FUNDACJA nowoczesna Polska

Warsaw, October 12th, 2016

Legalize non-commercial sharing
Proposal of the Modern Poland Foundation

Dr. Krzysztof Siewicz, legal counsel

Peer-to-peer non-commercial file sharing has always been present on the internet. And we do not limit our understanding of p2p to BitTorrent protocol exclusively. By p2p we mean communication between internet users without intermediaries that affect or control this communication in a material way. We believe that p2p is an important and necessary counterbalance to trends that may lead to the centralization of network communication, which essentially threaten the open internet. By centralization we mean in particular the emergence of exclusively controlled services ("platforms") that intermediate a material part of user communication. Such intermediaries exercise potential or even actual control over information exchanged by users. If (or when) no alternative to such "platforms" exists, the open internet will be at risk.

Unfortunately, the current copyright framework supports the emergence of information monopolies, and discriminating against p2p, it increases the above mentioned risk. Below, we discuss three examples of this relationship.

Firstly, the current copyright liability regime provides a **censorship mechanism** to private hands, practically without any independent control. Copyright is so broad it can easily apply to political and critical speech, unauthorized, fan-made derivatives, found footage, remix, etc. As a result copyright can be used as means to remove valuable communications which cannot be formulated without building upon the work of others. Formally, such censorship can be applied regardless of the model of communications, be it p2p or through centralized "platforms". But it is more technically cumbersome for p2p, while it has become quite easy to do on "platforms" using the so-called "safe harbor" mechanism. Technically, "safe harbor" allows "platforms" to avoid legal liability provided they swiftly remove data of which copyright is disputed. It is theoretically possible for users to request that their data is reinstated as it could fall under fair use or other defenses. Practically, they do not, mostly due to lack of necessary resources. At the end of the day, users are left with their data removed and with a threat of legal liability for their alleged infringement. Also, they cannot easily turn to other "platforms" or p2p for reasons such as network effects. And even if they did, they would still be subject to legal risk.

Secondly, there is a visible trend of **revenue sharing** between intermediaries that operate "platforms" and "right owners" (authors, but also intermediaries of kind such as publishers or collecting societies). The reason why a share is paid is mostly the "right owner's" claim of copyright infringement on the side

ul. Marszałkowska 84/92 lok. 125
00-514 Warszawa
tel./fax: +48 22 621 30 17
e-mail: fundacja@nowoczesnapolska.org.pl
www.nowoczesnapolska.org.pl

of the user who uploaded the data. Certainly, this revenue sharing reinforces protection of "platforms" against liability but there is no information that such arrangements remove liability from users (at least contractually). Additionally right owners can still resort at will to the censorship mechanism described in the first point. In such a way money is shared between "platforms" and established or even incumbent publishers/producers while users (who are authors as well) are left with liability risk, censorship risk, and little chances to participate in the revenue obtained with the help of their data. Needless to say, oficially there is no authors' remuneration scheme involved when it comes to p2p sharing, as even private copying levies distribution rules are based on traditional media statistics, not p2p popularity. This strongly biases the money flow towards authors and producers who already benefit from the traditional model, as further explained by Phillipe Aigrain in *Sharing*.

Thirdly, there is a prospering "business model" that has evolved as a direct consequence of the flawed copyright scope and sanctions system. (Alleged) copyright infringements of individual users are easily monetized by so-called **copyright trolls** who send mass "cease and desist" letters offering to abandon legal actions in exchange for a payment. The letters are often addressed to users who could not be easily found to infringe copyright by a judge, but going to court is not a part of copyright trolling business model. At its core lies the fact that a certain percent of users who receive such letters pay regardless of the validity of claims. The reasons are mostly copyright broad scope and shortage of user's necessary resources. We have procured a report on copyright trolling in Poland which contains a cautious evaluation that a revenue from one such a mass dispatch of letters can result in few dozen thousand to a few million Polish zloty (1 USD = approx. 4 PLN). Addressees of such letters can be easily found by looking at seeders lists on p2p networks, as well as by obtaining "platform" user data, which can be done using copyright provisions that mandate network and service providers to make available subscriber and user data in proceeding involving copyright infringement.

