

## Seeking alternative economic solutions for combating piracy

Digital technology makes sophisticated means available to the general public for reproducing works with an equal level of quality to the originals and at increasingly lower prices. Opportunities to circumvent intellectual property rights (IPR) are exacerbating free-riding problems. The music market has been hardest hit by the growth of P2P, and the cinema is about to follow suit. Unrestricted copying deprives producers and creators of a share of potential revenues from the sale of originals. The whole of the traditional system of financing cultural creation, based on consumers purchasing IP-protected works, could be at risk.

A varied range of measures can be taken to address the increasing capacity to circumvent IPR. In economic circles, Stephen Breyer first argued the case for abolishing copyright and forming contract-based clubs of voluntary contributors to finance cultural goods, as with public goods, in a groundbreaking article released as long ago as 1970. It is an idea that, with the development of digital technology, is generating fresh interest among economists (Kelsey and Schneier, 1999; Harrison 2002). At a broader level, there is a whole body of economic literature – whose relevance shall not be discussed here – maintaining that a world of contracts could ultimately replace intellectual property rules in the digital realm (Friedman, 1996; Dam, 1999). The efficacy of such arrangements would be ensured by content protection technologies geared not to toughening up IPR enforcement but to protecting the producers' investment. Digital technology makes it possible to develop new ways of excluding the consumer by means of contracts, i.e. new alternatives to IP rules.

In recent years, efforts to combat circumvention of those rules have hinged primarily on legal and technical solutions rather than those proposed by economists:

- on the legal side, we have seen the strengthening of exclusive rights in international law and a proliferation of legal proceedings brought against Internet surfers. Recent international negotiations reflect a mistrust of licences. The TRIPS Agreement, for instance, only allows limited exceptions to the general rule of exclusive rights. European directives have also settled for the exclusive rights option. Meanwhile, the music and film industry majors have been orchestrating virulent "information" campaigns (in France and especially in Germany) and suing ever-larger numbers of ordinary users;
- on the technical side, digital technology is an opportunity for the content industries to pay the artist an amount that tallies exactly with the service purchased. Content protection centres on the media (e.g. DVDs) and the networks, via Digital Rights Management systems. DRMs have wider functions on top of such conventional content protection schemes as pay TV: user licences and the tracing needed to recover revenue. They represent the technical equivalent of exclusive rights. Technology both permits and prevents the circumvention of intellectual property rules.

Extending beyond the confines of that legal-technical tandem, a brief foray into economic literature will unearth a number of original alternatives. A purely defensive approach (strengthening exclusive rights) appears far less urgent when it can be demonstrated that:

- purely technical alternatives are often undermined by a whole host of risks (legal, economic, social and cultural);
- there are alternative courses of action capable of tempering the negative effects of new practices in the consumption of works throughout the cultural industry sector. It is no longer a matter of a few isolated individuals on the fringes of society. Now there are millions of Internet users developing new social practices that it would appear unrealistic to try to fight.

Rather than elaborate on DRM-related issues, this article will concentrate on the alternative economic routes that can be taken to finance cultural creation. We distinguish market, public and "cooperation" economies.

### 1. Market-based solutions

A strong correlation has been noted in the United States, Germany, the United Kingdom or, more recently, France between falling CD sales and the growth in high-speed Internet connections or sales of blank CDs. Actual losses, however, are hard to assess. The Recording Industry Association of America (RIAA) and other trade groups base their estimates not on net losses but on shortfalls in earnings. Not all downloaded content has been paid for, of course. Piracy is just one of the many factors behind the fall in record sales; others include high prices and the fact that the CD, a product launched in the early 1980s as a means of revitalizing the market, is nearing the end of its life cycle. Studies seeking to gauge the impact of P2P on recorded music consumption often arrive at conflicting conclusions (for more finely shaded conclusions, see Boorstin, 2004; Liebowitz, 2003; Molteni and Ordanini, 2003). According to Curien and Muet (2003), there is no general and direct macro-economic relationship between record sales and the number of computer-equipped households: copying has not replaced the purchase of originals in countries such as Finland or Norway, where an extremely large number of households are equipped with computers, while sales have plummeted in Spain, where the computer penetration rate remains low. Molteni and Ordanini show that P2P has led to new forms of consumption with respect to experience goods –

where satisfaction is only registered once the good has been consumed – and is paving the way for changing tastes. The facts about losses therefore need qualifying.

While the sharing of copyrighted works may have a negative impact on sales of originals, economic literature contains a host of largely undetermined ways in which it can theoretically affect company profits (Meurer, 2003). Indeed, there are ways of offsetting losses or of developing new markets by capitalizing on changes in consumer behaviour.

