UiO : Faculty of Law
University of Oslo

Broken copyright:

Is a digital exchange like the one proposed by the Hargreaves report to address deficits in copyright law a solution Norway should adopt, and is there a role for Online Dispute Resolution in that platform?

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1 Introduction

Digital technology has, over the last two decades, led to a radical change in how we enjoy and create culture. The digitalisation of creative works and the development of devices with access to the Internet have made it possible for more than a third of the world's population[1] to enjoy, learn and be inspired by the works of others and contribute to the global creative sphere with their own works. This vibrant environment has become a spring of creativity, where new creations, art forms and business models are welling up. While there has been a liberalisation of the enjoyment and making of creative works, such works have also become increasingly valuable to individuals, businesses and the society and held by some to be the "single most important factor driving growth".[2] Therefore, the protection of creative works has become correspondingly more important. For this purpose copyright law has been given an essential role.

The question is whether copyright law in its present form is suited for this task. Digital technology and the Internet has not only given new opportunities, but also brought problems to the field of copyright. Copyright law, at its basic level, regulates the right to copy a certain work and historically the act of copying was complicated, expensive and time-consuming. Therefore, it can be argued that copyright had its most important role in regulating the rights and disputes between a limited number of people; namely, publishers who held the copyrights and other intermediaries who had the equipment and knowledge to copy.[3] Digital technology changed this. Suddenly, perfect copies of digital creative content can be made by anyone at zero cost on any digital device, and the Internet enables worldwide dissemination. This environment has, as noted above, many positive aspects but it is also results in a significant modern challenge that the current copyright regime seems unable to address: the severe increase in copyright infringement.

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[1] World Bank (2012).

[2] Elkin-Koren (2012) p.1.

[3] Schultz (2006) p.659, esp. fn.17, Griffin (2013) p.7.

Statistics show that copyright infringement causes great losses to the whole creative sector every year[4]. In 2011, 57% of the world's computer users would admit infringement of software. The commercial value of this software theft increased from $58.8 billion (353 mrd. NOK) in 2010 to $63 billion (378 mrd. NOK) in 2011, of which Western Europe[5] represents $13.8 billion (83 mrd. NOK).[6] The turnover of the Norwegian record industry dropped 50% from 2001-2011.[7] There were 7.3 million illegal downloads of content registered in Norway per week in 2012,[8] similar to 1.5 illegal downloads per person.

To protect their interests, the Content Industry[9] attempted to fight the new wave of copyright infringement by "traditional methods";[10] initially through litigation and when this did not provide the desired effect, additional efforts were made in lobbying for change of law. Governments responded by expanding the scope of the copyright and by introducing new and easier enforcement procedures. However, this has not led to a significant reduction in the infringement of copyright law. A natural conclusion would be that copyright law is not fit for purpose and is not an efficient tool to address copyright infringement. However, it is arguably not the law *per se*, but the enforcement mechanisms that render copyright law deficient. If copyright law was adhered to, authors would be encouraged to create by having their rights protected whilst the public would be able to access this creative content –

[4] Regarding the caution required when relying on these figures, see section 2.

[5] Twenty-two nations.

[6] Business Software Alliance (2012) p.9.

[7] IFPI Norge (2011) p.2.

[8] Norwaco (2013) p.15.

[9] For the purpose of this thesis, this term refers to business models in the creative sector mainly developed before the online digital revolution such as publishing houses, record labels, and film companies that more or less rely on copyright protection.

[10] The traditional methods by which the Content Industry attempted to protect its copyrights and the limitations inherent in this approach will be considered in detail in section 3.3.1.

which are among the main goals of copyright law.[11] This thesis puts forward the argument that the crisis of copyright infringement can be tackled through an innovative and progressive approach that culminates in the introduction of an online Digital Copyright Exchange ('DCE'). The regulation of undesirable behaviour and enforcement of copyright law could be carried out without unduly restricting access to content by providing a preferable substitute to copyright infringement.

In the Hargreaves Report,[12] which analysed how intellectual property law supports economic growth, the concept of a DCE was outlined as an online marketplace where the trade of rights to use creative works would take place. Content would be accessible on a website through a network of interoperable databases and rightholders could make new content available for licensing on the platform.[13] The idea is to make content and information regarding copyright ownership from all creative sectors available internationally. A DCE like this offers various benefits such as a drastic reduction in complexity and costs, more accessibility and greater clarity, and therefore has the potential to address the infringement challenge without constraining the constant growth of opportunities. This thesis takes this initial concept of the DCE as described in the Hargreaves Report, puts flesh on the bones of the idea and suggests the ways in which an ambitious formulation of a DCE could tackle the current problem of copyright infringement.[14] Part of the development of the concept of a DCE is the consideration of the function an Online Dispute Resolution service could have.[15] Such as service, it is argued, would provide a quick and cheap method of resolving copyright disputes, as well as an option for negotiation during the formation of contracts for licences, and further add to the potential flexibility and usefulness of the DCE.

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[11] MacQueen (2011) p.45, Rognstad (2009) p.34, see further section 3.3.1.

[12] Hargreaves (2011).

[13] Hargreaves (2011) para.4.31, 4.23.

[14] See section 4.

[15] See section 5.

Although the Hargreaves Report was initiated by the UK Prime Minister David Cameron due to the challenges facing the current copyright regime and hence the need for modernising the copyright framework in the UK, the concerns regarding copyright addressed in the Report are not limited to the UK. The same challenges, in particular infringement, are indeed apparent elsewhere.[16] Norway will serve as an example of a country where the DCE arguably could be introduced with success.

2 Methodology

The UK proposal of the DCE is not focused on particular legal rules, but instead adopts an economic and technological perspective. For this reason, the approach of this thesis is to discuss the issues raised at a conceptual level. It is not a legal doctrinal analysis. The advantage of this approach is that it will make the solution more relevant for Norway. This can be justified by seeing the problem of copyright infringement as a social problem in both the UK and Norway which requires a holistic, rather than strictly legal, solution. The technological solutions considered are dealt with in the same manner. The thesis does not delve into technical details as this is beyond the author's level of expertise.

The sources used are a combination of peer-reviewed academic literature and so called 'grey' literature. As the latter lacks the same quality checks as the former, it requires extra caution when evaluating its worth. However, consideration of these grey sources are necessary due to the youth of the topic under discussion and the fact that these sources aid understanding of the subject matter. For the statistics used in this thesis, additional care is required. The available statistical material is based on different methods. The numbers could have been produced for strategic purposes such as influencing policy and the method chosen can sometimes be linked to an ideologically, political or commercial bias.[17]

[16] See, for example, regarding the software industry: Business Software Alliance (2012).

[17] Bridy (2011) pp.695, 706-708, Mitra-Kahn (2011) p.76.

3 Copyright Infringement

To provide context to the argument that the DCE can address copyright infringement challenges, this section will look at who are the infringers and why they infringe. We will first meet six imaginary actors in the creative field and see how they are interacting with creative content. I will then distil from these stories the main reasons why copyright is infringed. Thereafter, I will discuss the traditional methods by which the Content Industry has attempted to tackle infringement. The disadvantages of these methods will be discussed and it will be suggested that a new approach needs to be taken to effectively combat the current infringement problem facing copyright law.

3.1 Stories

3.1.1 Story 1A

Oline Aas is a law student with a passion for jazz music. Oline is painfully aware of copyright law and acknowledges that artists are struggling to get any return on what they create, but she cannot afford to pay full price for everything she wants to listen to. It is also difficult to find the recordings she wants on legal services. She has, however, been lucky to find an online file-sharing community specialising in jazz music where she downloads music regardless of copyright protection. When she discovers new music from unknown artists she really likes, she often purchases the music directly from the artist.

3.1.2 Story 1B

Lars Holm's hobby is creating a digital library of creative content. He gathers everything he can find for free, from software to music and film. He is ideologically opposed to copyright and the constraining effect of copyright law on the public enjoyment of culture. He thinks everything should be available for free. Therefore, he is also eager to share his content on a several P2P networks.

3.1.3 Story 2A

As part of their studies, two psychology students Kristoffer Gjærde and Kari Festøy, produce a documentary film about personality assessment with focus on emotional reactions.

The first part of the film contained the theory behind such tests and an explanation of the application of this in practice. Thereafter came a self-assessment, where a series of famous and less known film clips, photographs and texts, followed by questions, allowed the viewer to assess his or her personality.

The film was a success and the professor in charge of the course wanted to use it for teaching her classes. The two students were quite business-minded and they discovered that there was great demand for their film from other universities, psychology practitioners and individuals. Therefore, they set up a company, named MindStudy, and started selling their film. When they started searching for film clips for their second film – on introversion and extroversion - they realised that according to copyright law they were obliged to acquire licences for the use of the content used and that had sold a lot of copies of their first film without any copyright. As the making of the first film was part of their education, they did not require licences due to copyright exemptions for educational purposes and they had totally forgotten about this when turning the project commercial.

It turned out to be difficult to get the licences required. Firstly, they had used many different types of content, the rights of which were organised by different intermediaries and collecting societies, and, secondly, as the film was relevant to psychology in general, their market was international. Due to a complex structure of right management and with laws varying from country to country, getting all the necessary licences became too costly and time-consuming. Genuinely convinced that their idea could both help the progression of the study of psychology and the life of individuals - and be profitable as a bonus - they decided to risk it without all licences in place.

3.1.4 Story 2B

Marte Kirkerud worked as a freelance editor, mostly within health, beauty and celebrities for magazines such as Se og Hør, and Her og Nå. One day she got fed up with it all and quit her jobs. As she always kept a backup of her work, she now had a big database of information and images. This was the starting point of her new activity. Employing her editing and software skills, she manipulated photos and stories to show celebrities in embar-

rassing or controversial situations, and her newly-started company used them to create slightly obscure advertising campaigns and web-sites.

3.1.5 Story 3A

Google launched their news aggregator service in 2002,[18] which brings together news from a range of sources all around the world.[19] Inspired by this a new company, MyNews, planned a similar service, focusing on personalised news aggregation. The personalisation feature would be based on choices made by the user and/or the service's 'intelligent' ability to monitor the user's electronic actions - such as email and social media - and supply news based on this. This type of news aggregation is automatically carried out by computers and the feed could be updated continuously. It is difficult to acquire licences for the aggregated news which may be copyright protected as at present there is no service offering automatic licensing. The company was aware of the on-going debate on whether this kind of news aggregation is in accordance with copyright law; there being decisions against similar companies[20] and countries like Germany and France have adopted new legislation to constraint the practice.[21] However, Google was still offering the service and they were willing to try the same. The way Google kept their service going in Germany was to make the German news sources actively accept the use of their online content.[22] What MyNews underestimated was the importance the powerful position Google had in comparison to themselves. Therefore, they did not get the desired acceptance from any news source when try-

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[18] Martínez (2012) p.114.

[19] Google (2011).

[20] See, for example, ECJ C-5/08 Infopaq International A/S v. Danske Dagblades Forening p.465 a preliminary ruling followed by Danish Case 97/2007 where it was ruled that 11 words could be subject of copyright. In the Belgian Case 2007/AR/1730 Copiepresse v. Google, the news aggregated by Google News was found to infringe copyright. However, due to loss in audience by not being searchable on Google, Copiepresse and Google later entered into a settlement, see Copiepresse (2012). Yet, traditionally compilation and reuse of news have been allowed by copyright law, see e.g. Berne Convention Art.2(8).

[21] Podszun (2013) p.260.

