

The Battle against Virtual Pirates: Promoting or Destroying Creativity?

by

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Abstract

The aim of this thesis is to provide an understanding of how copyright law, with specific relation to internet piracy, affects musical creativity and the fulfilment of creative potential. This thesis focuses on the operation of copyright law with regards to musical works, and will focus on musical creativity specifically. Whilst this thesis is not concerned with specific business models and ‘traditional economics’, there is much discussion around creative incentivisation and the impact this has on creativity. Following an in-depth look into the underlying philosophies and justifications behind copyright law, the accepted viewpoint throughout this thesis is that copyright law seeks to promote creativity through providing strong economic laws to incentivise artists into creating musical works. Western societies across the world are now inextricably linked with technology and the internet, and therefore it is necessary to understand what affect strengthening copyright law will have to the potential of creative development. To understand what impact the increasing trend to legislate against those committing online copyright infringement will have on creativity firstly requires an analysis of the UKs copyright system in comparison to other countries, as well as exploring the effectiveness of our domestic legislation against internet piracy. After acquiring this understanding, there then follows an investigation into creativity at a cognitive level. By using inferences from existing psychological research into our creative minds, and by using the findings of two qualitative interviews that have been carried out with musical artists, it is possible to form a hypothesis on this subject: namely that strengthened copyright laws do not promote creativity, and in fact actually significantly hinder the process of creative development. Combining this hypothesis with the collected research and philosophical understandings referenced throughout this thesis, ideas for reform are proposed, namely that there needs to be a change in the philosophy of copyright protection and enforcement

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to a more utilitarian stance, and that it is necessary to allow for greater access to musical works through either a private use exception and/or through the provision of educational music licenses through streaming platforms such as Spotify.

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Chapter 1 – Introduction

The purpose of this thesis is to investigate the impact on creativity of copyright law's responses to the increasing amount of online piracy of music. Instead of focusing on the economic impact of piracy on the creative industries, specifically the music industry, this thesis aims to draw on existing research into the creative mind with the aim of investigating the impact of the legal system in influencing a person's maximisation of their creative potential.

It is important at this stage to state that within the scope of this thesis, the research and any recommendations proposed will be made solely with regards to music. To investigate the impact of the legal system's responses to piracy within each individual creative industry that relies on copyright would be too large a project to cover in sufficient depth in this thesis.

This research is necessary as the importance of creativity to the United Kingdom's society is ever increasing. The creative industries are collectively now worth £71.5 billion to the UK economy, generating 1.68 million jobs¹, and in five of the last six years the best-selling album in the world has been by a British artist². There is now an increasing demand from the creative industries to strengthen copyright and to clamp down on online infringement to ensure that our musicians will continue to produce music, as they believe that without this there will be no economic incentive to produce. Of particular concern to

¹ HC Deb 13 February 2014, col 335W

² Ibid., per Mr Whittingdale

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the music industry, and specifically the British Phonographic Industry, is that in 2010, 28.8% proportion of UK online population (age 16-54) were involved in illegal downloading³, 76% of all music tracks obtained during 2010 were illegal⁴, and also that the total retail value of single tracks downloaded from ‘unauthorised sources’ in 2010 totalled £984,000,000⁵.

Definition of terms

It is necessary at this time to provide a definition for a number of the key terms which will be used throughout this thesis. Firstly, the term ‘copyright’ refers to ‘any property right over certain creative works, which grants exclusive right to the owner’⁶. Throughout this thesis there will be a reference to pirates, piracy, online piracy and virtual piracy. These terms will be used interchangeably to describe the same act, namely ‘the unauthorized reproduction or use of an invention or work of another...’⁷ through the use of the internet. The term ‘piracy’ with specific reference to the internet and copyright infringement is one which can cause concerns, as the term itself originally concerns itself more with the commercial exploitation of work rather than just civil infringement, however through time this term has been subverted to include civil infringement of copyrighted material. This thesis primarily concerns itself with the act of civil copyright infringement.

³ British Phonographic Industry, 'Digital Music Nation: The UK's legal and illegal digital music landscape' (BPI.co.uk 2010), <<http://www.bpi.co.uk/assets/files/digital%20music%20nation%202010.pdf>> accessed 26/06/14

⁴ Ibid., at pg 3

⁵ Ibid., at pg 3

⁶ Halsbury's Laws, Copyright (5th edn, 2013) vol 23, at 601

⁷ Oxford English Dictionary Online, Definition of ‘Piracy’

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Reference to the term ‘file-sharing’ will also be used frequently throughout this thesis, which can be defined as “the practice of making files available to other users of a network... the (often illicit) sharing of music or video files via the Internet”⁸. Within the context of this thesis, we will be referring primarily to the illicit sharing of music files via the internet through programmes such as BitTorrent.

In terms of the use of the word ‘artist’, an artist is a ‘person skilled in a particular art’⁹, and is being used to refer to an artist in a musical sense. There will also be reference to artistic creativity and musical creativity, with creativity being defined as ‘the faculty of being creative; ability or power to create’¹⁰. When referring to ‘cognitive’ creativity, the word cognitive can be defined as ‘the action or faculty of knowing; knowledge; consciousness; acquaintance with a subject’¹¹, and should be read with regards to the thought process and the knowledge of one’s own creative potential. This idea will be expanded on in greater detail later in this thesis.

Finally, throughout the thesis ‘he’ should be read as she/he for continuity purposes, and the law referenced throughout this thesis is correct as of the 30th June 2014.

⁸ Oxford English Dictionary Online, Definition of ‘File-sharing’

⁹ Ibid., Definition of ‘Artist’

¹⁰ Ibid., Definition of ‘Creativity’

¹¹ Ibid., Definition of ‘Cognitive’

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The Issues

The first issue is the clarification of the purpose of copyright law. Before any discussion on the impact of copyright law on creativity, we need to understand why copyright exists in the first place. Whilst it will be later established that it is commonly accepted that copyright is there to promote creativity, there are a number of ideas around the role of copyright and intellectual property rights. The relationship between these philosophies and the law is something which will be discussed, as is the effectiveness of these legislative responses.

The recording industry assumes that with a clampdown on online copyright infringement, we will see an increase in legal music sales and therefore that it is more likely that artists will produce music to begin with. The issue with this is that the recording industry has not researched what actually promotes artistic creativity. We must therefore understand what inspires artists to create. Stemming from this, it will then be necessary to find out what impact increased copyright protection has on the artists themselves.

Aside from what inspires the existing creative artists into producing, we must understand the wider impact of copyright law and internet piracy on society. It is crucial that we can evaluate exactly what impact enforcing strong copyright laws on society has in terms of promoting or destroying creativity, and compare this with the impact of internet piracy onto the creativity of society.

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To ensure that the UK's creative industry prospers and the country remains an intellectual leader in this field, it is important to discover three things; firstly, at what stage creativity develops; secondly, whether everyone has the potential to be creative; and thirdly, whether or not we can control our creative development. If everyone in society has the potential to be creative and it is possible to maximise their fulfilment of this potential, then this idea is one which is extremely appealing to both to the UK government and the creative industries as a whole.

The rationale behind this research is that whilst copyright and the strong protection of recording artists' rights is in place as a means of promoting creativity through incentivisation, this may actually hinder creative development on a societal level. Internet piracy provides a platform for people to freely access music, and with greater exposure to a variety of music types and recording artists, it is likely that this will positively affect creative development and inspire more people to create music themselves. To assess this rationale it is necessary to firstly establish what level of copyright protection is needed (if at all) to promote creativity, and secondly, whether the potential of greater levels of societal creativity would outweigh any economic harm that may come as a result of any change.

Methodology

In terms of research methodology and style, it is most appropriate that this thesis undertakes a socio-legal research methodology. Whilst it is possible to assess the effectiveness of copyright law through the use of the traditional black-letter law approach,

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the outcomes of using this approach would be entirely different. This thesis is looking towards how creativity is influenced through the use of the law and how effective the law is in achieving the aim of promoting creativity, whereas a black-letter law approach to the same subject area would not take into account the other relevant disciplines which the law affects, and would likely assess whether the law in itself is effective in its execution.

This thesis is interdisciplinary in its very nature and will draw upon other areas of research, such as sociology, psychology and philosophy. By using the research into different fields and drawing analogies from their findings, we can hopefully find what truly inspires musicians to create, and how the law can and is influencing this.

To aid this theoretical understanding, qualitative semi-structured interviews with two artists have been undertaken and can be found in the annex of this thesis, with their names being anonymised due to a discussion of illegal activity. The intention behind this is to find out what has attracted them into the music industry and their opinions on the issues raised throughout, namely internet piracy and the strengthening of copyright. Whilst the discussion has been centralised around creativity in theory thus far, it is necessary to compare the findings of this thesis so far with creative people involved in producing music. Artist 1 is a rock group based in the North of England, which is, as of yet, unsigned. Artist 2 is a house music producer also based in the North of England, who has had a number of his singles released through record labels. Due to the differences in stature and music genres, these two interviews will provide two sides to the argument in the hope of reducing the potential for bias. The decision to undertake a qualitative instead of

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quantitative analysis of the artists above was made as it is more appropriate to allow for the freedom of expression of the artists on a subject which is so intrinsically entwined with their creative minds.

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Chapter 2: A brief history of file-sharing

It is necessary to briefly understand what piracy is and how its role has developed at the beginning of this thesis so as to provide context and background to what is being discussed. The role of piracy has been one which has been forever interlinked with the history of recorded music and radio broadcasting; it did not simply start with the digital revolution (which will be discussed shortly). In fact, piracy even had a part to play in the industrialisation of the world's biggest opponents to modern day piracy, the United States of America. The USA '...pursued a policy of counterfeiting European inventions, ignoring global patents, and stealing intellectual property wholesale'¹², so much so that the Dutch word 'janke', which was another word for pirate, was given to them by Europeans (now pronounced 'yankee')¹³.

Piracy has always had an influence on musical development, with the first radio show ever to be broadcast being presented by Professor Reginald Fessenden in 1906. Fessenden broadcasted a recording of Handel's 'Largo', and then performed 'O Holy Night' on his violin¹⁴, and this radio show was broadcast to ships and those who possessed an amateur radio. Whilst licencing of music did not exist in 1906¹⁵, he went 'against the grain, manipulating an existing media format to create what he wanted, regardless of the conventional wisdom'¹⁶, traits embodied in those of piracy.

¹² M Mason, *The Pirates Dilemma: How Youth Culture is Reinventing Capitalism* (1st, Free Press, New York 2008), pg 36

¹³ Ibid.

¹⁴ Ibid., pg 40

¹⁵ Ibid.

¹⁶ Ibid.

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Whilst Fessenden has sparked curiosity in the potential of radio in the USA, radio was only thought of as a means of broadcasting information in Europe. In 1933, Radio Luxembourg began broadcasting on 'what was the world's single most powerful radio transmitter'¹⁷ which allowed them to reach as far as the UK. This was the beginnings of pirate radio and the explosion of offshore radio stations in the 1960s. The music industry had lagged behind in terms of capitalising on new technology, and these 'pirates' took to the seas to 'pave the way for modern commercial radio'¹⁸. Pirate radio continues to this day, with DJs playing music that is 'unfamiliar' to most commercial audiences. The famous Dizzee Rascal and Katy B both came from pirate radio stations¹⁹, and now their music is regularly in the charts. Piracy is often seen as an act of stealing a song from an artist by illegally downloading it from a file-sharing website. Piracy is much more than just this – piracy has aided innovation and pushed the development of legitimate media for over a hundred years.

The digital revolution

To further illustrate that piracy has helped innovate our media distribution services, it is crucial to understand the contextual history of 'internet' piracy specifically. We are currently in the midst of a new digital era for distribution of music, both legally and

¹⁷ M Mason, *The Pirates Dilemma: How Youth Culture is Reinventing Capitalism* (1st, Free Press, New York 2008), pg 42

¹⁸ BBC News, 'Radio Caroline 50 Years On: The Man Who Pressed The 'On' Button' (BBC.co.uk 2014) <<http://www.bbc.co.uk/news/uk-england-esssex-26769631>> accessed 14/04/14

¹⁹ S Wolfson, 'How Rinse FM, the Radio Station Behind Dizzee Rascal and Katy B, Keeps it Salty' (The Guardian 2011) <<http://www.theguardian.com/music/2011/aug/27/rinse-fm-geeneus>> accessed 14/04/14

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illegally, due to the power of the internet. Whilst the internet became capable of transmitting audio and video signals in 1992²⁰, large scale file-sharing only became possible due to the invention and introduction of broadband, which enabled users to surf the internet quicker than ever before, and ‘...facilitated music file-sharing on a wider scale’²¹.

The true birth of online file-sharing occurred when Shaun Fanning created ‘Napster’ in 1999. Whilst it was previously possible to find music online if you knew where to look, the task of doing so was often extremely arduous. Fanning therefore brought about a user friendly interface, which was primarily created so users could display their music library to others. Users would be able to view the music collections of an uploader, and then request to download one of the songs from that catalogue, all of which went through a central server. Napster ‘was only indirect peer-to-peer, facilitating sharing but also physically mediating it’²². This is the precise reason that Napster fell victim to a host of law suits, initially from the Recording Industry Association of America (RIAA), but also from artists such as Metallica²³, Dr Dre²⁴ and Madonna²⁵. The final nail in the coffin for Napster turned out to be the lawsuit brought by A&M Records, which found that Napster could be held liable for ‘contributory infringement’²⁶. This decision was reached as

²⁰ R Steinmetz, *Multimedia Systems* (1st, Springer, Germany 2004) 257

²¹ British Phonographic Industry, 'The Impact of Illegal downloading on music' (IFPI.org 2009) <<http://www.ifpi.org/content/library/the-impact-of-illegal-downloading.pdf>> accessed 26/06/14

²² *Ibid.*, pg 33

²³ A Doan, 'Metallica Sues Napster' (Forbes 2000) <<http://www.forbes.com/2000/04/14/mu4.html>> accessed 26/06/14

²⁴ J Borland, 'Rap artist sues Napster, students' (CNET 2000) <<http://news.cnet.com/2100-1023-239720.html>> accessed 26/06/14

²⁵ Pinsent Masons, 'Madonna enters into Napster battle' (Out-Law.com 2000) <<http://www.out-law.com/page-701>> accessed 26/06/14

²⁶ *A&M Records, Inc. v. Napster, Inc.* [2001] 1004 F.3d 239 (9th Cir.), at para. 58

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Napster was providing a server to share files through, and this decision led to a variety of new methods of file-sharing being created. The British Phonographic Institute (BPI) recently admitted that ‘since the launch of Napster... the sources of unauthorised music to download for free from the internet have proliferated’²⁷.

Following the death of Napster, decentralised file-sharing platforms, such as Gnutella, Grokster, Morpheus and KaZaA, became highly popular. These services operated very differently to Napster, however they were not without their problems, as most users would not select to share their files with other users. This meant that only a few uploaders held a majority of the content available. The music industry realised this and they switched strategy to sue individual file-sharers to stop copyright infringement²⁸.

Upon seeing the strategy of the music industry change to suing individuals, the file-sharing technology available also changed its strategy. The emphasis on the next stage of file-sharing was the protection of users from prosecution²⁹. This led to the popularisation of ‘BitTorrent’ clients, which differed greatly from the likes of the prior decentralised file-sharing software. Whilst the prior mentioned file-sharing clients allowed users to download directly from a particular uploader, BitTorrent instead opted to enable a user to download from a host of different uploaders, known as ‘seeders’. It would be extremely difficult to find out the exact identity of those infringing copyright, as they would provide

²⁷ British Phonographic Industry, 'The Impact of Illegal downloading on music' (IFPI.org 2009) <<http://www.ifpi.org/content/library/the-impact-of-illegal-downloading.pdf>> accessed 26/06/14, pg 1

²⁸ M David, *Peer to Peer and the Music Industry – The Criminalization of Sharing* (1st, SAGE, London 2010) pg 36

²⁹ *Ibid.*, pg 36-37

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only a fragment of the file being downloaded. Instead of just the one person hosting the file, it could now be thousands of different hosts. Since the introduction of BitTorrent, it is now used as a highly useful method of sharing legal files and quickening downloads, used by Blizzard for their MMORPG game 'World of Warcraft'³⁰ and has even inspired business models for 'peer to peer' loan companies³¹.

One of the main reasons why piracy's popularity exploded exponentially was due to a lack of a real platform to legally buy music online during the time of Napster and its successors. The record industry was slow to capitalise to this new method of distribution, and it may have cost them valuable ground in the fight against online piracy. It was not until the launch of the iTunes Store in 2003 that a legalised online music marketplace was available to the public, and this opportunity was taken up by the computer manufacturer Apple; not the record industry itself. As it can be seen, piracy was once again providing a service to people who had no legal alternative and, as such, pushed innovation from its legitimate competitors.

The purpose of this discussion is to provide context to the following research and to make clear at the start of the thesis that piracy is more than just a simple act of copyright infringement. The act of piracy is one which could be linked heavily with the mentality of a person, and their creativity – without the creative mind of Professor Fessenden or those aboard Radio Caroline, then the way in which the radio is now used could be

³⁰ C Hoffman, '8 Legal Uses For BitTorrent: You'd Be Surprised' (Makeuseof.com 2013) <<http://www.makeuseof.com/tag/8-legal-uses-for-bittorrent-youd-be-surprised/>> accessed 14/04/14

³¹ Zopa Ltd, 'How peer-to-peer lending works' (Zopa.com) <<http://www.zopa.com/peer-to-peer-lending>> accessed 14/04/14

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altogether extremely different. Just as there is a state of mind behind the act of piracy, there are also underlying philosophies behind copyright law that seek to achieve certain aims, and it is now necessary to investigate how these ideologies have affected the development and the purpose of copyright law in today's society.

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Chapter 3 – The Philosophy of Copyright

There are a number of different philosophical theories behind the need for copyright law, and as with any socio-legal research it is necessary to understand the purpose behind the law when attempting to analyse its impact. The idea behind this thesis is one which does not question the validity of the law, but instead focuses on whether or not these laws are operating in a just manner to achieve their intended outcomes. To ensure we can measure whether or not the law is achieving these outcomes, we firstly must understand what they are, and why copyright is now an important part of modern day society. This understanding will be aided by firstly establishing the different ideas behind the purpose of copyright, before moving on to assess the effect of these views on the historical creation of our system of copyright. Alongside these discussions will be an assessment of the impact of applying these philosophies to future law-making decisions. This application will also occur later in the thesis with regards to ideas behind reform.

Before we begin to discuss the philosophy of copyright, it is necessary to understand that the following chapter will be a very brief summary of the reading embarked upon, and this area of jurisprudence has been undertaken as a research subject within itself by other academics. Whilst it is beyond the scope of this thesis to go into such detail, it is still necessary to discuss the commonly accepted theories behind copyright. This will show how effective our current copyright laws are in achieving their philosophical purpose and also will help us to dissect the legislative responses to the previously discussed file-sharing era.

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Throughout the developed world, the basic principles of copyright law appear to be the same despite the differences in implementation between countries. William Patry, ‘Senior Copyright Counsel’ to Google Inc., believes that the basic principles of copyright according to policy-makers are as follows:

1. [To] provide incentives for authors to create works they would not create in the absence of that incentive;
2. [To] provide the public with access to those works;
3. [To] provide respect, via non-economic rights, for those who create cultural works³²

Patry then provides us with a quote from the European Union’s 2001 Information Society in Creativity and Innovation Directive, and he states:

...Copyright laws “foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry”. To accomplish these ambitious goals, we are told there must be a “high level of protection, since such rights are crucial to intellectual creation.”³³

From this we can see that the European Union believes that copyright laws promote creativity. The belief that copyright protection promotes creativity is one of the major justifications for having a system of copyright or legal protection for creative works in place. This belief has been restated by the European Union in 2009, when it was said that ‘Copyright is the basis for creativity’³⁴. There have been multiple restatements of words

³² W Patry, *How to Fix Copyright* (1st, Oxford University Press, New York 2011) 75

³³ *Ibid.*, pg 75; Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001, on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, June 22, page 10.

³⁴ European Union, ‘Creative Content in a European Digital Single Market: Challenges for the Future’ (European Commission 2009)
<http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf> accessed 22/06/14

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to that effect^{35 36}, and this justification of the promotion of creativity will be discussed in depth later in this thesis. There are other common justifications for copyright law, namely that copyright is needed to prevent free-riding³⁷, and also to remunerate authors and/or artists for their efforts, their work and their creativity³⁸. These justifications form the cornerstones of the principles of copyright law.

Establishment

Copyright protection began with the invention of the printing press in circa 1450³⁹. The need for copyright protection in England prior to this period was virtually none existent, and although the Roman Empire had previously offered a term of copyright protection to authors⁴⁰, there was no real statutory form of copyright protection in England following the invention of the printing press until the start of the 18th century. Instead, there were ‘crown privileges’ and ‘letters patents’. Crown privileges rewarded printers with a monopoly over certain books and other writings, with the first recorded book published in England under sovereign privilege taking place in 1518⁴¹. This was the origin of

³⁵ United States Patent and Trademark Office, 'Copyright Policy: Creativity and Innovation in the Digital Economy' (USPTO.com 2013) <<http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>> accessed 26/06/14, “Protection by copyright law gives creators incentives to produce new works and distribute them to the public”, at pg 3

³⁶ J E Cohen, 'Creativity and Culture in Copyright Theory' [2007] UC Davis L. Rev 1151, 1151 para. 1.

³⁷ S E Sterk, 'Rhetoric and Reality in Copyright Law' [1996] Michigan Law Review, vol. 94, no. 5 1197, 1197

³⁸ Ibid.

