‘COPYRIGHT INFRINGEMENT THROUGH INTERNET’

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ABSTRACT

This dissertation is a review of intellectual property and its protection through internet. The internet is considered simultaneously both as a factor of evolution of intellectual property and also as a treat from which intellectual property should be protected by countries worldwide.


The chapter II refers to the Anti- Counterfeiting Tread Agreement (ACTA), the multinational agreement that has caused contradictive opinions over its purposes and its agreements negotiations. There is brief reference to the countries that have signed this Treaty and the European Union’s policy over this Treaty.

The chapter III: ‘The Infringement of Copyright Law through Internet’ is consisted by smaller chapters A. General, B. Peer to peer file sharing and C. Pirate Bay. There is a brief reference to the infringing methods through internet that aim to offense the rights of the authors. The ‘method of three steps’ is also analyzed as it is regarded as ‘acquis communautaire’ of European Union and in respect with the principle of proportionality is a legal tool for the characterization of the nature of the actions as legal or illegal. Moreover, the chapter refers to the Digital Rights Management that is included in the article 17 of WIPOs as technological means that prevent the copyright infringement. It also refers to the ‘peer to peer method’ as it is considered to be the most difficult detected method of copyright infringement. The old way of operation of the system is presented, which was based on the distribution of digital files through a central server. The operation thus has changed through the decades and there it is nowadays based on a more complex system of distribution
through several servers that act simultaneously as providers of digital files and as acceptors of the digital files. Number of cases has been judged in a global level. In the last section there is a reference to the most known piracy website that distributes online ‘works’ of authors without their permission through Torrent digital files.

The chapter IV includes some of the most known case law such as a. NAPSTER case, which was the first manufacture of software that was used to distribute digital files, b. ‘SONY CORPORATION OF AMERICA v. UNIVERSAL CITY STUDIOS INC’ case, another case in which manufactures of machines that are used to infringe intellectual property law were not convicted as the court ruled in respect with the principle of proportionality also the exception of the presentation of a ‘work’ for personal use. The case of ‘RIIA INC V VERIZON INC’, which is also analyzed in this chapter, reveals the discussion on the matter of protection of personal data that are opposed to the disclosure of the infringers and to the fight against online piracy and ‘SCARLET EXTENDED SA V SOCIETE BELGE DES AUTRES, COMPOSITEURS ET EDITEURS SCLR’ also provides a ruling in respect with the principle of proportionality.

The chapter V includes the conclusion of the dissertation about the efficiency of legislative acts that fight against online piracy in the light of the Trade Market.
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INTRODUCTION

The intellectual property law is a part of property law that is protected as a fundamental right in article 17 paragraph 2 of Charter of Fundamental Rights of the European Union. This dissertation is an effort to understand its framework and its applications in European Union and globally.

As the rights of the right-holders need to be protected by all kind of copyright infringement through internet, there is an effort to interpretate the basic rules that enshrined in European directives and to analyze their application. The intellectual property rights are in sometimes contrary to other fundamental rights as the freedom of communication and protection of personal data.

The dissertation focus on the infringement acts that are contrary to the intellectual property rights both moral and economic and the process of eliminating them.

The matter is whether it is infeasible to prevent all copyright infringement acts through Directives, national legislative acts and adopting measures that detect and prohibit these actions.

The dissertation focusing on the evolution and the application of the intellectual property law aims to conduct a systematic analysis on the matter of efficiency of the applicability of the protection of the intellectual property rights.
Chapter I: The evolution of the legal framework of intellectual property in the information society.

A. The legal basis of Intellectual Property Law and its evolution

The evolution of International Copyright law is based on a long effort that has been made during centuries.

In a global level the protection of intellectual property law is achieved by three ways by national laws, by bilateral agreements and by a multilateral agreement.¹

First, the Berne Convention was established in 1886 and came into force in 1887, which was a multilateral agreement by Victor Hugo and still remains a significant step on this field of law. ²

Afterwards, in 1994, the ‘TRIPS’ were negotiated and the minimum standards of protection of intellectual property rights were clarified. In 1996, the WIPO Internet Treaties evolves the Berne Convention and the Rome Convention and it refers to the intellectual rights in a digital level. The last stage was European Copyright harmonization through a number of directives.

In the European Union, Intellectual Property Law is regulated by the national law of the Member States. Although there is a differentiation of the legislation among Member States, the Union has achieved in a satisfactory level to harmonize the intellectual property law by Directives. In contrast with USA the Intellectual Property Law is based on the principle of protecting property and the right of personality.

As the technology has been developed incredibly fast, new ways of copyright infringement have been invented and the need for protection of intellectual property in a digital world has been emerged.

¹ Slides of Lesson by Professor Tatiana- Eleni Synodinou at IHU University, LLM 2012-2013
² Δίκαιο Πνευματικής Ιδιοκτησίας, Λ. Κοτσίρης, Εκδόσεις Σάκκουλα 2004, σελίδα 223
In European level, there are important Directives concerning intellectual property law:\(^1\)\(^3\):

- Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights related to copyright the field of intellectual property, replaced by Directive 2006/115 EC.
- Directive 96/9Ec on the legal protection of databases.
- Directive 93/83EEC OF 27 September 1993 on the coordination of certain rules concerning copyright applicable to satellite broadcasting and cable retransmission.

Nowadays, the Internet dominates in all aspects of human life, personal life, working life, entertaining life, and also in many sector as in industrial, political, science etc, and the intellectual property rights (rights of authors of songs, articles, books and generally the authors right holders, etc) and the neighboring rights (rights of persons who contribute to the birth of the work) have been more vulnerable than ever because of the wider distribution of the ‘works’ through internet.

