Intellectual property in a digital world

The challenges and opportunities in media and entertainment

Media & Entertainment

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FORUM D’AVIGNON
This report was prepared by Ernst & Young in conjunction with the 2011 Forum d’Avignon. Bringing together culture and cultural industries, the Forum d’Avignon assesses economic and social issues, including both social cohesion and job creation. Ernst & Young understands the importance of culture and its economic impact, and has been a partner of the Forum d’Avignon since its first session.

The results of this year’s study combine an analysis of the business law framework within the G20, interviews of international experts — academics, artists, business representatives and policy-makers — and discussions with the working group of the think tank “Forum d’Avignon.” For more information about the Forum d’Avignon, visit their website at www.forum-avignon.org.

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Introduction
Media & Entertainment companies face a persistent challenge

It has been more than a decade since Napster appeared on the scene, pioneering a peer-to-peer (P2P) online file-sharing service that enabled users to share MP3 files — for free. Wildly popular among a young, rebellious, web-savvy generation, Napster and P2P services that followed upended the media and entertainment (M&E) industry with their facilitation of massive copyright infringement. Today, thanks to enhanced capacity, the use of streaming is significantly developing to access music and video services, and is the new challenge.

Years of litigation and millions of dollars invested in protecting intellectual property (IP) have not resolved the issue. As digital media consumption grows at double- and triple-digit rates, and as the number of platforms, devices and distribution channels proliferates, safeguarding content remains a persistent challenge for M&E companies.

To truly address IP challenges, M&E companies need to work with all members of the digital value chain — including internet service providers (ISPs), search engines and new media distributors — to find a solution.

Content distribution is more complex than it has ever been, and digital has made IP an immaterial concept. It takes a village to create, distribute, deliver, track and protect content across the entire digital supply chain. There are legal frameworks in place to help, but, ultimately, M&E companies will be able to drive more value from their IP assets by collaborating across the digital landscape and around the globe.
Content distribution complexity creates new risks

In today’s digital world, the number of distribution opportunities is dizzying—both in expanse and in the pace at which these opportunities are growing. New platforms, emerging economies and increased competition are driving content owners to reach broader audiences, either through traditional or digital distribution or a direct-to-consumer model—or both.

However, in pursuing these distribution opportunities, M&E companies need to understand the risks.

**IP management**

The proliferation of products, platforms, devices and partnerships has made the process of managing contracts, rights, ownership and royalty agreements much more difficult.

Content creators do not solely distribute content that they own. They also distribute a significant amount of content they have the rights to but do not own. In this sense, a content creator is really a “bundler” of various IP elements. For example, when a studio distributes a movie, there are several IP components of the film that it may not own, such as the music. Keeping track of the various content elements and their associated rights, and clearing those rights, is an enormous challenge for all M&E companies as they create new ways to configure content and distribute it across multiple platforms.

**Data protection**

High-profile security failures have made data protection a top-of-mind issue for many M&E executives. In several cases, hackers have gained access to online networks and systems, stealing not only proprietary information but also personal customer data, such as names, addresses, passwords and credit card information.¹ The financial costs of these breaches are often significant, ranging from tens of millions to billions of dollars. The damage to a company’s brand and its reputation as a secure provider of online entertainment often costs far more.

Security breaches cause obvious financial risks in the form of lost revenues, restitution to harmed customers and a hit to the affected company’s share price. However, the risk goes beyond the immediate legal or financial consequences of a data breach. Companies that are seen as lacking effective defenses to safeguard both content and consumer data face significant reputational risk. Consumers won’t use a platform they don’t think is secure—and content creators won’t keep their valuable content on it.

These risks are set to spread beyond network operators. M&E companies are increasingly pursuing direct-to-consumer relationships. As they do, they will face similar security concerns and brand risks.

Because M&E companies process more and more personal data, they need to comply, especially in the European Union (EU), with the demanding requirements of data protection laws (e.g., EU Directives 95/46 on protection of personal data and 2002/58 dealing with eprivacy). These requirements reach far beyond mere security issues to encompass provisions requiring organizations to:

- Notify national data protection authorities of data processes
- Inform data subjects about the way their data is used
- Legally secure transfers of data outside the European Economic Area
- Delete data when it is no longer needed

Piracy

Creative America, a coalition of US M&E companies, estimates that piracy has robbed the US of 140,000 jobs. The International Music Association IFPI reports that more than one million jobs will disappear from the creative industries in Europe by 2015 if piracy is not addressed.

Contrary to public perception, copyright infringement doesn’t only impact the largest copyright owners and distributors. It affects all creators, with independent artists and creators feeling the brunt of it. Unauthorized use reduces revenues that content creators receive from legitimate sale and distribution of their efforts. The exact economic cost to content creators of digital piracy is not known, but it is substantial enough to credibly threaten the adoption of new digital business models for companies in several M&E sectors.

Only a few years ago, illegal physical reproductions of CDs and DVDs were the M&E industry’s main worry. This has been supplanted by the massive illegal copying of digital content. Digital content enables new forms of IP theft. When faced with real (or perceived) factors that limit their ability to obtain legal products, many consumers believe that acquiring illegal material is the only viable alternative to purchasing the desired product. According to research by industry-watcher Envisional, more than 17% of internet traffic in the US is infringing. Globally, that number is closer to 25%.

BitTorrent accounts for approximately half of the global and US infringing traffic – almost 99% of content shared on BitTorrent sites are infringing. However, BitTorrent is not the only culprit. Other online internet storage sites, such as cyberlockers and video streaming sites, contravene copyright laws. Unlawful IP use not only impacts M&E company revenue, it also diminishes the compensation of creators and workers and harms communities, depriving them of jobs and diminishing their tax revenues.

