Digital Technologies – Digital Culture[1]

by

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I. Introduction

In light of the existing copyright system and the latest developments of the law of the European Union (with a special focus on the authors' home country, Hungary) and the United States, the article tries to answer whether and how the phenomena of *Web 2.0* and *P2P* ("*peer-to-peer*" filesharing), the digitization for cultural preservation, and several other special technologies affect the culture of our age. This article argues that the several different usages influence the culture in three main ways: it can *improve*, *preserve* or *deteriorate* the culture.

Naturally, it is hard to determine, if a use is either right or wrong. For example, *P2P* filesharing services are generally used for illegal purposes, despite the fact that the technology has several positive effects. Vice versa: one example of *Web 2.0, YouTube,* collects millions of home videos created by "average users". However, episodes of copyrighted TV shows or sports events are also accessible on the *YouTube* servers. Similarly, the *Google Books Project* impressively aims to preserve and provide access to millions of books in digital form. However, the original plan to execute the project raised legitimate copyright and competition law concerns, and so it sheds another light on *Google*. To sum up: only time will tell, whether a technological innovation or use will result in the improvement of culture or contribute to the deterioration of it.

Due to the technological revolution almost all areas of life have undergone a major transformation in the past few decades. Digital technologies earned a vital role in this reform, since they made time, space and energy saving activities possible through replacing analogue technologies.[2]

Digital technology heavily affected intellectual creative activity as well. The spread of digital technologies have had at least two important consequences: first, intellectual creations may be copied and changed without limitation and without changing the quality.[3] Second, due to the evolution of digital networks the distribution of, access to, and the forming of an opinion on accessible works has changed too: it has become easier, faster and more effective – both in time and in place. The traditional forms of human communication have been generally changed as well. Nowadays, people cannot imagine their life without digital technologies. Social networking sites, chat rooms, blogs, podcasts, e-newspapers, or streaming of TV or radio programs are great examples.

[2] Laurence Lessig: *Free Culture – How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, The Penguin Press, New York, 2004: 9.

[3] The Hungarian Copyright Expert Board [Szerzői Jogi Szakértői Testület] emphasized this opinion in one of its statements. See (in Hungarian language): *SZJSZT 20/2001*: 1-11. (www.mszh.hu/testuletek/szjszt/SZJSZT_szakvelemenyek/2001/2001PDF/ szjszt_szakv_2001_020.pdf).

The *evolution of an entirely new digital culture is apparent*. Intellectual creative activity has become something of a norm in our everyday lives. It would appear that besides the traditional copyright paradigm *a new copyright conception* emerges, where the *user-generated content* earns great importance.[4] Due to the mass creation of works of literature, musical and audiovisual works, and photographs the respect of copyright law and intellectual creativity has partially disappeared. The young digital generations – by lack of a better example – may feel that easier, faster and cheaper accessible materials do not have any monetary value.

The article starts with an introduction that introduces three separate effects of digital technologies upon the improvement, preservation, and deterioration of digital culture. Part two discusses the phenomena of *Web 2.0*, i.e. the way internet users communicate via the World Wide Web and contribute to culture at the same time. This part makes it clear that the present copyright rules are capable of solving the legal controversies raised by *Web 2.0*. Part three reflects upon the controversial question of file sharing. The article concludes that though file sharing may have several positive effects, it is clear that it the application is generally used for illegal activities, and therefore has a remarkable negative effect upon the entertainment industry and culture. Part four introduces the topic of digitization of already existing works, and emphasizes that there are several major differences between the existing copyright regimes of the European Union, the United Kingdom, Hungary and the United States. The author proposes consideration on whether it is necessary to broaden current statutory rules on digitization by libraries, in order to allow for the much broader preservation and making available of the valuable cultural heritage of our world.

Based upon this logical line of events the article will continue to introduce the main effects of digital technologies upon the culture: the improvement, the deterioration and the preservation of culture.

II. The improvement of digital culture – the phenomena of *Web 2.0*[5]

2.1. What does *Web 2.0* mean?

Since *Web 2.0* is not a definition of copyright law, but a technological term, it is impossible to provide an exact, scientific definition. Generally, *Web 2.0* covers internet services and

[4] Concerning the „democratization" of music see (in German language): Emil Salagean: *Sampling im deutschen, schweizerischen und US-amerikanischen Urheberrecht*, UFITA-Schriftenreihe, Band 248, Nomos, Baden-Baden, 2008: 59-60.

[5] It is worth mentioning that the improvement of our culture by digital technologies is conceivable through several means. For example the market of *eBooks* is still unable to approach the market of traditional paper books. It offers, however, a real alternative for the access to works of literature, and thus it opens a new dimension in the improvement of digital culture. Below I will cover only the phenomena of *Web 2.0*.

applications, where *interactivity of the users: the constant and mutual sharing of content* is at the heart of the model. In *Web 1.0* the internet surfaces had only one-way traffic, that is, the content was provided only by the owner of the website. In the case of *Web 2.0,* users fill the internet portals with information.[6]

Web 2.0 takes many different forms. First, traditional *social networking sites*, like *Facebook*, *LinkedIn* or the Hungarian *IWIW*,[7] belong to this category. These sites offer the possibility to create a network (establish contacts) of friends and relatives, as well as provide the infrastructure for members to share information (photographs, videos and profile data) about themselves to the public. *Online auction sites*, like *eBay*, or the Hungarian *Vatera*,[8] are another form of *Web 2.0*. Second, the "online auction house" is only a digital location for trade that the registered sellers enter to sell their goods, and the buyers leave with the purchased items. Third, websites that are specialized in allowing the *sharing of photographs and videos* (like *Flickr* and Hungarian *Indafotó* for photographs, and *YouTube* and Hungarian *Indavideó* for audiovisual content[9]) are important nowadays. It is undisputed that there has never been as much photography, filming, directing or editing in the world as there is today.[10] These photographs and videos can be easily distributed to a broad audience.

Fourth, an ever-increasing number of *blogs* are accessible on the internet, which illustrates the interactivity of users. There are several types of blogs: ranging from blogs that contain personal experiences of the users, to blogs that cover specific issues,[11] straight through to websites that cover thousands of different blogs (like a catalogue).[12] On her blog the blogger can easily distribute her own intellectual creations, and she may attach copyrighted works related to a specific entry. All these entries contribute to the present culture. The cooperation of several

[6] Paul Anderson: What is Web 2.0? Ideas, Technologies and Implications for Education, *JISC Technology & Standard Watch*, February 2007: 7-13. (www.jisc.ac.uk/media/documents/techwatch/tsw0701b.pdf).

[7] Available at: www.facebook.com; www.linkedin.com; www.iwiw.hu.

[8] Available at: www.ebay.com; www.vatera.hu.

[9] Available at: www.flickr.com; http://indafoto.hu; www.youtube.com; http://indavideo.hu.

[10] According to interesting data more audiovisual creations were uploaded to *YouTube* since it began operating compared to how many audiovisual were created in total in the previous (around) century (since the motion picture exists). See: Robert J. Kasunic: Copyright's Uneasy Transition into the Web 2.0 Environment, *Landslide*, March/April 2009: 11. Naturally the truth of this data may be questionable. In all honesty there is the minor question of whether or not YouTube has overstepped the boundary in terms of audiovisual uploading.

[11] See for example Laurence Lessig's copyright blog (which is actually rest for good): http://lessig.org/blog.

[12] See for example (in Hungarian language): http://blog.hu.

Web 2.0 services is illustrated by social networking sites. Another example is *Twitter*[13] that mixes the advantages of blogs and the sharing of audiovisual content.[14]

Finally, the best possible example of the *Web 2.0* phenomenon are the *wiki portals*[15] that aim to synthesize and provide easy access to selected knowledge that is written and edited by the users of the sites. These websites are accurately called online encyclopedias.[16] These encyclopedias are mirrors of the constantly changing and broadening knowledge of our society. Due to easy access and user-friendly structure these portals are not only collectors, but also distributors of knowledge.[17]

Interactivity is not a self-sustained activity: the underlying purpose is the synthesizing and digital distribution of the knowledge of society. For example *YouTube* and *Wikipedia* show that the online society of our age shifts the entertainment, the acquisition of knowledge, the developing of social contacts, the execution of business transactions from the analogue, physical world to the digital environment. The participants of this world have an ever-increasing role in the formation of this environment.[18]

2.2. Implications of *Web 2.0*

Kevin Kelly describes our present internet-based society as a new socialist system.[19] According to Kelly those, who write or edit the articles of the *Wikipedia*, upload pictures to *Flickr* or videos to *YouTube*, or who share content via *P2P* applications, are the pathfinders of the new digital socialism.