### 1.1 Offsetting losses due to copying: indirect appropriability

Economists have been discussing the effects of unauthorized copying on social welfare for years. As early as 1985, Stan Liebowitz was showing how publishers could indirectly appropriate revenues through price discrimination, charging libraries more for the purchase of copyrighted works – books and journals – in order to offset future losses due to photocopying.

*Selling complementary goods and services* emerges as the most common indirect appropriability mechanism for offsetting losses. Debate on the subject dates back to Plant (1934, 1954) or Breyer (1970). In the cultural industries, methods of indirect appropriability through complementarity are limited save in the case of vertical integration between the music industry majors and the copying equipment manufacturers (Sony). Furthermore, there is nothing to prevent content producers from entering into agreements with access providers or equipment suppliers whose goods and services can be considered directly complementary to their own (see 1.2).

*Network effects* are another way of minimizing losses. Copies engender positive network externalities. They can therefore have an impact in regard to the distribution of goods and benefits to copyright holders (Conner and Rumelt, 1991; Takeyama, 1994; Shy and Thisse, 1999). Unauthorized reproduction of video games and utility software enables some to gain a sizeable share of the market, and gives rise to significant network effects. P2P exchanges definitely do generate network externalities: a P2P site's usefulness increases with the number of surfers exchanging files. But these network effects do little to help create irreversibilities in regard to the purchase of specific goods and services. Contrary to the case of software, competition between works can hardly be likened to a standards war. A well-known musical group does not need to create a fan base but to appropriate short-term revenues for each work produced.

Copying, however, is found to have highly positive *promotional effects* in the cultural industries. New patterns of consumption emerge, such as testing a musical good on the Internet before buying it. P2P software can have a positive impact on CD sales by feeding the consumer's addiction to music in general or by enabling them to discover particular pieces. Artists react to piracy in a far greater variety of ways than the producers. They do not all appear to be affected in the same way. When an Internet surfer downloads tracks by a superstar, it is presumably not so much to discover the artist's work as to avoid the cost of buying the record. Lesser-known artists, on the other hand, have a lot more to gain from the promotional effect.

### 1.2 Opening up new markets

Attempts by the majors to make consumers pay for content previously available to them for free have famously failed to have any real impact on the general public. They have been a little too slow to react to be able to compete with the free sites, whose success can also be ascribed to the diversity of what they offer. Notwithstanding the difficulties, various factors can help further the development of legal fee-paying services: being easier to use compared to the relative disarray of P2P, having greater flexibility, offering a fuller range of services and so on. P2P subjects surfers to a number of inconveniences: excessive spam, risk of viruses, spyware, fakes, doubts about the quality of files, high transaction costs, etc. Legal services can show real differentiation on all of these points.

Given the competitiveness of free services, Internet surfers will only agree to pay for high value-added goods. To turn users into paying consumers, the market can be segmented according to a versioning-based rationale: releasing downmarket versions of limited quality, quantity or potential while premium goods are offered at higher prices. Mixed paying and non-paying alternatives are having to be developed; free Internet connections have not stopped large numbers of users from paying for high-speed access; and the existence of public television stations has not put people off subscribing to multi-channel cable or satellite.

The film economy has changed profoundly over the past few decades. After suffering from the competition of televised output in the 1960s and 1980s, cinemas have finally managed to find ways of attracting audiences of close to a billion Europeans a year through product *differentiation*. Furthermore, the proliferation of broadcast media has greatly increased the *size* of the film market. Europeans are spending infinitely more than during the golden age of cinema-going in the 1950s, a time often remembered with nostalgia. As with the P2P networks of today, the invention of the cassette – first audio, then video – was very badly received by the record and film industries respectively, which feared an increase in unpaid-for copying. In 1982, Jack Valenti, president of the powerful Motion Picture Association of America, solemnly warned the United States Congress of the dangers of video cassettes and recorders, saying that “the VCR is to the American film producer [...] as the Boston strangler

is to the woman home alone". Although initially hostile, the Hollywood majors are now making most of their turnover from video sales.

