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Unauthorised file sharing

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Publication date

2012

Document Version

Proof

Published in

Cyber safety: an introduction

License

Other

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Citation for published version (APA):

Poort, J., & Rutten, P. (2012). Unauthorised file sharing. In R. Leukfeldt, & W. Stol (Eds.), *Cyber safety: an introduction* (pp. 143-155). Eleven international publishing.

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10 Unauthorised File Sharing⁴³

Joost Poort & Paul Rutten

10.1 Introduction

This chapter deals with a fascinating, and for some disturbing, phenomenon in the domain of the media and entertainment industries: unauthorised file sharing, in some cases also referred to as piracy. The latter term, however, was originally used to refer to the organised production of a counterfeit product, i.e. illegal physical copies of games and DVDs (or Gucci bags and Rolex watches). On the internet, it is confined to those who practise file sharing with a straightforward criminal intent driven by commercial motives. This chapter deals exclusively with unauthorised file sharing by individual citizens. With the advent of broadband digital networks following up on the introduction of the internet, people have shown a great interest in acquiring digital content, in order to get to know it or to store their favourite works on their digital devices for immediate access. At first file sharing primarily related to music, later also to films, games and, since recently, books. Digital technology in the hands of citizens proved a powerful tool for sharing creative works online and get the better of rights holders, not asking for authorisation, giving consumers free access to a *mere à boire* of entertainment products. Although the unauthorised *distribution* of copyrighted works is a violation of copyright law, file sharing has proven to be an obstinate phenomenon. Media and entertainment companies have vigorously attempted to stop the unauthorised sharing of files on legal grounds, evoking copyright law in particular, with very limited success.

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This chapter introduces the subject of file sharing, discussing its specific nature and its relevant legal and regulatory context as well as recent policy developments in Europe. Based on an extensive survey among Dutch citizens it provides insight into the specific behaviour and motivations of file sharers and assesses the consequences of these for the actual sales of entertainment products. Before concluding, it presents a short review of the opinions of authors and performers on rights protection and file sharing based on research conducted among creators of digital content.

⁴³ This chapter is largely based on Huygen et al. (2009) and Van Eijk, Poort & Rutten (2010).

10.2 Legal and regulatory context

File sharing is the catchall term for uploading and downloading, and encompasses a range of technologies. The most popular forms are peer-to-peer (or P2P) file sharing networks such as Bittorrent, cyberlockers, and file hosting services. In *P2P file sharing*, users install software that connects to a peer-to-peer network to search for shared files on the computers of other users (i.e. peers) connected to the network. Files of interest can then be downloaded directly from other users on the network. Typically, large files are broken down into smaller chunks, which may be obtained from multiple peers and then reassembled by the downloader. By default, a peer who is downloading a file simultaneously uploads the chunks that he or she already has to other peers.⁴⁶ This ensures fast proliferation and wide availability of content. Hence, P2P networks contain no central database or servers on which copyright protected material is stored. *File hosting services* such as Usenet do have such servers from which material can be downloaded, even though these form a distributed network without a central server or dedicated administrator. *Cyberlockers* are websites that provide password protected online storage capacity. Cyberlockers can be used to store copyrighted content, which can subsequently be downloaded by anyone who has the required password.

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The regulatory context of file sharing in most European countries is based on traditional copyright related concepts, but increasingly is an issue that is attracting national and international attention. File sharing logically breaks down into downloading and uploading, with the latter particularly relevant in terms of the law since any online offering of copyrighted content generally is not permitted without the prior consent of the rights holder. By contrast, *downloading* copyrighted material such as music, films and books is permitted in several countries, provided it is for the downloader's own use and meets certain requirements – sometimes regardless of whether the content comes from an 'illegal source'. Note that these rules do not apply to games. They are considered computer programs (software) and are therefore governed by different laws. In Europe, both up- and downloading of computer programs is considered a violation of copyright.