In European level, the need for protection of intellectual property through Internet has been increased since all European countries have access to Internet and almost all European citizens access internet in a daily basis and this results to the fact that the free movement of information has conquered our world in such a level that protection of intellectual rights is absolutely essential.

\(^3\) Official Journal of Europeans Communities.

The Directive 2001/29 EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society harmonizes the national law of the Member States since it focuses on the promotion of internal market fair competition. It is based on the four freedoms of internal market (free movement of people, free movement of capital, free movement of services, and free movement of goods) and the principle of intellectual property law and freedom of expression and public interest.

This Directive aims to provide legal certainty and a high level of protection of intellectual property law by providing a severe system of protection and smothering the cultural and legal differences through Member States. It also promotes educational and administrative purposes by embodying exhausting list of exceptions for the reproduction and distribution of ‘works’ for these purposes.

The main rights that are embodying in this Directive are the exclusive right of reproduction (article 2), the right of communication to the public of work (article 3) and the distribution right of the right holder (article 4).

The authors have the exclusive rights in respect with their ‘works’. This includes both the moral and economic right over their work. In respect to their rights, there is a need for excluding third persons from accessing these works without the persimmon of the right holder.

In the information society this means that the users of the internet (3rd parties) should be restricted from accessing the ‘work’ that are uploaded by their right holders if they have no permission for accessing them by either subscribing to a database, or paying a fee as a fair compensation to the right holders.

This Directive has successfully accomplished the legalization of the rights of the authors in information society as regard to the right of communication their work to the public and the reproduction right as it provides an exhausting enumeration of

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4 EC Europea.eu, The EU single Market
the exceptions of reproduction and communication that are being applying in all Member States although the legal differences among their national laws.\(^6\)

Due to the difficulty of the purpose of this Direction and to the noticeable controversies among national substantive laws and the different culture of the Member States the adoption of this Directive took three years of constant preparation and renegotiation.\(^7\)

Article 2 provides that: “Member States shall provide for the exclusive right to authorize or prohibit direct or indirect temporary or permanent reproduction by any means and in any form, in whole or in part:

a. for authors, of their work;

b. for perfumers, of fixation of their performance;

c. for phonogram producers, of their phonograms;

d. for the producers of their first fixations of films, in respect of the original and copies of their films;

e. For broadcasting organizations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air including by cable or satellite. ”\(^8\)

In this article the basis of the intellectual property law is provided by giving the exclusive right of reproduction to the right holders (both authors and generally people who have contributed to the creation of the work or persons to whom the rights have been transferred).

Especially emphasis is give to the phrase “… by wire or over the air including by cable or satellite” because this states as a general phrase without specific nominazation of the means as there is not anticipation as to the technology means that will be used in the future.

Article 3 of D. 2001/29EC provides that:

“Right of communication to the public of works and right of making available to the public other subject matter.

1. Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including making available to the public of their works in such a way

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\(^6\) Proposal of Direction 2001/29 EC  
\(^7\) EC Europea.eu, The EU single Market  
\(^8\) Direction 2001/21 EC
that members of the public access them from a place and a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorize or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individual chosen by them:
   a. for perfumers, of fixation of their performance;
   b. for phonogram producers, of their phonograms;
   c. for the producers of their first fixation of films, of the original and copies of their films;
   d. for broadcasting organizations, of fixation of their broadcasts where these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.⁹

   This article includes all performances, first performance, re-performance, without nominating of their nature or the method of the performance as the right of communication to the public is just not exhausted by the first performance. The right holders have constantly the right to be compensated by any performance made of their works⁹.

   Article 4 of D. 2001/29EC Distribution Right provides that: “

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorize or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted not be exhausted within the Community in respect of the origin or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with his consent.¹⁰”

   In this article it becomes clear that the authors right does not been exhausted by the first distribution of their work but they have the exclusive right to every distribution of their work depending the will and their interests. The distribution through Internet is done by severe means such as through sites, sharing uploading,

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⁹ Direction 2001/29 ECC
¹⁰ Direction 2001/29 ECC
downloading, browsing, the simple performance of the work in the screen, the saving in the RAM or ROM of the computer and this leads to the outcome that authors have the exclusive right of distribution in every separate distribution act.

Article 5 of D. 2001/29EC Exceptions and limitations states that:

“1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right holders receive fair compensation;

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

(d) in respect of ephemeral recordings of works made by broadcasting organizations by means of their own facilities and for their own broadcasts; the
preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the right holders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and
provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organized by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) Use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorized act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal
exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.”

This article contains all the exceptions and limitations regarding the rights of the authors without special nomination of which are exceptions and which are limitations. The article’s title includes both exceptions and limitations in order to include all circumstances despite the legal differences through Member States.

Moreover, the process of many temporary performances of a ‘work’ that are necessary for the wider process of the full performance of the work constitutes an exception and it does not require a separate license and consent of the authors as there are necessary in the technical process of the performance of the full work.\(^\text{12}\)

The consent of the right holder in the limits of the reproduction right is necessary when the performance consists a full performance of the work that as a separate entity of work has an economic value. According to Professor Koumantos: «they do not consist special exploitation the uses that are connected in a process of unity entity, either as necessary preparatory acts or natural consequences, with the separate economical uses».\(^\text{13}\)

This use of temporary performance should both not have separate economic value (either it consists browsing or catching) and not convert and impede the legal use of technology.\(^\text{14}\) The lack economic value is an essential condition for the performance as to be regarded an exception.