It is particularly interesting to note that many of the reasons consumers do not pay are linked to factors that can be corrected by current members of the digital value chain.

The eight arguments consumers put forward to steal content

1. **Timing.** Many illegal users want earlier access to content before windowed distribution.

2. **Ease.** It is often the easiest way to access digital media and entertainment or to find the desired content.

3. **Price.** Many consumers have limited disposable income, and the price of legitimate content may put it out of reach for certain segments.

4. **Access.** Providers limit the production and/or distribution of legitimate content, making it more difficult to obtain. Unlike the US, many countries don’t have services like Netflix or Hulu, or the ability to buy shows from iTunes.

5. **Government restrictions.** Some governments either limit or censor certain products.

6. **Use format and interoperability.** It is easier to transfer illicit content, which lacks digital rights management (DRM) or other controls, to other digital devices.

7. **Timeliness.** Sites like Netflix and Hulu are continually adding more content. However, many sites primarily offer older library titles.

8. **Lack of education and awareness.** Many consumers are unaware of the requirements and objectives of copyright law and the impact of copyright infringement on the creative industry.

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2 Rachel Abrams, “Industry groups form anti-piracy org; Creative America site to provide info to creative circle,” *Daily Variety*, 6 July 2011, via Dow Jones Factiva, © 2011 Variety, Reed Business Information.


6 Ibid.

7 Ibid.

International copyright protection surfaced in the middle of the 19th century on the basis of bilateral treaties. There are a number of treaties which (together with implementing legislation at the national level) provide a consistent global framework to protect IP.

### The Berne Convention

In response to the need for a uniform system, the Littéraire et Artistique Internationale (the ALAI), founded by Victor Hugo, pushed for exclusive rights for creative works to be automatically in force without any prior formality of declaration or registry. As soon as a work is written or recorded or as soon as the expression of the work is fixed, its author is automatically entitled to all rights in the work and to any derivative work. These rights were enshrined in the Berne Convention, initially adopted on 9 September 1886. The Berne Convention further asserted that an author’s copyright should generally be protected for at least 50 years after his or her death.9

Today, the main provisions of the Berne Convention remain in effect and the will behind Victor Hugo’s initiative is still largely intact. More than 160 countries are members of the Berne Convention and almost all nations are members of the World Trade Organization (the WTO). The WTO requires in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that future members accept almost all of the conditions of the Berne Convention.10

### TRIPS

Signed in 1994, TRIPS represents the most important attempt to establish a global harmonization of IP protection. It creates international standards for protecting patents, copyrights, trademarks and design. It also provides a dispute settlement schema and establishes enforcement procedures at the intergovernmental level. All 153 WTO members are also members of the agreement on TRIPS. This includes all EU Member States, the US and China.10

#### Duration of protection of copyright/author right from the author’s death*

<table>
<thead>
<tr>
<th>Years</th>
<th>Countries</th>
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<tr>
<td>100</td>
<td>Mexico</td>
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<tr>
<td>70</td>
<td>Australia, Brazil, France, Germany, Italy, Russia, Turkey, United Kingdom, United States</td>
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<tr>
<td>60</td>
<td>India</td>
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<tr>
<td>50</td>
<td>Canada, China, Japan, Saudi Arabia, South Korea</td>
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</table>

* The durations noted are those applicable in most circumstances. In certain circumstances, the period of protection may be shorter or longer. For instance, in certain situations and especially when it is not possible to identify the author (orphan works), and/or in the collective works, and/or for anonymous/pseudonymous works and/or for works for hire, the duration of protection for these rights is in principle the number of years indicated above from the publishing date, except for the US (which uses 95 years from publication or 120 years from creation, whichever is shorter).11 See appendix for source.

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9 “Knowledge thieves are still thieves,” Joins.com, 6 April 2011, via Dow Jones Factiva.
11 US Copyright Law TITLE 17 > CHAPTER 3 > § 302.
WIPO

In 1996, 89 countries signed the World Intellectual Property Organization (WIPO) Copyright Treaty, which provides additional protection for on-demand, interactive communication through the internet. It forms a special agreement under the 1886 Berne Convention to enable computer programs and the arrangement and selection of databases to be subject to copyright protection. The treaty also allows authors to have control over the rental and distribution of their works, and prohibits the circumvention of technological measures for the protection of works and the unauthorized modification of rights management information contained in works. Signatories include all EU Member States, China and the US.\(^{12}\)

Anti-Counterfeiting Trade Agreement

In 2011, several countries signed the Anti-Counterfeiting Trade Agreement (ACTA). The signatories include Europe’s 27 countries, the US, Canada, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea and Switzerland. Its aim is to improve the enforcement of IP rights to combat piracy. In addition to film and music, the ACTA covers other categories, such as fashion items, cars and medicines. It calls on countries to have enforcement procedures in place to permit effective action against online infringement. ACTA leaves it to the individual companies to determine the best laws to combat piracy. Industry groups such as the Recording Industry Association of America and the Motion Picture Association of America believe this agreement is a positive step toward curbing online piracy. Unfortunately, the ACTA does not include China – a source of widespread piracy.\(^{13}\)

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Authors’ rights and copyright: two different approaches for content protection

Copyright law countries/civil law countries

Works are protected either by copyright or the authors’ rights, depending on whether it is a civil law or common law system. The two approaches are equally split among the G20 countries.

Both systems protect materials created, but not ideas. However, the scope of the protection granted by copyright is generally broader than the scope of authors’ rights because copyright aims to protect the investment more than the expression of the creativity of an individual.