New markets, then, definitely will emerge. On the Internet, the supposedly free consumption of cultural goods is a largely an illusion since the consumer has already had to make some considerable outlays: subscription fees, connection costs, purchases of equipment, etc. The real problem resides in transfers within the value chain between the content industries and firms – often strangers to the world of culture and communication – that use the content as loss leaders for selling computer hardware, players, high-speed Internet connections or any number of other things. Apple, the newcomer to the sector, has experienced rapid success with its online music site, [iTunes Music Store](#). The site itself may be far from profitable, but for Apple it serves chiefly as a means of selling the iPod digital music players with which to listen to tracks purchased through iTunes. In a similar vein, since the beginning of 2004 a number of French newspapers and magazines have been seeking to boost their profit margins by charging readers a slightly higher price in return for a "free" DVD or CD. The Italian press has sought to boost its margins by coupling newspapers up with books. Since March 2004, Coca-Cola has been offering purchasers of drinks the chance to win vouchers for downloading music to a cellphone. Widespread application of the "loss leader" model gives rise to two sorts of problems: the symbolic downgrading of artistic production and, at an economic level, the need to guarantee the transfer from those funding the content to those that use it. In the medium term, it is impossible to imagine adjustments not taking place within the market framework. Meanwhile, a number of short-term public solutions have been put forward for the current period of transition.

## 2. Public solutions

There is nothing new about seeking state intervention to underpin the funding of goods vulnerable to the threat of free riding. In the current context, that intervention can come in a number of specific forms.

### 2.1 *Regulating the price of high-speed access*

O.Bomsel (2003) suggests segmenting the Internet access market by compelling providers to adopt an asymmetrical pricing system for high-speed access, a disincentive to the uploading of protected material. A basic distinction is drawn between uploading and downloading. This solution would be conducive to the development of purchased content and the continuation of exclusive rights for actors, including access providers faced with falling profit margins, who would see an increase in their resources.

But it could never help industry players adapt to the new economic realities. The main services made possible by high-speed access – network games, instant messaging, Internet telephony, videoconferencing, distance learning, telemonitoring, etc. – will continue to grow ever more reliant on *uploading*. Perfectly lawful exchanges can take place on P2P networks: distributing Linux productions or disseminating non-copyrighted content, sending photos or videos to friends. Adopting a solution of this kind would ultimately inhibit interactivity on the Internet and, hence, its distinctive nature and vitality. For the good of increasing access to information and knowledge, efforts must be made to encourage uploading instead of penalizing it and relegating Internet surfers to the role of mere consumers. Furthermore, there are no guarantees as to whether content producers really benefit from the access providers' additional revenue. In the final analysis, it amounts to resources that depend not on any of the cultural content's inherent values, but on the random pricing of high-speed access.

### 2.2 *Collectivizing cultural goods*

P.David (1993) considers three public answers to the underproduction problems arising due to the special nature of creative works: IPR allocation, of course, but also direct state production (DSP) and subsidies. Although perfectly acceptable in many countries in the realm of scientific research, DSP is far less well received in that of cultural production. Subsidies, a more common solution, are not too highly thought of either. Funded by the state budget, they generate a great deal of rent-seeking behaviour. Beyond the consequences in terms of taxation and certain market distortions, they run the risk, as with DSP, of promoting academism in goods created by government fiat. While not applicable to all content, subsidies can be an effective means of offsetting the losses of more vulnerable copyright holders. The smallest content producers may be the least copied in the overall copying market, but they can still find themselves seriously weakened by acts of copying against which they have no means of protection. P.Eckersley (2003) shows that introducing subsidies can lead to better results in terms of social welfare than a DRM-backed system of exclusive rights, not least because the cost of DRM technologies is infinitely higher in terms of infrastructure and ensuring security against infringement.

The framework of intellectual property can – and increasingly does – serve to support the development of more complex, public forms of redistribution.

### 2.3 *The paying public domain*

The idea of extending IPR beyond copyright is not new and can be incorporated into that of a paying public domain for living authors, a concept championed by Victor Hugo in 1878. All works with no direct heirs would

enter the paying public domain, with the proceeds serving to support young writers. The legal arrangements for the introduction of a paying public domain, a frequently debated subject, have remained highly limited in geographical and historical terms (Chantepie, 2003).

Yet it would seem an appealing system. On the one hand it is beneficial to the authors, representing a more stable source of income than public subsidies or patronage, and a possible alternative to the much-demanded extension of the term of rights. Such an extension, by the way, is not at all conducive to ensuring fair payment for authors as it only affects payments made to heirs and producers. On the other hand, while the extinguishment of IPR should theoretically enable free and unrestricted access to works, once they are in the public domain it actually has little impact on what the end consumer has to pay for a book or a record, not least because of the persistently high distribution costs. If a paying public domain were introduced, the consumer would hardly notice the difference. Which leaves the crucial question of an independent publisher or producer's access to out-of-copyright works. This should remain unrestricted in return for a modest amount of funding.