[22] Brombach (2013), Rabenstein (2013).

ing to launch in Germany and in other countries they were running the risk of being sued, without the financial security of Google.

3.1.6 Story 3B

Peder Bakke and Hans Moe set up a website for sharing of digital content and making profit through advertisement and subscriptions which they called PirateFjord. They did not care about whether the content shared on their website was illegally uploaded. They simply considered the website as a good business opportunity.

3.2 Identifying Copyright Infringers

From the above stories, three main groups of online copyright infringers can be identified. These groups are not exhaustive, but are chosen because they show the main characteristics of the majority of copyright infringers.[23] In addition, the groups are not fixed entities, as the members of the groups often move from one to another, for example when a consumer downloads a copyright protected work (group 1), subsequently edits this work and makes it available for others online (group 2).[24] Furthermore, the stories above show one 'good guy' and one 'bad guy' from each group, which helps to visualise the parameters of the DCE. Finally, it can be noted that although the impact of the infringement problem can vary from sector to sector (film, music, software, etc.), the basic reasons behind the infringement would in broad terms appear to be similar and this makes it practical to consider the situation as a whole.

3.2.1 Group 1: The Consumer

Consumers of creative content infringe copyrighted content for their own use, rather than for the purpose of resale. They would typically be individuals illegally downloading e.g. music or software from a file-sharing service like the PirateBay[25] for their own use, or it

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[23] These groups are inspired by the list of the 5 players involved in copyright licensing in Hooper (2012, March) pp.11-12.

[24] This corresponds with the 'situated user' in Cohen (2005) p.349 *et seq*.

[25] www.piratebay.sx (the domain is changing all the time due to suspensions, see Ernesto (2013)).

could be a shop-keeper wanting to play music for customers. Some consumers would regularly upload or share content, intentionally or unintentionally, but if too extensively they may qualify for group 3, the distributor. Both Oline and Lars from the stories above are stereotypical examples.

So, why do consumers infringe copyright? A survey carried out in four waves from 2012 to 2013 by Ofcom[26] on online consumer copyright infringement in the UK shows what users themselves report as the reasons for infringing and what factors would encourage them to stop.[27] Although these findings are from the UK, by viewing copyright infringement as a common societal problem in both countries, in could be argued that the attitudes of consumers to copyright infringement are similar between Norway and the UK on these points.[28] Two tables in the Ofcom survey identify 18 "[r]easons for infringing", 17 "[f]actors that would encourage infringers to stop" and the importance in percentages for the infringers[29]. I place these reasons within 5 main categories which can influence consumer positively or negatively. These reasons relate to price of content, accessibility of content (e.g. convenience, speed, availability), risk, ideology and lack of clarity of law.

The reasons identified in the survey are also identified as important factors in academic literature. Adopting Becker's approach that committing an offence is a result of a rational person's choice,[30] the first three categories can be analysed as part of the balancing of costs against benefits that takes place when a consumer considers whether or not to infringe cop-

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[26] The independent regulator and competition authority for the UK communications industries.

[27] See Ofcom *High Volume* (2013) p.90. A survey on unlawful behaviour such as this may suffer from dishonesty even though measures were taken to avoid this, see Ofcom *Wave 4* (2013) p.10. However, it is plausable that dishonesty is likely to affect questions about whether a person has infringed or not, rather than the reasons given for infringing – which are the most important for this thesis.

[28] This is confirmed by a similar, less detailed, survey from Norway, see Gran (2012) pp.53-55.

[29] Ofcom *High Volume* (2013) p.90.

[30] Becker (1968) pp.176-179. See further on the relation between costs and benefits expressed as 'consumers' willingness to pay' for digital content in Chiang (2009).

yright. It can be argued that in the consumer's mind, the perception of risk - typically of legal sanctions, but also social condemnation, malware etc. - is compared with the benefits of infringement, for example, low price and high accessibility. This argument correlates with the Ofcom survey results, showing that low price is important and the perception of risk of sanctions is low, and is supported by Belleflamme and Peitz.[31] These writers also, however, ask why consumers are not, to the same extent, breaking laws other than copyright law where the allocation of costs and benefits are similar. They answer this question by referring to Balestrino's model showing that the lack of perceived social costs, which is a part of the consumer's perception of risk, leads to no social condemnation.[32] In the story of Oline, she does not feel judged by her friends and many of them are part of the same file sharing community. They have been notified that one of the members from the US has received copyright infringement warnings, but that felt remote and unlikely to happen to them. A similar explanation, but from the point of view of the potential infringer, is offered by Hill's application of Jones' 'moral intensity' argument, which shows that the moral intensity of committing copyright infringement is low compared to other crimes and therefore the rates are high.[33] It can, however, be suggested that both social condemnation and the moral intensity is increasing with the growing awareness of copyright law in society. This is also consistent with the increase in use of legal services[34] such as Spotify and Netflix.

Furthermore, according to Hill, some of the reasons for infringement can be explained by equity theory, which "describes an individual's search for fairness or equity in social exchanges".[35] Both the perceived value of content relative to price and feelings of inequality

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[31] Belleflamme (2010) p.4.

[32] Balestrino (2008) pp.455, 466. See also Schultz (2006) p.654 and Mandel (2013) who in his study demonstrates that "views of what intellectual property rights should be [differs] substantially from actual law" (in abstract).

[33] Hill (2007) pp.12-13, referring to Jones (1991).

[34] Chiang (2009) p.2.

[35] Hill (2007) p.12.

are identified.[36] This correlates well with reported reasons in the Ofcom survey such as "The industry makes too much money" and "I think legal content is too expensive".[37] The equity theory can therefore relate to the above-mentioned categories of price and ideology. In the story about Oline, a fairness argument can be spotted by the fact that she often purchases content subsequent to her infringing: she thinks the latter purchase balances out the wrongdoing. Lars is of the opinion that copyright law is unfair and therefore his actions are justifiable, especially when he supplies the rest of the society with free content.

The final category - lack of clarity of the laws - is supported by Belleflamme. He suggests that, in particular, limitations to the exclusive rights of the copyright owner, such as 'fair use' or 'private copy/private use', are difficult to apply in the online world and consumers do not understand what is legal.[38] For the consumers a similar reason relating to another stage of the content transaction could, however, encourage infringers to stop - that is if it is clearer what available content complies with copyright laws and what content is only available due to illegality.[39] Hence, instead of having to consider the law themselves, the consumers want someone else to consider the law, so that it is easy to get hold of legal content.

As discussed in section 4 onwards, the DCE could offer solutions that would mitigate these reasons for infringement so that the 'good guy', such as Oline, does not find it beneficial or justifiable to infringe. However, for the 'bad guy', the idealistic or criminally motivated infringer such as Lars, the DCE - which is voluntary based - cannot offer a direct solution. However, the DCE could lessen demand for illegal services in general, which in turn would cause fewer possibilities for infringement for anyone.

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[36] Hill (2007) p.12.

[37] Ofcom *High Value* (2013) p.90.

[38] Belleflamme (2010) p.3.

[39] Ofcom *High Value* (2013) p.90.

The reasons identified in the consumer group also apply to the two further groups considered below. In the following sections, for the re-users and distributors the additional reasons specific to the particular group are discussed.

3.2.2 Group 2: The Re-user

This group consists of those who are unauthorised and are using copyrighted works to create something new. Included here are artistic expressions made possible by digital technology and the Internet, such as mashups and remixes,[40] along with more traditional expressions like the film by MindStudy in the story above and the manipulated pictures by Marte Kirkerud. This group got an enormous boost of members with the introduction of the Web 2.0, where users were encouraged to "engage, create, and share content online" on sites such as Facebook, YouTube, etc.[41] This is not to say that all user generated content ('UGC') infringes copyright, but it is unlikely that a Facebook user acquires a licence before modifying and sharing a picture found on the web.

While the focus in the consumer group was on accessing and acquiring digital content, the infringers of this group have already got the content (legally or illegally), and are making it public in a way that constitutes copyright infringement. As the content here would be subject to use in a new context with or without alteration, a licence for re-using purposes would be different to that of a consumer. The story about MindStudy shows that a simple business plan can involve complexity in obtaining licences. However, as complexity represents high cost and time consumption, infringement could still partly be explained by a cost and benefit analysis.

Furthermore, the psychological explanations for consumer infringement are also applicable to this group, as re-use of content has become normal and acceptable. Related to this is Lee's argument that "uncertainty in formal copyright law can lead to the phenomenon of

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[40] O'Brien (2006).

[41] Lee (2008) pp.1460-1461.

"warming," in which - unlike chilling - users are emboldened to make unauthorized uses of copyrighted works based on seeing what appears to be an increasingly accepted practice",[42] which is the other side of the coin to lack of social stigma.[43] Re-users choose to do what the other re-users do and what the online UGC platforms encourages them to do.

As for the 'good guy' consumer, the DCE could offer solutions for the 'good guy' re-user to alleviate the reasons for infringement, particularly regarding complexity.[44] For the 'bad guy' re-user infringing copyright the DCE's role would be the same as described about the 'bad guy' in section 3.2.1. Regarding the 'bad guy' infringing moral rights, such as Marte Kirkerud above, the DCE could have a further role. Provided that the rights to use the content were acquired through the DCE, the existence of an ODR service could provide a method to resolve the moral rights dispute.[45]

3.2.3 Group 3: The Distributor

The distributor copies and redistributes content in its original form in order to gain economical profit.[46] Without authorisation this can constitute copyright infringement. The 'good guys' of this group are valuable for the society as they bring forward new ways of enjoying culture and enhance access to cultural content. Such businesses are not based on copyright infringement. However, as shown by the story of MyNews, it can be challenging for start-up businesses to comply with copyright, whether due to lack of clarity in the law or the complexity and expense of obtaining the appropriate licences, so they end up infringing copyright.

The 'bad guys' of this group are businesses based entirely on copyright infringement. Only looking at online activity, a recent study of websites considered to be infringing copyright

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[42] Lee (2008) p.1459.

[43] See section 3.2.1.

[44] Section 4.3.2.

[45] Sections 4.2.5, 5.2.3.

[46] Lessig (2004) p.62.

identified six business models based on copyright infringement, including P2P services and websites providing access to unauthorised content through pay-to-enter schemes.[47] The street sale of fake DVDs and other manifestations of creative content, which is a typical sight in some countries, is also often based on online copyright infringement. These businesses are either "in it for the money"[48] or for ideological reasons.[49] In the story above, Peder and Hans combine these reasons. These copyright infringers are not going to start using the DCE, as copyright infringement is the basis for the businesses. However, again the DCE could significantly reduce the demand for illegal services, thereby reducing the market, hence render the business model unviable.

3.3 Tackling Copyright Infringement

Following from the above section that outlined the different types of copyright infringers, this section will consider possible approaches and ways to tackle the infringement problem. I identify three approaches: i) the traditional, ii) alternative business models and iii) the holistic.[50] There are several disadvantages with the traditional approach and new business models cannot be adopted by all. It is therefore suggested we need a new holistic approach to efficiently tackle the infringement problem and at the same time ensure unimpeded creativity and access to culture.

3.3.1 The Traditional Approach

The traditional approach, which refers to how the Content Industry has attempted to address online copyright infringement so far, has mostly relied on three strategies: firstly, conventional litigation, secondly, graduated response laws and thirdly, preventive measures. The Industry has also lobbied for stricter copyright regulation by making the scope of the copyright laws wider and enforcement easier.