Since the adoption of the Berne Convention, copyright and authors’ rights are partially aligned on minimum principles. However, some important differences still remain (e.g., moral rights, work for hire).

Copyright law countries/civil law countries

Continuing efforts at a national level

As countries move toward greater cooperation, they are also re-examining their own rules to protect and promote IP. Regulators in many countries would prefer that companies find their own solutions, and in many countries this is indeed happening.

However, if voluntary actions by companies don’t meaningfully protect IP, legal and regulatory sentiment could swing in favor of a more interventionist posture.

Enforcement beyond the legal framework

Although many useful laws are in place, proper global enforcement of IP law has yet to be addressed. One stumbling block may be the costs to prosecute and enforce judgment of an infringement in one country against a guilty party who resides elsewhere. The justice system is often slow and expensive for the owners of copyright, and the remedies are relatively inadequate for both the owners of rights and the end users benefiting from online infringement. As a result, the standard court system may not be the most appropriate vehicle for resolving massive IP infringement.

Participants across the M&E supply chain are working together to enforce the existing legal frameworks and educate consumers on legal alternatives to piracy.

Among the interesting examples are countries where, surprisingly, the enforcement efforts are significant. In Russia, the number of cases with decisions is consistently increasing: 1,500 in 2009 and 1,900 in 2010. However, the increasing number of cases has not resulted in a significant decrease in piracy. In China, the number of criminal cases involving infringement on intellectual property rights (IPR) reached 3,942 in 2010, up 8% from 2009. A total of 6,000 people were judged guilty of IPR infringement. Moreover, Chinese courts at all levels in the country have decided 41,718 IPR-related civil cases, representing a 37% year-on-year increase.

16 Russian court practice and legislation databases: Garant (Гарант) and Consultant Plus (Консультант Плюс); Russian Higher Arbitration Court (www.arbitr.ru) electronic database of court cases.


Government action: graduated law responses

There is no simple or complete solution to piracy. An effective approach may involve a combination of measures targeting both illegal use and illegal offers from online players, such as video streaming websites.

The HADOPI three-strikes law

Seeking alternate forms of redress, France recently created Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet (HADOPI), a government agency assigned to ensure that internet providers screen their internet connections to prevent the exchange of copyrighted material without prior agreement from the copyright holders. Under a three-strikes regulation, repeat offenders of illegal downloading of copyrighted material could be banned from having internet service and are subject to a criminal fine.

A recent study issued by the French government found that 50% of all French believe HADOPI is a positive initiative and that it motivated them to access online content “more often legally.” The study also found that 72% of the 100 people who personally received a HADOPI warning, or knew of someone who did, said they either ended or reduced illegal downloading as a result of the law. The first year report, issued in September 2011, states that 22 million infringements were reported by right holders or their representatives in France, triggering 580,000 notifications to internet users, of which 35,000 were notified twice. The limited number of cases (lower than 60) transmitted to prosecutors should not mitigate the expected impact of this new regulation.

Initially widely criticized for its repressiveness and amended several times in France before being passed and implemented, the paradox is that HADOPI has in practice inspired other governments to implement or consider graduated responses to fight piracy.

Moral rights

In almost all countries covered by this survey, authors are granted the moral rights, which generally include (but are not limited to):

- Right of attribution
- Right to publish a work anonymously or pseudonymously
- Right to the integrity of the work

These rights are distinct from any economic rights tied to copyright. Moral rights have had a less robust tradition in countries that adhere to copyright laws where the exclusive rights tradition is likely inconsistent with the notion of moral rights when compared to countries that follow a civil law system. In countries that use civil law, moral rights are considered to be an emanation of the personality of the author and cannot be assigned to a third party. However, such an assignment is permitted in certain countries that follow copyright laws.

Germany and the UK follow France’s lead

In May 2011, Bernd Neumann, German Minister of State to the Federal Chancellor and Federal Government Commissioner for Culture and the Media, announced copyright law reforms. While the German authorities initially criticized the graduated response, they are now intending to implement a system closer to HADOPI.21

In the UK, after initially favoring blocking websites that provide access to illegal content, authorities are moving ahead with a graduated response. During the summer of 2011, the UK government confirmed its intention to implement the graduated response set out in the UK Digital Economy Act 2010 (the DEA). Effective 2013, the UK is planning an email communication as a first step. This decision reflects all 10 recommendations outlined in an independent review on intellectual property in the UK, which was commissioned by Prime Minister David Cameron and authored by Ian Hargreaves.22

New rules from the EU Commission regarding IP rights23

The EU Commission recently announced its objective to establish new rules that strike the right balance between ensuring reward and investment for creators and promoting the widest possible access to goods and services protected by IP rights.

“Ensuring the right level of protection of intellectual property rights in the single market is essential for Europe’s economy. Progress depends on new ideas and new knowledge,” said Internal Market Commissioner Michel Barnier. “There will be no investment in innovation if rights are not protected. On the other hand, consumers and users need to have access to cultural content, for example online music, for new business models and cultural diversity to both thrive. Our aim today is to get the balance between these two objectives right for IPR across the board. To make Europe’s framework for intellectual property an enabler for companies and citizens and fit for the online world and the global competition for ideas.”

To achieve such objectives, the EU Commission has highlighted the following initiatives:

- Introduce legislation that allows the digitization and online availability of orphan works (books and newspaper or magazine articles that are still protected by copyright, but where the rights holders are not known or cannot be located to obtain copyright permissions) targeting the creation of European digital libraries that preserve and disseminate Europe’s rich cultural and intellectual heritage. Please note that according to the last proposal of the European Commission for a directive on orphan works, this notion shall be enlarged and cover works such as: “(i) works published in the form of books, journals, newspapers, magazines or other writings, and which are contained in the collections of publicly accessible libraries, educational establishments, museums or archives, or (ii) Cinematographic or audiovisual works contained in the collections of film heritage institutions, or (iii) Cinematographic, audio or audiovisual works produced by public service broadcasting organisations before 31 December 2002 and contained in their archives.”

