



FEASIBILITY STUDY OF LICENSING SYSTEMS FOR THE PEER-TO-PEER EXCHANGE OF WORKS ON THE INTERNET

EXECUTIVE SUMMARY

REPORT FOR THE SACD/SCAM – Belgium

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EXECUTIVE SUMMARY OF STUDY RESULTS

The challenge

The practice of exchanging works protected by copyright using peer-to-peer is difficult to control. Prosecution of individual users for deterrence, judicial interdiction of exchange sites or software supply permitting it, filtering requested to access providers ... Despite the fact that copyright owners have explored many paths, users continue to access music, films or other contents thanks to unauthorized sites and software, threatening the legitimate remuneration of creators and producers as well as the development of legal offers respecting authors rights. One of the trends in the fight against illegal peer-to-peer file-sharing is to develop graduated response mechanisms that could lead to a suspension of internet access of users engaged in these practices. France has chosen to go this route with the HADOPI laws, followed by other European countries including Belgium with the bill drafted by the MR group, proposed by Senator Monfils April 21, 2010 and by Senator Miller January 28, 2011¹.

In parallel, another trend is emerging that aims to allow the exchange of works through peer-to-peer. It is therefore no longer a question of containing or to reprimand behaviour, but of regulating the sharing with legal mechanisms. The non-punitive solutions are designed to allow users to share peer-to-peer files of works for non-commercial purposes while redistributing appropriate remuneration to the authors and other right holders. In Belgium, Ecolo and Groen groups have developed a draft bill in this sense submitted for the first time March 2, 2010 by Senators Hellings and Piryns, and then again December 9, 2010 by Senators Moraël and Piryns², to regularize these exchanges as part of a so-called blanket license.

Various legal mechanisms could legitimize this derogation to allow the exchange of works in peer-to-peer networks, one way or another. Here the particular and exclusive rights of the author could have limited exception, non-voluntary license, mandatory collective administration of exclusive rights and extended collective license. This study aims to explore the legal feasibility of these authorization mechanisms particularly with regard to the international and European obligations of Belgium in copyright law as well as their practical feasibility by analyzing the constraints and obstacles that such a mechanism would face.

¹ Bill favoring the protection of cultural creation on the Internet, *Doc. Parl.*, Senate, 2010-2011, No. 5-741/1.

² Bill to adapt the perception of copyright to technological developments while preserving the right to privacy of Internet users, *Doc. Parl.*, Senate, 2010-2011, No. 5-590/1.

LEGAL FEASIBILITY

The authorization mechanisms

Once works are lawfully published, some uses are permitted to the public through the *exceptions and limitations* enshrined in legislation. In this case the author would lose some of its control over its work, that is to say, the communication to the public and/or the reproduction of its creations. The author no longer exercises complete control over the uses covered by these exceptions.

One category of limitations consists of *non-voluntary licenses* or *legal licenses* that allow public use the author's works by paying financial compensation. The authors, in the specific context of non-voluntary licenses, no longer have the ability to control the use made of their works. They simply have the right to receive payment.

Compulsory collective management of an exclusive right also limits the exclusive and individual power of authors but in a less radical way than through the exceptions and limitations above. When the legislator chooses to opt for compulsory collective management of an exclusive right, he deprives the author of the personal exercise of its exclusive rights and entrusts these rights to an organization to manage them collectively. The author has no control over the use of its work within the set framework since this control is now exercised by the collective society. However, contrary to non-voluntary licenses, management companies retain bargaining power over the licensing terms with users (terms, conditions, rates and even refusal to licence), subject to the constraints imposed by competition law. These management companies then have the task to collect and (re)distribute the compensation received to the persons entitled under this legislation.

The mechanism of *extended collective licensing*, the last device analyzed by the study, comes from the Nordic countries (Denmark, Finland, Iceland, Norway, Sweden). Initially, this system is characterized by a voluntary transfer, by the right holders, of their rights to a collecting society for the use of their works. The essential element is the voluntary membership of the right holders. Management companies then establish contracts with end users allowing certain uses of the repertoire they make available to them. Only later were these licensing agreements extended, by legislation, to all right holders of certain categories of works. Collective licensing is thus extended. The repertoire handled by the collective society is then extended to right holders who were not initially members. The only requirement is that the collecting society demonstrates its legitimacy in that it already represents a significant part of a given category of works. The extended collective license is automatically extended to all the authors in a given sector, including foreign authors. However, the legislation may allow authors to opt-out.