The whole article imposes an exhausting enumeration of exceptions because of purposes of education (paragr.3 a), administration purposes (paragraph. 3o), artistic purposes (paragraph. 3 d, h, m), public policy etc.\(^\text{15}\)

\(^{11}\) Direction 2001/29 ECC

\(^{12}\) Πνευματική Ιδιοκτησία και νέες Τεχνολογίες , Σχέση χρήστη - δημιουργού, συγγραφέας Τατιάνα - Ελένη Συνοδινού, Εκδόσεις Σάκκουλα, σελίδα 25

\(^{13}\) Κουμάντος, οπ σελίδα 213.

\(^{14}\) Πνευματική Ιδιοκτησία και νέες Τεχνολογίες , Σχέση χρήστη - δημιουργού, συγγραφέας Τατιάνα - Ελένη Συνοδινού, Εκδόσεις Σάκκουλα, σελίδα 27

\(^{15}\) Πνευματική Ιδιοκτησία και Ιντερνέτ, Οδηγία 2001/29 ΕΕ Διονυσία Καλλινίκου, Εκδόσεις Σάκκουλας
All these exceptions are governed by the principle of proportionality and under the light of this principle it should be examined the purpose of the performance in regard with the damage that the author will suffer.  

The article 6 of this Directive imposes the obligation to the Member States to provide legal protection against the technology measures any technology means that aim to infringe the author’s rights. This includes measures against production, promotion, sale, rental of this kind of devices that aim to circumvent or have limited commercial use or are designed to facilitate circumvention. It also contains the basis of the establishment of the Digital Rights Management System (DRMs).

It also for the first time regards as an infringement any action of infringement with the condition that the person who commits it knows or has reasonable grounds to know the circumvention.

The article 7 states that Member States are obliged to impose legal measures against persons who have infringe intellectual property with the knowledge of the illegality of their acts.


The Directive 2004/48 /EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights aims to facilitate in the creation of a high standard of protection of intellectual property rights in the Community so as to promote the free movement of goods and to reassure the confidence in Internal Market and to promote investment, creation and innovation.

This purpose has been successful accomplished by the harmonization of the

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16 Proposal of Direction 2001/29 EC

17 ‘Evaluating directive 2001/29/EC in the light of the digital public domain’, International Conference on Public Domain in the Digital Age Louvain-La-Neuve, Belgium, June 30th and July 1st 2008 by Lucie Guibault ,Institute for Information Law, University of Amsterdam

18 Proposal of Direction 2004/48 EC
enforcement of the intellectual property rights and not the substantive rules of Member States. This is included in Article 1, which states the measures, the procedures and the remedies of the enforcement proceeding of industrial property proceedings.

The scope of the Directive 2004/48 EC includes the legislation of Member States that concern Directive on Computer Programs 91/250 and Directive 2001/29 EC articles 2-6 and 8. It does not concern the obligation of the Community and of Member States to International agreements such as TRIPS and the national substantive criminal laws regarding intellectual property (Article 2).

The article three of this Directive imposes the obligation of Member States to the commitment to the principals of fairness and equity as regard to the procedures and remedies of the enforcement of intellectual property. These measures should not be costly, unreasonable, and unnecessary and should provide in such as way that not create barriers among states.

The Article 4 of the directive provides the list of the persons who have legitimate interest of applying the measures. Firstly it includes the right holders; secondly the persons who have granted the right through licenses, thirdly the collective right management bodies and last but least the professional defense bodies.

In regard to the author’s right (artistic or literary) in order to be protected in absence of proof to the contrary, his name should be appeared in his work.

The article 6 imposes the Member State to take into regard the evidence of the infringement action and to take notice of the opposite part’s evidence too. Especially for commercial scale infringements Member States have the right to order any appropriate measures to conduct evidence through banks etc.

The article 7 of the directive imposes the obligation to Member States in order to safeguard intellectual property rights to take even temporary measures to protect the collective evidence of the part and to reexamine these measures after noticing the other part and examining its evidence respecting its right to be heard. Even the temporary measures should be fair as regard to the balance of fairness and
the damage that the right holders are suffering and the compensation that they deserve.

The article 8 of this directive is crucial as it gives to the Member States the right to order information about the identity of the person and the device which is infringing after legal demand of the right holder. This right and simultaneously obligation of the member states should be performed with respect to the Directive 95/46/EC on the protection of personal data. The data of the person who infringe in a commercial scale or who has in its possession infringing goods or uses the infringing services or who is providing such services or product, manufacture or distribute such devices can be revealed both in criminal and civil proceedings.

In regard to this article that is considered crucial as it allows the reveal of the personal data such as names, addresses, devices of the infringing parties, it should be noted that it contributes to the criminal penalty of those persons and to the fair compensation of the right holders in civil proceedings. Additionally, it should be noted that this allowance to access to the data of the users that infringe and to their devices should respect the European Data Direction and the national substantive legislation on Data Protection of the Member States.

The article 13 about the Damages states that Member shall ensure the full compensation of the right holders in respect to the infringement activity for the safeguard of the intellectual property rights and for the protection of the Internal Market.

The Directive 2004/48 /EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, contains a huge effort to harmonize the enforcement of intellectual property law despite the differences of the domestic substantive laws of Member States. It provides quick and effective administrative and civil procedures that are common to all Member States and concern all copyright infringement in a digital level as the free illegal downloading and other methods of infringement are commonly used in European Union.19

The article 8 of this Directive is crucial as it obliges the Member States to legislate as to the disclosure of the identification of the persons that infringe through
internet. This disclosure of the personal data of the users is contrary to the Directive of 95/46 EEC Data Protection Directive and Directive 2002/58 EEC (E-Privacy Directive), so there is a need for application of the principle of proportionality in each case.