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[47] PRS for Music (2012) p.5.

[48] Schultz (2006) p.659, Belleflamme (2010) p.3.

[49] PirateBay claims to be a non-profit ideological service http://piratebayblog.wordpress.com/our-ideology/ and https://thepiratebay.se/about.

[50] Similar approaches are identified by Stranieri (2001) pp.111-113.

Conventional private litigation has involved suing thousands of individuals for uploading files onto file-sharing services, arguably trying to deter by spreading fear[51] and the Recording Industry Association of America represents an example of such a method.[52] Enforcement against a large number of infringers over a vast area did, however, prove burdensome and inefficient.[53] Another method has been litigation directed towards Internet intermediaries providing file-sharing platforms,[54] also without the desired effect.[55]

As these methods did not seem to be working, the Content Industry lobbied for graduated response laws,[56] to which many Governments have responded.[57] This method differs from the conventional litigation above by shifting some responsibility from the rightholders to an administrative authority and/or Internet Service Providers (ISP) to make it easier to reach individual infringers.[58] Rightholders are, due to privacy rights, usually prevented from ob-

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[51] Swartout (2011) p.500.

[52] Karunaratne (2012) pp.286-288.

[53] Swartout (2011) p.500. The Recording Industry Association of America ('RIAA') from 2003 to 2006 sued over 17,000 individuals, see RIAA Watch (2006), but still an estimate of 1.3 billion music files were illegally downloaded by US students in 2006, Brittain (2007). See also Electronic Frontier Foundation (2008).

[54] Swartout (2011) p.500. See, for example, UMG Recordings, Inc. v. MP3.com (US, 2000), A&M Records, Inc. v. Napster, Inc. (US, 2001); MGM Studios, Inc. v. Grokster, Ltd., (US, 2005); Swedish Case B 13301-06 (Pirate Bay, 2009); Dramatico Entertainment Limited & Ors v. British Sky Broadcasting Limited & Ors (UK, 2012).

[55] For example, the early case of A&M Records, Inc. v. Napster, Inc. (US, 2001) did not stop the explosion of infringement, the cases against The PirateBay in Sweden (Case B 13301-06) lead to a huge fine and jail sentence for four founders, but the site is still running. Due to Electronic Frontier Foundation (2008), new alternative file sharing platforms quickly pop up after others shut down or agree to filtering content, and the numbers of file sharing did not drop after shut downs.

[56] Swartout (2011) p.509.

[57] De Beer (2009) pp.389-391, Anderson (2008).

[58] De Beer (2009) pp.389-391.

taining the identity of copyright infringers from the ISP without a court order.[59] Under the graduated response system the intermediaries, or the authority, and not the rightholders, contact and warn the alleged infringers. Commonly, two warnings are sent to the infringer before the case can be taken to court where possible punishments could be fines, suspension of Internet access, or termination of Internet account.[60] In order to claim damages, however, the rightholder would have to proceed through a civil court action.[61]

Unlike other traditional methods, the graduated response approach can result in a decrease in copyright infringement.[62] Another advantage compared to the others is the educational aspect of warnings, which gives the infringers the chance to change behaviour before any court action. Nevertheless, despite the ostensible effect of the graduated response, the described methods all together have not been particularly successful. Recalling section 3.2.1 on reasons for why people infringe this is not surprising: the perceptible risk is not high enough to overcome the benefits. A better result could have been achieved if the Content Industry and the lawmakers managed to establish social condemnation of copyright infringement (also a risk for the individual infringer),[63] and not only focused on creating a risk of punishment. As argued by Schulz, it requires a lot to change peoples' behaviour by the use of deterrence-based strategies when the law does not correspond with the social norm.[64]

To consider graduated response in particular there are further, more fundamental, objections to this approach. Firstly, suspension of Internet access, which was perhaps the most effective aspect of this approach and increased the perceived risk for the infringer, could be

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[59] This is e.g. the case in Norway Åndsverksloven § 56b, Sweden, Finland, Netherlands, see Prop. 65 L (2012-2013) pp.11-13.

[60] Swartout (2011) p.499, Hadopi (2010).

[61] Werkers (2011).

[62] Meyer (2012) p.117.

[63] See section 3.2.1.

[64] Schultz (2006) p.663.

considered as a breach of the human right of freedom of expression.[65] Secondly, revealing Internet users' identity without the involvement of an independent judiciary could be in opposition with both individuals' privacy rights and the general rule of law.[66] It is perhaps not surprising that France, a pioneer on the graduated response law, recently decided to relax their law.[67]

The recently amended Norwegian Copyright Act[68] is similar, yet not as severe, as the French system. The law makes it easier to identify copyright infringing internet subscribers by enabling the court to order ISPs to disclose to rightholders personal information related to IP-addresses which they can then use to send warning letters or begin court proceedings. Such information was previously only accessible by a licensed authority.[69] The court has also been granted the power to block infringing web-sites. [70] However, Norway has addressed some of the ideological objections because penalising infringers by restricting Internet access as in France was considered inappropriate and was not advised.[71] Yet this may have the side-effect that the law will be less effective than its French counterpart.

The traditional approach also encompasses a preventive strategy. The Content Industry has sought to protect content by Digital Rights Management[72] ('DRM') - employing technological measures to restrict copying. This approach was also supported by active lobbying which resulted in the wide adoption of laws prohibiting the circumvention of technical

[65] Lucchi (2011) pp.675-676.

[66] Lucchi (2011) p.667.

[67] WIPR (2013), Ministère de la Culture et de la Communication (2013).

[68] Åndsverksloven kap.7a.

[69] Prop.65 L (2012-2013) p.5.

[70] Åndsverksloven §56c.

[71] Prop.65 L (2012-2013) p.9.

[72] Al-Rafee (2006) p.238.

copy-restriction methods.[73] Despite the law, mass circumvention of DRM has rendered this approach unsuccessful.

With this background, it is clear from a practical standpoint that the traditional approach as a whole has not been effective in addressing the copyright infringement problem. However, there are also more ideological objections. The traditional methods have as their aim the restriction of content and this can have a detrimental effect on creativity. It is the position of this thesis that copyright infringement can be addressed without constraining creativity.

Critics from, for example, The free culture movement,[74] and Communia[75] have pointed out that the continuously stricter regulation of cultural content is a constraint on our cultural life and the opportunities for creation and innovation.[76] This is an obvious effect of the preventive strategy where the Content Industry has 'physically' restricted forms of use. Should not culture be a part of the common goods of mankind instead of being a privilege granted to a few by the law? Rightly, exemptions have been made, for example, for non-commercial private use and educational use, but is this enough? Creation and innovation needs nutrition. Creators need 'free'[77] access to as much cultural expression and as many creative works as possible for further creation.[78] For this reason some acts of infringement can, to a certain extent, be justified.[79]

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[73] Initiated by WIPO Copyright Treaty Art.11, followed by e.g. Digital Millennium Copyright Act and Directive 2001/29/EC.

[74] Lawrence Lessig with for example *Free Culture,* 2004, and his establishment of Creative Commons, drawing on ideas from Richard M. Stallmann (founder of the free software movement), see e.g. Stallman (2002), and Stallmann (1983).

[75] de Rosnay (2012) p.xi-xiii.

[76] Lessig (2004) pp.8-10.

[77] Not as in free beer, Lessig (2006a).

[78] Elkin-Koren (2012) p.164.

[79] Lessig (2004) pp.62-79.

However, all infringement cannot continue. According to the socio-economic justification of copyright,[80] public access to work as inspiration for creating new works is not enough to encourage creation.[81] The creator also needs an incentive to create.[82] The creation of a work can be expensive while the illegal copying of a digital work, or a digital version of it, is practically free. The free culture movement also agrees that balancing these two objectives is important.[83] The question is therefore not whether to protect the values behind the privilege conferred by copyright law or not, it is how to do this.

3.3.2 Alternative Business Models

One alternative, and extreme way, of addressing copyright infringement is to make copyright practically irrelevant by creating business models where the authors' returns do not rely on copyright.[84] One currently very profitable[85] business model is the development of computer and smart-phone games based on advertising, sales of in-game assets and extra levels. An example is browser games on Facebook such as FarmVille. Playing the game is free and money is made from selling equipment inside the game.[86] Another type of business model is games that require online subscription in order to be attractive for the players.[87] The computer game World of Warcraft is an example where playing with friends online makes the game what it is.[88] A third business model is the development and sale of games as part of marketing campaigns or TV channels.[89] The narrow focus of these games

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[80] There are other possible justifications for copyright and it is difficult to empirically prove or disprove this socio-economic justification, see Rognstad (2009) pp.31-34.

[81] Landes (1989) pp.332-333, as referred in Rognstad (2009) p.33.

[82] Rognstad (2009) pp.32-33.

[83] Lessig (2004) preface by David Pogue.

[84] An idea put forward by Stallman (1994). This section and the examples are generally inspired by Edwards (2013).

[85] Kirman (2011) p.18.

[86] For a simple explanation of the business model, see Zichermann (2012).

[87] Doke (2013).

[88] Battle, M.

[89] E.g. Kelloggs: http://www.clubkelloggs.ca/games/building-with-the-bars/.

makes them an unattractive target for copyright infringement. A final example of business models is artists and musicians that make their money primarily through performances. A performance can be recorded, but the experience of being there can never be copied. In these examples copyright loses its importance.[90]

Although this approach works well for some authors, it does not suit everyone. How would for example a composer who for some reason is not interested in performing get income from her music? Telling her to tailor all the music to for example political parties or shopping malls would indeed be limiting, or to suggest including advertisement jingles as a part of the music would be rather strange as well. Therefore copyright infringement cannot simply be ignored, it must be dealt with in some way.

3.3.3 A Holistic Approach

As neither the traditional approach nor the innovative approach are sufficiently effective in addressing the copyright infringement problem, it is suggested that a more holistic approach should be taken. As argued by Lessig,[91] regulation of human behaviour is complex and consists of more than what can be enforced in the courts. There are four modes: architecture, the market, norms as well as law, and these all play important roles in affecting and controlling behaviour. This can be illustrated with an example. Drunk driving is usually regulated by law and penalties, social stigma and information campaigns, and by the price and availability of alcohol. Another way may be to install alcolocks in all cars, thereby changing the architecture.

In terms of modes of regulation the approaches described above are limited. The deterrence strategy is mainly using the mode of law, whiles the preventive strategy is a mix of architecture and law. The approach making copyright irrelevant has showed good results by

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[90] Edwards (2013).

[91] Lessig (1999) and Lessig (2006) Ch.7. For application of these ideas, see, e.g, Stranieri (2001), Dusollier (2012), Williams (2007) p.77, Rátai (2005).

using the modes of market and architecture in combination, but only for a limited group of authors. By contrast, a holistic approach where a combination of all the modes of regulation are used would arguably be more effective in addressing copyright infringement.

The DCE, the way it is described below, would be such a holistic approach. It would use all the modes of law, norms, the market and architecture, but without excluding anyone. Further, it would be ideologically satisfying as it would protect the rights of the copyright owners but not limit access or constrain creativity and creation.

4 How Can the Digital Copyright Exchange Address the Copyright Infringement Problem?

In this section, the argument put forward is that a Digital Copyright Exchange built upon the ideas proposed in the Hargreaves Report can have a positive impact on the digital content market and thereby reduce infringement activity. Firstly, there is an introduction to the context from which the proposal of the DCE emerged, thereafter an explanation in broad terms of what the DCE is and what it could look like before discussion of the advantages and disadvantages of the DCE's possible impact on the identified infringement problem.