Kelly argues that the ultimate goal of the digital socialism is – similarly to the evolution of socialism itself– to reach *collectivism*; starting from simple *sharing* growing into *cooperation* of

[13] Available at: http://twitter.com.

[14] Thus for example several NBA basketball players share their everyday life in words and videos in order to "dialogue" with their fans.

[15] Interestingly the word „wiki" means in Hawaiian language: „fast".

[16] This is easily proved by the name of the most well-known wiki portal. The word Wikipedia mixes wiki with encyclopedia.

[17] It is worth to mention though that the reliability of these online encyclopedias is not equivalent to the (for example) *Encyclopedia Britannica*. For example a US American court concluded once that the Wikipedia may not be accepted as an authentic source of information in legal processes. See: Lamilem Badasa v. Michael B. Mukasey, 540 *F.3d* 909 (2008).

[18] A final example is the *Google Earth* project, where *Google* offers satellite pictures of the Earth for free and allows users to connect their own pictures to a specific geographical area or building. This kind of cooperation of a company and any member of the society is a praiseworthy form of improvement of our culture.

[19] Kevin Kelly: The New Socialism: Global Collectivist Society Is Coming Online, *Wired Magazin*, 17.06.2009 (www.wired.com/culture/culturereviews/magazine/17-06/nep_newsocialism?currentPage=all).

users and finally reaching well-organized *collaboration* of the masses. Kelly understands sharing, like the distribution of personal photos or videos over the internet, as the mildest form of socialism. The users edit/tag (based on keywords, categories, labels) the shared information through which they achieve a much wider and more successful cooperation of (the) people.[20] If this cooperation coupled with a high degree of organization – like in the case of open source software *Linux* – then a communist-style production (a collaboration of masses) is realized. This serves as a counterpart to the present dominant capitalist style of production. Finally, however, some kind of hierarchy has to be involved in all cases of collaboration that aims to ease decision-making on important issues.[21] Kelly concludes "at the heart of online collectives is actually a sign that stateless socialism can work on a grand scale."

Without analyzing Kelly's theory from a political aspect we can conclude that it counters several problems from a copyright perspective. Naturally, he recognizes that the social networking sites and other internet services dominantly influence human communication. However, Kelly fails to mention that this is also valid for television and mobile phones. Kelly correctly identifies the advantages of the *Web 2.0*. It is feasible that our society will become an *online society*. It still does not mean what Kelly writes, "this new brand of socialism [would] operate in the realm of culture and economics, rather than government"; that "digital socialism is socialism without the state". Kelly further argues that "operating without state funding or control (...) this mostly free marketplace achieves social good at an efficiency that would stagger any government or traditional corporation."

These statements seem inaccurate, not only from a copyright aspect, but from the perspective of the whole legal system. All *Web 2.0* applications are subordinated to e.g. strict data protection, competition, civil and criminal law provisions. State control in this context is, however not necessarily evil, instead it is overwhelmingly justified. The use of state enforcement measures is generally not adequate, but its overall usefulness is not doubted. It is likely that there will always be more pirated software than the right holders and the police can catch. People will download more musical compositions illegally than they buy original CDs, but without state control and restrictions *we would be talking about digital anarchy, not socialism*. This argument is bolstered by the fact that Kelly mentioned *P2P* file sharing only in passing, despite the fact that file sharing is responsible for several copyright disputes.[22]

[20] Kelly uses the example of the Microsoft's *Photosynth* software that allows to create three dimensional pictures from the several users' photographs. Check out the software at: http://photosynth.net.

[21] For example millions of people contribute to the broadening of *Wikipedia's* content; there are, however, only some thousands of people, who are allowed to edit the written articles.

[22] It seems so that Kelly even forget about the fact that whilst the Soviet revolution had to reckon "only" with a state symbol (the Czar and his family), the present digital pathfinders had to fight with whole states and their legal systems, and – which is sometimes harder than the previous – with powerful, politically backed multinational organizations and companies, like the RIAA, MPAA, Hollywood companies, or the Microsoft.

Herein lies the paradox. All *Web 2.0* portals were founded for the purpose of enabling the free flow of information; at the same time they also enjoy protection under national law at the time of intellectual creation.[23] *These companies are therefore simultaneously promoters of digital socialism and magnates of digital capitalism*. Naturally, they will make decisions based on economics, when deciding on which side to take on any one topic of legal debate.

The positive effects of *Web 2.0* upon culture are undeniable. The publication of our achievements on *Twitter,* on *YouTube* or the sharing of knowledge on *Wikipedia* contributes to the distribution and improvement of our culture. On the other hand, the unauthorized and mass use of the protected expression of others should not be encouraged. *If the previous are the digital pathfinders, the latter are digital anarchists*.

2.3. *Web 2.0* and Copyright Infringement

Web 2.0 services affect copyright law greatly, causing millions of infringements. The dominant copyright regime – at least on a normative level – can handle the new and different types of uses satisfactorily. The question of enforcement is an entirely different story. Effective enforcement of claims is unlikely due to the massive nature of use. It is similarly true that the use of these services supposedly may weaken public faith in effective legal protection. This issue is, however, beyond the scope of this article. This article seeks to discover whether and how the use of *Web 2.0* applications can be integrated into the framework of the present copyright system. Here, the starting point is distinguishing content respecting their legitimacy.

The source of user-generated content is important when considering legitimacy. As long as the user independently creates an original work of expression based on its own ideas, the question of infringement should not be raised. If the user builds on preexisting materials, his act will not result in a breach of copyright, as long as he adopts only the idea of the previous work. Furthermore, in the copyright system of the United States uses that do not exceed the threshold of the *de minimis test* will not be deemed as infringing.[24] The German/Austrian concept of "free adaptation" (in German: "*freie Benutzung*") is somehow similar to the *de minimis* test, according to which new, original creations that were simply inspired/stimulated (in German: "*Anregung*") by the source work are also protected under the copyright law. Should any part of the original work be copied into the new work the user may excuse his taking, if it is impossible to recognize

[23] A great example for that is the Google's reasoning in the *Viacom v. YouTube* case, where it was argued that the creation of the YouTube's source code required more time than one thousand people's whole year work time, or the „*Video ID*" software was completed in more than 50.000 working hours. See: Viacom International Inc., et al., v. YouTube Inc., et al., 253 *F.R.D.* 256 (2008): 259-260.

[24] As the US Federal Court of Appeals for the Second Circuit declared it: "the law does not concern itself with trifles". See: Ringgold v. Black Entertainment Television Inc., 126 *F.3d* 70 (1997): 74. – See further: Robert M. Szymanski: Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use, 3 *UCLA Entertainment Law Review*, 1996: 300-301.

the affected segment due to its transformation. If the user does not transform the segment taken, he may even excuse his activity, if he combines that segment with many other motifs, and it finally has a subordinated role in the new creation.[25] In sum, it seems evident all over the world that if the taking is quantitatively high, then the unauthorized use should be deemed an infringement. In continental copyright regimes – due to the strong protection of moral rights – uses that hurt the authors' right of integrity may result in an infringement, no matter how large the taking. Such protection of moral rights is unknown in the United States.