The three examples described above contain different degrees of the following three main problems caused by the current copyright regime: (1) private, uncontrolled censorship, (2) discriminatory revenue sharing scheme, (3) liability risk. These problems can be properly addressed only by removing the threat of copyright infringement claims from users who engage in communications over internet. At least two important questions arise in the search of a specific implementation of this solution.

First, whether the legalization should cover users of "platforms" or only p2p? We, at the Modern Poland Foundation believe that it is sufficient if the solution is limited to p2p understood as communications without an intermediary who can affect or control this communications. Our main argument for this is that the discussed problems are intertwined "by design" in the model of communications via exclusively

ul. Marszałkowska 84/92 lok. 125
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controlled nodes ("platforms"). Certainly, we find it necessary to repair the flawed copyright safe harbor, preferably following the Canadian notice and notice approach, but this will not address all these problems sufficiently. In our opinion, it can be done only by stimulating operation of a decentralized communications model. **So, we purposefully limit the below proposal to situations where user is an administrator of a computer used to share files in the sense this term is usually referred to in IT (i.e., no other person, apart from the user can exercise full control over that files are shared). If a third party, such as software developer of service provider can influence the sharing process, it makes the solution proposed here inapplicable. For the avoidance of doubt, the mere fact that the computer is not in user's possession does not exclude a possibility that the user can be an administrator of that computer.**

Second, whether the legalization should cover all types of communications, or should it be limited to non-commercial communications only? At the Modern Poland Foundation **we believe that it is sufficient to limit the legalization to non-commercial sharing**. Certainly, we also believe that commercial uses should be regulated somehow, but providing for this alone does not remove the identified problems (as clearly shown by the above example of revenue sharing between "platforms" and copyright owners). The pivotal issue is to create a space of legal safety for individual internet users, not to give authors share in revenues of commercial, institutional users. The latter is paving its way, while there is no guarantee that the former will happen without eroding user freedoms. Having said that, we find it necessary to precisely define the term "non-commercial" in order to exclude situations where various intermediaries obtain revenues by taking part in p2p sharing.

Therefore, a short answer to the above two questions is that **the solution proposed here covers such a method of internet communications (uploading and downloading files) where, apart from the users sharing the files using computers administered by them, no other person can be attributed with copyright infringement and at the same time no one (including the users) can be reasonably considered as benefiting from the sharing otherwise than by obtaining the copyrighted work**. We propose to legalize p2p sharing defined in such a way.

The proposed solution has to take into consideration that currently using p2p is a copyright infringement, at least when it involves uploading without a license third party copyrighted files so that they are publicly available for download (whether downloading is illegal usually depends on jurisdiction). It is usually illegal regardless of a commercial or non-commercial nature of the sharing involved. So, we have procured an analysis of possible options for legalization of non-commercial file sharing under current international and EU copyright regime (in particular the Berne Convention as well as INFOSOC and collecting societies directives). In a nutshell, the result is a proposal to (1) cover non-

ul. Marszałkowska 84/92 lok. 125
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commercial downloading from peer nodes by a **private copying limitation of exclusive rights** and to (2) accompany it with **a general license** to non-commercially upload to such nodes against some form of remuneration for authors.

Private copying is recognized in all international and EU instruments mentioned above and it already covers downloading in some jurisdictions, while it is generally accepted that it covers activities such as video recording or photocopying for private purposes without exceeding the three-step test of Berne and INFOSOC (i.e. the test requiring that limitations are only in certain special cases, do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author).

Conversely, according to our analysis, it would not be possible to cover the uploading part of non-commercial p2p sharing by a copyright limitation as this would rather not remain within the three-step test. Hence, a proposal of a general license. Such a license would be granted automatically by collecting societies (within an extended collective management scheme), possibly linked to an internet access fee or an audiovisual levy. Extended collective licensing is a widely accepted solution in cases where individual management of rights is cumbersome and there exist a collecting society system that provides adequate safeguards for authors and users. It is also generally accepted that in such cases it does not constitute a limitation of authors' rights contrary to Berne or EU acquis.

The collection of money according to our proposal is not just necessary to satisfy legal requirements. We believe that it is also an important element of a mechanism that would empower individual users in order to counteract the trends of network centralization briefly described above, which strongly contribute to the long tail phenomenon. In order to succeed in this regard, the collected money would have to be distributed among authors based on statistical records of the use of their works in the non-commercial file sharing, using the mechanism described by Philippe Aigrain in *Sharing*.

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