property of the operators of download portals. Thus no infringement of the right to established and exercised commercial activities exists. Overall, the introduction of a culture flat-rate does not infringe the basic rights of download portal operators.

3.1.3 Internet Users

[101] Depending on the ADSL standard, the ratio lies between 5:1 and 24:1, cf. http://de.wikipedia.org/wiki/ADSL.
[102] German Federal Constitutional Court Decision 24, 326, 251; 34, 252, 256; German Federal Administrative Court Decision 71, 183, 193.
[103] German Federal Constitutional Court Decision 7, 377, 405f.; 65, 116, 125; 70, 1, 28; 78, 155, 162.
[104] cf. Decisions of the German Federal Court of Justice in Civil Matters 111, 349, 356; German Federal Administrative Court Decision 81, 49, 54.
[105] cf. German Federal Constitutional Court Decision, 51, 193, 221f.
[106] German Federal Constitutional Court Decision 58, 300, 353.

The internet users who must pay a fee for the culture flat-rate are also impaired. Their basic rights are affected by the payment obligation. Article 14, Paragraph 1, Basic Law, however, is not relevant since it does not protect assets as such.[107] As concerns the levying of obligations to pay fees, the general freedom of activity pursuant to Article 2, Paragraph 1, Basic Law, is ultimately affected.[108] Infringements of this right are permissible on the basis of laws formally and materially compliant with the Basic Law.

Critics of a culture flat-rate make reference to the circumstance that it is unjust to make the payment of a culture flat-rate dependent solely on the possibility of a download, because in this case, persons who make no use of this possibility would also have to pay.[109] This problem can be made less severe by making the amount of the fee dependant on the speed of the internet connection. In this manner, for example, only a fraction of the amount levied on DSL or VDSL connections could be levied on ISDN connections. Representatives of the music industry have repeatedly made reference to the circumstance that 'broadband content such as music or film' is the 'motivating factor behind the popularity of fast internet connection.'[110] From this it is concluded that no one '[pays] for a super-fast broadband DSL flat-rate connection to send emails and read the news.'[111] If this is accurate, no injustice can be assumed if the amount of the fee is made dependant on the speed of internet connection.

One way of avoiding this problem consists in levying the payment obligation on the access providers. They could then themselves decide whether and to what extent they would transfer the costs of the culture flat-rate to their customers.

Further, fundamentally the same problem exists with regard to fees paid on devices: in this case also, those who make no private copies with the printer or scanner they have purchased must pay.[112] No reasons are apparent why this should be permissible with regard to the fees paid for reproduction devices and blank media, but represent an infringement of basic rights as concerns the culture flat-rate. Similar considerations apply to the obligation to pay fees for broadcasters. In this case also, the Federal Constitutional Court considers it admissible on account of the greater goal (the functionality of the public broadcasters), to levy a monthly fee on broadcast users who make no use of their potential to watch and listen to public broadcasters.[113] The constitutional restructuring of the culture industry represents a comparably good reason that would also justify placing a financial burden on users who voluntarily do not exploit their advantages. It therefore follows that the payment obligation indispensable for the introduction of a culture flat-rate is constitutional even if it includes internet users who make no use of the potential to download cultural goods.

3.1.4 Interim Result

Overall, the introduction of a culture flat-rate thus represents neither an inadmissible

[107] Consistent jurisprudence since German Federal Constitutional Court Decision 4, 7, 17; see also Federal Constitutional Decision 95, 267, 300.

[108] See on this *Dreier* 2004, Art. 2 I, margin number 36, with further references.

[109] For example, as represented by the President of the German recording associations [*Phonoverbände*] *Gebhardt*, Spon.de of 06/09/2004 using the example of 'Erna Müller from Mühlheim' who only uses her internet access 'to regularly send messages to her granddaughter Nadine in Stuttgart'.

[110] As represented by chairman of the board of the German Federal Music Industry Association, Mr Gorny, in Bundesverband *Musikindustrie*, press release of 13/03/2008.

[111] As represented by the managing director of the German Federal Music Industry Association, Mr Michalk, cited in *Lischka*, Spon.de of 05/02/2008.

[112] On overview of the author compensation fees levied on printers and scanners (from €5 to 87.50 per device) is available at http://www.heise.de/newsticker/meldung/120216.

[113] Consistent jurisprudence since German Federal Constitutional Court Decision 73, 118, 158.; NJW 2000, 649.

infringement of authors' right to property, nor an inadmissible charging of internet users or providers of paid music download services. The introduction of a culture flat-rate would therefore not infringe national constitutional law.

3.2 Admissibility under European Law

The amendment of German copyright law to introduce the culture flat-rate is admissible only if it does not conflict with the requirements of European law, particularly the 'Directive on the harmonisation of certain aspects of copyright and related rights in the information society' (*InfoRL*)[known as both the Information Society Directive and the Copyright Directive].[114] Analogous to the arguments employed with regard to German copyright, the first step is to evaluate which property rights are impaired by the introduction by law of a culture flat-rate. The second step is to analyse whether an impairment of rights can be legitimised by a regulation of property and, if applicable, what requirements under European law should be taken into consideration.

3.2.1 Possibilities for exemptions and limitations of affected copyrights

German copyright has largely taken over the terminology used in European law, so the above arguments can be referred to as concerns the copyrights impaired by a culture flat-rate. Pursuant to Article 2, letters a and b, Copyright Directive, the author is entitled to the exclusive right to authorise, in whole or in part, or to prohibit, every making available of his works or recording of his works in every way and manner and in any form. Moreover, pursuant to Article 3, Paragraph 3, letter a, Copyright Directive, the author is entitled to the same freedom of decision with regard to the making available, by wire or wireless means, of recordings of his works, including in such a way that members of the public may access them from a place and at a time individually chosen by them. The producers of audio data storage devices are entitled to corresponding exclusive rights in respect of their sound carriers pursuant to Article 2, letter c and Article 3, Paragraph 2, letter b, Copyright Directive. By the introduction of a legal licence for the exchange of digitalised works on the internet for non-commercial purposes, exclusive rights guaranteed under European law to both the authors and sound carrier producers are impaired.

Article 5, Copyright Directive permits States Parties to provide for exemptions and limitations to these exclusive rights. A comprehensive listing of what exemptions and limitations are admissible for which of the exclusive rights governed in Article 2 to 4, Copyright Directive and under what conditions, is contained in Article 5, Paragraph 1 to 3, Copyright Directive. Should the requirements for one of these alternatives exist, the provision must be subjected to the three-step test[115] provided for in Article 5, Paragraph 4, Copyright Directive, which specifies the latitude of the Member States in respect of this structuring.

In relation to the introduction of the culture flat-rate, a differentiation must be made between the exploitation connected to the making available of copyright-protected works on the internet and the downloading and saving of media by other users of the file sharing system. Pursuant to Article 5, Paragraph 2, letter b, Copyright Directive exemptions and limitations may be made in principle to the authors' and sound carrier producers' reproduction right that is impaired by the download, if the reproduction is for private use and under the condition that the rightholders

[114] Directive 2001/29/EC of the European Parliament and the Council of 22/05/2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Official Journal L 167,10) also known as the 'Information Society Directive'.

[115] Extensive treatment of the three-step test in *Geige, Griffiths, Hilty and Suthersanen*, GRUR Int 2008, 822ff.; *Senftleben*, GRUR Int 2004, 200ff.

receive equitable compensation. The provision of an exemption to, or limitation of, the right to make publicly available would be necessary to legalise uploading, which however would be admissible under European law only for the purposes comprehensively provided for in Article 5, Paragraph 3, Copyright Directive. An alternative comparable to Article 5, Paragraph 2, letter b, Copyright Directive, as would be necessary for the introduction of the culture flat-rate, does not, however, exist. In the justification of the Directive, the goal of harmonised legal protection at a Community level in terms of the type and extent of this protection of transmissions of copyright-protected works over networks is referred to in this connection.[116] A clarification should be agreed that the rightholders recognised in the Directive should have the exclusive right to make interactive transmissions available for access by the public.[117] It follows that a provision for an exemption, as would be necessary for the introduction of the culture flat-rate, would not be reconcilable with the requirements of the Copyright Directive under European Law. The Directive would have to be adapted in this case.[118]

A divergent opinion to this, however, is advanced in the literature.[119] According to this opinion, the limitation of the authors' and rightholders' usage rights connected to the introduction of the culture flat-rate is not a limitation/governing of property under copyright law, since usage on a mass scale of a large number of copyright-protected works is concerned, for which an assertion of rights on an individual basis, and therewith the individual negotiation of compensation, are not possible.[120] To this extent, the copyright association merely exploits the exclusive rights of the author and other rightholders. The lump sum compensation for the usage rights does not limit the copyrights themselves, but rather limits the possibilities to which the author is entitled for exercising his existing usage right since compensation is admissible only in the form of compulsory collective management.[121]

In accordance with this, the admissibility of legalising the upload of copyright-protected works to the internet depends upon the result of terminological interpretation. If the measure were regarded as an exemption and limitation of the right to make publicly available, it would be inadmissible. If it were considered as governing the exercise of the right, it would be admissible. The German legislative authority must decide whether the existence of this alternative possible interpretation is sufficient to approve the conformity with European law of a culture flat-rate to be introduced in Germany by law. A significantly higher degree of legal certainty would exist if an exemption or limitation were to be integrated into Article 5, Paragraph 3, Copyright Directive governing a case analogous to Article 5, Paragraph 2, letter b, Copyright Directive. Even if the conviction that the culture flat-rate does not affect the right to make publicly available as such were accepted, or if the indicated supplement were made to the Copyright Directive, there is still agreement that the hurdle of the three-step test would have to be overcome in order for there to be international admissibility (admissibility under European law).[122]

3.2.2 The three-step test

[116] See Directive 2001/29/EC, Principle of deliberation [*Erwägungsgrund*] 25.
[117] See Directive 2001/29/EC, Principle of deliberation [*Erwägungsgrund*] 25.
[118] This is also advocated by *Grassmuck*, ZUM 2005, 108.
[119] See *v. Lewinski* 2004 for a thorough treatment of the reconcilability of collective administration of rights mandated by law with international and European provisions of copyright law.
[120] *V. Lewinski* 2004, 7; *Bernault and Lebois* 2006, 55f, concurs.
[121] *Bernault* and *Lebois* 2005, 54f.; *v. Lewinski* also performs the three-step test because it is also provided for in Art. 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and two agreements of the World Intellectual Property Organisation (WIPO), namely in Art. 10 WIPO Copyright Treaty and Art. 16, WIPO Performances and Phonograms Treaty.
[122] *V. Lewinski* 2004, 10f.; *Bernault and Lebois* 2006, 56.