Secondly, if the user-generated content earns copyright protection, and it is used by someone else without prior authorization, it can result in an infringement of its creator's copyright. Unlike the uploading of an original photograph to *Flickr* or a home video to *YouTube*, the publication of personal data on a social networking site is exempted. The creator of the user-generated content – like other authors – has the exclusive right to decide, whether she wants to protect her expression at all. It is more common to assign works to the public domain nowadays. The most well-known examples are the *Creative Commons* movement,[26] and the *GNU General Public License* system.[27]

Thirdly, the making available to the public of illegal content automatically raises the question, whether and how other actors on the internet can be held liable for the support they provide to infringers. The United States was the first country that created safe-harbor protection for content, hosting, mere conduit and search engine service providers.[28] Just a few years later the

[25] Salagean supra note 6, at 104-106. – Art. 24 Para. 2 of the German Copyright Act (hereinafter *dUrhG*) contains, however, an important restriction (nothing similar exists in Austria). According to the rule of "melody protection" (in German: "*Melodienschutz*"), if the melody of the source work recognizably forms the basis of the secondary work, no protection is granted to the new creation.

[26] Concerning the analysis of the CC movement see in the United States especially: Laurence Lessig: *Free Culture - How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, The Penguin Press, New York, 2004 – Adrianne K. Goss: Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project, *Chicago-Kent Law Review*, 2007: 963-996. – Lynn M. Forsyth - Deborah J. Kemp: Creative Commons: For the Common Good?, *University of La Verne Law Review*, 2009: 346-369. In Germany and Austria (in German language): Erik Moeller: *Freiheit mit Fallstricken: Creative-Commons-NC-Lizenzen und ohre Folge*. In: Bernd Lutterbeck - Matthias Bärwolff - Robert A. Gehring (Hrsg.): Open Source Jahrbuch 2006, Lehmanns Media, Berlin, 2006: 271-282. – Markus Eidenberger - Andreas Ortner: *Kreativität in Fesseln: Wie Urheberrecht Kreativität behindert und doch mit seinen eigenen Waffen geschlagen werden kann*. In: Leonhard Dobusch, Christian Forsterleitner (Hrsg.): Freie Netze. Freies Wissen. Echomedia, Wien, 2007. In Hungary (in Hungarian language): Gábor Faludi: A Creative Commons felhasználási engedély (CC-licenc) egyes jogi sajátosságai [Some Legal Features of the Creative Commons License]. In: *Fehér Könyv a szellemi tulajdon védelméről 2006*, Magyar Szabadalmi Hivatal, 2006: 136-145.

[27] Concerning the GNU GPL licenses see: Lawrence Rosen: OSL 3.0: A Better License for Open Source Software, *Computer Law Review International*, 6/2007: 166-171. – John P. Beardwood - Andrew C. Alleyne: Open Source Hybrids and the Final GPLv3, *Computer Law Review International*, 1/2008: 14-20. – Sapna Kumar - Olaf Koglin: GPL Version 3's DRM and Patent Clauses under German and U.S. Law, *Computer Law Review International*, 2/2008: 33-38. – Thomas Thalhofer: Commercial Usability of Open Source Software Licenses, *Computer Law Review International*, 5/2008: 129-136.

[28] Art. 512., *Digital Millennium Copyright Act* (1998) (hereinafter *DMCA*).

European Union had regulated the same issue in a directive[29] that the member states of the European Union had to implement in their national laws.[30] The *DMCA* also introduced the so-called "*notice-and-take-down procedure*". Under this procedure the right holders can demand the removal or disabling of the infringing materials and in case of non-compliance the service provider can face liability.[31] The *E-Commerce Directive* of the European Union does not contain exact rules on the "*notice-and-take-down procedure*", which means that Members States may create their own provisions on that.[32] Finally, both in the United States[33] and the European Union[34] right holders have a broad scope of measures available to forbid or prevent infringing activities, or for example to identify people, who use the service to commit direct copyright infringements. As a final remark it has to be noted that issues occurring under these regulations place a massive burden on the courts of these countries.[35]

Right holders also enjoy protection outside copyright law. For example, *Web 2.0* services providers face litigation for trademark infringements by their users that sell counterfeit goods on their sites.[36] Several anomalies also arise under competition law, or due to the unauthorized use of personal data or trade secrets, or material related to child pornography and/or pedophile crimes. However, the present article will not discuss these issues in depth. In sum, the legal

[29] Art. 12-14. of the 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 (hereinafter E-Commerce Directive). A major difference between the US and the European Union regulation is that the E-Commerce Directive does not provide a safe harbor provisions that includes search engines.

[30] See for example the electronic commerce statute of Hungary (Art. 7-13., Act CVIII of 2001), Austria [Art. 13-19., BGBl I Nr. 152/2001. S. 1977. (01.01.2002)], or Germany [Art. 7-10., Telemediengesetz vom 26. Februar 2007 (BGBl I S. 179), geändert durch Artikel 2 des Gesetzes vom 25. Dezember 2008 (BGBl I S. 3083)].

[31] *DMCA*, Art. 512(c)(3).

[32] *E-Commerce Directive*, Art. 14(3): „This Article (...) does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information." It is interesting that for example the German legislator missed to regulate the procedure on statutory level. This means that each service providers should have their own regulations on the issue. The Hungarian legislator created a thorough and easily applicable system of "*notice-and-take-down procedure*". See: Act CVIII of 2001, Art. 13.

[33] *DMCA*, Art. 512(h) and (j).

[34] The whole topic is covered by the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

[35] Concerning the above mentioned *Viacom v. YouTube* case, and the German, French, Italian, Spanish and British court practice on the liability of service providers see: Ben Allgrove - Paolo Balboni - Alexander Haines - Norman Heckh - Lorenza Mosna - Nicholas Quoy: Liability of Web 2.0 Service Providers – A Comparative Look, *Computer Law Review International*, 3/2008: 65-71.

[36] Thus for example *eBay* was convicted several times in connection to the infringements of Louis Vuitton, Christian Dior, Kenzo or Givenchy companies' trademark. See: *Computer Law Review International*, 1/2009: 20-23. In an actual US decision the District Court for the Southern District of New York refused to impose liability on eBay, holding that "the law does not impose liability for contributory trademark infringement on eBay for its refusal to take such preemptive steps in light of eBay's 'reasonable anticipation' or generalized knowledge that counterfeit goods might be sold on its website." Seed: Tiffany (NJ) Inc., et. al., v. eBay, Inc., 576 *F.Supp.2d* 463 (2008), 470.

problems arising under the *Web 2.0* phenomena fit easily into the dominant copyright paradigm. An ever stronger demand to broaden the present system in a more user-friendly way is clearly present. The prevalence of (for example) Creative Commons or the GNU licenses, however, proves that there are no well-developed alternatives that may be able to substitute the present copyright system. The fight against illegal uses that have a destructive effect upon society and culture faces several hurdles, due to the unlimited nature of the internet and difficulties connected to international enforcement. On the other hand, the constant growth and broadening of online content by the users all around the world, clearly contributes to the improvement our culture.

III. The deterioration of digital culture – the phenomena of *P2P file sharing*

Since the birth of *Napster* in 1999 file sharing rapidly became significant in society. A large proportion of the world's population uses *P2P* file sharing applications,[37] and an enormous proportion of internet data-transfer is related to these services.[38] Several court decisions conclude that the sharing of illegally up- and downloaded content was very high on *P2P* sites.[39] The use of file sharing services naturally has significant economic consequences worldwide.[40] In

[37] Some data show that *Napster* had been used around the millennia near 40 million users. See: Frederike Hänel: Napster und Gnutella – Probleme bei der Übertragung von MP3-Dataien nach deutschem Urheberrecht [Napster and Gnutella – Problems of Sharing of MP3 Data under the German Copyright Law], *Jur-PC* Web-Dok. 245/2000, Abs. 27. (Available in German language at: www.jurpc.de/rechtspr/20000245.htm) Another expressive data shows that there were some periods, when the number of Napster users had grew by 200% per month, 100 new users had registered each second, and 10.000 files had been shared every second. See: Llewellyn J. Gibbons: Napster: The Case for the Need for a Missing Direct Infringer, 9 *Villanova Sports & Entertainment Law Journal*, 2002: 61. Later, in the well known Grokster case the US Supreme Court stated that around 100 million users installed on their private PCs Morpheus and Grokster. See: Metro-Goldwyn-Mayer Studios, Inc., et al., v. Grokster, Ltd., et al., 545 *U.S.* 913 (2005): 923.