Belgium's international copyright obligations

The establishment of a mechanism that restricts the rights of authors, whether as an exception, a non-voluntary licence system, mandatory collective management or an extended collective licensing, cannot be done arbitrarily. The adoption of these devices is governed internationally by the three-step test that allows the legislator to determine the limitations of the exclusive rights of an author. By virtue of this instrument, the exceptions or limitations to exclusive rights must be restricted to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

The mechanism of non-voluntary license – and *a fortiori* that of the exception - which allows the exchange of works on peer-to-peer networks does not seem able to satisfy the three-step test in that it removes any possibility for right holders to control the exploitation of their creations in this context; moreover, it is likely to be in direct competition with the offers of legal downloads. Thus, solving the problem of the exchange of protected works on the peer-to-peer through the adoption of an exception or a non-voluntary license does not seem legitimate since these approaches run counter to the exclusive rights of the author and do not apparently pass the three-step test. In addition, peer-to-peer exchange of works is not included in the exhaustive list of exceptions and limitations of the Directive 2001/29 on copyright in the information society.

The strengthening of the collective management of exclusive rights - whether through compulsory collective management or extended collective licensing - might be a possible solution to the problem of peer-to-peer. On the one hand, these are not, strictly speaking, limitations of author's rights, thus in principle, therefore exempt from the obligation to respect the rather restrictive framework set by international treaties and European legislation in matters of exceptions to copyright. On the other hand, if a solution of collective management reinforced either through mandatory collective management or extended collective license, must still pass the three-step test, it is more likely to succeed. The bargaining power enjoyed by the collecting societies in these two cases, associated with the objective of right holders' protection that they pursue, is a key element to passing the test. In addition, the contractual basis coupled with the representativeness of the collecting society makes extended collective licensing the device of choice, most respectful of the exclusive rights of the author and therefore probably the most able to meet the challenge of three-step test.

The question of the compatibility of the opt-out mechanism usually associated with extended collective licensing, given the rule against formalities of the Berne Convention, is also analyzed in this paper. It was found that this principle prohibiting any formalities to the exercise of copyright is not an obstacle to an extended collective license since an opt-out precisely allows authors the ability to recover the full exercise of their exclusive rights and the possibility of individual management.

PRACTICAL FEASIBILITY

The need for a contract

Whatever mechanism is chosen for authorizing non-commercial peer-to-peer exchanges of works – compulsory collective management or extended collective licensing – it will require entering into a license agreement offered by collecting societies. Indeed, the option of compulsory collective management generally leads to the granting of a license by the companies representing the right holders. And if the legislator chooses the option of extended collective licensing, a contract must have been previously signed by the collecting societies and users.

In short, the contractual instrument plays a central role in the negotiation process, even if the introduction of compulsory collective management or extended collective licensing simultaneously requires legislative action.

Possible contractual models

Theoretical or legislative propositions to legitimize peer-to-peer exchanges are largely based on the conclusion of a contract (except for the case of non-voluntary licensing) between copyright owners and internet access providers. These contracts between collective societies and internet access providers are sometimes imposed by legislation, as in the current proposition from the Ecolo and Groen Party.

There are potentially three contracting parties: the right holders, represented by their collective societies (such as SACD / SCAM), internet access providers and internet users who access to material covered by copyright when sharing works on the internet. There are two possibilities: either right holders contract with internet access providers, or they contract directly with the internet users.

In the first model, internet access providers could contract with the collecting societies to allow their subscribers to use peer-to-peer services provided they pay compensation to the right holders. This compensation would come from additional payments by the subscribers to the internet access providers and then paid to the management company by the internet access provider, or by other means yet to be determined (advertising ...).

In the second model, internet access providers may simply act as intermediaries between the right holders and their users, simply transmitting the contracts offered by collective societies to their users, or by offering their users the possibility to mandate them to sign such contracts on their behalf. This more limited role for internet access providers is not often proposed but it would solve the difficulties of qualifying their contractual intervention and more easily convince them to play a role in the process.

The main obstacles to a license allowing peer-to-peer

Inviting internet access providers to the negotiating table

Whatever the contractual model, internet access providers will need to be part of the process; the challenge is therefore to find sufficiently strong arguments to get them involved in a contracting process. Access providers benefit, under certain conditions, from exemptions from liability for content circulating on the internet. But there are several ways to entice these actors to the negotiating table, whether economic (economic value they derive from peer-to-peer exchanges), commercial (competitive advantage to offer their subscribers legal use of peer-to-peer), ethical (respect for their code of conduct advocating a legitimate use of the internet) or political (Europe is pushing for greater involvement from internet access providers).