As these two European Directives leave outside their scope the criminal perspective of the infringement there was an attempt by the Union to legislate a Directive concerning the criminal perspective of intellectual infringement. This attempt was unsuccessful as the Proposal was withdrawn in 2010.20

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20 Codification of European Copyright Law, Challenges and Perspectives, Editor Tatiana-Eleni Synodinou, by Ioannis Iglezakis, page 286
CHAPTER II: Anti-Counterfeiting Tread Agreement (ACTA)

In a global level the absence of criminal proceedings has emerged the need for a global legislation that will defend the intellectual property rights as the Piracy and illegal downloading have taken enormous dimensions. The works of authors are nowadays more accessible to the public through internet without their permission of the right holders.

The Anti-Counterfeiting Tread Agreement (ACTA) is an effort to uniform the law in a global level as internet is worldly accessible and the ‘works’ – intellectual rights are transmitted through from one cross of the world to the other at seconds. It contains both civil and criminal provisions and it also provides methods of figuring the subscribers that infringe the intellectual property rights through their devices.\(^{21}\)

The first countries which have initiated the proceeding for the creation of ACTA were Japan and USA as they thought it was the best way to impede the infringement of intellectual property rights through internet.

It was signed on 1\(^{st}\) October 2010 by Australia, Canada, New Zealand, Morocco, Singapore, South Korea and USA. It aims to create a harmonized global legal basis and establish the minimum starts of protection of intellectual property that will protect the intellectual property and safeguard the international global trade market.\(^{22}\) Once ratified, companies belonging to non-members may be forced to follow the ACTA requirements otherwise they will be not protected internationally.\(^{19}\)

The European Union and 22 Member States have signed the ACTA, but it would come into force after its ratification. The ACTA has caused many conflicting opinions as on the one hand there is the opinion by the huge commercial companies that there is a need for a global harmonization and on the other hand there is the opinion of the nongovernmental organizations that ACTA is not necessary to be adopted as it limits the human rights in a civil basis and violates the freedom of speech and communication, internet privacy, civil and digital rights.

Finally, on the 4\(^{th}\) July 2010 the European Union voted against the ACTA and many Member States have been opposite to it, as it has emerged many conflicts.

\(^{21}\) Codification of European Copyright Law, Challenges and Perspectives, Editor Tatiana-Eleni Synodinou by Ioannis Iglezakis, page 289.
\(^{22}\) Wikipedia, ACTA
between the public and the European Council, nongovernmental organizations and citizens.

It still remains the only multilateral agreement by mixed developed and emerged economies \(^{23}\) and aims to put the minimum standards of intellectual property rights and eliminate the infringement of these, which has nowadays taken seriously dimensions through the use of internet. \(^{24}\)

ACTA contains boarder measures, civil enforcement measures, criminal enforcement and internet distribution and information technology \(^{20}\). It does not affect the TRIPS Agreement and the WTO Agreement and only concerns Trade issues and not personal acts of citizens and will respect the freedom of speech and the Public Health. \(^{20}\) It targets both the users of internet that commit infringement and the devices they are used for this purpose.

The European Union has not yet adopted the ACTA but there is a chance that maybe in the future will adopt it as it is regarded controversial and as the use of Internet day by day becomes uncontrolled and the need for protection of intellectual property rights becomes imperative to the extent of the development of trade and to promotion of the creation of intellectual property works.

It has been criticized as it is regarded to have been negotiated behind closed doors and although its international nature it lacks transparency and this brings out thoughts and skepticism about its purpose and about its consequences.

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\(^{23}\) Wikipedia ACTA

\(^{24}\) The Anti-Counterfeiting Trade Agreement – Summary of Key Elements Under Discussion
Chapter III: Infringement of Copyright Law through Internet

A. GENERAL

Beginning with the infringement as an action in a law level, there should be an examination of which actions that produces which results should be considered as infringements of intellectual property rights.

According to the Directive 29/2001 EC, the exclusive right of both moral and economic to a ‘work’ is pertained to the author. Actions such as communication to the public and reproductions are only considered author’s right.

At this point, there is an exception of reproduction for private use only and there are other conditions that should be met in order for an act not to be considered as infringement, such as the source of the work which should be lawful and the action of reproduction which should not have economic purpose. The ‘test of three steps’ is used in order to facilitate the characterization of the legal nature of the action.

The method of three steps was established at article 9 of International Hague Convention and was therefore concluded at TRIPS and the International Organization of Intellectual Property. By that time, it has become part of the European ‘acquis communautaire’, so it is directly applied by national courts within the Union. It is regarded as an international clause for the legal characterization of an action regarding infringement. The article 5 paragraph 5 of Directive 2001/29 ECC also introduces the test of three steps for the restriction of the exceptions.

The following three criteria should be met also cumulatively in order for an act not to be considered as an act of infringement of intellectual property right and to achieve this test. The three criteria are: first the act should be a certain special case (this means it should be stated with clarity and should have a special purpose), second this act should not put into risk the right of exploitation of the author and third it should not cause unfair damage to the legal rights of the author.

25 Πνευματική Ιδιοκτησία και νέες Τεχνολογίες , Σχέση χρήστη - δημιουργού, συγγραφέας Τατιάνα - Ελένη Συνοδινού, Εκδόσεις Σάκκουλα, Σελίδες 47-50.
In this point it should be noted that any act causes damage to the author’s rights but here the crucial element is the unfairness of the damage that can only be regarded as unfair after a careful examination of the action with regard to the author’s right and the condition that are regarded as exception and limitation by Directive 2001/29 ECC. The test of three steps is not an easy way of detecting infringing actions as the purposes of the international laws vary. This examination should not only take notice of the economic perspective but a whole perspective of both economic damage of the author and the fundamental rights of the citizens such as freedom of speech and free information. The third step refers to the examination of the damage to the legal rights of the author. The world ‘legal’ which characterizes the right of the author refers only to those rights that have been legislated by national laws and not the rights under general principals of intellectual property law.  