[38] According to the research of the German *ipoque* research center 70% of the night and 30% of the daytime data transfer had been related to the *P2P* in Germany in 2006, whilst filesharing had been amounted to 70% in the average of day and nighttime data one year later. See: *ipoque P2P Survey 2006*: 2. (www.ipoque.com/userfiles/file/P2P_survey_2006.pdf) and *ipoque internet Study 2007*: 2. (www.ipoque.com/userfiles/file/internet_study_2007.pdf).

[39] Napster court found that 87% of the contents were illegally shared. See: A&M Technology, Inc., et al., v. Napster, Inc., et al., 239 *F.3d* 1004 (2001), p. 1013. The Grokster decision contained a 90% figure. See: MGM v. Grokster supra note 36, at 922. Finally a Belgian district court similarly concluded that 90% of the files shared via *P2P* applications were infringing. See: SABAM v. S.A. Tiscali (Scarlet), District of Brussels, No. 04/8975/A, Decision of June 2007, *AELJ Translation Series*, 2008: 1285.

[40] Due to the uncertainties of the calculations conducted by the movie and music industry, I will omit referring to these researches and studies. On the same issue see: Malla Pollack: Rebalancing Section 512 to Protect Fair Users from Herds of Mice – Trampling Elephants, or a Little Due Process is Not Such a Dangerous Thing, *Santa Clara Computer & High Technology Law Journal*, March 2006: p. 549-550.

the present article, the main question is whether the *P2P file sharing* services have only negative effects upon our existing culture, or do they contribute to the culture in some way?[41]

In Europe, Art. 3 (2) of the *Infosoc Directive* introduced a new type of public distribution right: the *right of making available to the public*.[42] The respective authors and neighboring right holders are allowed to authorize or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. This does not require that the respective work or performance may be reproduced, thus only the purpose of "providing the chance to reproduce" is enough to infringe this right. Analogous with the situation of hyperlinks the simple creation of a torrent file (as the most popular form of file sharing nowadays) does not constitute infringement, as long as no reproduction or making available to the public takes place. Therefore, the defense of the defendants in *The Pirate Bay case*, according to which the upload of a torrent file to a tracker does not constitute infringement either, as long as no seeding[43] takes place, seems proper.[44]

However, no infringement takes place, if the users simply use the respective copyrighted works within the limits of a free use exception or limitation. In connection to the file sharing the only real option is *copying for private purposes*, but even this exemption is inapplicable, since the exception covers only reproduction (downloading) and not distribution or making available to the public (uploading).[45] In addition, the private copying exception does not cover software in the European Union.

The previous argument is equally important for every country, whether the national copyright statutes contain any provision on the legality of the copied work. For example, under the German copyright law the reproduction shall be considered legal, only if the source work is

[41] It is worth mentioning that the *peer-to-peer* services are erroneously identified as similar to the filesharing applications. The *P2P* software arrange data transfer between two parties (peers), which does not necessarily contain sharing or changing files. It is therefore more appropriate to talk about one or many-sided data transfer. The best example to demonstrate this is *Skype*, the Internet-based telephone system ("*Voice over internet Protocol*", that is, *VoIP*), where the two parties "share" voices with each other, and not copyrighted contents. This is similarly true for the chatting programs (like *Yahoo!* or *Windows MSN* that allows the real time conversation of the participants. These *P2P* services generally do not contravene the legal system, and therefore they do not deteriorate our culture. This is theoretically guaranteed in the United States by the "staple article of commerce" doctrine, under which "the sale of other articles of commerce does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes". See: Sony Corporation of America et al. v. Universal City Studios, Inc. et al. 464 *U.S.* 417 (1983), 442.

[42] In German language: „*Zurverfügungsstellen*" or „*Zugänglichmachung*"; in Hungarian language: "*a nyilvánosság számára hozzáférhetővé tétel*". The previous international sources of this right can be found in Art. 8 of *WIPO Copyright Treaty*, and Art. 10 and 14 of the *WIPO Performances and Phonograms Treaty*.

[43] That is, providing a source for the "torrent information package".

[44] See: www.edri.org/edri-gram/number7.4/pirate-bay-trial-sweden.

[45] Some national regulations of this rule are the followings: Hungarian Copyright Act (hereinafter: *HCA*) Art. 40; *dUrh*G, Art. 53 Para. (6); Austrian Copyright Act (hereinafter: *öUrh*G) Art. 42 Para. (5).

legitimate, that is, reproduced or made available to the public in a lawful way (for example by the right holder).[46] Although, the Hungarian copyright law does not contain similar regulations, the Hungarian Copyright Expert Board has concluded that the requirement of legality can be deduced from broader legal principles, specifically applied to the three-step-test.[47] This interpretation is supported by such general principle as "*nemo plus iuris*".[48]

It should also be kept in mind that file sharing – when viewed from the copyright perspective – should not be reduced to its components nor be viewed in a static way, but only be assessed in its entirety including its dynamics. One of the basic features of the most recent file sharing services is that *users share the downloaded content with others*. Therefore those, who do not find anything objectionable in downloading a song from the Internet, generally forget that they simultaneously become uploaders, and therefore infringers as well.[49]

File sharing is treated differently in the United States. As the US Court of Appeals for the Ninth Circuit declared in the *Napster case*, any downloading injures the authors' right of reproduction, and the uploading of any content to the *Napster's* central indexing servers infringes the authors' right of public display.[50] Subsequent court practice has followed *Napster* on the question of liability for down loaders. Consequently, most users sued by right holders have settled out of court.[51] Those, who have decided to try their case in court, have generally lost.[52]

Since the Copyright Act of the United States (USCA)[53] does not grant any right of "making available to the public" to authors, the person, who allows the free downloading of content from a shared folder on his personal computer, does not commit a legal offence.[54] Since

[46] *dUrhG* Art. 53 Para. (1).

[47] SZJSZT 17/2006. In: *Iparjogvédelmi és Szerzői Jogi Szemle*, 2006/4., 228-248. (Only in Hungarian language.) The three-step-test is codified by the Berne Convention, Art. 9. Para. (2); the TRIPS Agreement Art. 13.; the WIPO Copyright Treaty, Art. 10.; the WIPO Performances and Phonograms Treaty, Art. 16. Para. 2.; and the Infosoc Directive Art. 5. Para. (5).

[48] In Latin: „Nemo plus iuris ad alium transferre potest quam ipse habet." This means in English: „No one can transfer to another a larger right than he himself has." See: http://www.inrebus.com/legalmaxims_n.php

[49] It is sad that one of the most relevant German court decisions declared the fact of infringement (together with criminal liability) without any deep analysis of the operation of *P2P* filesharing services. See (in German language): AG Cottbus 6.5.2004 [95 Ds 1653 Js 15556/04 (57/04)]. In: *Jur-PC* Web-Dok. 236/2004 (www.jurpc.de/rechtspr/20040236.pdf).

[50] *A&M v. Napster* supra note 38., at 1014.

[51] See: http://arstechnica.com/news.ars/post/20081219-no-more-lawsuits-isps-to-work-with-riaa-cut-off-P2P-users.html.

[52] See for example: BMG Music, et al., v. Cecilia Gonzalez, 430 *F.3d* 888 (2005).

[53] Copyright Law of the United States of America (17 U.S.C. 1976) (hereinafter: *USCA*).

[54] Atlantic Recording Corporation, et al., v. Pamela and Jeffrey Howell, 554 *F.Supp.2d* 976 (2008): 983-984.

infringement of the distribution right requires the transfer of copyrighted content,[55] this system seems to be the opposite of the European system. Since the *USCA* does not contain a right to make available, the reasoning of the *Napster* court seems logical. Nevertheless, the decision seems to forget the dynamics of file sharing. That is, uploading requires the making available of some content – *you can download something from the Internet only if it is accessible*.[56]

If a plaintiff proves infringement the defendant can raise a fair use defense.[57] The fair use defense was, however, found inapplicable by both the *Napster* and *Grokster* courts. First, the *Napster* court found convincing that "the more music that sampling users download, the less likely they are to eventually purchase the recordings on audio CD".[58] Secondly, the fact that the downloaded works were shared with others, excluded any legitimate purposes. In light of these arguments the four statutory fair use factors cannot support the defendant's position.[59] These factors are

> "1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2. the nature of the copyrighted work; 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4. the effect of the use upon the potential market for or value of the copyrighted work".