In principle, the three-step test serves to limit the scope of activity of national legislative authorities as concerns introducing governance of property provisions.[123] Exemptions to, and limitations of exploitation rights are therefore admissible only under the following three conditions: they must be limited to particular special cases, the normal exploitation of the work or other protected objects may not be impaired, and the legitimate interests of the rightholder may not be infringed without financial compensation.

The limitation to particular special cases is intended to prevent extensive undermining of exclusivity rights. For this reason, if a special case is to exist, the public interest must take precedence over the protection of copyright.[124] Further, a clear definition is required and the effects must be limited.[125] Just as the limitation of copyright presented by the private copy, the culture flat-rate can represent a suitable means for decentralised distribution of information that responds to the needs of individuals.[126] Those who would benefit from the limitation are clearly defined as private persons and the formulation also significantly limits the scope of the special right to private use.[127] In this sense, the limitation to non-commercial acts of reproduction for private use represents a particular special case.

The second step is intended to guarantee that the normal exploitation of the work may not be impaired. The normal exploitation of use rights is considered to always be impaired if the use robs the author of a current or potential source of income, which typically exhibits considerable weight within the total exploitation of the affected works.[128] The instances of use subject to the legal licence may not compete with the exclusivity right. This means that such instances may not conceal the risk of 'commercial parasitism'.[129] This strictly economic perspective raises a fundamental question that is difficult to answer: do the right to produce private copies and the legalisation of file sharing networks really lead to a reduction in the number of protected works sold?[130] This can be doubted at least insofar as the media industry is already complaining of considerably reduced sales despite the existing fundamental prohibition of non-licensed acts of reproduction. Additionally, the proportion of downloads subject to fees comprises only 25% of the music industry's turnover, while at the same time, illegal downloads have decreased from 900 to 780 million over five years.[131] The position that the governing of property constitutes a conflict with the normal exploitation of the work is rejected in part because monitoring downloads as a basis for the calculation of the compensation is practically impossible due to the exchange on a mass scale of copyright-protected works amongst an almost limitless number of persons.[132] In conclusion, it can be assumed that the introduction of the culture flat-rate does not impair the normal exploitation of the work.

The last step of the three-step test is intended to ensure that the governing of property does not lead to an infringement of the legitimate interests of the authors and rightholders without financial compensation. In the context of a weighing of interests, it must be established that the public interest is greater than the impaired interests. In particular, the alternatives to dealing with the matter by a special case provision should be considered in evaluating the question of

[123] Dreier, in: Dreier and Schulze 2006, prefatory section to §§ 44a, Copyright Act, margin number 21.
[124] Runge, *GRUR Int*, 2007, p. 134.
[125] Bernault and Lebois, 2006, p. 33.
[126] Senftleben, CR 2003, 916; the following also agree that a special case exists: Bernault and Lebois, 2006, p. 56; Runge, *GRUR Int*, 2007, p. 134.
[127] *Bernault and Lebois* 2006, 34.
[128] WTO panel decision of 15/6/2000, WT/DS160/R, margin number 6, 180.
[129] *Bernault and Lebois* 2006, 34.
[130] An impairment of the normal exploitation cannot be assumed only because a market exists for making musical works publicly available on the internet, according to *Runge,* GRUR Int 2007, 134, rather, the income that can be achieved in this market must be taken into consideration.
[131] cf. *Bernault and Lebois* 2006, 11.
[132] cf. *Bernault and Lebois* 2006, 35.

whether the rights of the author or other rightholders are unreasonably impaired.[133] Finally, it must be evaluated whether the limitation of rights is balanced out by fair compensation. In this connection, not only the type of compensation (lump sum) is to be taken into account, but also and in particular, the potential alternative calculation and distribution methods. In principle, this weighing of interests corresponds to the proportionality evaluation performed in 3.1 and for this reason, reference is made to the above argumentation. The result is that there is no uncompensated infringement of the interests of authors and rightholders in connection with a culture flat-rate.[134]

4 Legal Requirements

The national law to be enacted in order to introduce the culture flat-rate must cover at least three regulatory aspects:

Limitation provision for the right to make publicly available pursuant to § 19a, Copyright Act
Limitation provision for the right to reproduction pursuant to § 16, Copyright Act
Regulation of the compensation obligation

4.1 Principle of Clarity and Definiteness and Requirements under Copyright Law

In enacting these copyright law provisions, general requirements obtaining under property law and copyright law must be taken into consideration.[135]

First, every statute must fulfil the principle of clarity and definiteness enshrined in the Basic Law.[136] From this proceeds the requirement that legal norms must be formulated clearly in terms of offences and legal consequences, which however does not exclude the use of indefinite legal terminology and the discretion of state regulatory authorities.[137] The limitation provisions to be introduced must therefore establish, at minimum, which copyright is being limited, which copyright-protected works are included and who the limitation provision is directed toward. Other classes of right/offence may potentially be included in the matter, for example, a limitation in respect of purpose. Both Article 5(2)(b) of the Copyright Directive and § 53, Copyright Act could serve as exemplars for the formulation of this provision. The provision introducing the compensation obligation must govern who holds the claim and whom the obligation claim may be asserted against, as well as establish the requirements for substantiation of the claim. In this case also, the provision pursuant to § 54, Copyright Act can be cited as an exemplar. The legislative authority must also decide whether to introduce the obligation that culture flat-rate claims under copyright law be administered by copyright associations. Then, a provision corresponding to § 49(1)(3), Copyright Act would have to be introduced.[138] Whether additionally the amount of the compensation obligation would be established by law remains at the discretion of the legislative authority. Until now, this has occurred only in the case of private reproduction, cf. Annex to § 54d, Copyright Act. Otherwise, the compensation amounts will be negotiated by the individual rightholders or the copyright associations.

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133 *Gaubiac and Ginsburg*, Communication – Commerce Electronique (Com. com. électr.) 2000, chron. 1.

134 Also taking this stance is Grassmuck, *ZUM* 2005, p. 108; for another perspective, see Runge, *GRUR Int* 2007, p. 133ff., with further references.

135 The formal requirements associated with enacting of the legislation will not be considered.

136 The principle of clarity and definiteness is derived from the principle of the state governed by the rule of law pursuant to Art. 20, Para. 3, Basic Law; Schlutze-Fielitz, in Dreier, Vol. 2, 2006, Art. 20 Basic Law [GG], margin numbers 129ff.

137 German Federal Constitutional Court 84, 133, 149; 87, 234, 263.

138 In principle, it would be possible for the tasks to be assumed by existing copyright associations, such as GEMA for music, VG Wort for language works, and VG Bild-Kunst for photography and film.

Moreover, the provisions of copyright law would have to be harmonised with the technical protection measures pursuant to §§ 95a and 95b, Copyright Act, as part of the introduction of the culture flat-rate. Section 95a, Copyright Act, establishes legal protection for technical protection mechanisms employed by authors and rightholders to prevent, or at least monitor, unauthorised reproduction of digital works. The prohibition against circumventing these technical measures gives rise to the possibilities of criminal prosecution, assertion of damages claims and actions for the issuance of prohibitory injunctions.[139] Section 95b, Copyright Act serves the interests of the users and balances out the implementation of the limitation provision against technical measures employed by rightholders in order to prevent certain types of use. With regard to the right to make a private copy pursuant to § 95b(3), Copyright Act, however, the technical measure has precedence, at least as regards online applications. Were a corresponding provision to be introduced for the limitation of non-commercial digital reproductions, then the use of individual works could be prevented by DRM in parallel to the legal licence.[140] Under the current legal situation, the use of copy protection mechanisms would leverage out the culture flat-rate. The user would be confronted with the problem that the digital private copy would continue to be prohibited, while at the same time, downloading would be partly legal and partly illicit. This result should be avoided at all costs.

4.2 Requirements under Data Protection Law

In the context of the evaluation of constitutional proportionality, it was argued that, from the perspective of users, the introduction of a culture flat-rate represents an alternative to the current legal situation that respects data protection and which would guarantee the compensation claims of the authors and rightholders. This argument must therefore be considered when establishing the structure of the culture flat-rate. Conformity with data protection law requires at minimum that the principles of data protection law be respected, in particular, necessity and relation to a purpose, as well as data reduction and data economy.[141]

In the case of the culture flat-rate, the decision regarding which data are necessary for its implementation depends on the concrete levy structure, and also on the distribution of the proceeds to the claim holders. Under a simple flat-rate model, each access provider could charge users a lump sum fee[142] that would compensate for all downloads of copyright-protected works from the internet. This variation is very compatible with data protection law because the access providers already have access to their users' data, such that no further collection of data would be necessary. Graduated lump sum fees scaled to the speed of internet access would also be conceivable. This would have the advantage of being fairer on a case-by-case basis. Finally, it is decisive that the principle of data economy can be effectively implemented by the introduction of a culture flat-rate. Conversely, if the compensation for each download instance were to be calculated individually by data quantity, this would necessitate extensive data collection regarding which internet users downloaded what, and when – in order to calculate the fees on this basis.

Based on existing models, it is to be assumed that a copyright association would be responsible for the distribution of licence fees to claim holders. Funds can also be distributed according to

[139] Dreier, in: Ibid. 2006, § 95a, Copyright Act, margin number 5.

[140] Almost no works are sold on DVDs without protection against copying. The copy protection is known as 'content scramble system,' and must be regarded as completely ineffective due to design shortcomings.

[141] See Jandt, 2008, pp. 104ff.

