

Summary

Introduction

This report, which has been drafted at the request of the WODC on behalf of the Ministry of Justice, describes the laws and proposed legislation aiming to combat illegal file sharing. 'Illegal' file sharing is here defined as both downloading (copying) and uploading (offering) copyright-protected content without the required copyright owner's permission. The report covers developments in Germany, France and the United Kingdom.

The report first describes, in chapter 2, the laws on private copying exceptions, in order to determine if downloading is considered to be legal private copying in any of the countries included in this study. Chapter three gives an account of legislative proposals for combating illegal file sharing in France and the United Kingdom, and of the current legislation in Germany. A discussion of the general issues and concerns, followed by a comparison of the legal regimes described, is provided in the concluding chapter.

Chapter 2 – private copying

Dutch law allows a private copy to be made for the purposes of private practice, study, or other use, provided that the copy is made by a natural person without any (direct or indirect) intention to obtain financial gain. A copy made under this provision may not be communicated to the public. Copyright owners receive a remuneration that is paid from a levy on data carriers (recordable CD-ROMs or DVDs, memory cards).

The legislature has indicated that private copying is allowed irrespective of the legality of the source of the copy. The district court of The Hague has recently (2008) ruled, however, that downloading from an illegal source (i.e. one that is made available without the required permission of the copyright owner) might not be covered by the provision on private copying; an appeal against this decision is pending. It is also generally assumed that using file-sharing software based on the Torrent Protocol could be illegal, as such software simultaneously downloads and uploads content.

The European legislator has not taken a stance on the applicability of the private copying exception to copies made from an illegal source.

France

The French *Code Propriété Intellectuelle* (CPI) allows private copying for private purposes within the family circle. The courts have given a rather wide interpretation of that concept, and it includes friends. Remuneration for private copying is paid from levies on data carriers. The French courts have not yet taken a definite or uniform position on whether a legal source is required for making a private copy.

United Kingdom

The English Copyrights, Designs and Patents Act (CDPA) contains only a very limited exception for private copying under the heading of 'fair dealing for the purposes of research or private study'. This exception requires that the copy is made with a view to conducting research or some sort of private study. Copying music or movies is not covered by this provision.

Germany

German law provides for an exception for private copying if the copy is made by a natural person without the purpose of obtaining financial gain. The copy may be used by persons who have a personal relationship with the maker of the copy. Remuneration is paid from levies on data carriers. The *Urheberrechtsgesetz* explicitly provides that making a copy from an illegal source is excluded from the exception of private copying (see below).

Chapter 3

France

The French legislature initially considered legalising the downloading of copyrighted material through P2P networks. Lobbying efforts have resulted in a change of course, and the CPI now contains provisions that penalise illegal file sharing (when a file is uploaded illegally). Other penal provisions forbid the distribution of certain file-sharing software.

A recently adopted law seeks to address the issue of illegal file sharing by establishing an administrative authority (called Hadopi) that is to send warnings to internet users who participate in illegal file sharing. If the user continues his illegal activities after two warnings, the authority can order his internet connection to be cut off for a maximum of one year. The Conseil Constitutionnel has ruled that this sanction is unconstitutional. The Conseil argued that access to the internet is a fundamental right that can only be restricted by a decision of an independent court.

United Kingdom

Both uploading and downloading are generally not permitted in the United Kingdom. The government is currently working on proposals to combat illegal file sharing. A proposed approach to self-regulation (involving mainly ISPs and organisations of copyright owners) has been turned down by the parties involved on the grounds that not all ISPs could be forced to co-operate and that ISPs would be left uncertain as to the actions they would be required to take to address individual instances of illegal file sharing.

For these reasons, the government has now opted for a full regulatory approach that obliges ISPs to issue warnings to users who commit illegal file sharing. Continued violations will probably be punished by slowing down the user's internet connection.

A special procedure for 'serious repeat infringers' has been proposed. ISPs will be obliged to monitor the data traffic of such users and disclose these data, after they have been made anonymous, to copyright owners, who can then use the data to establish whether any of the users have violated their rights. A copyright owner who has suffered damage can seek redress from a civil court by the existing procedures, after he has obtained a judicial ruling to force the ISP to disclose the personal data of the user.

Germany

Germany is the only country included in this study where legislation against illegal file sharing is in force. This legislation is predominantly penal in nature and addresses both uploading and downloading content. Whoever copies a file that is evidently offered illegally (without the required permission of the copyright owner) cannot rely on the exception for private copying, and is thus criminally liable. However, as case law is currently lacking, the definition of 'evidently' remains uncertain.

Chapter 4

The research describes three categorically different legal approaches to combating illegal file sharing. The German approach operates mainly by means of criminal law. The French regime introduces a new administrative authority with specially designed sanctioning powers. The British suggestions, finally, amount to predominantly private law enforcement (to which end the disclosure of personal data by ISPs is simplified), combined with new warnings and sanctions to be executed by ISPs. The first two types characterise illegal file sharing as a social problem, which is exemplified by clear sanctions and close government involvement. In the British regime, illegal file sharing is considered to be more of a private dispute between users and copyright owners, which is to be solved by means of private law and remedies such as compensation for damages and injunctions.

Some issues emerge in all three countries. The following are particularly noteworthy:

- Data and data protection: the problem of so-called 'initial data' is particularly pressing: how should data that can initiate the enforcement of anti-file sharing laws, e.g. by demonstrating specific suspicions of illegal file-sharing activities, be obtained? None of the regimes described in this report seem to deal with this issue. The disclosure of data by ISPs for civil, criminal, or administrative enforcement does seem to be addressed.

- Technology dependency: file sharing involves uploading and downloading, but these acts do not necessarily coincide with legal concepts of communication to the public and reproduction. New file-sharing technologies might not involve acts that constitute a copyright infringement. Examples are streaming, which is used to view content without actually downloading (e.g. reproducing) the file completely, and the use of the Torrent Protocol, which involves sharing very small parts of files (which might not be protected by copyright at all). The use of these techniques is perhaps not covered by file-sharing regimes.
- Sanctions alone do not suffice: in all countries included in this research it is stressed that the problem of illegal file sharing cannot be solved by imposing sanctions alone. The entertainment industry is expected to contribute towards solving the problem by developing licensing schemes for online exploitation of music and movies that meets consumer demands.
- File sharing need not be illegal: any law should be able to distinguish between legal and illegal file sharing.
- Protecting the interests of the internet user: safeguards are required if sanctions are to be imposed by an ISP or administrative body. They are particularly important if the sanction includes the cutting off of the internet connection, since access to the internet can be viewed as essential to the fundamental right of access to information.

The report concludes by comparing the advantages and disadvantages of the three approaches discussed. They are compared using four parameters: 1. legal principles (especially legal certainty, safeguarding fundamental rights, privacy); 2. costs (expected efficiency and distribution of costs); 3. enforcement (how and by whom?); 4. sanctions (the type and aim, and the methods of warranting proportionality). The regimes can be given various scores on the parameters, and none of the three can be said to have the best results on all scores. The comparison could, however, serve as a guideline for developing a Dutch regulatory approach.