⁴⁶ Downloaders may choose not to engage in uploading, but this will often lead to decreased download speeds as capacity is distributed on a quid-pro-quo basis.

Downloading and private copying

In the context of copyright law, downloading of copyrighted digital content constitutes a reproduction (copying). Every form of downloading (from P2P networks or a website, on a mobile phone, etc.) basically constitutes making a copy. In general, the permission of the rights holder is required for making a copy of protected content. However, in several countries downloading is permitted if the material is for private use. Whether or not content is paid for does not in itself indicate that the content is offered with or without the permission of the rights holder.

However, in certain cases consent to download content is not required. In some cases protection has expired,⁴⁷ as a consequence of which works are in the public domain and free to be used. Nor is consent required for downloading content that is not eligible for protection (facts, formulas and creations lacking their own original character). Likewise, 'torrent' files, which specify the name, size and location of a file, do not enjoy copyright protection.

Downloading of works that are not in the public domain can also be lawful without prior consent. That is the case if one of the copyright exceptions is applicable. The most relevant exception is private use. As a consequence citizens may *download* content from P2P networks, websites and social networks (Facebook, Hyves, MySpace, etc.) even without the consent of the rights holder, when they use the work in the private context. Both socio-cultural and economic arguments have been advanced for this private use exception. Socio-cultural arguments include privacy protection, promotion of participation in cultural and intellectual life, personal development and encouragement of creativity and freedom of expression. Economic arguments are the high costs and practical difficulties that would make it impracticable to enforce a prohibition on making copies for private use. Another consideration mentioned in the context of the private use exception is the need to strike a balance between, on the one hand, the aims of copyright (i.e. encouraging creativity, innovation and wider distribution) and the cost/benefit ratio (limiting the possibility for third parties to use existing creations) and, on the other, encouraging authors and producers. A specific condition for making digital copies for private use is that a fair levy is paid to the rights holders by way of compensation. In Europe,

⁴⁷ See Goldstein & Hugenholtz (2010), par. 8.3.

the types of levy and the amount of compensation are typically based on the sale of blank tapes/CDs/DVDs/harddisks and/or recording devices.⁴⁸

However, countries may also choose not to allow copying of certain types of works or limit the scope of it. For example, the private copying of games is not allowed or restricted to copies for the use and study of the work for professional purposes or for making a back up copy,⁴⁹ nor is breaking the protection schemes of DVDs. Private copying might also be limited to short parts of the work. More importantly, countries such as France and the United Kingdom have chosen not to allow private copying from a so-called 'illegal source'. A source is considered to be illegal if the content is *distributed* without the permission of the copyright holder or if the downloadable file has been produced without the consent of the copyright holder. Arguments against such a provision are that it is difficult for users to determine whether or not a source is 'legal' and that such a provision is difficult to enforce and can negatively affect the amount paid to the rights holders for private copying as part of the compensation for this practice.

Enforcement instruments and procedures

There is a relevant difference between *civil* and *criminal* instruments and procedures as far as the enforcement of copyright and action to prevent unlawful acts are concerned. The civil law rules are partly of a specific nature (e.g. the rules in copyright acts) and partly of a general nature (including tort law). Copyright can be enforced against anyone committing an infringement. Various instruments are available, including an injunction backed by a penalty for non-compliance (also in the case of imminent infringements), damages, surrender of profits, attachment, destruction of infringing content and means of production, claim for ownership of such content or means of production, recall of infringing products from the trade, and demands for personal information (name and address etc.) of infringers from the intermediaries (such as Internet Service Providers). Provisions on surrender of profits and attachment focus specifically on infringers who act in a commercial or professional capacity. When imposing enforcement measures, the courts must weigh the interests of the defendant (such as privacy and freedom of expression) against those of the rights holder.

⁴⁸ 1 See Goldstein & Hugenholtz (2010), par. 11.2.2.

⁴⁹ The applicable regime has effects on file sharing.