[142] The amount of the levy would have to be negotiated. The culture flat-rate introduced on the Isle of Man provides for a fee of one British pound per month for each broadband connection. cf. Pfanner, *New York Times,* 26/01/2009; A range of between one and ten euros is being assumed for Germany; cf. Grassmuck in *Deutschlandradio Kultur,* 21/02/2009, 4.46 p.m.

very different criteria. One frequently-cited model provides for the establishment of fee scales for the various categories of work (music song, music album, film) and additionally to take account of how often a particular work is downloaded or played. The copyright associations can also promote certain types of music and film in a targeted manner, such as GEMA does in connection with music deemed worthy of being taken seriously and ecclesiastical music.[143] In order to achieve the goal of a structure conformant to data protection requirements, it should be ensured that the data necessary for distribution of funds – in the case of the proposed model, this would be the number of times a particular song is downloaded – cannot be connected to the person who downloaded the song; otherwise, the advantages in respect of data protection law presented by a flat-rate would be undermined.

From a data protection law perspective and regardless of their function under copyright law, DRM systems have often not proven completely unassailable, making it advisable to amend §§ 95a and 95b for this reason.[144] For example, there were considerable practical problems associated with the Sony rootkit. It installed itself on the user's computer, even against the user's express wishes, and could not be deleted or modified.[145] The new basic right to guaranteed confidentiality and integrity of technical information systems has once again increased the requirements placed on DRM systems in order to be admissible.[146] The inadmissibility of such aggressive DRM systems cannot now be doubted. Further, music protected by DRM was never really accepted by customers.[147] The operators of the largest legal music download portals have declared their desire to dispense with DRM in the future.[148] DRM is still to be used for films, however.

5 A Look at Other European Union Member States

The competing interests of those concerned mirror a global phenomenon. Many efforts in other states are currently being undertaken by government, the private sector and independent organisations to harmonise these interests. This paper will now examine the state of discussion and development achieved in three EU Member States, chosen because they are representative: Poland, Sweden and the United Kingdom.

5.1 Poland[149]

Dr Krzysztof Wojciechowski[150]

In Poland, various products, such as music, films, books, games, software and images may be legally downloaded through authorised service providers. In the case of products subject to a fee, compensation is generally calculated per item. Additionally however, there are also subscription and video-on-demand services. Cost-free legal downloads are generally financed

[143] See *GEMA*, Principles and Foundations of Distribution, available at http://www.gema.de/presse/publikationen/fachaufstze/gema2003/.

[144] See Bizer in Roßnagel 2009, pp. 91ff.; Ulmer in Roßnagel 2009, pp. 75ff.

[145] See on this Hansen, *DuD*, 2006, pp. 95ff.; Trautmann, law-blog.de, 03/11/2005.

[146] Roßnagel and Schnabel, *NJW,* 2008, p. 3536; generally regarding the new basic right, German Federal Constitutional Court, *NJW,* 2008, pp. 822ff.; Hornung, *CR* 2008, pp. 299ff.

[147] In early 2009, the specialist publication *Computerwoche* judged DRM the fifth-biggest flop in the history of IT; cf. Hülsbömer, *Computerwoche,* 09/02/2009.

[148] 'Ist DRM am Ende?' [Is this the end of DRM?], heise online of 08/01/2009, available at http://www.heise.de/newsticker/meldung/121379.

[149] The original text was written in English; the German translation is by EML staff member Anne Yliniva-Hoffmann.

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by advertising. The exploitation rights are transferred by way of individual agreements with the given rightholders or by the copyright associations.

5.1.1 Copyright

5.1.1.1 Legal background

The Polish Act on Copyright and Associated Property Rights (hereinafter: Polish Copyright Act) of 4 February 1994,[151] in the amended version of 2002,[152] grants authors, performing artists, manufacturers of audio and video carriers, as well as broadcasters, the right to make works (or other protected content) public in any way or manner.[153]

The economic rights of the authors are based on property-like structures and include all forms of exploitation. The scope of the related rights is, however, limited to the exploitation forms listed in the Act. In 2004, Poland ratified the WCT (WIPO Copyright Treaty) and the WPPT (WIPO Performances and Phonograms Treaty).

Article 23[154] of the Polish Copyright Act permits the private use of works distributed without charge for personal purposes, even without the permission of the author. The scope of this personal use is limited to 'single copies of works',[155] as well as to 'a circle of people having personal relationships, and in particular any consanguinity, affinity or social relationship'.[156] The requirement being that the permissible personal use does not contradict the normal use of the work and does not impair the legitimate interests of the author (Article 35). Permissible personal use does not apply to computer programs (Article 77) and electronic databases (those that constitute a work)[157] unless the use of electronic databases is for 'one's own scientific use not connected with any profit gaining purposes'.

To implement 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 [the 'Copyright Directive'], Article 23 of the Polish Copyright Act provides for an exemption relating to incidental copies. The Act on the Regulation of Electronically-Provided Services of 18 July 2002,[158] which implements Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), contains provisions to release from responsibility intermediate service providers in cases of 'mere conduits' (Article 12), 'caching' (Article 13) and 'hosting' (Article 14). It further

[151] Consolidated text: *Official Journal – Dziennik Ustaw* (Dz.U.) 2006.90.631, with changes. The English translation is available on the website of the Polish Ministry of Culture and National Heritage: http://www.mkidn.gov.pl/cps/rde/xbcr/mkid/act_on_copyright.pdf.

[152] The Act of 28/10/2002 amending Copyright Act, Dz.U. 2002.97.1662, entered into force on 01/01/2003 (certain provisions, non-relevant in this text, on 01/05/2004).

[153] Articles 50, p.3, 86 para 1 p.2 (c), 94 para. 4 p.4, 97 para 7 of the Copyright Act.

[154] This provision applies *mutatis mutandis* to subject matters of neighbouring [i.e. ancillary] rights.

[155] The 'single copies' requirement was added by the Act of 01/04/2004, Dz.U. 2004.91.869. Under the prevailing view, it bans making an excessive number of copies (Barta, J., Markiewicz, R., *Prawo autorskie*, Warsaw 2008, p. 118; J. Preussner-Zamorska, [in:] *System prawa prywatnego. Tom 13. Prawo autorskie*, ed. Barta, J., Warsaw 2007, p.423; Traple, E., [in:] Barta, J., Czajkowska-Dabrowska, M., Cwiakalski, Z., Markiewicz, R., Traple, E., *Prawo autorskie i prawa pokrewne*. *Kommentarz*, Zakamycze 2005, p.309).

[156] A circle of personal relationships includes family and social relationships; the persons in social relation should know each other, stay in contact upheld for some time (Traple, E., Ibid.). Incidental or anonymous relations are excluded, although certain personal distant contacts may lead to a social relationship in the meaning of Art. 23 of the Copyright Act.

[157] Art. 17^{1} of the Copyright Act permits preparing a derivative work or reproducing a database constituting a work by a legal user, if it is required for access to the contents of the database and for normal use of its contents.

[158] Dz.U. 2002.144.1204 with amendments.

establishes that the service providers are not subject to any monitoring obligation in respect of the transferred or stored information (Article 15).

The use of works on the internet concerns various legal aspects according to the type of use. Any of the rights to record and to playback, the right to transmit, the right to distribute (linear transmission or distribution over the internet) and the right to make the work available independent of time and place may be affected.

Limitations and exemptions to these rights (designated 'permissible use' in the Polish Copyright Act) are granted in the case of permissible personal use (see above), copies produced for merely temporary use and certain forms of 'permissible public use', in particular: the use of certain materials by the media for informational purposes (current reports, articles, photos, overviews of publications, public speeches, short summaries) and the use of works made available in connection with current events for the purposes of reporting on these events.

There are also limitations on the exercise of rights. Pursuant to Article 21 of the Polish Copyright Act, short musical works, lyrical works and works that are a combination of music and lyrics, and – if used correspondingly – artistic presentations and audio recordings[159] may be exclusively broadcast based on contractual agreement with the copyright association. This only applies, however, provided a broadcaster does not acquire the transmission rights to commissioned works on the basis of independent agreements; authors and performing artists may determine the intermediary services of the copyright association by contractual agreement. Accordingly, this provision is applicable to the right to make available in any manner, provided works and artistic presentations (not, however, audio recordings) are affected. The Act contains no special limitation and/or exemption provision that would permit the exchange of protected materials (downloads and uploads) for uses over and above the permissible personal use pursuant to Article 23 of the Polish Copyright Act.

5.1.1.2 The approach being taken to combat illegal file sharing and in order to provide alternative legal ways of providing content that are consistent with national intangible property law

It should be emphasised in this connection that, according to the opinion prevailing in academic circles, certain instances of downloading protected content are to be considered legal, provided they fulfil all requirements for permissible personal use, namely: the work in question was made publicly available (distributed) with the permission of its author, the use is personal (non-commercial), only a limited number of copies will be produced ('single copy'), the use remains within a circle of persons bound together by personal relationships (family or social), it does not contradict the normal use of the work and does not impair the legitimate interests of the author. Otherwise, uploads are generally considered illegal.[160]

5.1.1.2.1 The 'permission side'

There are currently no official plans to solve the problem presented by sharing files of protected material. The Ministry of Culture and National Heritage, however, plans to review copyright law. This is based on broadly-conceived consultations and it is possible that diverse approaches

[159] Articles 92 and 95[1], Para. 1 of the [Polish] Copyright Act.

[160] Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne. Wprowadzenie*, Warsaw 2007, p. 147; Chwalba, J., *Korzystanie z programoww peer-to-peer a dozwolony uzytek pryatny w prawie autorskim*, ZNUJ PPWI, 2 (102) 2008, p. 50; Waglowski, P., *Prawo w sieci – zarys regulacji Internetu*, Gliwice 2005, p.144. Differently, treating downloads of works from a source where they have been made available illegally, as conflicting with a normal exploitation of a work, and thus not covered by permitted personal use: Swierczynski, M., *Prawo autorskie w spoleczenstwie informacyjnym*, [in:] *Prawo internetu*, ed. Podrecki, P., Warsaw 2004, p. 358.

could be discussed in connection with permissible use. In academic circles, the introduction of a lump sum fee to be paid by internet users as compensation for the granting of the licence has been suggested,[161] but not without opposition.[162] In 2006, the copyright association of performing artists and musicians (*Stowarzyszenie Artystow Utworow Muzycznych,* SAWP) suggested the introduction of a voluntary 'compensation fee', which would 'legalise' the sharing of files of protected material over the internet for those who paid the fee. Those who decided against paying the fee would be treated as 'pirates' in substantiated cases of illegal file sharing.[163]

According to an opinion advanced in academic circles, such a system should include all distributed works that are protected by related (also known as ancillary, or neighbouring) rights.[164] The SAWP's suggestion was in reference to music, films and other cultural products.

