

# ***“Copyright holders and peer-to-peer network users: an uncompromised relationship?”***

By author: Archontoula Kapsi

The technological evolution of the last years enabled the transmission of cultural works in a series of bits. Internet has created new practices such as file-sharing through peer-to-peer networks which are nonetheless harmful for Intellectual Property Rights. Intellectual Property content is digitized, compressed, downloaded, copied and distributed through the Internet all over the world. The tendency to share files in a digital form is massive enough to make it a social phenomenon. Indeed, in France, nearly half of all Internet users (49%) seem to use cultural content illegally, according to a study conducted by the «*Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet*» (roughly translated as the “*High Authority for the Distribution of Creative Works and the Protection of Rights on the Internet*”), on 23<sup>rd</sup> of January 2011, in Cannes. According to this report, illegal practices decrease according to age: from 15 to 24 years old 70% reported using cultural content online illegally as compared towards a rate of 55% when it comes to the 25-39 years old group and 32% as for those over 40 years old. The spread of internet usage for file sharing is a direct challenge to the very foundations of intellectual property rights; this challenge calls for the formulation of new policies that will take into account the practice of file sharing between internet users and the obligation to protect intellectual property.

In this context, it would be interesting to examine the arguments and conflicting interests of peer-to-peer users “vis-à-vis” those of the copyright holders in order to better understand the matter. More specifically, we will analyze the various forms of use of peer-to-peer networks and the reasons leading network users to downloading. Parallel to this, a short recall of creators’ fundamental Property Rights (moral and patrimonial), as applied in the digital environment, will highlight the conflicting basis of this relationship. Upon this basis, we will then try to analyze the consequences of this interaction. It is merely about a legislative attempt to strike a balance between the different interests through the implementation of measures that limit them, but also about the strong willingness of governments to tackle this issue through the introduction of strict legal measures which may nevertheless undermine Internet users’ privacy. Within this framework, it is also examined how the participation in file-sharing via network activities - as a method of distributing cultural content - is handled by courts in many parts of the world in regard to Intellectual Property Law.

## **I. The conflicting interests**

### **a. The technical architecture and the key to the success of peer-to-peer networks**

Peer-to-peer is a technology that enables the exchange of digital files (audio, video, etc.) among different users, simultaneously connected to the Internet. The Internet users can act as the 'server' or the 'client' in the exchange process. Users upload files that then become available for downloading by other users of the peer-to-peer networks. This can be a recurrent procedure. There are two types of architecture in peer-to-peer networks: the centralized and the decentralized models.

The centralized type of architecture is composed of a central server, to which all users are connected directly. It centralizes all the files provided by network users, allowing all Internet users to conduct a research of files (videos, photos, software, etc.) through a central database. *Napster* is perhaps the best known peer-to-peer network of this type. This software had created a file-sharing network requiring a search engine and a central server in which were listed all the available files. The exchange concerned mainly Mp3 files. This was the first network to allow connection among several millions of users, representing the most well-defined example of 'peer-to-peer centralized' networks. However, it was on July 1999, when the Recording Industry Association of America (RIAA) was turned against the company *Napster* on the grounds that the company intentionally facilitated the illegal sharing of music files. After a two-year litigation in the United States for violating the American law on copyright, the company *Napster* ceased file-sharing activities in September 2002. After the judicial difficulties faced by *Napster* that led it to cease its operations as a peer-to-peer network, new file-sharing networks have been developed based on the absence of a central server and/or a central database and focusing mainly on the use of 'peer nodes'. This 'decentralized' network model establishes a connection with one or more peers (i.e users) using the same software. All connections are based on the same principle: to launch the search, users should be connected to one or more search machines/users, which in their turn, are doing the same thing, and so on. *Gnutella* is the spearhead of decentralized networks. After the closing of *Napster*, peer-to-peer users turned to this new protocol which is a further step for the architecture of peer-to-peer networks. *Kazaa*, *Grokster*, *eDonkey* and *Morpheus* are other well-known examples of this type of decentralized peer-to-peer networks.

However, in recent years, new peer-to-peer networks have been developed, based on the combination of centralized and decentralized systems, using multiple computers as servers with increased Internet access power ('super-nodes'). According to this new type of peer-to-peer technologies, the role of users varies depending on each computer and on the Internet connection speed. The request of a file of each user is directed to a computer (i.e user's machine) that serves as the super-node. This super-node, actually, holds its own database but it can also search the requested file through other machines (i.e computers). Once the file requested is found, the user who submitted the request can download it directly from the user's computer that provides it. *Bittorrent* has been, in recent years, the most used peer-to-peer network of this type that facilitates broadband distribution. By optimizing the maximum bandwidth of file-sending and receiving, this new application is preferred by the public.

This free and direct exchange of digital files between users through peer-to-peer networks gives room for discussion about this new technology. With a deeper view to the matter we can clearly see that the services of these networks are not limited to the simple exchange of files.