The whole test including three steps should be examined according with the principle of proportionality as on the on hand there are the fundamental freedoms of the citizens and on the other the rights of the author both moral and economic.

In a technical basis, the actions that can violate the rights of the author can be numerous. The most common-known are illegal downloading, illegal uploading, file sharing, peer to peer file sharing, linking to sources on others websites, etc.

As internet has spread out and more and more citizens access internet the intellectual property in the forms of ‘works’ are running through internet and the access to them becomes easier as illegal acts allow the audience to access this work without the permission of the right-holders and infringing the exclusive right of the right holders.  

It is remarkable that the users of the internet do not consider their acts as illegal and this is too dangerous as it makes the intellectual rights more vulnerable to infringe. The knowledge of the illegality would make the users to take into account

26 Πνευματική Ιδιοκτησία και νέες Τεχνολογίες , Σχέση χρήστη - δημιουργού, συγγραφέας Τατιάνα - Ελένη Συνοδινού, Εκδόσεις Σάκκουλα., Σελίδες 57-59

the consequences of their actions and would surely eliminate the copyright infringement through internet.

The method of peer to peer downloading should be examined, as it is considered as a common method of infringement and there are numerous interesting case-laws in Europe and globally as it was first

Especially, reference should be made on the case of Pirate Bay, the most known webpage that its owners have been convicted by courts for copyright infringement.

Against copyright infringement lay the rights of the right holders who have been damaged both in a moral way and in an economic way. For the protection of their rights as technology develops and as more and more methods of infringement are invented, methods for withholding these illegal action are invented too.

In a global basis, but not globally accepted, such technological methods of detecting and preventing the illegal action which aim to infringe intellectual property rights have been invented and used.

The Digital Rights Management concerns the technological means that prevent the copyright infringement. These means concern the detection and the restriction of the infringement used by manufacturers of computer databases, producers, right holders etc. They have been used by well-known companies such as Microsoft, Apple, Sony etc. 28

Digital Rights Management has provoked different views over its use and pursues. Some claim that are necessary in order to detect and to circumvent the copyright infringement through internet and others that they do not have effectiveness as they cannot stop the infringement actions generally but only facilitate the big

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28 Διπλωματική Εργασία με Θέμα « Η πνευματική ιδιοκτησία στο ψηφιακό κόσμο», Μουμούζιας Εμμανουήλ, Πρόγραμμα Μεταπτυχιακών Σπουδών Εφαρμοσμένης Πληροφορικής ΤΕΙ Δυτικής Μακεδονίας, Πανεπιστήμιο Μακεδονίας, σελίδα 31.
companies and the right holders to gain more profit and to raise higher the competition.  

In 1998, the United States of America has legislated over the Digital Rights Management and criminalized the action of impeding these DRM methods. Until then, only article 17 of WIPOs included a provision for the necessity of the countries to facilitate the right holder in a practical way. The DRM are technical methods that are used in such a way that give the opportunity to the right holder to enable or disable the display of their work through Internet and to distribute their work to public by disable the illegal user to watch or hear their work through internet.

B. Peer to peer file sharing

Peer to peer is a network of computer that allows two or more computes to share their databases simultaneously. The use of this technique has been spread out through the world the last decades, as it is difficult to be detected. The copies of digital files have become a serious problem in the field of exploitation of intellectual property rights. The discussion on peer to peer system has been increased as the principle of freedom in civil basis, the free movement of goods and the right to information is struggling against the right of the right holders. The exception of private use need to be defined as it creates the basic argument in the field of copyright infringement through internet.

In this field it will be examined only the sharing of files and ‘works’ that are not permitted to be shared by their authors. Only the act of sharing of these files constitutes an illegal action and an infringement of intellectual property. According to the World Intellectual Property Organization the file sharing is a method that needs to have the approval and the permission of the right holders or else it is illegal and it is forbidden.

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31 Wikipedia, peer to peer.
32 Πνευματική Ιδιοκτησία και νέες Τεχνολογίες , Σχέση χρήση - δημιουργού, συγγραφέας Τατιάνα - Ελένη Συνοδινού, Εκδόσεις Σάκκουλα., Σελίδες 260,270
As far as the technology of this method, it should be noted that it is based on the development of a network of nodes where all connecting computers act as clients and servers of resources at the same time, asking from each other some files and receiving access to these files. The peer to peer operates with a number of peer nodes that simultaneously act as providers and receivers of digital files. The servers do not have the same characteristics in regard to their speed of access in internet or their file storage memory but this does not affect their collaboration. Each step of the proceeding of peer to peer whether it is the upload of the file or the download or the opening of the file is illegal and each step needs permission as it is considered as a communication of the ‘work’.

In previous years, there were some central servers and the research of the wanted files was done through this central servers but nowadays, there is no central server as it is not needed any more and the several connected servers are structured in such a way that have direct connection to each other and operate as both receivers of the demands and appliers of the digital files.

As the downloading of a file means simultaneously the sharing of this file to the network of the connected computers it is consider as an illegal act that constitutes distribution of the file.

The simultaneously sharing of the file as the process of downloading is not yet finished is done without the will of the user as it is an automatically process. In this case there is an opinion that this does not constitute contribution of the file so it legal. On the other hand there is the opinion that it is an illegal action as it distributes the file irrespective of the will of the user for the distribution.