4.1 Context

The DCE proposed by the Hargreaves Report is a part of the UK strategy on modernising the Intellectual Property framework for the digital age. One aspect of this is to resolve the copyright infringement problem.[92] The Hargreaves report was commissioned by Prime Minister David Cameron in 2010, as he was concerned about whether the current IP framework was promoting innovation and growth.[93] He referred to the fact that "the founders of Google have said they could never have started their company in Britain" as proof that something needed done.[94] By saying this, Google was referring to the lack of a fair use

[92] Hargreaves (2011) p.26, Gowers (2006) pp.3-4.

[93] Hargreaves (2011) p.1.

[94] Sherwin (2011). Rosati (2011) fn.1.

exemption which leads to concern that the search engine's technology taking snapshots of other Internet sites could constitute copyright infringement[95] and lead to the possible liability for illegal content accessed through Google's website. Suggesting making life easier for businesses like Google means taking a step into the on-going 'IP wars' between the Content Industry and technology industries.[96] An example of this lobbying tug of war are the proposed SOPA[97] and PIPA[98] US Acts in 2011. These Acts were the result of the Content Industry's[99] lobbying effort (valued at over $91 million (546m. NOK))[100] arguing they were suffering loss from the widespread infringement.[101] The Content Industry sought to "strengthen copyright holders' rights"[102] and assign liability to search engines and other service providers, requiring them not to link to foreign pages that allegedly contain copyright infringing content.[103] On the other side, the propositions caused uproar amongst technology companies and service providers such as Google and Yahoo. This was marked with a world-embracing protest by 115,000 web sites,[104] including Wikipedia that went for a total blackout.[105] Both sides have their narratives, the Content Industry with their big numbers of losses[106] and the technology sites with the arguments on constraints of innovation.[107] The situation is not helped by the fact that evidence is currently very difficult or

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[95] BBC (2010). See also story 3A in section 3.1.5.

[96] Belleville (2012).

[97] Stop Online Piracy Act.

[98] Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act.

[99] See Belleville (2012) p.321.

[100] Belleville (2012) p.318.

[101] Schmitz (2013) p.213.

[102] Belleville (2012) p.304.

[103] Schmitz (2013) p.223.

[104] Wortham (2012).

[105] Schmitz (2013) p.213.

[106] See for example RIAA: http://www.riaa.com/physicalpiracy.php?content_selector=piracy_details_online

[107] Kessler (2011), Belleville (2012) p.321, Gillmor (2011), Gramstad (2013).

impossible to obtain, and the methods used to produce evidence are contested.[108] On this backdrop Hargreaves was meant to suggest change to the copyright framework which satisfied all stakeholders. However, due to the wish of PM Cameron, there is a slight bias in favour of the technology branch of the debate.

The Hargreaves Report is focused on how to make the IP framework maximise innovation and economic growth. The DCE proposal was accepted by the UK Government which appointed Hooper to undertake a feasibility study of how the DCE could be moved towards operational reality.[109] Hooper's work was undertaken in two phases, i) diagnosing[110] and ii) seeking solutions,[111] and following on from this a pilot site of the 'Copyright Hub' was launched online.[112] Although Hooper's Report excludes copyright infringement from its scope, it, and the online trial version show what can be achieved with the DCE and provide an example of how the DCE could be built.

The DCE proposed in the Hargreaves Report is not the first project of its kind. There are similar projects already developed or planned by the private industry,[113] nations,[114] and organisations such as the WIPO.[115] The DCE proposed by the Hargreaves Report is special because it links the different creative sectors together on one platform. In addition, it is proposed to be non-profit, initiated by the Government, but run and built by the industry. The fact that the Government is supporting the project could be helpful for achieving the aim of making the platform international especially during the start-up phase when investments and other incentives are necessary.

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[108] See Mitra-Kahn (2011), Handke (2012), Watt (2009).

[109] Intellectual Property Office (2011).

[110] Hooper (2012, March).

[111] Hooper (2012, July).

[112] www.copyrighthub.co.uk, launched on 08.07.2013 according to CLSG (2013).

[113] See for example, www.gettyimages.com, Copyright Clearance Center www.copyright.com.

[114] http://cce.chinacopyright.co.uk/.

[115] WIPO (2011).

4.2 The DCE and its Features

4.2.1 Beyond Hargreaves

The manner in which the DCE is proposed in the Hargreaves Report resembles a vision rather than being a description of a functioning online platform. The focus in Hargreaves[116] is mostly on the needs and challenges of the copyright stakeholders, how the DCE could address these, and how this would stimulate innovation and growth. Copyright infringement is identified as a problem and supported by statistics, but an analysis of whether the DCE could address the copyright infringement problem is, however, lacking. In the following, I am analysing the DCE from the viewpoint that, along with addressing the issues considered by Hargreaves, if created with the infringement problem in mind, it could also address this issue. As well as elaborating on the ideas put forward by Hargreaves I suggest to develop the DCE in a certain way to best address the infringement problem. One of the main aspects of this is to make the DCE equipped for exception handling,[117] both with regards to flexible licensing and a quick, cheap and easy way to resolve disputes online, by the use of ODR technologies.

4.2.2 Objectives of the DCE

Different objectives could affect what the DCE would look like. The DCE could be everything from a database system providing metadata to simplify the process of identification of works[118] to a fully-fledged marketplace combining features from websites such as eBay, GettyImages and Google. The main objective for the DCE as I envision it is to reduce copyright infringement without constraining creativity. Based on my studies of copyright infringement,[119] the DCE should have certain characteristics to provide a sufficient substitute

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[116] Hargreaves (2011) ch.4.

[117] In this thesis, this term is not used in the technical sense that it is used in computation theory but rather to describe the process of dealing with situations that deviate from the norm and where the standard procedure for licensing offered by the DCE cannot sufficiently address the needs of the user.

[118] Griffin (2013) p.10.

[119] See section 3, esp. 3.2.

for the potential infringer. Particularly important are access, simplicity, safety and low cost. Therefore, the DCE here envisaged would be an online marketplace where the trade of rights to creative works takes place.[120] Users could search for and identify content on a website offering a user-friendly, easy and intuitive interface. Acting as a metawebsite, the DCE would be the first port-of-call for accessing information and content from a network of interoperable databases from all creative sectors[121] as well as accessing information and content directly uploaded to the DCE.[122] Furthermore, the DCE would ideally be cross-territorial[123] reflecting the international nature of the world of digital content. At the same time the DCE would work with initiatives such as the Linked Content Coalition to provide a standard rights information infrastructure.[124]

4.2.3 Automatic Licensing

Hargreaves proposes that the DCE is based on automatic licensing.[125] This would also be a main aspect of the concept of the DCE in this thesis. Following a standard[126] automatic licensing procedure, the website would allow licensors to easily distribute their content and offer a range of options regarding their terms and conditions. The licensees could then choose from these options, and easily and immediately purchase the licence required.[127] Different rates due to the field of use, the format of use, the manner of use, the target market, and the industry[128] could apply, and the whole licensing process would be done in seconds. For Kristoffer and Kari in MindStudy such a service could help save time and mon-

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[120] Hargreaves (2011) para.4.12.

[121] Hargreaves (2011) paras.4.31, 4.42.

[122] It is acknowledged that this vision of the DCE would involve a number of data protection issues. However, this is a large subject of discussion which is outwith the scope of this thesis.

[123] A Single EU Market for Content is suggested in Hargreaves (2011) p.35.

[124] Hargreaves (2011) p.33, Hooper (2012, July) p.43.

[125] Hargreaves para.4.23.

[126] Distinguished from exception handling procedures below.

[127] Hooper (2012, March) p.12, Hooper (2012, July) p.8.

[128] These examples of categories here are taken from GettyImages licensing options for rights-managed photos, www.gettyimages.com.

ey as they could get the rights to all types of digital content in one place. If they needed to acquire different licences for the films sold for educational purposes and for those sold to psychology practices, they could do this as they selected their field of use.

The automatic licensing as suggested by Hargreaves provides a feature which acts on the behalf of the licensor. The licensor only needs to set terms and conditions, then the DCE does the rest together with the licensee who selects his or her desired terms.[129] The automation can be taken further by allowing licensees to enter into agreements automatically, which for big scale licensees (belonging to group 3) can be useful. The story about MyNews above can serve as an example of this. When MyNews aggregates news from around the web, this happens with such a frequency and speed that acquiring single licences is not possible. Therefore the company has been taking the risk of operating in the grey areas of the law.[130] The DCE could provide the automated licensing procedure needed. Thus, when the MyNews computer system discovers a news story it will include in its service, it could, if connected to the DCE, automatically identify the author or right owner of the news story (which when published had been automatically registered on the DCE), and automatically select the appropriate licence.

In enabling the DCE to carry out the mentioned processes, software called autonomous or intelligent agents is essential.[131] Such agents are already apparent in most e-commerce platforms; they autonomously "send bids, accept offers, request quotes, negotiate deals and make contracts",[132] saving time and effort for the users. The term autonomous refers to the agents' ability not only carry out the task they are instructed to do, but also initiate the processes themselves.[133] Legally, the use of autonomous agents which perform and initiate

[129] This is how most e-commerce sites, like www.amazon.com, use automation.

[130] See subsection 3.1.5, story 3A.

[131] There are many synonymous terms without clear definition, Weitzenboek (2001) pp.206-208. However, the essential here is the agent's 'autonomous' behaviour.

[132] Pagallo (2013) p.58.

[133] Nwana (1996) p.209.

actions can raise issues regarding responsibility and liability. Is the principal of the agent liable under a contract she did not know was entered into by her agent? Three main solutions to this problem have been repeatedly considered to this problem: i) granting the autonomous agents some kind of a legal personality and thereby responsibility, ii) considering such agents under the law of agency, and iii) considering the agents only as means of communication, i.e. actions done by the agent are considered as actions done by its principal.[134] There is no conclusion in the literature which approach is the best. However, in current legislation specifically about autonomous agents[135] or on "contracts to be concluded by electronic means", the latter seems to be adopted.[136] Although this approach inevitably raises questions concerning whether essential elements of a valid contract such as capacity and consent are fulfilled,[137] especially in the case of a subjective consent theory,[138] this is the approach that causes least change to the existing legal system, which can be the reason why this is the preferable choice for the lawmaker. Many would also simply think that "to develop a notion of the software as a sort of legal person does not appear as a temping option."[139]

As the use of intelligent agents increases, there will be a need for further research on the relationship between computers and human users and a new legal framework on the actions of computers might be considered appropriate. Until this happens we have to continue with

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[134] Full discussion of this is not within the scope of this thesis. See Weitzenboeck (2001) who discusses all three options, Pagallo (2013), who draws on Roman law and compares with the way slaves were given a certain responsibility even though they were the property of their masters, and Dahiyat (2010), who "contemplates whether or not it is possible to share the responsibility with these agents" (in abstract).

[135] Such as MLEC Art.2, Art.13(2)b and Electronic Communications Convention Art.12.

[136] For example, Dir./2000/31/EC Art.9(1).

[137] Weitzenboeck (2001) p.210, Bing (2003) p.45.

[138] Weitzenboeck (2001) p.221.

[139] Bing (2003) p.46.

liability on the principal. The risk to the user will be balanced with the convenience of the use. For the DCE such convenience is therefore essential.