³⁹ M Kretschmer & F. Kawohl, 'History and Philosophy of Copyright' in S Firth & L Marshall, *Music and Copyright* (2nd, Edinburgh University Press, Edinburgh 2004) 22

⁴⁰ J Hughes, 'The Philosophy of Intellectual Property' [1988] 77 Geo. L.J. 287, 3

⁴¹ M Kretschmer & F. Kawohl, 'History and Philosophy of Copyright' in S Firth & L Marshall, *Music and Copyright* (2nd, Edinburgh University Press, Edinburgh 2004) 23

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contemporary copyright law, with this being designed to protect the printers and not the scribes who had created the work.

Following on from the previously mentioned system of primitive copyright protection, the ‘Statute of Anne’⁴² was enacted in 1710, which cemented the rights to protect books and other writings for a term of 14 years⁴³, and this could be renewed once. Whilst this statute offered protection for authors of books and other writings, it did not offer any protection for music – written or performed. Quite interestingly, ‘Eighteenth Century music publishers, unlike their bookselling colleagues, did not lobby for statutory protection’⁴⁴. This was possibly due to the lack of need; nowhere else in the world had copyright protection similar to what the Statute of Anne afforded, and no musician had yet suffered significantly at the hands of unauthorised copying.

The purpose of the Statute of Anne is debateable. Within the preamble of the statute it states that the statute is ‘for the encouragement of Learned Men to Compose and Write useful Books...’⁴⁵. However, whilst this states that the authors (and future inspired authors) are the ones to benefit from such protection, it would seem that the main beneficiaries were the London publishers⁴⁶. It aimed to protect the work of these publishers by affording them a protection period on their publications, which provided

⁴² Statute of Anne 1710

⁴³ M Kretschmer & F. Kawohl, ‘History and Philosophy of Copyright’ in S Firth & L Marshall, *Music and Copyright* (2nd, Edinburgh University Press, Edinburgh 2004) 25

⁴⁴ *Ibid.*, pg 27

⁴⁵ S Newman, ‘The development of copyright and moral rights in the European legal systems’ [2011] E.I.P.R 677, 681

⁴⁶ *Ibid.*, 681

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the actual authors of the book with no more economic reward than they had received before. It was only if the author decided to renew his term of copyright that the right to publish reverted back to himself. The publishers had even been successful in claiming that they were entitled to perpetual copyright over their works due to a common law loophole⁴⁷ until the case of *Donaldson v Beckett*⁴⁸ eradicated this defence.

Philosophical Justifications

There have been many theories applied to the law of copyright and intellectual property rights as a whole, most of which are a direct transition from the philosophical underpinnings of ‘physical’ property. The following ideologies will provide greater context for us to understand the effectiveness and necessity of copyright law in a modern day society.

The two main schools of philosophical thought behind the justifications of copyright are deontology and consequentialism. Deontology is a moral philosophy based around what we are bound by our moral duty to do, and does not concern itself with the outcome. This is a contrast with consequentialism, which focuses on justifying actions which bring about the most amount of ‘good’. A deontological theory would focus primarily on enforcing rights:

⁴⁷ *Millar v Taylor* [1769] 98 ER 201 (KB)

⁴⁸ *Donaldson v Beckett* [1774] 2 Bro Parl Cas 129

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with respect to persons who are entitled to intellectual property as a matter of natural rights or as a matter of classical liberal or human rights or as a matter of duty⁴⁹

An example of a deontological viewpoint on copyright would be that it is morally right to afford artists protection over their work and the opportunity for a reward as a result of this. A consequentialist theory would focus on providing IP protection:

... because of the valuable and correct consequences it brings about in a society such as providing incentives or encouraging learning⁵⁰

A consequentialist theory then would justify itself by stating that the provision of copyright brings about the largest amount of 'good' as it promotes creativity by providing financial reward. The difference between the two is that deontology focuses on what is 'right', whereas consequentialism focuses on what promotes 'good'⁵¹. One example of a consequentialist view of the law is utilitarianism, a theory discussed in further detail below, whereas a deontological example would be that of the 'personality' theory, also discussed below. Whilst it is possible to justify our copyright system under both ideologies, our copyright system has been developed with a mainly deontological view. This has occurred due to the development of intellectual property law relying heavily on the development of normal property rights, which was established using John Locke's 'labour' theory as its justification. This is at odds with the view of copyright as a basis for creativity, as earlier stated by the European Union⁵², and also with the purpose of the

⁴⁹ G Dutfield & U Suthersanen, *Global Intellectual Property Law* (1st, EE Publishing, Cheltenham 2008) 52
⁵⁰ Ibid.

⁵¹ An example distinguishing the views of deontology from consequentialism is an 'organ donor' scenario. If 5 people are dying and require an organ transplant to live, and there is one healthy patient who could save them all, a consequentialist view would require the doctor to kill the healthy patient to save the other 5 patients. A deontological view would not allow the doctor to kill the healthy patient as it is not morally right to do so.

⁵² European Union, 'Creative Content in a European Digital Single Market: Challenges for the Future' (European Commission 2009)
<http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf> accessed 22/06/14, pg 2

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Statute of Anne to '[encourage] ... Learned Men to Compose and Write useful Books'⁵³.

These are examples of the view that copyright is there to promote rather than to protect, or rather to promote 'good' over what is 'right'.

Perhaps then the most influential philosophical theory on the development of copyright is that of the aforementioned John Locke's labour theory (also known as Lockean theory), which originated in 1689 within the writings of the 'Two Treatises of Government'⁵⁴. The basic premise of this theory is that:

... every individual owns his body and in turn his labour; therefore, when an individual exerts labour upon the goods of nature, the labours add value to the goods and should therefore own the goods⁵⁵.

When applicable to copyright, this theory relies on the premise that ideas do not simply come in a 'eureka!' moment, but that in fact they require labour to actually think of and produce creative ideas⁵⁶. An example of this would be a new skyscraper in New York – the idea and design for a skyscraper requires many hours of labour over the course of a few years to develop and perfect, if not longer. This is the basic justification for copyright over intellectual property that Locke's theory presents us with, with this idea of 'eureka' moments versus long internal creative processes being further discussed later in this thesis.

⁵³ S Newman, 'The development of copyright and moral rights in the European legal systems' [2011] E.I.P.R 677, 681

⁵⁴ J Locke, '*Two Treatises of Government*' [1689], 2nd Treatise.

⁵⁵ K Shao, 'The global debates on intellectual property: what if China is not a born Pirate?' [2010] Intellectual Property Quarterly (UK), Issue 4 341, 346

⁵⁶ J Hughes, 'The Philosophy of Intellectual Property' [1988] 77 Geo. L.J. 287, 3

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The transition of this theory from tangible property to intellectual property can cause problems. Whilst it is commonly accepted that creators ‘have the right to enjoy the fruits of their labour, even when the labours are intellectual’⁵⁷ there are still a number of potential problems with the applicability of this theory. Firstly, Locke’s theory requires labour, which could be described as either something which people avoid, or want to avoid; something that they do not like; or something that they engage in because they must⁵⁸. To many people, formulating an idea and producing it can be rather pleasant in comparison to say, working on a building site. It is important to note that the labour does not actually *have* to be unpleasant, but rather it has to not be as pleasurable as other activities that the creator would rather engage in⁵⁹. This is known as the ‘avoidance’ theory, however this argument is quite suspect – say for example an artist truly enjoys the act of painting more than anything in the world, should he be denied copyright protection? This was the case with both Artist 1 and Artist 2, who produce music because they enjoy doing so, and treat it as a hobby rather than a job.

Another problem with applying Lockean theory to copyright is that the theory does not require any originality or creativity to afford a ‘natural’ right to intellectual property. It has been previously acknowledged that:

... cumulative innovation and access to knowledge are no more than a second concern of the Lockean theory and have almost no role to play in reality⁶⁰.

⁵⁷ D Baird, 'Common Law Intellectual Property and the Legacy of *International News Service v Associated Press*' [1983] 50 U. Chi. L. Rev 411, 413

⁵⁸ J Hughes, 'The Philosophy of Intellectual Property' [1988] 77 Geo. L.J. 287, 10

⁵⁹ *Ibid.*, pg 11

⁶⁰ K Shao, 'The global debates on intellectual property: what if China is not a born Pirate?' [2010] *Intellectual Property Quarterly (UK)*, Issue 4 341, 346

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This view is a little strange considering that one of the main cornerstones of copyright, as was earlier illustrated, is to promote creativity. If copyright is there to promote creativity, then it seems illogical that our society has based its intellectual property laws on a philosophical justification that does not care for creativity or originality, or even the fostering of new ideas.

One final problem with Lockean theory's applicability to copyright law is that one of the main reasons for property rights in the first place is scarcity of resources. You are entitled to ownership over property as without these rights over a scarce resource there would be conflict. With regards to intellectual creations, there is no scarcity over their use⁶¹. If a person were to write a poem, and somebody else then wrote this down to tell others, this would not take away the value of my poem or stop me from the enjoyment of this poem. However, if someone's car was taken from them, he would be no longer able to benefit from the use of the car. In the words of Thomas Jefferson:

he who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening mine⁶².

Therefore, if we place a property right of ownership as justified under Lockean theory, then we are actually creating artificial scarcity of the intellectual property. Again, it seems unusual to develop a system of copyright for something which can freely be enjoyed without affecting the original value of the product.

⁶¹ S Kinsella, 'Against Intellectual Property' (StephanKinsella.com 2012), pg 18
<<http://www.stephankinsella.com/wp-content/uploads/publications/kinsella-against-ip-lfb-2012.pdf>>
accessed 26/06/14

⁶² Ibid., pg 18

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There is another version of Lockean theory which seems more suitable to apply to copyright law. This consequentialist interpretation of the commonly accepted Lockean theory is the ‘value added’ theory of labour. This view:

... holds that when labour produces something of value to others – something beyond what morality requires the labourer to produce – then the labourer deserves some benefit for it⁶³.

This theory is dependent upon the labourer to create ‘social value’, and this social value created deserves some reward. Copyright, however, does not seemingly follow this theory, as there are no statutory provisions which demand that a creation has ‘value’ – a worthless piece of work also draws the protection of copyright⁶⁴. We can easily differentiate between this theory and the previous ‘avoidance’ theory as the ‘value added’ theory is built on the justification that your labour requires protection as it fulfils social wants and needs, whereas the ‘avoidance’ theory is only compensating the creator for the suffering they went through to produce the end result.

Lockean theory has influenced western societies heavily in terms of intellectual property law, but it is not the only influential philosophy we can apply to help us discover what copyright should achieve. One extremely popular consequentialist ideology is that of ‘utilitarianism’. The main principle of contemporary utilitarianism is that ‘it is the greatest happiness of the greatest number that is the measure of right and wrong’⁶⁵. Using this definition, we can see that the previously discussed point regarding the role of copyright

⁶³ J Hughes, ‘The Philosophy of Intellectual Property’ [1988] 77 Geo. L.J. 287, 12

⁶⁴ Ibid.

⁶⁵ J Bentham, ‘A Fragment on Government’ (University of Bristol 1776)
<<http://www.efm.bris.ac.uk/het/bentham/government.htm>> accessed 01/07/2012

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being to promote creativity is a utilitarian view in itself. As succinctly put by Peter S. Menell, 'Utilitarian theorists generally endorse the creation of intellectual property rights as an appropriate means to foster innovation'⁶⁶, with a prime example of this application of utilitarianism to copyright law visible from a US Congressional Committee report on the 1909 Copyright Act:

The enactment of copyright legislation by Congress under the terms of the Constitution is... [based] upon the ground that the welfare of the public will be served and progress of science and useful arts will [be] promoted by securing to authors for limited periods the exclusive rights to their writings⁶⁷

Whilst we have discussed that the UK's system of copyright was developed based on the deontological ideas of Locke, copyright is not solely based around protecting the author even in the UK. As previously stated, the original underlying purpose of copyright legislation was to promote learned men into writing useful books, which is a utilitarian principle in itself.

Applying this utilitarian philosophy to copyright law, and specifically musical creativity, requires legislators to answer the question: does having strong copyright laws in place create a higher level of 'happiness' or social value to society than not having them would do? This question takes into account the inspiration of creativity which is meant to derive from copyright protection. However, it needs to be asked that if we view copyright with a utilitarian outlook, then does copyright actually create the greatest happiness for the greatest number? After all, an ever-increasing number of people are illegally downloading

⁶⁶ P S Menell, 'Intellectual Property: General Theories' (1999)
<<http://www.dklevine.org/archive/ittheory.pdf>> accessed 02/07/2012

⁶⁷ US Congressional Committee, 'The House Report 1 on the Copyright Act of 1909' (University of New Hampshire 1909)
<http://ipmall.info/hosted_resources/lipa/copyrights/The%20House%20Report%201%20on%20the%20Copyright%20Act%20of%201909.pdf> accessed 02/07/2012

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music, and are therefore circumventing copyright laws to gain a higher level of personal happiness.

The counter argument would say that without any form of protection, we may end up with less music being produced by artists as there would be no incentive to do so, and therefore despite the high level of piracy taking place, copyright is still necessary – or else there would be less music to illegally download in the first place. It would also be the case that people would not invest into the production aspects of creativity as they would not be remunerated for their troubles, as people would easily be able to steal their work. This argument is the philosophical spin-off of a pure utilitarian view – it is known as ‘rule-utilitarianism’. The rule-utilitarian argument ‘focuses on the function of IP [Intellectual Property] in a free market’⁶⁸, and states the reason that we need copyright laws is because the market will fail as ‘pirates can easily reproduce the knowledge products created by others at a much less cost’⁶⁹, costs which do not include the costs of creativity – such as research and development. Whilst circumventing an individual rule may prove to be beneficial on its own, and as such justified in a utilitarian sense, a rule-utilitarian would argue that having rules in place provide us with better consequences on the whole. They believe that always following rules which promote the greater good will, in itself, promote the greatest amount of good, and this view does not allow for any exceptions. Therefore if a person was to illegally download an album to see if he liked it with the full intention of purchasing it afterwards, this would not be justified in a rule-utilitarian sense.

⁶⁸ K Shao, 'The global debates on intellectual property: what if China is not a born Pirate?' [2010] Intellectual Property Quarterly (UK), Issue 4 341, 346

⁶⁹ Ibid.

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Locke's labour theory and Utilitarianism are two of the most commonly applied philosophies to copyright law. However, there has been a sharp increase in the jurisprudence of intellectual property in recent years, which has led to differing opinions on what copyright law should aspire to do. The first of these theories is the 'personality' theory. This philosophy is not new by any means, however it may seem alien to those used to dealing with the Anglo-American forms of copyright protection. The philosophy derives largely from the works of Hegel; with the main premise being that 'an idea belongs to its creator because the idea is a manifestation of the creator's personality or self'⁷⁰. Therefore the personality theory argues that a work belongs to someone because their personality has added individuality to the end result; that is to say, that if two artists were to use 'paint by numbers' books, then even though both of them had the exact same instructions there would be very slight differences in both of the pictures – and it is these differences that illustrate personality.

In Hegel's 'Philosophy of Right'⁷¹ he remarks that property is an expression of one's self, and therefore ownership of property is integral to developing one's personality. As the personality theory believes that mixing your personality with property grants you certain rights over it, then it can be said that it is justified to apply this to intellectual property also. After all, it is likely that in many cases the personality of an artist, an author or a musician comes to fruition more than a labourer on a building site, so they should be afforded property rights over their creations. It can be seen therefore that this is significantly different to the prior two justifications of property ownership; Lockean theory justifies intellectual property rights as compensation for the time, effort and labour

⁷⁰ J Hughes, 'The Philosophy of Intellectual Property' [1988] 77 Geo. L.J. 287, 28

⁷¹ G Hegel, *The Philosophy of Right* (1st, Oxford University Press, Oxford 1821)

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of expressing one's intellectual creation; utilitarianism affords intellectual property rights as a means of achieving the greatest happiness for the greatest number; however, the personality theory justifies intellectual property rights to protect the person's 'personality' and individual mental process. This theory has been adopted by both the French and German legal system, with the moral rights of the artists being of greater importance in both of these societies. In both the French and German legal systems, the author is the person who is in charge of exactly what happens to his work. An example of this is that the author decides when his work is first distributed⁷² and when distribution ceases⁷³, whereas in both the UK and the USA there have been occasions where record labels have released albums without permission from the artist themselves^{74 75}. The differences between the implementation of moral rights within the UK when compared to France will be discussed later.

Another theory which is gathering in popularity is the 'social planning' theory. This theory believes that intellectual property rights 'can and should be shaped so as to help foster the achievement of a just and attractive culture'⁷⁶. This seems very similar to a utilitarian viewpoint. However, instead of just being based around social welfare maximisation, this theory takes it one step further and looks to 'deploy visions of a

⁷² French Intellectual Property Code, Art. L121-2

⁷³ Ibid., Art. L121-4

⁷⁴ The Wildhearts, 'Landmines and Pantomimes Re-release Warning' (TheWildhearts.com 2006) <<http://www.thewildhearts.com/2006/09/17/landmines-and-pantomimes-re-release-warning/>> accessed 22/06/14, Landmines & Pantomimes was "...a compilation of rarities originally released on Kuro Neko records and which the band had no input to"

⁷⁵ BBC News, 'Prince re-signs with 'slave' label Warner Bros Records' (BBC.co.uk 2014) <<http://www.bbc.co.uk/news/entertainment-arts-27081344>> accessed 22/06/14. Prince - "That's where I was. I don't own Prince's music. If you don't own your masters, your master owns you."

⁷⁶ W Fisher, 'Theories of Intellectual Property' [2001] *New Essays in the Legal and Political Theory of Property*, 6

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desirable society'⁷⁷ richer than the utilitarian model. To achieve this desirable society, copyright is a necessity. Neil Netanel believes that copyright is needed to ensure there is a production function – that is that the incentive provided by copyright will inspire 'creative expression on a wide array of political, social, and aesthetic issues'⁷⁸, and that the structure that copyright provides supports a creative sector free from outside influence. The copyright system within this ideal world does not have to be the same copyright system we have in place; in fact, the theory suggests quite the opposite. It is suggested that:

The copyright term should be shortened, thereby increasing the size of the “public domain” available for creative manipulation. Copyright owners’ authority to control the preparation of “derivative works” should be reduced for the same reason. Finally, compulsory licensing systems should be employed more frequently to balance the interests of artists and “consumers” of their works⁷⁹

This theory aims to modify the existing system to reflect a fairer society: one where the inspiration of creativity is one of the main aims of society as a whole. The aspects of 'social planning' theory which are suggested above could potentially be justified with a utilitarian rationale. As was previously noted, if the greatest happiness for the greatest number is to allow for music to be more freely available via the shortening of copyright terms, then this would be a just law. However, even the social planning theory has its problems. For instance, 'what sort of society should we try, through the adjustments of copyright... to promote?'⁸⁰ Each individual has many contradictory beliefs to those of other individuals over what society should aspire to be, so how can we possibly come to

⁷⁷ W Fisher, 'Theories of Intellectual Property' [2001] *New Essays in the Legal and Political Theory of Property*, 6

⁷⁸ N W Netanel, 'Copyright and a Democratic Civil Society' [1996] *106 Yale Law Journal* 283, 293

⁷⁹ W Fisher, 'Theories of Intellectual Property' [2001] *New Essays in the Legal and Political Theory of Property* 7-8

⁸⁰ *Ibid.*, pg 33

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a uniform conclusion within the spectrum of intellectual property? As William Fisher notes:

... it is plainly implausible that theorists of intellectual property could resolve controversies of this scale in the course of analyses of copyright... doctrine⁸¹.

Another theory worth discussion is Ram Samudrala's 'Free Music Philosophy' (FMP).

Whilst Samudrala is primarily a scientist, he is also a musician in the band 'Twisted Helices'⁸². The basic premise of this theory is that the FMP:

... is an anarchistic grass-roots, but high-tech, system of spreading music: the idea that creating, copying, and distributing music must be as unrestricted as breathing air, plucking a blade of grass, or basking in the rays of the sun⁸³

This definition would strike fear into the hearts of many of the modern day super-rich musicians, however as Samudrala goes onto explain, the FMP is not about the price of music, but about the freedom of it. This philosophy suggests that everyone should have a freedom to copy, distribute and modify music 'for personal, non-commercial purposes'⁸⁴. Again, it is important to clarify that this does not mean that musicians cannot charge for music, or that they should not have the right to do so – instead it is merely saying that you should have the freedom to make a copy of a CD, or download audio files (if they were already available in this format) etc. Samudrala believes that this is necessary as musicians use plenty of other musical works to influence their own work, and that by doing so they have used the creativity of other musicians to inspire their own creativity. He argues that 'there is an existential responsibility placed upon them to give [creativity]

⁸¹ W Fisher, 'Theories of Intellectual Property' [2001] *New Essays in the Legal and Political Theory of Property*, 35

⁸² R Samudrala, 'Biography' (Ramblings) <<http://www.ram.org/>> accessed 05/07/2012

⁸³ R Samudrala, 'Free Music Philosophy' (Ramblings)

<<http://www.ram.org/ramblings/philosophy/fmp.html>> accessed 05/07/2012

⁸⁴ Ibid.

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back unconditionally, so creativity is fostered among people⁸⁵, which seems to suggest that the true inspiration for creativity is not intellectual property rights or monetary gain, but the creativity of others. As previously stated, Samudrala's FMP is not one which is against a musician making money from his work – he is instead against the current way in which the system is ran. He believes that most of the money gained from record sales goes back to the record industry and not the creative artist, and therefore the FMP 'encourage[s] direct reimbursement to the artist rather than through a bureaucratically-entangled and unbalanced system'⁸⁶.