As regards means of enforcement under criminal law, it should be noted that an individual user who infringes copyright (e.g. by uploading without authorisation) might be guilty of an indictable offence if he or she acted with intent. Not every instance of unauthorised uploading is committed with intent. Intent may be doubted, for example, when users make use of P2P or BitTorrent software and may upload unknowingly. Conditional intent may be held to exist in certain circumstances, namely where users “knowingly expose themselves to the far from negligible chance ...”⁵⁰ Users might possibly be presumed to realise that using P2P software can also result in the distribution of copyrighted content. The level of actual awareness is therefore a relevant element. Other aspects that have to be taken into account are questions such as proving that the publication was actually committed by the suspect or the question whether or not the offence is committed in a commercial or professional capacity. Finally, it should be noted that criminal law in general serves as an ultimate remedy, which is applied mainly where the public interest is affected by the infringement.

Policy developments

The introduction of a special law in France in 2009 – intended to criminalise *downloading* by individual users – generated a lot of discussion throughout Europe. The law, known as the ‘Loi Hadopi’, provides the possibility to cut off internet access because of copyright infringements (after two previous warnings). The original version of the law received substantial criticism and was turned down by the French constitutional court. It didn’t provide enough legal guarantees, and more in particular it would have allowed cutting off internet users without a judicial procedure. The version that was finally accepted ruled that the intervention of a judge is obligatory. Nonetheless, it remains to be seen whether this legislation is enforceable in practice. It requires substantial resources (police, courts) and moreover criminalises large parts of the population. Also, there is a risk of file sharing going underground (by using encryption) or moving to alternatives (such as Usenet or cyberlockers). Some European countries are discussing whether they should introduce similar regulation. Others take a more cautious approach adopting a broader perspective by emphasising the need to implement new business models first.

The position of file sharing was heavily debated during the Review of the European communication framework. The European Parliament rejected proposals

⁵⁰ Dutch Supreme Court, 9 November 1954, NJ 1955, 55.

for stricter rules on copyright infringements. Finally a compromise was concluded. Article 1, sub 3 of the Universal Service Directive now reads as follows:

“This Directive neither mandates nor prohibits conditions, imposed by providers of publicly available electronic communications and services, limiting end-users’ access to, and/or use of, services and applications, where allowed under national law and in conformity with Community law, but lays down an obligation to provide information regarding such conditions. National measures regarding end-users’ access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, including in relation to privacy and due process, as defined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”⁵¹

This text clearly aims at a more balanced approach although it doesn’t entirely exclude the French solution. The issue remains a priority on the European agenda and is subject of further consultation.⁵²

10.3 Profiles and motivations of file sharers

Downloading all sorts of works, from music to film and from games to books from unauthorised sources is a widespread and growing global phenomenon. The International Federation of Phonographic Industries states that in 2009, the proportion of file sharers was around 21% of the internet users in the top five European markets (IFPI 2010). In a French survey, 38% of the internet users admitted having downloaded music from torrent sites, whereas around 28% had downloaded in the last year (*Rapport au Ministre de la Culture et de la Communication* 2010). Statistics for the United States, where lawsuits against individual file sharers have drawn considerable media attention, are

⁵¹ Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, Publ L337 d.d. 18/12/2009. (Article 1, sub 3, universal service directive).

⁵² See for example the recent Public consultation on “Content Online”: http://ec.europa.eu/avpolic/other_actions/content_online.

comparable. In December 2007, 37% of internet users admitted to having downloaded music; 27% downloaded video files (PEW 2009). File sharing figures tend to be higher in countries with higher broadband penetration and much higher among young people. A survey in the UK showed that 63% of young respondents download music (University of Hertfordshire 2008). In the United States, 58% of the age bracket from 18 to 29 years downloaded music (PEW 2009). File sharing of films and games is less common, but is rapidly catching up as residential bandwidth increases. Whereas estimates of the volume of download traffic vary strongly, it is clear that it accounts for many billions of files per year worldwide and makes up a substantial share of international internet traffic. File sharing of e-books is different again: the bandwidth required is almost negligible which makes e-books highly susceptible to unauthorised file sharing. However the popularity of e-books has until recently been limited. Given the current rapidly increasing penetration of e-readers and tablet computers, this is likely to change soon.