4.2.4 Exception Handling

Coming back to the functionality and user-friendliness of the DCE, Hargreaves did not consider exception handling,[140] which for many users could be essential. Fixed terms and no room for individual adjustment could be too rigid and inflexible, which could render the DCE unviable for them. There are two stages of the licensing process where exception handling could be necessary for the users. Firstly, negotiation in the process of entering into the licensing agreement, and secondly, resolving disputes subsequent to the initial agreement. To address these needs this thesis suggests offering an Online Dispute Resolution service within the DCE, considered in detail separately in section 5.

4.2.5 Moral Rights

When reading the Hargreaves report, the economic side of copyright is indeed prevalent.[141] This might not be surprising as the most important aspect of the DCE is to make exploitation of copyrighted content quick and easy. A complementary explanation, furthermore, could be the economic focus in the Common Law rationale of copyright,[142] which the Hargreaves proposal is built upon. However, copyright law also comprises the moral rights of the author,[143] and these rights require consideration. Therefore, to build trust and attract users, the DCE would benefit from creating certainty about how moral rights are protected. This would be of particular importance if introduced in Norway and Civil Law countries where moral rights have a stronger tradition.[144] As envisaged here, the DCE could protect

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[140] Including a negotiating agent is mentioned by Hargreaves (2011) para.4.23, but this is not considered in any depth, neither is the idea of including a low-cost dispute resolution system.

[141] For critique of this approach see Rahmatian (2011).

[142] MacQueen (2011) p.44.

[143] Moral rights are protected in the Berne Convention Art.6*bis*. In Norway moral rights are protected by Åndsverksloven §3 jf. §39 and in the UK by CDPA Ch.IV.

[144] Rognstad (2009) p.197.

of moral rights in two ways. Firstly, the licensor, when stating her terms and conditions for automatic licensing, could also submit limitations on how the content could be used, in which context it could be used, or specify the only permitted use of the content. It may nevertheless be difficult to foresee all kinds of situations in a licensing contract and if this was attempted the terms and conditions could become too complicated for the standard automatic procedure of the DCE. Therefore, secondly, the ODR facility would play an important role regarding moral rights, both when forming agreements and if disputes arose. In the agreement phase the ODR would allow more flexibility than the standard licensing procedure would, and when resolving disputes it would be more flexible, far less costly and quicker than court proceedings.[145]

4.3 The Advantages of the DCE

The previous sections discussed what would be the main features of the DCE as envisaged by this thesis. This section will consider in detail how the DCE will contribute towards tackling the copyright infringement problem. Hargreaves and Hooper identified the problems copyright stakeholders are facing based on rounds of calls for evidence. The DCE was proposed to resolve many of these problems, and numerous advantages of the DCE in this regard were illuminated in three reports.[146] The advantages discussed therein can be reduced to five categories: increasing access, reducing complexity, reducing risk, norms and education, and price. Although the DCE as envisaged here differs from Hargreaves' version on various points, the same categories are still suitable. In the following these categories are discussed in relation to the categories of reasons for infringement identified in section 3.2. The categories are interconnected and inevitably overlap slightly. As the infringers are on the licensee-side of the DCE this will be the focus. However, what happens on the supply side also affects the level of infringement and will be considered where appropriate.

[145] See further below at section 5.

[146] See Hargreaves (2011) pp.29,31,33,35, Hooper (2012, March) p.7, Hooper (2012, July) p.29.

4.3.1 Access

In section 3.2 insufficient access to legal content was identified as one of the main reasons why copyright infringement occurs. Access to content is fundamental for fostering creativity.[147] By providing an open market place where a large amount of material is available, the DCE would, quite simply, increase legal access to copyrighted content.

An important element is the means by which users could access content. The first step for potential users would be to find the DCE website and the content offered there. The DCE would be competing with extremely simple access to illegal content (e.g. through a Google search). Using the power of choice architecture, nudging potential users of the DCE in the right direction, searching online could be a part of the DCE process.[148] Cooperation with online navigation services like Google could make content available at the DCE first hit in searches.

Further, instead of removing metadata, as Facebook and Twitter are currently doing,[149] such websites could be encouraged to link up with the DCE and undertake automatic searches for content that users are uploading. For example when Oline wants to share on Facebook a new jazz track she has found, she could automatically be presented with rights information along with an easy route to acquire the appropriate licence. Studies show that the default choice is very likely to be taken.[150] Making licensing on the DCE the default choice could plausibly reduce infringement without limiting the freedom of choice for users.

When having found the content or the website, the second step for keeping the users attention could be a user-friendly interface offering simple and efficient search and browse fea-

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[147] See section 3.3.1.

[148] Thaler (2008).

[149] Laurent (2013).

[150] Thaler (2008) p.35. See also Kahneman (1991) pp.197-198, Samuelson (1988) on the 'staus-quo bias'.

tures along with sole registration for accessing content and content information from all sectors. To support clarifying the copyright law for the users, the system should also remember users and their legal position regarding copyright. The MindStudy story can be an example. If Kari logged on to the DCE, she would be recognised as a student. She could find content or identify content already found elsewhere, along with the prices relevant for her. If content was found through a Google search, this could then lead her to the DCE. The system would know about any exemptions for educational purposes, any collective licensing agreements, whether the protection period of the work in question had ended or about any special terms applied by the rightholder. For MindStudy, as a student project, some content could be free of use. When wanting to commercialise the film, Kari could change the purposes for which she wanted to use the content, the system could provide updated information and the two situations could easily be compared.

When users have accessed the DCE the next step is to have content available for the users. This is essential to be a sufficient substitute to illegal services. Providing access to a legal alternative would lead to less infringement[151] and is necessary to make the DCE the "one stop shop"[152] it should be. In order to compete with the great supply of illegal services, the DCE should aim to have similar or better supply. DCE would aim for access to as much content as possible and from all sectors – which is currently not offered by any other service. A starting point to achieve this could be to include databases from libraries, national broadcasters, museums and other publicly-owned copyright material on the DCE. Further, Governments could give incentives to private businesses and rightholders for supplying content.[153] Moreover, the DCE platform should be easy-to-use for suppliers of content. The platform would, on one hand, enable authors to directly distribute their content within regulated forms without assistance of an additional intermediary, and, on the other hand, offer a

[151] Ofcom (2012) p.2.

[152] Hargreaves (2011) p.35.

[153] Suggested by Hargreaves para.4.34. This could raise competition law issues, which is beyond the scope of this thesis.

channel for collecting societies and other already established intermediaries to reach their customers. With such great supply in addition to the other advantages described, the DCE could take over some of the illegal market. Offering such a supply will remove the reason for some users to infringe and they would in many cases choose legally available content.[154]

4.3.2 Reducing Complexity

In section 3.2 complexity was identified as one of the reasons why copyright infringement occurs. The DCE proposes to drastically reduce the complexity in licensing procedures.

Complexity is apparent when the user wants to establish who holds the copyrights to a work and who is managing them. Currently there are many collecting societies[155] and other intermediaries involved in rights management. The efficiency of such systems may vary between countries, and can result in a significant task for users wanting to secure the appropriate rights. In Norway and other Nordic countries, there are robust Extended Collective Licence ('ECL')[156] regimes.[157] However, within this regime the one-stop-shop effect of the DCE could simplify the licensing process, as ECL does not cover all uses of copyrighted content. Furthermore, ECL regimes could be implemented in the DCE e.g. allowing national broadcasters to freely use content. On the DCE a sole search could be sufficient to get all the needed rights information to allow a licence to be purchased.

The next step of the licensing procedure would be to enter into a licensing agreement. Considering the automated procedure as described above, this would be simple and quick. If not satisfied with the options available, the user could initiate a negotiation procedure on the ODR feature by pushing a button.

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[154] Ofcom (2012) p.2.

[155] More than 250 in the EU, European Commission (2012).

[156] These are collective licences that are not restricted to members of the rights management organisation, but are extended to all rightholders within the relevant field.

[157] Rognstad (2012) p.621.

Many of the problems that, for example, start-up businesses online have concern the international aspect of copyright licensing. Although the current copyright framework is heavily international there are still a lot of differences from country to country. Spotify had, for example, severe problems with entering the US market due to negotiations with large record companies and the US launch was delayed for about two years.[158] The more the DCE would be an international platform, with many countries participating, the easier it would be for the user to acquire all the licences required in a single transaction.

4.3.3 Reducing risk

In section 3.2.1 above certain disadvantages with infringement were identified. It is assumed that users consciously or subconsciously undertake a cost-benefit analysis before choosing where to get the content. It is appreciated that the risks involved in copyright infringement are low at the moment. However, the DCE would reduce risk even further and therefore people would prefer to use this legal method of accessing content, which would contribute to reducing infringement.[159]

A clear risk of infringement is the risk of getting malware, whether it is a damaging virus or spyware enabling access to sensitive information. The DCE could significantly reduce the risk by actively controlling content. Furthermore, if the user got malware from an illegal service, placing liability and pursuing a claim of damages is difficult. If this happened on the DCE in spite of the security measures, it would be easier to identify the content provider due to the registration procedures and/or the DCE could take on liability to some extent as a guarantor of secure content.

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[158] Rooney (2011).

[159] The particular risk of social condemnation is considered separately in the following section.

The use of copyrighted content has also been associated with the risk of unjustified threats of infringement proceedings.[160] As an example GettyImages adapted an aggressive approach in claiming damages for alleged infringement. They have been sending out letters in bulk threatening court action in event that the alleged infringer fails to pay the suggested settlement sum.[161] This practice has also been undertaken by law firms.[162] Such threats can hinder lawful exploitation of content by making the recipients anxious of using the content in question, even though they might have the right to do so. In addition, the fear of a justified threat might also rise. When businesses are undertaking a risk assessment, the perceived high risk of being sued even when they think they are using content legally, might put them off creating at all, or they may intentionally choose illegal content, where at least the content is available for free and this would then compensate for the perceived cost of litigation. It is suggested that this situation results from uncertainty within copyright, for example, lack of knowledge combined with the often complicated legal test of copyright infringement.[163] It is suggested that a system like the DCE, that could clearly identify to what extent the work in question is protected, would contribute towards higher certainty regarding copyright and thereby lower risk of both unjustified and justified threats of litigation.[164] This would again lead to the DCE being chosen by users.

4.3.4 Norms and education

As discussed in section 3.2, the lack of a general norm supporting copyright hence lack of social condemnation in society is likely to be one of the reasons behind infringement. This thesis argues that the DCE could have the potential to change people's online behaviour. One of the ways that the DCE could do this is by changing norms. The DCE is proposed to have an important educational function and be the place to find information about copy-

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[160] Griffin & Nair (2013) p.280.

[161] See for instance the association CopyrightInfringement at www.copyrightinfringement.org.uk that was established to help people who get such letters, and http://stepdev.net/Blogg/brev-fra-getty.

[162] Griffin & Nair (2013) p.281, Fiveash, K. (2011).

[163] Griffin & Nair (2013) p.291.

[164] Griffin & Nair (2013) pp.291-292, de Rosnay (2012) p.xiii.

right.[165] One example of such an informational role is the current version of Hooper's DCE: www.copyrighthub.co.uk, another example is the Norwegian www.clara.no. By also collaborating with educational institutions, the use of the DCE, the reasons for using it and the benefits of doing so would get familiar to future generations and create a culture of Internet use where infringement is not such a natural part of it. As an example the DCE could be a handy tool in all school projects where for example Powerpoint presentations, videos and other products involving digital content are being made. Through education, the risk of social condemnation for copyright infringement which is currently not present would increase and this risk would, of course, be non-existent for the users of the DCE.

