Submission to the Copyright Review Committee

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Introduction

This submission to the Copyright Review Committee (CRC) seeks to contribute to the CRC's deliberation of the central question: what is the proper balance to be struck between (i) rights holders, (ii) intermediaries and (iii) users from the perspective of encouraging innovation?

In doing so, this submission seeks to outline the intersection between the interests of these parties in the context of online file sharing, an issue which wholly encapsulates the tension that arises between these various actors in the digital environment.

The advent of file sharing technology represents a major feat of innovation in that these networks greatly enhance the distribution of information. However, given that such networks are regularly used to share copyrighted works without the licence of the rights holder, this innovative technology has become embroiled as one of the most contentious issues in copyright debates. It must be stressed that the technological medium of file-sharing does not necessarily equate to a channel of illegality per se, rather it is the use to which it may be put by an individual user that may constitute copyright infringement. In this way, legal actions which seek to quash such programmes altogether and block wholesale access to such websites, particularly by imposing obligations on intermediaries to do so, result in copyright's encroachment of a scope which should be preserved for innovation. As such, file sharing technology demonstrates the difficulties in attempting to create an effective and appropriately balanced regulatory framework in the digital environment.

The structure of this submission is as follows. The first section outlines the rise of this technology, the social attitudes displayed by its users and some of the various legal issues this raises. The second section delineates the regulatory dynamics relating to this issue and sketches the various approaches evident in other jurisdictions. The third section sets out recommendations relating to how the balance between these parties might be realigned to infuse the Irish copyright landscape with a more appropriate equilibrium when seeking to resolve the issue of copyright infringing file sharing. The fourth section, set out in a question and answer format, seeks to address additional questions posed by the CRC that relate to this submission's recommendations.

Section One: Technological, Social, Political and Legal Background

Technology

The age of the information society hails a shift from encoding information in atoms to encoding it in bits. The term 'bit' is short for 'binary digit'. In its simplest form, a binary digit is either a 0 or a 1. However, as Murray points out, 'like atoms, which on their own are not very impressive… it is how bits can be used to construct larger, more complex systems that give them their economic value and social importance'.[1] Moving from atoms to bits has instigated a migration from analogue technologies to digital technologies. Almost anything that can be recorded can be digitised; sounds, images, or electrical outputs.[2] Information in digital form is almost infinitely scalable, mutually exclusive and intangible.

The information age has also seen the arrival of the Internet. The origins of the Internet can be traced to ARPANET, a new protocol of communication developed by the US military, which was later subsumed by NSF-Net, the network of the National Science Foundation. This expanded through connections to other networks such as EBONE, which connected the United States to Europe, before the creation of hypertext linking by Tim Berners-Lee facilitated the development of the World Wide Web.[3]

The digitisation of information and the infrastructure provided by the Internet have supplied the building blocks for the development of peer-to-peer (P2P) file-sharing technology. While file-sharing technologies take many forms and continue to evolve, they involve the transfer of digitised information via digital networks from one user's computer to another. Peer-to-peer networks provide architecture for stable, cheap and global sharing of any digitised information[4] providing both legitimate and potentially illegitimate applications.

One of the earliest file-sharing programmes was Napster, was introduced by Northeastern undergraduate Shawn Fanning in 1999. Music is converted to digital form by means of the .wav software format and also the MP3 sound compression

[1] Andrew Murray, *Information Technology Law: The Law and Society* (Oxford UP, 2010) 6.
[2] ibid.
[3] See Kevin M Rogers, *The Internet and the Law* (Palgrave Macmillan, 2011) 3.
[4] Alexander Peukert, 'A Bipolar Copyright System for the Digital Network Environment' in Alain Strowel (ed) *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar, 2009) 2.

technique. Fanning sought to create a means of exchanging such music files with friends via the Internet. His software application Napster, was an innovative combination of two standard functionalities: the first a central directory service allowing users to identify specific content on other users' computers and the second a file transfer protocol enabling that content to be copied from one computer to another – from peer-to-peer.[5] At the time, Napster was the fastest growing application ever monitored on the net[6] and at its peak, had over 70 million users.[7]

However, litigation ultimately proved fatal for Napster. In *A & M Records Inc v Napster Inc*[8] several record labels sued Napster for contributory and vicarious copyright infringement. Both the District Court for the Northern District of California and later the Ninth Circuit Court of Appeal found Napster liable for both such forms of copyright infringement. The centralised nature of the Napster server, through which it was proven that Napster had 'actual knowledge that specific infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material',[9] ultimately proved to be its downfall. The court also found that it derived direct financial benefit through the availability of infringing material.[10]

In light of this milestone ruling and the way in which the program's server was centralised was found to be its Achilles heel. The file-sharing dynamic has since morphed into a decentralised structure in which there is no central server, as every computer engaged in the file-sharing network is incorporated in its capacity as both client and server. Rather than a central hub, semi-structured or hybrid P2P systems draw on a variety of users as temporary information hosts, or 'supernodes' – local search servers combining to comprise a semi-structured network in which both the role of the server and process of file transfer is decentralised.[11] Subsequent P2P programs of this type included Gnutella, Grokster, Morpheus, Limewire and

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[5] Expert Report of Professor Lawrence Lessig Pursuant to Federal Rule of Civil Procedure 26(a) (2) (B) *A & M Records, Inc v Napster Inc* (2000) Case No 99-5183 MHP (ADR) (Northern District of California).
[6] Amanda Lenhart & Susannah Fox, 'Downloading Free Music: Internet Music Lovers Don't Think It's Stealing' *Pew Internet & American Life Project's Online Music Report* (2000) 4 ['Media Matrix, a firm that tracks use of Web sites, reports that the use of the Napster song-swap application is the fastest growing application it has ever tracked on the Web.']
[7] Lior Jacob Strahilevitz, 'Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks' (2002) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=329700> accessed 20 June 2012, 7.
[8] (2000) (2000) Case No 99-5183 MHP (ADR) (Northern District of California).
[9] *A & M Records Inc v Napster Inc* (2001) 239 F 3d 1004 (Ninth Circuit), para 57.
[10] ibid, para 61.
[11] Andrew Murray, *Information Technology Law: The Law and Society* (Oxford University Press, 2010) 242.

BearShare.[12]

At first glance, decentralised file-sharing programmes which absolve themselves of a high degree of oversight and control might evade liability for copyright infringement. Legal doctrine has responded in kind however, with the US Supreme Court enunciating the active inducement principle in *MGM Studios Inc v Grokster Ltd*[13]and the Australian Federal Court finding copyright infringement by authorisation in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd.*[14]

Although the copyright industries may have won certain court battles, they currently appear to be losing the war as the technology continues to develop. Further developments in file-sharing technology include the rise of BitTorrent technology,[15] file hosting sites providing cyberlockers and linking sites directing users to streamed material. As discussed further below, the way in which the technology has developed, particularly the development of a decentralised architecture, poses major difficulties for implementing an effective regulatory and legal framework.

Furthermore, attempts to regulate file-sharing are often thwarted and hindered due to anonymising file-sharing networks. An example of this is the OneSwarm file-sharing system, which is designed to facilitate the transfer of data with a premium placed on user privacy. The principles behind OneSwarm are described as representing 'a new design point in this trade-off between privacy and performance', further cautioning that users are offered greater levels of privacy than attaches to the BitTorrent system and 'better performance than Tor or Freenet'.[16] It is also claimed that other peer-to-peer data sharing applications, such as BitTorrent, are less effective as "user

[12] See Hasina Haque, 'Decentralised P2P Technology: Can the Unruly Be Ruled?' (2009) 23(1-2) International Review of Law, Computers and Technology, 123-129.

