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RECAPITULATION
INTRODUCTION

The early 21st Century has been described as the Information Age. It is a period in which the most valuable resources are access to and control over information. As a result copyright and other intellectual property laws are of increasing significance. The success of a commercial enterprise depends, amongst other things, upon its ability to effectively exploit its information resources. Furthermore, social and political intercourse relies heavily on the quality and volume of these intangible assets that are available. Developments in broadband communications, digitalisation, convergence and globalisation raise serious implications for all regulatory regimes – especially that of the law of copyright of multimedia products. Following an analysis of each of the four factors, we will examine the nature of digital material and the rights over such material conferred by the copyright regime in this chapter. Finally possible technological, commercial and legislative solutions to the challenges of the digital domain will also be discussed.

Digitalisation refers to the ability of a person or system to convert a piece of information; a representation of reality is recording of some matter into digital form. In a digital world, all creation be it a novel, a poem, a shopping list, a painting, a photograph, a movie or a recording - are reducible to strings of noughts and ones. It is possible to digitalise anything not ostensibly physical. All material, content and information that can be represented in some virtual manner is capable of being

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23 Ian McDonald, Digital publishing and copying: issues for authors and publishers at P. 87
24 John Perry Barlow, The Economy of Ideas; Lewis Lee & J Scott Davidson, Intellectual Property for the Internet at P. 77
recorded in digital code.  In a discussion of virtual reality, Mille noted: "The digitalisation of representations of any nature has made all kinds of shapes, colours, lights, odours, temperatures and almost any expression of reality susceptible of being recorded, stored, processed, reproduced, and transmitted by computer means. Digitalisation is the essence of the concept of dematerialisation, "a term which describes the result of the passage of goods and services from a physical medium to a logical medium (e.g.: paper money is the physical medium of money, the information that the PS [payment system] of a store exchanges with the computer of a bank is a logical medium)." The digitalisation of all tangible subject matter has produced a kind of "technological Latin. This is due to common formats emerging for the storage, manipulation and transfer of digital material. Boundaries of language, geography and proprietary technologies are being stripped away in the digital domain. There are serious issues for the application of copyright in this context. The digitisation of intellectual property enables it to be used in many different media, to be copied at the same quality as an original, to be manipulated and distorted, and to be distributed throughout the world cheaply, easily and speedily.

When the Copyright Act 1957 was first drafted, there were clear distinctions between the various technologies addressed. Television, radio, published literature, artistic works, phonograms and other items were relatively autonomous. However, as Yastreboff explains, "Information services which were once delivered by 'distinct and separate technologies (such as paper, cassette tape, video and CD may now be

25 Robyn Coyle. Copyright & Cyberspace - Divergent Notions.
26 Virtual reality has been described by some as an interactive world or a "consensual hallucination" - Nick Weston. Copyright and Virtual Reality Technology: A Bandaid on the Bleeding Edge. P. 72
27 Antonio Mille. Copyright in the Cyberspace Era. P. 570
28 Ibid
29 Dr Andrew Christie. Towards a new Copyright for the New Information Age. P. 146; see also Copyright Convergence Group, Highways to Change - Copyright in the new communications environment P. 4.
30 In the context of text files, the Rich Text Format (RTF) has become a de facto standard for some purposes.
31 However, computer software posed some problems when it first received protection under the copyright law.
delivered by the same or interchangeable technology'. That is, 'digital technology provides a common universal language for all services', including text, voice, image and graphics."\(^{32}\) This phenomenon is known as convergence.

Network convergence refers to the merging of infrastructure and communications systems. As a result, previously distinct services such as radio and television broadcasting, telecommunications, publishing and cable services have begun to merge. Organisations, in adapting to these new realities, have also displayed an element of convergence in that one entity may now be involved in both content creation and distribution, or in the creation of different types of content\(^{33}\). Personal computers are able to carry out tasks that were previously the domain of separate autonomous appliances and systems. Such a development was discussed in Audio-Visual Copyright Society Ltd v New South Wales Department of School Education:\(^{34}\) "with the prospect of moving from analogue to digital recording, there would be a convergence of television, VCR, computer and digital recording technologies into a single living room Internet communication, information and entertainment unit. It would be connected to the web by optical fiber and/or satellite and receiving and recording information, video, film and music on-line from a provider to be accessed instantly or at some later time. If this level of service were achievable, the need to copy might decrease significantly."\(^{35}\)

This universal communication device is known as a Central Information Appliance.\(^{36}\)

\(^{32}\) Natalia Yastreboff. Copyright for online databases on the Internet - Part I. P. 36 [quoted from the Highways to Change - Copyright in the new communications environment report]

\(^{33}\) Highways to Change - Copyright in the new communications environment at 3, citing the 1992 OECD report, Telecommunications and Broadcasting: Convergence or Collision.

\(^{34}\) (1997) 37 IPR 495.

\(^{35}\) (1997) 37 IPR 495 per Sheppard P at 512. Such a device will dominate our communication, information and entertainment activities in the near future. The capacity of modern personal computers to fulfill entertainment, communication and information functions is a precursor of the future impact of a Central Information Appliance.

Flowing from the above, there have been calls for legal and regulatory convergence. In the light of the overlapping technological functions being provided by various digital systems, commentators argue that a common regulatory structure is necessary. The Digital Agenda Act and the Electronic Transactions Act, 1999 are two examples of this development in Australia and proposed CCI in India.

One striking example of convergence has been the emergence of multimedia. Multimedia encompasses "the convergence of video, audio and telephony technologies. It is a single work combining a rich variety of underlying works such as text, sound and visual images, both still and moving."

The significance of convergence should not be understated. The World Intellectual Property Organization (WIPO) Copyright Treaty of 1996 (the WCT) recognized the profound impact of the development and convergence of information and communication technologies on the creation and use of literary, musical and artistic works.

**Broadband communications**

In recent years communications technologies have developed rapidly. Not long ago data transmission speeds of 2400bps were common. Present compression technologies and infrastructure improvements facilitate 56Kbps transmissions over conventional telephone lines.

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37 Wright & Green leaf, "Law, Convergence and Communicative Values on the net".
38 The Digital Agenda Act received royal assent on 4 September 2000 and Commenced on 4 March 2001.
39 Although strictly speaking the term is a misnomer, it captures the concept of a cross content presentation. The media involved (the form of presentation or storage) is actually singular (typically a CD-Rom), it is the contents of the storage media that have multiple characteristics.
40 Jenny Zaverdinos. Legal Aspects of Multi-media - Enforcing Copyright" P. 151.
41 bits per second (bps) is a measurement of the speed of a flow of data across a communications link.
The next generation communications technology, such as fiber optics and satellite transmission, is known as broadband communications. Complementing the increased speeds of communications links have been improvements in the quality and reliability of these systems. Sophisticated software controls have enabled the creation of error correction and monitoring systems that significantly enhance the quality of the end product. Some telephone conversations are now carried using Internet protocols, due to their cost-effectiveness.

Broadband systems allow massive amounts of data to be transmitted almost instantaneously. This facilitates usage of communications links not previously considered commercial. For example, a few years ago it was not unusual for an hour to be required to download a song over the Internet. Now businesses are developing around the concept of online distribution of music. Transmission of feature films, in the near future, will enable video on-demand. When combined with convergence and digitalisation, the emergence of broadband communications technology poses a number of challenges for copyright management. It means that vast amounts of data, representing nearly all information, content or material, can be transmitted from one person to another quickly, easily, cheaply and reliably.

[A] Music Piracy

Music Web Sites are a splendid example of the digital era's dramatic impact on copyright. Music Web Sites basically operate in two modes: by means of the exploitation of a musical database or by means of a file sharing system between Internet users.

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44 This is based on a land transport analogy. Current communications are likened to a narrow street and are compared to the future systems being a broad highway (also known as the superhighway). The label broadband is also based on a pipeline analogy. Previous generations of communications links have been likened to a narrow pipe through which only small amounts of data can be transported at any one time.

45 See Ozemail www.ozemail.com.au

46 Copyright Reform and the Digital Agenda (Proposed Transmission Right, Right of Making Available and Enforcement Measures) at 3.48

47 Video on demand is considered to be a service that will encourage mass-market acceptance and use of Internet-type technologies (known colloquially as a "killer application").
The first system implies the organisation of an initial database which is put on the Music Service Provider's (hereinafter referred as MSP) server. These sites enable users to listen in audio streaming musical works or to download them in MP3\(^48\) format.

The second is based on specific software able to connect users, which are in possession of songs in digital format with users wishing to get a copy of these files: it is the case of Napster and Gnutella\(^49\).

A MSP willing to make business in compliance with copyright law shall acquire or obtain a licence from the proper right owners as to all the rights that shall be used for the operation of the site. When giving the site's users access to the musical database the MSP first makes use of the right of communication to the public of the works. Then, when the user has opted for a specific file to download, here comes the reproduction right: every download implies a reproduction of the digitised version of the work.

In order to avoid unauthorised duplication of the work downloaded, the MSP might use some technological devices (such as watermarks) to prevent further copying activity. In any case the MSP will insert specific language in the terms and conditions of the license whereby any user's reproduction of downloaded works shall be forbidden.

If the user just wishes to listen to a song instead of acquiring a copy of it, he might be able to do so by means of audio streaming\(^50\). Obviously, the user's machine

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\(^48\) The technology MP3 (Mpeg layer 3) permits rapid and efficient conversion of compact disc recordings into files easily accessed and transmitted over the Internet. It is able to sensitively reduce the dimension of a musical file, which as such would be too heavy to circulate in the Web, by means of compression of information originally stored in the file. The quality of sounds is not diminished and is comparable in all material respects to the one of the original work recorded on a CD.

\(^49\) The file sharing systems, which have proved to be very successful among the Internet users, are deemed to ease infringement of copyright works. In fact, every time users share an MP3 files they substantially reproduce it: an activity, which is often not authorised by right owners.

\(^50\) Similarly to the radio operational, the streaming technique allows to listen to a work without making any permanent copy of it. Unlike the radio, the user may chose the work to be played and the time of such transmission.
will need to process the information stored in the file in order to transform it into audible sound. That will imply an ephemeral reproduction in the RAM memory of the user's P.C. In that case a temporary reproduction of the work, for technical purposes has taken place.

The sound recording industry faces three types of piracy. First, there is a simple way by which songs from different legitimate cassettes/CDs (and thus different right holders) are copied and put in a single cassette/CD. These are then packaged to look different from the original products and sold in the market. Second, there is counterfeiting, when songs are copied in to and packaged to look as close to the original as possible using the same label, logos etc. These products are misleading in the sense that ordinary end users think that they are buying original products. The third form of music piracy is bootlegging, where unauthorised recordings of performance by artists are made and subsequently reproduced and sold in the market. All these happen without the knowledge of the performers, composer or the recording company.