In order to achieve this educational effect the DCE should not only offer information about copyright and copyright licensing, but the price of licensing should also be feasible for educational purposes. Exemptions or limitations to copyright and collective licences to make use of copyrighted content for educational purposes easier exist in many countries, the UK and Norway included.[166] By including these in the DCE system, the content in question could be accessible for free by students, while the school or Government could be charged. Many online scientific articles are currently available for free through library services for students and staff at educational institutions, and with the DCE this could be extended to more content.

4.3.5 Price

In section 3.2 the high cost of legally accessing content was identified as one of the main reasons why copyright infringement occurs. It is proposed that the DCE could cut costs for both consumers and other users.

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[165] Hargreaves (2011) para.4.23.

[166] See for example CDPA s.32-36A and Åndsverksloven §§13,13a,13b,16,18,20,21.

When people are asked why they choose to use illegal services many answer that it is because it is free.[167] For consumers the price tag on the desired content is most important. The DCE could, for the following reasons, make it possible for legal content to be available at a low cost. Firstly, the DCE could state which content is free of use, e.g. belongs to the public domain or is regulated by a Creative Commons[168] licence or similar regime. Personalised accounts could inform the user about exemptions or similar limits to copyright applicable for the respective user, such as in the educational example in the previous section. Secondly, consumers are arguably not considering risk when perceiving illegal content as free. As long as the activity has an economic risk, the DCE can limit this.[169] Thirdly, the price on provided content could be reduced due to increased competition. The DCE would provide easier access to the market to suppliers, including those that are smaller and independent, and free legal content as mentioned above would also contribute to increased competition. Finally, reduction in transaction costs for content providers, which the DCE would offer, would trickle down and allow price reduction on provided contract. The latter may, however, raise competition issues, depending whether the funding structure had Government involvement,[170] but further discussion of these issues are outwith the scope of this thesis.

The identified infringers of groups 2 and 3 have a more complex interaction with content. MindStudy needs to use and obtain clearance content from many different creative sectors. Business models based on redistribution of content, such as MyNews, need access and rights to use a great amount of content. For these, high costs are involved in all stages of the licensing process. Too high costs for this type of user might have two outcomes, either no use would take place hence no service or creation of new works, or the use would be based on infringement where the immediate transaction costs are much lower. The DCE's

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[167] Ofcom *High Value* (2013) p.90.

[168] www.creativecommons.org.

[169] Section 4.3.3.

[170] See e.g. TFEU Art.107.

reduction in complexity and increase in ease of access would result in lower costs involved in obtaining legal content for these users which could therefore both lead to more creation and distribution, and less infringement.

4.4 The Challenges of the DCE

What has been suggested above is ambitious and some points would represent big challenges. There are also disadvantages with the DCE in general. In this subsection the main challenges and disadvantages will be discussed.

The DCE is proposed as a dominant website, and in order to succeed it would need a high participation of all copyright stakeholders; user-friendliness *per se* is not enough. To achieve dominance and acceptance by users would be a great challenge. However, if the DCE starts up by offering all publicly-owned content and cooperates up with other non-profit databases such as Imslp Petrucci Music Library, Europeana and Project Gutenberg,[171] along with encouraging independent artists to distribute their content, the DCE would already be in quite a strong position from which it could grow.

Although it is suggested in this thesis that the DCE should be an international project, this would require information to be input regarding the copyright laws of many different nations. There may also be translation issues if the website was to be available for use in all languages. These requirements would involve significant investment in terms of time and cost.

The funding structure of the DCE would need thorough consideration, which is beyond the scope of this thesis. Hargreaves suggested funding support from Governments in the start-up phase, along with private investments. Reasonable membership fees[172] for licensors are

[171] See www.imslp.org, www.europeana.eu, www.gutenberg.org.

[172] These fees would have to be calculated so as to not cancel out the savings for licensors in being part of the DCE, see above section 4.3.5.

a possible solution for maintenance costs and the potential cost of the DCE as a guarantor of malware. These would be fees only for commercial licensors. Another solution could be allowing advertisement. Despite these options for funding, it is acknowledged that the DCE would be an expensive project, although due to the losses that copyright infringement currently produces,[173] spending on a large scale may be justified.

Finally, as the DCE would be a trustable source of rights information, hence a type of registry of copyrights, it could affect the role of copyright law.[174] What would be decided if a work registered on the DCE was challenged by someone claiming that the work in question was a rip-off of her non-registered work. In order to achieve predictability, should registration be the prevailing authority? If this should be answered positively, an authority would be required to assess each and every work before registration to ensure that correct author or right-owner was registered. There is a chance that such system could lead to unfair results, as weaker parties (who did not think about registration) could be taken advantage of and copyright theft could occur. However, provided there is a successful educational role of the DCE, most authors would be aware of registration. In addition, the registration procedure would be simple, quick and could be undertaken on any device connected to Internet. It has been suggested that the copyright system should change fundamentally and formalities should be reintroduced.[175] However, there is also a strong argument that the last word on copyright should remain with the court and registration with the DCE would only act as evidence for right ownership.[176] This would be consistent with the voluntary use of the DCE.

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[173] See section 1 above.

[174] Griffin (2013) p.11.

[175] Van Gompel (2011).

[176] As promoted by the Copyright House in the UK at http://www.copyrighthouse.co.uk/copyright/why-register-copyright.htm. A thorough introduction to this topic is given in Van Gompel (2011) and Elkin-Koren (2013).

4.5 Why the DCE Should be Introduced in Norway

The figures quoted in the introduction of this thesis showed that copyright infringement is apparent in Norway. The reasons for copyright infringement were identified and thereafter the unsuccessful traditional approach to enforcement in general and Norway's recent reforms on the subject in particular were discussed. Norway could benefit from adopting the holistic approach of the DCE which, as argued previously in this section, could provide a more effective solution to copyright infringement. The DCE, as proposed, would also fit well into the Norwegian legal system. To include the ODR service, discussed further below, as part of the DCE would complement a strong tradition of Norwegian mediation, both on the international political level[177] and as part of the court system. The treatment of moral rights through ODR would also correspond with the strong moral rights protection in Norway.[178] Such a technological solution would fit well with, and further stimulate, an already vibrant creative sector in Norway that is said to have the world's most advanced music business with 78% of the revenue from digital sources.[179] Furthermore, the DCE could be highly accessible to the Norwegian population as broadband is available in 99.9% of Norwegian households.[180]

As can be seen from the above discussion, an international version of the DCE would make trade of copyrights significantly easier and therefore remove and mitigate reasons for copyright infringement. For this reason, it would beneficial for Norway to take part in such a service as participation would be likely to reduce the high incidence of copyright infringement and its related losses.

However, even if only adopted in Norway, the DCE would have benefits. The DCE could facilitate trade between Norway and the rest of the world. For export of Norwegian culture,

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[177] Nyhamar (2007) p.76.

[178] See section 4.2.5.

[179] Mashup (2014) introduction.

[180] Fornyings-, administrasjons- og kirkedepartementet (2013).

a single point of access for foreign licensors would simplify the licensing process with the potential effect of an increase in exports. Such a system is highly relevant as it is argued that there are great challenges in Norwegian music export at the moment and that there is a large potential for this export.[181] Furthermore, an initiative has been started to encourage development of technology to facilitate export,[182] which indicates that there could be a role for the DCE in Norway. If the DCE was to develop into an international platform, Norway could arguably be a beneficial country in which to launch such a platform.

Finally, also internally in Norway, the DCE would have a role of disseminating culture and encouraging creation among the many Internet users, along with at the same time protecting Norwegian culture.

5 Online Dispute Resolution

In order to succeed the DCE's greatest assets should be user-friendliness and functionality. The more easy-to-use features that would help the user achieve her goal of acquiring legal content, the better. In this context, it must be recognised that not all users of the DCE are the same and some will have needs that are not served by the standard licensing procedure. Furthermore, despite best endeavours, disputes on the DCE will occur. An ODR feature would therefore be a significant benefit to the DCE and would be used for two purposes: i) for contract formation purposes where the desired licence is not catered for[183] and ii) as a cheap and quick method of resolving disputes. In the following sections, there is a brief introduction to the concept of ODR. Thereafter, the typical sorts of disputes which would occur on the DCE are considered. The main features of the suggested ODR service are then presented and finally, the benefits and challenges of the ODR for the DCE are discussed.

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[181] Gjestad (2014).

[182] Gjestad (2014), MashUp (2014).

[183] It may be seen as odd to discuss contract formation negotiations within this section on ODR. However, as both contract formation and dispute resolution would use the same negotiation features of the ODR and both can be considered under the concept of "exception handling", it is helpful to treat them together.

5.1 What is ODR?

ODR is a concept which originated from the online application of Alternative Dispute Resolution ('ADR'). ODR can be defined as electronic-assisted dispute resolution, i.e. a process that to some extent includes the use of electronic means such as e-mail, telephone, videoconference tools or the Internet and can be used for disputes arising both off- and online.[184] The ODR proposed in this thesis is suggested to deal only with disputes arising from transactions on the DCE[185] and the entire procedure will preferably be conducted over the Internet.[186] As ODR can be considered as online application of ADR ideas,[187] the most common types of ODR can be roughly categorised as negotiation, mediation and arbitration.[188] Negotiation consists of the voluntary exchange of information between the parties aiming for an agreement. In mediation, a neutral third party assists the negotiation and in some incidents suggests an outcome the parties can accept or reject. In arbitration the parties agree upon an arbitrator whose decision on the matter is binding.[189]

The proposed ODR service includes software-assisted negotiation with the extension of human mediation. In light of the business model of the DCE which would involve high-volume, low-value exchanges, arbitration would arguably get too expensive and liability-generating for the DCE. In cases where the parties are seeking a binding decision by a third party they would have to seek other fora, e.g. an external arbitrator or the court.

5.2 Potential Disputes on the DCE

In order to consider how ODR could be beneficial to the DCE, the potential types of disputes specific to the DCE need to be identified. There are two possible constellations of

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[184] Goodman (2003) p.1, Schiavetta (2004).

[185] See section 4.2.

[186] This 'branch' of ODR has also been called e-ADR, see Schiavetta (2008) p.30.

[187] Katsh (2004) pp.275-277.

[188] Cole (2006) p.196.

[188] Katsh (2001) p.816.

[189] Goltsman (2009) p.1397.

disputes arising from the DCE. These are licensor v. licensee and user v. DCE. An essential feature of ADR is that the negotiator/mediator is a neutral third party.[190] This would not be possible in an ODR service, provided by the DCE, which dealt with user v. DCE disputes. Therefore, this type of dispute will not be considered further. The licensor v. licensee disputes could roughly be divided into three categories: i) "eBay disputes", ii) disputes regarding licensing terms and conditions and iii) disputes regarding interests other than monetary interests.

5.2.1 eBay Disputes

The 'eBay-disputes' category resembles typical disputes arising from an e-commerce website like eBay.[191] The DCE is similar to eBay in being a platform facilitating trade between sellers/licensors and buyers/licensees. The typical recurring disputes in such environments are related to payment, delivery of content and quality of delivered content.[192] Such disputes would presumably also originate from the DCE. However, as all the content on the DCE would be digital, it is plausible that issues like delayed delivery typically associated with non-digital goods sold on eBay would be drastically reduced. Nevertheless, issues regarding payment, corrupted content and bad quality of content could still occur.