In early 1999 Shawn Fanning with his friends illustrated his idea of accessing songs in internet in form of MP3 and created the first network of peer to peer. Then the most known system of peer to peer file sharing is the Napster was created. Napster is considered the first peer to peer case and was convicted for infringement after the proceedings that R.I.A.A. an American Union of Recording Company

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33 Πνευματική Ιδιοκτησία και νέες Τεχνολογίες, Σχέση χρήση - δημιουργού, συγγραφέας Τατιάνα - Ελένη Συνοδινού, Εκδόσεις Σάκκουλα, Σελίδα 273 & Bernault C., Loi du 1eraout 2006 et peer to peer : le pire est il derriere nous, Page 128
initiated. The court’s decision based on the contributory and vicarious infringement and the special knowledge that the company had over this illegal action.

Nowadays millions of computers share their file with the help of internet. These files can be either games or documents or music or software or any other file. It is used widely as most of the times is free without any registration fee or with a small fee that most of the times is paid by the operators of the systems who transfer the cost to the users of the system and gives access to a huge number of digital files without big cost and without time limitations as it operates as an online service and it eliminates time and distance. The majority of the internet users have the thought that it is a need of society to access though internet the digital files without demanding the permission of the authors as the right of freedom of communication and the access to information has put into dangerous the principles of the intellectual property rights.\(^\text{34}\)

As in the previous chapters the right of communication to the public has been analyzed, the communication and the distribution of any intellectual property right is illegal without the permission of the author except for the purposes of public security, or private use that constitutes the exceptions and are therefore listed in the article of exception and limitations in article 5 of Directive 2001/29 ECC. The acts of file-sharing are acts of distribution to the public and acts of uploading or downloading for this purpose are illegal too. The act of peer to peer can be legal if it has legitimate purpose. The European direction 2001/29 EC reserves the separation of the digital and analogical files as in the digital world if the right holders do not impose technological measures of protection on their work they will be protected only through the equitable remuneration.\(^\text{35}\) The right holders who use DRM can stop the access to their work when a server request to access it or distribute their work as another form of exploitation of their work (article 6 paragraph 2 Direction 2001/29

\(^{34}\) Internet file sharing and the Liability for intermediaries for Copyright Infringement A need for international Consensus, 2003 , The journal of Information Law and Technology

\(^{35}\) Πνευματική Ιδιοκτησία και νέες Τεχνολογίες , Σχέση χρήστη - δημιουργού, συγγραφέας Τατιάνα - Ελένη Συνοδινού, Εκδόσεις Σάκκουλα., Σελίδα 264, 265
ECC). In this last case when DRM are used, the performance of the work has a contractual legal nature as it allows access to the digital file only with fair compensation of the right holders.\textsuperscript{30}

Napster was a first generation peer to peer system as it operated with a central computer that distributed the information that were requested. After that, second generation of peer to peer systems was appeared as there was no central server and the computers were connecting to each other directly. The third generation of peer to peer system (darknets) is an advanced method which protects the data of the users.

The system has been developed as nowadays there is no need for a central server which had to accept the request, store and distribute the files. The system works with as many computers that act both as providers and as receivers of the files. The servers receive the request of the other connected servers and each searches its database and then distributes the file through the connected servers.

The economic impact of the distribution of intellectual property rights through the system of peer to peer is huge for the big recording companies. The opinions are also controversial in the music industry as on the one hand the system advertises the songs and distributes the songs making them available and known to the public and on the other hand it causes economic damages to the right holders as it distributes the works without the payment of the legal compensation. The consequences of peer to peer distribution on music have become visible as the appearance of CDs has been reduced as the songs are illegally distributed through internet with the program of peer to peer.

The film production companies have been also vulnerable to the peer to peer system. According to a public research of International Chamber of Commerce the film producers companies have been suffered billions of dollars damages.\textsuperscript{36}

The majority of the users of the internet have been using the system without knowing that it is an illegal act as they have no permission by the right holders. In 2004, about 70 millions of people in USA had used peer to peer system and in

\textsuperscript{36}Wikipedia, peer to peer
Europe 20 percent of users of internet had used the system in order to access to song libraries.\(^{37}\)

The reveal of the personal data of the users of the system has become more frequent nowadays and as the Directive 2004 / 48EC obligate the Member States to reveal the data of the users who infringe intellectual property both personal names, addresses, IP sources etc.

A lot of cases have played important role such as ‘Kazaa Media Desktop’, ‘Morpheus’ and others that have been not been convicting for the companies. After these cases the courts have been opposed not only to the companies that produce these techniques, but also to the users that acquire these files. Numerous problems have been arisen in this point as the discovery of the users is made through collection of data. This collection of data is contrary to the protection of private data and the freedom of telecommunications.

The peer to peer system has lead to proceedings against both persons who produce, distributes this software and the users who uses it in order to access digital files.

C. The Pirate Bay

The Pirate Bay is a website that uses the method of peer to peer file sharing in order to give access to other users of files. This website has no legal permission by the authors of the digital files to do so and for this reason it is considered as an infringement of copyright law.

In November 2001 a Swedish anti-copyright organization which was accused several times for distribution of digital files without permission of their authors. In 2007 the managers of the website were convicted for assistance of copyright infringement. The Swedish Court in 2009 convicted the managers of the Pirate bay to one year prison and a fine of 3.100,000Euro. The Court of Appeal has increased the fine but reduced the penalty on 26 November 2010. The website was closed but after a while it was again available to the users.\(^{38}\)

\(^{37}\) Wikipedia, peer to peer
\(^{38}\) Wikipedia
It has a very interesting history as it was established as an anti-copyright organization and it is nowadays by far the most well known website for illegal downloading.