Samudrala believes that people will only pay for music which they have previously listened to and that they have liked, and he believes that the current system does not allow for a person to do this – except perhaps for the major bands which gain substantial radio air-time. Whilst this point does not seem to fully consider the variety of ways artists can now distribute their music for people to listen to, such as via their website, there is definitely truth behind this theory. This theory is backed up by Artist 1, who believes that

If you go to a record shop and you see a band you've never heard of – you might go, "oh, I might buy it", [but] nowadays you won't buy it. You'll write down the name of the artist and go home and download it for free⁸⁷.

It is seemingly accepted by Samudrala that implementing the FMP would result in a fall in the traditional income in album sales as a whole. However, he argues that the actual distribution of the money between the record company and artist is completely unethical, and states that if society were to 'free music', musicians would still be able to earn money

⁸⁵ R Samudrala, 'Free Music Philosophy' (Ramblings)
<<http://www.ram.org/ramblings/philosophy/fmp.html>> accessed 05/07/2012

⁸⁶ Ibid.

⁸⁷ Annex 1, pg 2

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through an increase in income from their alternative revenue-streams. The main two increased revenue-streams would be an increase in concert ticket sales and merchandise sales. Samudrala also suggests that a ‘donation’ system could come into place for the payment of artists’ music. If you like the music, you pay the artist a sum dependent upon how much you believe it to be worth, which he believes:

... could become an ingrained practice in society, like tipping, where even though there is no enforced requirement to tip for various services, people do anyway⁸⁸

This philosophy, if implemented, would obviously be extremely controversial and further research would be required into the practicalities of this system. Whilst Samudrala is not an expert in intellectual property, he is not alone in this belief that a tipping system should be implemented. Courtney Love, lead singer of Hole, has accused the record industry of underpaying artists (a scenario which will be discussed later), and has also recommended a tipping service as a means of fair payment to artists⁸⁹.

It is important to comprehend the variety of views which have been illustrated above so that we can give ourselves a rationale to base the findings of this thesis upon. It is interesting that many of the aforementioned theories are often implemented individually, and that they have primarily been transferred over from the body of understanding of general property law. It seems that the application of these theories to the intangible nature of intellectual property, and specifically copyright law, is perhaps a case of trying to fit square pegs into round holes.

⁸⁸ R Samudrala, 'Free Music Philosophy' (Ramblings)
<<http://www.ram.org/ramblings/philosophy/fmp.html>> accessed 05/07/2012

⁸⁹ C Love, 'Courtney Love Does The Math' (Salon 2000) <http://www.salon.com/2000/06/14/love_7/>
accessed 15/04/14

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The philosophies listed above cover a range of ideas about the role and importance of copyright in a modern society. Whilst the deontological and consequentialist theorists are often opposed to each other, it would seem that there may be some crossover in ideologies when looking at the UK's current copyright system. The Lockean theory justifies copyright as the labourer is entitled to protection as it is morally right to afford this to him to compensate him for his efforts, whereas the Utilitarian view may say that copyright is justified as it provides us with the greatest good for the greatest number by providing rewards for artists to inspire them to create. Whilst the theory of using incentivisation to promote creativity will be discussed later in this thesis, copyright is currently deemed necessary to promote creativity, and therefore any reform of ideas should take into account the principles of alternative philosophies as opposed to the antiquated and ill-fitted deontological principles of Lockean theory. There have been references throughout so far to the application of these philosophies to copyright law. Therefore, prior to any discussion about what truly promotes creativity, we need to establish the current legal position of copyright within the UK, as well as assessing the impact of the legislative responses to file-sharing on creativity.

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Chapter 4 – The current laws preventing copyright infringement and Internet piracy

Within England & Wales copyright is mainly governed by the provisions set out in the ‘Copyright, Designs and Patents Act 1988’⁹⁰ (CDPA). Following the discussion on what the underlying philosophical purposes of copyright law are, this now presents us with an apt opportunity to discuss how copyright law is currently implemented. To effectively do this requires careful examination of the laws of England and other countries which regulate copyright and, increasingly so, internet piracy. This chapter will primarily focus on offering an overview of copyright law, with the following chapter discussing the true effectiveness of these laws.

Whilst the CDPA does set out the regulatory basis of copyright within English law, there have also been a variety of further legislative responses to ever-increasing pressure from the entertainment industries. Perhaps the most important of these legislative responses is the highly controversial ‘Digital Economy Act 2010’⁹¹ (DEA). This statute is one of many responses to the perceived decimation of recording artists’ revenues caused by the incessant increase in virtual pirates from all parts of the world.

Whilst these two statutes are the main domestic laws which we can look at, it is also necessary to assess the influence that the European Union has had upon England’s copyright system and to illustrate the implementation of their directives across Europe. The UK is a signatory to a variety of other conventions and treaties which are all made

⁹⁰ Copyright, Designs and Patents Act 1988

⁹¹ Digital Economy Act 2010

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with the intention of ensuring that intellectual property rights are enforced effectively in a coordinated and uniform manner, examples of which are the ‘Trade-related Aspects of Intellectual Property Rights’ (TRIPs) and the ‘Berne Convention for the Protection of Literary and Artistic Works’. Many of these treaties provisions have already been amalgamated into the law of England and Wales, however this has not always been as effective as it was hoped. A brief discussion on the implementation problems of the Berne convention within the UK will also take place.

Finally, it will be necessary to look internationally, specifically to France’s responses towards copyright infringement and online piracy, mainly due to their striking resemblance with our own attempts to curb piracy. This section will primarily focus on France’s HADOPI system.

Provisions for copyright protection under the CDPA 1988

Under the CDPA, copyrights are granted to ‘original literary, dramatic, musical or artistic works’⁹² as well as ‘sound recordings...’⁹³. The most important of these works for the purpose of this thesis are musical works, literary works and sound recordings. According to the Act, a:

‘musical work’ means a work consisting of music, exclusive of any words or action intended to be sung, spoken, or performed with music⁹⁴.

⁹² Digital Economy Act 2010, S1(1)(a)

⁹³ Ibid., S1(1)(b)

⁹⁴ Ibid., S3(1)

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It is important to note that for these categories of works, copyright protection begins only when the work in question is recorded ‘in writing or otherwise’⁹⁵. With this in mind, we must discuss the rights assigned to each person involved in the creative process.

The easiest way to discuss the myriad of rights contained within artists’ musical works is to apply these rights to a practical example. To aid in understanding these rights and who they are assigned to, we will apply current copyright law these rights to the fictional scenario of ‘The Legislators’, whom have just recorded their first single. This recording draws a minimum of two forms of copyright protection. Firstly, there is a copyright for the song as a ‘musical work’⁹⁶, which encompasses all the music contained on the single aside from any lyrics or words being sung alongside of this. Secondly, there is a copyright over the lyrics to the song, which are classified as a literary work⁹⁷. It is not necessary that the lyrics are written down; it can also be spoken or sung, as long as they are recorded in some way.

When a band produces a musical work, it will have the intention of both the musical work and the literary work being used together, and this means that there is a ‘co-ownership’⁹⁸ over both of the copyrights involving the band members. If there were, for example, two lead-singers who had both worked on one specific song with common intention that their parts would be inseparable from the other, then there would be a joint-ownership over their work⁹⁹. Therefore, the difference between a co-ownership and a joint ownership is

⁹⁵ Copyright, Designs and Patents Act 1988, S3(2)

⁹⁶ Ibid., S3(1)

⁹⁷ Ibid., s3(1) – Literary work is anything which is spoken, written or sung.

⁹⁸ Ibid., s[10A](1)

⁹⁹ Ibid., s10(1)

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that with the co-ownership, the parts of the work are produced with the intention of being used together, but they are each individually identifiable. With joint ownership, the contribution of each author needs to be indistinct from the other.

With regards to the length of protection afforded by the CDPA for copyright over musical and literary works, copyright lasts for the author's life plus 70 years¹⁰⁰. Following a recent directive issued by the European Union, the copyright which subsists within a sound recording is now also 70 years from the end of the calendar year in which the recording was made, or if during that period the work was published then protection ends 70 years from the end of that calendar year¹⁰¹. In the case of The Legislators, the protection would run until 70 years after the last 'co-owner' or joint author of the band was to pass away.

The CDPA establishes three main types of protection: authorial right, performers' rights and entrepreneurial rights. Authorial rights are the aforementioned pecuniary rights over literary and musical works. Also provided for within the CDPA are the 'moral rights' of the author, and whether or not the original author of the copyrighted work is the owner of the actual copyright is irrelevant, they are still entitled to these rights¹⁰². The two main rights applicable to music are the right to be identified as the author¹⁰³ and the right to object to derogatory treatment of their work¹⁰⁴. These moral rights are not assignable to another party and therefore remain with the author throughout their life¹⁰⁵. To use our

¹⁰⁰ Copyright, Designs and Patents Act 1988, S 12(2)

¹⁰¹ EU Directive 2011/77/EU

¹⁰² Copyright, Designs and Patents Act 1988, S2(2)

¹⁰³ Ibid., S77

¹⁰⁴ Ibid., S80

¹⁰⁵ Ibid., S94

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earlier example of The Legislators, the band members would be entitled to be identified as the authors of their single and would be entitled to their ‘moral rights’ over their work, irrespective of recording contracts signed to transfer the ownership of their copyright. These rights were brought in following the implementation of the Berne Convention, however there have been a number of problems with this, as discussed later in this chapter.

Throughout the recording of The Legislators single there will have been a producer working with them to advise and ensure a high level of sound quality is present on the final release. The producer will be working on behalf of a record label. Following The Legislators song being recorded, there is now a copyright within this sound recording¹⁰⁶, and the ownership of this belongs to the producer of the song¹⁰⁷. As the producer was working in the course of employment, the ownership of this right falls with the record label¹⁰⁸. These are also known as entrepreneurial rights and these are granted to the record company to remunerate the investors for their initial outlay, although they offer little creativity into the project themselves.

Performers’ rights are granted to the artists with regards to their live performances of musical works or literary works¹⁰⁹, and this includes their performance on the record. These rights are ancillary to the copyright, and are non-pecuniary. Artists who do not write their own lyrics rely on performance rights within their songs as this protects their individual expression, therefore if songwriters working on behalf the record company had

¹⁰⁶ Copyright, Designs and Patents Act 1988, S(1)(1)(b)

¹⁰⁷ Ibid., S9(2)(aa)

¹⁰⁸ Ibid., S11(2)

¹⁰⁹ Ibid., S180(2)(b) – performance can mean musical performance

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written the lyrics for The Legislator's lead-singer, then he would no longer be entitled to a copyright over a literary work, and instead would only be entitled to the rights in his performance. The Legislators are still entitled to performers' rights over their work even if they did write the lyrics themselves, which would provide The Legislators with the right to request permission to record the live performance or any substantial part of it¹¹⁰, make a copy of the recording of a live performance or any substantial part of it¹¹¹, issue copies of the recording to the public¹¹², rent or lend copies of a recorded performance to the public¹¹³, or make available electronically a recording of the live performance to the public¹¹⁴.

Within the CDPA there are no references specifically of Internet piracy, although the Act does provide for injunctions to be granted against 'service providers'¹¹⁵. The term 'service providers' is defined under the Electronic Commerce (EU Directive) Regulations of 2002 as 'mean[ing] any person providing an information society service'¹¹⁶, with 'information society service' being defined as 'any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing'¹¹⁷. It is necessary therefore for an information society service to have been provided with some kind of remuneration for the infringing service offered to fall under the reach of s97A. Furthermore, the service provider must have 'actual knowledge' of another person using their service to infringe

¹¹⁰ Copyright, Designs and Patents Act 1988, S182(1)(a)

¹¹¹ Ibid., S182A(1)

¹¹² Ibid., S182B(1)

¹¹³ Ibid., S182C(1)

¹¹⁴ Ibid., S182CA(1)

¹¹⁵ Ibid., s97A

¹¹⁶ Electronic Commerce (EC Directive) Regulations 2002, s2(1)

¹¹⁷ Ibid.

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copyright¹¹⁸. To assess if the service provider had an actual knowledge of this, the court will take into account any relevant ‘particular circumstances’¹¹⁹, which includes if they have received a notification of the infringing material¹²⁰. An example of the use of the power granted under this section was the recent injunction served against the website ‘The Pirate Bay’¹²¹ (TPB). In this case it was judged that TPB were guilty of copyright infringement¹²², and an injunction was served as they met the prior requirements established under s97A. In terms of remuneration for the service provided, the Judge stated that:

the operators of TPB do not operate the website for altruistic reasons. On the contrary, the website carries click-through advertising... the revenue generated by such... [is] somewhere in the range of US\$1.7 to 3 million in the month of October 2011. In addition the operators sell merchandise¹²³.

In terms of relevant particular circumstances, it was held that the name and logo of TPB displayed the intention of infringing copyright¹²⁴ and that on their website they referred to being founded by a Swedish anti-copyright organisation¹²⁵. It was clear through a number of means that the owners of TPB knew that they were infringing copyright; TPB receive and display a variety of ‘take-down’ notifications from major companies for their

¹¹⁸ Copyright Designs and Patents Act 1988, s97A (1)

¹¹⁹ Ibid., s97A (2)

¹²⁰ Ibid., s97A (2)(a)

¹²¹ *Dramatico Entertainment Ltd and others v British Sky Broadcasting Ltd and others* [2012] EWHC 268 (Ch), at para. 13. Ordered ISPs to use the means of internal protocol (IP) address blocking to prevent people from accessing TPB.

¹²² Ibid., at para. 4, “I have already held that both users and the operators of TPB infringe copyright”, per Arnold J.

¹²³ Ibid., at pg 8, para 29 per Arnold J.

¹²⁴ Ibid., pg 23, para 78(i) per Arnold J.

¹²⁵ Ibid., pg 23, para 78(ii) per Arnold J.

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users to see¹²⁶, and it was held that not only did they have actual knowledge of the infringing material, but they actually ‘go far beyond merely enabling or assisting’¹²⁷.

Digital Economy Act 2010

Whilst the CDPA does a lot to protect an artist’s rights, such as providing against unauthorised copying, the statute does not stretch to cover the specific offences of online piracy. The CDPA, implemented in 1988, was not drafted by a society able to see what would happen to the future of the entertainment industries and how the internet would revolutionise media. The DEA therefore is the UK’s answer to online piracy. The majority of this act was brought into force on the 8th June 2010, however many of the provisions of the act have yet to be implemented due to a number of controversies surrounding it, an issue which will be discussed later in this thesis.

The DEA places obligations onto Internet Service Providers (ISPs) for the first time in the UK. Section 3 of the DEA¹²⁸ amends section 124 of the Communications Act 2003¹²⁹ by placing a duty on ISPs to notify subscribers of a ‘copyright infringement report’ filed by the copyright owner. This section applies if it ‘appears’ to a copyright owner that a subscriber to an ‘internet access service’ has infringed the owners’ copyright through these means¹³⁰, or has allowed another person to use the service to infringe the owners’ copyright¹³¹. The copyright infringement report is a report which claims that there has

¹²⁶ The Pirate Bay, 'Legal Threats' (The Pirate Bay) <<http://tpb.pirateparty.org.uk/legal>> accessed 10/12/2012

¹²⁷ *Dramatico Entertainment Ltd and others v British Sky Broadcasting Ltd and others* [2012] EWHC 268 (Ch) 23, para 81 per Arnold J.

¹²⁸ Digital Economy Act 2010, S3 – This section is now S124A of the Communications Act 2003

¹²⁹ Communications Act 2003, S124

¹³⁰ *Ibid.*, S124A(1)(a)

¹³¹ *Ibid.*, S124(1)(b)

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been an infringement of the owners' copyright¹³²: includes a description of the infringement;¹³³ and includes evidence of the apparent infringement¹³⁴. This report has to be sent to the ISP within a period of one month after the evidence was gathered¹³⁵. The obligation to 'notify' subscribers within this section means to send a notification to the electronic or postal address of the subscriber¹³⁶.

Not only is there an obligation for ISPs to notify their subscribers of any copyright infringement reports that have been issued, but they are also under a duty to provide copyright infringement lists to the copyright owners¹³⁷. The owner is entitled to request a copyright infringement list for a specified period, which lists any subscribers that have reached the 'threshold' set out in the OFCOM initial obligations code¹³⁸. This is the follow on from the previously mentioned copyright infringement report and is the first step towards identifying a subscriber to take legal action against. At the time of writing, the initial obligations code has yet to be implemented following controversy surrounding the initial 2010 draft. The latest draft proposal was submitted to consultation on the 26th June 2012 and dealt primarily with the controversial 'sharing of costs' burden placed on ISPs. However, it is likely that any initial obligations will not come into force until late 2014 at the earliest¹³⁹, with any warning letters not being sent until the end of 2015¹⁴⁰.

¹³² Communications Act 2003, S124(3)(a)

¹³³ Ibid., S124(3)(b)

¹³⁴ Ibid., S124(3)(c) – The evidence includes the subscribers IP address at the time the evidence was gathered

¹³⁵ Ibid., s124(3)(d)

¹³⁶ Ibid., S124(9)

¹³⁷ Digital Economy Act 2010, s4 – Implemented through the Communications Act 2003, S124B

¹³⁸ Communications Act 2003, S124(B)(3)

¹³⁹ BBC News, 'Digital Economy Act's anti-piracy measures are delayed' (BBC.co.uk 2012)

<<http://www.bbc.co.uk/news/technology-17853518>> accessed 19/08/2012

¹⁴⁰ Pinsent Masons, 'Ofcom anti-piracy code delayed until 2015' (Out-Law.com 2013) <<http://www.out-law.com/en/articles/2013/june/ofcom-anti-piracy-code-delayed-until-2015/>> accessed 15/04/14

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A further obligation established here is the obligation on ISPs to limit internet access¹⁴¹.

The Secretary of State may direct OFCOM to assess if it is necessary to impose any technical obligations upon ISPs¹⁴², with the term ‘technical obligation’ being very widely defined as:

an obligation for the provider to take a technical measure against some or all relevant subscribers to its service for the purpose of preventing or reducing infringement of copyright by means of the internet¹⁴³.

These technical measures can limit the speed of capacity of the internet service provided to the subscriber¹⁴⁴, prevent or limit a subscriber from gaining access to ‘particular material’¹⁴⁵, suspend the service provided to a subscriber¹⁴⁶ or limit the service ‘in another way’¹⁴⁷. As we can see, this again is extremely broad with a seeming ‘catch-all’ provision for limiting service to subscribers. An order to limit internet access cannot be made under this section within 12 months of an initial obligations code being in force¹⁴⁸, which is why there have been no such orders yet. The draft proposals of the initial obligations and the DEA have come under intense criticism from a variety of sources and even faced legal challenges from ISPs¹⁴⁹, which has ultimately lead to a delay in the implementation of the obligations on ISPs.

¹⁴¹ Communications Act 2003, S124H(1) – Implemented as a result of the Digital Economy Act 2010, s10

¹⁴² Digital Economy Act 2010, s9 – Implemented through the Communications Act 2003, s124G(1)(a)

¹⁴³ Communications Act 2003, S124G(2)

¹⁴⁴ Ibid., S124G(3)(a)

¹⁴⁵ Ibid., S124G(3)(b)

¹⁴⁶ Communications Act 2003, S124G(3)(c)

¹⁴⁷ Ibid., S124G(3)(d)

¹⁴⁸ Ibid., S124H(2)

¹⁴⁹ *British Telecommunications plc and TalkTalk Telecom Group plc v. Secretary of State for Culture, Olympics, Media and Sport and others* [2012] 232 EWCA (Civ) – Demands for judicial review of the DEA 2010

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Perhaps the most controversial areas of the DEA were section 17¹⁵⁰ and 18¹⁵¹, which dealt with placing an injunction on ISPs to block access to certain websites. Following a recent review by OFCOM into the effectiveness of implementing these two sections¹⁵², the government has decided to repeal the aforementioned sections¹⁵³. It was found that the provisions for blocking injunctions against websites were already part of our law under the aforementioned section 97A of the CDPA; however it has been conceded by OFCOM that there is no 100% effective way to block a website¹⁵⁴, and the additional measures under the DEA would not significantly speed up the grant of a blocking injunction to the level sought by rights holders, that being the immediate takedown of infringing websites.

The European Influence

As a member of the European Union, any regulation, directive or decision of the EU applies to the UK¹⁵⁵, meaning that EU citizens can rely on any protection afforded by Europe regardless of whether or not it has been implemented through national law or not¹⁵⁶. The EU has brought about change to copyright within the UK on many occasions, with perhaps the most recent change to the UK's copyright system being the extension of the protection period applicable to both sound recordings and performance rights. Often

¹⁵⁰ Digital Economy Act 2010, s17

¹⁵¹ Ibid., s18

¹⁵² OFCOM, "'Site Blocking' to Reduce Online Copyright Infringement' (OFCom.org.uk 2010) <<http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf>> accessed 26/06/14

¹⁵³ Department for Culture, Media & Sport & E Vaizey MP, 'Next steps to tackle Internet piracy' (Gov.uk 2012) <<https://www.gov.uk/government/news/next-steps-to-tackle-internet-piracy>> accessed 19/08/2012

¹⁵⁴ OFCOM, "'Site Blocking' to Reduce Online Copyright Infringement' (OFCom.org.uk 2010) <<http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf>> accessed 26/06/14, at pg 4

¹⁵⁵ Treaty for the Functioning of the European Union (TFEU) 2010, Art 288

¹⁵⁶ European Communities Act 1972, S2(1) - In the case of the UK, our Parliamentary Sovereignty has been maintained by enacting this gateway for any directly applicable European law into our legal system.

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referred to as 'Cliff's Law'¹⁵⁷, the directive¹⁵⁸ extended the protection period of performances and sound recordings to 70 years¹⁵⁹. This was only a problem for artists who had never actually written the songs they profited from themselves, such as Cliff Richard and Kylie Minogue¹⁶⁰; composers already have copyright protection over their work for their whole life plus 70 years. Charlie McCreevy, the European Union's internal market commissioner at the time of the proposal for extended rights, argued that 'it is the performer who gives life to the composition and while most of us have no idea who wrote our favourite song, we can usually name the performer'¹⁶¹. One further justification of this change was given to us by Peter Waterman, who said 'if people aren't being paid for making music then they won't make music'¹⁶², an issue we shall move onto in the next chapter of this thesis.