Individual elements of such concepts can be found in existing copyright legislation, such as the levies on carriers (e.g. hard disks, memory cards and MP3 players) and devices for reproduction of works and other protected material.[165] These levies are imposed by the copyright associations and distributed among the authors, performing artists, producers of audio and video recordings, as well as publishers (in the case of levies on copying devices and carriers). While the law does not explicitly specify which (copied) content is included here, the levies should compensate losses in revenue resulting from permissible personal use. They therefore include all protected content with the exception of content excluded from such use (software and electronic databases). Levies are also collected on reproduction services.[166]

The Polish Copyright Act also provides for levies on publicly-accessible publications of literary, musical, artistic, photographic and cartographic works that are not copyright-protected. These levies are payable to the Fund for the Promotion of Creative Activity.[167] The collection of these fees, however, is beset by difficulties of a practical nature.

Further, the Act on Cinematography establishes normative payment obligations for cinemas, parties offering films for rent, radio broadcasters, and operators of digital television platforms and cable television; the Polish Film Institute receives the proceeds for the purposes of promoting the production of cinema films.[168] These payments are not related to the use of content or the loss of rightholders' revenue (e.g. download or upload), but are viewed, rather, as a form of public promotion of cinema film production.

The suggestions made regarding a content flat-rate remain very general and make use of such broadly-conceived concepts as 'use on the internet' and 'exchange on the internet'. It is therefore important to understand this as meaning both downloads and uploads, both non-commercial in nature.

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[161] Barta, J., Markiewicz, R., *Od 'wolneg' oprogramowania do'wolnych' utorow,* Rzecezpospolita 14/12/2006. Authors do not use the term 'content-flat-rate'. Their proposal, far from a firm position, is presented as a possible option for further consideration; in other publications, authors also present other options. The proposal has been supported by Piesiewicz, P. F., *Utwor muzyczny I jego tworca*, Warsaw 2009, p. 155.

[162] Chwalba, J., *op. cit.*, p. 50.

[163] See the interview with J. Skubikowski of SAWP by Godlewski, K.: 'Abonament na sciaganie z internetu', *Gazeta Wyborcza*, 05/01/2006, http://serwisy.gazeta.pl/kultura/1,34169,3097009.html. The project was presented as a preliminary proposal.

[164] Barta, J., Markiewicz, R., *Od 'wolnego oprogramowania' …, op. cit.*

[165] Article 20 of the Copyright Act; Regulation by the Minister of Culture of 02/06/2003 on categories of devices and carriers used for copying works and levies on these devices and carriers paid by producers and importers, Dz.U. 2003.105.991.

[166] Article 20^1 of the Copyright Act.

[167] Article 40 of the Copyright Act.

[168] Article 19 of the Act of 30/06/2005 on cinematography, Dz.U. 2005.132.1111.

5.1.1.2.2 The ‘compensation side’

Since a content flat-rate does not currently exist in Poland, the following demonstrations generally refer to the existing system of levies on devices and carriers.

- Form of collection/levying of remuneration and/or compensation

The advocates of a content flat-rate recommend that copyright associations collect any compensation payments for private copies.

The existing compensation for permissible personal use, including downloads that fulfil the requirements for permissible use, is based on the system of levies on devices and carriers that may be used to reproduce protected materials. The levies are collected by the copyright associations legally designated for this purpose by the Ministry of Culture.

The fees on private copies are levied on ‘[p]roducers and importers: (1) of tape recorders, video recorders and other similar devices; (2) of photocopiers, scanners and other similar reprographic devices which allow to make copies of all or a part of a published work; (3) of blank carriers used for fixing, within the scope of personal use, works or objects of related rights, with the help of the devices listed in subparagraphs 1 and 2.’[169] The Ministry of Culture has issued an exact list of included products.

The producers and importers of the devices and carriers listed are obligated to render payment. Within the framework of the content flat-rate proposed by SAWP, the corresponding voluntary levies would be paid by internet users to the internet access provider, which would then forward them to the copyright associations.

Current copyright law establishes only the maximum limit of the levy collected on private copies: 3% of the amount generated by the sale of the devices and carriers specified in the list. The exact amount for each individual product is defined by the document issued by the Ministry of Culture and depends on the suitability of the device or carrier for reproducing works, as well as the given suitability for other purposes. The amounts vary between 1% (e.g. for hard disks) and 3% (e.g. for MP3 players). Under the SAWP proposal, the voluntary levy would be about one euro.

The concept of levies on private copies rests on the idea that rightholders should receive compensation for the loss in their revenue arising from permissible private use; yet the individual rightholders have no claim to the levies collected and distributed by the copyright associations designated for this purpose. The levies are characterised as a *sui generis* normalised obligation under civil law.[170] The law establishes the proportion due to each category of rightholder (authors, performing artists, producers of audio carriers and films, publishers) separately for levies on audio, video and reproduction devices, as well as blank carriers. The SAWP advocated adopting a comparable method for a future content flat-rate.

- Distribution of collected funds

Under the existing system, the copyright associations designated by the Ministry of Culture are responsible for collecting and distributing the levies on private copies. Specifically, ZaiKS and

[169] Article 20, Paragraph 1 of the [Polish] Copyright Act.

[170] E. Traple [in:] Barta, J., M. Czajkowska-Dabrowka, M., Cwiakalski, Z., Markiewicz, R., Traple, E., *Prawo autorskie i prawa pokrewne. Kommentarz*, Zakamycze 2005, p. 277.

SFB are responsible for authors of creative works in general/authors of written works, SAWP for performing artists and ZPAV for the producers of audio and video carriers.

The Polish Copyright Act determines the beneficiaries to whom the levies on private copies are payable as follows: the levies on audio and reproduction devices and carriers are distributed among authors (50%), performing artists (25%) and producers of audio recordings (25%). The levies on video reproduction devices and carriers are distributed among authors (35%), performing artists (25%), and producers of film and video (35%)[*sic*]. The levies on reproduction media and carriers are divided equally between the authors and publishers.

Detailed distribution criteria are worked out by the copyright associations and other representatives of rightholders.

- Ensuring compatibility with law of higher precedence (constitutional law, international copyright agreements, European law)

The existing levies system is regarded as the implementation of the provisions of Directive 2001/29/EC that call for 'fair compensation for rightholders' within the meaning of Article 5(2) (a) and (b) and its compatibility with law of higher precedence is not questioned. The following arguments regarding the content flat-rate therefore relate to the suggested proposal of what the law ought to be.

- Proposed solution approaches

There is discussion in academic circles as to whether the existing levies system and permissible personal use is adequate to meet the requirements of file sharing on a mass scale, particularly of music and films over P2P platforms. Several authors regard as necessary the establishment of a 'new paradigm for the use of works on the internet'. They suggest a system based on 'licences that are valid worldwide, are paid, normalised and acquired by paying a lump sum for the use of all works, as well as other materials protected by related rights distributed on the internet, for non-commercial purposes'.[171] The idea of a content flat-rate is criticised, however, since it would legalise infringement of copyrights on a mass scale.[172] It is alternatively suggested to circumscribe the scope of permissible personal use more strictly, particularly by adding the requirement that the user must be legitimately convinced that the exploited work has been permissibly distributed.[173] A further variation provides for a statutory expansion of liability for copyright infringements that would also extend to the contributory negligence attributable to those who refuse to use distributed filter software to prevent illegal P2P activities.[174] A simple increase to the levies on private copies is also under consideration.

- Counterpoint to legal services

As has already been described, the existing system of levies on private copies generates compensation for permissible personal use (which in some circumstances also includes downloads), but does not do so for file sharing in general (including uploads), which is considered to be illicit since it falls outside the scope of personal use. This compensation system works indirectly: the producers and importers of copying devices and carriers pay the levies to

[171] Barta, J., Markiewicz, R., *Od 'wolnego' oprogramowania...*, *op. cit.*; Piesiewicz, P. F., *op. cit.*, p. 155.
[172] Chwalba, J., *op. cit.*, p. 50.
[173] Ibid., p. 51; Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne. Wprowadzenie*, Warsaw 2007, p.148.
[174] Ibid.

the responsible copyright associations, which then distribute the levies according to the statistics collected regarding private copies.

- Consideration of the three-step test

The question of whether a content flat-rate would pass the three-step test is a central concern; it relates mainly to the legal consequences of such a system, more so than to the compensation as such. Opponents of a content flat-rate make reference, among other things, to the circumstance that it would contradict the normal exploitation of works (including use by providers of legal services). On the other hand, advocates emphasise that it would be impossible to prevent the exchange of protected materials on the internet. Academic opinions advocating the content flat-rate grant that a 'paradigm shift' is necessary and that 'obligatory licences' would require the prior modification of international and Community law; consequentially, they recommend licences for the copyright associations.[175]

The compatibility of the content flat-rate with the requirements of the three-step test depends, however, on the specific solution chosen, meaning that it would be premature to exclude the possibility that a conformant system could be created.

- Issues proceeding from Article 5 of Directive 2001/29/EC, which permits exemptions and limitations only with regard to the right to reproduction, but not with regard to the right to make publicly available.

The construction of permissible personal use in Polish copyright law is not limited to reproduction, but rather applies to any 'use', which can also include, for example, private showings, the renting of a created copy and transmission by email. This corresponds to the construction of the author's economic rights under property law, which also includes all forms of exploitation. Any difficulties that could arise owing to the different structuring of activities exempted under Article 5 of Directive 2001/29/EC have not yet been discussed.