[13] [2003] 259 F Supp 2d 1029 (CD Cal) para 932 ['We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties'].

[14] [2005] FCA 1242, para 420 ['...authorising Kazaa users to make copies of sound recordings and to communicate those recordings to the public is an infringement (of Australian copyright law)'.] See Jane C Ginsburg and Sam Ricketson, 'Inducers and Authorisers: A Comparison of the US Supreme Court's *Grokster* decision and the Australian Federal Court's *Kazaa* Ruling' (2006) 11 *Media & Arts Law Review* 1.

[15]*See* Andrew Murray, *Information Technology Law* (Oxford UP, 2010) 251. ['Once installed a BitTorrent client allows for the uploading and downloading of BitTorrent files. To obtain a file via BitTorrent the user first has to obtain a small file called a Torrent file. This contains metadata used by the BitTorrent client to obtain the location of the file... Instead of the file transfer taking place between two users (a Peer-to-Peer transfer) it allows for an interaction between several users simultaneously (a Multi Peer transfer) by breaking large files down into smaller chunks and having different users transmit each chunk independently... (P)eople are simultaneously uploading (seeding) and downloading (leeching) file chunks.'].

[16] Isdal Thomas et al, 'Privacy-Preserving P2P Data Sharing with OneSwarm'. *University of Washington* (2010) 111.

behaviour is easily monitored by third parties'.[17]OneSwarm's creators comment that other popular and currently-available file-sharing networks 'expose their users to silent, third party monitoring of their behaviour'. They also contend that in developing the OneSwarm system they have 'reduced the cost of privacy to the average user'.[18]

Systems and networks such as OneSwarm have emerged in the wake of attempts by the entertainment industry to curb the rise of illegal file-sharing and detect those behind it. It is clear that anonymising systems such as OneSwarm and BitTorrent are being developed faster than any regulatory or legal framework can be devised. This will become an even more critical issue in the file-sharing debates when jurisdictional issues regarding cloud computing become everyday legal occurrences.

It is clear that there are practical limits to any regulatory attempt to combat illegal file-sharing and downloading. However, the technological architecture of file-sharing in forms such as OneSwarm illustrates the need to develop an effective legal framework.

Social

The way in which society behaves in respect of a particular activity, as indicated by prevailing social norms, is an important factor when targeting that activity with regulation. The hurtling pace of the file-sharing phenomenon has, in tandem, given rise to certain social norms which have become embedded amongst a large portion of society. A passive acceptance of what is often illegal file-sharing has become engrained throughout society for several reasons, including the way in which development of the technology has outstripped attempts to clamp down on copyright infringement, the futility of taking action against individual infringers and widespread Internet access together with the ease with which file-sharing programmes can be used.

As a result, copyright infringing file-sharing is a routine activity widely accepted by swathes of Internet users, who rather than pay for copyrighted works simply download them for free. Sheehy argues that 'an entire generation has grown up believing that music is free, believing that they have an entitlement to use the Internet

[17]ibid 122.
[18] ibid.

to download music for free'.[19]

Downloading works via file-sharing networks is premised upon the fact that a fellow user has uploaded that file thus making it available. This raises the question of why people are inclined to upload files, ostensibly for no benefit to themselves. This has led to closer studies of file-sharing programmes which reveal that the technology is often designed to harness deeply held social norms such as the sense of serving a united community through reciprocity. Strahilevitz describes the file-sharing phenomenon as being emblematic of 'charismatic code – a technology that magnifies cooperative behaviour and masks uncooperative behaviour'[20] by drawing on reciprocal tendencies that are likely to be inherent within a majority of users.

The Pirate Bay, a prominent file-sharing website that facilitates file-sharing by means of the Bit Torrent protocol, consistently seeks to reinforce a strong sense of community amongst its users and awards special symbols to consistently safe uploaders.[21] These symbols equate to the conferral of an accolade upon an individual, thereby encouraging and reinforcing the file-sharing dynamic.

File sharing networks which seek to nudge users towards behaving in a certain way, demonstrate the powerful effects of shaping accepted norms within a social group. Uprooting and reversing the passive acceptance that is prevalent amongst large sectors of society in respect of illegal file-sharing, although a major challenge should be a primary objective of regulation in this instance. Ireland's campaign against drink driving provides an encouraging precedent of how, through public awareness campaigns and effective enforcement, society's behaviour towards a particular activity can be changed from passive acceptance of an illegal activity to widespread conformance with an effective regulatory framework.[22]

[19] Helen Sheehy, 'Copyright Protection and the Internet in Ireland – Where the Law Stands' (Irish Society for European Law Lecture, Dublin, 26 March 2012).

[20] Lior Jacob Strahilevitz, 'Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks' (2002) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=329700> accessed 20 June 2012, 5.

[21] See wikiHow, 'How to Safely Download Peer to Peer Files' (wikihow.com, 18 March 2012) <http://www.wikihow.com/Safely-Download-Peer-to-Peer-Files> accessed 13 April 2012.

[22] See 'Reduction in Drink Driving Incidents' (rte.ie, 4 January 2011) <http://www.rte.ie/news/2011/0104/roads.html> accessed 10 April 2012; Éanna Ó Caollai, 'Drink-Driving Camapign Unveilled' *The Irish Times* (12 December 2011); David Labanyi, 'Drunk Drivers May Face New Sanctions' *The Irish Times* (Dublin, 17 April 2012).

Political

Some recent controversies in the US and Ireland provide an interesting snapshot of the contentious political dynamic at play in regulating file sharing. The US proposed legislation in the form of the Stop Online Piracy Act (SOPA) and Protect Intellectual Property Act (PIPA), which sought to strengthen enforcement measures in response to online piracy. However, a heated backlash from the online community, including a Wikipedia blackout, resulted in a public outcry which ultimately saw support for both SOPA and PIPA within the US legislature fall away.[23] But for how long in a jurisdiction of explicit lobbynomics?[24] Ireland also saw the online community mobilise opposition to the recent European *Union (Copyright and Related Rights) Regulations 2012*.[25]These recent controversies vividly illustrate the various interests at stake and the political dynamic at play. The most important consideration in this context is to avoid weighting the regulatory framework too heavily in favour of either stakeholder and instead, ensure file sharing regulation accounts for the interests of all affected parties and strikes an appropriate balance.

Legal

The activity of illegal file-sharing is a stark example of how the regulatory framework often struggles to keep pace with rapidly developing technology. As Brownsword states, 'without doubt, the outstanding generic challenge presented by new technologies is regulatory connection'.[26] Maintaining such connection, in this case with the target activity of file-sharing, is a considerable challenge for regulation in this instance.

Classical, command and control regulatory mechanisms, the state's promulgation of legal rules as set out in legislation, are often left lagging in the wake of contemporary technological advances. The Irish Copyright and Related Rights Act 2000 for example, are premised upon earlier forms of file-sharing; that of a network comprised of a linear, client-server architecture. Litigation has exposed the way in which this legislation has become somewhat outdated. In *EMI Records (Ireland) Ltd & Others v*

[23] Dominic Rushe and Ryan Devereaux, 'Sopa blackout and day of action - as it happened'. *The Guardian* (London, 18 January 2012).
[24]See Bill McGeveran, 'SOPA and PIPA: They'll Be Back'*The Guardian* (25 January 2012).
[25] See <http://stopsopaireland.com/> accessed 18 April 2012.
[26] Roger Brownsword, 'So What Does The World Need Now? Reflections on Regulating Technologies' in Roger Brownsword & Karen Yeung (eds), *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes* (Hart, 2008) 26.

