

Copyright, internet is not the enemy. Thoughts on the “Estimating displacement rates of copyrighted content in the EU” hidden report

Copyright, a internet não é um inimigo. Reflexões sobre o relatório oculto: “Estimating displacement rates of copyrighted content in the EU”

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ABSTRACT: Since the dawning days of the popularization of the internet, it has been regarded as an enemy for copyright. Cultural industries have claimed for the losses derived from rampant piracy. That is their side of the coin. In 2013, the European Commission tendered a study that run over 28.000 polls and had an extension of over 300 pages to deepen into this subject: "*Estimating displacement rates of copyrighted content in the EU*". It was finally handled by 2015. However, the report never saw the light of day. Why? In July 2017, Member of the European Parliament (MEP) Julia Reda filed an application for accessing public documentation. The results of the report were surprising, stating that piracy in some cases was not hurting revenues, while in others, it was in fact enhancing the sale of copyrighted content by legal channels. Was it an unexpected result for the European Commission? Now, in 2019, with the perspective of time, it is easy to see that internet and digital distribution was not a threat, but an opportunity. Profits in all industries show wealthy increasements coming from digital sources. Steady growth figures for online markets of music, audiovisual and videogaming industry do not match the old discourse anymore. This work approaches to what this report said, why it was not made public, and how figures from 2019 prove that, perhaps, it was ahead of its time, and internet was not an enemy to fear all along.

KEY WORDS: Copyright, Internet, Intellectual Property, Digital transition, Revenues, Piracy, Music, Video games, Movies.

RESUMO: Desde os dias da popularização da Internet, tem sido considerado um inimigo dos direitos autorais. As indústrias culturais reivindicaram as perdas derivadas da pirataria desenfreada. Esse é o lado deles da moeda. Em 2013, a Comissão Europeia fez um estudo que publicou mais de 28.000 inquéritos, com uma extensão de mais de 300 páginas para aprofundar esse assunto: "Estimar as taxas de deslocamento de conteúdo protegido por direitos autorais na UE". Foi finalmente tratado em 2015. No entanto, o relatório nunca viu a luz do dia. Por quê? Em julho de 2017, Julia Reda, membro do Parlamento Europeu (MEP), apresentou um pedido de acesso à documentação pública. Os resultados do relatório foram surpreendentes, afirmando que a pirataria em alguns casos não estava a prejudicar as receitas, enquanto em outros, estava de fato a aumentar a venda de conteúdo protegido por direitos autorais por canais legais. Foi um resultado inesperado para a Comissão Europeia? Agora, em 2019, com a perspectiva do tempo, é fácil ver que a internet e a distribuição digital não eram uma ameaça, mas uma oportunidade. Os lucros em todos os setores mostram um aumento de riqueza proveniente de fontes digitais. Números constantes de crescimento para os mercados on-line da indústria de música, audiovisual e videogames não coincidem com o antigo discurso. Este trabalho aborda o que este relatório disse, por que não foi divulgado, e como os números de 2019 provam que, talvez, ele estivesse à frente do seu tempo, e a internet não era, afinal, um inimigo a temer.

PALAVRAS-CHAVE: Direitos autorais, Internet, Propriedade Intelectual, Transição Digital, Benefícios, Pirataria, Música, Videojogos, Filmes.

TABLE OF CONTENTS*:

1. History of a lost report

1.1. How the “*Estimating displacement rates of copyrighted content in the EU*” spent two years in the dark and finally got to be published in 2017

1.2. Stubborn data and mislead of the Single Digital Market agenda

1.3. Regulation (EC) No. 1049/2001 and how the report was finally published

2. Main ideas from the report

2.1. General approach and music industry as an example

2.2. Films as the most affected category. The disruption and success of the Video on Demand models

2.3. The enhancing effect of piracy. Is it surprising that it actually boosted sales? The videogames market

2.4. The singularity of the book market

3. Additional considerations

3.1. Apart from adapting to consumer tastes, price adjustments were needed.

3.2. Lack of education is an important factor. Value of copyrighted works needs more awareness

3.3. Changes over time: a 5 years’ perspective

4. Closing words

Bibliography

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1. History of a lost report

1.1. How the “*Estimating displacement rates of copyrighted content in the EU*” spent two years in the dark and finally got to be published in 2017

The goal of this work is to bring light to some interesting conclusions contained in the “*Estimating displacement rates of copyrighted content in the EU*”¹ report (from now on, EDRCCCEU), originally promoted and funded by the European Commission. Its interest for researchers in intellectual property resides in its approach to a highly controversial matter such as copyright and consumer behaviour. With over 28.000 respondents to the survey, and over 300 pages long, this report exposed certain unexpected conclusions, contrary to “conventional wisdom”² about consumption of copyrighted content legal and illegal. But equally important, because for undisclosed reasons, it was kept secret for two years.

The report we will be referring to in the next pages was tendered by the European Commission in 2013. With a cost of 360.000 euros, this project was awarded in 2014 to one of the oldest³ economic research and consulting companies in Europe: Ecorys⁴, and it gathered responses from more than 28.000 participants. The results of this project were reflected in the final report, handed by Ecorys to the European Commission by the end of May 2015, although the legal notice contained in page 4 clearly states 2014 as year of creation. Quite often questions of the report are related to consumers’ behaviour in the “past year”, so we will be referring to years 2013-2014 when mentioning or commenting the figures.

However, the European Commission never published any conclusions derived from this report, nor the report itself. As a result, public opinion never got to know it, and it ended locked down and lost. Nevertheless, its existence was first spotted thanks to a not peer reviewed paper submitted and published in September 2016, appeared at the SSRN website by the title of: “*Movie Piracy and Displaced Sales in Europe: Evidence from Six Countries*”⁵.

¹ EUROPEAN COMMISSION: “Estimating displacement rates of copyrighted content in the EU”. Available online at: <https://publications.europa.eu/en/publication-detail/-/publication/59ea4ec1-a19b-11e7-b92d-01aa75ed71a1/language-en> . 06.04.2019.

² Idem, p. 19; “*The conventional wisdom says that illicit use of copyrighted material reduces revenues of rights-holders and thus their incentives to produce content. Creative industries suggest piracy represents a significant threat to sales of copyrighted materials, aggravated by the rapid development of digital technologies, which substantially reduce the cost of making, distributing and accessing copies of copyrighted content. Related theoretical and empirical economic research is more ambiguous about the piracy effects, however.*”

³ More precisely, Ecorys is the result of the merge of old Dutch company NEI Kolpron, with the British Ecotec Research Consulting, that became a single company back in 2000. This is relevant because in 2018, this same company along with the University of Amsterdam conducted a follow-up study, that will be mentioned later on, regarding the key role that price point plays in the digital content market.

⁴ The original link is fallen. However, still a copy can be retrieved from Archive.org (also known as “WayBack Machine”): <https://web.archive.org/web/20180703221943/http://ted.europa.eu/TED/notice/udl?uri=TED:NOTICE:276982-2013:TEXT:EN:HTML&tabId=1>

⁵ BENEDIKT HERZ / KAMIL KILJAŃSKI, “*Movie Piracy and Displaced Sales in Europe: Evidence from Six Countries*”, *Social Science Research Network (SSRN)*, 28th, September 2016. Available at: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2844167 (20.03.2019)

This work took cyphers and statics directly from the report, even to the point of literally copying them⁶, but without properly citing the original source.

Authors of the paper identified themselves as members of the European Commission: Benedikt Herz and Kamil Kiljański. In fact, the latter appears at the first pages of the report as the contact person in the European institutions for this matter. This throws an immediate question: did these commissioners manage to obtain the information of the report because of their position? Moreover, this question necessarily leads to another one: was there any interest in keeping the original report under lock?

1.2. Stubborn data and mislead of the Single Digital Market agenda

Before we dive into the study of the report, it is necessary to point out that this is not the first time that the European Commission stands an awkward interpretation of the data returned by studies assigned by their own initiative.