5.1.2 Data Protection Law

5.1.2.1 Legal background

The Constitution of Poland of 1997 guarantees legal protection of private life (Article 47) and the right of persons to informational self-determination, including the provision that no one is obligated to provide information in respect of their person except if such providing is based on a law (Article 51). Data protection law is governed by the Act on the Protection of Personal Data of 19 August 1997,[176] which implements Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article 23 of this Act contains a listing of circumstances under which the processing of personal data is permitted, in particular:

- provided the affected person agrees with it;
- if it is necessary for the purposes of exercising rights and obligations guaranteed by law;
- if it is necessary for accomplishing tasks in the public interest that are specified by law;
- if it is for the pursuit of legitimate interests by the data administrator or data recipient, provided that this processing does not infringe the rights or freedoms of the data owner; particularly, the assertion of claims resulting from economically-significant behaviour is

[175] Barta, J., Markiewicz, R., *Od 'wolnego' oprogramowania…, op. cit.*
[176] Consolidated text: Dz.U. 2002.101.926 with amendments.

recognised as a legitimate interest in this sense.

5.1.2.2 Collection and storage of data regarding actual use

In practice, the distribution of collected levies on private copies incorporates statistical surveys (questionnaires). The data collected in this manner is rendered anonymous and is available to the responsible copyright associations.

5.2 Sweden

[to be supplemented]

5.3 United Kingdom[177]

Tobias Bednarz, PhD[178]

Numerous electronically accessible legal offerings of cultural content exist in the UK. Almost all music, film and video services are currently available online, often at a lower price than in stores.[179] Not only the media on offer varies, but also the business and financing models used by the different services, and the selection of new services is always growing.

'Pro-music' should be mentioned in any discussion of so-called online music stores: a collaborative effort by individuals and organisations within the music industry who together promote the legal use of music on the internet. According to a list created by Pro-Music, currently 39 online music stores exist in the UK,[180] while the IFPI Digital Music Report 2009 provides a broader overview of current developments in the area of digital music providers.[181]

'Streaming' offers represent a new development, whereby access is granted to music on offer, however it cannot be downloaded. Such services are financed by subscription or membership fees, or by advertising.[182] As regards these services, the copyright associations are charged with the management of rights, as has traditionally been the case.

Another innovative form of online music sales combines offering music together with broadband service. Such services are offered by Playlouder, or abroad, by the Danish internet service provider TDC and the French mobile telephone provider Orange.[183]

It is not only legal digital access to music services that is advancing; the digital distribution of film, for example, is also making headway. Research in this vein has indicated that the UK is the largest market in Europe for video-on-demand services.[184] Even legal e-book offers work in the

[177] The original text was written in English; the German translation is by EML staff member Anne Yliniva-Hoffmann.

[178] Centre for Studies in Intellectual Property and Technology Law, University of Edinburgh.

[179] Helmer, Stuart and Davies, Isabel, 'File-sharing and downloading: goldmine or minefield?' *Journal of Intellectual Property Law & Practice*, 4:2008, pp. 51-56, p. 56.

[180] See http://www.pro-music.org/Content/GetMusicOnline/stores-europe.php. This list, however, cannot be considered exhaustive.

[181] International Federation of the Phonographic Industry, IFPI Digital Music Report 2009, London 2009; http://www.ifpi.org/content/library/DMR2009.pdf.

[182] e.g. http://www.we7.com and the services offered by 'digital jukebox services': http:hmv.com/hmvweb/digitalSubscription.do?sku=999979&WT.ac=tcg_downloads_220109_hmvjukebox and http://sib1.od2.com/common/framework11.aspx?shid=0170008A.

[183] Gerd Leonhard, 'Hold on, I'm coming: the digital music flat rate is imminent', http://www.mediafuturist.com/2008/12/hold-on-im-comi.html lists these and other examples.

[184] NPA Conseil, 'La vidéo à la demande en Europe', Strasbourg 2007, http://ddm.gouv.fr/IMG/pdf/vod-npa-

British market.

5.3.1 Copyright

5.3.1.1 Legal background

In the following, the copyright law in effect and its application to 'internet piracy' will be presented.

British copyright law protects different types of content, such as music, films, books, software and games. Section 1(1) of the Copyright, Designs and Patents Act of 1988 (CDPA)[185] defines the scope of copyright as follows:

> (1) Copyright is a property right which subsists … in …—
> a) original literary, dramatic, musical or artistic works,
> b) sound recordings, films or broadcasts, and
> c) the typographical arrangement of published editions.

Section 16(2) additionally establishes that, in respect of a work, copyright is infringed whenever a person does any of the acts prohibited under copyright law without the licence of the rightholder, or who authorises another to do so.[186] A list of these illicit acts is contained in Section 16(1), which specifies the exclusive rights of the copyright owner:

> The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom—
> (a) to copy the work (see section 17);
> (b) to issue copies of the work to the public (see section 18);
> (ba) to rent or lend the work to the public (see section 18A);
> (c) to perform, show or play the work in public (see section 19);
> (d) to communicate the work to the public (see section 20);
> (e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21)

…

The lending and rental right (Section 16(1)(ba) and Section 18A) as well as the adaptation right (Section 16(1)(e) and Section 21) are typically not affected by the offence of piracy. The same applies to the right to issue copies (Section 16(1)(b) and Section 18) since this is only applicable to physical copies,[187] as well as the performance right (Section 16(1)(c) and Section 19), since the latter requires both the presence of an audience and the simultaneous perception of the presentation by the audience at the time of its creation, which is not generally the case as concerns internet piracy.[188] Consequentially, only the reproduction right (Section 16(1)(a) and

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2007.pdf and NPA Conseil, 'La vidéo à la demande en Europe: Second recensement des services de VoD', 2008, http://www.ddm.gouv.fr/IMG/pdf/LA_VOD_EN_EUROPE_-_Actualisation_etude_NPA-OEA-DDM_2007.pdf.

185 An unofficial consolidated version of the CDPA can be retrieved from the UK Intellectual Property Office at http://www.ipo.gov.uk/cdpact1988.pdf.

186 'Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.' CDPA, Section 16(2).

187 Laddie, Hugh, et al., *The Modern Law of Copyright and Designs*, Vol. II, 3rd edition, London et. al., 2000, Paragraph 34A.21; Bently, Lionel and Sherman, Brad, *Intellectual Property Law*, 3rd edition, Oxford, 2009, p. 143 pointing to EC Information Society Directive [Copyright Directive] 2001/29 Recital 28. Amongst practitioners, however, there is a debate whether the right to issue copies to the public and the lending and rental right might not also extend to digital content – see Boothroyd, Rachel, 'Licensing digital content: opportunities and risks', 2007, *Practical Law Companies*, Vol. 18, No 10, p. 52. Moreover, she rightly points out that the adaptation rights can be concerned if digital content is changed into another format.

188 Bently and Sherman (n 11), pp. 149f. The right does, however, apply to cases where content is streamed at times which cannot be influenced by the recipient of the right.

Section 17) and the right to communicate the work to the public (Section 16(1)(d) and Section 17) are significant.

When an internet user downloads copyright-protected material to his hard disk, the user copies this material, thereby infringing Section 17(1) CDPA. With regard to literary, dramatic, musical or artistic works, Section 17(2) CDPA explicitly establishes that its reproduction in any form is included within the scope of the Act, including its electronic storage, regardless of the medium. This provision is recognised to extend beyond its wording to electronically-produced copies of audio recordings and films.[189] Moreover, pursuant to Section 17(6) CDPA, the reproduction also refers to the production of merely temporary copies or incidental copies created within the framework of, and on the occasion of, other use of the work. However, the reproduction represents an illicit act within the meaning of the Act, and thereby an infringement of rights, only if the work is copied 'as a whole or any substantial part of it' is copied (Section 16(3) CDPA). This typically applies in the case of downloading protected content, but not necessarily to mere streaming. While using this technology, data is stored temporarily, i.e. individual bits of files are temporarily stored in the memory (RAM) but this does not result in the creation of an enduring copy.[190] While this certainly falls under the scope regulated by Section 17(6) CDPA, the answer to the question of substantiality is less equivocal. According to one perspective, each transmitted fragment is so small that – even if all fragments together are taken for a whole – a substantial part of the file within the meaning of the statute is not reached. The opposed opinion argues that even 'small and frequent' received transfers may constitute an act of infringement by way of producing a copy.[191]

Under British law, copyrights are limited by the granting of exemptions in the case of certain acts. These are designated 'permitted acts', which in itself indicates the legal nature of this system of limitations. Although the Act names a relatively large number of exempted acts (Sections 28 to 76, CDPA) these are each narrowly defined and concern very specialised circumstances. The most significant potential justifications for the present inquiry are the fair dealing (justifying) use for the purposes of research and private study (Section 29, CDPA), as well as the fair dealing (justifying) use for the purposes of criticism, review and news reporting (Section 30, CDPA). Within the framework of implementing Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, the UK has not introduced further excepted acts. It can be concluded that British law does not provide for any general excepted act for making a 'private copy'.[192]

This could change, however, since presently the introduction of such an exemption provision is under discussion. The 'Gowers Review' of 2006, an independent expert report commissioned by the British finance ministry concerning the general legal framework surrounding intellectual property rights, even went so far as to recommend introducing an exemption provision until 2008 for the limited private use relating to format conversions.[193] The British Intellectual

[189] Garnett, Kevin, Davies, Gillian and Harbottle, Gwilym, *Copinger and Skone James on Copyright*, Vol. I, 15th edition, London, 2005, Paragraphs 7-67 and 7-70; Bentley and Sherman (n 11), p. 141.

[190] Larusson, Haflidi Kristjan, 'Uncertainty in the scope of copyright: the case of illegal file-sharing in the UK', *European Intellectual Property Review*, 31, 2009, pp. 124-134, 127.

[191] Garnett *et al.* (n 13) 7-19 and Larusson (n 14) 127f with further arguments. Both follow the first interpretation. Larusson observes that with advances in technology it seems likely that streaming will be possible without buffering.

[192] A limited private copying exemption exists in relation to time-shifting; i.e. the possibility to make a private recording of a broadcast so that it may be watched at a later time (Section 70, CDPA). This, however, is not relevant in the context of online 'piracy'.