First of all, the peer-to-peer network technology can be used in the field of education in order to enable teachers to receive and send various educational resources such as courses, works or even training methods. Training and teaching

processes are therefore enhanced by this exchange practice while the principle of collectiveness is strengthened. Moreover, the use of peer-to-peer networks can foster cooperation and collaboration through the exchange of documents (texts, databases, memos, etc.) between the employees of a company. ‘Collaborative’ peer-to-peer applications can also include instant messaging, chats and online games (such as *NetMeeting*, *Groove* etc). Among the various services offered by these free networks, we could also include the ‘distributed computing’ peer-to-peer services which allow peers to bring their computing power together in order to solve a computationally intensive problem. In the case of malfunction of centralized networks, the peer-to-peer technology can guarantee data-processing security but also encourages the dissemination of protected works or even the normal operation of phone services (e.g. *Skype*). Peer-to-peer ‘storage’ services can also provide virtual stable storage allowing peers to continuously access files while preserving author anonymity (*Freenet* is an example of such systems). Finally, peer-to-peer multimedia streaming services (e.g. *Freecast*) let peers stream and broadcast audio and video among each other.

Nevertheless, downloading of cultural content is still the most widespread peer-to-peer service. However, we can observe different kinds of use of peer to peer networks for downloading, depending each time on the special needs of internet users. Indeed, for some users downloading simply facilitates their purchases in the real market in the sense that they can obtain information on the quality and price of a product online before to buy it in a real shop. On the other hand, works available in traditional forms (CDs, DVDs, etc.) still attract the consumers’ interest given that the quality of downloaded files through peer-to-peer networks is not always good enough to satisfy the users. For this category of users, downloading of files is merely seen as a secondary option than fundamental. However, we can observe another kind of users who do not contribute to the networks even though they benefit from them. This non-cooperative behaviour, almost passive, has two types: the “free riding” and the “easy riding”. Regarding the first type, the user does not contribute to the network since he/she has by all means access to the service and to commonly shared contents provided by other users. In this way, he/she does not bear the cost of the cooperation in such networks, such as technical (e.g. viruses or spam) or even legal risks (penalties for illegal diffusion of contents). As for the “easy riding”, it is the type according to which the user contributes to the service only to receive files. In this case, users share their content in order to get the files (content) they wish but once they have received this content, they cease the cooperation. However, both abovementioned types can undermine the effectiveness of peer-to-peer technologies, reduce the speed of transmission and decrease peer-to-peer systems’ utility.

The phenomenon of downloading files related to cultural content through peer-to-peer networks has clearly gained much support. However, what is the key to the success of this new technology? What are the potential changes in consumption patterns of users?

We can observe a variety of reasons leading to the downloading of files through peer-to-peer networks. One of the main reasons is the cost of the original work especially for what concerns musical or cinematographic works being downloaded through peer to peer technologies. Indeed, the public is discouraged by the high market cost of music works and/or movies either in stores or through online platforms where people must pay in order to download music or films (e.g. *iTunes* store). Many people cannot have access to culture because they cannot afford it. In

such a context, the availability of cultural works via peer-to-peer networks over the Internet plays a fundamental role in encouraging users to opt for this new technology. In fact, this new network can guarantee to everyone a free, faster and cheaper access to cultural works.

Furthermore, peer-to-peer networks undoubtedly offer a wide variety and extent of availability of contents. Users can find various music albums or film productions, new or sold out in the traditional market, in total availability. Another benefit could be the existence of subtitles in many different languages for the uploaded movies, which, coupled with the transaction speed, lead the public to downloading. In addition, through these new developed networks, users have the opportunity to discover new artists and producers who are not yet promoted by the current regime of trade. Consequently, peer-to-peer networks fulfil the needs for and expectations of cultural stimulation of consumers at the lowest possible price.

Finally, the need to 'test the product' is another reason that may lead people to use peer-to-peer networks. More specifically, users have the opportunity to test and evaluate the content and then decide whether to purchase or not. The peer-to-peer technology offers a sense of security regarding the users/consumers' choice of purchase, justifying their inclination to massive downloading of copyrighted works.

However, the distribution and exploitation of Intellectual Property contents by peer-to-peer users without the prior consent of the copyright holders can threaten creators' fundamental rights, raising political and legal uncertainties. In order to better understand the matter, it is essential to analyze in advance the Intellectual Property Rights, as they are applied in the digital environment.

## **b. The Intellectual Property Rights, applied in the digital environment**

European Union member-States generally have a common legal basis on Intellectual Property Rights (moral and patrimonial), complying with international and European Union legal instruments.

Generally speaking, the moral right of the author is divided mainly into the following basic privileges: a) the right to decide on the (first) disclosure of his/her work to the public, but also on the mode and time of publication; b) the right to the respect to his/her work, that is to say, the right to oppose to any modification or alteration made on the work; c) the right to authorship, which allows the author to claim that his/her name shall be mentioned on his/her work or even the right to publish the work anonymously or pseudonymously; and finally d) the right to repentance and withdrawing, according to which the author has the right at any time, after the publication of his/her work, to prohibit exploitation by third parties or even revise of the work.

But how these rights applied in the environment of new technologies could be threatened?