As the *Napster* court made it clear the "repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a *commercial* use"[60], and the downloading by users *does not transform* the original content in any way.[61] The first factor thus favored the right holder. Since users generally acquire the *whole of the copyrighted (creative) contents* with the help of *P2P* services the second and third factor also supports the plaintiff's

[55] *USCA* Art. 106 Para. (3) says that "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."

[56] Concerning the criticized reasoning of the Arizona District Court see *Atlantic v. Howell* supra note 45., at 986-987.

[57] *USCA* Art. 107.

[58] *A&M v. Napster* supra note 38., at 1018. – A similar reasoning was given by the US Federal Court of Appeals for the Seventh Circuit. See: *BMG v. Gonzalez* supra note 50., at 890.

[59] Gibbons supra note 36., at 68-71. – William S. Coats - Heather D. Rafter - Vickie L. Feeman - John G. Given: Blows against the Empire: Napster, Aimster, Grokster and the War against P2P File Sharing, *Practising Law Institute*, 2003: 478-481.

[60] Coats et. al. supra note 58., at 478-481.

[61] *A&M v. Napster* supra note 38., at 1015.

position.[62] Finally, the use of file sharing applications clearly has a negative, detrimental effect upon the potential market or value of the original work or author's market.[63]

This does not mean that every use by *P2P* services is unfair. For example the activity of "a law professor demonstrating Napster for a Cyber law class; an investigating attorney; a judge or law clerk downloading certain files for a better understanding of the issues in the case; members of the media demonstrating Napster as part of a news story; or individuals privately distributing MP3 files from Napster to friends or acquaintances" would fit into the frames of the fair use test.[64]

In light of the previous facts, mass file sharing generally has a negative effect upon the entertainment industry and – with the radical transformation of public opinion on the aims and justification of copyright protection – upon culture. It seems necessary to mention, however, that *P2P* file sharing has several positive features as well. For example, the file sharing programs can be beneficial to new and less famous bands, amateur moviemakers, and even well-known authors may benefit from their use.[65] *P2P* systems make it easier to distribute public domain works as well. Although the *Napster* court argued differently, it is possible that users, after downloading songs, may decide to buy the entire original album.[66] Some commentators also recognize the possibility the legalization of *P2P* systems in a future free culture.[67] P2P systems are therefore also capable of improving culture, though this is not their general "profile".

[62] *A&M v. Napster* supra note 38., at 1016. – *BMG v. Gonzalez* supra note 50., at 890.

[63] *A&M v. Napster* supra note 38., at 1016-1017. – „Downloads from peer-to-peer networks such as KaZaA compete with licensed broadcasts and hence undermine the income available to authors." See: *BMG v. Gonzalez* supra note 50., at 891.

[64] Gibbons supra note 36., at 78.

[65] Christopher Geiger: Right to Copy v. Three-Step Test - The Future of the Private Copy Exception in the Digital Environment, *Computer Law Review International*, 2005: 10.

[66] Such a prominent success was the Arctic Monkeys' debut album in 2006, perhaps due to the fact that a selection of their music was available on P2P systems before the album was released. *See Monkeys Let Music Do the Talking*, BBC NEWS, 24th February, 2006 (http://news.bbc.co.uk/1/hi/entertainment/4644214.stm). This "advertisement" offered a sampling of their musical style and when the band launched their album, "Whatever People Say I Am, That's What I'm Not," it became the best musical debut in England. *Ibid.*

[67] Lessig supra note 4., at 179-180.

IV. The Preservation of Culture – the *Digitization* of Cultural Heritage

4.1 Digitization in Practice

In addition to the newly-created content, humanity possesses an immeasurable amount of knowledge displayed in intellectual works.[68] The purpose of our copyright system is to preserve these creations, and to assure following generations the chance to become acquainted with them. Several different methods have been applied towards reaching this goal worldwide. One initiative is the Hungarian *Digital Literature Academy* (DLA).[69] The project was initiated by 39 outstanding poets and writers in 1998, and its goal is the worldwide distribution and popularization of Hungarian literature. Within the framework of the DLA all the (now 71) former and newly selected contemporary and posthumous members contractually license and non-exclusively make available digitally their life-work to the DLA, in exchange for a monthly sum that equals the Hungarian minimal salary quadrupled.[70] Although this initiative covers only a small segment of prominent Hungarian artists (thus ensuring its high quality) it constitutes a remarkable way of digital preservation and distribution of intellectual creations.

Libraries, public archives and records can serve as another medium of digitization, because their general purpose is the distribution and/or making available of collected and managed copyrighted works to members of society. The legal framework of this activity (like rules on public lending, interlibrary loans, photocopying by libraries, or copying for archiving purposes) is well-developed. In the last few years, however, a real demand has emerged to use digital technologies more intensively and in order to present material in a more user-friendly way. Today, one main goal is to share the knowledge collected and managed by libraries, that is, to *make our cultural values available online and in an interactive form*. The national and international regulations are nevertheless far from synchronized, and the digital archiving of our intellectual heritage fuels a recurring debate. The strongest promoters of the initiative are universities and research centers that argue that worldwide access to the contents of digital libraries would make their work much easier.

One of the latest contributions concerning the digitization by libraries is the *Gowers Review*. The report criticizes the defects of the British copyright law[71] that materially restricts the digitization by libraries. A comparison of the copyright laws of the European Union (including Hungary as an example for the implementation) and the United States can help the reader analyse the legal provisions on this subject in another country. It will be asked, whether national (and supranational) copyright laws restrict (1) the types of works that may be archived; (2) the

[68] To highlight just a few of the most typical: an incredible number of books, newspapers, photographs, works of fine arts, sound recordings, audiovisual works, broadcasted contents belong to our intellectual heritage.

[69] See (only in Hungarian language): www.pim.hu/object.d8f182da-fdfa-45ba-914f-2688ce822346.ivy.

[70] That is, around 1500$/month (depending on the exchange rate).

[71] Copyright, Designs, and Patents Act of 1988, hereinafter referred to as: *CDPA*.

number of copies allowed; (3) the possibility of format-shifting[72] the original work; (4) the distribution or making available of the copy to the public.

4.2. Digitization in the European Union

The Copyright or *Infosoc Directive*[73] lays down the legal framework in the EU that enumerates on the one hand the exclusive rights of authors, and on the other hand the exceptions and limitations thereto.[74]

The specific provisions that relate to this topic are the following. First, according to Art. 5. Para. 2. point c)

> "Member States may provide for exceptions or limitations to the reproduction right (...) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage".

Second, under Art. 5. Para. 3. point n)

> "use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of [publicly accessible libraries, educational establishments, museums, or archives] of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections".

Third, as the Directive makes it clear in its Preamble these exceptions "should be limited to certain special cases" and such exceptions "should not cover uses made in the context of on-line delivery of protected works or other subject-matter".[75] Finally, Art. 5. Para. 5. draws our attention to the fact that the limitations of and exceptions to the exclusive rights may be accepted only in the light of the three-step-test:[76]

[72] This means the reproduction of the work on a modern data carrier.

[73] 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.

[74] Concerning a detailed analysis of the Directive see: *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Final Report, 2007 (www.ivir.nl/files/implementation_2001_29_EC/index_eng.html).

[75] Information Directive, Recital (40). The same Recital stresses nevertheless that "this Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC."

[76] Green Paper – Copyright in the Knowledge Economy, Brussels, 16.7.2008, COM (2008) 466 final, 7-8. (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0466:FIN:EN:PDF). (Hereinafter: Green Paper.)

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

Due to the fact that the *Infosoc Directive* fails to answer the first three questions raised above, it was left to national legislators to resolve the missing questions.