UPC Communications Ireland Ltd,[27] in which the music industry sought injunctive relief against the Internet Service Provider UPC to restrain the company from making available sound recordings of the plaintiffs and to block access to the Pirate Bay website, Mr Justice Charleton found that the wording of section 37 and section 40 of the CRRA 2000 did not enable him to grant the relief sought, despite such relief in his view being merited on the facts. Given that 'the CRRA 2000 made no proper provision for the blocking, diverting or interrupting of Internet communications intent on breaching copyright',[28] in essence, as a consequence of the legislation's failure to maintain up to date regulatory connection with the problems posed by contemporary file-sharing technology, the court could not grant the injunction sought in this instance.

A further fundamental problem with the legal framework in this instance is the futility of taking legal action against individuals who engage in copyright infringing file-sharing. Elkin-Koren refers to this problem as one of 'enforcement failure':

> [a]s many scholars have observed, enforcement of copyright in the digital environment creates an "enforcement failure". The high costs of identifying, gathering evidence on, and suing numerous individual infringers – each engaged in small-scale copying but together causing a large financial loss – have rendered lawsuits against individual infringers inefficient. Individual lawsuits are expensive to prosecute, and the likelihood of recovering damages from individual users is low.[29]

Enforcement failure undermines the regulatory framework pertaining to file-sharing. This is vividly illustrated in the judgement of Mr Justice Charleton in *EMI v UPC* in which he refers to three cases concerning *Norwich Pharmacal* type orders (under which a third party has a duty to disclose relevant information and identify a wrong-doer in a civil action) in which costs amounted to €680,000 while the resulting settlements yielded only €80,000.[30]

Consequently, rights holders have explored other enforcement strategies. An

[27] [2010] IEHC 377; [2011] ECC 8.
[28] *EMI Records (Ireland) Ltd & Others v UPC Communications Ireland Ltd* [2010] IEHC 377, para 138.
[29] Niva Elkin-Koren, 'Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic' (2006) 9(15) New York University Journal of Legislation and Policy 15, 25-26.
[30] [2010] IEHC 377, para 62. ['The evidence establishes... that this process (pursuing individual infringers with Norwich Pharmacal orders) is burdensome and, ultimately, futile as a potential solution to the problem of internet piracy'.]

example of 'graduated response' enforcement[31] is provided by *EMI Records (Ireland) Ltd v Eircom PLC.*[32]The 'three strikes' policy requires rightsholders having the ability and right to monitor the Internet in order to locate copyright infringement. Users who infringe copyrights would receive a notice from the ISP outlining that penalties which range from fines to Internet disconnection and from protocol or site blocking to limitation of bandwidth may apply.[33]However, this form of enforcement could prove to be quite expensive. The Federal Court of Australia stated in *Roadshow Films Pty Ltd v iiNet Ltd* (No 3)[34] that graduated response enforcement 'would likely lead to significant expense'.[35] As a result an alternative enforcement method known as the 'speculative invoicing' approach was devised.

This controversial approach was exemplified by the practices of ACS:Law, a firm which specialised in enforcing alleged copyright infringement through file-sharing.[36] ACS:Law acting on behalf of their client MediaCAT issued letters to alleged illegal file-sharers. ACS:Law had obtained a number IP addresses by using a monitoring service to trace the illegal downloading of certain copyrighted films.[37] ACS:Law obtained Norwich Pharmacal orders and began to write to thousands of individuals on behalf of MediaCAT seeking £495 from each individual for breaching copyright or face court proceedings.

The matter came before the Patents County Court where the court noted that many recipients of the 'speculative invoicing' letters were upset and unaware of any illegal file-sharing taking place.[38] Indeed, Judge Briss stated that MediaCAT was unaware of whom the true offenders were, even after obtaining the Norwich Pharmacal order. The court held that such injunctions are merely methods of disclosure and should not be misused.[39]

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[31] Felipe Romero Moreno, 'The Three Strikes And You Are Out Challenge', (2012) European Journal for Law and Technology, Vol. 3, No. 1.
[32][2010] IEHC 108. See also'Briefing Note on Arrangement Between Eircom and the Irish Record Music Association (IRMA) With Regard to Copyright Infringement March 2009' available at <http://www.scribd.com/doc/13630351/Eircom-Irma-Briefing-Note-March-2009> accessed 20 June 2012.
[33] Alexandra Giannopoulou, 'Copyright enforcement measures: the role of the ISPs and the respect of the principle of proportionality', European Journal for Law and Technology, Vol. 3, No. 1, 2012
[34][2010] FCA 24 [435].
[35] ibid.
[36] Jane Wakefield, "Law firm ACS: Law stops 'chasing illegal file-sharers' " BBC News (London, 25 January 2011). <http://www.bbc.co.uk/news/technology-12253746> last accessed 20 June 2012.
[37] James Tumbridge, 'MediaCAT scratches the Norwich Pharmacal order', (2011) European Intellectual Property Review, 33(10), 659.
[38]ibid 660.
[39]ibid 661.

Furthermore the software used to track the alleged copyright infringement is claimed to provide inaccurate results.[40] Identifying users through Internet protocol addresses is not an exact science, a 78 year old pensioner received a 'speculative invoicing' letter from ACS:Law.[41] In *Cinepoly Records Co Ltd v Hong Kong Broadband Network Ltd*[42] it was accepted that IP addresses often have multiple users.[43] Furthermore, it is possible that Wi-Fi routers can be hacked and the subscriber unfairly prosecuted.[44]

In spite of the shortcomings highlighted above in respect of the detection of alleged copyright infringement, the use of detection software such as Logistep's software coupled with the use of Norwich Pharmacal orders has continued. This approach to enforcement was dealt with in *Golden Eye (International) Ltd v Telefonica UK Ltd.*[45] Here the rightsholders, Ben Dover Productions, sought a Norwich Pharmacal order against O2 in respect of 9,124 IP addresses.[46]

Mr Justice Arnold undertook a critical analysis of the 'speculative letter' approach. The Court sought to enjoin the national consumer association, Consumer Focus. The Court accepted expert evidence lodged by Consumer Focus which provides that monitoring software can if properly functioning, track file-sharing activities.[47] However, it was accepted that there will be an unknown amount of errors. While the Court was concerned about a number of issues surrounding the 'speculative letters' approach, an order for the disclosure of subscribers addresses was granted. *Golden Eye* is notable for a number of reasons. Firstly, the court spent some time considering how a correct balance could be maintained between the rightsholder's interests and those of the consumer. It was suggested that test cases would be a more acceptable alternative to speculative letters.[48] Secondly, it is notable that the ISP did not object to the granting of the injunctive relief sought. This latter point confirms that ISPs wish to avoid being involved in litigation to enforce copyrights. Indeed, the Eircom settlement illustrates that the current enforcement framework,

[40] 'More innocent consumers accused of file-sharing', Which? (2 July 2009) <http://www.which.co.uk/news/2009/07/more-innocentconsumers-accused-of-file-sharing--179504> last accessed 20 June 2012.
[41] Piracy letter campaign 'nets innocents' BBC News (26 January 2010)
[42] [2006] 1 HKLRD 255.
[43] Jojo Mo, 'Case Comment: Cinepoly Records Co Ltd v Hong Kong Broadband Network Ltd and others' (2009) European Intellectual Property Review 48.European Intellectual Property Review
[44] Felipe Romero Moreno, 'The Three Strikes And You Are Out Challenge', (2012) European Journal for Law and Technology, Vol. 3, No. 1, 4.
[45] *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch).
[46] ibid para 103.
[47] ibid.
[48] ibid para 143.

while constantly evolving is a hybrid of command and consensus modes of regulation.