With regard to the right to decide on the disclosure of the work, since the author has also the exclusive right to the first publication of his/her work, this right shall apply to any publication that takes place in both the real and digital environment. In fact, undermining the moral right of the author is a fairly widespread phenomenon in networks, consisting in the free circulation and exchange of works

unpublished or even unfinished over the Internet, without the prior consent of the author.

As for the right to the respect of the work, the author may oppose to any eventual modification to his/her work, even when it concerns non-material modifications. As far as there is digitalization (e.g the reproduction on a Cd-Rom) of a work, the creator could see these rights threatened. Moreover, the conversion of recordings into an analog format or mp3 ringtones may constitute a serious distortion of the original music content, since it is an operation that modifies the original sound.

Similarly, the right to the respect of the author's name may be impaired to the digital environment since the reproduction of a work, as described above, is usually realized without any reference to copyright holders. Indeed, being aware of the prohibition of this kind of reproduction and in an effort to avoid the authorship right infringement, network users usually hide files by changing the names of author's, violating the creator's right to authorship. Thus, the provisions of the article 7 of the European Directive of 22 May 2001 [*Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*], require that European Union member-States should punish all users that modify or delete any copyright-related information in electronic form.

Finally, the implementation of the right to repentance and withdrawing into the digital environment is compromised in an irreversible way because, due to new technologies, it seems to be even easier to proceed to alteration of cultural contents which have been already published, even if the copyright holder has previously denied or prohibited such activities or intends to revise and adjust his/her work in the future, at his/her own discretion.

In addition, copyright holders have also the principal right to the exploitation of their work, distinguished into the right of reproduction and the right of representation of the work, that is to say, the author may authorize or deny any reproduction and/or representation of his/her work, made without his/her prior consent.

Indicatively, the right of reproduction means that the author has the exclusive right to decide for the registration, translation, adaptation, and/or alteration of his/her work. The right of representation enables the author to decide whether and when to communicate his/her work, and more specifically to distribute, present, perform, transmit or retransmit it to the public.

However, several international legal texts and declarations have extended, through provisions they include, the right of reproduction described above to the digital environment. For example, the European Directive of 22 May 2001 in its article 2, introduces the principle of the exclusive right of the author to authorize or prohibit “...*direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part...*”. Thus, the concept of digitalization consists in recording an analog work into a digital form, requiring both an act of alteration and an act of reproduction. Therefore, the adaptation of an analog work to a digital platform or a Cd-Rom and its further storage in an electronic platform highlights the risk of infringement of the creator's right of reproduction in the digital environment.

Similarly, the definition adopted by the European Directive of 22 May 2001 related to the creator's right of representation of his/her work, determines how this right can also be implemented in the digital environment. More specifically, the article 3.1 of the Directive reads “[authors can]...*authorize or prohibit any*

*communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them*". The accessibility to a work by the public by means of new technologies undoubtedly consists in a form of 'public communication', as described above. Indeed, the author's right of representation may be applied and further endangered by the activity of 'streaming' which allows the user to access data files even before the ending of the downloading via peer-to-peer networks.

It would be therefore interesting to examine within the framework of peer-to-peer technologies how actually the aforementioned Intellectual Property Rights interact with the application of these networks over the Internet.

Firstly, according to the provisions of the World Intellectual Property Organization (WIPO) Copyright Treaty of 1996 [*WCT, adopted in Geneva on December 20, 1996*], the exchange of protected works over the Internet via the application of peer-to-peer networks consists of activities that are subject to the authorization of the author.

More specifically, peer-to-peer users, as we already examined, can make a work from their hard disk available to all Internet users having installed the software necessary for the exchange of files via peer-to-peer networks (uploading). Indeed, according to the architecture of peer-to-peer networks, all works, once downloaded, are automatically made available to other users. Furthermore, 'uploading' can also be made through digitalization of the work, an activity that consists, as we mentioned above, in reproducing the work. In both cases, making a work available to other users through peer-to-peer networks constitutes an infringement of the exclusive right of the creator to decide for the diffusion of the work also in digital environment.

Nonetheless, users reproduce through 'downloading' a work on the hard disk of their computer. Indeed, storage in the hard disk of a computer constitutes an act of reproduction. Consequently, this activity is made up by registration in the hardware part of a computer and furthermore by a procedure that allows the communication of the work to the public, contributing to the violation of the right of reproduction. Moreover, this reproduction can also take place by burning files to a Cd platform.

Faced with technological evolution and the rapid development of file-sharing networks which resulted in significant risks for copyright holders, governments have tried to find a way to strike a balance between the wide diffusion of cultural works and the preservation of authors' fundamental rights. This search of balance consists of legal measures delineating the different interests, but also of the promotion of legal solutions aiming to answer to the controversy raised by the application of peer-to-peer networks.

## **II. In search of balance**

### **a. A reconciliation based on technical protection measures and the exceptions to copyright**

In an effort to balance the different interests, the WIPO Treaty of 1996 [*WIPO Copyright Treaty (adopted in Geneva on December 20, 1996)*], adapted the provisions of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, to the digital environment. Also, the European Directive of 22 May 2001 related to the harmonization of certain aspects of copyright and related rights in the information society, aimed to harmonize the national legislations of EU member-States in relation to Intellectual Property, after taking into account the impact of new information technologies, through the implementation of new measures aiming at the protection of Intellectual Property Rights.