A file sharer profile

To gain a better understanding of consumers' file-sharing activity, their motivations, and its impact on the entertainment industries, a representative survey of a sample of the Dutch population was conducted in 2008 (Huygen et al. 2009). File sharing turned out to be a very common phenomenon across all socio-demographic groups of the Dutch population. Of the Dutch internet population over the age of 15 with internet access 44% admitted to file sharing on one or more occasions in the previous twelve months. Music is the most frequently downloaded entertainment category: 40% of those who have internet access do so. Note that this figure is remarkably in tune with figures in France and the United States. Films (13%) and games (9%) follow at some distance. File sharers mainly stand out from the overall Dutch internet population by their age: they are younger. The proportion of downloaders among students in secondary schools and higher education is also higher. Males are overrepresented among file sharers (57-74%), particularly when downloading of films or games is concerned. Interestingly this cannot be explained by their consumption patterns of entertainment products: women and girls spend a comparable amount of time watching films or playing games. Regional differences are negligible. However file sharers typically own more state-of-the-art equipment than non-file sharers. In addition, file sharers rate their internet knowledge higher than do non-file sharers.

A notable finding is that almost 50% of file sharers are unable to say what method or technology they use for downloading, e.g. P2P, Usenet, newsgroups

or FTP address. Most file sharers claim they only engage in *downloading* and do not *upload*. This would seem improbable as most P2P programs upload automatically. It seems likely that many file sharers are unaware that they are uploading. A mere one in twenty file sharers admit to adding new uploads. File sharers are very often not aware of what is and what is not permitted. The majority of both file sharers and non-file sharers have no idea what the (Dutch) law allows in terms of downloading, uploading and/or adding. Nine per cent of file sharers, for instance, believe it is illegal to download for one's own use, 16% think automatic uploading is permitted and 12% are convinced that adding uploads is not against the law.

Motivations: downloading and buying

Contrary to the popular belief that file shares are 'lost to the industry', purchasing of music, film and games and file sharing go hand in hand. Music sharers are as likely to buy music as other people: 68% of file sharers also purchase music. File sharers buy as much music as non-file sharers. Moreover, file sharers spend more money on merchandise and go to concerts significantly more often. As for films, file sharers prove to buy significantly more DVDs than non-file sharers. On average, file sharers and non-file sharers go to the cinema equally often. Game sharers also buy games, and significantly more frequently too: 67% of file sharers are buyers as well. And if they buy, they buy significantly more games than non-file sharers. These results are summarised in table 10.1.

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Table 10.1 Differences in purchasing behaviour between file sharers and non-file sharers

	Music	Films	Games
Buyers in the past 12 months: Yes/No	No difference	No difference	File sharers buy more often (61% vs. 57%)
If a buyer in previous 12 months: number	No difference	File sharers buy more (12.0 vs. 8.0 films)	File sharers buy more (4.2 vs. 2.7 games)
Related products	File sharers visit concerts more often and buy more merchandise	No difference in cinema visits	No difference in buying merchandise

Source: Huygen et al. (2009).

Interestingly 63% of music downloaders occasionally buy the music they first got for free online. The main reasons for buying are liking the music very much – a key motive for over 80% – or wishing to support the artiste

(over 50%). Owning the CD sleeve and booklet are cited as motivation by one third of eventual buyers, as well as the perceived higher quality of the CD compared to the download. Forty-eight per cent of film sharers occasionally buy a previously downloaded film at a later date, citing such reasons as liking it a lot or wanting the extra features the DVD offers. Between 50% and 60% download to discover new genres and directors/actors. Some 63% of game sharers report sometimes buying a previously downloaded game at a later date. Their main reasons include thinking it a really good game. Wanting to own the original box and game were also frequently mentioned.