In addition, the ineffectiveness of addressing the problem of copyright infringement on a case by case basis against individuals has seen ISPs come under increasing pressure to assume a more active role in policing file-sharing networks. Clark, writing in 2007, observes that '[u]ntil recently, the position of ISPs in Europe has been relatively comfortable, enjoying a degree of immunity from liability due to the Electronic Commerce Directive',[49] and further speculates that a belief existed 'that ISPs have little or no knowledge or control over materials hosted or accessed by users of their services'.[50]

The recent European Court of Justice decision in *Scarlet v SABAM*[51]clarifies the position of ISPs from the standpoint of content filtering as a method of protecting intellectual property rights. In the instant case, the ECJ ruled that ISPs could not be obliged to install content-filtering systems or to engage in site-blocking with a view to upholding intellectual property rights and preventing copyright infringement. An injunction requiring an ISP to monitor communications passing through its services entirely at their expense would infringe the rights of the ISP.[52] Furthermore such monitoring cannot be required unless a national court orders such monitoring as part of a criminal investigation as provided for in EU law.[53]

Notwithstanding the defences provided for ISPs in EU law, recent litigation in a number of European states has resulted in ISPs being required to block their subscribers from accessing certain websites where copyright holders' rights are being infringed. Examples include the decision of the UK High Court in *Twentieth Century Fox Corporation and Others v British Telecommunications plc*[54] granting the film industry an injunction against British Telecommunications (BT), the UK's largest ISP, ordering it to prevent access to the website known as 'Newzbin 2' and the decision of the Hague District Court in *Brein v Ziggo & XS4All*[55] granting an application against two Dutch ISPs requiring the blocking of subscriber access to the

[49]Robert Clark, 'Illegal downloads: sharing out online liability: sharing files, sharing risks', (2007) *Journal of Intellectual Property Law & Practice*, 2, No. 6,415.
[50] ibid.
[51]*Scarlet Extended SA v Societe Belge des Auteurs, Compositeurs et Editeurs SCRL* (SABAM) (C-70/10) [2012] (ECJ (3rd Chamber))
[52] Francesco Rizzuto, 'Injunctions against intermediate online service providers.' (2012) Computer and Technology Law Review18 (3) 69. 73.
[53] ibid.
[54][2011] EWHC 1981 (Ch).
[55] [2012] Case No: 374634/HA ZA 10-3184

Pirate Bay website. The recent signing into law of The European Union (Copyright and Related Rights) Regulations 2012[56] which amend the CRRA 2000 by granting rightsholders the right to seek an injunction in the High Court against ISPs within the terms of overarching EU law may see this trend extend to Ireland.

Such blocking orders raise further legal issues. It must be stressed that it is not necessarily the file-sharing technology itself that is illegal, but the activities for which it is used, such as copyright infringement. As such, blocking access to file-sharing websites is arguably a disproportionate response, as this does not account for the potentially legitimate purposes for which the technology might be used, such as for sharing works that are no longer under copyright but are in the public domain. Accordingly, it is submitted that the regulatory framework and enforcement thereof should focus not on intermediaries and the blocking of access to websites as a whole, but on the individual themselves and the activities they engage in.

However, refocusing enforcement on individual infringers raises the conflict between attempts to discover the identities of those engaged in illegal file-sharing and peer-to-peer downloading and the legality or otherwise of the methods of used to discover this information. Clark notes that it is important to make a distinction between 'privacy intrusive techniques' of collecting evidence and methods which arise as a consequence of court mandated methods.[57] From an Irish perspective, data collecting methods which are intrusive may be challenged under the privacy provisions in the EU Telecommunications Data Protection Directive, as well as under the constitutional guarantee of privacy in respect of the communication of messages.[58]

In conclusion of our discussion on the social, technological and legal factors that affect the regulation of illegal file-sharing, there are a number of complex issues. The challenge facing regulators is to adopt an effective regulatory framework that strikes a balance between the various interests at stake, which will be explored in the next section.

[56] *European Union (Copyright and Related Rights) Regulations 2012* Statutory Instrument No 59 of 2012.
[57] Robert Clark, "Illegal downloads: sharing out online liability: sharing files, sharing risks." (2007) *Journal of Intellectual Property Law & Practice*, 2, No. 6,415.
[58] ibid.

Section Two: Regulatory Dynamics

The sharing of copyright protected content over the Internet poses significant regulatory challenges. Namely what type of regulatory environment will facilitate access to information and innovation, protecting the interests of rightsholders, intermediaries and individual consumers? The Internet and related technologies do not fit within the jurisdiction of land based legal systems.[59]
Professor Charles Nelson contends that existing law on file-sharing is out of date and requires reform.

> When file-sharing emerged it was new, so no law had been crafted for it, [and] as a result it is a brand new problem. Judges have created an old physical law that doesn't fit with our modern society. Therefore the law needs a better solution.[60]

Brownsword has suggested that the regulatory spaces inhabited by new technologies are dynamic, constantly evolving environments that require flexible responses.[61] While we should not transplant a regulatory regime from one environment without considering the dynamics of the new environment, we should not reinvent the wheel.[62]

Cass Sunstein has advocated evidence based regulation incorporating a low cost regime that retains freedom of choice.[63] In particular Sunstein recommends that regulations should be enacted after careful analysis and review.[64] Therefore the challenge in the context of copyright infringement using file-sharing networks is to adopt a balanced approach that tackles the complex issues surrounding digital infringement. In order to reach this objective we must consider the regulatory approaches taken in other jurisdictions.

[59]Roger Brownsword and Karen Yeung, 'Regulating Technologies: Tools, Targets and Thematics' in Roger Brownsword and Karen Yeung (eds) *Regulating Technologies: Legal Future, Regulatory Frames and Technological Fixes*, (2008 Hart Publishing), 5.
[60] Catherine White, 'The F Flies', (2010) *Intellectual Property Magazine*. November. 33. 34.
[61]Roger Brownsword, 'So What Does the World Need Now?' in Roger Brownsword and Karen Yeung (eds) *Regulating Technologies: Legal Future, Regulatory Frames and Technological Fixes*, (2008 Hart Publishing), 31-33.
[62]ibid.
[63] Cass Sunstein, 'Empirically Informed Regulation' (2011) University of Chicago Law Review, 1349.
[64]ibid 1350.

Modalities of Regulating File-Sharing

Regulation is a broad concept and often focuses on attempts by a state to influence behaviours through the creation, monitoring and enforcement of rules. In the context of the online world, a broad understanding of regulation is required, encompassing the influence that politics, technology, law, competition and social control have.

The objective of this section is to review the regulatory approaches taken in different jurisdictions in the context of copyright infringement on file-sharing networks. In undertaking this review we will apply the Morgan and Yeung framework.[65]

Command

Command-based mechanisms for controlling behaviour involve the sate enacted rules that restrict certain conduct. These rules are under pinned by sanctions. The CRRA 2000 provides an example of this classical approach to regulation, based on command and control.