Indeed, article 11 of the aforementioned WIPO Treaty on copyright, stipulates the obligation of member-States to take legal action against the distortion of effective technological measures that are used by the authors in respect of their rights on their works. In this content, article 6 of the European Directive of 22 May 2001, also requires member-States to take effective technological measures against any activity designed to cancel the protection of protected works. According to its provisions “technological measures” consist to “*any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the right holder of any copyright and right related to copyright ...*”. However, these technological measures shall be deemed effective as far as “*the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective*”.

For example, a type of technological protection measure is the Inter Deposit Digital Number (IDDN) system, which contains all the data of a protected work, as soon as reference on this work has been made on-line. The international IDDN number is designed to accompany the work in all its reproductions and representations, and the right holder can thus always be identified. Moreover, we can also identify the development of devices such as the Windows Media Audio (WMA) which allows the limitation of acts of reproduction since the protected work that has been downloaded on the Internet can be burned only twice to a Cd, while it cannot be transferred more than ten times.

Thanks to the legal protection of works through the application of technological protection measures, the violation of the intellectual property rights of authors is quasi controlled or even limited through peer-to-peer networks. The need to protect the fundamental rights of the author is fostered by these measures, while the prohibition of illegal exploitation of works by users is effected through international legal instruments.

On the other hand, the protection and security granted to the authors by technological measures is limited because of the legal regime of the exceptions to the exploitation of a work in favor of the users. Indeed, several international and/or European legal instruments introduce such exceptions in relation to the exploitation (i.e reproduction) of a protected work, through a ‘three-step test’. This ‘triple test’ constitutes the legal framework of the exceptions applied to intellectual property rights of authors, striking a balance between the different interests of the peer-to-peer networks’ users and those of the copyright holders.

More specifically, the three-step test appears in article 9 par. 2 of the Berne Convention, in the article 13 of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) of the World Trade Organization (WTO) [*signed in*

*Marrakesh, Morocco on 15 April 1994]* but also in the WIPO Treaty of 1996. However, the European Directive of 22 May 2001 foresees further exceptions and limitations to copyright, obliging member-States to adopt such measures in order to guarantee the normal application of these exceptions on author's work. Among these exceptions we can indentify the exception of a reproduction made for private use (i.e the regime of 'private copy') "*on condition that the right holders receive fair compensation*", which takes account of the application or non-application of the technological measures mentioned above. Thus, according to article 5 of the European Directive of 22 May 2001 which also determines the regime of the 'triple test', this exception of 'private copy' "*shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder*".

Consequently, the regime of the exception for private copy, being limited as described above through the triple test and on a not-free basis may be implemented in the national legislation of member-States, at their own discretion, giving the opportunity to juridical cases to invoke the exception of 'private copy' in order to release the accused from penalties for infringement of copyright through peer to peer networks, as it is hereinafter examined.

We can observe that the conciliation of the interests of users and those of right holders is principally achieved through legislative means and especially through the introduction of legal provisions aiming to restrict the rights of both sides. However, the wide spread of piracy over the internet and the consequent increase of copyright infringement, often lead governments to adopt stringent legislative measures which can though threaten the constitutional rights of users.

#### **b. A regime of legal downloading and strict legal measures, a response to internet piracy?**

The French government has shown keen interest in the repression of illegal internet activities, not only through the introduction of strict legislation against peer-to-peer networks, but also through the implementation of preventive actions against internet piracy on a more concrete and more practical basis.

In July 2004, the establishment of a national committee against piracy and the signature of an 'anti-piracy charter' ('charte anti-piratage') can be considered as a decisive step in the fight against internet piracy in France. This initiative has three components: the first deals with the awareness of Internet users in order to alert them on the dangers of peer to peer activities but also inform them about the illegal character of the exchanges of protected works by these means. The second component aims at the promotion and development of legal offers of downloading of music files put forward by music industries in order to satisfy consumers' interests. The third component underlines the intention of the French government to facilitate the conviction of Internet users through the implementation of measures aiming at user's disconnection and termination of his/her access to internet.

This 'anti-piracy charter' has introduced stricter and more concrete measures against illegal downloading of files through peer to peer networks. Yet, we can observe that until today, all aspects of the charter were implemented by the French government.

Actually, it was in September 2007 when the French government assigned to Mr. Olivennes, the task to give an end to the phenomenon of illegal downloading, by

implementing the provisions of the aforementioned charter. The “Commission Olivennes” aimed specifically to reconcile copyright with the interests of Internet users through the outlining of a legal framework. In 23 November 2007, Mr. Olivennes submitted to the President of the French Republic its report on a project agreement on the protection of cultural works through new technologies. More specifically, the measures proposed in this project aimed to encourage the promotion of legal distribution of works through the Internet but also to fight against internet piracy and illegal downloading. The ‘Commission Olivennes’ proposed to increase the attractiveness of the legal offer of contents over the internet through wider availability of works on legal on-line commercial sites. The report also suggested that the regime of legal downloading should be more competitive by reducing the price of online contents. Furthermore, it introduced the implementation of sanction mechanisms adapted to a system of 'graduated response' ('réponse graduée'). In addition, it created an administrative authority in charge of supervising and controlling the efforts and actions to counteract illegal downloading by sending warning messages to infringers in case of complaints of right holders. In case they do not comply, they will see their Internet subscription suspended or terminated.