The Hungarian implementation of the Directive can serve as a concrete example. The leading provisions can be found in Art. 35. Para. 4. and Art. 38. Para. 5. of the *HCA*. The first contains a general description of the limitation of the exclusive right of reproduction, in favor of libraries. Accordingly, non-profit public libraries and archives[77] may reproduce copyrighted works for the purposes of, 1) academic or scientific research; 2) public library services; 3) displaying the copies on computer terminals installed and operated in these institutions for members of the public for scientific research or for learning. Libraries are also allowed to 4) make a copy of a small part of a published work, or of articles in newspapers/periodicals for internal purposes.[78] The Hungarian legislator may pass specific legislation concerning archiving[79] and has done so once, when passing the so-called *NAVA Act*.[80]

The *HCA* does not restrict the types of works that may be archived, and thus makes it *possible to preserve all possible types of works*.[81] Since the purpose of the archiving is neither restricted by the statute, quality correction[82] and modification (or shifting) of format[83] is also acceptable. This argument is strongly supported by Art. 2 of the *NAVA Act*, which contains the word "restoration". This refers to the mending of the substance of the archived work or the restitution of its original conditions. The question of the *quantity of copying by reason of the purpose of the use* is equally important. Specific balancing is required; however, it makes it leaves room for the possibility to create more than three copies (as is allowed in the United States).[84]

[77] The *HCA* similarly guarantees this right to public educational institutions, museums, and public collections of picture and sound recordings.

[78] *HCA* Art. 35 Para. (4) point (a)-(c).

[79] *HCA* Art. 35 Para. (4) point (d).

[80] Act CXXXVII of 2004 on the National Audiovisual Archives.

[81] It is worth mentioning that sound recordings, audiovisual works or broadcasted contents are not covered by the *CDPA*. The United Kingdom Patent Office emphasized that sound recordings, films and broadcasts were originally not covered by the *CDPA* due to the available technologies and the requirements of libraries at the time of drafting the statutory exception. See: *Taking Forward the Gowers Review of Intellectual Property – Proposed Changes to Copyright Exceptions*, UK Intellectual Property Office, 2007: 28. (www.ipo.gov.uk/consult-copyrightexceptions.pdf).

[82] For example in case of an old tape.

[83] For example if the original data carrier, like an old celluloid tape, is not in circulation.

[84] The United Kingdom copyright rules are even more restrictive in this field. The CDPA only allows creating one copy per work. See: *CDPA* Art. 42 (1)(a)-(b).

Here we also have to be aware of the requirements of the three-step-test, and therefore the acceptable number of copies has to be interpreted narrowly. The *HCA* is very liberal concerning the distribution or the making available of the copy to the public. For example, Article 35.4(b) contains the term "public library services", and thus it supposedly allows putting these works at the users' disposal. However, the second segment of the same article narrows the right to circulate copies. Accordingly, the display of the copies is allowed only on computer terminals installed and operated in these institutions. The members of the public are only allowed to use these terminals for scientific research or for learning purposes. This simply means that no other method of publication is allowed.

4.3. Digitization in the United States

The United States Copyright Act (*USCA) Section 108* differentiates between three main types of uses.[85] Provisions concerning the purpose of the use, the allowed number of copies, the nature of the source work, the "fate" of the copy, and the conditions of the use are significantly different from each other and vary depending on the case. The first option grants the right for all libraries and archives that are open to the public, to create and distribute one copy of any kind of work, if the use is made without any purpose of direct or indirect commercial advantage, and the reproduced or distributed copy contains a notice of copyright.[86] The second option allows a right to reproduce and distribute any unpublished work in three copies, solely for purposes of preservation or for deposit for research use in another library or archive, supposing that the original work is in the collection of the institute, and only if the work reproduced in a digital format is not distributed or made available to the public outside the premises of the library or archive.[87] Finally, three copies of a published work may be created – but never distributed – for the purpose of "replacing a copy that is damaged, deteriorated, lost, or stolen, or if the existing format in which the work is stored has become obsolete".[88] The latter condition allows libraries and archives to format-shift their collections.[89] The

[85] Thus where the statute mentions only distribution, there the making available to the public is not allowed. The previous exclusive right does not cover the latter use, as held by several court decisions. An Arizona District Court found that the Art. 106 Para. 3 of the *USCA* demands the actual transfer of the source work to hurt the exclusive right of distribution. The *USCA* states that "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." As the court reasoned "infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords." See: *Atlantic v. Howell* supra note 52., at 981., 985. See another decision that was based on the previous holding: Capitol Records Inc., et al., v. Jammie Thomas, 579 *F.Supp.2d* 1210 (2008).

[86] *USCA* Art. 108 (a)(1)-(3).

[87] *USCA* Art. 108 (b)(1)-(2).

[88] *USCA* Art. 108 (c).

[89] According to the last sentence of *USCA* Art. 108 (c) "a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace."

preconditions for format-shifting are that the library or archives may create the reproductions after a reasonable search for finding an unused replacement of the deteriorated original work at a fair price, and the work reproduced in a digital format is not distributed or made available to the public outside the premises of the library or archive.[90]

4.4. Comparative Discussion on Rules and Technological Development

Do the current copyright rules concerning the preservation of cultural goods require any modification due to the rapid development of digital technologies? At present the countries mentioned above have a rational system regarding archiving. The number of allowed copies is closely tied to the purpose of the use everywhere. The *USCA* regulates three different cases, and uses fixed numbers in each of them. The Hungarian statute seems more flexible, however requires more attention paid by the copier. It is also important that the copyright acts do not restrict the types of works that may be reproduced. Since every creation has cultural value, the preservation of each work is supported equally strongly. Digital technologies make fast, easy, and cost-effective storage of data possible. This advantage should not be constrained by the prohibition of format-shifting. Devotion to old formats may hinder the preservation and even the enjoyment of the works in the future. Therefore, it seems that the present regulations fulfill all the requirements for the effective archiving of cultural heritage. The original question is therefore modified in the following way: is it necessary to allow for the digitization of works in order to provide much broader availability of these works?

The US and Hungarian statutes regulate the right to make the copied works available to the public via terminals of the respective institution in accordance with the basic threshold of the three-step-test. Though these rules seem to be useful, they also restrict easy and (inter)active access to the cultural goods of the digital world. I argue that the much broader distribution of our present cultural assets is a highly supported cause in an economically, legally and culturally globalizing world – without which the digitization of intellectual works would become a purposeless effort. This argument is supported by the general goals of the *i2010: Digital Libraries* initiative in the European Union and the subsequent introduction of the European Union's online multimedia library.[91] *The Europeana*[92] originally had made around 2 million pieces of books, maps, charts, paintings, archive documents, digital copies of films etc. available in a user-friendly way and free of charge. All this content was provided by national libraries, archives and other collections, for example the Louvre, the British Library, and the Hungarian National

[90] *USCA* Art. 108 (c)(1)-(2).

[91] *i2010: Digital Libraries* – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 30.9.2005 COM(2005) 465 final. (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0465:FIN:EN:PDF).

[92] See: www.europeana.eu/portal.

Széchenyi Library. Even though most of these works are in the public domain, the general idea of and the initiative itself is an extraordinary one.

The Hungarian *NAVA Act*[93] was introduced in accordance with the provisions of the European Convention for the Protection of Audiovisual Heritage,[94] and complies with all the requirements of the *Infosoc-Directive*. This archive records all the broadcasts of analogue and digital television channels. It is considered equally important to preserve this expression of our cultural and historical heritage, as other copyrighted materials.

Some clarifying conclusions can be drawn at this stage. First, it is not the author's intention to advocate that the digital reproduction and distribution of copyrighted materials should be accepted as free use. Such an exception would disrupt the present balance of rules, existing business models, as well as arguably contravene with the international minimum requirement concerning copyright limitations and exceptions, mainly the three-step-test. Secondly, the contents that are collected by the libraries and archives greatly differ. A large part of our cultural works is part of the public domain and can be distributed without restrictions. Another large part constitute orphan works, whose owners cannot be identified or located,[95] and it is therefore impossible to obtain consent to use the copyrighted work from them.[96] However, these creations have such an important value that their exploitation must be socially justified. The number of works that are no longer exploited commercially is also enormous. The collections of libraries also contain such copyrighted materials that are exploited by their owners actively. The reproduction and distribution/making available to the public of the works in the first three categories would constitute an essential means towards the improvement and the effective preservation of the culture. Only the last category of works raises copyright concerns and could lead to heavy debate.