- Simplify the collective management of copyright in the EU. Collecting societies license the rights of creators and collect and distribute their royalties.

- Assess the feasibility of creating a European copyright code, including the creation of an optional “unitary” copyright title to provide rights holders with the flexibility to choose whether to license and enforce their copyrights nationally or on a multi-territory basis.

- Explore to what extent voluntary measures can be used to reduce the sale of counterfeit goods over the internet by involving the stakeholders most concerned by this phenomenon (rights holders and internet platforms).


Industry action: Center for Copyright Information

Instead of government intervention, in the US, the film, music and television industries, in partnership with ISPs and other distributors, have formed a consortium under the Center for Copyright Information. Established in response to the rising loss of revenue from online piracy, the center has a mandate to educate consumers on copyright protection and direct them to lawful sources to obtain content.24

Education measures include a system of alerts to inform internet users when potential content infringement is identified on their internet accounts. The system consists of five consecutive alerts, all to provide internet users with information about content infringement. The first two alerts exist solely to inform. However, the third, fourth and fifth alerts require the user to acknowledge receipt of the alert by clicking a pop-up notice or similar mechanism. If the user receives a fifth alert, the ISP may take steps to help resolve the content infringement matter. These measures include temporary reductions of internet speed, redirection to a landing page until the user contacts the ISP and is educated on copyright, or any other measures the ISP deems necessary. Unlike France’s HADOPI law, this alert system does not result in internet account suspension or termination. Rather, it is meant to educate in the hope that creating awareness of illegal action will encourage offending users to abandon any further internet content fraud.

Disparities in national case laws regarding ISP liability: the stakeholder solution

The liability of ISPs to protect online content has become a top-of-mind issue for many countries. Areas of particular concern include:

- The rise of P2P and other methods allowing illegal downloading or access
- The evolution of the web toward web 2.0 services, where users can generate or mediate content by themselves
- The growing importance of streaming and linking websites

A study of legal systems and case laws suggests a more complex picture of the liability issues than litigation has generated. The reasons for this complexity are linked to the ease of disseminating information and the difficulty for copyright owners to control the subsequent use of their work. In trying to balance the author’s rights with legitimate public interest, three approaches have emerged:

- Conditional liability. ISPs can benefit from a limitation of their liability if they act “expeditiously” to remove or disable access to content upon “actual knowledge or awareness” of “illegal activities.” This system, known as “Notice and Takedown,” has been adopted by the European E-Commerce Directive. The Directive specifies that an application of strict liability would impair the expansion of electronic commerce within the EU.25

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Secondary liability. Most commonwealth countries recognize the notion of vicarious liability (P2P) file sharing and secondary liability in copyright law, which imposes liability on one person for the negligence of another to whom the former has entrusted (or “delegated”) the performance of some task on their behalf. In Australia, the Copyright Act adopted in 2000 recognizes an offense of “authorization” consisting in a form of vicarious liability for ISPs. To be found liable for the infringement of copyright committed through the use of their services, the courts are required to take three factors into account:

- Whether the ISP had the power to prevent the infringement
- The nature of any relationship between the ISP and the infringer
- Whether the ISP took reasonable steps to prevent infringement

Direct liability. This system can be seen as a clear recognition of the court’s power to issue orders against ISPs to prevent illegal activity online. In a recent case in the UK, an internet access provider (IAP) was ordered to take direct action to block a website that made available unlawful copies of film, television programs and other protected works without permission and despite a previous court order. In Japan, an ISP was found liable for copyright infringement by “making copyrighted works transmittable” and “public transmission of copyrighted work” through a P2P file-sharing service.

These disparities produce a legal uncertainty, but with effective collaboration, countries could achieve a single, consistent international regulation.

Such disparities result in a legal uncertainty which can also be mitigated through wide and effective collaboration through signed agreements between stakeholders (contractual approach).

In the meantime, contractual law seems to be the only way to efficiently address this issue and reach a balance between both the interests of the public and of the authors. To this end, major record companies and important ISPs have already adopted this solution to reduce their loss of profit in the digital environment. In France, for instance, Universal Music has signed an agreement with the music service Deezer to allow streaming of its catalog. Universal Music has also joined Warner Music and Sony Music in signing with a leading Chinese search engine to allow the streaming or direct download of their respective catalogs.

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27 University of New South Wales v. Moorhouse, (1975) HCA 26; (1975) 133 CLR 1 (High Ct. Australia, 1 August 1975).
28 Twentieth Century Fox Film and Others v. British Telecommunications PLC (High Court [Chancery Division] 28 July 2011).
29 JASRAC v. MMO Japan (Tokyo District Court, 29 January 2003).
Protection by design: IP finds an ally in technology

Over the last 20 years, technology and electronics companies have experienced incredible growth based on consumer appetite for music, video and books. Given that it is consumers driving demand for devices that enable content access and consumption, it may be time to team with technology and electronics companies to embed content protection into the devices.

Security technologies

Although there is no one technology solution to protect IP from unauthorized use, many M&E companies are developing security strategies that employ a suite of technologies and capabilities to:

- **Identify** ownership and the source of a piece of content. Technologies used for this purpose include metadata and watermarking.
- **Protect** by providing content security and tracing during distribution. Technologies may include protected streaming and DRM to deter unauthorized distribution by controlling access to the content.
- **Detect** data leaks.