Other forms of redistribution and compensation have been highly successful.

#### 2.4 Compulsory licensing

The principles of the *droit d'auteur* form of remuneration have two main characteristic features: first, *droit d'auteur* is an exclusive right to authorize or forbid utilization, not a mere right to payment; second, contrary to most Anglo-Saxon copyright practices, remuneration must be proportional to revenues and not a lump sum. Current practices have watered down these principles without clearly drawing attention to the fact.

These past few years have seen the emergence of compulsory licensing: another means of implementing *droit d'auteur*, with which it actually has little in common. Compulsory licensing compels owners to drop their rights in exchange for a lump-sum payment set by law or by negotiated contract. Remuneration is no longer proportional to revenues, and the owner's exclusive rights are called into question. Compulsory licensing facilitates access for users by removing the need to seek authorial consent.

Economists regard this solution either as a bona fide alternative to copyright in the digital world (Ku, 2002; Nadel, 2002) or as an additional means of, *inter alia*, offsetting losses due to unauthorized copying (Netanel 2002). Compulsory licensing has many drawbacks. Once remuneration has been collected, the collecting societies have to distribute it among the authors, performing artists and producers, with all the difficulties that that might entail. The licences therefore lead to a build-up of indivisible sums whose allocation is a source of conflict.

The leading conventional argument in favour of compulsory licensing is that it represents the most effective way to reward rights owners because prohibitive transaction costs make it impossible to uphold exclusive rights through private management or voluntary collective administration. T.Gallagher (2002) makes a more original case from the point of view of economic incentives. When rights owners have considerable market power or the duration of rights is extended, the exercise of copyright becomes remarkably owner-biased and fails to fulfil its traditional role of providing an incentive for creation and production. Compulsory licensing can be means of combating such abuses and restoring balance between the various parties.

As for whether the licensing system in French radio broadcasting should be extended to the Internet, this is a hotly debated topic. The European Grouping of Societies of Authors and Composers (GESAC) backs an exclusive right to authorize or prohibit utilization and to freely negotiate remuneration. The major record labels and their representatives support that right, and are openly hostile to compulsory licensing on the Internet. Representatives of the performing artists appear much more open-minded, recognizing its potential to secure them a greater share of revenues than is currently the case under contracts negotiated with the majors. Compulsory licensing is proving more complicated to implement in the digital world than in the analogue. It can only work if the cost of identifying the users and rights owners is kept to a minimum. The P2P networks carry films, games, music and more, meaning that all of the various actors must be made to see the potential of this solution and the need to find the right way to redistribute revenues. Who should be granted right of use, for what territory, and with what basis for assessing remuneration and allocation between owners? In the light of the sums allocated under current licences, there are grounds to believe that the cultural industries as a whole would lose out. In some cases, compulsory licensing can be the only means of securing at least some form of financial compensation. L.Lessig (2002) maintains that if a licensing system had come into being in 1999, a share of subsequent P2P exchanges would have generated revenues for authors and producers and stimulated significant growth in the online music market.

#### 2.5 Mechanisms for offsetting losses due to copying

Lawmakers have dreamed up a variety of mechanisms for offsetting losses due to copying. In virtually every European country, legislation applying first to written work then to music and audiovisual has involved authorizing private copying (as an exception to the rule of *droit d'auteur*) in return for a sum paid to the rights owners to offset the shortfall in earnings. In line with the classic principle from environmental economics that the "polluter pays", copiers indulging in over - consumption should be made to pay compensation to the original producers, thereby

encouraging them to cut down on their copyconsumption. These various rights of remuneration have definite economic legitimacy but are radically changing the legal paradigm based on exclusive rights (without that being the clearly stated aim).

A good many authors have raised the possibility of introducing taxes to compensate for P2P-based copying: the access providers,<sup>1</sup> telecommunications operators or hardware manufacturers actually benefit a great deal from the unlawful downloading of content, as it enables them to increase traffic, attract new subscribers or sell equipment (see 1.2).

Introducing new taxes also has its drawbacks. It leads to market distortions: in the case of private copying, it penalizes blank media manufacturers whose goods are often used not for copying protected content but for other purposes that have no adverse effects on sales of originals (compilation and storage of personal data or out-of-copyright works). Furthermore, as stressed by S.Liebowitz (2003), it raises a number of questions at the practical application level: which ancillary product markets should be taxed? Recording devices, blank media, Internet subscriptions? At what rate of taxation? How is that rate going to be able to change over the years, seeing as how experience has shown it can remain at its starting level for decades?