Thirdly, it can be argued that digitization can take place respecting copyrighted works. The European Commission has stated in a recommendation that "Europe's cultural material should be digitized, made available and preserved in full respect of copyright and related rights".[97] The Commission refers to the provisions of the *Infosoc-Directive*. Another working document from the European Union, the *Medina Draft Report* supported subjecting digitization by libraries to the three-step-test. *The Rapporteur* also stated that "the phenomenon of works being put online

[93] See: www.nava.hu.

[94] The Convention was commissioned by the Council of Europe. The text of the Convention is available at http://conventions.coe.int/Treaty/en/Treaties/Word/183.doc.

[95] Green Paper supra note 75., at 10.

[96] According to the estimation of the British Library one of each four printed books, and more than half of the randomly selected sound recordings were orphan. See: Gowers supra note 81, at 63, 69-71.

[97] Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC), Recital 10.

by digital libraries can be very damaging to copyright holders".[98] Both of these reports start from the premise that the current copyright regimes are untouchable. This is, however, unconvincing, if we look at the social importance of the issue. The rethinking and rebalancing of the present national and international copyright framework is inevitable. The *Medina Draft Report* seems to be based on a misunderstanding of the three-step-test. The test aims to restrict only the royalty-free uses; however, the national legislators may introduce some statutory limitations, where the members of the society are allowed to use the copyrighted works, if they pay the necessary royalty.[99] This is why it is extremely important that the *Commissioner for Information Society and Media* Viviane Reding, publicly called for the digitization of the cultural heritage for preservation purposes, raising the necessity of EU legislation to the level of directives.[100]

Below follows a short summary on how national rules allow the digitization and distribution of works with different "status". Since no one has any economic rights to the works in the public domain, the question of archiving and making available these works to the public is theoretically really simple. Because these works are old and possibly kept on an obsolete data-carrier, format-shifting should not be restricted. The situation is different in the case of out-of-print works and orphan works. They are generally protected by copyright law, although the exercise of the rights can be questioned. First, it is conceivable that the work is already unmarketable, or the publisher is liquidated, and therefore no one can publish the original work again. In these situations digitization seems to be the only real alternative. This way of reproduction is easy, fast, and cost-effective, and the distribution is also simple. Digitization seems to be the best option for all of the interests involved (author, consumer and distributor). Out-of print works may also become "orphaned". The biggest problem with these (protected) works is that the consent of the right holder is required for their use. However, the time, energy and money required for discovering the owner is excessive, and hampers the utilization of the creative content. For example, many documentaries and sound recordings are hidden in the depth of archives that inform us about significant historical events without crediting the creator of the works. Their utilization is impossible without the authorization of the right holder; however, not relinquishing them for use deprives society of the creation of new useful works. Distributors of digitized old films face similar difficulties. The original use contracts were signed

[98] Draft Report on the Commission report on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Committee on Legal Affairs, Rapporteur: Manuel Medina Ortega, 14.10.2008 [2008/2121(INI)], 10. (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-413.997+01+DOC+PDF+V0//EN&language=EN).

[99] P. Bernt Hugenholtz - Ruth L. Okediji: *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Final Report, 2008: 24. (www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf).

[100] „Let us be very clear: if we do not reform our European copyright rules on orphan works and libraries swiftly, digitization and the development of attractive content offers will not take place in Europe, but on the other side of the Atlantic." See: Viviane Reding: *Digital Europe – Europe's Fast Track to Economic Recovery*, The Ludwig Erhard Lecture 2009, Lisbon Council, Brussels, 9 July 2009: 9.

by the right holders; however, these contracts did not contain the right to create digital copies of the works. That is, the digital versions of the films may be distributed only, if the original author or her descendants permit the use. Acquiring permission causes serious problems in practice.

The problem was high-lighted, when the United States' Congress terminated the renewal mechanism imbedded in the old copyright act by the "*Copyright Renewal Act*" (*CRA*) in 1992, and the term of protection was extended by the "*Sonny Bono Copyright Term Extension Act*" (*CTEA*) with 20 years in 1998. Before the enactment of the *CRA* and *CTEA*, if the right holder did not initiate ("*opt-in*") the extension of the copyright term at the end of the original term, then the work became part of the public domain, thus allowing any kind of use. Due to the modifications, practically every copyrighted expression earned a *post mortem auctoris* of 70 years, even if the original author (or her descendant) was not interested in the commercial exploitation of her work. This system is usually referred to as the "*opt-out*" regime. Therefore the question suddenly emerged, what is the fate of those works, which are protected by copyright, but no identifiable right holders can be connected to the work?[101] The US Register of Copyrights has discussed this topic in detail.[102] It argued that the use of orphan works should be deemed an infringement, except if the user can prove that she made a reasonable effort to find the right holder. If the right holder later "appears" the parties can sign a contract with respect to the future uses.

The European Commission also supports the creation of mechanisms to facilitate the use of orphan works, and promotes the making of lists of known orphan works and works in the public domain and making them available.[103] The Interim Report of the Digital Library Initiative High Level Expert Group in 2006,[104] and the Final Report in 2008[105] similarly urged

[101] The constitutionality of these statutes was also discussed by the USA federal courts. In the famous *Kahle* case it was held that „the outer boundary of 'limited Times' is determined by weighing the impetus provided to authors by longer terms against the benefit provided to the public by shorter terms. That weighing is left to Congress, subject to rationality review. (...) Congress passed the CTEA in light of demographic, economic, and technological changes, and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works." See: Brewster Kahle, et. al. v. Alberto R. Gonzalez, 487 *F.3d* 697 (2007): 701.

[102] *Report on Orphan Works – A Report of the Register of Copyrights*, January 2006 (www.copyright.gov/orphan/orphan-report-full.pdf). Later the Congress of the United States passed an act on orphan works (and thus modifying Art. 514 of the *USCA*. The statutory provisions are generally equivalent with the content of the Report of the Register of Copyrights. The act is available on the following site: http://www.kasunic.com/legislation.htm.

[103] 2006/585/EC Recommendation, Point 6. a) és c).

[104] European Digital Library Initiative High Level Expert Group – Copyright Subgroup, *Interim Report* (16.10.2006). Available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/interim_report_16_10_06.pdf.

action concerning orphan works. The Hungarian legislator introduced some pioneering articles of *HCA* concerning the orphan works in 2008.[106] According to these, the Hungarian Patent Office (*HPO*) shall grant a license to the person, who is unable to locate the author of a respective orphan work under reasonable circumstances. The license is granted for a maximum of five years, it is limited to the territory of Hungary, it is non-exclusive, cannot be transferred, and it carries no right to grant additional use rights or rights for adaptation of the works in question. The license fees are determined by the HPO.[107] In case of non-commercial uses the license fee is paid directly to the author as soon as she becomes known. If the use serves commercial purposes the fee shall be deposited with the *HPO*.[108] In this latter case, as soon as the author becomes known, the fee has to be paid to her, and the original license is revoked (to force the conclusion of a new agreement directly between the parties);[109] otherwise the sum will be handed over to the respective collective rights management association (or the *National Cultural Fund*).[110]

Logically the most pointed debates arise regarding the archiving of protected works that are still available on the market and the right holders intend to commercially exploit them. For example the songs of The Beatles, the episodes of the TV-show Married with Children, or the books of John Steinbeck are still really famous. The archiving of these works by public libraries necessarily requires the clarification of their connection to the exclusive economical rights of public performance and/or public display, making available to the public and public distribution. The issue is therefore, whether it is possible to restrict the scope of the economic rights (even if that causes some economical harm to the right holders) in order to support the archiving purposes of the libraries?

[105] i2010: Digital Libraries High Level Expert Group – Copyright Subgroup, *Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works* (04/06/2008). Available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf.

[106] Act CXII of 2008 (Hereinafter: *Reform HCA*), Art. 8 introduced the new *HCA* Art. 57/A-C. The above statement is naturally true concerning the European Continent. Canada has for example since the 1980's national rules on the use of orphan works.

[107] *HCA* Art. 57/A Par. 1.

[108] *HCA* Art. 57/A Par. 2.