Two types of technology that are receiving significant attention from M&E companies are watermarking and fingerprinting.32

Watermarking

Like a physical serial number, a watermark is a piece of information added to content that establishes the identity and ownership of an individual piece of content. It allows owners to enforce copyrights by identifying and tracking music, movies, television programming and other material as they move through various distribution channels.33

Watermarking is generally an after-the-fact tool because it allows content creators to trace their content as it is being used. However, the biggest benefit of watermarking is its potential for deterring unauthorized uses of content, rather than enforcing ownership rights after the fact.

For example, several studios are experimenting with premium on-demand offerings of some major films. For US$30, consumers can watch movies at home 60 days after they open in theaters through an exclusive streaming deal with DirecTV.34 The studios insisted that DirecTV use watermarking technologies to allow them to track copies to individual purchases should the films end up online.35

Watermarking alone does not prevent piracy. However, studios and other content creators are instituting it as part of an overall package of content protection measures.

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Fingerprinting

Digital fingerprinting is expected to play a growing role in protecting and monetizing content. Like a human fingerprint, every piece of content is unique in its own way. A digital fingerprint is an exclusive pattern of ones and zeros that identifies content. This can be either a whole piece of content or specific portions of it. Content is scanned to create a pattern that is mapped, stored and matched to protect content.

Unlike watermarking, digital fingerprinting does not mark or otherwise modify the content. Fingerprints are effective even after compression or degradation, so that the piece of content can still be detected in the poorest quality clip. Because it can identify small pieces of content, it even works on mash-ups — files that combine snippets of several different pieces of content, such as music or video.36

Fingerprinting can help content owners identify TV shows and films that are posted on video-sharing sites without their permission, and enable the video-sharing site to either remove the content or share advertising revenue with the content owner. For example, if a user wants to upload a video clip onto a user-generated video website, the site’s fingerprinting technology would identify the clip and check its database for distribution rules given by the owners. If the content owner does not give permission for the clip to be shown, it would be blocked from uploading. Alternatively, the video may be allowed to load, with the provision that the content owner shares in any advertising or other revenues that the clip might generate. Beyond blocking uploads, content creators can use fingerprinting technology to scan internet sites to determine where their content is playing, and put in place measures to either take down or monetize it.37

Fingerprinting was used successfully during the 2008 Olympics. NBC aired 2,000 hours of live streaming content and 3,500 hours of on-demand content. As an ad-supported venture, driving traffic to the NBC.com site was critical to monetization. To prevent users from capturing the video and posting it to their own websites, NBC worked with YouTube to employ a fingerprinting system that helped NBC monitor video as it traveled across the internet. The technology generated a digital fingerprint in real time that compared NBC’s footage to content uploaded to YouTube. If such content was found, it was blocked from being uploaded.38

Both watermarking and fingerprinting offer multiple benefits, including:

- Establishing ownership, copyright and content creatorship, and allowing for quicker reaction to piracy when it occurs
- Creating a deterrent effect that mitigates potential damage
- Encouraging increased sales of legitimate content
- Reducing the risk of litigation from copyright owners
- Enhancing the content owner’s reputation as a socially responsible partner that lives up to its obligation to protect copyright holders

Taken together, watermarking and fingerprinting provide a layered content-security approach that provides the most effective way to protect content in the digital world.

Distribution technologies

Distribution-enabling technologies provide another means by which the M&E supply chain is protecting intellectual property.

Streaming services

Although P2P technology remains a thorn in the side of many M&E companies, newer, legitimate distribution technologies have gained traction. Services such as Netflix (television and film) and Deezer (music) stream content that is readily available, secure and affordable.

Cloud computing

Cloud offerings provide another distribution method for consumers to experience content across digital platforms whenever, wherever and from any device without resorting to piracy. The Digital Entertainment Content Ecosystem (DECE) – a consortium of entertainment, software, hardware and retail companies – has developed a universal format that makes storing and using content easier. Its cloud system, called UltraViolet, lets consumers buy and watch movies and TV shows on any device – a television, game console, tablet, PC, Blu-ray player or mobile device. Content sharing with a small group will also be allowed within limits.39

One of UltraViolet’s key advantages is that it brings standardization to the digital locker concept. This should help give consumers confidence that they can “buy it once and play it anywhere.” By the end of 2011, participating companies will sell DVDs and digital downloads with the UV logo. Consumers will begin to see the logo on a range of consumer electronics hardware.

Not all of the large M&E companies are participating in UltraViolet – some are building their own systems. Apple’s iCloud service, launched in October 2011, enables consumers to download and access all of their iTunes content across multiple iOS devices and PCs.40 In May 2011, Google announced the availability of its Music Beta service, which will enable users to store and access their music remotely.41

These cloud systems all use a common set of features:

- Consumers access content from a group of external servers
- The system authenticates the user
- The system enables the consumer to use the content on a variety of devices

This allows consumers to buy the content once without having to copy it for multiple devices and then access it directly from the web, likely through service providers.

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40 “Apple to Launch iCloud on October 12,” Business Wire, 4 October 2011, via Dow Jones Factiva.
41 “Google unveils cloud-based music service to rival Amazon,” Associated Press Newswires, 10 May 2011, via Dow Jones Factiva.
Cloud technology has evolved significantly since its inception. Dumb cloud (Cloud 1.0) refers to the traditional cloud service offering of storing and accessing content on a remote server via the internet. Smart cloud (Cloud 2.0) represents the next generation in cloud computing capabilities. Smart clouds enable anytime, anywhere, secure content distribution and can include:

- Access from multiple devices (tablets, smartphones, internet-connected TVs, PCs)
- Authenticated access so that only those users with the right to access the material can do so
- Robust DRM protection of content so that it cannot be pirated by unauthorized cloud access or illegally copied by authorized users
- A recommendation engine that recommends content based on consumer preference inputs or content choices
- Analytics to capture data such as customer demographics, content use, etc.