Earlier the music piracy was confined to cassette tapes only. With the advent of CDs in the eighties it was thought that piracy of sound recordings would become things of the past. But in reality CD piracy is the greatest threat to today's music world. Infact, with CDs piracy has got an international vigour. Fortunately or unfortunately, CD industry is still in it nascent stage in India. At present CD market is just 2 to 3 percent of the overall music market in the country. CDs have not taken off mainly because of high prices. In India CDs are sold on an average price ranging between Rs.150 to Rs.550. Considering price of cassettes, the price differential (between cassettes and CDs) is quite high and prohibitive for ordinary music lovers.

Cassette piracy in India is as old as the cassette industry itself. Govt. policy put music industry in the small-scale category and volume of a record company's cassette production was restricted to 300,000 units per annum. This led to a wide gap in the demand supply front, which was ultimately bridged by the pirates. India is
the world's sixth largest pirate market in value terms but third in volume terms. The sale of pirated cassettes/CDs (both in number & value) is also on the rise in the country. However in contrast to many developed countries piracy of CDs is low in India. At present CD piracy is below 10% level.\(^{51}\)

The popularity of Indian music has gone beyond the national boundaries. There is large demand for Indian music in the neighboring countries such as Pakistan, West Asia as well as far off countries like USA, Canada and the UK. Indian music is also pirated in some of these foreign countries, the notable among these being Pakistan and the West Asia. Similarly, foreign audio products are also subject to piracy in Indian soil.

[B] Features of digital content

Content, stated for text, data, sounds, images or other records of the results of a person's observation or perception. Digital content is that content which can be stored in digital form. Hardware and software may be required for the recording, storage, use and later perception or observation of the phenomena. Due to the character and nature of digital content, copyright and other legal regimes struggle to regulate its use and exploitation. Digital material is inexpensive to work with and is easily manipulated, stored, copied and transported. Further it leaves minimal records and fundamentally challenges our economic notions of value and price. Many traditional disincentives to copying do not apply to the digital medium and as a result creators fear a loss of control over their work.\(^{52}\)

The equipment needed to use, create, transform and communicate material stored in digital form is relatively inexpensive. CD players, personal computers and scanners are present in many people's homes and most businesses. Further, it is a

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\(^{51}\) UNESCO conference on higher education in India country paper.htm

\(^{52}\) As discussed above, the copy of digital content is of identical quality. The copy can be made with significant expense or effort and is particularly difficult to identify and police. Finally, practical advantages of using the original item, such as the convenience
straightforward task to take existing digital material and create a derivative, either by combining two pre-existing items or by adding one's own creation to existing material. Any commercially available word processing program has the capacity to create digital content. Further, such programs allow a user to easily adapt or manipulate existing digital material. Combined with a scanner or manual data entry, an individual is able to convert any text-based material into digital content. Such content is then easily stored and used. The same is true for audio, audio-visual and visual material although slightly more complex equipment and software is needed. Storage is much simpler in the context of digital material. Whereas a collection of books may require a room full of shelves, the same material in digital form can be stored on a CD taking a fraction of the space.

Information or data can be readily retrieved. The extensive indexing and searching technologies available enhance this capability. Digital material can be transported almost instantaneously, effortlessly and inexpensively.

For example, international communications links allow high-speed transportation of audio-visual files with high accuracy and minimal errors. The cost of such is at least comparable to voice communications and, using the Internet, may be far cheaper.

Unlike physical uses of content, no records need be kept of the use of digital material. Perfect quality copies may be made that are indistinguishable from the original. There are usually no restrictions on the number of copies that can be made. These copies can be made in a very short period of time and for almost no cost. These factors pose considerable problems for civil or criminal authorities. Traditional economic concepts of value are difficult to apply in the digital domain. Scarcity, in terms of physical units or copies, is not an issue. The effort involved in the production or creation of extra copies and reproductions of content may be minimal or almost non-existent.
Conventional economic analysis suggests that the equilibrium price of a good or service provided within a competitive market will approach its marginal cost.\(^53\) Marginal cost per unit of production of a copy or reproduction of digital content is negligible and from a competitive cost point of view the equilibrium price is almost nothing. Hence, the competitive market may be unable to price digital content, or may conclude that such content should be free. There may be challenges in identifying which party deserves economic compensation.

For example, how would the market respond to a person who uses digital recording devices to convert an analogue sound recording into a digital one?

[C] **Copyright Protection of Digital Work**

Protection of digital material under the Copyright depends upon whether the material can be included within one of the specific categories of works and no works. Most digital content does not fit easily into only one category. This is a new issue for the copyright regime; however, with the impact of convergence digital material is particularly difficult to characterise. More significantly, some material may not fit into any of them.

Instead of strictly following the discrete categories provided for in the Act, the following discussion groups together the main kinds of digital content according to the stimuli observed. Following that, the copyright protection afforded to the various kinds of content is considered. Finally, some issues common to the different types of content are discussed.

1. **Audio-visual**

A cinematograph film is defined as: "the aggregate of the visual images embodied in an article or thing so as to be capable by the use of that article or thing; of being

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\(^53\) John Jackson and Campbell McConnell, Economics Chapter 26 "Price and output determination: Pure competition"
shown as a moving picture; of being embodied in another article or thing by the use of which it can be so shown and includes the aggregate of the sounds embodied in a sound-track associated with such visual images". A number of cases have examined the scope of the film category, especially in relation to digital content. As noted earlier, Galaxy Electronics Pty Ltd. v Sega Enterprises Ltd., discussed whether a computer game could be categorised as a film. The court approached the issue from a "technology-neutral" perspective and held that the effect observed by the viewer was the important issue, not the means utilised. Therefore, the fact that the images and sounds were stored in digital files on a computer instead of conventional magnetic film was not material. Computer games challenge the traditional concept of a motion picture film. Each time the game is played; the sequence of sounds and images presented to the user varies, depending upon the user's interaction with the computer program. The court held that this "non-linear" content could still be categorised as a film. That no "two sequences of images will be identical, since the actual images seen in any particular game reflect player input, did not mean that the sequence was incapable of coming within the definition of 'cinematographic film'".

The South African Supreme Court came to a similar conclusion in Golden China Game Centre v Nintendo. Many examples of multimedia are likely to be protected under the cinematograph film category. It is uncertain, however, how broadly courts will interpret the concept of a film. Although a number of courts have protected relatively non-linear computer games as films, the games in question have had a limited number of possible scenarios. In each the game's authors created all the scenarios, at least to an extent. Whether a reference work such as an online

55 News Section: National Reports [1997] 2 EIPR 37 at 38
56 News Section: National Reports [1997] 9 EIPR 229
59 News Section: National Reports. 9 EIPR 1997. P.232. It can also be said that the images themselves were only created immediately prior to them being presented by the computer itself.
encyclopedia would be similarly protected is uncertain. It would be harder to characterize as a cinematograph film. However, a court may be willing to characterize this as a collection of numerous literary works, sound recordings and cinematograph films. For example, in Ahn v Midway Manufacturing Company a court had to consider the protection afforded to the components of another computer game. In the production of the game, actors had been choreographed and filmed in various scenes to be used in the program. The court was willing to protect the choreography itself as a separate item of content, regardless of the fact that it was commissioned for and used in a larger work.

2. Auditory and musical content

Auditory material may receive copyright protection under two main headings. First, a musical item may be characterized as a musical work. Musical is not defined in the Act but McKeough and Stewart suggest that it involves a "combination of melody and harmony". This may be broader than music's general meaning, which is the "art of combining sounds of voice(s) or instrument(s) to achieve beauty of form and expression of emotion". Second, a sound recording, being "the aggregate of the sounds embodied in a record" is an item capable of protection. A "record" means a disk, tape, paper or other device in which sounds are embodied." There appears to be little doubt that a selection of sounds embodied in digital form will receive copyright protection as a sound recording.

3. Work communicated to the public

Separate from the underlying materials involved, copyright exists in the manner that content is communicated to the public. For example, copyright exists in the sounds and or images transmitted to the public in a broadcast. The published edition of a

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60 No 95 C 0719, ND III May 28, 1997 [Cited in Meeka Jun .Mortal Kombat over Digitized Images in Video Games]
61 Copyright Act, 1905 of Australia, section 4
literary, dramatic, musical or artistic work receives copyright protection, albeit a different collection of rights to the original work itself.

4. **Author's rights in copyright**

The Copyright provides a bundle of rights to owners. These vary according to the categorisation of the content in question. Creators may exercise these rights and restrict or authorise their exercise by other difficulties in the digital domain. However, there are serious commercial issues involved. This is due to the nature of digital content. The natural disincentives to copy or reproduce content, such as economies of scale and the lower quality of copies have largely disappeared. As digital content is easily copied, transmitted and manipulated, the potential for abuse of the commercial rental rights is extraordinary. Difficulties arise when identifying adaptations and derivative works as a result of the ease with which digital material may be manipulated. Further, certain processes inherent in the use of digital technology may involve adaptations and derivations - such as the translation of instructions between different levels of software code or from one operating system to another. Although this is not new it is a more severe manifestation of the issue that exists in the physical realm. Reproduction and copying (the duplication rights) are not generally defined. Duplication "under the copyright law occurs simply by transferring copyrightable content from one digital storage device to another." To reproduce is generally to "produce a copy or representation of" an item, to "cause [it] to be seen, heard etc again" or to cause a second object to be "made in imitation of" the first. Duplication may involve more than one medium, form of storage or presentation. For example, in *Roland Co v Lorenzo* and Sons a reproduction was held to have occurred where text stored in a digital file was printed out on to paper.

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64 i.e. from source code to object code.  
65 Concise Oxford Dictionary  
66 Lewis Lee & J Scott Davidson P. 77.
Where the material in question is a musical, literary, dramatic or artistic work, the reproduction must be in material form to infringe the copyright owner's rights.

a) **Material form:** One element of a number of the copyright owner's rights is the concept of material form. It is defined in the Act to include "any form (whether visible or not) of storage from which the work or an adaptation, or a substantial part of the work or adaptation, can be reproduced." This is sufficiently broad to include the storage of content already in digital form and also the digitalization of other content. Hence the duplication of a digital text file or audio track would constitute a reproduction or copy in material form. Further, the scanning of an image to create a digital file would probably constitute a reproduction or copy in material form. This corresponds to the technology-neutral approach taken in cases such as *Roland Co. v Lorenzo and Sons* and *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd*. From *Roland Co. v Lorenzo and Sons* it appears that a work saved in digital code on a computer disk is in material form. The binary code was held to constitute "a form of storage from which" the content could "be reproduced". If in Roland the printing on paper of a digital word processing file was considered a reproduction of the literary work contained in the file, then it is logical to assume that the scanning of a printed page of text to create a digital file would also constitute a reproduction. This same reasoning should apply to the digitalisation of visual and auditory material, as well as sound recordings.

b) **Computer generated or assisted creations:** Although most works have an identifiable author, in some situations the identification of an author can be a problem. In the digital domain, this poses two main issues. There may be material for which no direct human effort can be identified. An example would be weather information generated by a satellite and transmitted to the earth. The author, for copyright purposes, of such material would probably be the person who

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67 See the discussion of the WIPO proceedings under the heading "Transient copies" in the section "Possible legislative changes".