The Pirate bay informed its users for the torrent ‘files’ in this meaning it is included songs, movies, software, games etc, that were at that time available by other connected users. The Pirate Bay used the Bit Torrent Protocol to share files from 1\textsuperscript{ST} July 2007 until 31\textsuperscript{st} May 2006. It was a trial with both civil and criminal aspect.

The owners of Pirate Bay found guilty for the operation and distribution of software that contributed all kinds of torrent files such as music, games, videos and computer software. The website offered the opportunity to its users to access all kind of available files and thus conducted distribution of the ‘work’ to the public. Due to the fact that there had not the permission from the right holders they were committed an intellectual property infringement.\(^{39}\)

Especially the court found out that the website was operating by the uploading of the digital files from its own users and simultaneously the downloading, saving to a computer memory. Furthermore, the District Court of Sweden found out that the Pirate Bay had done preparatory actions for saving the torrent files and prepare to distribute it to the general public through databases.

The plaintiffs were six Swedish records companies, two Nordics and six American film producer companies, who demanded expected for the condemnation of the Pirate Bay also full compensation for their loses from copyright infringement that the defendant had done. This allegation was judged by civil Courts.

The Court in the following verdict that the website was guilty of complicity in Breach of Copyright Law as the plaintiffs have suffered losses from the distribution of their ‘work’ and their rights were utilized without their consent.

The Pirate Bay website was shut down in many countries but in some it still operates as it uses different URLs\(^{40}\).

\(^{39}\) Case B 13301-06 Pirate Bay
\(^{40}\) Wikipedia
Chapter IV: Application of the Intellectual Property Law

In this chapter there will be a reference to some of the most important case law that has influenced the route of intellectual property law and its infringement through internet.

Especially emphasis will be given to the principle of proportionality that sets out the boundaries for the distinction of freedom of communications and data protection under European law and Greek law on the one hand and on the other of the need for protection of the authors’ exclusive rights.

A. NAPSTER CASE.

The Napster was a company that gave their subscribed users the opportunity to search any song they wanted in a MP3 form through the database of other users that were also subscribed and to create a unique collection of songs in their own database. The use of this method was extremely widden that the company could no longer checked if its users (both searching users and downloading users) were legal holders of the authentic CD.

In 1999 R.I.A.A. initiated proceedings against NAPSTER alleging that the second one was disturbing a kind of software through which digitals files were distributed with the help of search catalogue. The First Instance Court and the Court of Appeal convicted Napster for contributory and vicarious infringement. The catalogue was use in order to connect the software and distributed the digital files without the permission of the authors, who suffered loses opposite to the Napster who gained money from the infringement. The principle of proportionality was applied as the need of protection of intellectual property right was contrary to the freedom of The convicting evidence was the control of the devices that were distributed the files without their consent.

41 A& M Records, IncvNapster Inc 114FSupp.2d896
42 A& M Records, IncvNapster Inc 239FSupp.3d1004
43 Πνευματική Ιδιοκτησία και νέες Τεχνολογίες , Σχέση χρήστη - δημιουργού, συγγραφέας Τατιάνα - Ελένη Συνοδινού, Εκδόσεις Σάκκουλα., Σελίδα 275
B. ‘SONY CORPORATION OF AMERICA v. UNIVERSAL CITY STUDIOS INC’ CASE

In this case which is also known as the BETAMAX case, the Sony Corporation Of America which invented, manufactured and distributed a videocassettes records that had many uses one of which was taping of television programs with result to the fact that people could watch these programs not only when the TV shows them but also whenever they wanted after they had taped them.

The Universal City Studios and Disney as right holders of lots of these films argued that this was an illegal act which constituted copyright infringement as it allows reproduction of the films without the permission of them. In addition they claimed that this action caused to them loses of several dollars. They also alleged that the video –cassette recorder reproduced and distributed their films.

The Supreme Court did not convict Sony Corporation as it ruled that the taping of the films by the viewers while they were presented on TV was not illegal because this action did not request the special allowance of the right holders and it is considered as a fair act.

Additionally, the Court ruled that the reproduction of the taped films was legal according to the principle of fair use as it does not distribute them to the general public but it is reproduced for personal use.  

After these cases, the Courts of USA in several following cases have been convicted to the providers or manufactures of machines that could possibly distribute the works to the general public as the ‘purpose’ and the ‘inducement’ of them, that helped the illegal distribution became crucial element of the judicial proceedings and was examine in each case very carefully.

Many States have been condemning the copyright infringement also by condemning the users of those machines when they commit illegal acts that infringe intellectual property. In these circumstances there is an effort to detect the devices and by that detection there is a disclosure of the users themselves who have committed through the devices the infringement. In this matter there is a dispute over

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the right of the right holders to access the personal data of the infringers and the protection of the personal data of the users of the Internet that infringe the intellectual property.

C. ‘RIIA INC V VERIZON INC’ CASE

This case also known as the VERIZON case concerns the matter of accessing the personal Data of the users that were infringing intellectual property law through websites conducted transmission of recordings without the permission of the right holders.

The RIIA Inc initiated proceedings against the Verizon Inc which was a big internet provider company in USA because through this access their clients were infringing several intellectual property rights.

The Courts of First Instance accepted the allegation of RIIA Inc and order the rendition of the IP addresses which are considered to be personal data as they lead to the personal data of the users. The IPs are considered personal Data and are protected as those according to the Law of Protection of DATA. The Court after the request of the plaintiffs ordered the disclosure of the IPs as the clients of the defendants act numerous of illegal acts which infringe intellectual property of the RIIA Inc.

The defendants appealed the decision and the Federal Court changed the First Instance Court decision as it claimed that IPs are personal data and due to their nature they need to be protected by Law as the infringement actions of the users of the internet has not been connected with the infringement acts as the defendants provided internet connections but they do not store the infringing files to their servers.