All measures and goals described above were finally incorporated into the law known as “Hadopi Law” (*Loi Hadopi*) or “Loi Création et Internet (Law on Creation and the Internet)” incorporated into the French legislation on 12 June 2009, aiming to control and regulate internet access and to protect copyright. This legal instrument created an agency called “*Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet*” for the diffusion of works and the protection of copyright over the internet. It has the competence to protect works against digital infringements, encourages the development of legal distribution of contents on internet, supervises how users make use of these contents and finally ensures an effective regulation and implementation of technical protection measures. This authority is composed by a college and a commission for copyright protection. More specifically, this authority requires from the internet service provider to provide all the information necessary in order for the infringer (user) to be identified. Once the authority obtains this information, it sends a first warning e-mail to the e-mail address of the user, reminding the French legal provisions for the copyright violation. This email specifies the time of the claim but neither the object of the claim nor the identity of the claimant. In case repeated offense is suspected through internet technologies within six months, the offending internet access subscriber receives a second warning with similar content to the aforementioned email message, accompanied this time by a certified letter. In case the offender fails to comply during the year following the reception of the certified letter, and upon accusation of repeated offenses, the internet service provider is required to suspend internet access of the offender, for a specified period from two months to one year. Furthermore, the internet access subscriber is blacklisted and other internet service providers are prohibited from providing an internet connection to this blacklisted subscriber.

The law of 28 October 2009 (“loi Hadopi 2”) supplements the law of 12 June 2009 as the latter has been partially criticized by the Constitutional Council of France. The new legal dispositions specify the power of the agents of the Commission for the protection of copyright, while establishing the framework for the offence due to negligence. Furthermore, the judges are granted the authority to decide for the suspension of the user’s access to the internet. However, this suspension can only be extended up to one year if the alleged act constitutes a copyright infringement and up to one month in case of negligence.

In practice, this effort to fight against the phenomenon of digital piracy through the offer of alternative solutions to the use of peer to peer networks became understood by many music industries which have promoted and developed websites for legal downloading of music files, such as the well known [www.promusicfrance.com](http://www.promusicfrance.com). In addition, the platform Wippit has entered into many agreements with major recording industries (e.g BMG and EMI) for the online downloading and sale of music files. The number of songs available online has yet been significant, reaching about 200,000, whereas the content of Wippit has significantly increased. Furthermore, in 2007 new sites as YouTube, MySpace or Facebook made their appearance, as they allow the free and wide circulation of cultural content through 'streaming'. To protect copyright, these sites often proceed to an agreement with recording companies or producers in order to distribute their cultural contents legally.

This notwithstanding, the strict new measures introduced by the Hadopi Law for the fighting against internet piracy is often perceived unfavorably by the public. The investigation and further storage and exploitation of their personal data (i.e address, name etc.) via their IP address by the Authority, seems to threaten the fundamental rights on the protection of personal data of every individual. The continuous controversy between fundamental rights of each part (i.e author's and user's rights) caused by the use of peer to peer networks leads to the conclusion that the conciliation of interests has become a top priority. However, this controversy raised about peer to peer networks could not remain outside the juridical realm. Indeed, the courts all around the world are called to apply the legal instruments they have at their disposal, in an effort to strike a balance between the legal and the illegal aspects of peer to peer networks.

### **III. The conviction issued by the courts**

#### **a. The conviction of software distributors**

The judicial remedy for the exchange of protected works through peer to peer networks is closely linked to the gradual development of the architecture of this technology, which has shaped the judicial decisions and practices.

At first, copyright holders turned against the companies distributing the software used for the illegal exchange of works, given that tracing and accusing peer to peer users was still difficult. Adverse jurisdictions for the peer to peer networks in the United States are characterized rather by the condemnation of publishers and suppliers of software encouraging the exchange of files than by the condemnation of users of such networks. Indeed, the example of the condemnation of Napster that we analysed above, based on the fact that the company facilitated the illegal exchange of music files providing freely the software for this purpose, forms the basis of judicial decisions on peer to peer technologies in the USA. Similarly, the Supreme Court of the United States, in June 2005, came up to the point that the editors of Grokster and Morpheus, by providing the means (i.e software) to file-sharing via peer to peer networks, intended to allow and encourage the infringement

of third parties' copyright. Actually, the Supreme Court focused on the demonstration of bad faith of the accused as they knew the illicit side of their business. The Supreme Court noted that the two editors had encouraged Napster users to opt for the use their software, whereas they did nothing to curb the illegal use of contents. The fact that this activity clearly constituted a source of income, led the Court to hold the defendants responsible.