5.2.2 Licensing Terms and Conditions

As the DCE would be based on licensing, many different types of licences and specific terms and conditions could occur, creating relationships often more complex than a basic buyer/seller relationship and giving room for more points to disagree on. As a licence of use regulates the use after the contracting stage, there would be potential for disputes regarding the use, such as whether the content has been used too long, in a setting not covered in the agreement, or too many copies had been made. Disagreement of the interpretation of terms and conditions could be a source of dispute. Furthermore, situations where the licensor grants a licence conflicting with a third party's right could occur, for example, in

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[190] See e.g. Dir.2008/52/EC Art. 3b, 4b, EU (2004) s.2.

[191] eBay was a pioneer within ODR using firstly SquareTrade and now Modria http://www.modria.com/.

[192] Chong (2001).

the case where the licensor has transferred an exclusive licence to one party and regardless subsequently transfers a licence to a second party.

5.2.3 Moral Rights

Contrasting with the two categories above which generally would be dealing with pecuniarily measurable issues, the final category involves disputes where non-pecuniary interests are at stake, such as, regarding moral rights. Moral rights aspects could, as mentioned in the previous section, be reflected in the licence, making the source of the dispute the same as in category two above. The nature of the dispute would, however, differ. Furthermore, statutory protection of moral rights and the interpretation of this could also be subject to dispute. Disputes regarding moral rights are likely to be between the author and a re-user. Marte from the story 2B could serve as an example here. Assume that Marte had acquired licences to the content she had been using as a freelance editor in the celebrity field from the DCE. One of the photographs was taken by the photographer Anne, renowned for her work within the health and fitness sector and Marte had been granted an unlimited right to use the photo in the magazines she was working for over a period of 5 years. There was still one year left of the licence period when Marte modified the photo, added some text and her company used it in an advertising campaign for deep-fried Mars bars. As soon as Anne discovered this, she contacted Marte through the DCE and claimed her moral rights had been violated.

5.3 Features of the ODR Service in the DCE

The ODR service envisaged includes both software-based negotiation and human mediation, although it would be desirable for the system to handle most cases without human intervention. This section presents the various features of the ODR system and how they would serve the user in either the contract formation or dispute context.

5.3.1 Automation

The use of software-based negotiation will be discussed first. Although the technology that would be adopted for formation of contract and dispute resolution would be very similar

and basically within the e-negotiation category,[193] the needs for the user could differ in the two situations.

5.3.1.1 Contract formation

In the contract formation phase there is nothing binding the parties together in the way a licence or a legal claim does in the case of dispute resolution, so each party could at any moment leave the negotiations. Furthermore, most transactions entered into on the DCE are likely to be of low value and the importance for the parties to reach agreement would not be as great as in big commercial deals or when trying to settle a dispute. Additionally, the potential licensee would, when choosing negotiation rather than the standard process, be likely to know the terms of licence she is looking for. Therefore satisfaction for the user, here the licensee, could be achieved with a simple interface facilitating interaction with the licensor to add flexibility to the DCE. Appropriate for this could be a messenger system like those found on social media sites like Facebook. Interaction could happen manually from both sides. However, it could be convenient for licensors with high demand to also here be relieved from manual labour by using autonomous agents which reply according to given preferences. This would additionally make the process quicker for the licensee who would not have to wait for manual reply. In addition to the messenger system, the system could have a bank of suggested style licence clauses available upon which the parties can agree to allow quick resolution of the negotiation.

As an example, Oline started using the DCE. She wanted to share the music she found with her friends in the jazz forum. On the DCE she could acquire a licence for "making the purchased content public on the Internet", but as the jazz forum was a closed group, she thought it would be possible to get a cheaper licence. For this purpose she was happy to find the option of contract formation negotiation, where she would be able to negotiate with the licensor on price.

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[193] Thiessen (2012) p.341.

5.3.1.2 Dispute resolution

In a dispute situation there is more at stake than in contract formation as a contract and perhaps a legal claim are binding the parties together. The users would have an extra incentive to use the ODR as an alternative to litigation, or in smaller disputes, loss for one party. Simply facilitating interaction between disputing parties would be a part of the dispute resolution process, as for contract formation. However, to increase the chance for settlement, it is also suggested to also offer further assistance.

Further support could be provided by various tools based on negotiation software agents that could further help the parties understand their interests, position and options.[194] The interface could either be organised as a negotiation workbench[195] where the users could choose freely between negotiation tools, or the software could take more control over the process, leading the parties through a pathway of questions where appropriate tools were recommended based on the information gathered. In such a pathway, the system could analyse and formulate the problem, suggest appropriate tools and generate different solutions for the parties to consider.[196] At the same time the system could detect the emotional state of the parties, inform the parties about the influence such state could have on the process and adjust its suggestions according to this.[197]

For the experienced negotiator the basic ODR system could be preferable due to more freedom of choice. However, for the normal user of the DCE, too much choice could be confusing. The advanced ODR version with more guidance and a higher level of assistance is likely to be preferable and could lead to more satisfied users and a higher number of settlements. One solution that would maintain flexibility would be having the latter version as default but with the possibility to opt out of the former.

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[194] Van Veenen (2010a) p.4.

[195] Kersten (2008) pp.471-472.

[196] Ibid. pp.472, 478-479.

[197] See further Picard (2002), Van Veenen (2010), Zondag (2007).

To further envisage the process, and to provide some examples of the tools which could be part of the ODR service, MindStudy from section 3.1.3 can serve as an example. Assume that MindStudy had acquired a licence on the DCE to use a video clip in their film. Although they were not sure whether the licence covered this, they also used parts of the clip in the film trailer. After a while they received an SMS notification from the DCE that the licensor, who had discovered this, wished to discuss the matter. As Kristoffer and Kari had no experience in disputes and were not too sure about how much a reasonable price for acquiring a licence would have been, they were worried about being exploited by the licensor. However, as the process was free they decided to give it a try and they could opt out at any moment. By accepting, they were taken to the ODR interface which informed about the claim from the licensor and questioned their point of view. The system advised them to use the BATNA/WATNA tool, which would show them the possible outcomes if the negotiation failed.

5.3.1.2.1 Batna and Watna

Informing disputants of the best alternative to a negotiated agreement ('BATNA') is an important factor for achieving more agreements in online negotiation.[198] For the regular DCE user who might know little about disputes, such as Kristoffer and Kari, it would calm and assure them by giving them some information about their position right at the start of the process and ultimately give them confidence to reach a settlement. More accurately, they would be better equipped to determine what would be a good agreement to enter into (better than their BATNA) and what would be better to reject (worse than their BATNA), and whether to continue the ODR process at all.[199] The BATNA for Kristoffer and Kari would be that the licensor would consider it too expensive and time consuming to litigate against them and would take no further action. However, there is the possibility that parties get overly positive regarding their BATNA, leading to rejection of negotiation. In these

[198] Zeleznikow (2011) p.17, Klaming (2008) p.93.

[199] Zeleznikov (2011) p.17, Andrade (2010) p.7.

cases, information about the worst alternative to negotiated agreement ('WATNA') could create a more realistic perception about their situation and encourage them to settle.[200] In Kristoffer and Kari's situation, the WATNA may be a successful action against them where they would have to pay damages for copyright infringement.

5.3.1.2.2 Fair Market Price

For disputes regarding price of a licence, where for example the licensor claims that the user has temporary exceeded the licence or used the content for non-licensed purposes such as in the case of MindStudy, having an objective price[201] for the licence in question could ease the settlement of a dispute. To find such a price there has, for example, been patented software for intellectual property audit system.[202] There are three accepted approaches to find a fair market price.[203] Firstly, the cost approach, where the reproduction or replacement price is considered before deducting any decrease in value. One problem with this approach is that the creation of content is not reflected in the "economic earning power or the value of the property."[204] Secondly, the market approach considers "the price paid for similar property in arm's length transactions."[205] The DCE could potentially represent "an active market with a sufficient quantity of reliable and verifiable data", hence making this approach applicable in the ODR service. The third approach is the income approach, which would consider the predicted income stream for the right owner, taking into account risks and duration of the income.[206] For the DCE's ODR service, the second approach would probably be easiest to achieve, as information on past transactions could be stored in a

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[200] Carneiro (2011) p.47.

[201] In the case of unauthorised exploitation of a work, market price is considered the starting point for the estimation of compensation, Rognstad (2009) p.404.

[202] Donner (1999) *U.S. Patent No. 5,999,907*. The idea described in this patent is used as an example – other approaches might be possible.

[203] Parr (2005) p.148.

[204] Donner (1999). *U.S. Patent No. 5,999,907*.

[205] Ibid.

[206] Ibid.

knowledge base ready for retrieval. Information needed for the two other approaches would have to be gathered from external sources, before becoming a part of the knowledge base of the DCE.

In the case of Kristoffer and Kari, the system generated a price range for a film trailer licence. The licensor was satisfied with this price range as it was based on the prices he and other licensors had sold licences for film trailers on the DCE. However, he offered to settle on a price 40% off market price as he acknowledged unclear terms on his behalf. Kristoffer and Kari thought, with knowledge of their BATNA and WATNA, this was an acceptable solution and the dispute was resolved.

5.3.1.2.3 Bargaining Chips

Where non-pecuniary interests are at stake, a further useful tool for users could be bargaining chips. Recalling from section 5.2.3, Marte got in trouble for using a modified photo for an advertising campaign and was invited to the ODR process. Marte hoped she could get away with paying a sum of money. However, the photographer, Anne, who had a clear health and fitness profile on her work, was not happy with seeing her photo in a deep-fried Mars bar advertisement. Therefore only receiving a sum of money was not an acceptable solution for Anne. Still, she had problems with formulating what would make her satisfied and kept saying that Marte should not have used the photo for the advertisement campaign. The ODR system detected that non-pecuniary interests were at stake and suggested the bargain chips tool. This tool, through asking the parties questions, identifies what is important to the parties[207] and gives examples of options upon which the parties could reach an agreement – this could include a formal public or private apology, author acknowledgement or a undertaking on the part of the infringing party not to use the copyright infringing material in the future for a particular purpose. Coming back to the example, Marte's advertisement campaign was running in the UK, where deep-fried Mars bars is well-known, but also as a smaller introductory campaign in Norway. Anne, who exclusively operated in the

[207] See further Van Veenen (2010a) pp.9-10.

Norwegian market, was most worried about this side of the campaign. The ODR system suggested to focus on limitation of territory. Along with a sum of money, this was something Anne could be satisfied with and Marte was willing to stop the (anyway hopeless) campaign in Norway.

5.3.1.3 All Automatic

The above discussions mostly focused on manual users of the ODR. It could be proposed that for some disputes, where speed is particularly important, parties could be represented by software agents so settlement would happen without any interference by humans. If implemented successfully, this would result in significant savings in time, and therefore money, for the relevant users of the DCE. One example of users that could benefit from this is large-scale licensees, such as MyNews. For companies purchasing hundreds or thousands of licences every day, it is likely that, for example, some of the content could be damaged or not completed by delivery. When noticed by the automatic agent undertaking the licensing procedure, the issue would be brought to the ODR service where the automatic agent, prepared with information from the user, would go through the procedure in question. Settlement would be chosen if beneficial, compensation received or/and another version of the broken content could be acquired without any inconvenience for the users. Not only big businesses would benefit from such procedure but the typical consumer may also find such a process convenient. Especially when coming to minor issues, the convenience would be more important than having direct personal control over the decisions made in a dispute. However, in many disputes this level of automatisation may not be desired, as the disputants might want to be personally involved in all decisions, and therefore, this aspect of ODR should be optional.