The similar cases that have been not accepted the disclosure of the IPs to the collective management of intellectual property organizations are ‘Promusicae Inc V Telefonica Inc’, ‘Personal Information and Electronic Documents Act Case’.  

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45 RIAA, INC V Verizon INC351 F. 3d 1229
46 Westlaw
D. ‘Scarlet Extended SA v Societe des autres, compositeurs et editeurs SCRL (SABAM)’ Case

This case refers to a preliminary ruling that the President of Tribunal du premiere instance of Brussels asked to the European Court of Justice. The plaintiff Sabam SA, which was a management company representing authors such as composers, editors, initiated proceedings against Scarlet SA, which was an internet service provider (intermediate), before the Court of Brussels.

The Scarlet’s clients access ‘works’ through peer to peer system which were illegally downloading online. The rights of the authors, which were represented by Sabam SA, were infringed and Sabam SA demanded by the Court of Brussels to order the Scarlet SA to stop this infringement and to stop the access to these works without the permission of the right holders through the permanent use of filters according to the Directives of EU that protect the intellectual property rights. The Court accept the claims of the plaintiff and order Scarlet to control the access of its clients permanent through the use of technical filters in order to stop the infringement as an intermediary.

Scarlet SA appealed the decision as it claimed the permanent use of the technical filters causes several problems concerning the cost, the network capacity and the impact on the internet. The Court asked for a preliminary ruling and the Court of Justice took in account the Directives 2001/29, 2000/31, 2004/48, 95/46 and 2002/58. After decided that there was surely infringement of copyright law, by illegal downloading the Court ruled in the light of proportionality of the rights of the authors that are protected in the 17th Article paragraph 2 of Charter of Fundamental Rights and the Article 1 and 2 of the Direction 2001/29 EC and the freedom of conduct business by operators (Article 16 of Charter of Fundamental Rights). The Court took in account the article 15 of Directive 2001/31 that forbids the Member States to impose permanent measures of general monitor of the information that is transmitted on network, and article 3 of Direction 48/2004 EC that imposes the national measures that intermediates are imposed to take to be fair, proportionate and not extreme costly.

47 Court of Justice, Curia, Case -70/10
The court of Justice ruled that the permanent use of technical filters has as a result permanent huge cost for the intermediate Scarlet SA and this leads to unfair obligation of the last one.

Moreover, it stated that the protection of intellectual property rights are in these circumstances infringing the freedom of communication, because not all costumers of Scarlet SA were infringing and not all ‘works’ were illegal to be downloading as in some countries its use could possibly be public, and the protection of personal data, because the collection of information of Scarlet clients are personal data that are protected by article8 and 11 of Charter of Fundamental Rights.
CHAPTER V: Conclusion

In conclusion, the Intellectual Property Law and especially Intellectual Property Law in the field of Internet needs collaboration of the countries across world as through internet users have access simultaneously to a worldwide range of ‘works’ from different countries. 48

The access to Internet in the last decades and especially nowadays have met such growth that the need for protection of the ‘works’ is a very demanding process that will never stop and will constantly evolve as new methods of infringement will appear in the future.

The protection of the right holders rights is the only way of protection this field of property law as any infringement of them effect both the moral and the economic right of the authors.

The European Union as the freedom of exchanging goods and the principle of the protection of the property and the protection of the intellectual property obligates it has legislate numerous Directions in order to facilitate to the development of the artistic and intellectual field and to the united Trade Market.

In a global level, there are also important multilateral Treaties that aim to the protection of the intellectual property right as internet has taken global extensions and the copyright infringement is easier than ever as almost all ‘works’ are available to the users through websites or Torrent files, or downloading etc.

The effort of elimination of the copyright infringement is an evolving and a difficult process. Both the users of the internet who infringe intellectual property right and the manufactures of the infringing machine have been convicted by several courts. The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society and the Directive 2004/48 /EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights have legislated over the matter of copyright infringement through internet as they have specialized the right of the authors, they have nominated the act of the infringement (the exclusive right of reproduction (article 2), the right of

48 Δίκαιο Πνευματικής Ιδιοκτησίας, Λ. Κοτσίρης, Εκδόσεις Σάκκουλα 2004
communication to the public of work (article 3), the distribution right of the right holder (article 4) and categorized all the possible exceptions from these action for special causes ( administrative issues, education purposes etc).

The matter over the Personal Data Protection is a controversial matter over the world and European Union as the freedoms of communication and the reproduction for personal use are opposed to the rights of the authors.

The Directive 2004/48 /EC has reinforced the protection of the right holders as it focuses on the proceedings on the access of the information of the users that infringe the author’s right concerning commercial matters through intermediaries, lower the cost of judicial proceedings and rationalize their time and also condemn web pages who have saved personal data of users.

The effort of European Union has been successful until now but as the cases show the condemnation of the Pirate Bay has not been able to stop its operation as after it has been blocked in several countries it still finds way to exist and re operate as it uses different URLs.

Among the offensive acts of infringement the most extensive and more difficult to be detected is the peer to peer method as it has been analyzed above and several court’s decision have been delivered globally. After contemning the manufactures of machines and the owners of the websites through which the copyright infringement was done, the individual users have been targeted and a numerous cases have been judged with controversial judgments.

The E-Commerce Directive has also helped to the development of safety in the internet basis and to harmonization of rules on the commercial communications. It has contributed to the measures against infringers as it provides the method of takedown of websites and notification of the infringers.

The global Market struggles for efficient protection of the intellectual property rights as due to them the artistic work and scientific works are promoted. This fight against copyright infringement will be continued in the future.
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