[193] Gowers, Andrew, *Gowers Review of Intellectual Property*, Norwich, 2006, http://www.hmtreasury.gov.uk/d/pbr06_gowers_report_755.pdf, p. 63. Gowers equally recommended the introduction of another new exemption for parody, caricature and pastiche as well as changes to the existing

Property Office (IPO) took up this recommendation and began consultations regarding the suggested modifications to provisions regulating exemptions.[194] The consultations ended in April 2008 and most respondents advocated the introduction of an exemption provision for format conversions.[195] In the subsequent formal proceedings, the IPO will begin a second round of consultations to address the type and manner of legislation. In light of the very specialised and narrowly-defined circumstance occasioning this suggested exemption provision, should it be introduced, it would likely be of no assistance to internet users downloading protected materials.

The uploading of files to a website by a user also constitutes an infringement of Section 17(1), CDPA. The exchange of files over P2P platforms, however, requires a different perspective. In this case, it is less a question of transmission of a copy by the user as the mere enabling of other users to access one's own files. In these cases, Section 20(1), CDPA, applies (Infringement by communication to the public) to the literary, dramatic, musical and artistic works, as well as audio recordings and films. Section 20(2), CDPA, establishes that the provision includes acts that cause a work to be made available 'to the public by electronic transmission in such a way that members of the public may access it from a place and a time individually chosen by them'. All forms of making available for access by transmission are included, and thus also the making available by file sharers of their files.[196]

Up to the present, the question of where the right-infringing act takes place has remained unclarified. In this connection, four alternatives are discussed: (1) where the user uploads a work onto a website; (2) the place where the server is located; (3) where the work can be accessed; or (4) where the public for whom the work is intended is located.[197] There is consensus with regard to the defining characteristics of 'public' to the effect that even though the work is made available only to users of particular internet services, these users are nevertheless to be considered 'public' in a legal sense, and consequently, P2P networks constitute a 'public' under the law.[198] The position that file sharing also infringes the right to issue to the public pursuant to Section 16(2) and Section 18, CDPA[199] is at least partially advocated; the prerequisite to this interpretation being the applicability of this norm to digital content. It is preferred, however, to apply it only to physical copies.

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exemptions related to education, libraries and archives, and research and private study.

194 UK Intellectual Property Office, *Taking Forward the Gowers Review of Intellectual Property – Proposed Changes to Copyright Exceptions*, Newport, 2008.

195 UK Intellectual Property Office, *Taking Forward the Gowers Review of Intellectual Property – Proposed Changes to Copyright Exceptions*, Newport, 2008.

196 Larusson (n 14), p. 126, makes the point that the expression 'transmission' does not really seem to describe a case where an internet user only stores files in a shared folder and no 'conveyance from one person or place to another' (i.e. the common understanding of transmission) takes place. This notwithstanding, no one has seriously argued that this precludes the liability of an uploader in a peer-to-peer network. On the contrary, the general view is that no actual transmission is necessary – See Garnett et al. (n 13) Paragraphs 7-116, suggesting that as soon as a work becomes available, the restricted act is committed. This interpretation is also in line with Polydor Ltd. v Brown [2005] EWHC 3191 (Ch) and European Court of Justice (ECJ) case C-306/06, Sociedad General de Autores y Editores de Espana v Rafael Hoteles SA [2007] ECDR [European Copyright and Design Reports] 2.

197 Bently and Sherman (n 11), pp. 150ff. See also Garnett et al (n 13), Paragraphs 7-117, advocating the first view.

198 Garnett et al (n 13), Paragraphs 7-118. See also the clarifications made by the ECJ in SGAE v Rafael Hoteles (n 21) that the public refers to 'an indeterminate number of potential viewers' while the 'private or public nature of the place where the communication takes place is immaterial' (Paragraphs 36 and 50).

199 Piasentin, Robert C., 'Unlawful? Innovative? Unstoppable? A comparative analysis of the potential legal liability facing P2P end-users in the United States, United Kingdom and Canada', 2006, *International Journal of Law & Information Technology*, 14, pp. 195-241; James, Steven, 'The times they are a-changin': copyright theft, music distribution and keeping the pirates at bay', 2008, *Entertainment Law Review*, 19, pp. 106f; Sumroy, Rob and Ryburn, Amy, 'Copyright liability on the internet – Issues for service providers' risks', 2007, *Practical Law Companies* 18, 11, p. 46.

With regard to P2P operators, the discussion in the UK principally centres around the question of authorisation. Here, it should be remembered that under Section 16(2), CDPA, copyright may be infringed not only by one directly doing a prohibited act oneself, but also by authorising another to do so. If the activity of the P2P operator is interpreted as such an authorisation of copyright infringements by way of file sharing, this would consequentially be equally a primary act of infringement. From a corresponding application of existing jurisprudential precedent established in the case *CBS Songs Ltd. v Amstrad Consumer Electronics Plc*,[200] in which the emphasis was on the circumstance that, in the final analysis, the decision to commit or not to commit a copyright infringement is taken by the directly acting person – and (therefore) not by the manufacturer of the devices that merely enable the infringement – to the operators of P2P networks, it follows however that even in this case, it is the individual decision of the individual user to use the network legally or illegally. Consequentially the operator would not authorise copyright infringements and therefore would not be liable for primary acts of infringement. The fact that this precedent-establishing decision goes back to 1988 and that international jurisprudence tends to insist on the responsibility of the P2P operators,[201] has ignited the discussion concerning the (continued) existence of the decision criteria in the UK. Reference is made in particular to the considerable uncertainty in this area,[202] but some call for a less restrictive interpretation of 'authorisation'.[203]

CDPA also contains provisions regarding secondary acts of infringement. Sections 22 to 26 establish importing infringing copy (Section 22), possessing or dealing with infringing copy (Section 23), providing means for making infringing copies (Section 24), as well as provision of apparatus for infringing performance (Section 26). The interpretation that P2P operators provide the requisite apparatus for making an infringing copy and therefore commit a secondary infringement under Section 24, CDPA is defensible. However, the Act requires that the contributory act in question must be specially conceived for making copies of the work. It follows that in this case also, the operator could avoid responsibility using the same arguments made in the context of authorisation: P2P networks and software may be used legally as well as illegally, and in the final instance, the end-user takes the decision whether to commit infringements of rights or not. In any case, all cases of secondary infringement of rights require a cognitive moment: unlike the primary infringements of rights, in this case, responsibility requires that the accused knew or would have to have known that the act in question was illicit. The foregoing discussions remain purely theoretically, however, since to date, British courts have not heard proceedings against P2P operators.

When copyright-protected material is transmitted from the place of transmission to the place of reception, it is temporarily copied to the server of the internet service provider (ISP). The resulting question is whether this represents an infringement of copyright by the ISP. According to Section 17(6), CDPA, simply making transient copies is illicit. At first glance, ISPs hereby infringe the reproduction right pursuant to Section 16(1)(a) and Section 17, CDPA. However, several acts considered fair (justifying) use exist to which the ISPs could appeal. On one hand,

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200 [1988] 2 All ER 484.

201 A & M Records Inc v Napster Inc, 239 F.3d 1004 (9th Circuit, 2001) and Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd 125 S. Ct. 2764 (2005). See Davies, Nigel and Pryor, Geregor and Keane, Aoife, 'Peer-to-peer case developments', 2006, *Entertainment Law Review*, 17, pp. 25-29 and Akester, Patricia, 'Copyright and the P2P challenge', 2005, *European Intellectual Property Review*, 27, pp. 106-112 for a more detailed analysis. A survey of more recent cases against peer-to-peer operators is provided by Helmer and Davies (n 1).

202 Bently and Sherman (n 11), pp. 156f; Blakeney, Simone, 'Peer-to-peer file sharing under assault', *Computer and Telecommunications Law Review*, 12, 2006, pp. 55-57. See also Larusson (n 14), pp. 128f who points out that unlike Amstrad modern peer-to-peer operators indeed are in a position to prevent copyright infringing acts.

203 Haque, Hasina, 'Is the time ripe for another exclusive right? A proposal', *European Intellectual Property Review*, 30, 2008, pp. 371-378.

Section 28A, CDPA, which implements Article 5 of Directive 2001/29/EC, establishes that copyright '…is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technical process and the sole purpose of which is to enable transmission of the work in a network between third parties by an intermediary … and which has no independent economic significance.' It is argued that this exemption was developed to encompass caching.[204] In any case, it can hardly be argued that this copy has no independent economic significance to the ISP. On the other hand, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) provides for limiting the liability of ISPs.[205] The provisions of Articles 12 to 14 concern exemption in cases of a 'mere conduit', 'caching' and 'hosting'. In distinction to Section 28A, CDPA, these provisions are not limited to copyright infringements on the internet, but rather concern every illicit act. Some uncertainty exists with regard to the interaction of these provisions with Section 18A, CDPA. In any case, the successful assertion by the ISP of these indemnifications depends on the circumstances of the particular case.

5.3.1.2 The solution approach pursued to combat illegal downloading and to provide alternative means of offering goods and services that are compatible with national intangible property law

According to IFPI estimates, 95% of music downloads provide no corresponding compensation payments to the rightholder[206] and a current study commissioned by the phonographic industry found that, in 2007, a total of 6.5 million persons in the UK were engaged in internet piracy, corresponding to 25% of British internet users.[207] Numbers such as these emphasise the need to take action in this area. Even if developments remain in flux, some prognoses may yet be made.