In particular, we have been able to observe this attitude in a fairly related matter: the reform on certain aspects concerning contracts for the online and other distance sales of goods, which has been surrounded by controversy since the CESL (Common European Sales Law) draft proposal⁷, then with the twin Directives of 2015⁸, subsequently unified⁹ in 2017 and still under development.

Some authors found significant dissonances between the results of the studies commissioned by the European institutions and the ideas subsequently contained in them, just like in the case of the referred hidden EDRCEU report. What explains this mismatch between statistical data and policymakers claims and proposals?

In the case of the ill-fated CESL proposal, its first four pages were built around a series of data obtained in Eurobarometers 320¹⁰ and 321¹¹. Apparently, it evidenced the existence of a series of transnational law problems and certain levels of concern in this matter among

⁶ Out of the 24 pages of the submitted paper, only 1 to 13 represent an original job, while pages 14 to 24 contain cyphers and graphics literally extracted from the unmentioned report.

⁷ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law 2011/0284 (COD) */, COM/2011/0635 final.

⁸ Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content 2015/0287(COD), COM(2015) 634 final; along with Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods 2015/0288(COD), COM(2015) 635 final.

⁹ Amended Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council 2015/0288 (COD), COM/2017/0637 final.

¹⁰ Eurobarometer 320: "European contract law in business-to-business transactions. Analytical report": http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_320_en.pdf

¹¹ Eurobarometer 321: "European contract law in consumer transactions. Analytical report": http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_321_en.pdf

both SMEs (small and medium-sized enterprises) and consumers, affecting the European economy¹².

However, as GUIMARÃES early detected¹³, the alleged facts did not coincide with the results of the studies they were based on. In fact, in the words of this authoress: *"they seem to be insufficient to draw the indicated conclusions and even, it would be said, point in a different sense to the one that is maintained in the Proposal for Regulation"*¹⁴. On one hand, according to the arguments stated by the European Commission in its "Context of the Proposal" and "Grounds for and objectives of the proposal": *"The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or expanding to new Member States' markets. Consumers are hindered from accessing products offered by traders in other Member States"*.

But on the other hand, a detailed examination of the results found in the Eurobarometer 320 (page 25) reveals the contrary results through an elementary question: "[Are] Contract law-related barriers blocking cross-border trade?". To solve this initial premise, the following question was asked to the respondents: *"How often did these obstacles deter you from conducting cross-border transactions?"*. Surprisingly, the result was a clear majority for the "never" (33%) and "not very often" (49%), which reveals an overwhelming 82%. Only 3% answered "always", and 12% "often" (a mere 15%). From this point, any support for the need to reshape European contract law in order to stimulate the internal market falls under its own weight.

The results shown in the Eurobarometer 321 are equally clarifying. Interviewed individuals faced several questions concerning supposed difficulties experimented in transnational sales. None of them provided evidence of the existence of important contract law-related troubles. In fact, it reflected the opposite: there is a consistent majority of answers in the range of "without impact" (> 53%) and "minimum impact" (> 17%)^{15 16}.

Probably the most surprising —while clarifying— result is the one obtained to the question: *"How often did consumer legislation dissuade you from making cross-border sales?"* The 79.5% had not encountered major problems, as 38.8% said "never" and 40.7% "not very

¹² http://europa.eu/rapid/press-release_MEMO-11-680_en.htm

¹³ MARÍA RAQUEL GUIMARÃES, "A compra e venda 'transnacional' de bens de consumo. Algumas reflexões sobre as iminentes novidades legislativas", *Revista Electrónica de Direito (RED)*, Centro de Investigação Jurídico-Económica (CIJE), Universidade do Porto, N.º1 (June), 2013, pp. 8-11. Available at <https://www.cije.up.pt/content/compra-e-venda-%E2%80%9Ctransnacional%E2%80%9D-de-bens-de-consumo-algumas-reflex%C3%B5es-sobre-impinentes-novidade> (25.03.2018).

¹⁴ *Ibidem*, p. 8. Original quote: *"parecem ser insuficientes para retirar as conclusões indicadas e até, dir-se-ia, apontam num sentido diferente daquele que é sustentado na Proposta de Regulamento."*

¹⁵ Eurobarometer 321, pp. 60-61. The main question was: *"Impact of potential obstacles on companies' decision to sell cross-border to final consumers"*, subdivided into other 4 questions, being two of them (tables 9, language; and 12, taxes) not directly related to contract law. Table 10 refers to *"The need to adapt and comply with different consumer protection rules in the foreign contract laws"*. That one is clearly tied to contract law matters, and the results speak for themselves: >80% found little to no impact. Therefore, the need for changes in regulation is doubtful, to say the least.

¹⁶ Eurobarometer 321, pp. 62-63. In this case, the question was: *"Impact of potential obstacles on companies' decision to sell cross-border to final consumers: The need to adapt and comply with different consumer protection rules in the foreign contract laws"* (table 11). As previously stated, this is the other question (out of four) that is truly linked to contract law fundamentals. Again, results clearly show that renewal of contract law in the European Union is not an urgent matter at all.

often", thus forming the aforementioned majority percentage (79.5%)¹⁷. In similar proportions: "How often have you refused to sell to foreign consumers due to differences in consumer protection rules in the contract laws of other EU countries?"¹⁸. A resounding 72'2% answered "never", accompanied by another 17'6% who said "not very often", making up 89'8%.

In the same line HUBBARD has stated (in a remarkable vast work): "A closer look at these surveys, especially the Flash Eurobarometer surveys on which the Proposal primary relies, reveals that the cited data only ambiguously supports these empirical claims. The cited surveys tend to cast doubt that the numbers of discouraged traders are large, and the surveys make a weak case that contract law is the primary obstacle to cross-border trade."¹⁹

Also EIDENMÜLLER, who examined the results of Eurobarometer 321 to suggest that: "Moreover, all these impediments might not have any significant impact on cross-border transactions"²⁰. In similar terms, WULF opposes the arguments raised by the European Commission: "My empirical analysis sheds doubt on these claims. According to the results presented above businesses that refuse to sell to consumers in other Member States are not likely to use the CESL. Thus, contrary to the Commission's claim the CESL would not be an effective measure to facilitate sells from these businesses to foreign consumers"²¹.

To end with EDUCATE, this author casts reasonable doubts about the origin of the information, as well as its lack of correlation with the interpretation given to it by the European Commission in order to justify the opportunity of the CESL reform. In other words, EDUCATE sustains —like the aforementioned authors previously did— the idea of the surveys actually reflecting that the problem was nonexistent, while the European Commission relied on them to prove the opposite. Thus, this author considers that in order [To]: "further defend the CESL's conformance with subsidiarity, the Commission relies on several secondary source materials either produced or sponsored by various EU institutions. It refers to a European Parliament Resolution wherein the Parliament agreed that the EU's 'internal market remains fragmented.' The Commission also cites a series of surveys to show that the current cross-border sales regime hinders a significant number of traders and consumers who want to, but cannot, engage in cross-border trade. The Proposal mentions Flash Eurobarometer 320 and 321-surveys conducted by the Gallup Organization and sponsored by the Commission-alleging 'traders ranked contract-law-related obstacles among the top barriers to cross-border trade'"²².

¹⁷ Eurobarometer 321, pp. 81-82.

¹⁸ Eurobarometer 321, pp. 83-84.

¹⁹ WILLIAM HJ HUBBARD, "Another Look at the Eurobarometer Surveys", *Common Market Law Review* Vol. L, No. 1-2, 2013, pp. 187-206. Particularly, pp. 23-24. Revised version, updated to 2015 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167489 (25.03.2019)

²⁰ HORST EIDENMÜLLER, "What can be wrong with an option? An optional Common European Sales Law as a regulatory tool", *Common Market Law Review*, Vol. L, No. 1-2, 2013, pp. 69-84. P. 71.