All in all, these figures show that there is no sharp divide between file sharers and others in their buying behaviour. On the contrary, when it comes to attending concerts and spending on DVDs and games, file sharers are the industry's largest customers. Note that no causal relationship is implied here. File sharers tend to be music, film or games aficionados who were more likely to consume content in the first place and might have consumed more if there had been no opportunities for file sharing. On the other hand, some might also have purchased *less* had there been no file sharing; several possible mechanisms concerning the effect of file sharing on sales are discussed below. Rather, the message here is that by declaring war on file sharers, the content industry would be declaring war on their largest customers, which could have serious adverse effects.

File sharers can have many different motivations for their activity: avoiding payment for the content they want to have (substitution) is just one of these. Other motivations are getting acquainted with the artiste and genres, known as 'sampling'. After sampling the content, consumers might decide to purchase it, to purchase other work from the same artiste, go to concerts or the cinema or to buy merchandise. Hence, the net effect of file sharing on sales is ambiguous: file sharing can have a negative, as well as a neutral or a positive effect on sales, depending on the effects that prevail. In general, this will vary between different media types and between famous and relatively unknown artistes. Well known artistes seem to profit less from sampling and suffer more from substitution, while the opposite holds for relatively unknown artistes (Blackburn 2004). Nine potential mechanisms discussed in the literature are summarised in table 10.2.

The survey also asked file sharers what they would consider a reasonable price for a CD, film or game they would really like to own. Please note that this is more than what they would be willing to pay on average for the products they

are downloading. Three-quarters of music sharers are willing to pay at least eight euros for a CD. The average 'reasonable price' for music was higher than that for DVDs, which was five euros. Games are generally valued more highly.

Table 10.2 Nine possible effects of file sharing on the sales of CDs, films, games and related products

Positive effect on sales	<ul style="list-style-type: none"> – File sharing introduces consumers to music, films and games (and to artistes and genres), thus creating demand. This is known as the sampling effect. – File sharing allows consumers to pool their demand, resulting in increased demand. (*) – File sharing enhances willingness to pay and demand for concerts and related products (complementary demand). – File sharing enhances the popularity of products, boosting demand driven by a lack of purchasing power (network effect). (**)
Neutral effect on sales	<ul style="list-style-type: none"> – File sharing meets the demand of consumers who are not, or not sufficiently, willing to pay and subsequently are not served by the manufacturer. – File sharing meets a demand for products that are not offered by manufacturers (e.g. film files for iPods).
Negative effect on sales	<ul style="list-style-type: none"> – File sharing substitutes the purchase of music, DVDs or games or cinema visits (substitution). – File sharing results in the deferred purchase of music, DVDs or games, at a lower price than the price at launch. – Sampling results in sales displacement as a result of fewer bad buys.

(*) This applies in particular to the exchange of content with friends rather than to the anonymous exchange through P2P networks.

(**) This applies in particular to the use of software for which network effects are clear. A (modest) network effect may also be found for lifestyle products such as music, films and games. Unauthorised use can also, under certain circumstances, have a positive effect on profits and investments without network effects as it can weaken competition between products.

Source: Huygen et al. (2009).

Table 10.3 Reasonable price according to file sharers

	Music	Films	Games
75 percentile	€ 8	€ 5	€ 7
Median	€ 9	€ 9	€ 19
Top quartile	€ 12	€ 11	€ 24

Source: Huygen et al. (2009).

Opinions and experiences of creators and performers

Despite the wide acceptance of file sharing within the general population and the ambiguous relationship between file sharing and revenues for the industry, a majority of *performers and creators* in the Netherlands think that action should be taken against both file sharers and file sharing websites (Weda et al. 2011). About 30% of all creators and performers claim financial damage from file sharing, primarily performers in the music industry.