### **3. “Cooperation” solutions**

Instead of being relieved of their exclusive rights by the government and compensated through a variety of financial mechanisms, authors can freely choose to drop those rights.

The “free” movement, drawing on the philosophy of sharing, first emerged in the field of software. In the late 1990s, the principle of free software, no longer a utopian ideal, proved its efficiency through a range of solid productions. Linux now enjoys a sizeable share of the operating system market – dominated by Microsoft’s Windows – especially among government services, developers and young Internet surfers. The voluntary “loss” of exclusive rights is only ever temporary, but it allows a set of creators to produce “common” works without each of them having to bear the financial burden of paying for protected elements. With less restrictive terms and conditions, the emphasis is on the right to authorize not the right to prohibit.

Copyleft Attitude and other such movements regard this model as applicable not just to software but also to literature and art. They are now calling for a community of user-creators to be able to take a work and modify, enhance and redistribute it.

A clear distinction needs to be drawn between the sharing of works with an author’s consent, where the roles of users and creators are largely one and the same, from the sharing of end products by mere users (Meurer, 2003). P2P networks such as Kazaa – in which goods produced in a market economy are given away free without the agreement of their creators – are rooted in a rationale diametrically opposed to the non-market economic model of free use with authorial consent. Kazaa’s software may be distributed free of charge to Internet surfers – possibly just users, and not necessarily suppliers, of content – but the company’s shareholders see it as a means of building a highly profitable economic model hinging on banner advertising and the sale of ancillary services. Much of Kazaa’s revenue comes from selling user information to companies that indulge in spamming.

The philosophy of sharing draws support from the fact that artists down the ages have always re-used and been influenced by the ideas of others. The word “author” stems from the Latin “augere” (to increase), thus reflecting the desire to see one’s work added to a collective whole. As early as the nineteenth century, the cumulative nature of the artistic creation process served as Pierre-Joseph Proudhon’s grounds for challenging the right of authors to own their works (Sagot-Duvauroux, 2002). Authors draw freely from the public pool of ideas and strive to produce a work. Once it is published and sold, they lose ownership to the purchaser. When an author has drawn from the pool of ideas and decides to publish a work, that work automatically enters the public domain.

Collective creation on the Internet is bound to grow as a result of the input and interaction of successive user-creators. What is more, the institutional context within which the Internet first began is not enough to explain the current prevalence of non-market services and the vitality of cooperative behaviour based on the free software model (Dang and Pénard, 2003). The very structure of the Internet economy, which conduces to role reversibility and a lack of a clear dividing line between customers and producers, will help ensure the durability of that cooperative behaviour.

It would seem especially fruitful to apply the philosophy of the free software movement to cultural productions as long as it continues to involve a voluntary approach and centre on very specific cases: cooperation-based collective creations, MIT-type productions whose authors happen to be on a salary or even productions by authors whose only aim is to make a name for themselves. The free software economic model is built largely on

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<sup>1</sup> The P2P networks’ success has led to a number of technical problems for the access providers due to the resulting overconsumption of bandwidth and the fact that their networks were not designed to carry such large quantities of data.

the reputation and prestige that computer scientists gain in the eyes of their peers, and which subsequently enables them to reach the higher paid levels of more traditional labour markets. Foundation status (e.g. Richard Stallman's FSF) or more atypical forms of funding bring additional benefits. Advocates of the free software approach suggest that the practice of making donations could become more widespread during the downloading of music, thereby introducing an obligation-free social practice on a par with sectors where tipping occupies a key place (Samudrala, 2000). The free software philosophy can never under any circumstances be extended to productions requiring extremely large fixed costs, e.g. certain films.

## **Conclusions**

1. Purely technical, defensive solutions are impractical when it comes to addressing the proliferation of ways to circumvent copyright. Some in-depth changes are underway in the cultural industries, and companies are eventually going to have to adapt.

2. There are no magic solutions. It is not a matter of two conflicting models (free P2P versus DRM) but a production-remuneration continuum extending from the absolutely free through public forms of redistribution to direct payment by the user. Different ways of exploiting works will probably need to be identified, exclusive copyright being just one possible form of remuneration that is well-suited to some periods and types of content yet less so to others. DRM-protected exclusive rights are fine for a few market niches: premium content with fixed costs and an audience that is more than ready to pay.

3. The role of economists is to help remove these issues from the confines of strictly legal-technical debate. But economics is only the science of alternative choices. Each solution has its advantages and its drawbacks, which need to be discussed publicly in a more cool-headed manner.

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