68 (1992) 22 IPR 245.
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primarily made the arrangements to facilitate the collection and transmission of the information. digital technology appear to be responsible for the results. In Express Newspapers Plc v Liverpool Daily Post and Echo Plc the author of the computer software at issue was held to be the creator of the results from the computer program's use. In this case the software was designed to generate various patterns and sequences. In situations where the technology, such as word processing software, is akin to a tool being utilised to achieve a user's purposes, the results of this effort are likely to be owned by the user. In Roland Co v Lorenzo and Sons Pincus J explained that, in the light of Express Newspapers "obviously the author of the letters and symbols typed onto a word processor is the author of the printout". By contrast, the user of a multimedia work, although influencing which images and sounds are perceived, would probably not hold copyright in any results. It is acknowledged that there will be intermediate cases where the characterization is much more difficult. Indeed, it is possible that some situations will appear to be cases of joint authorship.

c) Transient copies: A few cases have examined the status of temporary copies such as those created in a computer's Random Access Memory (RAM) during its use. In MAI Systems Corporation v Peak Computer Inc the plaintiff claimed that Peak had infringed MAI's copyright by copying software owned by MAI into the RAM of a third party's computer. The ninth circuit appeals court held that MAI had "adequately shown that the representation created in the RAM is 'sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated' for a period of more than transitory duration". A statement was issued by the 1996 WIPO conference that, "The reproduction right, as set out in

69 [1985] FSR 306 [cited in Roland at 252]
70 (1991) 22 IPR 245.
71 [197] 991 F 2d 511 (2nd Cir 1993) [cited in Ronald Katz & Lateef Mtima, "Uncertainty Reigns in software cases"].
72 Ronald Katz & Lateef Mtima [quoting from the judgement - (1993) 991 F 2d 511 at 518-9].
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Article 9 of the Berne Convention, and the exceptions permitted there under, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.\(^\text{73}\)

In Copyright Reform and the Digital Agenda exclusion for transient copies party the right to control whether their material is made available regardless of whether or to what extent it is accessed. This enables a party to take action without having to prove access and transmission, which as noted before, is a difficult task in the digital domain. Second, the right extends to situations in made in the course of communications was proposed. The Report justifies this in terms of achieving a balance between the rights of the copyright owner and the public: "The extension of the copyright owner's reproduction right to cover certain temporary and incidental reproductions made in the course of transmissions would tilt the copyright protection too far in favour of copyright owners. The proposed exclusion from their reproduction right of temporary copies made in the course of transmissions is an important part of the proposed scheme's balancing of the interests of owners of copyright and reasonable needs of users for access in the new communications environment."

The Digital Agenda Act inserted a new section 43A. This provides that the copyright in a work is not infringed by the "temporary reproduction of the work or adaptation as part of the technical process of making or receiving a communication". At present certain copies are made in the carrying out of tasks other than communications. For example, most computer applications copy software from permanent storage\(^\text{74}\) to temporary storage\(^\text{75}\) during normal use. Such copying is

\(^{73}\) Copyright Reform and the Digital Agenda P. 340.

\(^{74}\) i.e. the hard disk

\(^{75}\) i.e. RAM memory
exempted under section 43A. It may be that an implied license exists according to the analysis below.

The Copyright Reform and the Digital Agenda report observes that copies made to RAM or for the purpose of making material available to the public are not exempt. The researcher's view is that a broader exemption than the new section 43A would have been appropriate. An exemption that covers duplications made in the course of all uses of material that have been authorised by the owner and require the creation of temporary duplications is preferable. This would promote the aims of technological neutrality and simplicity.

d) Licenses: A copyright owner may permit another person to do an act within the scope of the owner's exclusive rights by granting them a license. Such a license may be express or implied. The license may be contractual but this is not always so. Trumpet Software Pty Ltd v Ozemail Pty Ltd\(^76\) examined the position of no contractual licences.\(^77\) Trumpet produced software and distributed it as shareware.\(^78\) This arrangement constituted a license binding the recipients of the software. The Court used the contractual principle of implied terms,\(^79\) combined with the written instructions bundled with the software, to ascertain the nature of the licence: "The Court considered that the rights granted to shareware distributors or users fell between a bare licence and a contractual licence. In effect, it was found that distributing software as shareware gave rise to certain quasi-contractual rights to the

\(^{76}\) (1996) 34 IPR481

\(^{77}\) A copyright owner may utilise a shrink-wrap licence, where the terms of the licence are wrapped in plastic packaging and are only available to the consumer after purchasing the product. Although under general contract law the terms must be agreed between the parties prior to the purchase, as opposed to being unilaterally imposed by one party later, ProCD Inc v Zeidenberg [(1996) 86 F.3d 1447 (7th Circuit)] - cited in Copyrights No 24 and by in Angela Bowne at 141] held that a shrink-wrap-type licence is valid.

\(^{78}\) That is, they had provided copies to the public for the purpose of evaluation and required that, should a consumer wish to continue using the product after a trial period, they would make a payment to the company.

\(^{79}\) Michael Pattison & Moana Weir, "First case on the legal protection of shareware -Trumpet v Ozemail" P. 67.
world at large. In determining what these quasi contractual rights actually are, the Court adopted a contractual analysis by relying on the doctrine of implied contractual terms. By acting in breach of these terms, Ozemail was outside the scope of the licence and hence breached Trumpet's exclusive rights. Some have argued that an implied licence to make, at the least, transient copies would accompany the distribution of materials using a number of digital technologies. This is largely academic in relation to electronic communications of works following the insertion of section 43A. However, it is still important in other contexts such as temporary copies made in a computer's RAM (as discussed above). To access or use digital content by the only methods available, one often needs to make temporary copies. An example of this is use of word processing software. For a user to utilise the software, elements of the software are retrieved from permanent memory (such a hard disk or CD-Rom and temporarily stored in the computer's RAM. A license may be implied in this situation, although, "Traditionally, Courts have been slow to imply licences or permission to reproduce copyright works in the absence of clear expression to do so by the copyright owner. It remains to be seen how the Courts will deal [with] the question of implied licence[s] where material is placed on the Internet in circumstances where there is often full knowledge that the material could be copied" Pendleton notes that although in the physical realm a person may read a document or listen to a song without the need for a licence from the copyright owner, with digital content some form of licence may be needed. It is likely that courts will imply a licence from the act of voluntarily making their material available in a form that requires temporary copies to be made so that the material can be used. The implication rules such as "commercial necessity" and that the term "goes without saying" support this argument.

e) Authorisation: The right to authorise a person to do an act encompassed within a copyright owner's exclusive rights is also an exclusive right of

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the copyright owner. In Australia, the leading case on the meaning of authorise is UNSW v Moorhouse. In that case the High Court held that to authorise meant to "sanction, approve and countenance". In respect of digital content, a number of cases have discussed whether a party, usually a service provider or carrier of some sort, had authorised a breach of copyright. Due to the logistical difficulties involved in monitoring breaches of copyright by individual users in a dynamic environment such as digital communications, copyright owners have tended to pursue service providers and carriers. In Religious Technology Centre v Netcom Online Communications Services the court held that the operator of a bulletin board service was not liable, as they were simply conduits for communications between unrelated third parties. However in Playboy v Frena and Sega Enterprises v MAPHIA the bulletin board operators were held to be liable, as they had been more than just passive carriers. A number of lawyers and commentators have called for reform in the copyright liability of service providers and carriers. The decision in Telstra v APRA implies that many such entities could potentially be liable for the conduct of the users of their systems. The Australian reports recommended that the concept of authorisation be used to regulate the liability of users and carriers. However, cases such as APRA v Telstra revealed that legislative amendment is required. In response, the Digital Agenda Act inserted a new section 39B that clarifies the position of carries and carriage service providers (amongst others) in respect of breaches of copyright by persons using facilities provided by them. Section 39B provides: "A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work merely because another person uses the facilities

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81 Section 13(2) provides "the exclusive right to do an act includes the exclusive right to authorise a person to do that act".
82 (1975) 133 CLR 1 www.austlii.edu.au/au/cases/cth/high_ct/133clrl.html (references are to paragraph numbers in the AUSTLII publication.
83 Gibbs J at para 10, Jacobs J (with whom McTiernan ACJ agreed) at para 9.
84 (1993) 839 F Supp 1552 (MD Fla) [cited in Angela Bowne at 140]
85 (1994) 857 F Supp 679 (ND Cal) [cited in Angela Bowne at 140]
so provided to do something the right to do which is included in the copyright." As a result, an "innocent" carrier would not be liable for its client's breaches of copyright. The scope of the exemption, however, is uncertain.

Jurisdictional issues seriously complicate the use or protection of copyright material. Although regulated by a number of international treaties, copyright law is basically national. Each legislated regime is different and there are many countries that have not ratified the primary treaties.96

[D] Protection of Multimedia Works: online

Digital technologies have made possible the creation of works with much more versatility than in the past. A work may now consist of literary, artistic, musical and dramatic elements and may also include a phonogram and a cinematographic film.

Multimedia works by their basic premises are works combining different elements, such as text, sound, still visuals and moving images, into a single medium. Increasingly works from different categories are being fixed in a single medium of expression. Works from protected by copyright have become less and less differentiated by type and more and more equivalent to one another because they are in the same medium. This equivalence of works in digital form has made it increasingly easy to create a difficult-to-classify work by combining what have previously been thought of as separate categories of works for copyright purposes. This has given rise to the consideration of forming a separate category under the present Copyright laws for future.87

The user can 'interact' with the work in ways previously unknown. He can make alterations and additions and even create a new work out of the stock of existing ones. If the rights for all classes of works were the same, then perhaps, this

86 i.e. the Berne Convention for the Protection of Literary and Artistic Works 1886 and the WCT
would not have been a major issue. But the law as it stands in India, distinguishes between different classes of works in the matter of rights. For example, the rights in a literary work and those in a cinematographic film are different. There is no rental right in a literary work, whereas there is such a right in cinematographic film. The authorship may raise another problem, as the criterion of authorship is different between literary, dramatic, musical and artistic works on the one hand and cinematographic films and sound recordings on the other hand.