In the absence of voluntary involvement from internet access providers in the negotiations for a licensing system authorizing non-commercial peer-to-peer exchanges for a charge, we could think about a legislative action requiring such involvement or, at least establishing a framework for the negotiations. To this end, the legislator could establish an “Internet Commission” bringing together representatives of copyright holders and related rights, internet users, consumers and internet access providers.

The territorial nature of the licensing system

There exists a real hurdle to overcome: the principle of territoriality that governs the application of copyright.

First, the scope for peer-to-peer will be limited to Belgium. Exchanges can only be done legally in Belgium. The authorization mechanism must relate to internet subscribers residing only in Belgium. However, even if the authorization system is limited to Belgian territory, there may be effects beyond Belgium unless specific mechanisms are put in place. Legitimizing peer-to-peer in Belgium will inevitably drive up the volume of works available for exchange in other countries. Internet users around the world will therefore benefit, not from the authorization system, but from a volume of material lawfully made available from Belgium. But outside of Belgium, users that exchange material would still be illegally sharing. And, it is not technically possible to limit peer-to-peer to only Belgium territory, for example by only allowing material available to Belgian users to be uploaded.

On the other hand, the Belgian collective societies – if the solution of collective management was chosen – are only responsible for the material they themselves manage. These companies would not normally have mutual representation agreements or arrangements that would allow them to allow peer-to-peer exchanges of material belonging to foreign collecting societies. The authorization could therefore only cover material produced in Belgium. It is obvious that people will not join a Belgian authorization system that would give them access to exclusively Belgian material and not British music and American films.

Only the solutions of a non-voluntary license (rejected as incompatible with the international legal framework) or an extended collective license (subject to certain conditions), can include foreign works in such an authorization.

Constraints related to the audiovisual sector

The authorization mechanism of peer-to-peer exchanges of works will meet the various constraints inherent in the exploitation of audiovisual works, such as the fragmentation of rights and the media chronology. On the one hand, the multiple ownership of rights in audiovisual work – directors, writers, adaptation authors, copywriters, graphic writers, producers – reinforces the need to address in a special way the discussion for the sector. On the other hand, if the illegal peer-to-peer exchanges of audiovisual works are to be allowed, the entire media chronology may be undermined, and thus, ultimately, the business strategy of right holders and their remuneration. The challenge is to know where to insert the operating window for peer-to-peer and to enforce the exclusion of certain works from the exchanges thanks to filtering mechanisms.

The terms for the peer-to-peer license

A global approach or by sector

The user will expect, regardless of the model in place, that they can download and share all types of works, that is to say music, audiovisual, multimedia and literary works. It is thus appropriate that the license agreement covers all these areas, which also means that all right holders of such contents - authors, producers and performers - will have to give their consent. However, it is hard to imagine that the same solution can cover the various categories of works and right holders. Reaching a consensus will be difficult as the expectations, challenges and constraints are specific to each sector. A sectorial approach seems the most realistic option; but the fact remains that any proposal will necessarily be partial for the users and thus ineffective. If the license covers only certain types of works, this could be detrimental to the success of the operation.

The authorized acts for users

Provision should be made so that the mechanism will allow both the download and upload of works in the context of exchanges between individuals and for non-commercial purposes on peer-to-peer. The reproduction and the communication to the public of works (specifically making a work available) in the particular case of peer-to-peer exchanges would therefore be permitted.

The optional characteristic for the user of a system authorizing the peer-to-peer exchanges of works

With the freedom of choice necessarily granted to the user thanks to the contractual models proposed, the authorization system would be fair and equitable in the sense that the payers would necessarily be those who use peer-to-peer. This avoids the problem that all users contribute, while in fact many do not use peer-to-peer to exchange works illegally.

However, such an optional system for users is a risk in that it relies on the honesty and goodwill of users. It may be useful to provide specific sanctions if the user continues to illegally share works without having signed the authorization contract.

CONCLUSION

The only possible mechanism to allow peer-to-peer exchanges of works should be based on collective management reinforced, either through mandatory collective management or extended collective licensing. This path is based on the exercise of exclusive rights and contract negotiation. It requires the involvement of internet access providers which appear, in all the models proposed, as the debtors as concerns the compensation due to the right holders. This involvement is not evident if not required by law.

While this study has revealed the difficulties, it has also outlined some ideas that could lead to a gradual development of licenses authorizing peer-to-peer exchanges, even if these licenses will concern, initially, only certain categories of works and certain right holders. This gradual progress towards a blanket license for peer-to-peer necessarily must be accompanied by the development of legal offers and a consideration of the obstacles which prevent a global offering attractive to the consumer. Platforms for legal offers and peer-to-peer networks are not necessarily antagonistic. Just as second hand record stores or flea markets and garage sales compete with the new record shops, it is possible that peer-to-peer will become a mode of exploitation of works that are not subject to digital exploitation by their right holders, but that would develop in parallel. The authors of these works should benefit and receive remuneration from such exploitation. This is what collective management could offer them.