This is not the only change to copyright made as a result of an EU directive; the controversial 'Copyright Directive'¹⁶³ was seen as a victory for rights holders in 2001 which altered rights with regards to reproduction, and affirmed the position held under the prior 'E-Commerce' bill of a lack of liability on behalf of service providers for the transfer of copyrighted material over their networks, who were acting as 'mere conduits'. Broadly speaking, the aims of this directive were to realign the position of the EU with

¹⁵⁷ C Cooper, 'Cliff's law' gives ageing rockers a pension after copyright ruling' (The Independent 2011) <<http://www.independent.co.uk/arts-entertainment/music/news/cliffs-law-gives-ageing-rockers-a-pension-after-copyright-ruling-2351636.html>> accessed 22/08/2012

¹⁵⁸ EU Directive 2011/77/EU

¹⁵⁹ Ibid., S(2)(a)

¹⁶⁰ C Cooper, 'Cliff's law' gives ageing rockers a pension after copyright ruling' (The Independent 2011) <<http://www.independent.co.uk/arts-entertainment/music/news/cliffs-law-gives-ageing-rockers-a-pension-after-copyright-ruling-2351636.html>> accessed 22/08/2012

¹⁶¹ BBC News, 'Bands set for longer rights' (BBC.co.uk 2008) <<http://news.bbc.co.uk/1/hi/business/7244928.stm>> accessed 22/08/2012

¹⁶² C Cooper, 'Cliff's law' gives ageing rockers a pension after copyright ruling' (The Independent 2011) <<http://www.independent.co.uk/arts-entertainment/music/news/cliffs-law-gives-ageing-rockers-a-pension-after-copyright-ruling-2351636.html>> accessed 22/08/2012

¹⁶³ Directive 2001/29/EC

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that of the World Intellectual Property Organisation (WIPO) Copyright Treaty¹⁶⁴. This was implemented into the UK's CDPA through the 'Copyright and Related Rights Regulations' Statutory Instrument in 2003¹⁶⁵. Another directive which was brought into effect in the UK was the Intellectual Property Rights Enforcement Directive¹⁶⁶, which primarily encouraged member states to enforce effective, dissuasive and proportionate laws where internet piracy is concerned¹⁶⁷. Again, this was implemented into UK law in 2006 under the Intellectual Property (Enforcement, etc.) Regulations Act¹⁶⁸, with little change to the current CDPA apart from its applicability to certain states in the European Economic Area¹⁶⁹.

Following on from the prior references to the Berne Convention, there have been a number of problems in implementation of the 'moral rights' of the author within the UK. Whilst under the CDPA, moral rights are not assignable to another¹⁷⁰, these rights have a number of exceptions and can actually be waived¹⁷¹, even with regards to future works¹⁷². This means that a recording artist could technically waive his right to his moral rights as part of a contract with a recording label. This is not what the Berne Convention had intended by trying to create uniformity in enshrining the moral rights of authors across the member states¹⁷³. This illustrates the difference between the UK and France with regards to the way in which they view the author and his rights over his work, and

¹⁶⁴ World Intellectual Property Office, 'WIPO Copyright Treaty' (WIPO.int 1996) <http://www.wipo.int/treaties/en/text.jsp?file_id=295166> accessed 22/08/2012

¹⁶⁵ Copyright and Related Rights Regulations 2003

¹⁶⁶ Directive 2004/48/EC

¹⁶⁷ *Ibid.*, Art. 3(2)

¹⁶⁸ Intellectual Property (Enforcement, etc.) Regulations 2006

¹⁶⁹ *Ibid.*, s8(2)(1)

¹⁷⁰ Copyright, Designs and Patents Act 1988, s94

¹⁷¹ Copyright, Designs and Patents Act 1988, s87(2)

¹⁷² *Ibid.*, s87(3)(a)

¹⁷³ Berne Convention for the Protection of Literary and Artistic Works, Article 6bis(1)

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shows that the UK treat these inalienable rights as a ‘bolt on’ to the economic rights provided by copyright. This is likely due to the way in which copyright has developed within the two countries, with the aforementioned Lockean theory being diametrically opposed to that of the ‘personality’ theory adopted by France.

‘Droit d’auteur’ and HADOPI

Whilst England was the birthplace for modern day copyright law, in other countries a different kind of copyright has evolved over the years, particularly in France. As was previously discussed in the philosophy chapter, France has focused heavily on the ‘personality’ theory throughout its development of copyright law, whilst the UK focused on the Lockean theory. Yet despite these differences there are similarities to be discussed between the two systems.

Copyright law in France, otherwise known as ‘droit d’auteur’, heavily favours the author and their ‘personality’. This is significantly different to our system of copyright due to the difference in balance between moral rights and entrepreneurial rights; the author has the ultimate power over ‘both the intellectual and moral nature as well as attributes of an economic nature’¹⁷⁴, however the producer still holds the right to compensation for his initial investment. The entrepreneurial rights also do not solely relate to the producer of the song, but also grant the performer certain rights to reclaim remuneration also¹⁷⁵. France’s system favours the creator, whereas it could be seen that the UK system of

¹⁷⁴ French Intellectual Property Code, Art. L111-1

¹⁷⁵ Ibid., L214-2 – “remuneration rights... are divided between the performers and producers of phonograms”

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copyright favours the entrepreneur; the record label that provides the money for production, but provides no creativity them self.

As well as authors possessing the right to financially benefit and distribute their work, they also have the right to exploit their artistic work's public performance¹⁷⁶, with authors having the power to prevent both the performance of their work and its distribution if they wish¹⁷⁷. Whilst the author has the right to prevent public performances of their work, there are certain exceptions such as private family performances, private copies of the work and use for parody, criticism or review¹⁷⁸. These 'moral rights' over their work are 'perpetual, inalienable and imprescriptible'¹⁷⁹, and can only be transferred to another person upon death¹⁸⁰.

Although France does not provide entrepreneurial rights in the same manner as the UK, the Intellectual Property Code establishes the right to a 'private copy' levy on 'other mediums' which can be used to enable private copying of copyrighted works¹⁸¹. The use of the term 'other mediums' is rather broad, the actual meaning of which is defined by a Committee which is chaired by a representative of the state¹⁸², and thus far has been interpreted to include MP3 players¹⁸³, personal computers¹⁸⁴ and even certain tablet

¹⁷⁶ French Intellectual Property Code, L122-1 – 'The right of exploitation belonging to the author shall comprise the right of performance and the right of reproduction.'

¹⁷⁷ Ibid., Art. L121-2 – The author alone shall have the right to divulge his work. He shall determine the method of disclosure and shall fix conditions thereof

¹⁷⁸ Ibid., Art. L121-1

¹⁷⁹ Ibid., Art. L122-5

¹⁸⁰ Ibid., "It may be transmitted mortis causa to the heirs of the author"

¹⁸¹ French Intellectual Property Code. Art. L311-1 to L311-8

¹⁸² Ibid., Art. L311-5

¹⁸³ M Kretschmer, 'Private Copying and Fair Compensation: An empirical study of copyright levies in Europe' [2011] An Independent Report Commissioned by the UK IPO, 27

¹⁸⁴ Ibid., pg 27

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computers¹⁸⁵. This ‘levy’ system puts a charge on certain items which are likely to be used for private copying of copyrighted material to remunerate artists and those involved within the process of the making of copyrighted material (such as the artist, the producers and the performers¹⁸⁶) for the time and effort they have taken to create such artistic works of the mind. This money is redistributed not just back to remunerate those who have lost potential revenue due to private copying, but also ‘to assist creation and promote live entertainment and for training schemes for performers’¹⁸⁷. This provision is evidence of France’s intention to promote creativity through copyright law, and is an example of the earlier mentioned philosophy of the ‘social planning’ theory in practice. This system is not just in force within France, but also in a variety of other European countries such as Germany, Italy and Spain; however there is not complete uniformity in the application of the levy.

As a response to the increasing trend of online piracy, France established the ‘*Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet*’¹⁸⁸ (HADOPI). The rights of this governmental body were brought in following a decision by the French constitutional council in 2009¹⁸⁹ to amend the Intellectual Property code. This brought about the controversial ‘graduated response’ to online piracy, also known as the ‘three strikes’ rule. Simply put, the graduated response is where HADOPI issues, in the first instance, a warning letter to an internet subscriber who is ‘likely’ to be infringing online copyright laws¹⁹⁰. There is no automatic assumption that the person who may be

¹⁸⁵ M Kretschmer, 'Private Copying and Fair Compensation: An empirical study of copyright levies in Europe' [2011] An Independent Report Commissioned by the UK IPO, 12

¹⁸⁶ French Intellectual Property Code, Art. L311-1 – L311-2

¹⁸⁷ *Ibid.*, Art. L321-9

¹⁸⁸ ‘High Authority for the Distribution of Works and the Protection of Rights on the Internet’

¹⁸⁹ Decision n° 2009-580 of June 10th 2009

¹⁹⁰ French Intellectual Property Code, Art. 331-25

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infringing copyright laws is the contract-holder, as the initial letter sent to the contract-holder provides them with advice on how to secure their internet connection amongst other helpful hints such as where to locate legal music online¹⁹¹. If there is a repeat infringement within the next six months, a second letter will be sent out to the contract-holder¹⁹² to yet again remind them of their responsibilities and warning them of the possible repercussions of further repeated copyright infringement¹⁹³. Finally, if there is yet another infringement from the same subscriber within one year after the second warning letter, then a third letter is sent out to the subscriber informing him of the likely criminal prosecution they will be facing for their actions, and an injunction may be sought against the contract-holder¹⁹⁴. A maximum penalty of €1,500 can be issued to the individual, as well as a suspension of internet access for up to one month¹⁹⁵. The HADOPI law in France seems to have directly influenced the aforementioned DEA¹⁹⁶ within the UK, although there are obvious differences between the two laws; namely that the DEA aims to put responsibility on ISPs to punish its subscribers, whereas HADOPI themselves are in charge of punishing individuals within France.

The above discussion surrounding the laws of both the UK and France demonstrate the difference in copyright protection stemming from the aforementioned differences in underlying philosophical ideologies. It is interesting how despite the two jurisdictions operating separately and the two different philosophical ideals, they have implemented

¹⁹¹ HADOPI, 'Réponse graduée' (HADOPI.fr) <<http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduee>> accessed 04/11/2012

¹⁹² French Intellectual Property Code, Art. 331-25

¹⁹³ HADOPI, 'Réponse graduée' (HADOPI.fr) <<http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduee>> accessed 04/11/2012

¹⁹⁴ French Intellectual Property Code, Art. L331-32

¹⁹⁵ HADOPI, 'Réponse graduée' (HADOPI.fr) <<http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduee>> accessed 04/11/2012

¹⁹⁶ Digital Economy Act 2010

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an extremely similar method of combating internet piracy with the introduction of Loi HADOPI and the DEA. Following an understanding of exactly what the current legal position is for copyright holders, it is now necessary to analyse the effectiveness of the aforementioned legislation in combating piracy and to see what effect this has had on creativity in society. Governments and rights-holders worldwide have worked together to try to establish a system which seeks to prevent people from illegally accessing copyrighted work, but how well has this worked?

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Chapter 5 – The effectiveness of the current laws surrounding the prevention of Internet piracy and an analysis of the proposed strengthening of online copyright protection

To assess the impact of the above mentioned legislation on creativity, it must first be investigated as to how effective this legislation has been. The following chapter will look at both the stated laws on copyright of England as well as internationally, and evaluate whether these laws have been appropriately enforced as intended. It is necessary due to the universal nature of the internet to assess the effectiveness on a global scale; the internet does not follow traditional jurisdictional rules and the effects of any strong copyright laws introduced within major nations will be felt throughout the world. This was felt most recently by the proposed ‘Stop Online Piracy Act’ (SOPA) and the ‘Protect IP Act’ (PIPA) within the United States, which caused extreme controversy and sparked the first uniform international black-out of information across thousands of websites whose operators were worried about the effects of the legislation. As these Acts did not pass into law, detailed discussion of these Acts is unnecessary. Firstly we must assess the efficacy of our own domestic legislation prior to discussing how the trends surrounding strengthening copyright law effects creativity.

As mentioned earlier in the definition of terms, the perception of the word ‘piracy’ has been altered through the subversion of this term by the music industry to include civil infringement as well as criminal infringement. Copyright piracy historically refers to the exploitation of copyrighted works for commercial reasons, where someone is making a profit from the exploitation of a copyrighted work¹⁹⁷.

¹⁹⁷ Copyright, Designs and Patents Act 1988, s107

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Copyright, Designs and Patents Act 1988

Unlike the Constitution of the United States of America (USA)¹⁹⁸, the CDPA contains no specific mention of the underlying purpose of copyright legislation; namely that ‘copyright is the basis for creativity’¹⁹⁹. In fact, there is very little mention of creativity within the CDPA at all. Instead the CDPA prefers to use the term ‘original’, which does not necessarily translate as the same meaning. This is shown by the protection that is offered to databases²⁰⁰ as ‘original literary works’, which require little artistic creativity.

The primary concern over the CDPA as an effective piece of legislation is the sheer complexity of it. David Vaver, in a scathing attack on the CDPA succinctly states that:

Good economic laws must have at least three characteristics: they must be (1) clear; (2) just; and (3) efficient... I suggest that our current IP laws fail significantly in all these three aspects²⁰¹

He is absolutely correct too; the CDPA is extremely large when compared to the relative simplicity of other country’s intellectual property laws. With regards to copyright alone, the Act weighs in with 179 sections on copyright, and that is not including the additional 32 sections dedicated to performer’s rights, nor does that include the explanatory

¹⁹⁸ United States Constitution, Art. 1, s8: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”

¹⁹⁹ European Union, 'Creative Content in a European Digital Single Market: Challenges for the Future' (European Commission 2009)
<http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf> accessed 22/06/14, pg 2

²⁰⁰ Copyright, Designs and Patents Act 1988, s3(1)(d)

²⁰¹ D Vaver, 'Reforming IP Law: An obvious and not-so-obvious agenda: the Stephen Stewart lecture for 2008' [2009] I.P.Q 143, 144

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schedules of the Act either. On top of all that, we also have further Acts which concentrate on strengthening copyright, such as the Digital Economy Act (DEA), as well as a myriad of European directives and international treaties to apply. By comparison, the Intellectual Property Code of France contains all of their IP laws in one single document, which is easily accessible to the public. The complexity of such a law, whilst beneficial for copyright lawyers²⁰², has created a ‘legal minefield’²⁰³ for the artists, consumers and budding music producers trying to establish their rights.

An example of the complexity and absurdity of the CDPA is that until recently, if a consumer ripped the audio tracks from their legally purchased CD to their PC, and then used these MP3s to place onto a portable MP3 player, they created an infringing copy of that album - even though they legally owned the album themselves. Whilst this is in the process of being amended following the Hargreaves report²⁰⁴, this illustrates that the copyright system is unfair and significantly lags behind the development of new technology.

Another criticism of the CDPA is the weight of protection and remuneration which is offered to entrepreneurs in comparison to the author themselves. These ‘entrepreneurial rights’ are granted through the aforementioned copyright existing within a ‘sound recording’²⁰⁵, with this right being granted to the producer of the song²⁰⁶, and in turn the

²⁰² The more complex, the more they will be needed to interpret the law, the more money that they receive. It is a dream for copyright lawyers.

²⁰³ D Vaver, 'Reforming IP Law: An obvious and not-so-obvious agenda: the Stephen Stewart lecture for 2008' [2009] I.P.Q 143, 144

²⁰⁴ The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, amending CDPA 1988 to include S28B – ‘personal copies for private use’ exception

²⁰⁵ Copyright, Designs and Patents Act 1988, s{5A}

²⁰⁶ Ibid., S9(2)(aa)

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record label who employs the producer. Whilst copyright should be used to promote creativity, ‘the making of a sound recording itself requires almost no *artistically* creative input’²⁰⁷. However, the affording of these rights can be justified by compensating the entrepreneur for their expenses that go into the production of the music itself. The purpose of entrepreneurial rights is primarily to award protection for a period to recoup their costs and make a reasonable amount of profit²⁰⁸, but awarding too long of a period of protection has led to a ‘gratuitous statutory subsidy for the record industry’²⁰⁹. It does seem unreasonable for 70 years protection to be granted to the record industry to make money from work into which they have put no creativity. As stated by Jim Killock, the executive director of the campaigning organisation the Open Rights Group:

[The extension of the protection of copyright on sound recordings from 50 to 70 years] puts money into the pockets of big labels. It's unlikely to benefit smaller artists and it will mean that a lot of sound recordings that are out of print will stay out of print²¹⁰

This extension of rights means that there is less music within the public domain for people to freely use and experiment with, which has the potential to further inhibit creativity.

Digital Economy Act 2010, Loi HADOPI and Human Rights

To understand the issues with the DEA, it is necessary to look at France’s HADOPI law again and briefly discuss the effectiveness of this three-strike system that has so heavily influenced our only real anti-piracy law. HADOPI is ‘an "Independent Public Authority",

²⁰⁷ A Rahmatian, ‘Music & Creativity as perceived by Copyright law’ [2005] I.P.Q 267, 289

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ BBC News, ‘Rock veterans win copyright fight’ (BBC.co.uk 2011)

<<http://www.bbc.co.uk/news/entertainment-arts-14882146>> accessed 23/01/2013

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with legal personality'²¹¹, aiming to 'protect works against acts of infringement online'²¹². The last chapter discussed the three-strike action plan that is enforced in France through the Intellectual Property Code. However, there have been a number of issues raised about the graduated response to online copyright infringement: firstly, there is the question of whether or not the access to the internet can be classified as a 'human right'; secondly, whether or not HADOPI is actually deterring people from committing piracy; and finally, whether HADOPI has proven to be cost effective.

As discussed in the last chapter, the final strike of the HADOPI law is the suspension of internet access for up to one month and a fine of up to €1,500²¹³. This suspension of internet access has created much debate about whether or not this would qualify as a breach of the user's basic human rights; namely their right to the freedom of expression. This debate has arisen due to the wording of Article 10 of the European Convention on Human Rights, whereby it states that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas... regardless of frontiers²¹⁴

The use of the phrase 'regardless of frontiers' is the problem for those hoping to suspend access to the Internet for committing the offence of copyright infringement, or indeed for any other crime which requires the suspension of Internet access as a remedy. The Constitutional Council of France has recognised that access to the internet is linked with

²¹¹ HADOPI, 'Hadopi & Vous FAQ' (HADOPI.fr) <<http://www.hadopi.fr/faq/thematique-1-dv.html>> accessed 24/01/2013

²¹² Ibid.

²¹³ HADOPI, 'Réponse graduée' (HADOPI.fr) <<http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduee>> accessed 04/11/2012

²¹⁴ European Convention on Human Rights, Art. 10

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a person's freedom of expression, and removed the rights of HADOPI to block internet access. Now only the judiciary can suspend internet access²¹⁵.

If the Constitutional Council of France have realised that access to the internet and freedom of expression are so inextricably linked, then it seems unfair to deny anyone the right to this freedom of expression, even if it is not an absolute right. The European Court of Human Rights (ECHR) stated in the case of *Ahmet Yildirim v. Turkey* that 'the internet [has] now become one of the principal means of exercising the right to freedom of expression and information'²¹⁶, and in this case it was found there was a violation of Article 10 as a result of blocking internet access to Google sites. Whilst freedom of expression is not an absolute right, neither is the right over intellectual property²¹⁷, and that:

... the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights²¹⁸.

Whilst a decision recently ruled in favour of copyright over freedom of expression in the case of fashion photography, this was because the pictures had then gone on to be used commercially²¹⁹. It would be intriguing to see what the courts would rule if there was a similar case whereby the pictures were not posted for commercial means but for private usage. This further draws into question the validity of both the Loi HADOPI's and the DEA's provision for suspension of internet access as a punishment for copyright infringement.

²¹⁵ Decision no 2009-580, June 10th 2009

²¹⁶ *Ahmet Yildirim v Turkey* [2012] 458 ECHR

²¹⁷ *Scarlet v. Sabam* [2011] ECJ Case C-70/10

²¹⁸ *Ibid.*, at 44

²¹⁹ *Ashby Donald and others v France* [2013] ECHR 28

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Practically, suspending someone's internet access is not going to stop them from using the internet. The suspended individual would be able to use their friends' internet connection without detection, or perhaps even the mobile internet on their phone or tablet device. Yet despite the entire furore around HADOPI law, there has only been one conviction to date for 'failing to secure their internet connection', and that case resulted in a mere €150 fine with no suspension of internet access at all²²⁰.

Freedom of expression is not the only human right with which internet access is linked. Arguments have been made that the right to family and private life²²¹ are also dependent upon access to the internet due to programmes such as Skype and social media websites such as Facebook and Twitter allowing family members to keep in contact at great distances²²². Even the public believe that access to the internet is a fundamental right, with 'almost four in five people around the world believe that access to the internet is a fundamental right' according to a 2010 survey by the BBC²²³. This shows the drastic nature of imposing any restrictions on internet access with regards their right to family and private life, and this is without even taking into account the impact on creativity that imposing a blanket ban on the internet would have for society.