What kind of protection does a multimedia work attract in its individual combination of component parts. The question is how to qualify digital off-line and on-line media from a copyright perspective. The significance of the issue lies in the fact that the relevant categorization entails different legal consequences and the presence of multimedia work defies existing classification under the copyright law.

It is not a new type of work to the extent that a multimedia product can fall under one or several, already existing, categories. Protection of the individual elements of a multimedia work must not be confused with protection of the multimedia production as a whole. In accordance with the existing provisions of the Copyright Act it remains possible to dispose of the individual contributions separately, even after the individual elements have been combined in one single work.

The actual classification of a particular multimedia product will depend on the type of work and on the different and specific characteristics of each individual multimedia product. Therefore, it has to be decided on a case-by-case basis. To the extent it is a literary work it gets protected as such; to the extent it is a cinematographic work, it attracts copyright protection as a cinematographic work.

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88 See, S. 14(a) and (d) of Copyright Act, 1957.
and to the extent that it is a pure phonogram, its producer is protected. The final interpretation, of course, will then often be in the hands of the courts.

It is possible to consider and treat multimedia products as works similar to cinematographic film in the sense of section 2(f) of the Copyright Act, 1957. It seems possible to classify and to treat multimedia productions as collections of literary or artistic works in the sense of Article 2(5) of the Berne Convention and they might also fall under the category of compilations of data or other material in the sense of Article 10(2) of the TRIPS Agreement. There is also a view that multimedia work be classified as computer programme since every multimedia work will have a software component. As there are separate provisions for rights and authorship of a computer programme distinct from literary works in the Copyright Act, this could be a possible solution. However, issues may arise on the retention of separate copyrights in the works incorporated in the multimedia, in terms of section 13 of the Act\(^90\) and the rights of performers\(^91\) in the product. At present, large numbers of multi-media works are being created by combining pre-existing works. The classification of multi-media works is an issue, which needs to be looked into in depth.\(^92\)

There is nothing new in the combination of several types of works within one larger work or on one data carrier; phonograms and cinematographic works are examples from the past. What is new is that text, sound and visual information is now presented and stored in digital form. However, it would not be advisable to equate all multimedia works with the exiting category of cinematographic works. The fact is that a multimedia work taken as one single product does not exactly fit any of the existing categories of works protected under the regime of copyright. The fact that digital

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\(^90\) S. 13(4) of Copyright Act, 1957, provides: “The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the sound recording is made.”

\(^91\) As per S. 38(4) of Copyright Act, 1957, once a performer has consented to the incorporation of his performance in a cinematograph film, his performer’s right in that performance ceases to exist, whereas in the case of other classes of works there is no such provision.

\(^92\) See, TC James, supra note 89 at 429.
products are vulnerable not only to copying of the whole work but also vis-à-vis copying of parts of the work poses additional problems. According to the previous prevailing opinion, unauthorized appropriation of parts of a work only amounts to an infringement of copyright where the relevant part attracted protection as such.

It still remains to be decided whether multimedia works should be regarded as a separate category of works protected under the regime of copyright. Since it has not yet been clarified to what extent multimedia works fall within one of the above-mentioned types of work, it should be pointed out in legislation that a work can consist of the combination or merging of other works. This would ensure that the prerequisites of protection were not examined separately but in relation to the multimedia work as a whole, which would enable protection of the interactivity so characteristic of many multimedia works, provided that it fulfils the originality requirement.

1. **P2P Networking**

Peer-to-peer (hereinafter referred as P2P) is defined as two or more computers connected by software which enables the connected computers to transit files or data to other connected computers. In recent usage, P2P has come to describe applications in which users can use the Internet to exchange files with each other directly or through a mediating server. It is helpful to think of the P2P network as a conversation between computers – some computers are “talking” while others are “listening”. The P2P connection means that it’s a direct link,. The file is being directly transferred from one computer to the other, it is not going through any mediating server. Napster and Gnutella are examples of this kind of P2P software.

**a) Napster:** Napster was created by 10-year-old Shawn Fanning in 1999 and it quickly became popular around the world and pioneered the concept of P2P file sharing. With Napster, individual people stored files that they wanted to share (typically mp3 music files) on their hard disks and shared them directly with other people.
In order to enjoy a free music file First of all one had to become a member of Napster service by downloading the Napster software on one's computer. The Napster software was available for free at the Napster's Web site 'www.napster.com'. After implementing the Napster software the computer became a small server able to make files available to other Napster users. Then the computer connected to Napster's central servers. The Napster software that a member downloaded on his computer automatically told Napster central servers that these were the music filed on his computer. So, the Napster central servers had a complete list of every shared song available on every hard disk connected to Napster at that time. A Napster user could send a request to the Napster server for a particular piece(s) of music. Now the Napster server did not contain any music on its own server but had a list of all the music that was available on the Napster members' computers. The list was dynamic in nature as the music files available depended on which member was online at a particular time. The entire user community could be searched for artists or titles in seconds. One could simply type in the name of an artist or song, receive a list of what was available, and then downloaded the music from another user's hard drive.

Napster grew to having 57 million users of its service with a consistent 1.6 million using the system at any given time. Napster became so popular so quickly because it offered a unique product -- free music that anybody obtain nearly effortlessly from a gigantic database. You no longer had to go to the music store to get music. You no longer had to pay for it. You no longer had to sorry about cuing up a CD and finding a cassette to record it onto. And nearly every song in the universe was available. At its peak, Napster was perhaps the most popular Web site ever created.

93 Technically, all computers can be divided into two categories, client and server. A client computer avails of the services provided by the server computer and the server computer serves the client computers.

But for the music industry Napster was a big, automated way to illegally copy copyrighted material. The music industry was against Napster because people could get music for free instead of paying for a CD and any music downloaded was considered a loss of business opportunity. The industry sued Napster under a claim of copyright infringement. Napster’s defence was that it contained no copyrighted music filed on its servers. It just had a list of what was available on Napster’s users’ computers. So, if at all any one is liable for copyright infringement it is the person who downloads the copyrighted product or the person who makes it available and not Napster itself. But the court had sufficient reasons to injunction Napster for copyright infringement. The court said that putting the list on the Web site was akin to running a huge distribution network. Napster’s key weakness lay in its architecture – the way that the creators designed the system. The central database of song titles was Napster’s Achilles’ heel. The court ordered Napster to stop listing the music files which were under copyright protection and there was no means with Napster to segregate copyrighted music filed from those that were in public domain. The only option with Napster was to shut down the database and the absence of a central database killed the entire Napster network.

b) Post Napster P2P Networks: With Napster gone, what the world had at that point was something like 100 million people around the globe hungry to share more and more files. It was only a matter of time before another system came along to fill the gap. One distinguishing feature of the P2P services that came after Napster was that they had no central server maintaining direct file listings of all the files. The other distinction was that Napster was related to music files and that too specifically mp3 files. But most of these new softwares, Gnutella, Kazaa, etc., allow any type of files to be transmitted and downloaded.

Gnutella is an underground variant of Napster whose popularity has risen dramatically in the wake of the litigation in which Napster had been embroiled.

Gnutella has dozens of clients available. Some of the popular Gnutella clients include: BearShare, Gnucleus, LimeWire, Morpheus, and XoloX. Given that there is no central server to store the names and locations of all the available files first, one has to install a version of Gnutella on one's computer and type in the name of the song/film or any other file one wants to find. The machine knows of at least one other Gnutella machine somewhere on the network because it has been told the location of the machine by typing in the IP address, or because the software has an IP address for a Gnutella host pre-programmed in. The machine sends the file name typed in to the Gnutella machine(s) it knows about. These machines search to see if the requested file is on the local hard disk. If so, they send back the file name (and machine IP address) to the requester. At the same time, all of these machines send out the same request to the machines they are connected to, and the process repeats. After getting all of the search results the machine directly contacts the computer that has the desired file. It is an extremely simple and clever way of distributing a query to thousands of machines very quickly.

Kazaa is the latest version in the P2P technology which is spreading like a wildfire. Kazza was originally established in the Netherlands. Kazaa network is built on a technology called the Fast-track technology. This is different from Gnutella in the manner that this software actually converts certain good quality computers in a particular network into supernodes\(^6\) which perform the listing function. The P2P searches occur through users with these supernodes. A supernode contains a list of some of the files available and where they are located. The Kazaa software first searches the nearest supernode to a user and then refers his search to other supernodes and so on. This process is designed to make searching as fast as

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\(^6\) Any computer using Kazaa Media Desktop can become a supernode if they have a modern computer and are accessing the Internet with a broadband connection. Being a supernode does not affect the performance noticeably. If your computer is functioning as a supernode other Kazaa Media Desktop users in your neighbourhood will automatically upload to your machine a small list of files they are sharing, whenever possible using the same Internet Service provider. When they search, they send the search request to you as a supernode. The actual download will be directly from the computer who is sharing the file, not from the supernode. The download goes from them to the person who wants it.
possible and means that searching will take place only through the files that have been indexed by the supernodes.

In *Buma and Stemra v. Kazaa*, an action for copyright infringement was brought against Kazaa by Buma and Stemra in a Dutch Court. The Plaintiffs, Buma and Stemra, a Dutch Copyright licensing group, sued Kazaa for the distribution of software which allowed users to make unauthorized copies of copyrighted works. In November of 2001, the district court of Amsterdam ruled in favour of the copyright industry and ordered Kazaa to remove its website. Kazaa, thereupon, filed an appeal vide matter *Kazaa v. Buma and Stemra* in the Amsterdam court of appeal. The court of appeal decided in Kazaa’s favour and reversed the findings of the district court starting that the Kazaa technology has many other substantial and legitimate uses such as trading jokes and personal photographs apart from the fact that it could be used for copyright violations. Further, after release Kazaa.com is not monitoring the way it is being used and is not in a position to control it.

However, in the meantime, Kazaa had already left Holland; Sharman Networks purchased the rights to distribute the software from its Dutch owners, and Kazaa is now managed from Australia, but incorporated in Vanuatu, a South Pacific island.

In *Metro Goldwyn Mayer Studios v. Grokster et al.*, a roster of entertainment conglomerates accused Fast Track-enabled services kazaa, Morpheus, and Grokster of profiting from a “21st – century piratical bazaar.” Record labels and movie studios wanted the services closed and fined $150,000 for each illegally traded song or movie. It was finally held that the absence of any central control over

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97 *Buma and Stemra v. Kazaa*, Cause list number KG 01/2264 odC (Judgement passed by the President of the Amsterdam District Court on November 29, 2001).

98 *Kazaa v. Buma and Stemra*, Judgement delivered by the Amsterdam Court of Appeal (Fourth three-judge civil section) on March 28, 2002.