²¹ ALEXANDER J. WULF, "Who Would Use the Common European Sales Law? An Empirical Analysis of Cross-Border Consumer Contracts in the European Internal Market", *Polish Yearbook of Law & Economics*, No. 6, 2016, p. 48. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849047 (28.03.2019).

²² MICHAEL EDUCATE, "The Common European Sales Law's Compliance with the Subsidiarity Principle of the European Union", *Chicago Journal of International Law*; Vol. XIV, No. 1 (summer), 2013, pp. 317-346. P. 336.

Ultimately, what we are trying to point out here, is that there is a significant mismatch between political goals of the European Commission and the facts drawn by the results of reports and surveys —especially regarding the digital market—. As it happened back then, now we find strong similarities in the case of the EDRCCCEU report, thus suggesting that policymakers are not responding to a real problem, but to other incentives.

At the time, CESL misrelating with data coming from polls and studies of their own (Eurobarometers 320 and 321) raised criticism among the doctrine, in the words of the aforementioned authors. Now, by examining the results of the “Estimating displacement rates of copyrighted content in the EU” report, we find significant reminiscences with previous mismatches between the European Commission’s political agenda and the evidence provided by the report as it happened back then.

This allegation is compatible with the strange demeanor of keeping the results of a publicly funded study hidden for more than two years. Also, an event such as an odd publication of a biased paper, lacking peer review, and taking data from this non-publicly available document, and not citing it at all, is a notorious episode worth mentioning. If it was not for Member of the European Parliament Julia Reda’s request, this report might had not ever seen the light.

1.3. Regulation (EC) No. 1049/2001 and how the report was finally published

As stated earlier, the study was tendered in 2013, conducted in 2014, delivered in 2015, and never published. It was not until 2016, when commissioners Benedikt HERZ and Kamil KILJAŃSKI issued their very own —biased— overview of the report, that some of the original data were brought to light. They focused on some data related to the filmmaking industry, particularly the part with worst results of the report. Nothing was said about music (0% displacement), videogames (+24%) or books (-38%, although with its own peculiarities).

One year later, in July 2017, Member of the European Parliament (MEP) Julia Reda filed an application (reference GESTDEM 2017/4422) for access to documents²³. This process is based on the rights of information contained in article 15.3 of the Treaty on the Functioning of the European Union²⁴ and article 42 of the Charter of Fundamental Rights of the European

²³ The whole process is registered and publicly available in the official site for EU information requests: https://www.asktheeu.org/en/request/estimating_displacement_rates_of

²⁴ Official Journal of the European Union, C 326, 26th of October 2012 P. 0001-0390.

Article 15:

“1. *In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.*

2. *The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.*

Union²⁵. Its details are ruled by Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents²⁶, articles 6 to 13. After the whole process was conducted (twice failing to provide a reply within the 15 working days timeframe established in art. 7), finally the documents were published at the Publications Office of the European Union website in the 22nd of September, 2017²⁷.

Following the explanation given by MEP Reda, there seems to be no link between the commissioners' unreviewed paper and the discovery of the existing report, as she claims to realize its existence "after having become aware of the public tender for this study"²⁸.

Before we begin, it is needed to say that not much doctrine has written about this matter, but we can cite COLANGELO and MAGGIOLINO, that reached a clear conclusion: "The results of the study are not in line with the value gap denounced by the Commission as a fundamental reason for its proposed reform of copyright law. In particular, among the main conclusions, the report shows how, with the exception of the recent top films, 'the results do not show robust statistical evidence of displacement of sales by online copyright infringements': in the case of games the effects of illegal trade are even positive, having led to an increase in the legal consumption of products"²⁹.

With this background, we proceed to analyze the figures and the interesting conclusions of the referenced report: "Estimating displacement rates of copyrighted content in the EU".

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph."

²⁵ Official Journal of the European Union, C 202, 7th of June, 2016. Pp. 389—405

Article 42:

"Right of access to documents.

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium."

²⁶ Official Journal L 145, 31st, May 2001 Pp. 0043 — 0048.

²⁷ <https://publications.europa.eu/en/publication-detail/-/publication/59ea4ec1-a19b-11e7-b92d-01aa75ed71a1/language-en>

²⁸ <https://juliareda.eu/2017/09/secret-copyright-infringement-study/>

²⁹ GIUSEPPE COLANGELO / MARIA TERESA MAGGIOLINO, "ISPs' copyright liability in the EU digital single market strategy", *International Journal of Law and Information Technology*, Vol. XXVI, No. 2 (June), 2018. Available online at: <https://academic.oup.com/ijlit/article/26/2/142/4956825#116419113>. (31.03.2019) P. 151.

2. Main ideas from the report

2.1. General approach and music industry as an example

The actual content of the report itself begins on page 19, although these first pages contain an executive with the most important results and conclusions. Within its more than 300 pages, we want to stress a breaking statement to begin with: *“The conventional wisdom says that illicit use of copyrighted material reduces revenues of rights-holders and thus their incentives to produce content. Creative industries suggest piracy represents a significant threat to sales of copyrighted materials, aggravated by the rapid development of digital technologies, which substantially reduce the cost of making, distributing and accessing copies of copyrighted content. Related theoretical and empirical economic research is more ambiguous about the piracy effects, however. This impact can be anywhere from total substitution of legal offer, through no effect on sales, to even positive effects on creators’ revenues (thanks to stimulation of legal demand for some types of uses)”*³⁰.

Obviously, being this the starting paragraph of the report, it is clear that some of the results obtained after more than 28.000 polls show that reality clearly does not match the *“conventional wisdom”* nor the official discourse. As a matter of fact, the study contravenes some popular beliefs, perhaps more widespread among digital immigrants than among the natives, more prone to digital consumption. As seen in Table 1.2 —page 22—, from the age of 55 and on (specially in Spain), the daily use of internet declines among users above this age. It should be noted that the question is proposed in a highly inclusive manner, as its precise formulation is: *“Last time the individual used internet was in the last 12 months”* (that is, in year 2013).

In this sense, and to a greater extent, the study itself highlights the existing generational gap from 55 years of age onwards. From this frontier, users were considered to have a minimum digital content consumption³¹ —whether legal or illegal, much less among the latter for obvious reasons—. However, a 6 years leap is an important amount of time in technology. Thus, since 2013-2014, the use of smartphones, APPs, subscription services, etc. have experimented a vast popularization until 2019. This clear observation should be matched with the fact that the individuals that were 55 years old back in 2013 now correspond to a group of age of over 60 years old. Thus, the figures obtained in the report represent a picture of its time (2013-2014), and therefore, they need some basic interpretation and understanding, in order extract relevant information from the wider perspective of time, from 2019. Have companies such as Netflix, Spotify or Amazon created a way of consumption easy and appealing enough to channel the potential interest of those consumers? In other words: can content creators and providers reach new audiences with a quality an affordable product?

³⁰ EDRCCCEU Report, P. 19.

³¹ EDRCCCEU Report, P. 93: *“Because above the age of 55 years a lower proportion of the people use internet, a lower proportion of the people above the age of 55 years should unlawfully access content online as well and this results in (slightly) higher estimates of the use of illegal online channels by internet users compared to the whole population.”*

The largest part of the demand for copyrighted works comes from younger groups of ages, especially digital natives, represented as minors in table S.1 of the study, consistently outnumbering overall population³². A very interesting reveal, one that perhaps should pass on to “*conventional wisdom*” when dealing with the online piracy issue, is that “(...) *one may well find a positive correlation simply because of the unobserved characteristics of consumers (like their interest in music) that might influence both variables: consumer’s propensity to pirate online and their propensity to purchase online and offline*”³³.

In other words: people who develop an interest in an artistic field —such as literature, music, films, etc.— tend to satisfy their need for content not only through the pirate offer, but also by legal channels, in such a way that they get to combine and feed each other³⁴. This enhancing effect has been observed and is most notable in the case of video games, as we will see later.