Consumers can benefit from the cloud in many ways, including:

- Meeting the increasing demand for anytime, anywhere, any device access to content and services
- Improving the customer experience by safeguarding content in a location that is immune to hard drive crashes and stolen devices
- Saving money because they won’t have to purchase media-playing devices such as Blu-Ray players or storage devices with smaller hard drive

For M&E companies, the cloud is not only about storage and access. It has the potential to transform business models. Cloud storage and services offer several new potential revenue streams and greater pricing flexibility. For instance, a content owner can introduce new choices for consumers, such as pay per each use, pay for five uses, pay to own and share, etc.

The cloud also enables companies to establish a direct relationship with their customers, many of whom will go directly to the provider for branded media and entertainment, bypassing intermediaries. Cloud delivery allows companies to analyze consumer use patterns and preferences, which can be used to create new and profitable products. If they are designed with effective recommendation engines, cloud services should drive more long-tail content purchases.

However, for all its opportunities, the cloud also presents both M&E companies and consumers with several risks. From an industry perspective, M&E companies may lose revenue from not being able to sell the same content to consumers on multiple devices. This loss may not be offset by the new revenue streams the cloud creates. From a consumer perspective, hosting content in the cloud exposes consumers to significant privacy issues. Companies will not only have access to personal information, they will be able to use it to profile consumption behaviors and target consumers in ways they may not have consented to.
Distributors and aggregators become partners in protection

Over the years, content creators have wanted distributors and aggregators to take a more active role in helping them control access to content. Until recently, however, they have been stymied because the interests of content creators, distributors and aggregators weren’t necessarily aligned.

Traditionally, content creators want to sell or rent content and build audiences to generate ad revenue. Distributors and aggregators have different value drivers. ISPs want to sell profitable, high-speed data packages. For other aggregators, the objective is amassing eyeballs to sell advertising. This divergence has created sizable financial and reputational risks for many distributors and aggregators, and caused tremendous friction in relationships with content creators.

Some organizations, such as Research4Life, have made portfolios of scientific publications available, royalty free, to developing countries for research and educational purposes. Similarly, some creators are willing to broadly share their works, either through open licenses, such as creative commons, or simply by not enforcing their rights.

As the industry evolves, however, the interests of content creators, distributors and aggregators are not only aligning, in some cases, such as with Comcast and NBC, their businesses are converging. This convergence means that distributors and aggregators have a greater interest in protecting professionally produced content. They want to profit as they sell legal music and video to their customers, and they recognize that their own growth depends on delivering secure content.

Telecommunications companies may have an equally strong interest in prioritizing certain types of content to limit the significant broadband investment required to accommodate ever-growing downloads and video streaming.

As partners in the protection of content, producers, distributors and even government agencies are joining forces to help combat piracy. HADOPI and the Center for Copyright Information (discussed earlier) are two such examples.

The risks of not working together

- **Royalty risks.** Inadequate IP management exposes M&E companies to several royalty risks, including: underpayments, overpayments, and a lack of an audit trail to support payments, making the company vulnerable to claims.

- **Rights risks.** There is a significant reputational risk that stems from not properly clearing rights and safeguarding assets. A content creator that does not manage and protect rights properly risks damaging its reputation among content creators – directors, producers, authors, musicians, etc. This may result in a loss of access to creative talent, both in house and third party.

- **Distribution risks.** In as much as content creators face financial and reputational risks for selling content they don’t have the rights to, distributors face similar risks; some are distributing content that they don’t have the rights to. Like content creators, distributors have an obligation to ensure that artists are being paid for their efforts. In a fast-moving market, distributors may rush to market with new products without having all the proper rights agreements in place. This period, from idea to execution, creates significant financial and reputational risks.

- **Legal risks.** Improper IP management can result in criminal liability. IP infringement can also mean paying significant damages to compensate for the loss of revenues for rights holders.

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Accountability for IP protection strengthens digital ecosystems and preserves cultural diversity

As the distribution landscape grows in size, scope and complexity, participants are aligning their value chains and partnerships. For example, 10 years ago, it would have been inconceivable that retailers such as Fnac or Walmart would be in the digital content distribution business. But in a hyper-competitive retail market, both companies see digital content distribution as a driver of their core businesses.

Financial success and managing reputational risk are no longer about what one company does or doesn’t do – they are about the partnerships and arrangements companies make. Interconnection means that a mistake by one impacts others in the value chain. Trust is indispensable to making the entire ecosystem function.

All members of the value chain have a vested interest in making sure that what’s being distributed is valid and legal. They are being asked to take more responsibility for their impact on the communities in which they operate. However, the community they serve is more than geographic. It comprises all the creative people who make informing and entertaining the public possible – writers, producers, directors, musicians and authors.

Demanding greater accountability could preserve the diversity of creative content by reducing the need for independent creators to invest in enforcement that they often cannot afford, particularly in the digital world.

In the digital age, the creative community is searching for a business model that will allow them to earn a fair living at a time that their work is often stolen without earning them a dime. M&E companies have a duty to achieve commercial success in ways that respect all of the people across the value chain. This means doing all they can to make sure that IP rights owners are adequately compensated for their work.