More recently, the Federal Court of the U.S decided to shut down the well known "LimeWire" services of file-sharing, based on the fact that the recording companies (including Sony Music, Warner Music, EMI) claimed that they suffered irreparable damage from the illegal file-sharing through peer to peer networks. The most interesting point about this decision is that the court considered that software distributing companies can be guilty for copyright infringement, as soon as they offer services designed to download illegal files, even if these services may be used for legitimate files.

Such kinds of decisions have also been issued elsewhere in the world. For instance, in 2005, in Australia, some companies were indicted for producing peer-to-peer software. This is the case of the decision taken by the High Court of Australia in September 2005, ruling against the company "Sherman License Holdings Ltd" for violation of the copyright on protected works by using the software "Kazaa". Indeed, the company was held responsible for infringement of intellectual property on the basis that it took no action or measure against these illegal activities in order to prevent the infringement. Furthermore, even more recently, the Court of First Instance of Paris [*Tribunal de grande instance de Paris 31ème chambre Jugement du 3 septembre 2009*] decided on the conviction and the further closing of the company named 'Mubility' for illegal reproduction and diffusion of programs and videos. More specifically the company finally closed on the grounds that there has been illegally disposed, via its website, a) a software named "radioblog 2.5" enabling the circulation of phonograms through the internet, under the form of playlists, while this software permitted at the same time the automatic referencing of these playlists on the website of the Mubility company, and b) a software named 'radioblog 3.1', allowing the illegal communication of phonograms to internet users through the act of downloading of the said software.

## **b. The conviction of peer to peer users**

There has also been a change in the 'strategy' followed by copyright holders who have switched from identifying and taking the companies that distribute the peer to peer software to the court to suing directly the users. This change is due to the evolution of technology and the change of the architecture and the general functioning of peer to peer networks. The conviction of users seems to have a deterring character as it aims to clearly discourage the violation of intellectual property rights. Indeed, criminal judgments charging Internet users with high penalties can clearly demonstrate the general willingness of recording industries and copyright holders to discourage peer to peer network users from sharing files. However, the protection of the privacy and security of communications are often brought up before the courts as a 'shield' by the users in order to contain the detection and the conviction of activities committed via peer to peer networks. The way jurisprudence is interpreted and applied throughout the years in Europe and the United States, underlines the debate on

the relationship between the interests of peer to peer users and those of copyright holders, from a practical point of view.

The Recording Industry Association of America (RIAA), brought for the first time to the courts of America, a case of illegal downloading of contents. Jammie Thomas was sentenced on October 2007, by the court in Duluth (Minnesota) to pay 222,000 US dollars for damages to six music industries including Virgin Records, Sony BMG and Warner Music, on the basis of illegal downloading and sharing of files and further violation of intellectual property of copyright holders. In 2005, the accused had made available on internet via the Kazaa network, about 1,702 music songs. However, out of almost 2,000 music files, RIAA accused the defendant only for the downloading of 24 songs. The defence claimed that it could not be proved that the accused had actually downloaded music files, whereas they underlined the possibility of misuse of the IP address of the accused by a hacker. The judge decided that making files available for downloading is sufficient enough to make someone guilty for copyright infringement. So, there was no need to prove that these songs had been downloaded by other users or by the accused itself.

This judicial case sets a legal basis for the condemnation of peer to peer users in America. Indeed, it is the first time that a dispute between a peer to peer user and the RIAA is brought before the court. On the other hand, the judge, not convinced by the arguments of the accused, ignored the fact that it is almost impossible to prove that a particular person uses a computer and proceeds to downloading via peer to peer networks at a specific time. The court actually concluded that the name appearing on the internet access bills can be enough to prove that this person is using its computer and is further responsible for the illegal downloading of files via peer to peer networks at any time. This highlights the strict policy of judges against the exchange of cultural contents through new technologies, as the peer to peer networks.

In Europe, the judicial basis for the conviction of peer to peer users, despite of putting forward privacy as a threshold for intellectual property rights, is well established upon the example of French courts. The Appeal Court of Paris in its decision of April 2007 [*Cour d'appel de Paris, 13ème chambre, section B Arrêt du 27 avril 2007*] sanctioned the downloading of approximately 2,000 music files on Kazaa, rejecting the argument of the exception for private use of copies. The Court held that the existence of files compressed into a 'shared folder' named as such on the computer of the accused, proved that he/she knew that public could have access to his/her own files. The fine imposed to the accused was amounted to 5,000 Euros.