5.3.2 Human intervention

Section 5.3.1 above considered the role of software-based negotiation in the ODR. Although dispute resolution can be run by software to a great degree it is suggested that there is a role for a human mediator in the ODR process. Due to the variety of disputes possible as shown in section 5.2, meeting all the needs with technology would be difficult, if not

impossible.[208] Therefore, the mediator can take over where the technology stops and provide the appropriate service to users.

Furthermore, some users may, for various reasons, be more comfortable communicating with a human mediator rather than a computer. In addition, a human mediator could mitigate frustration of the users. There could be situations where the system does not respond to the information given or choices taken in any 'reasonable' way – we have all been in the situation where we try to explain something to an artificial voice on an automatic phone service line without success. For these reasons, the option of human mediation should always be available for the ODR user. In any case, the human mediator would benefit from the technology as well, for example, by using the software support tools. Furthermore, the system could provide the mediator with information about the foregoing circumstances of the dispute to enable them to assist the parties in reaching an agreement.

One particular disadvantage of using human mediators is the running cost involved. In contrast, automation would, after the up-front design costs, be practically free. Although funding is not within the scope of this thesis, in order to be attractive for the user, the ODR should be as cheap as possible. It could therefore be suggested that, if necessary to add a fee for using the ODR, a cost should only be attached to the human mediator service. However, the cost should not be high, in order to meet the needs of as many users as possible.

5.4 Advantages of ODR

5.4.1 Cost

As can be seen from the foregoing sections, there are many advantages for the user of the ODR service in the DCE. It would be a cheap alternative to both formal judicial proceedings and traditional ADR – even where a fee would be charged for the human meditator option.[209] There is no need for the cost and time involved in, for example, travelling, meet-

[208] See the feasibility of legal AI-systems considered in Schafer (2010).

[209] Klaming (2008) p.84.

ings[210] and for cross-border disputes the complex jurisdiction question is avoided.[211] In particular, the potentially large cost of raising or defending a court action is avoided. It is likely that many of the disputes on the DCE would be low-value and a cheap procedure would therefore enable resolution in situations where the costs of other methods of dispute resolution would be disproportionate to the interests at stake.

5.4.2 Speed

Many of the software tools described above would increase the speed at which disputes could be settled or agreements could be made and the delays involved in traditional dispute resolution methods would be circumvented. The user could use the service from their home computer and therefore the ODR would be at their service at the click of a key. For the user who employs the all-automatic service, their involvement in the process would be minimal, making resolving the dispute incredibly quick and convenient.

5.4.3 Flexibility

The contract formation side of the ODR adds flexibility to the DCE process and enables deals to take place that are better for both parties than the standard licensing procedure. Regarding dispute resolution, the fact that there is no meeting at a specific time allows the parties to engage with the resolution process whenever they want. This also means the users have time to consider their decisions and can receive advice from others. If the DCE operated in an international environment, this added flexibility could prove important due to the number of time-zones involved.

5.4.4 Control

The ODR service gives a sense of control for both parties over the licence agreement, and this is perhaps particularly important for the licensor who gets an extra tool to remain in control of her work, even when it comes to low value transactions. The procedure is also in

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[210] Klaming (2008) p.84.

[211] Cortés (2010) p.3. However, choosing jurisdiction could be necessary in order to let an ODR system advise the parties on bargaining positions and BATNAs, see Turel (2010) p.429.

control of the parties as it would be voluntary and they can always decide which direction the negotiations take.

5.4.5 Reducing Risk

The contract formation feature could reduce risk for under-negotiated agreements, where, for example, the licensee takes the chance to accept a licence assuming that it covers what she needs without being sure, which could lead to a dispute. Furthermore, the dispute resolution feature would be an alternative to, hence reduce the risk for, litigation.

5.4.6 Moral rights

Some licensors may have particular moral rights concerns regarding the use of their work. The contract formation side of the ODR would enable them to go into detail and discuss this with the licensee. The dispute resolution side of the ODR also makes enforcement of moral rights easier.

5.4.7 Trust

Finally, having an ODR service could add trust to the DCE system, as users would know about the easy and cheap way of resolving any disputes. If a user has been through a satisfactory dispute resolution process, this could increase customer loyalty. In the end this could lead growth in the number of the users of the DCE in general.

5.5 Challenges of ODR

5.5.1 Lack of Face to Face Communication

One of the main challenges or drawbacks of ODR is considered to be the lack of face-to-face communication, which is said to be "probably the richest of all communications encounters"[212] where just the slightest change of voice or use of body language can change the meaning of words.[213] However, in many of the disputes on the DCE, a face-to-face

[212] Katsh (2001) p.816.

[213] Katsh (2001) p.816.

meeting would not be possible (due to travel costs or distance), in these cases ODR is not a substitute[214] but a new opportunity for resolving disputes and would allow people involved in low-value disputes[215].

In other cases face-to-face meetings could even impede settlement of a dispute, for example, where there are emotional tensions between the parties[216] or significant power imbalance.[217] This situation could occur on the DCE if a big company has infringed the moral rights of an independent self-distributing author and in a face-to-face meeting the former would have a different level of experience in settling disputes in their favour. Such experience could also be beneficial online, but the ODR process would be less emotionally charged and allows parties more time to consider their alternatives. Further, the ODR procedure can be seen as a continuous on-going progress towards resolution and thereby allowing a quicker settlement because there is no delay between face-to-face meetings which can hinder settlement.[218]

5.5.2 Deception

Another concern is the difficulties of dealing with fraud. Although deception occurs in any dispute resolution system,[219] it could potentially be increased when there is no human interaction,[220] and if there were a user of the ODR with false identity it could be difficult to discover the user's true identity.[221] As the proposed ODR would deal with disputes originating from the DCE, this problem could be partly remedied by having secure identification processes when registering as a DCE user and when purchasing licences, although this

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[214] Katsh (2001) p.816.

[215] Cortés (2010) p.11.

[216] E.g. family disputes where there are a history of violence, Zeleznikow (2011) p.17.

[217] Turel (2010) p.430.

[218] Katsh (2001) p.816.

[219] Robberstad (2010) p.12.

[220] Farkas (2012) p.192.

[221] Turel (2010) p.432.

should not affect the user-friendliness of the DCE. However, the DCE is based on voluntariness and so is the ODR, therefore, it is expected that the users of the DCE want to trade legally and not infringe copyright. As a result, intentional deception is less likely to occur.

6 Conclusion

The picture painted in the introduction of this thesis was one of the juxtaposition between a thriving life of trade and culture provided for by the Internet and a broken copyright regime where futile attempts where being made to bring online copyright infringement to an end. Providing the ideal online space for creativity whilst also protecting legal rights to the content published on the Internet is incredibly difficult. In the Norwegian legal system "the importance of balancing copyright and avoiding repression of other societal interests has traditionally been greatly emphasised."[222] This balance has also been emphasised throughout this thesis. Now, this balance is under threat. The strong focus over the recent years on expanding the scope of copyright protection, together with the simplification of traditional enforcement, could arguably tip the scales in favour of the right owner with the consequence that public access to culture and knowledge would suffer.

To address this problem, inspired by the suggestion in the Hargreaves Report, this thesis has argued for the introduction of a Digital Copyright Exchange that could both increase access to creative content as well as protect copyright, with the aim of reducing copyright infringement. It was further argued that it would be beneficial to introduce the DCE in Norway. Based on an examination of the reasons underlying copyright infringement online in section 3.2, it was argued that traditional approaches to the problem have been largely ineffective and that a holistic approach was required. The proposed DCE is put forward as such a holistic approach. The aforementioned examination further showed that access, price, safety and simplicity were of importance for the three identified categories of copyright infringers, namely i) consumers, ii) re-users and iii) distributors. These factors then informed the shaping of the DCE where user-friendliness and functionality were considered

[222] Rognstad (2009) p.34. Author's own translation.

paramount. To encourage acceptance of the DCE and cater for the varying needs of users, it was proposed to have one main procedure for regular users, where simplicity is the main focus, together with exception handling for those users who deviated from the norm by including the ODR feature for i) contract formation and ii) dispute resolution. Online dispute resolution was not discussed by the Hargreaves Report but as ODR could greatly add value to DCE, this has been discussed at length in this thesis. As can be seen from the above analysis, there are many advantages of ODR in the context of the DCE as the provision of a such a service would allow a quick, flexible and cheap method of resolving disputes or forming contracts while also building user loyalty.

The ODR service would have a particularly helpful role in relation to moral rights. In designing the DCE in this thesis, I took account of the fact that the protected interests in Hargreaves' version of the DCE was based on a Common Law copyright rationale and did not include discussion of moral rights. As moral rights represent important interests in Norwegian copyright law, the treatment of moral rights would be significant to the feasibility of the DCE in Norway.

The analysis in section 4 shows how the DCE as envisaged in this thesis could neutralise the reasons for copyright infringement by providing to the user a preferable substitute for the illegal market. It is ambitious, and perhaps quite naïve, but on the basis of this analysis, it could be argued that there is a good *prima facie* case for the DCE. There is still need for progressive thinking in the field of copyright infringement and this thesis attempts to contribute to such thinking. Before a functioning DCE could be introduced, much interdisciplinary research and empirical testing, both technological and juridical, would need to be completed. However, based on the premises of this thesis it can be concluded, and recommended, that a DCE be introduced in Norway.

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7.5 Statutes

7.5.1 Norwegian Statutes

1961 Lov om opphavsrett til åndsverk m.v (åndsverkloven) av 12. mai 1961 nr. 2.

7.5.2 Foreign Statutes

CDPA Copyright, Designs and Patents Act 1988 [UK].

PIPA Draft Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PIPA), S. 968, 112thCong. (2011) [US].

SOPA	Draft Stop Online Piracy Act (SOPA), H.R. Res. 3261**,** 112th Cong (2011) [US].
Digital Millenium Copyright Act	Digital Millenium Copyright Act of 28 October 1998, US Code, Title 17 [US].

7.5.3 Travaux Préparatoires

Prop. 65 L (2012-2013)	Endringer i åndsverkloven (tiltak mot krenkelser av opphavsrett m.m. på Internett).

7.5.4 Treaties/conventions

Berne Convention	Berne convention for the protection of literary and artistic works, as revised at Paris on July 24, 1971.
Electronic Communications Convention	UN Convention on the Use of Electronic Communications in International Contracts, 2005.
MLEC	United Nations Commission on International Trade Law Model Law on Electronic Commerce, 1996.
WIPO Copyright treaty	The World Intellectual Property Organization Copyright Treaty, 1996.
TFEU	Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

7.5.5 EU Law

Directive 2000/31/EC	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
Directive 2001/29/EC	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc- directive).
Directive 2008/52/EC	Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

7.6 Table of cases

UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000) [US].

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (2001) [US].

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Dramatico Entertainment Limited & Ors v. British Sky Broadcasting Limited & Ors (2012) EWHC 1152 (Ch). [England].

Case no. 97/2007 Danish Supreme Court decision of 15.03.2013. [Denmark].

Case no. 2007/AR/1730 Belgian Court of Appeal decision of 05.05.2011 Copiepresse v. Google. [Belgium].

ECJ C-5/08 Infopaq International A/S v. Danske Dagblades Forening p.465. Reports of Cases 2009 I-06569.