However, from this very beginning, it’s important to point out the fact that the figures are taken from a period of economic depression —the years prior to 2014—, so the data must be brought into general economical context. The economic cycle in Europe was unfavorable and, even so, it already shows the dawning change in the business model. Besides, figures come from a time when some of the most important streaming companies had not arrived in the majority of States of the European Union, such as Netflix, HBO, FilmIn, Prime Video (Amazon), etc. Through the last 5 years, network development and market solutions for copyrighted content consumption have shown an important evolution, as five years in technology are a quite significant amount of time.

That reasons would explain why industry figures have been showing a consistent growth in profits since then —from 2014 onwards—, probably benefiting from a better economic landscape, but mainly pushed by their own capability to capture the interest of the consumers. This effect can be seen on pages 79 and 80 of the study for instance, but also, making a simple tracking of the revenues obtained by the digital exploitation of the different creative industries.

We can anticipate that there is a clear trend that reflects a palpable reality: the industry is adapting to new consuming standards, promoted by a change in the behavior of consumers, driven by the great technological innovations earlier exposed. Industry has passed from physical media —such as CD, DVD, cartridges— as main source of revenues for copyrighted works, to the MP3 format, portable players —mainly smartphones—, digital distribution, improvements in telecommunications networks, especially wireless, etc. This has provided the possibility of ubiquitous enjoyment thanks to techniques such as *streaming* —for content like music or video on demand— and the *cloud*. These improvements have led to the birth of successful business models thanks to the new capabilities brought by technology: Netflix, HBO, Hulu, Spotify, Bandcamp, Amazon Prime, Steam, GoG, etc.

³² *Idem*, p. 12.

³³ *Idem*, p. 19.

³⁴ *Ibidem*: “*In addition, causation may run both ways, ie from illegal to legal consumption and vice versa*”.

The declining of sales in the music industry experimented in the last decade showed a clear trend reversal through the 2010's, with profits constantly scaling as migration from physical to digital consumption started to consolidate in the form of legal offers becoming appealing to consumers. This fact can be easily observed in the own music industry literature, as published in the International Federation of the Phonographic Industry's Global Music Report 2019³⁵. A continuous decline of physical revenue must be compound with a clear and consistent rise of profits from digital sources, to the point that, as of today, digital revenue represents 58'9% of a 19'1 billion dollars' worth industry worldwide —that is, over 11'2 billions—, while physical revenue has decreased to the point of representing a mere 24'7% — 4'7 billions—. Moreover: *"In 2018, the global recorded music market grew by 9.7%. It is the fourth consecutive year of global growth and the highest rate of growth since IFPI began tracking the market in 1997."*³⁶ Roles have radically shifted to become the absolute opposite: now digital revenue represents more than double the physical. This fact symbolizes the definitive confirmation of an absolute change of paradigms on how copyrighted works are both made profitable —for authors— and accessed and enjoyed —by consumers—, at least for the music industry. But it also provides an insight on the moving forces beneath the surface of the "piracy" debate, and how the *"Estimating displacement rates of copyrighted content in the EU"* report was able to catch them way ahead its time.

The perspective of time provides a clear landscape that, most probably, was not so easy to perceive in 2013-2014, although the report has proven itself to be in the right track back in the day. Through the last 5 years, digital revenue has grown at a very fast and steady pace. In 2013, it grew 41% compared to the previous year. In 2014, + 35.5%; in 2015, + 47.6%; in 2016, + 65'1%; in 2017 + 41'1%; and in 2018 +34%. These are very high growth rates consistently sustained in a five-year period of time³⁷.

These claims are not only backed by the confirmation of latter data gathered years after the elaboration of the displacement sales report, as this fact was also pointed by the own IFPI back in 2014. So is reflected in the EU report at page 73: *"According to an interview with a music label company (see Annex B for an overview of interviewees), income from streaming has the potential to become the largest source of income, and the 2014 report of IFPI underlines this, pointing to the potential of YouTube and Vevo. In Sweden this is already the case thanks to the popularity of Spotify. Total revenues from streaming increased from 9 million euros in 2009 to 82 million euros in 2013, while in the same period physical sales (CDs, vinyl records) fell from 68 million to 28 (see Figure 4.1). As a net result, total revenues from music increased in Sweden, with the exception of 2012"*. From a 2019 standpoint, it is plain to see that the industry was undertaking a profound technological

³⁵ INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (IFPI): "Global Music Report. State of the industry 2019". Available online: <https://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2019>

³⁶ Idem, p. 12.

³⁷ Idem, p. 13.

transition and a subsequent evolution in the consumption model. Similar behavior shall be found in other copyrighted works, and so we will try to explain in the following pages.

There are two key conclusions that need to be noted. The first one is that digital media has proven to be an excellent tool for copyrighted works enjoyment in the perspective of consumers. Meanwhile, the industry built around copyrighted works has faced a process of transformation, switching from physical media to digital, with wealthy economic outcomes, resulting in the internet and the digital media being a perfectly profitable activity, returning a consistent growth in revenue figures, once producers and right holders have adapted to consumers' behavior and preferences³⁸.

The second key conclusion that must be inferred from the above is: the economy based upon physical sales —reproductions— is no longer the only way to monetize intellectual property. Not even the primal one.

2.2. Films as the most affected category. The disruption and success of the Video on Demand models

Filmmakers represent one of the main sectors in the cultural industry, not only under the paradigm of fully featured movies for cinemas, but also thanks to the wealthy and popular business of TV-Series that engages audiences worldwide thanks to shows such as Friends (NBC), The Wire or the Sopranos (HBO), Family Guy (Fox), Doctor Who (BBC), How I Met Your Mother (CBS), Homeland (Showtime), House of Cards (Netflix), or Game of Thrones, allegedly the most pirated TV series of all time³⁹, whose producers (HBO) happen not to alarm from piracy⁴⁰ —although certainly not happy about it—, as they perceive a synergetic (enhancing) effect —according to show director, David Petranca—⁴¹.

Referring to data related to cinema industry displacement of sales in the EDRCCCEU report, it should be clearly pointed that there are evident negative results, reflecting a -27% global

³⁸ GREGORY N. MANKIW; "Principles of Microeconomics", South-Wester Cengage Learning, Harvard University, 6th edition, 2011. Pp. 441-447. Also, see page 440 for budget constraint effect on consumer's decision.

³⁹ <https://www.washingtonpost.com/news/morning-mix/wp/2017/09/08/game-of-thrones-was-pirated-more-than-a-billion-times-far-more-than-it-was-watched-legally/>; <https://www.independent.co.uk/arts-entertainment/tv/news/game-of-thrones-torrents-streaming-2017-watch-online-hbo-season-7-a8133036.html>

⁴⁰ <https://ew.com/article/2013/03/31/hbo-thrones-piracy>. Extract from the interview with HBO's programming president, Michael Lombardo: "The show's second season was recently released to record-setting DVD sales for the network. But in December, Thrones topped another chart that is far more dubious — Thrones ranked as the most illegally downloaded TV series for 2012. I probably shouldn't be saying this, but it is a compliment of sorts," Lombardo said. "The demand is there. And it certainly didn't negatively impact the DVD sales. [Piracy is] something that comes along with having a wildly successful show on a subscription network". The show is currently, on a per-season basis, the network's top money-earner despite widespread piracy of the show, the executive confirmed. "If you look at aggregate of international and DVD sales — which are the two revenue streams we look at since we're not selling it domestically on another platform — yes, absolutely, in terms of shows we have on now," Lombardo said". See the above link for the full interview.

⁴¹ <https://www.smh.com.au/entertainment/tv-and-radio/downloads-dont-matter-20130226-2f36r.html#ixzz2LywE7AZ2>. "(...) illegal downloads did not matter because such shows thrived on "cultural buzz" and capitalised on the social commentary they generated."

decrease (or displacement)⁴². Filmmakers were the most damaged creators at the time, according to the report.