English courts have stopped just short of declaring that the right to internet access is a fundamental human right, stating that:

²²⁰ BBC News, 'Pirated Rihanna songs land Frenchman in court' (BBC.co.uk 2012) <<http://www.bbc.co.uk/news/technology-19597429>> accessed 25/01/2012

²²¹ European Convention on Human Rights, Art. 8

²²² A Wagner, 'Is Internet access a human right?' (The Guardian), 11/01/12

²²³ BBC News, 'Internet Access is Fundamental Right' (BBC.co.uk 2010) <<http://news.bbc.co.uk/1/hi/8548190.stm>> accessed 25/01/2013

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a blanket prohibition on computer use or internet access is impermissible. It is disproportionate because it restricts the defendant in the use of what is nowadays an essential part of everyday living for a large proportion of the public, as well as a requirement of much employment²²⁴

It is interesting how integral to everyday life the internet has become. An example of how dependent upon the internet society has become is the integration of Twitter into Television²²⁵ programmes. An excellent analogy to blanket bans on the internet is provided to us by Lord Justice Hughes, who suggested that:

Before the creation of the internet, if a defendant kept books of pictures of child pornography it would not have occurred to anyone to ban him from possession of all printed material. The internet is a modern equivalent²²⁶

One could draw from this that the English judiciary have a clear view that internet injunctions for users who have illegally downloaded are highly disproportionate. The blanket ban approach to the internet may affect more than just the main person within the household, and would mean that his family members would also be unable to access the internet. If there are children within the household, this could potentially affect their learning and their creative development as they would not have access to many resources available to other children.

A report released by HADOPI themselves analysing the effects of their three-strikes law against online piracy was published in March 2012, and provided us with a number of statistics showing the effectiveness of HADOPI law against internet piracy. The report states that after seventeen months passed since the first graduated response mail was sent

²²⁴ *R v Smith & Others* [2011] EWCA Crim 1772, at para 20, per Hughes LJ

²²⁵ Twitter, 'Watching Together: Twitter and TV' (Twitter.com 2011)

<<http://blog.twitter.com/2011/05/watching-together-twitter-and-tv.html>> accessed 25/01/2013

²²⁶ *R v Smith & Others* [2011] EWCA Crim 1772, at para 20, per Hughes LJ

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out, that there has been a significant decrease in illegal downloading in France. The statistics provided show us that there has been a 43% reduction in overall illegal data sharing in 2011²²⁷, but the exact details of how this conclusion was reached were not included. The report states that HADOPI have used statistics provided by 'Peer Media Technologies', which on their website claim that their network coverage includes 'Ares, BitTorrent, Direct Connect, eDonkey, Gnutella, Piolet, Shareaza, SoulSeek and WinMx'²²⁸.

The aforementioned list inconspicuously fails to mention any of the alternatives to the main stream technology used to commit internet piracy, for instance file-lockers and Cloud services, or even websites such as the recently shut-down 'Megaupload' where users could upload files for quick download by other users. The effectiveness of 'Peer Media Technologies' ability to monitor Virtual Private Networks (VPNs) is also questionable, as 'by using a VPN, businesses ensure security - anyone intercepting the encrypted data can't read it'²²⁹. VPNs have grown significantly in popularity recently amongst the illegal file-sharing community as a means of avoiding detection for online copyright infringement with a recent study by Lund University showing that there had been a 40% rise in the number of 15 to 25-year-olds using such services since 2009²³⁰. The introduction of HADOPI may therefore not have actually stopped any illegal data

²²⁷ HADOPI, '1 ½ Year After then Launch' (HADOPI.fr 2011)

<http://www.hadopi.fr/sites/default/files/page/pdf/note17_en.pdf> accessed 26/01/2013

²²⁸ Peer Media Technologies, 'Services' (peermediatech.com)

<<http://peermediatech.com/services.html>> accessed 26/01/2013

²²⁹ J Tyson & S Crawford, 'How VPNs Work' (Howstuffworks)

<<http://computer.howstuffworks.com/vpn.htm>> accessed 26/01/2013

²³⁰ BBC News, 'File-sharers look to VPNs to overcome Pirate Bay ban' (BBC.co.uk e.g. 2005)

<<http://www.bbc.co.uk/news/technology-17922214>> accessed 26/01/2013

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sharing, but instead has forced people to take other measures to continue illegally file sharing.

The HADOPI report also states that following graduated response notifications the vast majority of people do not require another warning to stop carrying out online copyright infringement. HADOPI claim that: 95% of people receiving an initial notice do not require a second warning for illegal behaviour; 92% of those having received a second warning notice do not receive a third warning; and that 98% of those who receive a third warning also follow the same trend²³¹. However, this is not necessarily the victory that HADOPI are making it out to be. Following the first warning, detection of illegal copyright infringement has to occur within the six months directly after the warning was sent to the subscriber, and within 12 months after the second warning. If there is no further detection of illegal activity within these periods, then the subscriber's information is deleted from record. It is entirely plausible that those who actually get caught for online piracy in France just simply wait for the detection period to end, or find a different way to access illegal copyrighted material.

A final blow to HADOPI is that despite the claimed reduction in online piracy since its introduction, there has been continued decline in sales of music through the legal channels, with revenues down 3.9% in 2011 on the previous year²³². In fact, it has been found that piracy can actually help promote sales²³³, with a Swiss governmental report

²³¹ HADOPI, '1 ½ Year After then Launch' (HADOPI.fr 2011), at pg 3

<http://www.hadopi.fr/sites/default/files/page/pdf/note17_en.pdf> accessed 26/01/2013

²³² TorrentFreak (Ernesto), 'French 'Three Strikes' Law Slashes Piracy, But Fails to Boost Sales' (TorrentFreak.com 2012) <<http://torrentfreak.com/french-three-strikes-law-slashes-piracy-but-fails-to-boost-sales-120330/>> accessed 26/01/2013

²³³ Ibid.

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finding people who illegally download end up spending more money on legal revenue streams including concert attendance²³⁴. An American study has also found that an album benefits from increased pre-release file sharing²³⁵, and strangely enough ‘that file sharing has benefitted established/popular artists more so than new/small artists’²³⁶.

The above points demonstrate that the HADOPI law is ineffective in stopping file-sharing, and that the restrictions imposed have little to no effect on a person’s ability to commit internet piracy. Interestingly it would seem that piracy helps promote sales, and if it is the view of the recording industry and the French Government that incentivisation promotes creativity, then trying to impose restrictions on file-sharing has the potential to stifle creativity unnecessarily by reducing exposure and secondary income streams to artists.

Therefore the actual effectiveness of HADOPI and its graduated response scheme is debateable. The weight of the argument against the effectiveness of HADOPI is even greater when the cost-effectiveness of the organisation is considered, with the future looking increasingly bleak following Aurelie Filipetti, the new culture minister, stating that ‘Hadopi has not fulfilled its mission of developing legal downloads. I prefer to reduce

²³⁴ E Kain, 'Swiss Government Study Finds Internet Downloads Increase Sales' (Forbes 2011) <<http://www.forbes.com/sites/erikkain/2011/12/05/swiss-government-study-finds-internet-downloads-increase-sales/>> accessed 26/01/2013

²³⁵ R G Hammond, 'Profit Leak? Pre-Release File Sharing and the Music Industry' (Social Science Research Network 2013) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2059356> accessed 26/06/14, pg 15 - “Whilst I find that file sharing has a positive effect on an album's sales, that effect is small relative to other promotional efforts that affect music sales”

²³⁶ R G Hammond, 'Profit Leak? Pre-Release File Sharing and the Music Industry' (Social Science Research Network 2013) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2059356> accessed 26/06/14, 21

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the funding of things that have not been proven to be useful²³⁷. Filipetti was also quoted stating that HADOPI has been ‘unwieldy, uneconomic and ultimately ineffective’ costing a reported €12 million since its inception²³⁸. If the purpose of HADOPI, or indeed copyright law in general, is to promote further creativity, it would seem that the €12 million that has been wasted on an ineffective system could have been better invested into alternative means of developing creativity.

It seems peculiar then that a law would be passed in England which bases itself directly on a faulty system of copyright protection from another country. As mentioned previously, the DEA was influenced directly from HADOPI law in France, and this new anti-piracy act has been the subject of much controversy.

The DEA was originally passed during the ‘wash-up’ period of Parliament. This period is used to often hurry through ‘essential or non-controversial legislation’²³⁹. The DEA should never have been pushed through in this way; MP Don Foster described the little amount of time that the Act was debated for as a disgrace²⁴⁰, with only two hours of debate in the Commons taking place²⁴¹. In the wash-up period the attendances are much lower than what they generally are during the term of government, with the DEA proving

²³⁷ S Byrne, 'French illegal downloads agency Hadopi may be abolished' (CNET 2012)
<<http://www.cnet.com.au/french-illegal-downloads-agency-hadopi-may-be-abolished-339341011.htm>>
accessed 26/01/2013

²³⁸ R Chirgwin, 'France backs away from Hadopi' (The Register 2012)
<http://www.theregister.co.uk/2012/08/06/hadopi_under_fire/> accessed 26/01/2013

²³⁹ N Newson & R Kelly, 'House of Lords - Library Note – Wash up 2010' (Parliament.uk 2010)
<<http://www.parliament.uk/business/publications/research/briefing-papers/LLN-2011-007/washup-2010>> accessed 26/06/14

²⁴⁰ BBC News, 'Anger about 'stitch-up' over Digital Economy Bill' (BBC.co.uk 2010)
<http://news.bbc.co.uk/1/hi/uk_politics/election_2010/8608478.stm> accessed 30/01/2013

²⁴¹ C Arthur, 'Digital economy bill rushed through wash-up in late night session' (The Guardian 2010)
<<http://www.guardian.co.uk/technology/2010/apr/08/digital-economy-bill-passes-third-reading>>
accessed 20/01/2013

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to be a perfect example of this; the Act was passed with 189 votes to 47, meaning only 236 out of 650 MPs were present to vote²⁴².

The problem with the DEA being pushed through in this way was even highlighted by MP John Hemming²⁴³. During the short debate on the DEA, Hemming stated that:

The Bill is a complete mess... The first problem is trying to deal with a very complex issue in the wash-up. It is a completely absurd thing to do. I accept that the industry has had to wait four years for this, but that is not a reason to do it all in one night or two nights²⁴⁴

This is absolutely true. It seems unconstitutional that such an important bill which aimed to effect the everyday lives of millions of web users would be passed through with such little debate surrounding it or its potential impact upon electronic commerce, especially considering that the House of Lords even recognises that only 'non-controversial' bills should be passed in this way²⁴⁵. It would seem that Parliament here decided to put the views of its electorate on the backburner, instead folding to pressure from the entertainment industries.

Why was it of such importance to rush through this Act in such a way? It seems preposterous that four years have passed since the DEA was granted royal assent, yet the act itself is not truly in force yet. There has been mass-disruption with the implementation of the Act due to the legal challenge over the validity of the DEA and the issue of cost

²⁴² C Arthur, 'Digital economy bill rushed through wash-up in late night session' (The Guardian 2010) <<http://www.guardian.co.uk/technology/2010/apr/08/digital-economy-bill-passes-third-reading>> accessed 20/01/2013

²⁴³ Hemming is also a member of the British Phonographic Industry and the Performing Right Society and the Musicians Union

²⁴⁴ HC Deb 7 April 2010, col 1117

²⁴⁵ N Newson & R Kelly, 'House of Lords - Library Note – Wash up 2010' (Parliament.uk 2010) <<http://www.parliament.uk/business/publications/research/briefing-papers/LLN-2011-007/washup-2010>> accessed 26/06/14

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sharing between ISPs and copyright holders²⁴⁶. The DEA aimed to only impose its regulation on those ISPs with subscribers over 400,000 users, which both BT and TalkTalk argued put them at a disadvantage as pirates would move to the smaller ISPs to avoid detection²⁴⁷, with the problem with costs arising from a lack of including case fees as a qualifying cost²⁴⁸, which they argued would lead to a price hike for their services. The latest draft was made available in 2012 and there are still a number of problems with this draft obligations code.

Firstly, the requirements necessary for a Copyright Infringement Report (CIR) to be issued are that the copyright owner must prove that the subscriber has infringed their copyright by means of their internet access²⁴⁹, or has allowed another person to use their service and they have infringed the owners copyright through this access²⁵⁰. Whilst some have commented that ‘one cannot speak of an accident if, after getting two CIRs in two months, the user receives a third one’²⁵¹, this is untrue for many families. In recent surveys, it was found that 70% of US teenagers hide what they are doing from their parents and that ‘as teens continue to outsmart their parents online, more and more teens are participating in... illegal activities... [with] 30.7% [accessing] pirated movies and

²⁴⁶ *R (on the application of British Telecommunications plc. and another) v Secretary of State for Culture, Olympics, Media and Sport* [2012] EWCA Civ 232, at 107 per Richards LJ (costs appeal allowed)

²⁴⁷ BBC News, 'BT and TalkTalk Challenge Digital Economy Act' (BBC.co.uk 2010) <<http://www.bbc.co.uk/news/10542400>> accessed 23/06/14

²⁴⁸ *R (on the application of British Telecommunications plc. and another) v Secretary of State for Culture, Olympics, Media and Sport* [2012] EWCA Civ 232, at 107 per Richards LJ – ruled that a case fees would fall under qualifying costs.

²⁴⁹ OFCOM, 'Draft Initial Obligations Code', s6(5)(a) (OFCOM.org.uk 2012) <<http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>> accessed 21/01/2013

²⁵⁰ *Ibid.*, s6(5)(b)

²⁵¹ K Garstka, 'The amended Digital Economy Act 2010 as an unsuccessful attempt to solve the stand-alone complex of online piracy', [2012] IIC 158, 167

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music²⁵². In the UK the statistics are even higher, with four in five teenagers hiding their internet activity from their parents²⁵³. In the UK 21.5 per cent of parents 'admit that their teenager is more tech-savvy than they are and that they will never be able to keep up with their online behaviours'²⁵⁴ and that 11 per cent of their children admit to disabling parental controls on their technological devices. Even OFCOM have recognised in their report on parents' views on parents controls that there 'are some parents who felt ill-equipped to intervene... because of their own lack of confidence or competence online'²⁵⁵. This is dangerous for parents considering the aforementioned section of the OFCOM code which states that it only needs to be proven that the subscriber has allowed another person to use their internet access service to infringe copyright²⁵⁶, as they will be liable for their children's actions online when quite often they are powerless to prevent any illegal activity their child is committing from occurring. The importance of children using the internet will be discussed in greater detail in the creativity chapter, as it is likely that this will play a part in their creative development.

Another problem with the current DEA and its initial obligations is that the CIRs, which are to be produced by the ISPs following a report from the copyright owner, are only

²⁵² J Le, '70% of Teens Hide Their Online Behaviour from Their Parents, McAfee Reveals What U.S. Teens are Really Doing Online, and How Little Their Parents Actually Know' (McAfee.com 2012)

<<http://www.mcafee.com/uk/about/news/2012/q2/20120625-01.aspx>> accessed 31/01/2013

²⁵³ The Telegraph, 'Four in five teenagers 'hide internet activity from parents' (The Telegraph 2012)
<<http://www.telegraph.co.uk/technology/internet-security/9687896/Four-in-five-teenagers-hide-internet-activity-from-parents.html>> accessed 21/01/2013

²⁵⁴ The Telegraph, 'Four in five teenagers 'hide internet activity from parents' (The Telegraph 2012)
<<http://www.telegraph.co.uk/technology/internet-security/9687896/Four-in-five-teenagers-hide-internet-activity-from-parents.html>> accessed 21/01/2013

²⁵⁵ Jigsaw Research, 'Parents' views on parental controls' (OFCOM.org.uk)
<http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/oct2012/Annex_1.pdf> accessed 31/01/2013

²⁵⁶ OFCOM, 'Draft Initial Obligations Code', s6(5)(b) (OFCOM.org.uk 2012)
<<http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>> accessed 21/01/2013

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effective against those who are using BitTorrent as a means of illegal file-sharing, as ‘only torrents make IP addresses of other downloaders/uploaders visible’²⁵⁷. The DEA ‘is going to affect only one out of the five major categories of online resources used for online copyright infringement’²⁵⁸, and any reduction in online infringement will in fact most likely end up being just mere migration over to other means of copyright infringement that fall outside of the scope of the DEA such as the previously mentioned one-click hosting websites, MP3 search engines, Usenet newsgroups, streaming services²⁵⁹ and the increasingly popular cloud based services²⁶⁰. This is not even to mention the websites which allow users to directly download a song from a YouTube video as an MP3 file by just pasting in the link to it²⁶¹, or using the ‘Google Napster’ feature that has been well-known for many years²⁶².

This is not to forget the other problems associated with basing identification via CIRs purely on IP addresses. The aforementioned VPNs do not allow for a public display of their users IP address, and therefore the effectiveness of the DEA to VPN users is minimal. Users of proxy services are also able to disguise themselves as a different IP address, meaning that a CIR will either ‘[reach] no one or (in the worst case scenario)

²⁵⁷ K Garstka, ‘The amended Digital Economy Act 2010 as an unsuccessful attempt to solve the stand-alone complex of online piracy’, [2012] IIC 158, 161

²⁵⁸ Ibid., 166

²⁵⁹ Ibid., at pg 166

²⁶⁰ S Patterson, ‘Dropbox Becomes Megaupload With New Link Feature’ (WebProNews 2012) <<http://www.webpronews.com/dropbox-becomes-megaupload-with-new-link-feature-2012-04>> accessed 31/01/2013 (Whilst Dropbox have publically claimed they will curb online piracy, just the sharing of one file between you and a friend would still constitute copyright infringement)

²⁶¹ ListenToYouTube, <<http://www.listentoyoutube.com/>>, accessed 31/01/2013

²⁶² M Chernoff, ‘Turn Google into Napster 2000’ (Mark and Angel Hack Life 2000) <<http://www.marcandangel.com/2006/10/13/turn-google-into-napster-2000/>> accessed 31/01/2013. (This simply uses code to search for open directories of songs, movies or books online through the Google search facility)

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[reach] the wrong person'²⁶³. The difficulty of finding these websites is minimal; a simple search for the word 'proxy' brings up millions of results instantly. If this CIR reaches the wrong person there may be an unfair limitation to the freedom of expression of this non-guilty party and this may also limit the potential of creative development by removing access to the internet. This is the problem with identifying file-sharers through IP addresses.

Perhaps the most worrying prospect for the future of the DEA and its impact on society is that they have adopted the provision to suspend internet access to users who have been placed upon the Copyright Infringement List²⁶⁴. As we previously discussed regarding the HADOPI law, European courts have recognised the right to internet access to be classified as part of the freedom of expression, a right recognised by the United Nations²⁶⁵, and any decision on the suspension of internet access needs to be deeply considered rather than the economic interests of rights holders taking automatic precedence. An order under this section can only be made a year after the initial obligations code has come into force, which is looking likely to be late 2015²⁶⁶. We will have to wait and see if this sanction is imposed on subscribers and whether this is deemed legal by the European courts.

Future Plans of Copyright Enforcement

²⁶³ K Garstka, 'The amended Digital Economy Act 2010 as an unsuccessful attempt to solve the stand-alone complex of online piracy', [2012] IIC 158, 162

²⁶⁴ Digital Economy Act 2010, s9(3)(c)

²⁶⁵ F La Rue, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', [2011] A/HRC/17/27, 7

²⁶⁶ Pinsent Masons, 'Ofcom anti-piracy code delayed until 2015' (Out-Law.com 2013) <<http://www.out-law.com/en/articles/2013/june/ofcom-anti-piracy-code-delayed-until-2015/>> accessed 15/04/14

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The UK Government have recently appointed Mike Weatherley MP as the Intellectual Property Advisor to the Prime Minister, and there now seems to be a greater emphasis towards education as method of combating online piracy. An example of this is the 'Rock the House' event, founded by Weatherley, which is the first live music competition to take place within the House of Commons. The ultimate goal of this is to 'raise awareness among parliamentarians about the importance of copyright to musicians'²⁶⁷, and has received backing from many famous musicians as patrons, such as Alice Cooper and Brian May²⁶⁸. Weatherley said during an ITV interview that:

no-one really knows what intellectual property means, what it means is that the artist can take control of what they make and actually get paid for what they make, and it's important that we do pay our artists otherwise we won't have any artists²⁶⁹

This is an interesting point, as we have already once mentioned in the philosophy chapter and will again discuss in greater detail in the next chapter, the current model of payment for artists seems unfair. To refer back to the interviews with Artist 1 and 2, both of these Artists have said that they would continue to produce music if they would have no potential for economic gain for the future²⁷⁰. Whilst this event seems to promote the issue of copyright as a positive for the small unsigned artists, it is the recording industry and government who would be set to benefit the most from strengthened copyright laws, with increased revenues for the former and increased tax income from the VAT on this additional revenue. Interestingly, the government have planned to close the loophole on

²⁶⁷ M Weatherley, 'Protecting IP: Striking a Balance' (WIPO.int 2013)

<http://www.wipo.int/wipo_magazine/en/2013/06/article_0008.html> accessed 16/04/14

²⁶⁸ Rock the House, 'Patrons' (RockTheHouseHOC.com)

<<http://www.rockthehousehoc.com/sponsors.html>> accessed 16/04/14

²⁶⁹ ITV News, 'Bands rock the Houses of Parliament' (ITV.com 2013)

<<http://www.itv.com/news/calendar/update/2013-11-20/bands-rock-the-houses-of-parliament/>> accessed 16/04/14

²⁷⁰ Annex 1, pg 15 & Annex 2, page 9

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digital downloads by imposing VAT on all digital downloads from next year²⁷¹, with no mention of this additional income being reinvested into developing creativity or helping unsigned musicians.