99 *MGM Studios Inc and others v. Grokster Ltd and others*, decided by the US District Court for the Central District of California on 25 April, 2003.
how users used the P2P systems in question meant that, unlike Napster, there was no liability on the suppliers for vicarious or contributory infringement of copyright.

The Industry was successful in the initial legal battle against Napster but it has been unsuccessful in the later ones against Kazaa, Morpheus and the like as these networks do not depend on any central server for their operation.

But on 27th June 2005 US Supreme Court struck down the decision of US district Court and held that P2P file sharing of copyrighted materials free of cost is illegal and those who are encouraging users to trade songs, movies and television shows on-line without paying for them will be liable.

c) Extent of Damage by P2P Networks: Millions of people around the world have downloaded P2P softwares and are increasingly using them to exchange music, movie and software files. According to CNET.download.com there are over 2.5 million downloads per week of the Kazaa Media Desktop Software and 111 million downloads of the Gantella-based Morpheus software accounts per week. According to The International Federation of the Phonographic Industry (hereinafter referred as IFPI)^100, an organization representing the recording industry worldwide, for the year 2001, worldwide record sales were US$ 33.7 billion dollars. The availability of free music on the Internet was blamed for the 5% drop in global sales of compact discs.\textsuperscript{101} In the year 2002, global sales were down 9.2%. World sales recorded music fell by 10.9% in value and by 10.7% in units in the first half of 2003. Interim sales of all audio and music video formats were worth $US 12.7 billion, compared to $US 14.2 billion in the same period of 2002.\textsuperscript{102}

The stakes as reported by the Industry are definitely high. The Industry points the finger directly at the Internet. But these figures have all been brought out by the

\textsuperscript{100} IFPI comprises a membership of more than 1500 record companies, including independents and majors, in over 70 countries (http://www.ifpi.org/).


\textsuperscript{102} See, \textit{ibid}. 
Industry. Moreover, it can’t be said with unfailing certainty that how much of this loss is due to online piracy. So, on the question of the impact this activity is having on entertainment company profits one has to be agnostic: other factors, such as the state of the economy, and the easy availability of CD’s and DVD’s in the form and containing the tracks that users want, will also have a bearing on the sales of pre-recorded music, films and software. There is also a tendency by the entertainment industries to argue that every copy made through the medium of file-sharing is a lost sale and missed business opportunity. That begs the question as to whether the person who made the copy would have actually paid to acquire a legitimate copy had the alternative not been available.

In India, the problem of infringement through the Internet has yet to reach the magnitude that it has in some developed countries – we have had no Napster-like problem on anything like the same scale, audio cassettes still being the most common and most accessible form in which copies of sound recordings are stored, being much cheaper and more widespread than the digital alternative. That situation could no doubt change.

2. Reaction of the Copyright Industries

For the audiovisual industry, Napster was a loud wake-up call. The online file-sharing service demonstrated that people using readily available equipment could easily download and distribute digital music and movie en masse, regardless of copyright. No surprisingly, that sent the audiovisual industry into a panic. After all,, one theory goes, if you can get digital files for free, why would you ever pay for a movie ticket or a CD?

The industry argues that online piracy eliminates the economic incentives for a business to invest millions in the production of movies, software, video games, CD’s, etc. A business will no longer get a return on its investment if a consumer can
just get it for free online. In that manner Internet piracy would hinder the growth of creativity.

Shocked and dismayed, the industry in the last couple of years has been fighting this menace of 'piracy' on all possible fronts that include, lobbying, litigation, legislation and technological measures. The industry is starting to prosecute not only companies like Napster but also individuals who download copyrighted content and the persons who make it possible namely the Internet service providers. A recent example of such litigation is *RIAA v. Verizon Internet Services, Inc.*\(^{102}\) where the Recording Industry Association of America (hereinafter referred as RIAA) served Verizon, an Internet service provider, with a subpoena demanding that the service provider disclose the identity of a user who uploaded more than 600 songs while connected to the company's Internet service. Verizon protested, but recently a US district court judge ruled in favour of the RIAA and ordered Verizon to reveal the user's identity.

3. **Indian Legal Landscape vis-à-vis Networks like Napster, Gnutella and Kazaa**

Let us examine a network like Napster functioning in India which allows people to share and distribute music, films and computer software. Section 51 of the Copyright Act\(^{104}\) says that in case anyone does anything the exclusive right to do which is by this Act conferred upon the owner of the copyright, his act amounts to infringement of copyright. Section 14 of the Copyright Act\(^{105}\) which governs the domain of exclusive rights granted to copyright owners says that making copies of any work by using whatever medium, communicating the work to the public or issue copies of the work to public fall within the domain of exclusive rights of a copyright holder.

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\(^{104}\) See Supra note 89.

\(^{105}\) See Supra note 88.
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owner. So, if any person is running a network like Napster in India he could be liable for encroaching upon the exclusive rights of the copyrights owner as he is essentially facilitating the communication of the work to the public. In case he take up an argument like Napster that well “I am not making anything available, I just have a listing.” Even in this case the man could be held responsible under section 63 of the Act which says:

\[a. \text{ the copyright in a work, or} \]

\[b. \text{ any other right conferred by this Act, except the right conferred by section 53A shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees (Emphasis added)} \]

In this case the person who runs such a system like Napster would be held guilty of abetting the infringement, as without such a network it would have been virtually impossible for people to share copyrighted works.

Further section 51(a)(ii)\(^{107}\) says that in case a person permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement, he shall be liable for infringement of copyright. The expression any place could well be construed to mean virtual place as well.

As for the persons who actually make available and download copyrighted works, the law is very clear. Section 14 says that issuing copies of work or communicating the same to public amounts to infringement. So, a person who downloads a software like Napster and implements the same on his machine is making the copyrighted work available to any member of the public who has the

\(^{106}\) S. 63, Copyright Act, 1957.

\(^{107}\) S. 51(a)(ii), Copyright Act, 1957.
corresponding software installed on his machine. The person who actually
downloads the file containing copyrighted work is reproducing the work without the
consent of the copyright owner, so is guilty of copyright violation as well. Section
51(b)(ii) says anyone who distributes either for the purpose of trade or to such an
extent as to affect prejudicially the owner of the copyright. Any person making
available copyrighted works over P2P network may not be trading in the same but
he is nevertheless distributing such work which combined amount to gigantic
proportions affecting prejudicially the interests of copyright owner.

Now for networks akin to Gnutella or Kazaa, where there is no central server
brokering the requests of people, it is rather hard to stop the system in one go.
There is no one person or entity that it managing the affairs. The entire thing is
managed by a software and that is already out and lakhs of people have made
copies of the same. You can’t really outlaw the installation and use of that software
as it could legally be used for sharing files which are not protected by copyright. But
individuals who use such software for sharing copyrighted works remain guilty under
the above stated provisions of Copyright Act. But catching them is rather difficult.
But, potential liability is made easier to document by the fact that P2P applications
create long user sessions that present adequate opportunity to trace users back to a
point of origin. The court would have to find a way to block all such network traffic
at the ISP and the backbone levels of the Internet to stop people from sharing.\textsuperscript{108}

4. Management of Copyright in Digital Environment

As more and more digital products in network environment are emerging, efficient
management and controlled distribution of such products has become one of the
important considerations, as never before. Digital and Information technologies
combined together have made the management and administration of copyright
quite difficult. It has made reproduction, distribution and communication of works

\textsuperscript{108} The exact liability of ISPs and how one could go about tracing copyright infringers with the aid of ISPs
is described in the subsequent section on the liability of ISPs.
easier and within the competence of ordinary individual. Now copies can be made at an amazing speed with absolute fidelity to the original and transmitted over vast distances and dispersed to millions of people in a few minutes or even seconds. This has opened up the possibilities of widespread unauthorized copying and distribution of copyrighted works materially affecting the economic interest of the owners.

a) **Right Management Information:** The primary requirement for the automated grant of rights in a digital context is that the protected work and subject matter can be identified as such belonging to the relevant authors and rights holders and the licensing terms must also be available electronically. On the one hand, this information must be easily readable of a potential user; on the other hand it should not be easily erasable so that it remains embodied during the subsequent stages of exploitation in connection with the work. In addition, right holders must be able to prove their authorship and ownership of rights in case of infringement; the relevant information should not be discernible to third parties and should remain embodied within the work even after the latter has been adapted, or where parts of the work are used.\(^\text{109}\)

This is possible only if certain data which identifies the work, the author of the work, the owner of the work, or information about the terms and conditions of use of the work which are necessary for licensing and payment of licence fee, are embedded in the work. This data is classified as “rights management information” in the WCT and WPPT. The WCT defines rights management information as:\(^\text{110}\)

Information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represents such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.


\(^{110}\) Art. 12(2) of WCT.
Contracting parties to the Internet treaties have to provide legal remedies against any kind of removal or alteration of any of the above information as well as distribution or communication to the public of copies of work with such removals or alterations.\textsuperscript{111}

Section 52A of the Copyright Act, 1957 provides for certain information to be displayed on cinematographic film and sound recording. The information could be described as a part of ‘rights management information’. But this provision is not adequate for the administration of the rights in the digital environment and further it is limited to two classes of works only. Also in this case, the onus is on the copyright owner. A considerable amount of work is being done on “copyright tagging” and developing “unique identifiers” so that the owners of digital material will be able to identify their property wherever it is and however it has been modified or distorted. This will overcome many of the problems of identification.

‘Rights management information’, as a technological adjunct providing legal support to network-based rights management systems will enhance the ability of rights holders to exploit their property on the Internet, and allow consumers to rely on the accuracy of the information they receive so they can feel secure transacting online.\textsuperscript{112}

\textbf{b) Technological Protection Measures:} When a digital product is made available for access on the Internet, anyone in the world becomes capable to

\begin{footnotesize}
\textsuperscript{111} Art. 12(1) of WCT States:

“Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

\end{footnotesize}
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download the product free of charge, use it without restrictions, incorporate the product into his own product and make the resulting product available in a global network, hence competing with the product of the creator himself. This is about how technology can assist a crafty person to exploit someone else's work digitally. In order to fight this loss of control over the product in the digital environment the legal instrument as such are not sufficient. To a large extent the solution to a loss in technical control is being sought in technology itself.

Increasingly, technological solutions are being found for the problems posed by the new technologies through access control or copy control mechanisms such as encryption technology or water marking incorporated into works distributed over digital networks with a view to protecting them from illegal exploitations. Encryption, watermarking, coding, encapsulating copyrighted works in a tamper-resistant electronic envelope, electronic lamination, etc., have already been experimented with.