Those were the results back in 2013-2014. However, as we previously stated, evolution in technology and market offer for legal consumption has vastly improved in a 5-year timeframe.

On how the consumers approach to content consumption, the filmmaking industry has probably benefited from the evolution. Video on demand, subscription services, 4k streaming quality, home cinema displays, and an unprecedented availability for different platforms to choose from (Netflix, HBO, Hulu, FilmIn, Vimeo on Demand, Amazon Prime, Rakuten, etc.) clearly proves that the landscape for the filmmaking sector has rapidly evolved in the last 5 years, possibly following the footsteps that the music industry left behind earlier in its successful path to digitalization⁴³.

Indeed, the report focuses mainly on full feature films, designed for prime cinemas exhibition and then moving to the classic physical business model, in the form of DVD and Blu-Ray sales, that being the tradition at the time. Hence, it is easy to understand why consumers behavior started to evolve with the availability of new ways of using and enjoying this kind of audiovisual content, already dawning in 2013-2014. The report reflected how infrequent it was for an individual to see the same film twice in a short period of time: *"On average, people have seen 5.7 films of the 100 best box office films for the first time in the cinema, approximately double that in each of the other channels (legal transmission or download, DVD or Blu-Ray disc, TV or airplane or illegal transmission or download). Interestingly, people see one in four movies for the second time. However, a second view in a movie theater is very rare, and it is very likely that movies will be seen for the second time on a DVD or Blu-Ray (1.5) or on a TV or an airplane (1.1)). The second online views of the movies are more or less similar between legal and illegal, 0.8 compared to 0.6 of the 100 best box office films"*⁴⁴.

The truth is that it is an unreasonable prospect to expect a second view of the same movie, next in time to the first one. After some time, it is more likely that potential audience might show interest in watching the same movie for a second time: *"When the number of visits is broken down by the year the film reaches the main lists (usually the year of its premiere), the numbers are quite consistent over the years"*⁴⁵.

⁴² EDRCCEU Report, p. 14. Table S.3. p. 148 for explanation.

⁴³ CHONG HYUN / CHRISTIE BYUN, "The Economics of the Popular Music Industry", Palgrave MacMillan, Houndmills, Hampshire R., England, 2016. P. 34.

⁴⁴ EDRCCEU Report, Table 6.17, page 106. *"On average, people have seen 5.7 films out of the 100 top box office films the first time in the cinema, roughly twice as much as via each single one of the other channels (legal streaming or downloading, DVD or Blu-Ray disk, TV or airplane or illegal streaming or downloading). Interestingly, people see one in four films a second time. However, a second view in a cinema is very rare, and films are most likely to be seen a second time on a DVD or Blu-Ray disk (1.5) or on TV or in an airplane (1.1). Online second views of films are roughly as likely legal or illegal, 0.8 compared to 0.6 out of the 100 top box office films."*

⁴⁵ *"When the numbers of views are further broken down by the year in which the film hit the top lists (generally the vintage year), the numbers are fairly consistent over these years (Table 6.19)."*

The audiovisual market, understood as both cinema and series, has some peculiarities whose evaluation seems complex, since the act of going to watch a movie at theaters is a different sensory (and even social) experience from watching series, which takes place in the domestic sphere. Besides, the filmmaking industry might be suffering a struggle in producing new and attractive movies, with an alleged crisis⁴⁶ of creativity⁴⁷. As a consequence, there might be a relationship between a perception of a lowering quality of the new products or, at least, some degree of failing in presenting the new creations as appealing to consumers. Also, the context of the economic crisis by the time when the report was made might have had influenced the results to some extent⁴⁸, as it is a factor that affects the disposable income for consumers.

It is no secret that the main public perceives that the offer of original films is diminishing, as more reboots, remakes⁴⁹ and sequels⁵⁰ find their way to the theaters, while indie productions become more attractive⁵¹.

Consequently, the purchase of theatre tickets might not correspond to other historical moments, more prone for creativity in the filmmaking industry, although the business is still presenting consistent growth year by year. To best illustrate the situation, global revenue for cinema in the year 2017⁵² steadily increased over 2% in the last (reaching a total of 33,1 billion dollars), but spectators decreased (-6% sold tickets compared to the previous year).

However, as we stated earlier, we are looking at a complex context that cannot be fully portrayed in these lines. Many factors arise as possible causes. As it was previously found for music, this could be tied to market problems, such as new consumers' behavior related to technological evolution, or in relation to unadjusted price points, affecting consumers budget constraints⁵³, therefore affecting the overall demand.

To support this conjecture, we find some support in the data reflected in a key part of the EDRCCEU report: "willingness to pay". As already advanced on page 108: *"The tables indicate that a substantial proportion of the Internet user population (after weighing the*

⁴⁶ <https://www.hollywoodreporter.com/news/crisis-at-movies-no-new-187243>

⁴⁷ ADAM T. DEAN, "The Paradox of Creativity and Business in Feature Hollywood Filmmaking: The Relationship Between Motion Picture Production and Budgeting", thesis prepared for the Degree of the Master of Arts, University of North Texas, August 2005; Denton, Texas. Available online at: <https://digital.library.unt.edu/ark:/67531/metadc4885/> (05.04.2019).

⁴⁸ OLGA KOURELOU / MARIANA LIZ / BELÉN VIDAL, "Crisis and creativity: The new cinemas of Portugal, Greece and Spain", *New Cinemas: Journal of Contemporary Film*, Vol. XII, Nos. 1 & 2, 2014. Pp. 133 to 151. Available online: http://www.academia.edu/download/37264772/Crisis_and_Creativity_NEW_CINEMAS_PUBLISHED.pdf (04.04.2019).

⁴⁹ <https://www.foxnews.com/entertainment/creativity-crisis-has-remake-obsessed-hollywood-run-out-of-new-ideas>

⁵⁰ TIRTHA DHAR / GUANGHUI SUN / CHARLES B. WEINBERG, "The long-term box office performance of sequel movies", *Marketing Letters*, Vol. XXIII, N. 1 (March), 2012. Pp. 13–29. P.27: "In comparing sequels to parents, we obtain a number of interesting results. First, parents and sequels are statistically equivalent in terms of the number of theaters they attract in the first week and in their first-week attendance. However, parents outperform sequels in terms of total attendance (...)"

⁵¹ DAVID LEE, "Independent Television Production in the UK. From Cottage Industry to Big Business", Palgrave Macmillan and Springer International Publishing, 2018. P. 157: "Debates about cultural value have become urgent in recent years, and are connected to tensions between economic value (and measurements of such value) and cultural value (...)"

⁵² https://www.comscore.com/lat/Request/other/2019/Informe-Anual-CINE-2018?cs_edgescape_cc=ES;results_cited_in_Spanish_newspaper_El_País:https://elpais.com/cultura/2018/01/02/actualidad/1514912900_970002.html

⁵³ GREGORY N. MANKIW; ob. cit. p. 440.

questions of WTP [willingness to pay] for both the number of users and the population Internet) is willing to pay more than the current prices of books and games, while for audiovisual, most respondents are not willing to pay more than a minimum amount”⁵⁴. It is an important indication of a price problem (as we have already shown above) that is the only kind of works for which consumers are not willing to pay (in comparison books or video games, an aspect that could be due to the methodology used⁵⁵). On this issue, the study warns: “This (...) means that the willingness to pay data cannot be used beyond its intended purpose, namely to assess whether the price of creative content is one potential factor that could help explain piracy”⁵⁶.

On the contrary, the TV Series are in an absolute boom, with million-dollar productions, whose success and cache has displaced actors and actresses of great reputation to the silver screen, and with great acceptance among the public, as the ones cited above.