CONDITIONS OF AN APPROVAL PROCESS FOR NON-COMMERCIAL PRIVATE PEER-TO-PEER INTERNET EXCHANGES

To allow the private non-commercial exchanges of protected works and performances on peer-to-peer requires satisfying various conditions summarized in this conclusion. For each parameter to be considered, the precise consequences of the choice made will be examined. These consequences can sometimes appear at odds with one another, demonstrating that there is no easy and ready-made solution to the problem.

The parameters of the authorization process:

- The solution of legitimization must meet the ***conditions imposed to the limitations and modes of exercising copyright and related rights by international conventions***, and primarily by the Berne Convention and the European Directive 2001/29 on copyright in the information society.

Consequences:

- The non-voluntary license cannot be an acceptable model, since it is a limitation not provided for by the list of exceptions to the European directive of 22 May 2001 on copyright in the information society and will face too many difficulties to successfully meet the three-step test.
 - The mandatory collective management or extended collective licensing devices, which would strengthen the collective management, appear to be more compatible with international texts.
 - A model of extended collective licensing is more legitimate if it includes an opt-out mechanism that allows authors to recover the individual exercise of their rights.
- The right holders must keep a check on permit exchange requirements, as well as the related remuneration, in order ***to preserve the fundamental principle of the exclusive right***.

Consequences:

- The proposed model should not remove the exercise of copyright or related rights from legitimate holders; collective management of rights should be preferred (in the absence of individual management which is difficult to implement because of the number of works affected).
- The authorization must provide internet users with ***a repertoire of works that is as wide as possible***.

Consequences:

- The individual exercise of copyright cannot effectively guarantee a license to exchange on a global scale. For the related rights, principally those of

producers, the answer is less clear, given the size of some stakeholders and their ability to negotiate with internet access providers.

- Two legal mechanisms can help to slowly expand the repertoire covered by an exchange authorization, mandatory collective administration and extended collective licensing. Their effect is to include in the collective management, authors who are not members of the company concerned, as well as foreign authors not represented by means of mutual representation agreements.
- The benefit of an opt-out mechanism for the authors included in a system of extended collective licensing, while it seems to provide more legitimacy to this model of collective management, it runs the risk of fragmenting the directory of works available in the license. It will require the implementation of measures to inform users of the works excluded from the license or filtering measures implemented by internet access providers. Compulsory collective management would provide greater security for the authors and artists.
- Geographically, the availability of a global directory managed by collecting societies is hampered by the absence of mutual representation agreements or mandates of representation for peer-to-peer exploitation, which constitutes an obstacle to the effectiveness and attractiveness of the proposed license. Only the extended collective licensing mechanism could allow an extension of the license to foreign authors, subject to the collecting society concerned being sufficiently representative in the domain.

- A **sectorial solution**, separating musical works, audiovisual and literature can be justified because of the particularity of the use of these types of works.

Consequences:

- The media chronology can justify the introduction of a grace period during which the film cannot be exchanged. This grace period may also be required by the other categories of works, especially with regard to digital books, to protect these emerging products.
 - The sectorial approach means that different licenses are proposed by category of works, or for certain types of works (e.g., movies and electronic books...) the right holders decide not to allow peer-to-peer exchanges to preserve the commercial exploitation of these works.
- But this sectorial solution has to be dealt with ***the demand of internet users and internet access providers***, acting as potential contractors for collecting societies, to obtain a license that is ***as comprehensive as possible*** covering all types of contents and with the same conditions of use.

Consequences:

- Collective societies representing the right holders of various sectors could work together to provide a "multi-license", eventually through different devices and at different rates depending on specific sectors and categories of right holders. The exclusion of whole categories of works may make the licence less attractive because of fragmentation.
 - A blanket license for the benefit of users of peer-to-peer should, in turn, ensure the permission of all copyright owners of a given content, this includes copyright and various related right holders. These right holders do not share the same interests and do not have the same approach as to legitimate non-commercial exchanges on peer-to-peer. They are also represented by different collecting societies (or even exercise individually their rights). A common approach is a prerequisite for the effectiveness of a global authorization but is also the main obstacle.
 - Differentiated solutions may be required for various right holders: mandatory collective management (or extended collective licensing, which has a similar effect) for holders of copyright and performers, and maintenance of individual management for the film and music producers (with possibly incentives to promote negotiation or collective management).
- ***The involvement of internet access providers***, which is usually presented as an essential component of any authorization model, contradicts to some extent the liability exemptions established by law, although the "exemptions" nevertheless include certain duties of intervention and collaboration (which may also evolve according to the European Commission).