In other cases, the courts accepted the argument of copying for private use, as for the reproduction of works committed through peer to peer networks, acquitting users from a particular indictment for illegal reproduction. It was on 10 March 2005 when the Appeal Court of Montpellier [*Cour d'appel de Montpellier 3ème chambre correctionnelle Arrêt du 10 mars 2005*] reiterated the decision of the Court of Rodez of 2004, according to which the limitation of copyright on private copying applies also to reproductions committed via peer to peer networks. Indeed, this case concerned the reproduction of audiovisual works (i.e almost 500 movie films) on disks by the accused, after having downloaded these movies by using peer to peer technologies. The user was finally acquitted for its act of distributing cultural works since there was not sufficient evidence that these contents had been accessed through peer to peer networks. Moreover, the judge, confirming the claims of the accused, ruled that, according to the provisions of the French intellectual property code, the acts of the accused were based on the exception of private copying. Similarly, the

decision of the Court of Bayonne on 15 November 2005 [*Tribunal de grande instance de Bayonne Jugement du 15 novembre 2005*] held that the act of downloading MP3 files via the peer to peer software 'Kazaa' was neither a crime of concealment, nor an act of illegal copying of music. Therefore, the judge ruled that '*... by storing on the hard disk of his computer music content, or by burning them to CD ROM, the accused had simply exercised its right to establish a copy for personal use; so, he should be acquitted of the surplus continued (...) the accused had not any purpose of personal enrichment, it was in a precarious situation, and that a basic sentence should be imposed..*'. The judge considered that it was not possible to quantify the exact number of acts of file-sharing. Finally, the user who made protected files available to other users was only sentenced to a fine of 750 euro on the basis of 'uploading' and to 700 euro for damages.

However, the juridical handling of these issues related to peer to peer networks by the courts of the United States and European countries, as analyzed above, may highlight the instability that characterizes the judicial crisis related to these technologies. In fact, the particularities of peer to peer technologies imply that the conviction of peer to peer users can be subject to diverse opinions with regard to its effectiveness against copyright piracy through the internet. This is because of the existence of a legislative shield for peer to peer users, as we examined above, ensuring the legal exploitation (i.e reproduction) of works upon the condition of private use. The harmonization of different interests seems therefore to be more complicated or even unrealistic. In fact, the evolution of new practices of copyright infringement, such as the development of web services (i.e. YouTube, Dailymotion or Myspace etc.), but also new types of offences via new technologies, render the conciliation of the different interests a complex issue.

Copyright holders and peer to peer users are in an ongoing debate that is developing at a rapid and steady pace. We can observe the very nature of this conflict through legislation, but especially through jurisprudence, where the opposing parties put forward their arguments and claim economic or moral compensation. The need for a conciliation of interests becomes imminent. But, the attempt to seek solutions to the phenomenon of peer to peer networks under different perspectives is always made on a legal basis. Indeed, for all governmental institutions the solution to the problem, the balance between the different parties can be found in the application of the law. According to the legislator, the balance can be stricken by means of legislative provisions and the legal limitations applied to the opposite interests. The different interests can therefore be put forward in accordance to the interpretation of the jurisprudence by taking into consideration the special circumstances, in an effort to maintain an impartial and fair stance. My personal opinion is that this is not enough; in order for any solution to be viable it has to depend not only on the provisions of the law but also on our individual moral principles and respect of others.

*“The right to swing my fist ends where the other man's nose begins”*  
(Oliver Wendell Holmes, Jr., jurist)

## References

### **Books:**

- ΣΥΝΟΔΙΝΟΥ ΤΑΤΙΑΝΑ – ΕΛΕΝΗ (2008), *Πνευματική ιδιοκτησία & Νέες Τεχνολογίες – Η σχέση χρήστη – δημιουργού*, Εκδόσεις Σάκκουλα,
- BARBET Philippe – LIOTARD Isabelle (2006), *Sociétés de l'information: enjeux économiques et juridiques*, L'Harmattan,
- DELPRAT Laurent – HALPERN Céline (2007), *Communication et Internet: pouvoirs et droits*, Vuibert,
- FERAL-SCHUHL Christiane (2006), *Cyberdroit – Le droit à l'épreuve de l'Internet*, Dalloz,
- GUINCHARD Serge – HARICHAUX Michèle – TOURDONN Renaud (2001), *Internet pour le droit : connexion, recherche, droit*, Montchrestie,
- LUCAS André (1998), *Droit d'auteur et numérique*, Litec,
- QUEMENER Myriam – FERRY Joël, (2007) *Cybercriminalité – Défi mondial et réponses*, Economica,
- RAVAZ Bruno – RETTERER Stéphane (2006), *Droit de l'information et de la communication*, Ellipses,
- WEKSTEIN Isabelle (2002), *Droits voisins du droit d'auteur et numérique*, Litec,
- LUCAS André (1998), *Droit d'auteur et numérique*, Litec.