The need of technology is not only for preventing the work from being stolen and misappropriated, but also for detecting infringements and misappropriations.

[E] Protection of Neighbouring Rights

Neighbouring rights or related rights were unknown in the Indian copyright Act 1957, But has accommodated some of them with in "Copyright law". The expressions "Neighbouring rights or related rights are therefore, not very common in India. As for neighbouring rights, the Rome Convention is the important starting point. The actual title of the convention is completely self explanatory regarding the subject matter protected i.e. the International Convention for the protection of performers, Producer of Phonograms and Broad Casting organization.

The Neighbouring Rights are similar to the rights protected by copyrights and are applied to protection. In other words, these are rights, which are neighbours of
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Traditional copyrights and are sometimes called as "Derivative Rights". These rights arise from distribution or dissemination of traditional copyright work.

There are three broad categories of such rights:

1. Performers Rights
2. Broadcasters Rights
3. Rights of Producers of Phonograms/Sound Recording.

The international treaties and conventions lay down the basic standards of protection to the Neighbouring Rights:

1. **Rome Convention 1961**: The International Convention for the protection of performer's, Producers of Phonograms and Broadcasting organizations.

The Rome Convention\(^{113}\) definitely is against unauthorized reproduction of their productions and fixations of their performance and it also provides limited rights for broadcasting organizations. The Convention further provides the term of protection to be for a period of 20 years. It also provides for the protection against the "Secondary users" Phonograms such as broadcasting. The Geneva Convention is mainly against piracy. Further provides for the protection of Phonograms against unauthorized reproduction and distribution for a minimum term of 20 years and satellite Convention specific purpose unauthorized distribution of satellite signals.

\(^{113}\) "Pioneer Convention in the area of the protection of neighbouring rights".
Role of the WIPO

The world Intellectual Property organization in the Diplomatic Conference on Certain Copyright and Neighbouring Rights adopted the WIPO Performances and Phonograms Treaty. The preamble is stated as follows:

Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible.

Recognizing the need to introduce new international rules in order to provide adequate solution to the questions raised by economic, social, and technological developments.

The WIPO Copyright Treaty, 1996

The WIPO Copyright Treaty (WCT) originated in the WIPO program to update the major international copyright treaty, the Berne Convention. The original purpose was to make explicit in the Berne Convention that computer programs and databases are protected as copyright subject matter and to update the convention concerning use of copyrighted works in digital, electronic environments.

The major issues that arose in the Diplomatic Conference was the liability of the on-line service providers or Internet service providers and the other communication entities that facilitates access to the internet and that Art.9 of the Berne Convention applies to the use of works in digital form and the storage of protected work in digital form in an electronic medium constitutes a reproduction.

114 on 20th December 1996

115 This work programme started in 1989 and included discussion of the relevant copyright issues by seven committees of Experts. This process was known as the “Berne Protocol”

116 It was in the WIPO Diplomatic Conference in Geneva, Switzerland, which met from Dec. 2-20, 1996, that the work on the treaty was completed. It should be further mentioned that this treaty was enacted under the provisions of Art. 20 of the Berne Convention.
Now dealing with the various provisions of the WCT. The preamble to the Convention highlights the necessity to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible and recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by the new economic, social, cultural and technological developments.

Article 1 enumerates that this treaty is a special treaty within the meaning of Art. 20 of the Berne Convention and that this treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.

Art. 2 reiterate that copyright protection is extended to expression and not ideas. Art.3 mentions that the provisions as given in Art. 2 to Art.6 of the Berne Convention shall be applied by the Contracting Parties mutatis mutandis.

Art 4 of the WCT make it clear that computer programs are protected as literary works under Art.2 of the Berne Convention, whatever are the mode or form of their expression. The Diplomatic Conference also adopted an agreed statement concerning the relationship between the treaties, Art. 2 of the Berne Convention and the Provision on computer program protection in TRIPs.117

Art.5 of the Treaty states that parties must accord copyright protection to database that constitute “intellectual creations”. The copyright law protects thus the compilation of data or the content but the protection does not extend to the content itself unless the content is independently the work of the intellect, in which case only to enjoy a separate copyright. The Diplomatic Conference adopted an “agreed statement” which read as follows:

117 "The scope of protection for computer programs under Art.4 of this Treaty, read with Art. 2, is consistent with Art.2 of the Berne Convention and on a par with the relevant provisions of the TRIPs Agreement."
"The scope of protection for computer programs under Art. 5 of this Treaty, read with Art. 2, is consistent with Art. 2 of the Berne Convention and on a par with the relevant provisions of the TRIPs Agreement."

Art. 6 of the WCT provide that authors enjoy the exclusive right of authorizing the making available to the public of copies of their works. The Diplomatic Conference adopted an "agreement statement" concerning Art. 6 (right to distribution) and Art. 7 (right of rental) of the Treaty to confirm that these right apply to fixed copies, embodied in tangible objects.\textsuperscript{118}

The Treaty permits, but does not obligate, the parties to limit the public distribution right by the 'first sale' or "exhaustion of rights" doctrines. These doctrines are applied usually to limit the public distribution right to the first date authorized by the copyright owner.

Art. 7 of the WCT mentions that the authors of computer programs, cinematographic work, and embodied in phonograms enjoy a generally exclusive right of authorizing the commercial rental of these works. The Diplomatic Conference adopted an "agreed statement" concerning rental of works in phonograms.\textsuperscript{119}

There are three exceptions to the exclusive rights. They are:

- In the case of computer programs. The right does not apply where the computer program itself is not essential object of the commercial rental.

- In the case of cinematographic works, the right does not apply unless the commercial rental in a given country has lead to widespread unauthorized reproduction of copies, which materially impairs the right of reproduction.

\textsuperscript{118} "As used in these Articles the expression 'copies' and 'original copies' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects."

\textsuperscript{119} "It is understood that the obligations under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who under that Contracting Party's law, are not
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- As a concession to Japan, if a country's law in effect on April 15, 1994 provides only a right of equitable remuneration for rental of work in phonograms, that remuneration right satisfies the treaty obligation as long as there is no "material impairment" of the exclusive right of reproduction.

Art. 8 of the WCT specifies that authors enjoy the exclusive right generally of authorizing any communication to the public by wire of wireless means, if the public can access the communication at different times and places.\(^{120}\)

Art. 11bis (2) of the Berne Convention permits compulsory licensing of broadcast and communications to the public. Therefore what it means is that Art. 8 amount to a transmission right, which extends to digital online and interactive communications, as well as analogue communications. The reference to individual choice of reception is intended to exclude broadcasting; a right that remains governed by the existing Berne Convention. Also, the public communication right of the new Treaty explicitly cannot prejudice the existing public performance, broadcasting and communication rights of authors as set out in Berne Articles 11(1)(ii), 11bis(2) (i) and (ii) 11 ter(1)(ii), 14(1) (ii) and 14 bis (1).

Art. 9 of the WCT deals with the provision that in respect of photographic works the Contracting parties shall not apply the provisions of Art. 7(4) of the Berne Convention for deciding the duration of the Copyright work.

In the entire Treaty there are two limitations to the exercise of the exclusive rights of the authors. Art.2 enumerates the "idea-expression dichotomy" that is only expressed works are protected by the copyright laws and the copyright law does not prevent the copying of ideas, concepts and methods. And the second exception is granted rights in respect for phonograms. It is understood that this obligation is consistent with Art. 14(4) of the TRIPS Agreement.

\(^{120}\) The "agreed statement" on this article as adopted by the Diplomatic Conference reads as follows:

"it is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty of the Berne Convention. It is further understood that nothing in Art. 8 preclude a Contracting Party applying Art. 11bis (2)."
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enumerated in Art. 10, which do not conflict with the normal exploitation of the work and do not unreasonably, prejudice the legitimate interests of the author. The "agreed statement" adopted by the Diplomatic Conference provides that Contracting Parties may extend into the digital environment any existing limitations and exceptions that have been considered acceptable under the Berne Convention. They may also device new exceptions and limitations "that are appropriate in the digital network". Finally, the conference expressed an understanding that Art. 10(2) of the WCT "neither reduces nor extends the scope of applicability of the limitation and exceptions permitted by the Berne Convention.

Art.11 of the WCT establish a new kind of legal protection for authors. Treaty adherents shall provide not only adequate legal protection against copyright infringement but the Contracting Parties shall provides protection to the authors so that such protection also available against devices or services that defeat anti-copyright technologies.

Art.12 deals with the obligations concerning right management information. The above articles of the WCT provisions provide the legal status of the law, as it exists today in the digital era. Article 13 to 25 of the WCT deals with the administrative and the implementing issues of the Treaty. India is not a signatory to the WCT.

Rights management information is defined as information which identifies the work, the author of the work, the owner of any rights in the work, or information about the terms and condition of use of the work, and any numbers or codes that represents such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public. It lays down that treaty adherents must provides adequate and effective legal remedies against any person knowingly performing prohibited acts relating the removal or alteration of electronic right management information.

The WCT is not yet in force because as per Art.20 the Treaty can enter into force three month after 30 instruments of ratification or accession by states have been deposited with the Director General of WIPO. Presently though fifty-one countries have signed the Treaty only 19 have approved it by the July 15,2000.
WIPO Performance and Phonogram Treaty, 1996

The Diplomatic Conference also adopted this WIPO Performances and Phonogram Treaty (hereinafter referred as WPPT) on December 20, 1996. Till the July 15, 2000, fifty countries had signed the treaty and 16 countries had ratified the treaty. India is not yet a signatory to the Treaty. 123

The preamble to the Treaty highlights the importance of the new economic social, cultural and technological developments, the development and the convergence of information and communication technologies on the production and the use of performances and phonograms and the need to production and the use of performances and phonograms and the need to maintain a balance between the rights of the performers and producers of phonograms and the larger public interest, particularly education, research and access to information.

This Treaty through Art.3 ensures that the Contracting Parties shall accord protection to the performers and producers of phonograms who are the nationals of the other Contracting Parties provided such performers or producers of phonograms would meet the criteria for eligibility for protection as mentioned in the Rome Convention. Art. 4 contain the National treatment clause.

It is Art. 5, which embodies the principle of moral rights. According to this provision if the work of the performer is distorted in any way then the moral rights of the performer is infringement, as this would be prejudicial to his reputation. Further, the moral right of the author enjoys a greater duration of protection than the economic rights.

Art.6 provide protection to the economic rights of the performers in their unfixed performances. Art. 7,8,9 and 10 gives the performers the exclusive right of

123 This has not yet come into force. Art. 29 of the Treaty enumerate that this treaty will enter into force three months after 30 instruments of ratification or accession by state have been deposited with Director General of WIPO.
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authorizing the direct or the indirect reproduction of their performance fixed in the phonograms in any manner or forms, making their work available to the public, commercial rental of their work to the public and also the transmission of their work to the public by wireless and wired means, respectively. Chapter III of the Treaty comprising of Articles 11 to 14 gives the same exclusive rights to the producers of phonogram.