One scheme being currently discussed by Parliament is the implementation of a 'Voluntary Copyright Alert Programme' (VCAP), which has already been implemented within the USA²⁷². This scheme is industry-led, where content owners will find their copyrighted material online, download it to verify that it is the full version of the copyrighted work and not just a sample, and then notify the ISPs of the IP addresses concerned. This would not require any changes to the law and would seek to implement many of the same provisions the DEA did, and is likely to be in place by the end of the year²⁷³. These discussions are private and have nobody representing the public internet, a point raised by the Open Rights Group only for their suggestions to be ignored²⁷⁴. There are a number of questions raised by its members, including what sanctions are likely to be imposed against infringers, what the appeals process for those who have been sanctioned against in error, and what standards of evidence is likely to be used. There are no specifics of this proposed agreement available as of yet, however it is likely any sanctions on internet usage proposed would face legal challenges and that any voluntary copyright enforcement scheme would have to consider the impact of their suggestions to

²⁷¹ R Burn-Callander, 'Budget Threat to 99p Music Downloads' (The Telegraph 2014)

<<http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/10717432/Budget-threat-to-99p-music-downloads.html>> accessed 16/04/14

²⁷² Center for Copyright Information, <<http://www.copyrightinformation.org/>>, accessed 16/04/14

²⁷³ HC Deb 13 Feb 2014, vol 575, col 370W per Ed Vaizey

²⁷⁴ J Killock, 'Will 'voluntary' copyright enforcement protect users' rights?' (Open Rights Group 2014) <<https://www.openrightsgroup.org/blog/2014/will-voluntary-copyright-enforcement-protect-users-rights>> accessed 16/04/14

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the right of privacy²⁷⁵. Many of the aforementioned criticisms of the DEA also apply to any form of graduated response targeted at IP addresses, and the VCAP is no exception – it can only effectively monitor BitTorrent, and will again struggle if people access the material through VPNs or proxies.

Weatherley has discussed that aside from simply educating the public, he intends to enforce a ‘carrot and stick’ principal over internet users, making it easier to access legal content whilst engaging with ISPs to ensure those who continue to illegally access copyrighted material are punished²⁷⁶. The question is, will this ‘carrot and stick’ system of incentivising people actually work, and what effect does the ‘carrot and stick’ principle, including proposed amendments to the law, have on creativity?

²⁷⁵ Pinsent Masons, 'Voluntary Copyright Alert Programme Could Be Operational Before End of 2014, says UK Government' (Out-Law.com 2014) <<http://www.out-law.com/en/articles/2014/march/voluntary-copyright-alert-programme-could-be-operational-before-end-of-2014-says-uk-government/>> accessed 24/03/14

²⁷⁶ M Weatherley, 'Protecting IP: Striking a Balance' (WIPO.int 2013) <http://www.wipo.int/wipo_magazine/en/2013/06/article_0008.html> accessed 16/04/14

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Chapter 6 – The Creativity Issue

Whilst there seems to be an increased push towards censorship over internet access as a response to copyright infringement, any legislative responses which censor or prevent access to the internet may actually hinder the potential for creativity. If people are denied access to the internet due to the provisions of the DEA, then this could lead to a significant gap within the comprehension of other cultures. Part of the essence of creativity is forming ‘associations between existing ideas or concepts’²⁷⁷, and the internet provides the largest collection of existing ideas and concepts ever to be compiled. A qualitative psychological study into this area found that as a whole, the ‘...Internet environment encourages creativity...’²⁷⁸, with some of the prominent reasons for these findings being that the internet promotes multiculturalism, intellectual freedom and exposure to creative people²⁷⁹. It is therefore integral that censorship of the internet is kept to an absolute minimum when looking at the protection of copyright. However this is increasingly difficult as ‘copyright policy is now Internet policy, because anything one does to limit copying is a shackle on the Internet and all of its uses, high and low’²⁸⁰, and the emphasis of modern legislation is increasingly focused on promoting these limits to copying.

Leading on from this, the aim of this thesis and a key component of it thus far has been ‘creativity’, and the effects of copyright law and piracy on this mysterious part of the

²⁷⁷ L A Jackson et al, 'Information technology use and creativity: Findings from the Children and Technology Project', found in "Computers in Human Behavior" [2012] Computers in Human Behavior, Volume 28, Issue 2 370, 370

²⁷⁸ Y Shoshania & R B Hazib, 'The Use of the Internet Environment for Enhancing Creativity' [2007] Educational Media International vol. 44 No. 1 17, 19

²⁷⁹ Ibid., pg 22-23

²⁸⁰ C Doctorow, 'Copyrights vs. Human Rights' [2011] ALA Midwinter Preview 36, 38

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human brain. Having discussed and understood the philosophical and legal background behind copyright law and the purpose of it, it is necessary to clarify exactly what is meant when creativity is referred to. The term creativity is vague by its nature, even the 'dictionary definition' of the word does not really paint a clearer picture of those embroiled in discovering what inspires this enigmatic part of our biological make-up; being described as 'relating to or involving the use of the imagination or original ideas to create something'²⁸¹. Creativity therefore can refer to a variety of activities, as 'not all creativity is artistic: there's the genius of the industrialist; the mathematician, the surgeon'²⁸².

For the purpose of this thesis, there needs to be some clear distinctions made to illustrate exactly what is referred to when we are discussing the impact of copyright law and piracy on creativity. Firstly, as has already been made clear, we are focusing primarily on the creative processes associated with music and the creation of music. Therefore, we are looking more towards the artistic end of the spectrum of creativity. The following chapter will focus on this 'creativity' as a cognitive concept. To find out how creativity can be further promoted, the focus will be on exploring the research into creative processes, pinpointing when creativity is developed, and speaking with 'creative people' to try to get to the bottom of what motivated them to become involved within the music industry, and to evaluate their points of view on the effects of copyright law on their work.

²⁸¹ Oxford English Dictionary Online, Definition of Creative

²⁸² J Kluger, 'Assessing the Creative Spark' (TIME Magazine 2013)

<<http://business.time.com/2013/05/09/assessing-the-creative-spark>> accessed 24/01/14

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One important point to mention at this stage is that the issue of creativity is still one which is in its infancy in terms of psychological understanding. Much of the research used in the following chapter has not been specifically undertaken to deal with the issue of musical creativity and development, and the work required to specifically answer many of the questions raised would be beyond the scope of this thesis. By drawing comparisons with existing research into creativity, it is reasonable to develop a hypothesis based on this.

Creativity as a cognitive concept – What effects creativity?

When discussing whether we can affect creativity, the main question which we must answer firstly is ‘is creativity a measurable concept?’. What one person will see as being creative, another may see as a waste of time, unoriginal or not worthy of recognition. Whilst some critics have argued that modern music is too loud and sounds the same²⁸³, the real question is how can we actually define what musical creativity is?

Mihaly Csikszentmihaly, a psychology professor currently in post at Claremont Graduate University, presents us with one take on the idea of creativity. He defines creativity as ‘any act, idea, or product that changes an existing domain, or that transforms an existing domain into a new one’²⁸⁴. Csikszentmihaly further expands on what he believes to be a

²⁸³ C Wickham, 'Pop music too loud and all sounds the same: official' (Reuters 2012)

<http://www.reuters.com/article/2012/07/26/us-science-music-idUSBRE86POR820120726?feedType=RSS&feedName=scienceNews&utm_source=dlvr.it&utm_medium=twitter&dlvrit=309301> accessed 08/02/14

²⁸⁴ M Csikszentmihaly, *Creativity: Flow and the psychology of discovery and invention* (1st, Harper Collins Publishers, London 2007) 33

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creative piece of work, stating that work is only classified as creative once the ‘novelty he or she produces is accepted for inclusion in the domain’²⁸⁵. This is a definition which sits uncomfortably within the context of music, firstly as musicians within existing genres and fans of those genres may look down on new music or new genres which are created, as they are not part of what is ‘accepted’ at the time. Does this mean that these artists and their work is not creative? If we were to apply Csikszentmihaly’s ideas to music through the ages, it would be interesting to see whether or not he would accept the Sex Pistols’ controversial music as being creative, or if he would dismiss it due to the lack of recognition society originally gave them. His initial definition almost contradicts this secondary definition, as if someone transforms an existing domain into a new domain, how can they be accepted for inclusion in the domain in which they themselves have created? Who would be the peers by which their music would be judged? The issue of recognition being necessary as a prerequisite to creativity is similar to the old philosophical questions of ‘if a tree falls in a wood and no one is around to hear it, does it make a sound?’, musical creativity can still take place without anyone else hearing it – a young singer/songwriter may be creating new music within their own bedroom with no one else there to observe it, does this make their art any less creative than that of those who are in the public domain? In terms of creative mental process, whether or not somebody is present to witness an act of creativity does not matter as the same processes are taking place within the brain of the creator.

²⁸⁵ M Csikszentmihaly, *Creativity: Flow and the psychology of discovery and invention* (1st, Harper Collins Publishers, London 2007) 34

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Despite the aforementioned contentious areas of Csikszentmihaly's work, he does make a number of points which are valid in the context of musical creativity. The strongest of these points would be that 'a person cannot be creative in a domain to which he or she is not exposed'²⁸⁶. In the context of music, it is highly unlikely²⁸⁷ that a person would be able to produce a piece of Electronic Dance Music (EDM) without first having heard any previous EDM music or having had access to any music production software. If a person cannot be creative in a domain to which they are not exposed, then we must ensure that in order to promote creativity, everyone is provided with the opportunities of accessing music without the current restrictions imposed by copyright. Csikszentmihaly reaffirms this belief when he offers the reader with tips on how to promote creativity, stating that:

the world is our business, and we can't know which part of it is best suited to ourselves, to our potentialities, unless we make a serious effort to learn about as many aspects of it as possible²⁸⁸

The idea posed above is that people can influence their own creative ability. Whilst this does not necessarily equate to an absolute right to access others works freely, it is clear that as a general principle there needs to be an alternative way for people to access a wide variety of music regardless of economic boundaries.

²⁸⁶ M Csikszentmihaly, *Creativity: Flow and the psychology of discovery and invention* (1st, Harper Collins Publishers, London 2007) 34

²⁸⁷ The use of highly unlikely here is due to the possibility of the 'infinite monkey theorem', that being that if you have a monkey typing random keys on a typewriter infinitely then he will eventually type the complete works of William Shakespeare. In context, without being exposed to EDM music there would still be the possibility that someone may accidentally produce a piece of EDM music without ever having heard it before or having been exposed to the materials, but the chance is extremely small.

²⁸⁸ M Csikszentmihaly, *Creativity: Flow and the psychology of discovery and invention* (1st, Harper Collins Publishers, London 2007) 376

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Whilst a person may be able to influence their creative ability, are all people born with the same creative potential? One of the greatest inventors in history, Thomas Edison, described his genius as being one percent inspiration and ninety-nine percent perspiration. Edison, therefore, would seemingly be of the belief that creativity within itself is not something which someone is simply born with, but something that someone works towards. This viewpoint is supported by that of Thomas Hobbes, who believed that:

Nature hath made men... equal in the faculties of body and mind... And as to the faculties of the mind... I find yet a greater equality amongst men than that of strength²⁸⁹

The historical point of view would seem to allude to the human mind being one which is almost equal from one person to the next, with the difference simply being how hard someone works. Since the times of Edison and Hobbes, we have acquired a much greater understanding of the brain, hereditary influences and neurological development. Whilst the debate of creative potential and nature versus nurture still continues²⁹⁰, Mark Runco reaffirms the Hobbes belief of the equality of mind, when he writes that ‘everyone has the potential to be creative, but not everyone fulfils that potential’²⁹¹. Runco believes that this is due to people not having the ‘...experiences to fulfil their potential or do not exercise their creative talents’²⁹². Runco’s view agrees with Csikszentmihaly’s view that people do not make the most of their own experiences and potential to become creative. Therefore, with the right experience and guidance, could anyone become creative?

²⁸⁹ T Hobbes, *Leviathan* (1st, Amazon Kindle Edn, A Public Domain Book 1651) 55

²⁹⁰ J Kluger, 'Assessing the Creative Spark' (TIME Magazine 2013)

<<http://business.time.com/2013/05/09/assessing-the-creative-spark>> accessed 24/01/14. According to a poll carried out by time magazine, 71% of people believed that creativity is driven both by nature and nurture, with 14% believing nature alone and 10% believing nurture alone

²⁹¹ M A Runco, *Creativity: Theories and Themes: Research, Development, and Practice* (Kindle Edn, Elsevier Science, Burlington 2010), 40

²⁹² *Ibid.*, at pg 40

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The answer is unclear, as Runco himself mentions with reference to the great Johann Sebastian Bach:

Clearly musical talent was common in the family. Was this because of nature (a musical gene?), nurture (parents listened to and played music, so the children heard music and experienced the benefits), or both?²⁹³

This example illustrates the problem with whether or not creativity is something that relies upon nature or nurture. Not only does the exposure to music due to the family being musically proficient present us with a problem of distinction, but also shared between generations is economic class (money), education standards and more²⁹⁴.

Despite the ambiguity, it seems clear that we can do something about our own creativity. As Runco states, ‘much of our creativity, is under our own individual control’²⁹⁵. The subject of creativity, especially with regards to the development of creativity throughout a person’s lifetime and the effects that music may have on this, is an area which lacks any substantial amount of research. There is still a lot which is not known about the makeup of the brain and how to maximise the creative within us. Unfortunately, this means that much of what is being discussed is inferred, and within the scope of this thesis there has to be an element of speculation. From the evidence though, it would seem that an exposure to creative material, in our case music, is positive for encouraging creative development.

²⁹³ M A Runco, *Creativity: Theories and Themes: Research, Development, and Practice* (Kindle Edn, Elsevier Science, Burlington 2010) 50

²⁹⁴ *Ibid.*, pg 106

²⁹⁵ *Ibid.*, pg 67

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The development and control of our own creativity is something which is affected by more than just someone's natural creative streak. A person's creativity, and how effectively it is used, is closely linked with their intrinsic motivation, their personality and cognition. Author and researcher, Daniel H. Pink, believes that a person requires motivation to be creative; people will only feel motivation provided certain basic needs are fulfilled, and not through the introduction of traditional 'carrot and stick' incentives²⁹⁶. The link between the two is interesting, as you could be the most talented artist alive, but unless you have the motivation to pick up the paintbrush, you will never produce any creative work. A person's personality is also linked heavily with creativity, and especially with music. This close relationship of personality and music is developed from a young age, and is described in further detail later in this chapter.

Another influence on a person's creativity and their potential to be creative is the culture in which they are brought up in, and which ultimately forms part of their psychological make-up. One question to ask is why the United Kingdom has historically been such a hub of creativity²⁹⁷? On the face of it, the United Kingdom is a small island which is isolated from mainland Europe and its influences. However, once you look at the population of the country, it is one of the most multicultural countries on the planet²⁹⁸.

²⁹⁶ D H Pink, *Drive: The Surprising Truth About What Motivates Us* (1st, Canongate, London 2009), a conclusion drawn from part one

²⁹⁷ The Creative Industries, 'UK Creative Overview: Ten UK Firsts' (The Creative Industries) <<http://www.thecreativeindustries.co.uk/uk-creative-overview/facts-and-figures/uk-firsts>> accessed 27/02/14

²⁹⁸ L Benedictus, 'All Together Now' (The Guardian 2006) <<http://www.theguardian.com/uk/2006/jan/23/britishidentity.features118>> accessed 27/02/14. "On the whole, Britain today is one of the most tolerant and multicultural societies there has ever been - in fact it is the country's multiculturalism that is making it more tolerant."

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The United Kingdom and its historical worldwide colonisation has allowed for the British people to become exposed to a wide variety of different cultures, with ‘diverse experience[s]... probably [being] a good thing for the development of creativity’²⁹⁹.

Perhaps even more interesting than the effects of the country’s society on creativity, is the effects of the internet on creativity. The internet itself is an increasing part of our everyday lives, with the amount of time people spend on the internet continuing to rise³⁰⁰. The internet is forming societies of its own. Whether you are the member of a forum, a social media website, or even a MMORPG player, you are part of a subculture of people who have a similar interest and similar social rules to that of a common society. The impacts of this on creativity may be huge, as often people may be scared of either persecution or ridicule for sharing their ideas freely with others, whereas on the internet behind the shroud of anonymity, they will feel the freedom to share their thoughts without reasonable fear of the repercussions of doing so. It seems increasingly likely that:

intellectual and spiritual freedom [are] essential condition[s] for creativity... if this hypothesis is correct, then the many levels of freedom provided by the internet offer a convenient environment in which creativity can flourish³⁰¹

²⁹⁹ M A Runco, *Creativity: Theories and Themes: Research, Development, and Practice* (Kindle Edn, Elsevier Science, Burlington 2010) 53

³⁰⁰ eMarketer, 'Digital Set to Surpass TV in Time Spent with US Media' (eMarketer 2013) <<http://www.emarketer.com/Article/Digital-Set-Surpass-TV-Time-Spent-with-US-Media/1010096>> accessed 04/03/14

³⁰¹ Y Shoshania & R B Hazib, 'The Use of the Internet Environment for Enhancing Creativity' [2007] *Educational Media International* vol. 44 No. 1 17, 23

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Regardless of your interests, there will always be a place on the internet for you to socialise with likeminded people where you can feel both intellectually and spiritually ‘at home’.

The benefits of the internet are more widespread than simply having a place to socialise. One of the greatest changes the internet has brought to modern civilisation is the freedom to access information from all over the world in an instant. Prior to the internet, new information would come primarily from the news and the library. This restriction of information may have hindered people from accessing the information they want, as it can often take hours to find the information you seek in a library, and through watching or reading the news you can never be sure of the potential political and corporate influences that the particular news channels may have behind them. The internet has provided people with a platform to subscribe to news from around the world, to find information and answers within a matter of seconds through a simple search, and access to genres of music that they may never have even heard of before. To paraphrase the earlier quote from Csikszentmihaly, people need to make the world their business so that they know what part of the world is best suited to themselves and their creative potentialities³⁰², and the internet provides us with the best possible tool to do so. As Runco states ‘...information can provide the individual with the know-how to be creative and

³⁰² M Csikszentmihaly, *Creativity: Flow and the psychology of discovery and invention* (1st, Harper Collins Publishers, London 2007) 34

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solve problems in a creative fashion³⁰³, and as previously stated diverse experiences are probably a good thing for creativity³⁰⁴.

Repeatedly the research points us towards the conclusion that:

the broader the intellectual and cultural horizons of the learner, the greater his/her potential for creativity... Then clearly the internet... can encourage creativity³⁰⁵

If access to the internet encourages creativity, then why does both HADOPI and the DEA, two acts meaning to enhance copyright protection (which is in place to promote creativity), provide for suspension of internet access? As previously mentioned, if a person's internet connection is removed, then it is not just them that will feel the effects of this – the other members of the family will also feel this, including their children.

If we can control our development, it is important to understand when creative development is at its most prominent. Whilst creative development is often the subject of early childhood concern, this is not the case for those who need the specific knowledge and experience continually referred to by both Runco and Csikszentmihaly to make creative works. Whilst music is undoubtedly important in the development of a child's intellectual potential³⁰⁶, the musical identity of a person does not truly develop until adolescence; 'indeed, of all social markers of adolescence, perhaps none is more

³⁰³ M A Runco, *Creativity: Theories and Themes: Research, Development, and Practice* (Kindle Edn, Elsevier Science, Burlington 2010) 31

³⁰⁴ *Ibid.*, at pg 53

³⁰⁵ Y Shoshania & R B Hazib, 'The Use of the Internet Environment for Enhancing Creativity' [2007] *Educational Media International* vol. 44 No. 1, 22

³⁰⁶ M O'Brien & M Walton, 'Music and Creativity' (National Science Foundation 2011) <http://www.nsf.gov/news/special_reports/science_nation/musiccreativity.jsp> accessed 08/02/14. *Parag Chordia: "And people have, in terms of early learning, shown that exposure to music at an early age, intensive exposure in music does improve cognitive outcomes"*

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diagnostic than a passion for popular music'³⁰⁷. Interestingly, Runco also states that the basis for any tactical or strategic creative efforts is metacognition³⁰⁸, which only develops in adolescence³⁰⁹.

The idea of being able to take control of one's creativity and maximise his creative potential is an appealing one. If creativity is not something that is only attributed to a lucky few, then this is an extremely positive outlook for society and culture. As mentioned, musical experience is one of the core values of being an adolescent, and during this stage is where the aforementioned important metacognition stage develops. As the teenage years come, so does the stereotypical rebellious nature and a craving for freedom and independence. As Runco states, 'many adolescents are independent enough to walk away from that stereo playing classical music or put on their headphones to get back to pop'³¹⁰. This time of life is also increasingly important with the adolescent's increasing exposure to the internet environment, with recent research indicating that 74% of 'teens' aged 12-17 access the internet on their cell phones, tablets and other mobile devices at least occasionally, with nine in ten of those surveyed having either a computer or access to one at home³¹¹. This ties in with the earlier statistics surrounding adolescents and children accessing the internet for illegal or infringing purposes, and how the parents cannot police them as often the child has a greater technological understanding than they

³⁰⁷ P G Christenson & D F Roberts, *It's not only rock & roll: Popular music in the lives of adolescents* (3rd, Hampton Press, New Jersey 2004) 4

³⁰⁸ M A Runco, *Creativity: Theories and Themes: Research, Development, and Practice* (Kindle Edn, Elsevier Science, Burlington 2010), 32

³⁰⁹ *Ibid.*, at pg 32

³¹⁰ *Ibid.*, at pg 52

³¹¹ M Madden, A Lenhart, M Duggan, S Cortesi & U Gasser, 'Teens and Technology 2013' (PewResearch 2013) <<http://www.pewinternet.org/2013/03/13/teens-and-technology-2013/>> accessed 28/03/14

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do. In fact, placing barriers in front of rebellious adolescents may in fact inspire them to try even harder to navigate around the parental protections and the site blocking injunctions.