When M&E companies meet the needs of the present, they are also ensuring their future. Being accountable for adequately compensating rights holders forms the basis for the future of the business. Adequately managing and protecting IP serves as a cornerstone of any creative relationship. M&E companies that are in violation of rights and usage agreements will be viewed as untrustworthy. This is a huge reputational risk as the world progressively becomes more digital. It could threaten the very survival of those distributors and aggregators that choose not to be accountable.

Effective impact of IP Legal Framework on the development of legal offers

Most surveyed countries are showing their will to enforce measures against online piracy but an important issue for IP protection remains the delay taken by legal offers to develop accordingly.

In its report on the application of directive 2004/48/EC on the enforcement of IP rights,43 the European Commission considered piracy was notably caused by this lack of legal offers, stating that this lack “has led many law abiding citizens to commit massive infringement of copyright. On this topic, the Commission recommends a double approach:

- “New regulation to target those who trade in counterfeit goods over the internet,
- “The creation of a European framework for online copyright licensing would greatly stimulate the legal offer of protected cultural goods and services across the EU.”

If the law may seem unable to effectively create or develop legal offers ex nihilo, in many countries the strengthening of the IP enforcement framework has shown to be an enhancement factor for the success and diversification of legal offers while failure to do so undermines investment both in new content and in digital platforms that use content.

The European Grouping of Societies of Authors and Composers, in a submission44 issued in March 2011 on this subject, stresses that in the UK, which can be considered as having one of the toughest laws for IP protection, there are at least 24 legal services of online music.

Sweden is the “World’s Dominant Information Economy” according to the IDC/World Times Information Society Index,45 thanks to a severe IP framework and a highly competitive ecommerce sector.

Based on the above experiences, it appears that strengthening IP rights protection contributes to favor the development of diverse and high quality legal offers based on the collaboration of all stakeholders in a digital environment.

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An effective IP strategy doesn’t just protect – it drives revenue growth

The rapidly shifting landscape presents numerous challenges – and opportunities – for M&E companies now, and in the future. IP protection is crucial, but to maximize the value IP assets offer, M&E companies are beginning to think more broadly. They are rethinking their strategies to protect and monetize their IP assets. They want a better understanding of how current and emerging technologies can improve IP protection and exploitation. They also want to develop new product and distribution strategies that drive revenue and market share gains, and forge closer relationships with their customers.

In developing an effective IP strategy, M&E companies should include the following four elements:

**Customer monetization**

To monetize their content, M&E companies need to deliver a branded experience. Companies need to:
- Build consumer awareness
- Determine pricing and bundling
- Enable payment
- Provide customer care management
- Manage churn and usage

**IP management**

M&E companies have the ability to reach vast numbers of new consumers across multiple platforms and through new and innovative monetization models. However, they cannot monetize their intellectual property assets if they don’t know the rights and usage associated with the content. Effective IP management is necessary to reach new monetization opportunities.

**Digital supply chain optimization**

Many M&E companies still lack an effective digital supply chain (DSC) that can manage digital media delivery from content creation to post-production and distribution. Companies need to know what assets they have, regardless of the form, and they must have those assets readily available for exploitation. DSC optimization allows M&E companies to exploit their assets more efficiently across platforms and geographies. It also makes it easier for M&E companies to better exploit a deeper catalog – the long-tail strategy. It is not uncommon for a company to have content that no longer reaches the market because it is lost in the archives or is no longer physically available. These hidden treasures are often just waiting to be discovered and monetized. For example, Google signed with a European publisher to scan and sell digital editions of selected titles that are no longer in print.46

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IP protection

Reducing the risk of piracy is an enterprise-wide effort. Top-level management must set a tone that prioritizes IP and data protection. This means more than just having a data protection policy. It means making data protection a priority and communicating that mindset to customers and partners. M&E companies must also:

- Create dedicated teams that focus on the true impact of piracy in terms of lost revenues, higher costs and the potential risk to brand and reputation
- Support industry efforts – regulatory, legislative, forensic and technological – to stem piracy
- Place tight controls over individuals that have access to content, both within your organization and among your supply chain partners
- Conduct audits of partners’ anti-piracy systems, processes, policies and procedures
Conclusion: It’s time to show leadership

The international IP legal framework provides consistent and flexible protection for owners of both traditional and digital forms of content. The existence of a legal framework by itself has an influence on the behavior of stakeholders. However, neither legal frameworks nor regulatory intervention will ever keep pace with technology or the pirates that seek to circumvent that technology. As a result, the onus for enforcement of IP law needs to be on all members of the media supply chain, including owners, aggregators, distributors and electronics manufacturers. The success of tablets, smartphones and other mobile devices, for example, present significant opportunities not only to boost revenues but to protect IP using technology embedded into the devices.

By focusing on partnerships, agreements and the use of technology to ensure that rights are protected and monetization opportunities exploited, all players in this new, digital marketplace can benefit.

Brand and trust are the most valuable assets of the operators in the digital world. They attract both the creators and the users. IP infringement can put them at a risk they can no longer afford in a world where reputation can change in a millisecond.

IP protection is an essential element to encourage creators to innovate and to preserve the diversity of creation.