Art. 15 provides that the performers and the producer of the phonograms shall enjoy the right to a single equitable remuneration for the direct and the indirect use of phonograms published for commercial purpose for broadcasting or for any communication to the public. Article 16 deals with the limitations and exceptions to the rights of performers and producers of phonograms. Art 17 grants that the period of protection of performers shall be till the end of 50 years computed from the end of the year in which the performance was fixed in a phonogram. For producers of phonograms the term of protection is until the end of the period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

Art. 18 of the Treaty provides that the Parties shall provide adequate legal protection and effective legal remedies to the performers and the producers of phonogram from the use of technology which would restrict their exclusive rights. Art. 19 of the Treaty embody the concept of "Right Management Information System". To remove or alter any electronic rights management information without authority and also if any of the exclusive right of the performer or producer

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124 It defines this system as which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represents such information, when any items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or phonogram to the public. The Article mentions that the Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts or with respect to civil liberties having reasonable grounds to know that it will induce, enable facilitate or conceal an infringement of any right covered by the Treaty.
of the phonogram is violated without the needed authority then it would amount to altering the right management information system.

There is no formality and no reservations to this treaty shall be allowed. The administrative and the final clause are mentioned in the final chapter of the treaty. Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms. Recognising the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information. Have agreed as follow:

Inspite of all these desires and recognition WIPO could not recognize the rights of converge transmitters.

1. Neighbouring Rights in the Copyright Triangle

Copyright sustains a triangle of relationships. While industrial property tends to establish bi-polar linkages between right-owner and user-copyright has, on the right-owner side, both creators and entrepreneurs. As against users, their interests are largely the same: to ensure that the use of works is licensed and that the returns of use are maximized. But between them, there will exist tensions over how works may be exploited economically and how returns are to be divided. This has indeed been so in every country from the moment when published and other investors have pressed for protection to be accorded in the name of their authors. Thus in the era of convergence of information technology, the convergence transmitters have a realistic claim to share the field of copyright and neighbouring rights.

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125 Article 20 of the treaty provide that There is no formality and Article 21 provides that subject to the provisions of Article 15 no reservations to this treaty shall be allowed the administrative and the final clause are mentioned in the final chapter of the treaty.
It is the cultural value attaching to authorship, which provides such copious moral legitimacy for legal protection. Not only are authors given a longer-lasting right than could possibly be needed by way of economic incentive; entrepreneurs are also to justify related rights, which protect their own investments in cultural productions.

Michel Foucault’s questioning essay, “what I an Author?” has sustained a school of writing about copyright and related rights which envisions a brave new world, of freely co-operating writers and artists, each contributing to evolving work, each offering selfless support and accepting enlightened criticism. At least in its beginnings, the Internet has seemed to offer a medium peculiarly suited to such an aetherial Academe.

The uncalculating of ideas has long been part of scholarship of shared interest of many kinds. If new technology enables that process to evolve, so much the better. But to suppose that it will supplant the need for informational, educational and entertainment material which is generated upon the expectation of a market return is the stuff of dreams. Copyright will remain because it provides necessary protection for the investment of intellectual effort and capital in material, which is not produced in order to be freely shared. The law m-y have to be somewhat adapted, but its moral mainspring that works should not be substantially copied or otherwise taken without authority expresses a justification for legal intervention, which will remain very widely accepted. This is the raison d’etre for the neighbouring rights of the convergence transmitters.

The earlier copyright law of the United Kingdom adopted a strategic division between true authors rights and the neighbouring or related rights of investors which was in the van for its time: German legislation, for instance, was adopted a similar pattern only in 1965. This division, however, has been obliterated in the 1988 Act of U.K. Instead for better, for worse the two types are listed indiscriminately. In each case the copyright is in a work and it is granted initially in most cases to an “author” who “creates” it. All is resolved in a grossly misshape definition of the “creator”. The
shift is typical of that old strain of common law thought which sees no difference of kind between true creators and investors in the creators of other; and which is inclined to prefer the latter to the former.

In the meantime, the tensions between the world of “mixed” system as in UK and India and the world of “authors and neighbours” established in Continental Europe seem to be increasing. These are reflected also in differing concepts of originality, different rules about initial ownership of rights, different attitudes to moral rights and different approaches to legally guaranteed shares in economic returns.

2. Neighbouring Rights of Convergence Transmitter

When materials ranging from e-mail to multimedia are transmitted through convergence of information and communication technology, transmission is done in digital form. It is a broadcast of a new generation. Can these transmissions be protected by a copyright or a related right?

A recent Scottish case, *The Shetland Time v. Jonathan Wills* and another has dealt with the issue whether such links are themselves protected by copyright. In this case, The Shetland News (News), an online newsmagazine had developed the practice of citing on its Web site headlines from a rival news service. The Shetland Times (Times). These headlines were highlighted as hypertext links so that, by clicking on the link icon, the Internet user was taken from the News Web site to the relevant story in the Times site. The Times argued that its headlines were protected by copyright under the copyright law of U.K. both as “literary works” and as “cable programmes”. At an interlocutory hearing, the judge found that the Times did have an arguable case on both counts.

The issue of whether news headlines can enjoy protection, as literary works was not a new one, and case law indicated that the courts are generally reluctant to

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126 (1997) FSR 604
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grant copyright protection to them. In addition, even if a court were to find at a full hearing of the case that the Times headlines were literary works, it would only mean that care should be taken not to use headlines as links to other Web sites, or any other phrases which might be held to be literary works. What is significant, however, is whether at a final hearing, a court would find that the headlines were protected as “cable Programme”.

Right to Issue Works to the Public: The rights of convergence transmitter include the right to issue copies of the work to the public. It may well be an infringement of copyright for a bulletin board operator to transmit a message to a group of subscribers since the public can be a limited group. On the other hand, it has been argued that “issuing” would probably require a positive act by the bulletin board operator and, therefore, automatic transmission would not amount to a positive act. It has also been asserted that an infringement of this exclusive right is unlikely where the transmission is triggered by the subscriber, although the equivalent right has been relied on in a U.S. case. Playboy v. Frena. In that case, the operator of a bulletin board, Frena, admitted that Playboy were freely available of bulletin board, but claimed that photographs had been placed on Frena’s bulletin board by subscribers. The court held that Frena had infringed copyright.

Right to Public Performance: Performing, showing or playing the work in public is an infringement of copyright in many jurisdictions. There are arguments that this exclusive right could be infringed by making available the work on a bulletin board or Web site. This is more likely to be a problem where a work is sent at the same time to a large group of subscribers, particularly since a small group can constitute the public. If many individuals access at different times, a public performance is less likely. In Australasian PRS v Telstra, as Australian court held that playing music to the “hold” facility of a telephone exchange system was not public performance.

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Broadcaster and Convergence Transmitter: Transmission of a work over the Internet will not constitute broadcast as per the presently prevalent definitions of broadcasting which requires “transmission by wireless telegraphy”. Let us look at some of the definitions.

According to WPPT “Broadcasting” means the transmission by wireless means for public of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting” transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

According to Rome Convention “Reproduction” means the making of a copy of a fixation; “Broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds; “rebroadcasting” means the simultaneous broadcasting by one broadcasting organization of another broadcasting organization.

3. Indian Position

In India the Copyright Act 1957, deals with the rights of Broadcasting Organisations and of Performers in Chapter VIII. In section 37 it lays down as follows: Broadcast reproduction right.

1. Every broadcasting organization shall have a special right to be known as “broadcast reproduction right” in respect of its broadcasts.

2. The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which broadcast is made.

3. During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof:-
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a) re-broadcasts the broadcast; or

b) causes the broadcast to be heard or see by the public on payment of any charges; or

c) makes any should recording or visual recording of the broadcast; or

d) makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or where it was licensed, for any purpose not envisaged by such licence; or

e) sells or hires to the public, or offers for such sale or hire, any such sound recording or visual recording referred to in clause (c) or clause (d).

Shall, subject to the provisions of section 39, be deemed to have infringed the broadcast reproduction right.

Section 39 specifies act, which do not infringe broadcast reproduction right or performer’s right: No broadcast reproduction right or performer’s right shall be deemed to be infringed by

a. the making of any sound recording or visual recording for the private use of the person making such recording or solely for purposes of bonafide teaching or research; or

b. the use consistent with fair dealing, or excepts of a performance or of a broadcast in the reporting of current events or for bonafide review, teaching or research; or

c. Such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under section 52.
Section 39 A states as follows: "Section 18, 19, 30, 53, 55, 58, 64, 65 and 66 shall, with any necessary reproduction right in any broadcast and the performer's right in any performance as they apply in relation to copyright in a work.

Provided that where copyright or performer's right subsists in respect of any work or performance that has been broadcast, on license to reproduce such broadcast shall take effect without the consent of the owner of rights or performer, as the case may be, or both of them.

[F] Legal Provisions for Technological Measures

Technological solutions play a major role in the commercialisation and regulation of digital content. The attempt to find a technological solution is not new. Throughout the history of copyright law, creators have attempted to ban or restrict the use of technologies that facilitate the exploitation of their work and to encourage the introduction of technologies that assist them to protect their material.

Technological measures are technologies, devices or components that, in the normal course of their operation, are intended to prevent or inhibit the infringement of copyright or any right related to copyright or sui generis right related to databases. Such measures are, for instance, encryption and decryption, de-scrambling or other transformations of the work.

The European Commission's green paper on copyright and related rights in the Information society\(^ {128} \) aptly drew the attention on a pivotal feature of the digital era: technology now enables one to keep track and control dissemination and use of copyright works in the networks.

\(^ {128} \) Green Paper on Copyright and Related Rights in the Information Society of the Commission of the European Community, COM (95) 382-
The electronic future prospected in the U.S. White Paper, as well as that for which most content providers are getting prepared, implies massive use of technological measures. Technical measures can control and limit access and copying of the copyright material and are able to protect a service (Pay TV, Web sites) or some specific content. Another kind of technological protection is the one offered by the RMI that can support digitised works, specifying the name of the work and of the author, the owner of any right in the work, the terms and conditions of use of the work and any number or code representing such information.

Copyright owners, willing to exploit such potential, put vigorous pressure upon the legislator in the last years for the inclusion of specific previsions about technological measures to protect copyright. The point of the right owners was that technical measures as such would not have been effective if not coupled by adequate legal protection: circumvention of such measures should thus have been legally sanctioned.