The approach taken by France to copyright infringement on file-sharing networks is a distinctly command approach. The '*loi favorisant la diffusion et la protection de la creation sur Internet*'[66]was enacted in 2009. In addition to providing for a graduated response that old eventually lead to the disconnection of users and a public authority HADOPI[67] maintains a list of those disconnected users to ensure that they do not subscriber to another ISP during the period of disconnection. However, in June 2009, the French Constitutional Court decreed that the section dealing with terminating users' Internet access in the wake of infringement was in conflict with the fundamental right to free expression.[68] In addition, Bonadio observes that the court 'held that any decision involving Internet disconnection should be taken by a court after a careful balancing of the two interests at stake, i.e. copyright protection and freedom of speech'.[69]

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[65]Bronwen Morgan and Karen Yeung *An Introduction to Law and Regulation* (Cambridge Universtiy Press 2007), Chapter 3.
[66]Loi nº 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (Law No. 2009-669 of June 12, 2009 to Promote the Dissemination and Protection of Creation on the Internet).
[67] The administrative agency set up to administer the lawisreferred to as HADOPI (Haute autorité de diffusion desoeuvres et de protection des droits sur internet).
[68] Enrico Bonadio, "File sharing, copyright and freedom of speech." (2011) EuropeanIntellectualPropertyReview *33* (10) 619. 624.
[69]ibid

HADOPI is an example of the distinct problem that the command approach entails. The formal, static approach to regulation can fail to take account of broader social and constitutional rights which may subsequently develop.

Furthermore such regulatory mechanisms can be bureaucratic, inflexible, unwieldy and as a result ineffective. Following its implementation, a study undertaken by the University of Rennes showed that file-sharing in France had grown.[70] Lavine comments that 'as of early 2011, HADOPI had yet to issue a single penalty; it wasn't even allowed to start sending second notices until January 2011'.[71]

Competition

Competition based mechanisms rely less on legal compulsion and more on financial incentives to alter behaviours.[72] In many cases competition-based techniques rely on taxes and levies or subsidies.

While file-sharing networks are necessarily illegal in nature, such applications a de facto means of obtaining sound files free of charge, and in the process, depriving copyright holders of earnings and livelihoods.[73]

Market based responses invariably arise when rightsholders deem the command based regulatory framework to be inadequate. This reaction is evidenced by the approach taken in the ACS:Law and *Golden Eye* speculative letters discussed above. A regulatory framework must provide for effective enforcement so as to avoid rightsholders relying on controversial market based remedies.

Consensus

The consensus-based approach can include a broad range of regulatory tools including self-regulation. This approach focuses on co-operation and can allow for a

[70] Sylvain Dejan, Thierry Pénard, and Raphaël Suire, 'Une premièreévaluation des effects de la loi HADOPI sur les pratiques des Interatuesfrançais'. <http://www.marsouin.org/spip.php?article345 >accessed 26 June 2012.
[71] Robert Lavine, *Free Ride. How the Internet is Destroying the Culture Business and How the Culture Business can Fight Back*. The Bodely Head (London, 2011) 209.
[72]Anthony Ogus, ', 'Regulation' (2004) in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge Universtiy Press 2007), 86.
[73] See Robert Lavine, *Free Ride. How the Internet is Destroying the Culture Business and How the Culture Business can Fight Back*. The Bodely Head (London, 2011) 55, who contends that 'no reputable study has found a popular file-sharing network where more than 10 per-cent of downloads are legitimate, and most show that fewer than 5 per-cent are'.

greater amount of expertise and knowledge to be applied as a broad range of participants can be involved. Such an approach relies on social consensus which is lacking in the debate around copyright infringement. In particular, tension arises regarding the extent to which ISPs should become embroiled in quashing copyright infringement.

The Digital Economy Act was enacted in the United Kingdom during 2010 and imposed an obligation on ISPs to send warning letters to subscribers when rightsholders inform the ISP of IP addresses that are alleged to have been used to obtain copyright protected material illegally. In addition, the media regulator (OFCOM) can direct the ISPs to undertake technical measures such as bandwidth restrictions or disconnection. This regulatory approach requires ISPs to fund OFCOM's activities include the appeals body for alleged copyright infringers.

The Digital Economy Act does appear to offer some flexibility and could be considered as a hybrid approach as it combines the command–based approach and elements of the consensus-based approach. This demonstrates one way in which the burden of enforcement can be shared between rightsholders and ISPs. However, the legislature should be wary of imposing too heavy a burden on intermediaries in the interests of preserving sufficient scope for innovation.

Communication

The communication-based approach relies on communication to persuade and educate society. Certainly, the high profile examples of enforcement are an example of 'naming and shaming'.[74]User's attitudes range from complete ignorance to passive acceptance of copyright infringement in their activities online. In essence users are simply not as aware of the risks of infringing copyright as they might be. The regulatory response should therefore incorporate a concerted effort to preempt infringement by increasing public awareness of the risks of doing so. Such an approach could take the form of public education campaigns. However, Yeung has commented that a wide body of literature exists which holds that such forms of public information campaigns are ineffective as individuals react in complex ways to them.[75]

[74]High profile examples of enforcement such as the trial of the four founders of Pirate Bay demonstrate to society that individuals behaving in an unacceptable manner can be punished. This plays a key coercive role in changing behaviour.
[75] Karen Yeung, 'Government by Publicity Management – Sunlight of Spin (2005) inBronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge Universtiy Press 2007), 99.

Code

The use of technology or architecture has long been viewed as a means of controlling behaviour. The ability of technology to regulate itself was first highlighted by Lessig[76] and suggests that by controlling the public space regulators can manipulate behaviours.

The control of code has been applied by rightsholders to restrain illegal file-sharing, notably through the use of digital rights management (DRM). However DRM also creates the potential for the collection of vast quantities of personal data, individuals' intellectual habits and preferences.[77]

The response to DRM has been the circumvention of protection measures. The development of DRM cracking software is analogous to the development of circumventing IP tracking software. Additionally, DRM is viewed as a paternalistic and inflexible approach as it is unable to distinguish between lawful circumvention for purposes of fair dealing and unlawful circumvention which results in copyright infringement. As a result consumers are not able to exercise their fair dealing rights. In this way DRM seeks to prioritise the interests of one party over another with the adverse effect of distorting an appropriate balance between these interests. As a result this approach should deterred.

Other Jurisdictions

The modalities of regulation highlighted above are not watertight categories and states have applied regulatory tools in different ways.

Recently, the Australian High Court upheld a Federal Court ruling that Internet service provider iiNet 'had no direct technical power to prevent its customers from using the BitTorrent file-sharing system to infringe copyright'.[78] This decision is instructive from the perspective of ISP liability and file-sharing. Michael Malone, CEO of iiNet commented that the film industry should attempt to protect copyright holders' interests by increasing 'the availability of lawful, online content in a more timely,

[76] Lawrence Lessig, *Code: and Other Laws of Cyberspace* (Basic Books 1999).
[77] Julie Cohen, 'DRM and Privacy' (2003), 18 Berkeley Technological Law Journal 575.
[78] 'iiNet welcomes High Court decision.' *Herald Sun* (Sydney, 20 April 2012)

affordable manner'.[79] The court held that 'the extent of iiNet's power to prevent its customers from infringing copyright was limited to indirect power to terminate its contractual relationship with its customers." [80] Clearly, the Australian High Court's decision does not envision the ISPs as gatekeepers of intellectual property rights for the entertainment industry.