Both performers' perceived financial damage from file sharing, and their opinions regarding (legal) action against file sharing were strongly age-related: older performers more often claim damages and endorse measures against file sharers and file sharing websites. Performers in the music industry are much less sympathetic towards such measures, despite the fact that file sharing has as yet been more disruptive to their industry than to any other creative industry.

Some 22% of performers and creators admit to downloading from illegal sources themselves.⁵³ Though a substantial percentage, this is significantly less than for the general population. This suggests that more involvement with copyright and the creative industries can influence downloading behaviour. It will not come as a surprise that performers who themselves download copyright protected content from illegal sources are much less sympathetic towards measures against consumers who engage in file sharing than those who do not download themselves.

⁵³ From those performers who download from illegal sources, 85% admit to downloading music, compared with some 40% for films, and less than 10% for games and books.

10.4 Conclusion

File sharing is a typical product of the confrontation between new ways of dealing with acquiring and gaining access to information and traditional and legal models from the pre-internet era. The advent of digital technology has effectively separated content and information carriers like CDs, Videocassettes and DVDs and more recently CD-ROMs and game consoles. The internet has introduced new forms of distribution of information, gaining access to content and sharing of entertainment products in broader communities on a scale and with a speed that was unimaginable in the pre-digital age. Digital technology, deeply penetrating in society, has provided opportunities to citizens to introduce new practices and to consequently undercut the business prospects of entertainment companies, whose operations were still based on traditional concepts. It seems that the recording industry was ill prepared for the new era. Instead of timely adapting their way of doing business to the new circumstances, the industry chose to head for a strategy in which criminalisation or even prosecution of supposed offenders of copyright law was a key element, together with lobbying for legal reform and a plea for higher compensation for private copying. The main argument of the industry was that file sharing should be prohibited because it was seriously harming the business prospects of the entertainment industry and the income of authors and performers.

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The analysis of the legal and regulatory context of file sharing provided in this chapter shows that in many jurisdictions within the European Union, the law does not provide a clear-cut basis for prosecuting consumers who share files containing copyrighted material. Whereas uploading is a violation of copyright, downloading is often part of the private use exception, with the exception of games. As they are considered to be computer programs, games have a more extended protection than music and films. This situation is complicated further by the fact that in many cases consumers are unaware of the fact that they upload music in the technological context in which downloading takes place. Also, they are often confused about the legal status of their activities, and one might even claim this confusion is structurally nurtured by the entertainment industry. Moreover, it turns out that it is not always possible or easy for consumers to tell a legal source from an illegal one. The lack of any intent to download from an illegal source and to upload complicates prosecution.

At the same time legal regimes in different countries differ, in particular outside the European Union, which makes it hard to follow a clear-cut policy concerning the global network that is the internet. Lastly, the actual prosecution

of supposed offenders is extremely difficult to enforce and will in many cases prove disproportionate, as some cases in the United States have shown. This is also the background of scepticism about the effectiveness of the 'Loi Hado-pi' in France. Moreover, a harsh policy towards file sharers has a detrimental effect on the reputation of the entertainment industries, leading to backlashes, harming sales. Note once more that in the Dutch survey, file sharers turned out to be the industries' best clients. The case of file sharing shows that in some circumstances technological developments and their social and cultural consequences can and should have consequences for laws and regulations and should be taken on as inducement for industries to reconsider their business models and to align them with the way people want to consume their products. Moreover the research reported here shows that the music industries' presupposition about the effects of file sharing being detrimental to sales and revenues needs serious revision. File sharing proves to be part of the culture and identity of music fans who do not stop spending money on their hobbies as a result of file sharing options. The industries' challenge is to tap into the new revenue streams.

Key concepts

- File sharing
- Unauthorised source
- Copyright
- Private copying exception