Whilst we can seemingly then pinpoint the stage of life one begins to develop their musical knowledge, their independence, their freedom of internet access and their ability to strategically improve creatively, the term adolescent is one which itself causes problems due to a changing of definition:

Although we all know an adolescent when we see one, the concept of adolescence is by no means easy to define. It is certainly not synonymous with teenage, notwithstanding the common tendency to use the terms interchangeably³¹²

What is important to refer to here is the recent economic crisis which has drastically affected almost every country in the westernised world. This is because ‘the end of adolescence is defined entirely by social indicators such as the establishment of one’s own home, joining the permanent work force, and marriage’³¹³. Increasingly due to the economic crisis, there are fewer first time buyers of homes, an increase in people living at home with their parents until a later age³¹⁴, and a higher rate of unemployment³¹⁵ (especially with regards to the younger generation) than when Christenson & Roberts wrote their research in 2004. Recent figures show that:

Flying the nest, it seems, has become increasingly difficult for a generation of young adults. Record numbers were living with their parents last year... as rising

³¹² P G Christenson & D F Roberts, *It’s not only rock & roll: Popular music in the lives of adolescents* (3rd, Hampton Press, New Jersey 2004) 3

³¹³ *Ibid.*, 4

³¹⁴ H Osborne, “Stuck in the nest: 3.3m adults still living with parents as financial woes hit home” (The Guardian), 22/01/14.

³¹⁵ *Ibid.*, 19% of the economically active population between 18-24 were unemployed in 2013

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youth unemployment, high house prices and the cost of university leave millions still sleeping in their childhood bedrooms³¹⁶

On top of this, people are generally getting married later than they ever have before³¹⁷.

This definition of the end of adolescence then means that we are no longer solely talking about teenagers anymore.

One reason this is important is because adolescents on the whole have less money to spend on music, therefore inhibiting their creative exposure and potential. As Lessig states:

creativity in the arts is affected by constraints at the physical, code and contact layers. To author, or to create, requires some amount of content to begin with...³¹⁸

Restriction on this content, in our case the free access of music, may reduce the creative potential of the adolescent who has much more pressing economic needs at hand. This is especially true for an age of young artists who are taking to their computers to produce new music using samples of older songs and remixing them together to create something new altogether³¹⁹. To quote Lessig again:

³¹⁶ H Osborne, "Stuck in the nest: 3.3m adults still living with parents as financial woes hit home" (The Guardian), 22/01/14

³¹⁷ S Hauran, 'Getting Married in 2013' (The Guardian 2013) <<http://www.theguardian.com/money/2013/feb/15/getting-married-2013-tax-property>> accessed 27/02/14. The most recent figures from the Office for National Statistics show the average age at which men get married is 30.8 years, while women are typically aged 28.9 years when they tie the knot.

³¹⁸ L Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (1st, Vintage Books, New York 2002) 104

³¹⁹ A W Kosner, 'Girl Talk's Greg Gillis On Copyright, Curation, and Making Mashups Rhyme' (Forbes 2012) <<http://www.forbes.com/sites/anthonykosner/2012/10/07/girl-talks-gregg-gillis-on-copyright-curation-and-making-mashups-rhyme/>> accessed 11/02/14

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We've come to exaggerate the new and forget that a great deal in the "creative" is actually old. The new builds on the old, and hence depends, to a degree, on access to the old³²⁰

Even established artists who are regularly found residing in the top 10 charts of the westernised world are consistently building on the works of the old. One example being the Grammy nominated 'LMFAO'³²¹, whose song 'Party Rock Anthem' sold 9.7m copies in 2011 alone³²² and has over 640m views on YouTube at the time of writing³²³. The chorus to the song, in case you have not heard it, involves lead singer Redfoo declaring that 'everyday I'm shuffling'³²⁴. This song was an obvious play on the song 'Hustlin'' by Rick Ross³²⁵, with Rick Ross now trying to sue LMFAO over creating an illegal derivative of his work³²⁶. Without the parodying of the original song 'Hustlin'', there would be no 'Party Rock Anthem'. In the words of the Bible, 'the thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun'³²⁷.

Creativity in practice

Whilst the discussion has centred around creativity in theory thus far, it is necessary to compare the findings of this thesis with creative people involved in producing music. Due

³²⁰ L Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (1st, Vintage Books, New York 2002), 105

³²¹ LMFAO, 'Biography' (LMFAO Music) <<http://www.lmfao.com/biography>> accessed 11/02/14

³²² IFPI, 'Digital Music Report 2012: Key Facts and Figures' (IFPI.org 2012) <http://ifpi.org/content/library/DMR2012_key_facts_and_figures.pdf> accessed 11/02/14, at pg 2

³²³ LMFAO ft. Lauren Bennet, GoonRock , 'Party Rock Anthem' (YouTube 2011) <<http://www.youtube.com/watch?v=KQ6zr6kCPj8>> accessed 11/02/14

³²⁴ Ibid.

³²⁵ R Ross, 'Hustlin'' (YouTube 2006) <<http://www.youtube.com/watch?v=JU9TouRnO84>> accessed 11/02/14

³²⁶ C Martins, 'Rick Ross Sues LMFAO for Shufflin' Over His Hustlin'' (SPIN.com 2014)

<<http://www.spin.com/articles/rick-ross-lmfao-lawsuit-party-rock-anthem-hustlin/>> accessed 11/02/14

³²⁷ The Bible, King James Version, Ecclesiastes 1:9

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to the discussion of illegal activity, the names of the artists interviewed have been anonymised to keep their identities confidential. As a means of a comparison in opinions, the two interviews that will be referenced will be from artists who produce two completely different genres of music, and also one of the artists has their music signed to a record label whereas the other does not. For the purposes of this study, the unsigned 'rock' musicians from the North of England, will be referred to as Artist 1. The second participant, also from the North of England, is a house music producer who has had music signed to major labels, and he will be referred to as Artist 2.

The purpose of the interview process is to investigate the role of copyright on those who are actively creating, with the hope of finding out exactly what promoted their creativity and if financial incentive and strong protection of rights ever played a part. Interestingly, there are a number of similarities in both parties' responses despite their differences in age, location, genre and stature.

Building a fan base as an artist is often extremely difficult, which is why both of the artists began by releasing their music freely, both on the internet and physical copy. Artist 1 benefited through the free release of music through the internet to get to 'a worldwide audience'³²⁸, and whilst they are a relatively new unsigned band, they have a 'massive fan base'³²⁹ and 'radio play and Facebook likes'³³⁰ from Mexico. This is something

³²⁸ Annex 1 – at pg 1

³²⁹ Ibid.

³³⁰ Ibid.

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which could never have happened without the release of their music freely over the internet, as:

... if you just keep going to record companies and stuff like that, all your music is [going to get] heard by is some idiot who hasn't got a clue about music or just hears what they want to hear³³¹

The problem for Artist 1 is that their songs would not be considered to be played on the popular radio and music channels. Whilst rock and metal bands do have success, with AC/DC and Pink Floyd being prime examples with two of the best-selling albums in history³³², the younger generation are generally listening more to 'pop' music, which is now entwined with electronic and house music³³³, meaning that the industry, hungry for record sales, caters for the masses by focusing on this genre. These pop songs, or 'radio edits', are often short catchy songs with repeated choruses and electronic beats backing up the vocalist³³⁴. One of Artist 1's songs starts with over a minute of a guitar solo, with the total song length over 7 minutes long. This is something which is undeniably creative, but does not fit with the status quo of what is 'popular' right now.

The problem highlighted by Artist 1 about the recording industry 'not having a clue' has been mirrored by Johnny Marr, the guitarist for the Manchester based band The Smiths, who believes that the music industry:

³³¹ Annex 1, at pg 1

³³² Recording Industry Association of America, 'Top 100 Albums' (RIAA 2014)

<http://www.riaa.com/goldandplatinum.php?content_selector=top-100-albums> accessed 12/04/14

³³³ D Schawbel, 'House Music Has Become a Global Phenomenon' (Forbes 2012)

<<http://www.forbes.com/sites/danschawbel/2012/03/09/house-music-has-become-a-global-phenomenon/>> accessed 12/04/14

³³⁴ Ibid., - "Young people are now more interested in the chorus and beat of a song over the words, something that house music has capitalized on."

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...has never created anything in its history. It never invented anything... nothing has ever been created of value by the British or American music industries³³⁵

and the true innovators of popular music have always been outsiders who have been shunned by the music industry³³⁶. Yet more often than not, it is the music industry and the recording associations which are the most vocal about the need for stronger copyright law.

The use of websites such as Bandcamp, ReverbNation and Facebook has proven to be the way in which Artist 1 is able to gain recognition. The band's BandCamp page allows for you to freely play their latest single, and then allows the listener to buy the song on a 'name your price' basis. They are not forcing people into paying for their music. This method of releasing music was also adapted by Artist 2, who continues to release music freely despite also having his music signed to labels. Artist 2 justifies this decision as:

To gain more fans, it's sometimes better to release some of your music for free just to keep them interested in you. If you're an up and coming artist it is quite hard to get fans to find out who you are, and they are more likely to stay with you and follow you more if you give them music for free³³⁷

Artist 2 has also used websites similar to Artist 1 to promote their work, especially when they were just starting out. Even though, as previously mentioned, house and electronic music is becoming more common with the younger generation of listeners, Artist 2 originally found it hard to get spotted by the 'Artist and Repertoire' (A&R) scouts³³⁸, and

³³⁵ A Jamieson, 'British music industry 'never invented anything' says Smiths guitarist Johnny Marr' (The Telegraph 2008) <<http://www.telegraph.co.uk/news/celebritynews/3384740/British-music-industry-never-invented-anything-says-Smiths-guitarist-Johnny-Marr.html>> accessed 13/04/14

³³⁶ Ibid.

³³⁷ Annex 2, page 1

³³⁸ Annex 2, page 6

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used both the websites Soundcloud and Beatport to gain exposure. However, Artist 2 believes that these platforms can actually make it more difficult to differentiate yourself from what he describes as a saturated market³³⁹. This concern is also shared by Artist 1, describing the scene in Manchester as saturated, with venue owners and promoters now exploiting musicians to play every night for the sake of bringing in their friends and fans to fill the bar without giving them an adequate cut³⁴⁰.

As mentioned previously in this thesis, research indicates that people who commit internet piracy spend more on music than those who only consume legal content³⁴¹. This is also seen by both Artist 1 and Artist 2, who have both committed internet piracy to access copyrighted music³⁴², with Artist 2 actually pirating the necessary software to begin producing his own music³⁴³. Artist 1 believes that piracy directly links with an increase of the audience of recording artists and in turn, their revenue, as:

... people aren't afraid to just download it for free. If you go to a record shop and you see a band you've never heard of, you might go "oh, I might buy it...", but nowadays you won't buy it. You'll write down the name of the artist and go home and download it for free. If you like it, you'll then go and buy it... I don't buy the CD, I'll buy the vinyl... If I particularly like it... I'll buy two. That way I've got one wrapped and I've bought one that I've played³⁴⁴

³³⁹ Ibid., page 8

³⁴⁰ Annex 1, page 7

³⁴¹ CBC News, 'Digital Piracy Not Harming Entertainment Industries' (CBC.ca 2013)
<<http://www.cbc.ca/m/touch/business/story/1.1894729>> accessed 23/06/14

³⁴² Annex 1, pg 2

³⁴³ Annex 2, pg 7

³⁴⁴ Annex 1, pg 2

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This increase in revenue from piracy is something which both artists believe in, including the promotion of secondary revenue streams³⁴⁵, as more people will know who you are and your fan base will grow as a result.

On the prior point about Artist 2 actually illegally downloading the necessary software to produce his music, this epitomises the fact that copyright within itself can often discourage creativity. Without circumventing the law, Artist 2 would not have produced music and been able to contribute to our creative culture. Artist 2 said that the majority of artists he knows illegally download the required software, as otherwise it is far too expensive. Whilst this thesis is primarily concentrating on the piracy of music, it is interesting to see that what would be seen as illegal would, in a utilitarian sense, promote and enable creativity. Following this illegal acquisition of software, Artist 2 has since heavily invested into the hardware enabling him to produce the music required, such as the purchase of new monitors and the Mac computer which he uses for his work.

When directly questioned on what drives Artist 1 to produce music, the response was ‘for the love of it... playing music and having a laugh’³⁴⁶, with the thought of strong protection over their musical works never entering their mind when they formed their band³⁴⁷. When questioned if there was no chance of financial gain in the future from their music, whether or not they would continue to make music, Artist 1 responded by stating that ‘I’d still do it definitely’, provided that no-one else was making money from their music³⁴⁸. The

³⁴⁵ Annex 2, pg 6

³⁴⁶ Annex 1, page 4

³⁴⁷ Ibid., page 5

³⁴⁸ Annex 1, page 13

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responses of Artist 1 to these questions were almost identical to Artist 2, who has received income from the sale of their music and continues to do so. Artist 2 said the main inspiration to make music was that ‘I just really like doing it. It’s like a hobby which has become my job, really’³⁴⁹, and that he never had it in his mind when he started producing music that he wanted to do so for economic gain³⁵⁰. Whilst Artist 2 has experienced people passing off their music as their own, they never think of the protection of copyright during their creative process³⁵¹, and that ‘it’s something I love doing and I would definitely do it even if it didn’t make me any money, it’s still fun’³⁵².

These views seem to go against that of the image portrayed by the music industry, the record labels and the phonographic industries around the world that artists would simply stop producing music if there was no strong copyright protection in place and a financial incentive to do so. One of the largest recording artists in the world, Sir Mick Jagger, believes that:

... People don’t make as much money out of records. But I have a take on that – people only made money out of records for a very, very small time. When The Rolling Stones started out, we didn’t make any money out of records because record companies wouldn’t pay you! They didn’t pay anyone! Then there was a small period from 1970 to 1997, where people did get paid, and they got paid very handsomely and everyone made money. But now that period has gone. So if you look at the history of recorded music from 1900 to now, there was a 25 year period where artists did very well, but the rest of the time they didn’t³⁵³

³⁴⁹ Annex 2, page 3

³⁵⁰ Ibid.

³⁵¹ Ibid., page 4

³⁵² Ibid., page 9

³⁵³ BBC News, 'Sir Mick Jagger goes back to Exile' (BBC.co.uk 2010)
<<http://news.bbc.co.uk/1/hi/8681410.stm>> accessed 13/04/14

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The Rolling Stones were fortunate, like many large artists that fell within that period of time, which capitalised on the business to turn themselves into multi-millionaires through the sales of recorded music. Whilst the record industry would justify the reasoning for strengthened intellectual property rights is for the artist to be inspired into making music, this is simply not the case, as even the assistant general secretary of the UK's musicians union, Horace Trubridge, argued that 'nobody ever became a musician to make money'³⁵⁴.

Whilst Trubridge continued on to say that 'unless [musicians] are... rewarded, unless they can't pay bills, they'll drift out of it'³⁵⁵, this criticism should be directed more towards the record industry who have continued to underpay their artists whilst bringing in extremely large profits. Matthew David, a senior lecturer at Durham University, conducted research into the underpayment of creative artists, and suggested that in fact it is the music industry who are the pirates, not those sharing music freely³⁵⁶. David, critiquing a report from the BPI in 2008, highlighted that 'the routes into the creative industries often involve working for free or next to nothing in the hope of future success'³⁵⁷ and describes this as 'extreme exploitation'³⁵⁸. He remarks that he finds it ironic that even though the government admitted that the content industries are poor at paying young artists, they expect the same young people to find that IP protection really does reward young talent.

³⁵⁴ BBC News, 'Timing helps Sir Mick Jagger's money making' (BBC.co.uk 2010)
<<http://www.bbc.co.uk/news/10581280>> accessed 13/04/14

³⁵⁵ Ibid.

³⁵⁶ M David, *Peer to Peer and the Music Industry – The Criminalization of Sharing* (1st, SAGE, London 2010) 120

³⁵⁷ Ibid., pg 121

³⁵⁸ Ibid., pg 121

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David builds upon the research of Steve Albini, who conducted studies into the payment of artists based on record sales. He states that when one of the aforementioned artist and repertoire scouts approach a young artist, they force them into signing a deal memo, which is legally binding and prevents them from signing to other labels, meaning that the artist loses any form of negotiating power prior to signing a deal³⁵⁹. If the artist has been signed to a major label from an independent one, the costs of buying out the artist from the independent label will be taken out of the royalties as part of this new contract, ‘as will the manager’s percentage and lawyer’s fees’³⁶⁰. Following this, if the artist then goes on to sell a quarter of a million of albums a year, they will still be in debt to the record company following their first year, as ‘the royalties garnered on sales will not cover the advance plus the producer’s percentage and advance, the promotional budget and the buyout from the independent label’³⁶¹. All the costs of recording, artwork, making a video, band equipment also falls on the band, and then the label will charge the artist for any tour-related expenses. This means that the band will be earning around the same as a part-time worker in a convenience store, whereas the record label will make a gross profit of over \$700,000 on \$3m³⁶² worth of sales³⁶³. As David concludes, ‘If sales of a quarter of a million are considered insufficient to warrant a part-time sales assistant’s wage, something seems amiss with the model’³⁶⁴. Whilst this is not seeking to justify people infringing on copyrighted work, it is necessary to understand that regardless of internet

³⁵⁹ M David, *Peer to Peer and the Music Industry – The Criminalization of Sharing* (1st, SAGE, London 2010), 123

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Based on an average of \$12 a unit

³⁶³ M David, *Peer to Peer and the Music Industry – The Criminalization of Sharing* (1st, SAGE, London 2010), 123

³⁶⁴ Ibid., pg 124

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piracy, artists would still be getting underpaid due to the way in which the music industry structures the payments and expenses of the artists.

As mentioned earlier in the philosophy chapter, there is a growing call for a tipping system to be brought in place for musicians instead of the current methods of payment from the record industry. This would seek to rectify both the underpayment of artists as a result of their recording contract, as well as to foster a culture of tipping for music people do like amongst those who currently engage in music piracy. Both the aforementioned Samudrala and also the artist Courtney Love have called for this to be brought in³⁶⁵, hoping that people will pay for their music provided they like it. This way, the money will go directly to the artist for their creativity. Whilst this is not a 'common' way of distributing music, there has been a significant increase recently of artists trying to make their music through the use of tips or donations. Radiohead's 'In Rainbows' was released on a 'pay what you want' scheme³⁶⁶, and increasingly artists are using websites such as PledgeMusic for funding their music through donations from their fan base³⁶⁷. As one member of Artist 1 stated, if he likes a particular recording he has pirated, he will then go and buy it³⁶⁸, which again backs up the points being made by both Love and Samudrala.

³⁶⁵ C Love, 'Courtney Love Does The Math' (Salon 2000) <http://www.salon.com/2000/06/14/love_7/> accessed 15/04/14

³⁶⁶ P Thompson, 'Radiohead's In Rainbows Successes Revealed' (Pitchfork 2008) <<http://pitchfork.com/news/33749-radioheads-in-rainbows-successes-revealed/>> accessed 15/10/08

³⁶⁷ G Wildheart, '555% We Did It!!' (PledgeMusic 2012)

<<http://www.pledgemusic.com/projects/gingerwildheart/updates/8951>> accessed 16/04/14. The artist Ginger released a video on PledgeMusic asking for fans to donate to his project which was rejected by record labels previously. He asked for donations and when they hit 100%, he would begin producing. There was unprecedented success from this campaign, with Ginger hitting 555% of his initial target (and thus calling his album 555%), and this finished at a total of 594% of his goal.

³⁶⁸ Annex 1, pg 2

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Whilst it has been argued throughout that money does not incentivise people into creating as such, there is a level of financial security which a person needs to be creative and motivated. As the aforementioned Daniel H Pink writes:

The starting point... is to ensure that the baseline rewards—wages, salaries, benefits, and so on—are adequate and fair. Without a healthy baseline, motivation of any sort is difficult and often impossible³⁶⁹

As previously stated, motivation and creativity are inherently linked, and if we look at both Weatherley & Trubridge's conclusions that artists will 'drift away' or not create if they are not being paid, we need to ensure that we are giving our artists a healthy baseline wage which is proportionate to their output in creativity. Past this point of ensuring basic needs are met, monetary incentivisation for artists to produce music can actually be detrimental to the creative process. When assessing the classic 'carrot and stick' motivator, Pink comes to the conclusion that using this for creative work can 'extinguish intrinsic motivation... [And] can crush creativity'³⁷⁰.

Maximising Creativity – Nature, Nurture & Metacognition

There has been much discussion both in this chapter and in this thesis as a whole as to what effects a person's creativity. As originally stated, the research into this specific area

³⁶⁹ D H Pink, *Drive: The Surprising Truth About What Motivates Us* (1st, Canongate, London 2009), 60

³⁷⁰ *Ibid.*, pg 59

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is in its infancy, however by drawing comparisons from research already in existence, we can build a hypothesis for the development of creativity.

We have found that nature and nurture both play a part in the development of a person's creativity, and that an individual controls much of their own creative development. It is often difficult to separate the nature and nurture aspects as often if the parents of a child are talented musicians, it is likely that as part of a child's upbringing they will undergo a lot of exposure to music, both by playing and listening. Society now has more children and adolescents accessing the internet than ever before, with ever greater access to music available both legally and illegally through this medium. The access to this wide variety of music, when combined with the natural curiosity and rebellious nature of an adolescent, and added to this the metacognition capabilities that develop at this stage of life, is surely a positive for creative development.

It has been seen that the internet has a big impact on the fulfilment of creative potential and in aiding this development to take place for a variety of reasons, and therefore any suspension of internet access arising as a result of copyright infringement is counterproductive to the purpose of copyright legislation, that of promoting creativity. Copyright has never featured in the minds of the two artists who interviewed above, and we have found that they would continue to produce music without strong copyright enforcement legislation being in place. In fact, it is quite the opposite, as with Artist 1 & 2, piracy has played a part in their creative development. Be it by finding new artists whom they have drawn inspiration from, or the procurement of the tools which would

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have otherwise been unavailable to them due to financial constraints, piracy has inherently helped develop their creativity.