In contrast the aforementioned UK Digital Economy Act 2010 was devised as a regulatory response to curb and control the burgeoning instances of file-sharing. Sanctions available include sending warning letters and emails to those who have been detected as having engaged in illegal file-sharing. Repeat offenders, on foot of a court order, can have their identities disclosed to the affected copyright holders.[81]

The risks of such prescriptive legislative approaches as the DEA and its French counterpart HADOPI include the erroneous identification of IP addresses that are alleged to have infringed copyright, a problem complicated by dynamic IP addresses for example which change each time the user connects to the broadband service.[82]This is yet another disconcerting instance in which the interests of one party are asserted at the expense of another.

Attempts to regulate the file-sharing problem in the United States by way of filing lawsuits based on Internet Protocol addresses of suspected infringers illustrate the unreliability of this approach and the misregulation of the problem. The Recording Industry Association of America[83] began suing users 'for violating the copyright holder's exclusive right to distribution'.[84] In 2003, the RIAA sued sixty-six year old grandmother Sarah Ward, who did not know how to download and in 2005 also sued Gertrude Wilson, who was deceased.[85]

Such enforcement actions have also resulted in the imposition of extortionate and unrealistic damages on defendants. In June 2009, Jamie Thomas-Rasset was found guilty of copyright infringement in respect of 24 songs and was ordered to pay a fine

[79]ibid
[80]ibid
[81]ibid.
[82] See for example Benjamin Farrand, "The Digital Economy Act 2010 - a cause for celebration, or a cause for concern?" (2010) European Intellectual Property Review. 536.
[83]Henceforth cited as RIAA.
[84]Robert Lavine, *Free Ride. How the Internet is Destroying the Culture Business and How the Culture Business can Fight Back*. The Bodely Head (London, 2011) 264, fn 57.
[85]ibid, 56, fn 59.

of $2million following a retrial.[86] The case had a long and protracted history, with Thomas originally being ordered to pay a fine totalling $222,000 for copyright infringement in 2007. [87] She had been one of 30,000 people levied with fines by the RIAA for amounts ranging from €3,000 to $10,000 for copyright infringement arising from use of peer-to-peer sites including Kazaa.[88]

In the context of the approach of Irish courts to cases based on applications for disclosure of the identities of file-sharing infringers by the entertainment industry, the comments of Charleton J, in the course of *EMI v UPC*[89] are particularly instructive in relation to the tension between privacy arguments and the rights of the entertainment industry to protect copyrighted works. Here, Charleton J rejected any suggestion that such cases could prove problematic from the standpoint of privacy grounded on a constitutional basis, noting'[i]n the case of Internet file-sharing to infringe copyright, I am of the view that there are no privacy or data protection implications to detecting unauthorised downloads of copyright material using peer-to-peer technology'.[90] UPC's contention that to grant an injunction would be tantamount to a breach of privacy or might constitute a disproportionate approach, was rejected by Charleton J.[91] Kennedy aptly expresses concern that Mr Justice Charleton's comments appear 'to be founded on a presumption that all of those who engage in the downloading of copyrighted material from the Internet are engaged in criminal activity'.[92] We wholeheartly agree with his assertion that this may not necessarily be the case and as a result the learned judge may attach sufficient weight to the rights of privacy in this context. We therefore submit that any revision of the regulatory framework relating to this issue must be 'careful to consider and balance the constitutional rights of all involved'.[93]

In the light of the context outlined above, we submit that the proper balance to be struck between (i) rights holders, (ii) intermediaries and (iii) users from the perspective of encouraging innovation is one which takes into account the pace of development of technology, the difficulty of keeping pace through legislation and case law and the impact of social norms on rates of copyright infringement and the

[86]Rosie Swash, 'Filesharer ordered to pay nearly $2m.' *The Guardian* (London, 29 June, 2009).
[87]ibid.
[88]ibid.
[89][2010] IEHC 108.
[90]ibid at [68]
[91]Gemma O'Farrell, "Time for pirates to walk the plank? The position of internet service providers after *EMI v UPC*." (2011) European Intellectual Property Review, 655. 656.
[92]Rónán Kennedy, 'Was it author's rights all the time?: Copyright as a Constitutional Right in Ireland', (2011) 33 *Dublin University Law Journal*253, 278.
[93] ibid.

practicalities of enforcement. All of the stakeholders mentioned have genuine interests and a positive contribution to make in encouraging and rewarding innovation but the recent history of copyright law highlights how these interests can be damaged when one group is overly influential or uncontrolled. Any balance must be flexible and capable of adjusting to changes in the social, economic and technological context but as a minimum, rights holders need to have access to quick and inexpensive enforcement mechanisms; intermediaries should be given the freedom to develop new services and products providing they are not actively encouraging infringement; and the privacy and fair dealing rights of individual users should be clearly delineated and protected. This will require the creation of a regulatory body for copyright in Ireland, such as the proposed Copyright Council. The next section outlines some practical examples of how this balance could be implemented in practice.

Section 3: Recommendations for Reform

From Enforcement Failure to Enforcement Efficiency

As highlighted above, the disproportionate cost of pursuing legal action against individuals who engage in illegal file-sharing renders this form of enforcement ineffectual. As a result, it is necessary to reduce the cost involved in enforcing copyright where it is infringed by file-sharing with a command based regulatory approach.

Given that the procurement of a Norwich Pharmacal order against an ISP is an essential component in taking an action for copyright infringement against an individual file sharer, we recommend that steps be taken to extend the power to grant such orders beyond the remit of the High Court to the Circuit Court. This would go some way towards reducing the cost accrued by rights holders in such instances, making the pursuit of individual infringers a more viable venture. Refocusing the burden of enforcing copyright onto the rights holders themselves might also relieve some of the increasing pressure on ISPs to play a more active role in policing their networks and stem the recent flow of injunctions blocking all subscriber access to certain websites. As individuals face legal action for copyright infringement, including claims for relatively low amounts, this may uproot the passive acceptance of illegal file-sharing that is prominent amongst many Internet users. The presence of a

'benign big gun'[94] looming in the background, evidenced by effective and routine enforcement, would prove to be an effective deterrent.

Moreover, the current graduated response approach to enforcement relies on costly litigation. As we have seen the 'speculative letter' approach has been subject to criticisms, in particular that tracking software can identify alleged copyright infringers in error. A number of enforcement options are available. Firstly low-cost arbitration would be desirable. However arbitration requires the consent of both parties and cannot be imposed. An alternative is to create a specialised jurisdiction at Circuit Court level. This approach has been suggested in the recent consultation published by the Copyright Review Committee.[95] A similar model exists in England and Wales where litigants may pursue their action in the Patents County Court. However as was acknowledged by Mr Justice Arnold in Golden Eye, claims relating to one instance of infringement are unlikely to be economic to litigate.[96] However, the creation of a specialist jurisdiction in the Circuit Court could then be extended to other intellectual property law disputes and through the use of appropriate court rules create an model of enforcement what Lavine suggests should be analogous to speeding tickets.[97]

In a consensus based regulatory vein, an alternative dispute resolution approach could be pursued by creating a Copyright Tribunal. This body would meet to adjudicate on relatively minor breaches of intellectual property rights and determine levels of compensation. Its purpose would be to establish a mechanism of adjudication which could operate in a manner similar to the InjuriesBoard.ie and remove the prospect of costly, protracted and lengthy litigation. The tribunal would be an adjunct of the court system, but would be part-funded by the state and collecting societies, with each litigant paying an administration fee when filing a claim, similar to the mechanism attaching to the small claims court. A system of appeals would still be available through the Courts system.