Leadership is building the effective legal offer, even if this requires alliances and agreements that were not a given.
### Appendix

**Sources for duration of protection between the G20 countries**

<table>
<thead>
<tr>
<th>Country</th>
<th>Legislation (source used)</th>
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<tbody>
<tr>
<td>Australia</td>
<td>▶ Copyright Act n°63, of June 27, 1968</td>
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<td></td>
<td>▶ Copyright Amendment Act n°158, of November 6, 2006</td>
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<tr>
<td>Brazil</td>
<td>▶ Law on Copyright n°5.648, of December 11, 1970</td>
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<tr>
<td></td>
<td>▶ Law changing, updating and consolidating the Law on Copyright n°9.610, of February 19, 1998</td>
</tr>
<tr>
<td>Canada</td>
<td>▶ Copyright Act, R.S.C., 1985, c. C-42, of 1985, c. C-42</td>
</tr>
<tr>
<td>China</td>
<td>▶ Copyright Law of the People’s Republic of China of September 7, 1990 as amended by presidential order n°26, of February 6, 2010</td>
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<tr>
<td>France</td>
<td>▶ Law No. 85-660 of July 3, 1985 on Authors’ Rights and on the Rights of Performers, Phonogram and Videogram Producers and Audiovisual Communication Enterprises</td>
</tr>
<tr>
<td>Germany</td>
<td>▶ Law on Copyright and Related Rights n°DE078, of September 9, 1965 (Urheberrechtsgesetz)</td>
</tr>
<tr>
<td>Italy</td>
<td>▶ Law No. 633 of April 22, 1941 Protection of Copyright &amp; Other Rights Connected with the Exercise Thereof</td>
</tr>
<tr>
<td>India</td>
<td>▶ Copyright Act n°14, of June 4, 1957</td>
</tr>
<tr>
<td>Japan</td>
<td>▶ Copyright Act n°48, of May 6, 1970</td>
</tr>
<tr>
<td>Mexico</td>
<td>▶ Federal Law on Copyright of December 5, 1996</td>
</tr>
<tr>
<td>Russia</td>
<td>▶ Federal Law on Copyright and Neighboring Rights n°5351-I, of July 9, 1993</td>
</tr>
<tr>
<td>Republic of Korea</td>
<td>▶ Copyright Act of 1957 (Law No. 432, as last amended by Law No. 9625 of April 22, 2009)</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>▶ Law issued by Royal Decree No. M/41, 2 Rajab, 1424, of August 30, 2003 on Copyright and Related Rights</td>
</tr>
<tr>
<td>Turkey</td>
<td>▶ Law No. 5846 on Intellectual and Artistic Works of December 1951</td>
</tr>
<tr>
<td></td>
<td>▶ Law No. 4630 for the Amendment of Certain Articles of the Law No. 5846 on Intellectual and Artistic Works of February 21, 2001</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>▶ Copyright, Designs and Patents Act 1988 (C. 48) of November 15, 1988</td>
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Global survey contacts

Global contacts

<table>
<thead>
<tr>
<th>Name</th>
<th>Title/Role</th>
<th>Telephone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bruno Perrin</td>
<td>Ernst &amp; Young et Associés, EMEIA Media &amp; Entertainment Assurance Leader (Paris, France)</td>
<td>+33 1 46 93 65 43</td>
<td><a href="mailto:bruno.perrin@fr.ey.com">bruno.perrin@fr.ey.com</a></td>
</tr>
<tr>
<td>Mark Borao</td>
<td>Ernst &amp; Young LLP, Global Media &amp; Entertainment Advisory Services Leader (Los Angeles, US)</td>
<td>+1 213 977 3633</td>
<td><a href="mailto:mark.borao@ey.com">mark.borao@ey.com</a></td>
</tr>
<tr>
<td>Sylvia Ahi Vosloo</td>
<td>Ernst &amp; Young, Global Media &amp; Entertainment Center Marketing Lead (Los Angeles, US)</td>
<td>+1 213 977 4371</td>
<td><a href="mailto:sylvia.ahivosloo@ey.com">sylvia.ahivosloo@ey.com</a></td>
</tr>
<tr>
<td>Louisa Melbouci</td>
<td>Ernst &amp; Young et Associés, EMEIA Media &amp; Entertainment Marketing Manager (Paris, France)</td>
<td>+33 1 46 39 76 47</td>
<td><a href="mailto:louisa.melbouci@fr.ey.com">louisa.melbouci@fr.ey.com</a></td>
</tr>
</tbody>
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Local country contacts

France

<table>
<thead>
<tr>
<th>Name</th>
<th>Title/Role</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fabrice Naftalski</td>
<td>Ernst &amp; Young Société d’Avocats, Partner Attorney at Law, Head of Intellectual property and information technologies team in France</td>
<td></td>
</tr>
<tr>
<td>Axel du Boucher</td>
<td>Ernst &amp; Young Société d’Avocats, Manager Attorney at Law</td>
<td></td>
</tr>
<tr>
<td>Guillaume Marcerou</td>
<td>Ernst &amp; Young Société d’Avocats, Attorney at Law</td>
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Russia

Igor Nevzorov, Ernst & Young (CIS), B.V. Senior Manager, Legal Services

Germany

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<tr>
<th>Name</th>
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<th>Email</th>
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<tbody>
<tr>
<td>Dr. Peter Katko</td>
<td>Ernst &amp; Young Law GmbH, Rechtsanwalt, Director, Head of Intellectual property and information technologies team</td>
<td></td>
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</table>

Turkey

Mehmet Kucukkaya, Ernst & Young, Partner, Legal Counsel, Tax & Law

Forum d’Avignon contacts

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<tr>
<th>Name</th>
<th>Title/Role</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Laure Kaltenbach</td>
<td>Managing Director of the Forum d’Avignon</td>
<td><a href="mailto:laure.kaltenbach@forum-avignon.org">laure.kaltenbach@forum-avignon.org</a></td>
</tr>
<tr>
<td>Alexandre Joux</td>
<td>Director at the Forum d’Avignon</td>
<td><a href="mailto:alexandre.joux@forum-avignon.org">alexandre.joux@forum-avignon.org</a></td>
</tr>
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