In January 2019, Netflix alone already had 139 million users in the world⁵⁷, with a year-on-year growth of 17’8% (from 118 million in 2018)⁵⁸, topping 4’1 billion dollars revenues in just Q4⁵⁹. HBO, on the other hand, had 142 million users back in February 2018⁶⁰ and 1’7 billion dollars revenue⁶¹. Their success, among other platforms such as Hulu, Rakuten, Amazon Prime, Vimeo on Demand, etc. represent a technological disruption⁶² on how the audiovisual industry invests and obtains revenues from these kind of copyrighted works⁶³. What we are trying to suggest here is that the filmmaking industry might be following the steps of the music one, and now undergoing the same evolution and mutation process, from an old business model to a new one, driven by new technologies (subscription video on demand)⁶⁴ and consumer tastes, in a new scenario where, again, internet is serving as a profitable and fast-growing channel for a legal offer at fair and appealing price point.

⁵⁴ EDRCCCEU Report, P. 108: “The tables therefore indicate that a substantial proportion of the internet using population (after weighting WTP [willingness to pay] questions to both the number of users and the internet population) is willing to pay more than the going prices for books and games, while for audio-visual the majority of respondents is not willing to pay more than a minimal amount”.

⁵⁵ EDRCCCEU Report, P. 161.

⁵⁶ *Ibidem*.

⁵⁷ <https://edition.cnn.com/2019/01/17/media/netflix-earnings-q4/index.html>

⁵⁸ <https://www.washingtontimes.com/news/2018/mar/15/netflix-now-plans-to-carry-news-poised-to-shape-cu/>

⁵⁹ <https://www.theguardian.com/media/2019/jan/17/netflix-adds-subscribers-stock-falls-fourth-quarter-earnings>

⁶⁰ <https://www.cnet.com/news/hbos-online-us-subscriber-base-jumps-to-5-million/>

⁶¹ <https://www.wsj.com/articles/hbos-u-s-streaming-customers-exceed-5-million-1517511343>

⁶² JOSEPH L. BOWER / CLAYTON M. CHRISTENSEN, “Disruptive Technologies: Catching the Wave”, *Harvard Business Review* LXXIII, No. 1, 1995. Available online at: <https://hbr.org/1995/01/disruptive-technologies-catching-the-wave> (04.04.2019).

⁶³ VERÓNICA HEREDIA RUIZ, “Revolución Netflix: desafíos para la industria audiovisual”, *Chasqui, Revista Latinoamericana de Comunicación*, No. 135, August-November, 2017 (Sección Ensayo, pp. 275-295).

⁶⁴ MICHAEL L. WAYNE, “Netflix, Amazon, and branded television content in subscription video on-demand portals”, *Media, Culture & Society*, Vol. XL, No. 5, 2018. Pp. 725—741.

2.3. The enhancing effect of piracy. Is it surprising that it actually boosted sales? The videogames market

If Benedikt Herz and Kamil Kiljański forgot to tell something about the “*Estimating displacement rates of copyrighted content in the EU*” report, and if it had anything surprising, really noticeable and thus worth sharing for public knowledge, it clearly was this very fact: the report states that videogaming industry benefits from an enhancement in sales around 24%⁶⁵ displaced—or, enhanced—because of piracy.

Surely, “*conventional wisdom*” never would have stood for piracy having no effect on music profitability, and it was damaging filmmaking industry (or was it a business model transition from physical to digital streaming and video on demand?). But most probably, piracy helping sales in some way was directly unconceivable.

The EDRCCEU report concludes: “*For games, the estimated effect of illegal online transactions on sales is positive — implying that illegal consumption leads to increased legal consumption. This positive effect of illegal downloads and streams on the sales of games may be explained by the industry being successful in converting illegal users to paying users. Tactics used by the industry include, for example, offering gameplay with extra bonuses or extra levels if consumers pay*”⁶⁶. Not necessarily contradicting this statement, it is clear that videogaming industry has been a leading light in adopting the digital distribution model thanks to platforms like Steam and Good Old Games (computer), PlayStation Network and Xbox Live (consoles), and promoting the *free2play*⁶⁷ model in mobile gaming through Google Play Store and Apple App Store. Hence, this industry has been an early adopter for the digital transition, finding the clear vocation of digital as the future⁶⁸, perhaps because of its very own nature as software programs.

Moreover, game creators have been able to capitalize many factors that incentive online transition, hence routing the consumers interest to legal channels. Troubles with price points for videogames are almost nonexistent, so willingness to pay always ends up meeting consumers’ budget in the mid-term. The industry has adapted to this problem adjusting prices consequently to market trends⁶⁹. New games are offered at a premium price in its launch date, so early adopters and enthusiastic consumers that are keen to enjoy the game are willing to pay an extra price. However, those others that do not show such eagerness, or

⁶⁵ EDRCCEU Report, P. 19.

⁶⁶ P. 15.

⁶⁷ OSCAR CLARK, “Games as a service: how to free2play design can make better games”, Focal Press, Oxfordshire, England, 2014.

⁶⁸ WILL LUTON, “Free-to-Play: Making Money From Games You Give Away”, New Riders, Pearson Education, 2013. P. 3: “*In the digital world, however, supply chains are much simpler: A product is delivered from server to consumer. A perfect copy of the product is transferred from one machine to another. The material cost to the supplier to provide that copy is electricity and bandwidth—often in the realms of a fraction of a cent. The cost is so small in fact that it is considered to be zero, and indeed to some, where the platform bears these costs—as with Apple’s App Store—it is zero.*”

⁶⁹ <https://www.cnet.com/news/steam-summer-sale-2018-day-8-best-deals/>

with more constrained budgets, will be looking for sales and discounts, that occur frequently⁷⁰.

Besides, videogaming industry has a wider variety of tools to hook consumers, through in-game purchases, extra levels, online gaming, leaderboards, guilds, cooperative modes, etc. These ultimately serve to route illegal consumers to legal channels if they want to benefit from and enjoy these features, as they entail a connection to the servers of the game. The ESDCCEU report reflects this singularity: *“The positive effect of illegal downloads and streams on the sales of games may be explained by players getting hooked and then paying to play the game with extra bonuses or at extra levels”*⁷¹.

However, the phenomenon is even wider, and it reaches older platforms that existed prior to the online transition. Games for those consoles (mainly from the 90’s and 80’s such as Nintendo and Super Nintendo Entertainment Systems, Sega Master System and MegaDrive/Genesis, Atari 2600 from the late 70’s, etc.) are easy to find in the internet by illegal channels. These games —or, more precisely, the downloadable archives— are known by the name of ROMs. But, contrary to *“conventional wisdom”*, its availability doesn’t affect proper sales on legal channels. In FARRAND’s words: *“As the Sega Ultimate Megadrive Collection shows, the pre-existence of ROM files of games does not seem to seriously impair sales of reissued old content”*⁷². Again, data prove this idea true. Following his example with the MegaDrive/Genesis Collection: the cold fact is that, despite being available for free download by unauthorized means, the reissue of these titles (year 2009) for the seventh generation of domestic consoles exceeded 5 million copies sold among all systems⁷³. When referring to videogames market, we are looking at an industry that proves how to transform and benefit from the digital ecosystem. Internet is not a foe to fear, but an ally for better exploitation of copyrighted works. It only needs a proper implementation that hooks the existing demand and routes it to legal channels⁷⁴.

Figures will provide support for the ideas sustained in this work, just as we did with the music industry and the audio-visual before. Despite being affected by piracy, the gaming industry has capitalised its early adoption of the digital distribution model and high adaptability to consumers’ tastes and budgets. Its success is shouted by the revenue figures, as offered by specialized consultant company SuperData Research⁷⁵. In its 2018 report, it

⁷⁰ HOON CHOI / CHARLIE CHEN, “The effects of discount pricing and bundling on the sales of game as a service: an empirical investigation”, *Journal of Electronic Commerce Research*, Vol. XX, No. 1, 2019. Pp. 21–34.