From the inception of the World Wide Web as it is known to us today, the problem of illegal P2P file sharing has been an uncomfortable issue. In more recent times, the publication of the Gowers Review has given this discussion its own dynamism. The Review recommended looking into industry agreements made for the purpose of preventing internet piracy and of excluding users involved in internet piracy concluded between ISPs and rightholders governing the exchange of data protocols. Should it be determined that no nominal improvement has been made to this area by the end of 2007, the government should take legislative action.[208] In February 2008, the government declared in a Green Paper entitled 'Creative Britain' that it recognised the importance of the discussions between ISPs and rightholders, and advocated voluntary agreements between ISPs and all other relevant stakeholders, but would not hesitate to take legislative action. The government would begin consultations regarding potential regulatory measures with a view to introducing a regulation by law by April 2009.[209]

On 24 July 2008, ISPs and representatives of the creative industry signed a memorandum of understanding produced by the British government. Six ISPs (Virgin Media, Sky, Carphone Warehouse, BT, Orange and Tiscali), as well as the British Phonographic Industry and the Motion Picture Association agreed to collaborate toward reducing the frequency of copyright

[204] 35 Bently and Sherman (n 11), p. 223.
[205] The text of the Regulations can be found at http://www.opsi.gov.uk/si/si2002/20022013.htm.
[206] International Federation of the Phonographic Industry, *IFPI Digital Music Report 2009*, London, 2009, http://www.ifpi.org/content/library/DMR2009.pdf, p. 5.
[207] Cited by O'Shea, Tim, 'BERR [Business, Enterprise and Regulatory Reform] Consultation on legislative options to address illicit P2P file sharing', *Entertainment Law Review*, 20, 2009, pp. 30-33.
[208] Gowers, p. 103.
[209] Department for Culture, Media and Sport, 'Creative Britain – New Talents for the New Economy', February 2008, http://www.culture.gov.uk/images/publications/CEPFeb2008.pdf, Paragraph 5.9.

infringements associated with P2P file sharing over a period of two to three years, and to change the public stance on such rights infringements.[210] To accomplish this, they undertook to develop codes of conduct. These provide for informing internet customers if their connection has been used illegally for the purposes of transferring copyright-protected material and for suggesting legal alternatives. In the first three-month trial phase, ISPs informed 1 000 customers each week.

In July 2008, BERR began consultations on illegal P2P file sharing and came to the conclusion that a co-regulatory solution would be preferable to that proposed by the government.[211] This provided for combined measures consisting of the industry's efforts at self-regulation, as developed in the memorandum of understanding, the inception of a group to develop effective measures for dealing with repeat offenders, as well as the obligation of ISPs to take measures against users identified as copyright infringers. The consultations also identified four further alternatives: (1) simplification of the existing procedure by obligating the ISPs to provide to the rightholder personal data associated with a certain IP address without the rightholder having to pursue the matter in the courts; (2) obligating the ISP to directly take action against infringers of rights; (3) the establishment of a council charged with investigating the proof submitted by the rightholder and instructing the ISP to take appropriate measures against infringers of rights or to take such measures itself; and (4) to grant the ISPs the obligation to install filter systems to prevent copyright infringement.

On 29 January 2009, the government published the results of the consultations and the government response. It concluded that none of the proposals had received broad approval. Instead, the viewpoints of the rightholders, consumers and ISPs were determined to be polarised.[212] The government itself distanced itself from the option that it originally preferred, noting that it would lead to legal uncertainty to the detriment of the ISPs in respect of the scope of their obligation. It was additionally noted that the memorandum of understanding represents only a portion of the relevant interests, although the participation of all affected parties would be necessary. As a consequence, the government now prefers option (2), namely directly obligating the ISPs to take measures, however with a special obligation that they instruct suspected copyright infringers that their behaviour is illegal (which is to be documented in a graduated manner). This special obligation obviously resulted from the three-month trial phase during which the ISPs sent warning letters to rights infringers, which led to an approximately 70% reduction in copyright infringements. Additionally, the government plans to obligate the ISPs to anonymously collect data regarding users who repeatedly commit serious copyright infringements (based on the notification measures, not based on surveillance of their customers' internet habits), in order to make such data available to the rightholders in connection with personal data information for the purpose of initiating court proceedings. Moreover, the government plans to obligate the industry to draw up codes of conduct relating to illegal file sharing, accompanied by giving Ofcom, the British communications regulatory agency, subsidiary regulatory responsibility. The next step is a renewed round of consultations based on this proposal, which would also perform an estimation of the consequences and a cost-benefit analysis.

Also on 29 January 2009, the government published another political paper, the interim report

[210] Reproduced in Department for Business Enterprise & Regulatory Reform, 'Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing, July 2008', London, http://www.berr.gov.uk/files/file47139.pdf, pp. 47f.

[211] Department for Business Enterprise & Regulatory Reform (n 42), pp. 5f. For a full account of the consultation paper see O'Shea (n 39).

[212] Department for Business Enterprise & Regulatory Reform, 'Government Response – Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing', London, 29 January 2009, http://www.berr.gov.uk/files/file49907.pdf, p. 2.

on the ‘Digital Britain’ programme. This programme analyses the British digital economy with a view to securing the absolute vanguard position of the United Kingdom in innovation, investment and quality as concerns the digital and communications industries.[213] With regard to digital content, the interim report repeats the government recommendations regarding illegal P2P file sharing developed within the framework of the consultations. Additionally, the report encourages the establishment of a rights agency charged with motivating the industry to create incentives for the legal usage of protected content, to approve collaborative efforts to prevent copyright infringements by means of consumer behaviour and to support technical solutions to protect copyrights.[214] Building on the memorandum of understanding, the establishment of an independent council would create a forum in which all parts of the value chain would come together. The aim is that such a council would be able to implement effective and appropriate measures.

In summary, it can be concluded that illegal file sharing is a worldwide phenomenon, meaning that, to a certain extent, discussions in the UK mirror international developments. It is difficult to predict the direction the development will take. On one hand, the ECJ has emphasised the importance of confidentiality of communication[215] and the European Parliament has declared its opposition to the option of what is known as the ‘graduated response’.[216] On the other hand, for example, in order to resolve a legal dispute with the Irish Recorded Music Association, the Irish ISP Eircom declared at the end of January 2009 that it would issue warnings to customers infringing copyright, and after three unsuccessful warnings, to block their internet access.[217]

These developments have definitely increased pressure on British ISPs. The hope of avoiding legal regulations of potentially wider scope through cooperation with the rightholders based on the memorandum of understanding could also increase the motivation. Moreover, these hopes appear to be fulfilled, since the current government proposal neither provides for an ISP obligation that would extend beyond sending warning letters, nor fundamentally relaxes the requirements for providing personal customer data in comparison to the existing legal situation. The ISPs can be relieved regarding the current state of discussions and the fears expressed by some that ISPs would become the ‘industry’s secret police’[218] or ‘copyright cops’[219] have not been confirmed.

At the same time, the weak element of the current proposal is revealed, in that it remains silent on the problem of implementation and the conceivable consequences for non-observance of the warning letters. At this point, the rights agency already mentioned could come into play.

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213 Department for Culture, Media and Sport, and Department for Business, Enterprise and Regulatory Reform, ‘Digital Britain - the future of communications’, Press Release, 17 October 2008, http://www.culture.gov.uk/reference_library/media_releases/5548.aspx.

214 Department for Culture, Media and Sport, and Department for Business, Enterprise and Regulatory Reform, ‘Digital Britain – The Interim Report’, January 2009, http://www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf, pp. 42f.

215 Case C-275-06 Productores de Musica de Espana (Promusicae) v Telefónica de Espana. See Hetherington, Louisa, ‘Peer-to-peer file sharing – ISPs and disclosure of user identities’, *Entertainment Law Review*, 19, 2008, pp. 81-82, and Kuner, Christopher, ‘Data protection and rights protection on the Internet: the Promusicae judgment of the European Court of Justice’, *European Intellectual Property Review*, 30, 2008, pp. 199-202.

216 Massey, Rohan, ‘Independent service providers or industry's secret police? The role of the ISPs in relation to users infringing copyright’, *Entertainment Law Review*, 19, 2008, pp. 160-162.

217 Andrews, Robert, ‘Ireland Gets France's Three-Strikes: Eircom Will Boot Persistent File-Sharers’, paidContent:UK, 29 January 2009, http://www.paidcontent.co.uk/entry/419-ireland-gets-frances-three-strikes-eircome-will-bootpersistent-file-sha/.

218 Massey (n 50).

219 Edwards, Lilian, ‘Should ISPs be Compelled to Become Copyright Cops?’, 2009, http://www.scl.org/editorial.asp?i=2024, with a particular emphasis on human rights arguments.

It should not be forgotten that the suggested proposals are still under development and the published government report is only an interim report. The final report is expected to be published in the summer of 2009.

The proposal of a content flat-rate played no role in the political debate in the UK regarding the problem of illegal downloading. Contrarily, however, a solution of this type was advocated and will be discussed below.

Beforehand, it should be remarked that the term 'content flat-rate' corresponds to the choice of words in the study at hand. In the United Kingdom debate around this question, the term was not, however, employed. The terms chosen are drawn from arguments of United States legal scholars and include for example 'alternative compensation system', 'non-commercial use levy', 'compulsory blanket license [*sic*]', or 'voluntary blanket license [*sic*]'.[220] The differences among these concepts are not only terminological in nature, but also concern their meaning. Nevertheless, as a whole they can be resumed under the umbrella term 'content flat-rate' which, broadly conceived, is to be understood as a system in which users pay a lump sum contribution as compensation for the opportunity to download digital content legally.

At the time the Gowers Review was compiled, a music industry association representing around 1 000 independent record labels and about 50 000 song writers advanced the proposal to impose a fee, a 'value recognition right', on ISPs, mobile telephone companies and device manufacturers.[221] The British Phonogram Industry, the most important representative of the music industry, did not participate, however and this proposal appears not to have been further developed.

In August 2008, reports circulated that Virgin Media was planning a legal P2P service.[222] Such a model would effectively move the newly-created services based on membership forward by a step. It was indicated that Virgin Media would want to cooperate with Playlouder MSP. Such plans would legalise acts that are illegal when committed by many internet users today and would guarantee consistent quality. It is therefore not surprising that a survey conducted for British Music Rights (which represents song writers and composers) found that 80% of individuals who download would be interested in a legal P2P system.[223] ISPs too, could profit from such an arrangement by distinguishing themselves from their competitors. The situation for rightholders is more complex, however. On one hand, this would give them the opportunity to transform into money all downloads that are currently illegal and performed without their knowledge. On the other hand, they will likely hesitate to establish a price that would be very difficult to increase. Publishers and composers have the additional reservation that the existing distribution of licence fees would be carved in stone, for both online and offline media.[224]

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[220] For a summary of the different models see Mehra, Salil, 'The iPod Tax: Why the Digital Copyright System of American Law Professors' Dreams Failed in Japan,' Temple University Legal Studies Research Paper No. 2007-27, http://ssrn.com/abstract=1010246, and Zarsky, Tal. Z., 'Assessing Alternative Compensation Models for Online Content Consumption,' *Denver University Law Review*, 84, 2006, pp. 645 to 719, both with an abundance of further references.