We Don't Need No Education

The majority of activity that takes place across P2P file-sharing networks results in

[94] Ian Ayres & John Braithwaite, 'Responsive Regulation: Transcending the Deregulation Debate' (Oxford University Press, 1992) 19.
[95] Copyright Review Committee, 'Copyright and Innovation: a Consultation Paper' (2012) 13-14. <www.djei.ie/science/ipr/crc_consultation_paper.pdf> last accessed 24 April 2012.
[96] *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch) para 143.
[97] Robert Lavine, *Free Ride. How the Internet is Destroying the Culture Business and How the Culture Business can Fight Back*, The Bodely Head (London, 2011) 246.

copyright infringement. As discussed above, a passive acceptance of such activity is now deeply engrained amongst large portions of Internet users. Although file-sharing is particularly prone to being used to infringe copyright, there are a myriad of other activities within the digital environment, particularly in this era of 'Web 2.0' that might also result in such an offence. To this end, we submit that there is a need to raise further awareness of copyright infringement and inform society of the importance of copyright law for encouraging creation and contributing to culture by means of a communication based regulatory initiative. As MacQueen points out, '[o]ne does not have to subscribe to the view that copyright should be a central part of the primary school curriculum to see the case for increasing accurate and objectively formulated public awareness of copyright'.[98]

To this end, we submit that an education initiative, in tandem with a more efficient enforcement process for rights holders, could go some way towards encouraging people to be more conscientious before engaging in file-sharing activity online. As Sheehy has stated,

> 'a generation has grown up quite prepared to pay for water in a bottle but believing that music is and should be free, so education is a vitally important component in the overall solution and for education to work there must be a likelihood that the uploader will be caught'.[99]

Certain initiatives have been instigated in the past, such as the 'Don't Copy that Floppy' anti-copyright infringement campaign run by the Software Publishers Association in the early nineties, to questionable effect.[100] However, a campaign featuring some of Ireland's leading artists, publicised through television advertisements and at live music festivals may have the desired effect of deterring some people from simply passively engaging in copyright infringement. Such a campaign could be conducted in association with the global initiative of the Artists' Charter Against Online Piracy. This initiative seeks to establish a mechanism of engagement among artists, music companies and Internet service providers with a view to arresting the reduction of artists' earnings. The European Commissioner for

[98] Hector MacQueen, 'Appropriate for the Digital Age? Copyright and the Internet: Scope of Copyright' in Lillian Edwards & Charlotte Waelde (eds) *Law and the Internet* (3rd edition, Hart, 2009) 187.
[99] Helen Sheehy, 'Copyright Protection and the Internet in Ireland – Where the Law Stands' (Irish Society for European Law Lecture, Dublin, 26 March 2012).
[100] See Bohus, 'Stunning Sequel to "Don't Copy that Floppy"' (retrothing.com, 23 September 2009) <http://www.retrothing.com/2009/09/stunning-sequel-to-dont-copy-that-floppy.html> accessed 20 June 2012.

the Information Society has also called for the remuneration of artists to be a central concern in reshaping policy.[101]Such an initiative would be largely funded by the Copyright Council of Ireland.[102] Such a body would undertake the role of a national consultative and advisory body.[103] In the context of the enforcement of copyright, the council could provide guidance and enforcement policies and procedures. If the council is created as suggested, a broad range of interests would be represented including those of consumers, ISPs and rightsholders.

Technological Neutrality

In addition to the economic aspects relating to enforcement, the challenge when regulating any developing technology is to ensure that there is regulatory certainty and regulatory connection.[104] Enforcement of copyrights is difficult given that ‘‘technology used for the purposes of online infringement of copyright is changing fast.’[105]As such, regulators must consider that any regulations ought to be technologically neutral so as to take account of more advanced forms of third generation file-sharing systems such as Tor, ANts P2P, Rshare, Freenet, I2P, GNUnet and Entropy.[106]

In addition to the difficulties posed by ongoing technological advances, the issue of territoriality must be considered. It could be argued that an international response instead of actions taken by specific countries is required. The EC Communication on Creative Content Online suggests that an EU-wide market for content should be created.[107]An Irish response must account for the future direction of harmonisation of copyright law at EU level.

[101]NeelieKroes, ‘Who Feeds the Artist?’ (Forum D’Avignon, 19 November 2011). [‘We need to go back to basics and put the artist at the centre, not only of copyright law, but of our whole policy on culture and growth’.]
[102] See below.
[103] Copyright Review Committee, ‘Copyright and Innovation: a Consultation Paper’ (2012) 13-14. <www.djei.ie/science/ipr/crc_consultation_paper.pdf> last accessed 24 April 2012.
[104]Roger Brownsword and Karen Yeung (eds).*Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes*. (Hart Publishing 2008) 5.
[105]*Digital Economy Act 2010* Explanatory Note, note 61.
[106] Michael Nwogugu, ‘Economics of digital content: new digital content control and P2P control systems/methods’ (2008) Computer and Telecommunications Law Review 14(6), 140-149. In addition, fourth generation file-sharing systems such as YouTube, Peercast, Miro, Cybersky, and DemoTV provide that content is stored on host servers and not transferred to the user’s computer.
[107]Commission Communication, ‘Creative content online in the Single Market’ COM (2007) 836 final.

Section 4: Additional Questions Considered

(7) Should a Copyright Council of Ireland (Council) be established?

Yes, a Copyright Council of Ireland should be established. This should be founded as a statutory body, to firmly place it as the centralised authority charged with consistently reviewing Irish copyright law with a view to making the requisite recommendations to ensure the copyright framework is suitable for the constantly evolving digital world in which we live and strikes a balance, as far is possible, between the various and often competing interests of the diverse range of actors operating within that environment.

(8) If so, should it be an entirely private entity, or should it be recognised in some way by the State, or should it be a public body?

The CCI should be founded by statute. That is not necessarily to say it should be an entirely public body. Nor should it be an entirely private entity. Rather, the CCI should be characterised by a co-regulatory approach; a body in which the various interlocutors involved in the copyright debate are represented with a view to fostering a collaborative effort between all interested parties when seeking to ensure the Irish copyright framework strikes an appropriate balance.

(9) Should its subscribing membership be rights-holders and collecting societies; or should it be more broadly-based, extending to the full Irish copyright community?

The CCI's subscribing membership should be as diverse as is necessary to accommodate the views of the full Irish copyright community. In addition to members representing private interests, the CRC should actively encourage membership of those acting in the broader public interest, to reflect the full and diverse spectrum of views across the Irish copyright landscape.

(10) What should the composition of its Board be?

The composition of the CCI's board should ensure adequate representation of the various interested parties in the copyright debate. Given that this submission attempts to contextualise the competing interests between rights holders,

intermediaries and consumers, it is submitted that these parties each be allocated an individual board member to represent their interests, amongst others.

For example, in terms of rightsholders representation, a member of a body such as Publishing Ireland should represent the publishing industry;[108] a member of the Irish Film Board[109] or Irish division of the Industry Trust for Intellectual Property Awareness[110] should represent the film industry; and, a member of the Irish Recorded Music Association (IRMA) should represent the music industry.[111] Intermediaries should be represented by a member of an established representative body, such as the Internet Service Providers Association of Ireland (ISPAI).[112] Consumers and Internet users should also be represented by a member of an established representative body, such as the National Consumer Agency of Ireland (NCA).[113]

More generally, the Board might also include a legal practitioner with significant experience of dealing with copyright issues in this jurisdiction, a nominee by the relevant Minister, a civil servant and perhaps an additional and optional wildcard member to provide for an individual who can offer a range of perspectives on the Irish copyright landscape, such as the music journalist Stuart Clark of Hot Press for example.