⁷¹ EDRCCCEU Report, p. 149.

⁷² BENJAMIN FARRAND, “La emulación es la forma de adulación más sincera: videojuegos retro, distribución de ROMs y derechos de autor”, en IDP: revista d’Internet, dret i política, N.º 14, 2012. Pp. 19 - 33. Available online at: <https://idp.uoc.edu/articles/abstract/10.7238/idp.v0i14.1546/>. (02.04.2019). Particularly, p. 30: *“Como muestra la Sega Ultimate Megadrive Collection, la preexistencia de ficheros ROM de juegos no parece que perjudique seriamente las ventas de contenido antiguo reeditado”*.

⁷³ According to figures offered by the specialized portal www.vgchartz.com, counting only physical sales: 2’36 million units for PlayStation 3, 1’48 million for Xbox 360, and 1’45 million for PlayStation Portable. Again, these figures only represent physical sales. Units sold in digital format are not normally undisclosed in detail and publicly available. There are many other examples of re-releases and remasters that end up achieving commercial success.

⁷⁴ JETHRO DEAN LORD IV, “Would You Like to Play Again? Saving classic videogames from virtual extinction through statutory licensing”, *Southwestern University Law Review*, Vol. XXXV, No. 3, 2006. Pp. 405-430.

⁷⁵ SuperData Research Holdings, Inc. (2019): “2018 Year in review”. P. 7. Available online after a free purchase process: <https://www.superdataresearch.com/market-data/market-brief-year-in-review/>

accounts 109'8 billion dollars revenue for the year 2018, with a growth of 11% up compared to 2017, only in digital distribution (physical sales aside, which would top 134'9 billion dollars altogether⁷⁶).

This section cannot be closed without warning about the important margin of error that the EDRCCEU report presents regarding videogaming estimated displacements: 45%. The report does not hide this fact at all, on the contrary, it expressly adverts that it is double the usual error margin: *“For games, the estimated effect of illegal online transactions on sales is positive because only free games are more likely displaced by online copyright infringements than not. The overall estimate is 24 extra-legal transactions (including free games) for every 100 online copyright infringements, with an error margin of 45 per cent (two times the standard error)”*⁷⁷. That was the reality back in 2013-2014. Still, these conclusions can be complemented with aforementioned figures reflected above: despite piracy existence, legal consumption continues to grow, driving profits up in a year-over-year basis, even in Spain, the most pirating country in the EDRCCEU, where profits grew from 762 million euros in 2013 (996 million in 2014) to 1.530 in 2018, according to official reports from the Asociación Española de Videojuegos (AEVI)⁷⁸.

2.4. The singularity of the book market

The consumption of literature is on a clear crisis. Perceptions from daily life invite to think of a continuous decline in the interest of reading, especially among the younger. Causes of this phenomenon are beyond the scope of this paper. However, we cannot oversee this reality when dealing with the regression of books sales.

In this case, the displacement of sales is clearly stated in the report, estimating a -38%⁷⁹. However, variable data from different sources, lack of e-books online sales data in some markets (such as Spain)⁸⁰, and other variables end up affecting the conclusions: *“The net effect is uncertain, since the estimated displacement rate of 38 per cent has an error margin of 150 per cent (two times the standard error)”*⁸¹.

Is this just the reflection of a change in the behavior of consumers? Is the book industry undergoing the same process as the other did before? Not certainly, although the report also

⁷⁶ <https://www.gamesindustry.biz/articles/2018-12-18-global-games-market-value-rose-to-usd134-9bn-in-2018>; referring the results from a report made by consultant Newzoo.

⁷⁷ EDRCCEU Report, P. 149.

⁷⁸ ASOCIACIÓN ESPAÑOLA DE VIDEOJUEGOS. Reports available at the official website: <http://www.aevi.org.es/documentacion/el-anuario-del-videojuego/>

⁷⁹ Idem, p. 14, Table S.2; and p. 148.

⁸⁰ Idem, pp. 77-78.

⁸¹ Idem, p. 148. In order to maintain the original meaning, we reproduce the full quote: *“For books, the number of people reporting illegal streams is negligible and hence only effects of illegal book downloads can be reported. Sales of printed books (offline or via a web shop) are displaced at an estimated rate of 73 per cent by illegal book downloads with an error margin of 79 per cent (two times the standard deviation). On the other hand, 100 illegal book downloads are estimate to induce 50 extra-legal book streams. The net effect is uncertain, since the estimated displacement rate of 38 per cent has an error margin of 150 per cent (two times the standard error).”*

expresses itself about this subject: *"The overall conclusion from the sales trends described in this chapter is that consumers increasingly go "online" with regard to creative content, although the online market is still marginal for books"*⁸².

Books having a clear and particular sensorial experience tied to the its physical media that is absolute of its own (touch of paper, smell, the sound of a turning page), and therefore unmatched by other copyrighted works such as music, games or movies, might be playing another major role. In other words: books in paper stand as a notably different sensorial experience that justifies on its own a slow paced migration to the online consumption (compared to the others), since consumers still have a desire for paper touch, clearer or less tiring reading media, and even the pleasure of building a custom library that matches their own tastes. However, the complexity of this particular market prevents us from stating any conclusions.

3. Additional considerations

3.1. Apart from adapting to consumer tastes, price adjustments were needed

As for every good there is to be bought, digital contents have to deal with budget constraints and the necessity to adjust prices to the point where consumers are keen to purchase. KÖKLÜ has referred to this aspect in the online market of copyrighted contents: *"Competition in this sector appears to be thriving, as there are a large number of internationally operating intermediaries offering access to various repertoires of music, movies and eBooks. It further appears that the prices in this sector have also reached a reasonable level, which apparently meets the acceptance of users"*⁸³.

It is well known that the product must reach a price level where it becomes affordable to consumers, among other factors. Sticking to the pricing issue, the EDRCCEU Report also points at this particular matter as one of the main keys in digital consumption: *"(...) an indication that price is a potential factor that could help explain the piracy of audiovisual content. For music, books and games, the fact that between half and two thirds of the respondents would have been willing to pay the market price or higher indicates that the price is not a factor that could help explain piracy for those categories"*⁸⁴.

Explanation given by the report deepens into the data:

"When adding up the proportions of persons willing to pay a price P[0], P[+1], P[+2] and P[+3], it turns out that 21 per cent of the people who illegally downloaded or streamed a film

⁸² Idem, p. 80.

⁸³ KAYA KÖKLÜ, *"Individual Licensing of Copyrighted Works"*, in KUNG CHU LIU / RETO M. HILTY (Eds.): *"Remuneration of Copyright Owners"*, MPI Studies on Intellectual Property and Competition Law, Springer, Berlin, 2017. P. 187.

⁸⁴ EDRCCEU Report, P. 164.

or TV-series is willing to pay the market price or higher for the last illegal transaction if it is no longer available on illegal sites, and 51 to 66 per cent for music, games and books (Table 9.6). For films and TV-series this implies that nearly 80 per cent of the people would not pay the market price for the last illegal online transaction, and according to economic theory this proportion is even higher for the average illegal online download. This is an indication that price is a potential factor that could help explain the piracy of audio-visual content. For music, books and games the fact that one half to two thirds of the respondents would have been willing to pay the market price or higher indicates that price is not a factor that could help explain piracy for those categories”⁸⁵.