### **Articles :**

- AUROUX Jean-Baptist (December 2007), *Rapport Olivennes: les grandes lignes de la loi DADVSI 2?* Revue Lamy Droit de l'immatériel, n 33,
- BAUWENS Michel – REMI Sussan, (2005) *Le 'peer to peer': nouvelle formation sociale, nouveau modèle civilisationnel*, Revue du Mauss semestrielle, Alter-démocratie, alter-économie, n 26,
- COULAUD Mathieu – MARIEZ Jean-Sébastien, (January 2008) *L'évolution de la protection des œuvres sur les réseaux numériques ou le choix du mode contractuel*, Revue Lamy Droit de l'immatériel, n 34, 55
- SINGH Asim, (June 2007) *La qualification juridique des actes accomplis dans un réseau 'peer to peer'*, Revue Lamy Droit de l'immatériel, n 28

### **Internet:**

- Munindar P. Singh, Shengru Tu (2009), *Free Riding in Peer to Peer Networks*, online at :  
[http://www.cs.bilkent.edu.tr/~p2p/ieee\\_internet\\_computing.pdf](http://www.cs.bilkent.edu.tr/~p2p/ieee_internet_computing.pdf) / accessed 18.3.2011
- Synthèse du Forum de Discussion (2003), *Peer to Peer : Quelle utilisation pour quels usages ?* online at :  
<http://www.foruminternet.org/telechargement/documents/syn-p2p-20030620.htm> / accessed 18.3.2011
- Text of *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, online at :  
[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=126977](http://www.wipo.int/wipolex/en/text.jsp?file_id=126977) / accessed 19.3.2011

- Text of *WIPO Copyright Treaty (adopted in Geneva on December 20, 1996)*, online at :  
[http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs\\_wo033.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf) / accessed 19.3.2011,
- Text of *Uruguay Round Agreement: TRIPS, Trade Related Aspects of Intellectual Property Rights*, online at :  
<http://www.wipo.int/treaties/en/agreement/trips.html> / accessed 20.3.2011
- Text of *LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (1)*, online at:  
<http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020735432&fastPos=1&fastReqId=1885736834&categorieLien=id&oldAction=rechTexte> / accessed 19.3.2011
- Text of *LOI n° 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet (1)* online at:  
<http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021208046&fastPos=1&fastReqId=1775307367&categorieLien=id&oldAction=rechTexte> / accessed 20.3.2011
- Le Forum des Droits sur Internet (2005), *Peer to Peer : la Cour Suprême des Etats-Unis d'Amérique condamne....un business model*, online at :  
<http://www.foruminternet.org/specialistes/veille-juridique/actualites/peer-to-peer-la-cour-supreme-des-tats-unis-d-amerique-condamne-un-business-model.html> / accessed 20.3.2011
- Sébastien Delahaye (2007) *Justice et piratage : 9250 dollars par chanson téléchargée*, online at :  
<http://www.ecrans.fr/Justice-et-piratage-9250-dollars.2265.html> /accessed 20.3.2011
- Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet (2011), *Hadopi, biens culturels et usages d'internet pratiques et perceptions des internautes français*, online at :  
<http://www.hadopi.fr/download/hadopiT0.pdf> / accessed 21.3.2011
- International Protection of Author's rights and neighboring rights online at:  
<http://www.iddn.com/> accessed 25.3.2011
- LE MONDE (13.5.2010) *Téléchargement illégal : Limewire reconnu coupable*, online at :  
[http://www.lemonde.fr/technologies/article/2010/05/13/telechargement-illegal-limewire-reconnu-coupable\\_1350848\\_651865.html](http://www.lemonde.fr/technologies/article/2010/05/13/telechargement-illegal-limewire-reconnu-coupable_1350848_651865.html) / accessed 21.3.2011
- Discours et communiqués, *Charte d'engagements pour le développement de l'offre légale de musique en ligne, le respect de la propriété intellectuelle et la lutte contre la piraterie numérique*, online at :  
<http://www.culture.gouv.fr/culture/actualites/conferen/donnedieu/charte280704.htm> / accessed 22.3.2011.
- Le Développement et la protection des oeuvres culturelles sur les nouveaux réseaux (2007), *Rapport au Minister de la Culture et de la Communication* online at:  
[http://www.culture.gouv.fr/culture/actualites/conferen/albanel/rapportolivenne\\_s231107.pdf](http://www.culture.gouv.fr/culture/actualites/conferen/albanel/rapportolivenne_s231107.pdf) / accessed 22.3.2011
- Text of the decision of *Cour d'appel de Montpellier 3ème chambre correctionnelle Arrêt du 10 mars 2005*, online at:

[http://www.legalis.net/jurisprudence-decision.php3?id\\_article=2035](http://www.legalis.net/jurisprudence-decision.php3?id_article=2035) / accessed 22.3.2011

- Text of the decision of *Tribunal de grande instance de Bayonne Jugement du 15 novembre 2005*, online at:  
[http://www.legalis.net/jurisprudence-decision.php3?id\\_article=1559](http://www.legalis.net/jurisprudence-decision.php3?id_article=1559) / accessed 22.3.2011
- Text of the decision of *Cour d'appel de Paris, 13ème chambre, section B Arrêt du 27 avril 2007*, online at:  
[http://www.legalis.net/jurisprudence-decision.php3?id\\_article=1954](http://www.legalis.net/jurisprudence-decision.php3?id_article=1954) / accessed 22.3.2011
- Text of the decision of *Tribunal de grande instance de Paris 31ème chambre Jugement du 3 septembre 2009*, online at:  
[http://legalis.net/spip.php?page=jurisprudence-decision&id\\_article=2714](http://legalis.net/spip.php?page=jurisprudence-decision&id_article=2714) / accessed 22.3.2011.