Within the UK, the prior mentioned entrepreneurial rights put a lot of the potential for making money onto the record industry. This takes away the autonomy of the artist, which may damage their motivation to be creative, and also allows for the recording industry to take a disproportionate percentage of the revenue from creative works to ‘compensate’ them for their investment. As pointed out earlier by David, the recording industry often places much of the cost of their investment onto the artist which they have acquired anyway. Due to the peculiar implementation of the Berne Convention in the UK, there is also a possibility that record labels could contractually force artists into waiving their moral rights to their own work, again creating an unfair balance of power between the creators and the investors.

What is clear is that we can control to some extent our own creativity, and that the exposure to a wide variety of music invariably benefits this. This does not mean that artists should have to give their music away for free and solely rely upon income from secondary income streams, but that the current system of copyright in the UK does not effectively promote creativity. Now that we have a greater understanding of the creative mind and the way in which the law impacts it, this can be used to develop new ideas around reform of our current system of copyright.

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Promoting creativity through reform

It is clear from the above research that the recent additional legislative changes to copyright protection are not effective in promoting creativity within society. The prospect of copyright protection does not enter one's mind when a person first picks up his instrument or decides to form a band, and therefore we need to ensure that whatever we have in place is there to enable people to fulfil their creative potential prior to this formation, and to hopefully inspire them into doing so more frequently.

It is necessary to state that to propose a fully comprehensive reform to copyright law is outside of the scope of this thesis. There needs to be further research undertaken into musical creativity and development prior to major legislative changes, and the consequences of altering copyright for music alone may cause problems with other parts of the entertainment industries. Nonetheless, there is value in proposing change.

The first change that is required is a change in the way in which we philosophically understand copyright within the UK. As established towards the beginning of this thesis, copyright in the UK was based upon Lockean theory which cares not for creativity or originality, and awards a right over intellectual property as it is 'right' to do so. If we are to look towards the best way of promoting creativity for society, then we must switch the emphasis from the deontological view of Locke, and instead look to justify future legislative reform in either a purely Utilitarian manner, or through the use of the 'social planning theory'. To promote the greatest 'good' for the greatest number of people fits

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much more comfortably with the idea that copyright exists to promote creativity, as does the idea of legislating for the planning of an ideal society.

As mentioned earlier, the internet is key to promoting creativity and enabling creative development³⁷¹. Therefore, if we are to seriously consider any reform at all, it must start with repealing the blanket internet ban provisions provided for by the DEA³⁷². These provisions will affect more than just the guilty party, and in the worst cases will affect a non-guilty party due to pirates using VPNs to cloak their IP addresses as another person's IP address³⁷³.

One idea for reform would be to allow music to be accessed freely for private use. Whilst there is currently a draft bill to allow for a private use exception³⁷⁴, this is only suitable for format shifting. Following the Hargreaves review, a wider private use proposal was rejected by the government due to 'losses to copyright owners [being] likely to significantly damage incentives to create and provide new creative content'³⁷⁵. However, if further research proves the earlier hypothesis that copyright and monetary incentivisation do not promote creativity, then there is the potential the above

³⁷¹ Y Shoshania & R B Hazib, 'The Use of the Internet Environment for Enhancing Creativity' [2007] Educational Media International vol. 44 No. 1, 22

³⁷² Communications Act 2003, S124G(3)(c)

³⁷³ K Garstka, 'The amended Digital Economy Act 2010 as an unsuccessful attempt to solve the stand-alone complex of online piracy', [2012] IIC 158, 162

³⁷⁴ The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, amending CDPA 1988 to include S28B

³⁷⁵ Intellectual Property Office, 'Copyright Exception for Private Copying' (IPO.gov.uk 2012) <<http://www.ipo.gov.uk/ia-exception-privatecopy.pdf>> accessed 27/06/14, pg 20

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exception³⁷⁶, or even a wider version, could work. This may encounter problems if legislated for though, as removing the ability for artists to charge for their work could potentially breach their right to peaceful enjoyment of property under the European Convention of Human Rights³⁷⁷, as they would be having their property removed from their control and put into the public domain for people to freely access. Artists could still charge for the use of their music in a commercial capacity, such as if their song was to be featured on an advert, and also they could request payment for any public performances of their work. Artists would also still be able to charge for their live concerts and other secondary revenue streams, and they may actually see an increase in their revenue from this model. With regards to creativity and the above suggestion, the question needs to be asked whether under this model, would artists be any worse off? The answer is possibly not. As established, artists are underpaid for their recorded music³⁷⁸ and make the majority of their money from touring³⁷⁹. This may actually produce an increase in demand for their tours if their music were available freely to the public. This again would likely cover their baseline reward required for the motivation to be creative as discussed by DH Pink³⁸⁰.

³⁷⁶ Intellectual Property Office, 'Copyright Exception for Private Copying' (IPO.gov.uk 2012) <<http://www.ipo.gov.uk/ia-exception-privatecopy.pdf>> accessed 27/06/14, pg 20 "Option 3 would cover any copying done for private, non-commercial use. It would allow private copying, including within the family or domestic circle, from any source (bought, borrowed, etc.). Such exceptions exist in many other European countries (e.g. The Netherlands, France)"

³⁷⁷ European Convention on Human Rights, Protocol 1, Article 1.

³⁷⁸ M David, *Peer to Peer and the Music Industry – The Criminalization of Sharing* (1st, SAGE, London 2010), 121

³⁷⁹ P Kafka, 'Concert Tours Are Where the Real Money Is' (Forbes 2011)

<<http://abcnews.go.com/Business/story?id=86535&page=2>> accessed 27/06/14

³⁸⁰ D H Pink, *Drive: The Surprising Truth About What Motivates Us* (1st, Canongate, London 2009), 60

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One potential legislative reform would be that of introducing a ‘private copying levy’ in the UK similar to the previously discussed levy in France³⁸¹. As explained earlier, this would place an additional charge on certain items commonly used for private copying of copyrighted works, such as MP3 players³⁸², personal computers³⁸³ and tablet computers³⁸⁴, with the aim of remunerating those involved in the production of copyrighted material for their loss in revenue. This would also be redistributed not only to the existing artists, but used ‘to assist creation and promote live entertainment and for training schemes for performers’³⁸⁵. The more money spent on these schemes to promote training for performers would inevitably help promote creativity within the UK as it would enable them to express and concretise their creativity, against promoting the greatest ‘good’ for the future of our creative society.

Following on from the prior point of reinvestment into training schemes for performers, and the revelation that HADOPI has cost over €12 million euros so far with no realistic return on this investment³⁸⁶, it would be illogical for the UK to continue investing into enforcement of legislation which has directly based itself on HADOPI. The money spent fighting the battle against piracy could be reinvested into promoting creativity through society and education around copyright in the hope to change society’s habits from committing piracy to understanding exactly where there money goes. However, if the

³⁸¹ French Intellectual Property Code, Art. L311-1 to L311-8

³⁸² M Kretschmer, ‘Private Copying and Fair Compensation: An empirical study of copyright levies in Europe’, [2011] UK IPO, pg 27

³⁸³ Ibid., pg 27

³⁸⁴ M Kretschmer, ‘Private Copying and Fair Compensation: An empirical study of copyright levies in Europe’, [2011] UK IPO, pg 12

³⁸⁵ French Intellectual Property Code, Art. L321-9

³⁸⁶ R Chirgwin, ‘France backs away from Hadopi’ (The Register 2012)

<http://www.theregister.co.uk/2012/08/06/hadopi_under_fire/> accessed 26/01/2013

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current system of payment is kept in place and elucidated for the purposes of education, there is the potential that this could have the opposite effect, as people will see clearly that the vast majority of their money spent on artists' music actually goes to the record label³⁸⁷.

One final idea for reform builds on the previous idea to invest the money used on enforcement elsewhere. Instead of focusing and investing in legislative change to stop piracy that money could be better used to invest into 'grass roots' musical education. This education could either form a part of the UK school curriculum, or could be in the form of local meetings and canvassing. As well as the aforementioned education surrounding copyright and where the money for music goes, this education would also focus on providing people with access to a variety of music, and the chance to engage in creating music themselves. This would encourage people to access a wide variety of music, to begin learning different instruments and to engage with other like-minded members of society on subjects of music, all of which will aid their creative development. Following on from this, money could be invested into providing communities with a local recording studio, which would be free to use. This would provide people with the ability to be creative and produce music without the need for a recording contract. Whilst these would require a heavy amount of government funding, it would be possible for the government to legislate for a proportional percentage of any music sold to be transferred back to their local community studios, which would aid with the upkeep of the recording studios. This

³⁸⁷ M David, *Peer to Peer and the Music Industry – The Criminalization of Sharing* (1st, SAGE, London 2010), 123

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idea would fit with the deployment of ‘visions of a desirable society’³⁸⁸ necessary under the social planning theory ideology.

It would also be advisable, either in addition to the previous suggestion or as a standalone, to allow for educational music licences. This would allow for people who are in school, college and University to freely access music for private use. This could be implemented by working closely with an external provider such as Spotify to provide access for pupils free of charge. There would need to be funding to be provided to purchase these educational licences, but this would enable students to freely access music during the most critical years of creative development: the adolescent stage of life. This would also promote the sales of secondary revenue streams for artists as they will have higher exposure than ever before.

Whilst Spotify and other platforms of the same design go some of the way to help with the access of music for wider society, these platforms are not the whole embodiment of what this thesis proposes. These platforms still have many limitations, such as the free versions allowing for only a limited amount of music each month to be streamed, and also a number of artists from other cultures and a selection of those of significant cultural importance are still not accessible through these platforms³⁸⁹. The provision of educational licences to access Spotify is likely to help with the fulfilment of creative potential, provided that this is alongside a switch in culture and education along with this.

³⁸⁸ W Fisher, 'Theories of Intellectual Property' [2001] *New Essays in the Legal and Political Theory of Property*, 6

³⁸⁹ The Beatles, amongst others, are still not available through Spotify.

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As has been discussed, there is more to promoting creativity than just having access to music.

Whilst many of these changes require a radical change in approach from either the government and/or society as a whole, it is likely that these options given would help to achieve the aim of promoting creativity further than simply continuing to strengthen copyright legislation.

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Chapter 7 – Conclusion

Introduction

This thesis set out with a purpose to assess the psychological impact on creativity of copyright law's responses to the increasing amount of online piracy of music. In the scope of this thesis, it is important to remember that this research and its findings primarily concern itself with musical creativity and the impact of the law on this.

This research is significant as there has been a lack of investigation into the areas specifically concerning how copyright law and internet piracy affects creativity on a psychological level. There has also been a lack of research into the impact of musical exposure to adolescents' creativity, and whilst inferences have had to be drawn on this subject area, it would seem that this stage of life is integral in the overall achievement of creative potential. Drawing from other disciplines in this research as well as using primary research from semi-structured qualitative interviews, this dissertation has investigated how to promote creativity, and what role wide exposure of music has on this, without concentrating solely on how to legislate for this.

Findings

In response to the first issue raised at the start of this thesis, it is widely accepted that the purpose of copyright is to promote creativity, as evidenced by the European Union's

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statement that ‘copyright is the basis for creativity’³⁹⁰. It would seem that recent amendments to the law treat this as a secondary concern. Instead there appears to be a prioritisation of content owners’ rights. The philosophy underpinning the UK’s copyright system, Locke’s ‘labour theory’, has no mention of originality or creativity as a reason for protection, instead drawing the conclusion that the affording of rights over property is due to the labour put into it.

Whilst the recording industry assumes that strengthening of copyright protection will lead to an increase in legal music sales, it has been demonstrated that this is not necessarily the case, as since the implementation of HADOPI in France there has actually been a decline in legal music sales³⁹¹, with research indicating that pirates actually spend more on legalised music than the average consumer³⁹². Furthermore, the recording industry has not actually understood what promotes musical creativity. It has been shown that offering financial incentives for creative work can actually destroy creativity and motivation³⁹³, and that artists do not become musicians for the reason of making money³⁹⁴, but because they enjoy making music³⁹⁵. What has been an interesting discovery is that even under the current system of releasing music through a record label, many artists do not get paid

³⁹⁰ European Union, 'Creative Content in a European Digital Single Market: Challenges for the Future' (European Commission 2009)
<http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf> accessed 22/06/14, pg 2

³⁹¹ TorrentFreak (Ernesto), 'French 'Three Strikes' Law Slashes Piracy, But Fails to Boost Sales' (TorrentFreak.com 2012) <<http://torrentfreak.com/french-three-strikes-law-slashes-piracy-but-fails-to-boost-sales-120330/>> accessed 26/01/2013

³⁹² E Kain, 'Swiss Government Study Finds Internet Downloads Increase Sales' (Forbes 2011)
<<http://www.forbes.com/sites/erikkain/2011/12/05/swiss-government-study-finds-internet-downloads-increase-sales/>> accessed 26/01/2013

³⁹³ D H Pink, *Drive: The Surprising Truth About What Motivates Us* (1st, Canongate, London 2009), 59

³⁹⁴ BBC News, 'Timing helps Sir Mick Jagger's money making' (BBC.co.uk 2010)
<<http://www.bbc.co.uk/news/10581280>> accessed 13/04/14

³⁹⁵ Annex 2, page 3

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a proportionate amount of the revenue brought in from their music³⁹⁶, earning a fraction of what the recording industry does and often finding themselves earning less than a convenience store worker³⁹⁷. The impact of increased copyright protection has little to no effect on the artist. The recent extension of the copyright protection term of performances from 50 to 70 years is unlikely to benefit smaller artists and will put further money into the pockets of big labels³⁹⁸.

Any extension to copyright protection laws has the potential to be extremely detrimental to the creativity of society. Increasingly, measures have focused on targeting the internet in terms of blocking access to websites or removing internet access entirely, as evidenced in our own system by the implementation of the DEA. As mentioned earlier, not only is accessing the internet now inextricably linked with the right to freedom of expression, but also that the ‘...Internet environment encourages creativity...’³⁹⁹ by providing us with the content to author and create from⁴⁰⁰ and form associations from existing ideas and concepts⁴⁰¹. As a person cannot be creative in a domain which they have not been exposed to⁴⁰², any blanket ban on a person’s internet access could significantly hinder the

³⁹⁶ Courtney Love, 'Courtney Love Does The Math' (Salon 2000)

<http://www.salon.com/2000/06/14/love_7/> accessed 15/04/14

³⁹⁷ M David, *Peer to Peer and the Music Industry – The Criminalization of Sharing* (1st, SAGE, London 2010), 124

³⁹⁸ BBC News, 'Rock veterans win copyright fight' (BBC.co.uk 2011)

<<http://www.bbc.co.uk/news/entertainment-arts-14882146>> accessed 23/01/2013

³⁹⁹ Y Shoshania & R B Hazib, 'The Use of the Internet Environment for Enhancing Creativity' [2007] Educational Media International vol. 44 No. 1, 19

⁴⁰⁰ L Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (1st, Vintage Books, New York 2002), 104

⁴⁰¹ L A Jackson et al, 'Information technology use and creativity: Findings from the Children and Technology Project', found in "Computers in Human Behavior" [2012] Computers in Human Behavior, Volume 28, Issue 2 370, 370

⁴⁰² M Csikszentmihaly, *Creativity: Flow and the psychology of discovery and invention* (1st, Harper Collins Publishers, London 2007), 34

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fulfilment of their creative potential. As new creativity is based on the old, anything new created requires access to the old to begin with⁴⁰³, meaning greater access to a diverse amount of information, or music in our case, can only promote creativity further⁴⁰⁴. Runco states that ‘everyone has the potential to be creative, but not everyone fulfils that potential’⁴⁰⁵, and this is likely due to people not having the necessary ‘...experiences to fulfil their potential’⁴⁰⁶. Therefore, those who commit piracy and experience a wide variety of music may be more likely to fulfil their creative potential, as otherwise they may not have either purchased the album of bands they have not heard of to begin with⁴⁰⁷, or may not simply be able to afford access to all of the music they wish to consume. Having more exposure to more diverse experiences is ‘probably a good thing for the development of creativity’⁴⁰⁸.

In terms of when this creativity actually develops, it would seem that this occurs heavily during the adolescent stage of life, as the basis for any tactical or strategic creative efforts is metacognition⁴⁰⁹, which only develops in adolescence⁴¹⁰. This is also the time where people develop their independence and have greater access to the internet without supervision, which, as previously stated, is important to encouraging creativity. This

⁴⁰³ L Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (1st, Vintage Books, New York 2002), 105

⁴⁰⁴ M A Runco, *Creativity: Theories and Themes: Research, Development, and Practice* (Kindle Edn, Elsevier Science, Burlington 2010), 53

⁴⁰⁵ Ibid., at pg 40

⁴⁰⁶ Ibid.

⁴⁰⁷ Annex 1, pg 2 – “people aren’t afraid to just download it for free. If you go to a record shop and you see a band you’ve never heard of, you might go “oh, I might buy it...”, but nowadays you won’t buy it. You’ll write down the name of the artist and go home and download it for free. If you like it, you’ll then go and buy it”

⁴⁰⁸ M A Runco, *Creativity: Theories and Themes: Research, Development, and Practice* (Kindle Edn, Elsevier Science, Burlington 2010), 53

⁴⁰⁹ Ibid., 32

⁴¹⁰ Ibid.

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conclusion was reached through a number of inferences due to a lack of research specifically focusing on the effects of musical exposure on creativity in adolescents. As creative potential is based both on nature and nurture⁴¹¹, it may be the case that some of a person's creative development will have already taken place as a result of their upbringing. To help with their development during this stage of life, there needs to be consideration around adapting the UK school curriculum to provide children and adolescents with the facility to access and play music, which should help in promoting creativity for future generations.

Finally, this research has highlighted that there is the potential for an alternative to releasing music other than the traditional method of releasing music through a record label. Both Samudrala⁴¹² and Courtney Love⁴¹³ have expressed their opinions on music moving towards more of a service, where artists are 'tipped' on their work if people like what they hear. This has also been demonstrated through the success of this method being utilised with Radiohead's album 'In Rainbows'⁴¹⁴, as well as the success of websites such as PledgeMusic in generating funding for artists to create their own music⁴¹⁵. Whilst it was mentioned earlier that financial incentives can potentially destroy creativity and motivation, it has been said that without a healthy baseline artists will struggle to have

⁴¹¹ J Kluger, 'Assessing the Creative Spark' (TIME Magazine 2013)

<<http://business.time.com/2013/05/09/assessing-the-creative-spark>> accessed 24/01/14.

⁴¹² R Samudrala, 'Free Music Philosophy' (Ramblings)

<<http://www.ram.org/ramblings/philosophy/fmp.html>> accessed 05/07/2012

⁴¹³ C Love, 'Courtney Love Does The Math' (Salon 2000) <http://www.salon.com/2000/06/14/love_7/> accessed 15/04/14

⁴¹⁴ P Thompson, 'Radiohead's In Rainbows Successes Revealed' (Pitchfork 2008)

<<http://pitchfork.com/news/33749-radioheads-in-rainbows-successes-revealed/>> accessed 15/10/08

⁴¹⁵ G Wildheart, '555% We Did It!!' (PledgeMusic 2012)

<<http://www.pledgemusic.com/projects/gingerwildheart/updates/8951>> accessed 16/04/14

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the motivation to create⁴¹⁶. Under the current payment structure of major label recording contracts, it is often the case that an artist does not achieve this⁴¹⁷. Therefore, by tipping the artist directly for their creativity, there is a greater chance of them achieving these baseline rewards.

It is important to note at this stage that there have been certain limitations which have been imposed upon this research. Whilst the primary limitation was the lack of research specifically into the area of promoting cognitive creative development through musical exposure, the other limitation was the unwillingness of artists and music industry representatives to make available their time for interviews. For future research there should be a larger selection of qualitative interviews available to draw from, with people involved as both musical artists and also involved within the music industry themselves. With regards to the study of creative development, specifically there was a lack of research into the importance of musical exposure on creative development in the adolescent years.

Implications & Future Research

From the above, it is clear that the provision for extended copyright protection is not only potentially harmful to creativity, but also that it is misguided in benefiting those who are 'creative'. Whilst people may be currently pirating copyrighted work, this has been shown

⁴¹⁶D H Pink, *Drive: The Surprising Truth About What Motivates Us* (1st, Canongate, London 2009), pg 60

⁴¹⁷M David, *Peer to Peer and the Music Industry – The Criminalization of Sharing* (1st, SAGE, London 2010), pg 124

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to lead to not only extra income from legalised music sales, but also it has enabled people to have more disposable income to spend on concert attendance – where proportionately the artists are eligible for more of the revenue. The implications of this may mean that the government need to re-evaluate their spend on implementing acts such as the DEA to combat online piracy, and instead focus on exactly how to better invest in promoting creativity. It is unlikely that the recording industry will change their policy of pursuing for greater protection as they are the ones who risk losing the most from any change of policy.

In terms of future research, it would be prudent that prior to any serious change in legislation, there would need to be a more in-depth psychological study concentrated primarily around the impact of piracy and/or wide ranging musical exposure on adolescents' creativity, as well as whether musical exposure affects creativity on a broader level. An example of a potential research area would be whether wide exposure to music through the adolescent or post-adolescent stages of life impacts their general creative thought processes. With the adolescent stage now extending to greater than simply the 'teenage' years, it may also be interesting to study whether creative development is based on a state of mind rather than on a physiological level.

With regards to legal research, there is scope for a further study on the impact of copyright law and piracy on the creativity of other disciplines, such as movies, television and computer games. As set out at the start of this research, this thesis would only concentrate on copyright infringement of music and musical creativity. It would be interesting to

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compare the findings of this study against those of a study focusing on other media due to the differences in production budgets.

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