[221] OUT-LAW.COM, 'Music industry proposes "ISP tax",' 13 July 2006, http://out-law.com/default.aspx?page=7104.

[222] Andrews, Robert, 'ISP's New Music Service Will Pay Labels For "Illegal" Downloads,' paidContent:UK, 12 August 2008, http://www.paidcontent.co.uk/entry/419-isps-new-music-service-will-pay-labels-for-illegaldownloads; Orlowski, Andrew, 'Legal British P2P "by the end of the year" – ISP-music talks get serious', *The Register*, 26 June 2008, http://www.theregister.co.uk/2008/06/26/music_service_provider_talks/.

[223] Orlowski, Andrew, '80% want legal P2P – survey', *The Register*, 16 June 2008, http://www.theregister.co.uk/2008/06/16bmr_music_survey/.

[224] As the cost of making, distributing and promoting physical recordings was burdensome in the past, the royalties were split much in favour of the record companies. In the online world, runs the argument, these costs are lower. Taking over the pre-existing structure is therefore perceived as unfair by writers and composers. See

Moreover, no-one can say what consequences this would have for CD sales and traditional online music services. In January 2009, it was reported that Virgin Media had put their plans in this respect on hold.[225]

Recently, the government of the Isle of Man declared that it plans to legalise P2P file sharing. Some sources report this would be associated with an obligatory licensing fee,[226] but details have not yet been clarified. The island is an independent territory, not subject to the British legal system. Nevertheless, the introduction of the announced system would further excite the debate in the UK.

5.3.1.2.1 The 'permission side'

As discussed above, there are no specific plans to introduce a content flat-rate in the UK. The current trend in favour of bundling broadband connections with music services is based on voluntary fee systems suggested by the rightholders.

5.3.1.2.2 The 'compensation side'

It is important to organise the existing bundled broadband/music services along the lines of traditional forms of collective rights management, since they are comparable in terms of the structure of their compensation systems.

- Other sources of revenue, such as [levies] for storage devices or carriers (as compensation for private copies)

Unlike many continental legal systems, British copyright law does not provide for such levies. Such a system assumes the prior existence of an exemption provision covering the private copy, which is unknown under British copyright law.

- Consideration of the three-step test

The three-step test only represents a hurdle for content flat-rate systems that call for compulsory licensing fees. There were no serious proposals of this nature in the UK. The compatibility of such a system with the three-step test appears very questionable, however. Giuseppe Mazziotti has performed a precise analysis of this point.[227]

- Issues raised by Article 5 of Directive 2001/29/EC, exemptions and limitations only with regard to the right to reproduction, however not the right to making available

The background to this problem is that Article 5(2)(b) of the Directive potentially offers an exemption within the scope of downloading for the private copy, but not for uploading in this context.

Orlowski, music tax (n 57).

[225] Orlowski, Andrew, 'Virgin puts "legal P2P" plans on ice – Historic deal consigned to history', *The Register*, 23 January 2009, http://www.theregister.co.uk/2009/01/23/virgin_puts_legal_p2p_on_ice/.

[226] Orlowski, Andrew, 'Manx P2P for "one euro a year"?', *The Register*, 21 January 2009, http://www.theregister.co.uk/2009/01/21/manz_p2p_one_euro_a_year/.

[227] Mazziotti, Giuseppe, *EU Digital Copyright Law and the End-User*, Berlin and Heidelberg, 2008, Paragraph 8.3.3.2. The three-step test and its application to compulsory licensing is also dealt with by Ficsor, Mihaly, 'Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption-Based, Extended, Mandatory, Possible, Inevitable?', in Gervais, Daniel (ed.) *Collective Management of Copyright and Related Rights*, Alphen aan den Rijn, 2006, pp. 37-83.

The establishment of such an exemption for uploading is, however, necessary only if the following occur: (1) an obligatory fee system is introduced, and (2) this includes both download and upload. Both are unaffected within the framework of British law.

5.3.2 Data Protection Law

5.3.2.1 Legal background

The relevant provisions in this area are contained in the Copyright, Designs and Patent Act of 1988 and the provisions of 2003 relating to data protection and electronic communication, which are implemented by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.[228]

5.3.2.2 Collection and storage of data regarding actual usage

The difficulties that could arise in connection with surveillance of internet users for the purpose of fair distribution of compensation have not been treated in detail. Virgin Media's plans included making an anonymous record of downloads. Reservations from the perspective of data protection law were mainly discussed in terms of ISPs providing customer data to rightholders for the purposes of pursuing legal action.

5.4 Summary of Approaches in Other EU Member States

The examination of the selected states exhibits commonalities in terms both of issues and pursued solution approaches. First, they share the recognition that competing interests, especially those of rightholders and users, have to be brought into a balanced and fair relationship to improve the existing situation, which is unsatisfactory for those concerned. The contested points in this connection are also similar, such as the degree to which ISPs are to be obligated to be involved and the data protection aspects. Similarities present themselves with the problems discussed in Germany. The fact that there have been no legal or voluntary commitment solutions to date is also common to the states. Even if the details of the discussions and their current state differ, the idea of a content flat-rate or comparable systems has not been capable of achieving the approval of a majority, but rather is advocated primarily by representatives of individual interests and proponents of academic positions.

6 Structural Modalities

The culture flat-rate is intended to legalise exclusively non-commercial acts of reproduction carried out on the internet. The commercial providers of music (e.g., iTunes, Napster) and film (e.g. Maxdome) download services, whose activities are currently already legal because they possess the requisite licences, would not be directly affected by the new regulations introduced by law. It is to be assumed that these business models will face considerable losses in turnover. The providers of such services must offer added value vis-a-vis the cost-free services provided by P2P file sharing networks, which would then be legal.[229] This added value could inhere in better quality, faster rates, consistent availability and security of the offered works. These advantages cannot be guaranteed by P2P file sharing networks because they are dependent on

[228] A more detailed analysis is provided by Lloyd, Ian J., *Information Technology Law*, 5th edition, Oxford, 2008, Chapter 7 and Walden, Ian, 'Privacy and Data Protection', in Reed, Chris and Angel, John (eds.), *Computer Law – The Law and Regulation of Information Technology*, 6th edition, Oxford, 2007, Chapter 10.

[229] See also Chapter 0, above.

users and are therefore unpredictable. Professional service providers could exploit these weaknesses of P2P file sharing networks and market added value or premium services. Under a realistic price structure, it is to be assumed that the services would still be used despite the introduction of a culture flat-rate.[230]

The legal regulation of the co-existence of a culture flat-rate and premium services is questionable. Since premium services are commercial in nature, the introduction of the culture flat-rate does not exempt operators from the requirement to obtain the necessary licences. The operators would be able to negotiate the terms of use for online services with their users as has been the case to date. Admittedly, non-commercial transfers on the internet by users cannot be effectively prohibited, since the culture flat-rate provides for a legal licence that permits such transfers.

It is certainly to be assumed that no disadvantages will result for operators of premium services. When a user acquires works in digital form from a premium service provider and then makes them available on a P2P file sharing network, the usual disadvantages apply with regard to transfer rate and availability. The same applies to data security. Conversely, it will be a quality characteristic of the works sold by premium service providers that they are free of malware. This is not guaranteed in the case of a transfer mediated by a P2P file sharing network. In this respect then, the advantages of premium services remain intact.

An important part of the decision concerning structural modalities is the way in which artists will receive their compensation. If the familiar model of copyright associations is adopted for the culture flat-rate, they will also be charged with distributing the levies imposed by the access providers to the artists. As has already been demonstrated, it can be freely decided whether a new copyright association is necessary for the introduction of a culture flat-rate. Economic efficiency should be the foremost consideration when taking this decision. A frequent criticism of copyright associations is that they use a not inconsiderable proportion of their revenue for their own operating costs; over the last few years, this amounted to about 14% of GEMA's income.[231] Although this corresponds to expenses of about €120 million annually, the fundamental necessity of GEMA's existence is not doubted for legal reasons.

In any case, since they lack independent commercial interests, the copyright associations have the advantage of ensuring efforts directed toward achieving a fair distribution of levies that also promotes culture. For this reason, they will be trusted not only by authors and rightholders, but also by those who pay levies and society as a whole.

7 Conclusion

The introduction of a culture flat-rate requires the prior amendment of copyright law currently in force. It would not infringe the basic rights of creators, but rather ensures that they receive fair compensation for the reproduction of their works. Similarly, the rights of download portal operators and internet users who do not use protected works, but who must nevertheless pay the levy, are not infringed. To the extent that their rights are infringed at all, such infringements are justified by the purposes served by the introduction of a culture flat-rate. Such purposes include the restructuring of the culture market and adapting to the technical possibilities of the 21st century; additionally, the decriminalisation of users of file sharing networks, the urgent need to

[230] The iTunes Store price of €0.99 per song, which is inflated because it is oriented toward hard copies, is criticised by Blocher, cited in Löwe and Schnabel, in Roßnagel, 2009, p. 106. Blocher in Roßnagel, 2009, p. 49 also notes that it would cost € 20 000 to fully fill an iPod with a capacity of 80 GB with music acquired legally from Apple.

[231] GEMA, 2008, p. 52.

relieve agencies charged with criminal investigation, courts and telecommunications companies, and improved protection of internet users' rights to informational self-determination and confidentiality of telecommunications.

At the European level, the introduction of a culture flat-rate requires that the Copyright Directive be adapted. Such an adaptation, however, is admissible only because the culture flat-rate passes the three-step test. Digital rights management measures, which on the whole have proven unfriendly to consumers and ineffective, could then be dispensed with. It would be necessary to establish a copyright association to distribute the revenue from the culture flat-rate to the authors whose works are reproduced online. The collection of this data would be anonymous and therefore possible while still respecting data protection principles.

The introduction by law of a culture flat-rate therefore requires amendments to both national and European law, yet it remains nothing less than the logical consequence of the technological revolution ushered in by the internet.[232]

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[232] For a similar opinion, see Flechsig, beck-blog, of 12/08/2008.

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