Hence, an important part of the US digital agenda at WIPO's negotiations for the Copyright Treaty was the establishment of a new international norm to address this specific issue.

1. World Copyright Treaty, 1996

Under art. 11 of WCT, "Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological
measures that are used by authors in connection with their rights [...] which are not authorised by the author concerned or permitted by law".

Art. 12 of the Treaty obliges contracting parties to provide adequate and effective legal remedies against any person knowingly performing certain acts being aware that in doing so he will induce, enable, ease or conceal an infringement of any right covered by the Treaty or the Berne convention. Such conduct shall consists in: (a) the removal or alteration of any electronic rights management information without authority; (b) the distribution, import for distribution, broadcasting or communication to the public, without authority of works or copies of works knowing that electronic rights management has been removed or altered without authority.

While the provision concerning the Rights Management System did not raise any particular criticism, the adoption of the language provided by in art. 11 provoked an intense debate both in the drafting phase and in the further analysis carried by some scholars. The Digital Millennium Copy Right Act (hereinafter referred as DMCA) and the proposed EU directive expressed even greater disagreement, with reference to the implementation of this article on copyright.

In particular, serious concern has been expressed as to the possible consequences of the adoption of these technical measures and of concrete the enforcement of the rule set forth in art. 11. In fact, circumvention of these measures could be held as an infringing behaviour both in case of would-be pirates trying to force the barrier held by the technical devices and in case of lawful exercise of a fair use exception; but as the wisely underlined not all circumvention is bad.

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133 P. Samuelson (1997).


135 According to, T. Vinje (1996), technical protection systems will be deployed not only to prevent infringing reproduction but also to hinder lawful reproduction, i.e. falling under one of the cases of fair use. That is to say that technical measures can exceed, in away, the level of protection granted by copyright and may be able to impede the full operation of the fair use mechanism.
Why should a person - even assuming he is able to do so - be obliged to circumvent a technical measure in order to benefit under a fair use exception to copyright? And what about technically protected works, which have already fallen in public domain or that, are not entitled to copyright protection for lack of creativity?

In this fashion the digital era, despite of the fears expressed by right holders, is more likely to affect the exercise of exceptions rather than the exercise of rights.  

Protection of technical measures may bring to even more broad distortions of the present IP legal system depending on the way legislators does tackle the problem of the manufacture of devices and equipment, which are able to circumvent technical measures.

There are basically two approaches to address this objective: the "act approach" or the "device approach". Legislators may opt for specific sanctions targeting acts of circumvention without authority or for the broader solution to punish people that import, produce, market or sell technical devices that may disable technical protection.

2. Digital Millennium Copyright Act, 1998

Moving beyond from the WTC provisions, the US opted in the DMCA for this broader scope of protection but provided for substantive exceptions and limitations to that principle.

The DMCA expressly prohibits on one side the unauthorised access to a work by circumventing technical measures put in place by the author. On the other side it prohibits the manufacture or making available of products and services that defeat measures controlling access or measures that prevent reproduction.

The DMCA, on the same vein of EU proposed directive, prohibits devices that are primarily designed or produced for the purpose of circumventing; that have only

a limited commercially significant purpose or use other than to circumvent; or are marketed for use in circumventing. Anyway, in order to reset a proper balance with public interests need was felt in the drafting phase of such Act to clearly define the borders of this strengthened copyright by granting some specific exceptions.  

Anyway, the DMCA shall be considered as midway between WCT and the EU proposed directive.

3. **The EU proposed Directive on Copyrights**

This proposal, which has opted as for a "device prohibition" policy, despite of its being not yet enacted has already been received with harsh criticism by scholars.

Here again, in addition to the sanctioning or mere circumvention of technical measures, specific language was added in order to provide for adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services that; are promoted, advertised or marketed for the purpose of circumventing; have only a limited commercially significant purpose or use other than to circumvent, or are primarily designed or produced, adapted for the purpose of enabling or facilitating the circumvention of any effective technological measure.

It is worth noticing that this "device approach", which both EU and US opted for, may give rise to a number of major concerns.

The "device prohibition" policy clearly aims at anticipating the forbidden conduct punishing acts that may lead to circumvention, in order to prevent massive

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137 Significantly, fair use exceptions were inserted in DMCA as to circumvention for the purposes of reverse engineering, for the benefit of encryption research, for tests to measure the security of a computer and for law enforcement and intelligence activities.

138 According to scholars such provision is not coupled with adequate exceptions and limitations and strongly unbalances the previous system to the benefit of right owners.
infringement. Therefore, Member States shall use this policy very cautiously. The risk would be otherwise to unjustifiably put the burden of the proof as to rightful behaviour upon the manufacturer/dealer. This would impose an unsustainable degree of uncertainty over these subjects: any device as such may be used for proper or unlawful purposes. As a result devices able to defeat technical measures could simply disappear from the market, at least the "official one": was this the original aim of the legislator?

In short, the outcome of this new set of rules may be that those limitations of the copyright which in the analogue world successfully balanced the interests of the right owners with the ones of the public might not apply anymore, due to an undesired effect of these new provisions. To make a long story short, anti-infringement measures for the digital era do not appear to be accompanied by sufficient ad-hoc exceptions.

4. **Indian Position**

Technological protection measures are designed to prevent, in the digital networked environment, the unauthorized access to or use of works protected by copyright. Their legal protection comes as a third, cumulative, layer of protection for rights owners, in addition to copyright protection itself and to the technical protection of work.

As per the Copyright Act, 1957 knowingly making or possessing any plate for the purpose of making infringing copies of a copyrighted work is a punishable offence. The definition of 'plate' under the Copyright Act is very wide indeed. It includes:

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139 S. 65 of the Copyright Act, 1957:

Possession of plates for purpose of making infringing copies. – Any person who knowingly makes, or has in his possession, any plate for the purpose of making infringing copies of any work in which copyright subsists shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.

140 S. 2(t) of Copyright Act, 1957.
In any stereotype or other plate, store, block, mould, matrix transfer, negative duplicating equipment or other device used for or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which sound recording for the acoustic presentations of the work are or are intended to be made.

This definition to a great extent provides protection for the technological protection measures adopted by a copyright owner. Taking a lead from Article 11 of the WCT some countries of the world have already enacted anti circumvention provisions like in Digital Millennium Copyright Act, 1998 in USA, in Australia in 2000, European Directive 2002 and in Canada and Japan. The debating point for India is whether to put such provisions in the Copyright Act, 1957? Since anti circumvention provisions have bearing on the fair use provisions, the suitability of these provisions for India is being discussed in the subsequent para.

The basic principle of copyright like other intellectual property rights is the balance of the interests of the individual creator and that of the society at large. The limitations placed on copyright serve to balance the interests of authors against the legitimate interest of the copyright industry, users and the general public especially in freedom of information and freedom of intellectual creation. Therefore, the laws while granting exclusive rights to authors or producers of creative works limit those rights in time. Even during the period of copyright, certain special uses are allowed without any specific permission from the copyright owners such as for private, academic, educational, judicial or legislative purposes. \(^{141}\)

The exclusivity of copyright is indeed based on law and the same is balanced by ‘fair use’ provisions. Technological protection measures allow the exclusion of uses. However, while copyright is limited in many ways, exclusivity based on technology is potentially unlimited. It may, for example, be possible by way of technology to exclude others from using information which is not copyrightable, or to exclude acts which are not restricted acts under copyright, either because they do not fall under the definitions

\(^{141}\) See, s. 52, Copyright Act, 1957.
of the exclusive rights or because they are explicitly exempted by way of fair use.\textsuperscript{142} With the technological protection measures and accompanying legal provisions against their circumvention, the exclusivity of copyright is sought to be extended over and above what was envisaged by the legislature.

How should the legislature deal with this phenomenon of expanding exclusion? Should the policy which is expressed in copyright law, of which the limitations on the right are an integral part, be preserved – or should the broader exclusivity based on technology be endorsed? The legislator must decide either to maintain the limitations on the control that a copyright holder can exercise over the use of copyrighted product, or to in effect protect technological measures. Technology – at this stage – is simply not developed enough to accommodate all the subtleties of the law. A complete reliance on the exclusivity based on technology could result in gagging of fair use which will be fatal to the balance represented by ‘copyright’.

The latest but not least dangerous factor that is challenging the future copyright system is the development of a highly restrictive contractual practice (online licenses, or to use another fancy name, click-wrap licenses), which tends to sensitively diminish the scope of the rights granted to the user. The user who is willing to buy a copyright product on line, by clicking on the suitable button of the seller’s web page, automatically accepts terms and conditions of the license granted by the right owner. One of the issues to be soon addressed shall be to assess the validity of contractual provisions that curtail user’s privileges derived by law.

The balance between private user’s and right holder’s interests should not be negotiable at a contractual level and is an issue that can only opportunely be addressed by a parliament\textsuperscript{143} (or in any case, the legislator only).


\textsuperscript{143} M. Ricolfi, ‘A copyright for cyberspace? The European dilemmas”.
Some correct suggestions are prompted, wisely enough this time, by the UE legislation: both computer software directive and database protection directive provide for nullity of the provisions aiming at limiting or abolishing the exceptions both directives are granting to the benefit of users.\textsuperscript{144}

**RECAPITULATION**

The digital domain has begun to seriously challenge the copyright system, both in India and abroad. We cannot simply rely on legalistic interpretations because technological developments may marginalise copyright as a force in creative and commercial affairs. Dramatic growth in broadband communications, convergence of technology systems, digitalisation of content and the globalisation of human interactions have changed the context within which copyright operates. Copyright exists to regulate the use of content and to balance the rights of creators and the general public.

In the digital domain, there is some uncertainty whether copyright is the most suitable regime to undertake this function. Due to the nature of digital content, a combination of commercial, technological and legal solutions will be utilised to manage copyright material.

Owners need to explore the potential for the application of technological solutions that substantially discourage or even prevent unauthorised use and dealings. Digital watermarks and content that relies on network access provide two of the most promising examples of these. Business entities can be expected to adapt existing schemes and to develop new ones to deal with the challenges of new environments. This has been and will continue to be the case in the context of digital copyright.

\textsuperscript{144} See art. 9.1 of Computer Software EU directive 91/250.
Some of the business solutions are such that they would be successful in the absence of technological or legislative developments. However, most of them rely on technological measures for their efficacy. Access and advertising based regimes provided the first generation of digital content enterprises.

Evolution of cross marketing, first-to-market and service focused firms can be observed at present. In the future, electronic commerce and virtual community centered organisations will probably dominate themselves; solve the dilemmas facing regulators and copyright owners. However, measures such as the new technology-neutral communication rights will provide greater certainty for all and more flexibility for copyright owners.

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144 See art. 9.1 of Computer Software EU directive 91/250.