Consequences:

- The involvement of internet access providers in the remuneration of authors whose works are made available through peer-to-peer, can however be based on an economic argument, and result from the value derived by the internet access providers of the broadband development of the internet. This value can be secured in a blanket licensing model in which the internet access providers would be considered as debtors of the compensation due to authors, or even through a direct tax on internet connections. In other models based on the collective management and the license granted voluntarily by the authors, the internet access providers intervention is based in principle on their own contractual choices and freedom.

- The imposition by the legislator of negotiations between internet access providers and collecting societies seems unusual but desirable provided that it justifies a special exception to the principle of contractual freedom it requires.
 - The involvement of internet access providers could also be explored as part of the licensing activities for the public communication of works they carry out directly (cable, VOD, etc.). These exchanges could then be considered as a secondary exploitation in relation to other forms of exploitation of contents by access providers, especially when the subscriber has multiple-play access. Preferential rates could be offered to internet access providers willing to enter into such license.
 - A model involving access providers, as simple intermediaries in a license agreement that would actually be concluded between copyright owners and end users, should also be explored. It requires that the negotiations be tripartite and include the collecting societies, end users or consumers and their representatives and access providers, with the support of government.
 - The involvement of internet access providers as either licensees for the benefit of their subscribers, or as simple intermediaries in the contract between their subscribers and right holders, could be compensated in the form of administrative fees collected by internet access providers on the agreed remuneration.
 - The cost of filtering measures incurred by internet access providers, needed either for compliance with the established media chronology or for the exercise of the right to opt-out in the extended collective licensing system, could possibly require that they share these costs.
- The exchanges allowed should be limited to *acts of non-commercial exchange of works between individuals*, including uploading and downloading, that is to say the right of reproduction and the right of communication to the public. Only acts of exchange *on Belgian territory* and by Belgian internet subscribers would be covered. Other limitations are likely to be claimed by the right holders, particularly with regard to the volume of exchanges permitted.
 - The establishment of a model that leaves *the choice to users* regarding the benefit of the ability to exchange works and performances by peer-to-peer is likely to satisfy consumers who do not generally engage in such sharing and do not want to bear the cost of these exchanges in the price of their internet connection.

Consequences:

- User choice does not exist in the legal license model.
 - It can however, easily be integrated into a contractual model that brings together right holders and users of works on peer-to-peer. In a licensing agreement model between right holders and internet access providers, this choice may also be offered to subscribers but it does make the model more complex. In both cases, management of these choices has administrative costs.
 - Strengthening specific legislative penalties for peer-to-peer exchange could also be justified for recalcitrant internet subscribers, those who refuse the benefit of the license but persist in exchanging protected contents without authorization, and those who go beyond the terms of the contract.
- ***Monitoring mechanisms of exchanges*** should be established to strengthen the legitimacy of the compensation distribution paid to the copyright owners whose works have likely been exchanged. Such mechanisms must be voluntary for users contributing to this monitoring and respect the protection of their privacy and personal data.

Based on these various constraints, a blanket license proposed by the collecting societies (assuming we exclude the path of non-voluntary license or legal license) could be proposed to users, through internet access providers. The main challenges are to obtain a consensus among various interested parties on the principle of authorization and a common license (even though sectorial differences may persist). Other challenges include the implication of internet access providers, both in their willingness to enter into a contract or acting as intermediaries and in their accepting of the technical and financial conditions, and of course, the legitimacy of the collecting society managing not just a national but a global repertoire.

The principle of the authorization model is that the exclusive right of authors is exercised by collective management, so legislative action is not necessary to legitimize peer-to-peer. However, the authorization process for non-commercial peer-to-peer would be facilitated by these legislative changes:

- Either the imposition of mandatory collective management (to force all beneficiaries, or at least the authors and performers, to collectively exercise their rights in this context) ;
- Or the imposition of a negotiating mandate for collecting societies and internet access providers, either direct or by establishing a committee bringing together the stakeholders (collective societies representing copyright holders and related rights, internet access providers, representatives of consumers);
- Or an intervention based on an extended collective licensing scheme in two stages :

- adoption of an extended collective licensing mechanism in copyright law authorizing non-commercial peer-to-peer exchanges;
 - and then, based on the representativeness of these agreements, extending the effects of this agreement to the right holders who are not members of collecting societies which signed the agreement.
- If necessary, the development of specific penalties for illegal exchanges carried out without authorization.