[109] *HCA* Art. 57/A Par. 3 and 5.

[110] *HCA* Art. 57/A Par. 5. It is worth to mention that *HCA* Art. 57/A Par. (7) clearly excludes the application of the above rules regarding works, whose licensing falls within the scope of collective rights management. The *HCA Reform* amended the rules on public lending at the same time (by the introduction of the new Art 23/A and the modification of the earlier Art. 23 and 39), according to which the authors and the performers of musical compositions and motion picture works may license the use of their works only through an obligatory collective rights management. This practically means that the licensing of orphan musical compositions and motion picture works that are accessible only from the collection of a library or archives remain outside of the statutory provisions, and therefore possibly more difficult than the new *HPO* process.

It seems easy to answer this question by a simple "no". In the case of public domain works the fear of the "vanishing of the work" (due to lack of protection and the cessation of the intent of exploitation); and in case of orphan and out-of-print works the social demand on the easing of access to them strongly supports the involvement of the libraries/archives in the distribution of works (and not only in the preservation of them). There is no similar reason for works that are still commercially exploited. The right holders are able to utilize their works with the help of a broad range of business models. Thus, a sound recording may be accessed via the publisher's online database. This is the same with the marketing of books.[111] An important such initiative is the Hungarian website, where a fairytale plays and cartoons of the Hungarian National Television are streamed.[112]

This seems to be only the first step in our digital world. It is therefore worth discussing the *Google Books Library Project.* The Project aims at the digitization and worldwide making available of public domain, orphan and out-of-print works, thus allowing the search, reproduction or buying of these books for everybody around the world. This new dimension of access to millions of literary works seems to be extraordinarily important.[113] The Project however, contains many uncertainties from the perspective of right holders. The adversity surrounding the *Google Book Settlement* that was signed by Google, The Authors Guild, and the Association of American Publishers, confirms this point. The parties concluded the original settlement in October 2008,[114] and the trial court judge was scheduled to decide upon the matter on October 7th, 2009. The US Justice Department, however, submitted its objections in September 2009 stating that it would be harmful to approve the settlement.[115] The parties also announced that they planned to revise their original agreement, and they submitted the amended settlement in November 2009, which was preliminarily approved by the trial court judge.[116]

The main problem of these settlements is that they generally concentrate on the exclusive copyrights provided by the *USCA*. This means that even foreign right holders are "covered" by the agreement, i.e. they also have a share in the revenues derived from the sale of their works, but only with regard to the use of their works within the United States.[117] Under continental copyright regimes Google's activity constitutes a clear infringement of the authors' and other

[111] Thus for example Paolo Coelho made available some of his books via different torrent sites. See: http://torrentfreak.com/best-selling-author-turns-piracy-into-profit-080512.

[112] Downloading is not allowed via the site. See (Hungarian language only): http://mese.tv.

[113] Siva Vaidhyanathan: The Googlisation of Everything and the Future of Copyright, *U.C. Davis Law Review*, March 2007: p. 1207-1231.

[114] Jonathan Band: The Google Settlement: International Implications, *Computer Law Review International*, 3/2009: 72-75.

[115] Statement of Interest of the United States of America Regarding Proposed Class Settlement, 18.09.2009, www.justice.gov/atr/cases/f250100/250180.pdf. (Hereinafter referred to as: *US Statement*.)

[116] The *Amended Settlement* is available at: http://books.google.com/booksrightsholders.

[117] Except if they effectively "*opt-out*" the application of the settlement until 7th December, 2009

right holders' interests. Thus, even if the *Google Books* site displays only samples of the books[118] Google servers contain the whole copy of the works, and this results in infringement, if the reproductions took place without prior authorization. Nevertheless, even the display rights can be infringed by allowing the preview of the books, supposing that this part also contains enough originality to earn copyright protection. This is why in European countries, like France,[119] trials have started. Even the European Union has publicly opposed the settlements raising both copyright and competition law concerns. As a result *Google Books Library Project* is still not available (in its complete form) on the European continent. The United States Justice Department had also emphasized its fears concerning the possible harms of the original settlement on antitrust law, that is, that it would create a monopoly for Google.[120] The Amended Settlement therefore contains a clear reference to the non-exclusivity of the authorization (given by the Authors Guild and the Association of American Publishers).[121] Anyway, this is the future. The enviable online world library developed by Google should be a model to be followed by the libraries, archives etc. that maintain European cultural values.

The European Union should take active steps towards developing a working system on the European Union. It needs on the one hand the adoption of new provisions that serve as a basis for the effective preservation of culture and knowledge. On the other hand, it is vital to guarantee the possibility for other institutions/companies to start their archiving projects. This means that if *Google* abuses its current de facto monopoly over the distribution of digital copies of public domain, orphan and out-of-print works, the company should face antitrust procedures.

Naturally a long list of questions should be answered in connection to this topic. Thus, should only the non-profit sector be allowed to participate in this European initiative, or even the profit-oriented companies? What kind of fee should be paid after the use of the works, maybe a

[118] According to the Amended Settlement: „Google may display (in addition to the table of contents, title page, copyright page and other pages that appear prior to the table of contents, and the index) up to twenty percent (20%) of the pages of a Book to a user but no more than five (5) adjacent pages at a time (...), before or after which no fewer than two (2) pages are blocked; provided that, for Fiction, Google will block the final five percent (5%) of the Book's pages (or a minimum of the final fifteen pages in the Book)." See: *Amended Settlement* supra note 120., at 63. [Article IV., Point 4.3(b)(i)(1)]. The original agreement contained similar conditions. See: Band supra note 117., at 73.

[119] Earlier a German procedure was initiated; however, it was later withdrawn. See: Danny Sullivan: *Google Book Search Wins Victory In German Challenge* (http://blog.searchenginewatch.com/060628-152950). Concerning the initiation of the French trial see: John Oates: French Publisher Sues Google, *The Register*, 7th June, 2006 (www.theregister.co.uk/2006/06/07/france_sues_google). At the end of 2009 the respective French court finally found the Google Books Project as an infringement. As a commentator noted: "The Paris Civil Court said Google violated the French copyrights of two groups representing publishers, editors and authors and awarded 300,000 Euros ($430,000) to publisher Editions du Seuil SAS, which filed the lawsuit." See: Heather Smith: *Google's French Book Scanning Project Halted by Court* (http://www.bloomberg.com/apps/news?pid=20601087&sid=apZ3UG9CPLo8).

[120] *US Statement* supra note 118., at 16-26.

[121] *Amended Settlement* supra note 120., at 26. (Article II., Point 2.4.)

statutory license or the introduction of a new compulsory license would be possible? What kind of economic rights may be included in this use? Should it cover only online reading (like streaming of audio- and audiovisual contents) or would even downloading be acceptable? Should digital right management be used in this context? In sum, copyright law is what the legislators declare it to be. It is therefore encouraging that Vivian Reding suggested that the copyright law of the European Union is ready for reform.[122]

V. Conclusion

The interpenetration of technology and copyright law is undeniable. This is simply proved by the fact that copyright law was developed after the evolution of printing. This interpenetration is heavily accelerated by the improvement and spreading of digital technologies, especially the Internet. Everyday access to the Internet led to the development of *Web 2.0* that partially caused the appearance of a new model of creation, and a new dimension of the improvement of the digital culture. This occurred only partially, because not all *Web 2.0* services contribute to the creation of copyrighted works (like in the case of *eBay*), and other applications, like file sharing, also help share infringing content.

The present article discussed the digital preservation of our cultural heritage. Making information broadly available to society in our globalized world should be strongly supported. The realization of this project is, however, a different question. Should private actors be allowed, for example Google (or other similar companies) to supervise the digitization, or should this task be given to our libraries? The latter would fit much easier into our existing copyright regimes, but in practice there is nothing like the *Google Books Library Project*, not even the *Europeana*. *Commissioner Reding* made it clear that digital preservation is one of the main interests of future generations, and therefore the modification of the present copyright regime will be indispensable. Nevertheless, we are used to these major shifts. Copyright law has endeavored to follow and react to the challenges of technology. We are fortunate to be able to say that we will bear witness to such a development soon.

[122] Reding supra note 103., at 9.