The aforementioned section of the report, dedicated to the willingness to pay for content downloaded outside the legal channels, is, without a doubt, one of the keys of it. In the first place, as the own report states, the economic capacity of the subject is a determining factor for his response. Obviously, students present responses that tend not to show willingness to pay higher ranges of prices: *“There is a large difference between minors and adults, when we look at the 15 year olds in the lowest price category, 45% the minors are not willing to pay more than this lowest price (compared to 30% other ages). In the highest price category, 10% of the 15 year olds are willing to pay more than the highest price category, compared to 17% of the other age categories”⁸⁶. Budget constrains show how they influent demand in the digital ecosystem, and probably explains the success of business models such as freemium, free2play, seasonal sales, ad-supported, etc. In 2018 the University of Amsterdam and the IViR (Instituut voor Informatierecht or Institute for Information Law), along with the same company that conducted the original EDRCCEU report (Ecorys), issued a new study on this topic: “Global Online Piracy Study”⁸⁷, confirming that price point is a key factor: *“(…) a lack of evidence concerning the effectiveness of most enforcement measures and the strong link between piracy and the availability and affordability of content suggests otherwise: at a country level, online piracy correlates remarkably strongly with a lack of purchasing power”⁸⁸.**

As the EDRCCEU report stated back in 2014: *“However nowadays the offer of legal online services is so diverse that it can no longer be assumed that all (free) downloads or streams are illegal, due to the existence of free trials, trailers, promo offers, monthly subscriptions (that allow free downloads in the period for which the subscription is paid) and simply free content where advertisements are the real source of revenues”⁸⁹. This situation has clearly evolved into a profitable scenario as the transition to digital consolidated throughout the years 2014-2019, if revenue figures shown above are considered to prove true it.*

⁸⁵ Ibidem.

⁸⁶ Idem, P.168.

⁸⁷ JOOST POORT (Principal investigator) / NICO VAN EIJK / JOÃO PEDRO QUINTAIS, “Global Online Piracy Study”, University of Amsterdam and IViR (Instituut voor Informatierecht or Institute for Information Law), 2018. Available online at: <https://www.ivir.nl/projects/global-online-piracy-study/> (01.05.2019).

⁸⁸ Idem, p. 8 and p. 14.

⁸⁹ EDRCCEU Report, pp. 30-31.

The ability to use the digital goods acquired at will also has, as well, a determining influence on the price that a person is willing to pay for them, as shown by SINHA, MACHADO and SELLMAN. According to the aforementioned authors: *"More specifically, the presence of shared DRM increases piracy and reduces the mean WTP of nonpirates. The estimated piracy rates are 6.8% for the absent shared DRM condition and 9.7% for the present shared DRM condition, while the (unconditional) mean WTP estimates are \$.83 and \$.69, respectively"*⁹⁰. Obviously, this a clear aspect that directly affects the price consumers are willing to pay: if the paying solution does not correlate with easiness of use, the value of these contents decreases on its own demerits, but also creates the perception of less freedom of use than the pirate alternative, thus creating a harmful mix. The conclusion reached by the aforementioned authors is clear: *"Therefore, we conclude that the elimination of shared DRM restrictions has a double impact of reducing hard piracy and increasing WTP [willingness to pay] for digital music"*.

3.2. Lack of education is an important factor. Value of copyrighted works needs more awareness

As we just stated, price point is one of the key factors in any goods or services market. As more and more content is created through the years, music discographies, television series, movies, collections of books, etc. accumulate in an ever-growing offer of copyrighted works to spend spare time on. However, as the amount of time that can be dedicated to these activities is limited, and other ways of entertaining compete for this restricted amount of time (TV, social networks, etc.), authors cannot escape from this natural scenario. It should be noted that high price points for their works may be fair for their time, effort and prospects. But market mechanics still operate, and unaffordable fares may discourage consumers, therefore resulting unappealing content for consumers.

Simultaneously, society perception of adequate remuneration for authors in return for their works still remains as a working field. As extracted from the report, education level played a significant part in how consumers perceived the value of the works and their willingness to pay.

This is a remarkable fact: *"Education: There is an interesting difference in the lowest educational group, 40% of this group is not willing to pay more than the lowest price range, compared to 29% for people with other educational attainments"*⁹¹. Thus, data extracted from more than 28.000 polls revealed a clear relationship between level of education and the consumers' willingness to pay. As the information society of the XXI Century, the exposed results might suggest a certain degree of miseducation in building a proper conscience on

⁹⁰ RAJIV K. SINHA / FERNANDO S. MACHADO / COLLIN SELLMAN, "Don't Think Twice, It's All Right: Music Piracy and Pricing in a DRM-Free Environment", *Journal of Marketing (American Marketing Association)*, Vol. LXXIV, No. 2 (March), 2010. P. 47.

⁹¹ EDRCEU Report, P. 168.

how art, music, literature, and every copyrighted work enriches our society, and how demanding they are for their authors. As a result, it is possible that our society is lacking a higher level of pedagogy on how important it is to provide a proper compensation for the authors of these works. Hence, awareness must be raised in this matter, while providing an attractive and affordable legal offer in order to channel the clear and increasing interest of the XXI Century citizens in spending their time and money enjoying copyrighted works.

3.3. Changes over time: a 5 years' perspective

While examining the "*Estimating displacement rates of copyrighted content in the EU*" report, it was clear that the data and behaviors described in it were taken at a concrete moment in time. It should be noted that, while the report being finally made public by 2017, it was finished in 2015 and the data gathered in 2013-2014. As a matter of fact, the legal notice contained in page 4 of the Report reflects year 2014, as well as page 3. Since then, five years have passed, affecting the available technology (broadband, mobile networks, higher storing capacities, faster speeds, smartphone popularization), the evolution of consumer behavior (moving to streaming services), new market trends for legal offer of contents (Spotify, Netflix, and basically *content on demand* models), etc.

Besides, the general economic situation has experienced a significant improvement since 2013-2014. Revenues have greatly grown for cultural industry as we have already stated. Accordingly, *streaming* platforms such as the aforementioned have become popular, making the subscription model a success in the economic exploitation of intellectual property. More legal offer to access copyrighted works at an affordable price point seems to pay off the idea that an important part of online piracy was in fact a market problem that, gradually, has been solved, thanks to the industry adapting to the new tastes and tendencies of the consumers.

Hence, the landscape has radically changed. The digital ecosystem has proven successful and profitable for copyright holders, which confirms the viability of this media to serve the purpose of intellectual property itself: obtaining remuneration in exchange for the artistic works, as well as the profitability of the investments in artistic productions.

Some of the studies and figures quoted as relevant bibliography in the "*Estimating displacement rates of copyrighted content in the EU*", are from the year 2012 or earlier, which affects in a decisive way the results, considering that they belonged to a less developed technological context. This leads us to a criterion that might be somewhat finalist, but it is also the purest outcome from real data. The success figures stated in previous pages could not have been available two or three years ago. But from 2019's perspective, and observing the steady-growing rate of revenues coming from digital sources earlier detailed, we must conclude that, perhaps, the digital ecosystem was not a threat, but an opportunity.

4. Closing words

It turned out that, contrary to cultural industry claims and “*conventional wisdom*”, Internet and the digital revolution were not a threat nor a problem for copyright. On the contrary, they have brought a new world of possibilities. As the perspective of time now suggests, these sectors were partially affected by a context of global economic crisis and, more certainly, they were simultaneously undergoing a process of technological transition, as well as failing to provide an adjusted and affordable price point that was attractive enough to digital consumers.

With the perspective of time, internet and the digital revolution have reshaped the way copyrighted works are offered to consumers. Internet has proven to be a reliable and profitable platform for authors and content creators to migrate to, and with plenty of possibilities to explore lucrative business models for copyrighted works. It is not necessary to sell copies to achieve the objective of remunerating the creators anymore. What is needed, are businesses models that fit basic market functioning, not one-sided, by ignoring consumers’ behavior and needs.

Cultural industries are still adapting to this new reality in order to provide an appealable and commercially successful offer of copyrighted works, but the certainty of growing revenue figures clearly prove these steps being in the right direction. Adjusted fares, appealing content and providing a comfortable, easy to use and consumer oriented experience have proven to return excellent results in innovative business models built around new technological possibilities, mainly represented by subscription models and streaming techniques for music and video on demand, as well as digital distribution and online gaming for videogames, routing the demand of copyrighted works to legal channels.

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