(11) What should its principal objects and its primary functions be?

The principal function and primary object of the CRC should be to provide an official forum where representatives of the various parties involved in the copyright debate can express their views and work together in monitoring developments regarding copyright issues with a view to maintaining an holistic oversight of Irish copyright law to ensure the framework remains appropriate for today's world. The CRC should be the primary body charged with assessing Irish copyright law so as to recommend any amendments that may be appropriate in the future. Given the constantly evolving and dynamic digital environment to which copyright now pertains, a permanent body charged with this task is required.

[108] See <http://www.publishingireland.com/about-us/> accessed 20 June 2012.
[109] See <http://www.irishfilmboard.ie/irish_film_industry/About_Us/1> accessed 20 June 2012.
[110] See <http://www.youmakethemovies.ie/Supporters.html> accessed 20 June 2012.
[111] See <http://www.irma.ie/> accessed 20 June 2012.
[112] See <http://www.ispai.ie/about.htm> accessed 20 June 2012.
[113] See <http://www.nca.ie/about-us> accessed 20 June 2012.

Once established, the CRC's initial agenda must focus on both enhancing efficiency in the enforcement process for rights holders in respect of individual infringers and spearheading educational initiatives to raise public awareness of copyright and the repercussions to which individuals may be subject if they engage in infringement. The overall objective of these priorities is to realign the balance between rights holders, intermediaries and users in the digital environment – the intersection between whom we have sought to contextualise throughout our submission.

(12) How should it be funded?

The State should provide sufficient funding for the Council to ensure its independence of the commercial stakeholders but the majority of its operating expenditure should be provided by a levy on commercial users of copyrighted content, such as newspapers, music labels and film studios, together with subscriptions from members.

(15) Should the Council include the establishment of a Copyright Alternative Dispute Resolution Service (ADR Service)?

The disproportionate cost of pursuing legal action against individuals who engage in illegal file-sharing renders this form of enforcement ineffectual. As a result, it is necessary to reduce the cost involved in enforcing copyright where it is infringed by file-sharing. This can be achieved thought the creation of a tribunal which could offer litigants an effective means of obtaining a judgment. We submit that parties should not be compelled to use the tribunal in all but the simplest matters.

The Copyright Tribunal would adjudicate on copyright disputes and determine levels of compensation. Its purpose would be to establish a mechanism of adjudication which could operate in a manner similar to the InjuriesBoard.ie and remove the prospect of costly, protracted and lengthy litigation. The Tribunal should refer matters beyond its competency to the Circuit Court. Furthermore, parties would have a further right of appeal to the High Court though judicial review. We envisage that this tribunal would be funded both by the state and collecting societies, with each litigant paying an administration fee when filing a claim, similar to the mechanism attaching to the small claims court.

Disputes which arise relating to exceptions and exemptions, particularly in the

context of e-accessibility could be addressed in a more efficient and lower cost environment than the High Court.

The Copyright Tribunal should have the power though tribunal rules enacted under statute to compel parties to consider engaging in ADR. A refusal by a party to consider ADR could be a determining factor when the matter of damages and costs is decided.

(16) How much of this Council/Exchange/ADR Service architecture should be legislatively prescribed?

We propose that the Copyright Tribunal and the CCI should be created by statute. In addition, the rules governing practices and procedures should take the form of a statutory instrument.

Furthermore we propose that the Arbitration Act 2010 and the Draft Mediation Bill Ireland 2010 provide a suitable framework for the ADR process.

(17) Given the wide range of intellectual property functions exercised by the Controller, should that office be renamed, and what should the powers of that office be?

We propose that the Copyright law functions exercised by the Controller should be absorbed by the CCI.

(19)Furthermore, what should the inter-relationship between the Controller and the ADR Service be?

The CCI should promote ADR in Copyright disputes and provide model licence agreements and contracts which include clauses which would trigger ADR in the event of a dispute. In practice this could involve the use by ISPs of a standard ADR clause whereby all beaches by the end user of the terms of use would be referred to an ADR process. The contract should provide that if required the ISP could enjoin the copyright holder in the ADR process.

(20) Should there be a small claims copyright (or even intellectual property) jurisdiction in the District Court, and what legislative changes would be

necessary to bring this about?

It is our view that a small claims copyright jurisdiction in the District Court would not be necessary if the CCI and Copyright Tribunal were to be established.

We believe that the District Court would lack the required expertise in Copyright litigation to deal sufficiently with the complex matters which would come before it. A specialist jurisdiction in the Circuit Court would be more appropriate.

(21)Should there be a specialist copyright (or even intellectual property) jurisdiction in the Circuit Court, and what legislative changes would be necessary to bring this about?

We submit that a specialist court is a long-term solution to the difficulties posed by copyright litigation. A specialist court would be an alternative to the creation of a Copyright Tribunal. In practice we suggest that a specialised jurisdiction be created at Circuit Court level. This could involve the creation of copyright dispute lists in each circuit. These cases could be heard by members of the Circuit Court who are experienced in copyright and intellectual property litigation. A similar model exists in England and Wales where litigants may pursue their action in the Patents County Court. However as was acknowledged by Mr Justice Arnold in *Golden Eye* claims relating to one instance of infringement are unlikely to be economic to litigate.[114]

(22) Whatever the answer to the previous questions, what reforms are necessary to encourage routine copyright claims to be brought in the Circuit Court, and what legislative changes would be necessary to bring this about?

We propose that where copyright litigation comes before the Circuit Court the categories of orders that the Court may grant should be enhanced. Remedies available to the Circuit Court level should include the Norwich Pharmacal order.

Given that the procurement of a Norwich Pharmacal order against an ISP is an essential component in taking an action for copyright infringement against an individual file sharer, we recommend that steps be taken to extend the power to grant such orders beyond the remit of the High Court to the Circuit Court. This would go

[114] *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch) para 143.

some way towards reducing the cost accrued by rights holders in such instances, making the pursuit of individual infringers a more viable venture.

Conclusion

In essence, it is clear that any attempts to institute reform in relation to copyright-infringing file-sharing and illegal downloading will prove difficult. The challenge from a regulatory standpoint is to strike a balance between rights-holders and consumers on the one hand, and rights-holders and intermediaries on the other.

The failure to strike such a balance results in misregulation. Misregulation of this issue may have adverse effects for innovation by curtailing access to a form of technology that may be used for legitimate purposes, as well as to infringe copyright. As the contentious issue of file sharing depicts, the failure to strike a proper balance between these parties has resulted in disproportionate costs for rights holders in taking legal action against individuals who infringe copyright through use of file sharing networks, the imposition of extortionate financial penalties on infringers, the misidentification of alleged infringers and an increasing burden on ISPs including requirements to block access to a technology which is the result of a major feat in innovation and which may be employed for legitimate purposes and not solely to infringe copyright.

Ultimately, this illustrates the need to devise a legal framework for enforcement which is cost-effective and results in a proportionate response. Furthermore, the mindset of Internet users needs to be nudged from a passive acceptance of copyright infringement to one of conscientious awareness. Effective enforcement, increased public awareness and maintaining regulatory connection with the target activity through technologically neutral regulation are means by which this may be achieved. It is hoped that our consideration of the various technological, social and legal aspects of file sharing, in tandem with our deliberation of the regulatory dynamic followed by our recommendations, may contribute to the comprehensive deliberation required in order to implement an effective, proportionate and well balanced framework to regulate copyright and innovation in the context of digital technologies.