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Abstract :

The development of information technologies in what is often referred to as the “*information society*” is at the origin of new uses, new exchanges which necessitate the implementation of new economic and judicial models. The copyright constraints and above all its immateriality have not only been misunderstood but also ignored by society. Recently, French parliament has proclaimed the principle of illegality of peer to peer file sharing between internet users. We will need to reconcile a fair and equal compensation of “authors”, taking into consideration international legal constraints regarding free access to knowledge and information, as required by the Tunis agreement. The issue of the compensation of authors therefore appears to be one of the most important aspects the new internet governance.

Keywords :

« *Peer to peer* », intellectual property, DADVSI

Résumé :

Le développement des technologies de l'information dans ce que l'on appelle la « *société de l'information* » est à l'origine de nouveaux usages, de nouveaux échanges qui imposent, de manière coercitive, la mise en place de nouveaux modèles économiques et juridiques. Les contraintes du droit d'auteur et surtout son immatériabilité étaient alors mal comprises voire ignorées par le corps social. Récemment les parlementaires français posaient dans des circonstances exceptionnelles le principe de l'illégalité du téléchargement entre internautes. Il faudra conjuguer : juste et équitable rémunération des auteurs, prise en considération des contraintes juridiques internationales avec la garantie de l'accès à la connaissance et à l'information pour tous, conformément à l'engagement de Tunis. La question de la rémunération des auteurs apparaît donc comme un des aspects majeurs de la gouvernance de l'Internet.

Mots-clefs :

« *Peer to peer* », propriété intellectuelle, DADVSI.

*« Information society and intellectual property –
The search for new ways of paying authors »*

Regarding the controversy of “peer to peer” downloading, the French Senate has just confirmed the broad lines of the project called “Droits d’auteur et droits voisins dans la société de l’information” adopted by “l’Assemblée Nationale” in its first reading.

Therefore, the parliament tries to seize the new practices and uses permitted by the advent of the “*information society*”. Digitalization of information allows the propagation and the distribution of goods considered as informational without time or territory restrictions. However this tremendous technical advance as regards quality of preservation, stocking, reproduction and functionalities of works has become a real threat for the intellectual property of authors. The constraints of copyright and especially its immateriality are poorly understood, or even ignored by society. Internet users did not hesitate to seize works, thus depriving their authors of a fair compensation, and became “pirates”. For a certain number of people, it was the economic system itself of mechanical distribution, which had become obsolete¹. As the increase of the loss in commercial revenues led to a reduction in the share of minors’ artists, authors’ associations started fighting against the existence of such a threat against creation and cultural diversity.

Faced with these new challenges, the conduct of governments under the pressure of lobbies and after a few attempts at establishing responsibilities (such as the attempts based on “fair use”) was to answer with legal sanctions. In France, repression met with technical and judicial limits especially the protection of

personal data² and the notion of “private copy exception”. The controversy occupied an enlarged area of communication (authors and holders of similar rights, internet users, collective management societies, multinational companies of the music industry and cinema, politicians, institutional...) to become a real issue of society.

The Year 2005 was the year of the “case law” debate, while the year 2006 has become the year of the legislative debate. All the actors remain mobilized, from Internet users to broadcasting companies. During the parliamentary debates of the end of 2005, the “Assemblée Nationale” then in search of an impossible consensus, the “Assemblée Nationale” voted under exceptional circumstances for the legality of peer to peer file sharing between Internet users and for the principle of a legal license. This process was planning a fixed compensation for the authors by Internet users. Being against the projects of the government the initiative was censored in favour of new penal measures banning peer to peer downloading.

Several ideas regarding the compensation of authors conflicted here. It is necessary to combine a just and fair compensation for the authors, while taking international legal constraint into consideration with the guarantee of access to knowledge and information for all. However, legislators insist on a criminal issue to protect authors royalties. The efficiency of these measures remains relative. It takes us back to the search of new models of paying authors.

¹ “Aujourd’hui, le rôle de l’intermédiaire est terminé. Grâce au peer-to-peer le système de distribution mécanique, qui a rapporté tant d’argent pendant si longtemps à l’industrie musicale, est devenu obsolète » Gilberto Gil, auteur compositeur et Ministre de la culture du Brésil. Conférence “[Condividi Conoscenza : la cultura incontra la rete](#)” jeudi 9 juin, Venise, Scoletta dei calegheri, Campo San Tomae

² FRAYSSINET Jean « Attention en cas d’abus le Sell peut être dangereux pour la contrefaçon de logiciels de jeux ! » Legipresse n°221 Mai 2005 p.75

Recent developments regarding French criminal code jurisprudence pertaining to online downloading.

For several months, criminal qualification of illicit downloading of works protected by copyright, remained indefinite. The Court of cassation (The french supreme private law Court) never reached on that question. The "outlines of the apprehension of downloading" by the law were not perceived until 2005.

The first stage of what could be call " the battle of copyright " began on 5th February, 2005 with a decision of the Pontoise Criminal Court. The Court gave a suspended sentence of 3000 € to a teacher, making the front pages of the newspaper "Le Monde". This decision of the Pontoise Criminal Court considered that the offence of forgery was constituted by sharing musical files thanks to a "peer to peer" program.

Several decisions came to clarify the substantive law on the question. Thus a noteworthy decision taken by Montpellier Court of Appeal on 10th March, 2005 discharged a defendant prosecuted of forgery, who confessed downloading nearly a third of 488 films that he had burnt for his personal use.

The Court justified its decision by considering that no collective use of these copies had been demonstrated and finally recognized in the act of downloading, the exercise of a right based on the exceptions provided for in articles L. 122-5, L211-3 and L214-1 of the intellectual property code.

The synthesis of these two decisions whose facts differ, could be found in a decision of the Meaux Criminal court dated April 21st, 2005. The decision established a distinction between acts coming under the exception of private copy and those constituting a public distribution. Downloading came under the right of private copy while public distribution (brought about through upload), often imposed by "peer to peer" programs constituted the offence of forgery. This

solution was clearly asserted by judges: " Each of the accused recognized having downloaded the musical files and the videos found on their hard disks or on CD ROM, thanks to "peer to peer" exchange programs allowing them to reach files stored by the other Internet users, on condition that at the same time, they give these other Internet users a part of their files ... This public distribution through broadcasting of works the rights of which they did not hold constitute an offence of forgery provided for in article L335-4 of the French intellectual property code .

A contrario, if collective use was not proved, as well as the public distribution, the malpractice of forgery was not established and the exception private copy was recognized; That is on what decided the Montpellier Court of appeal on March 10th, 2005:

« Attendu que le prévenu a déclaré avoir effectué les copies uniquement pour un usage privé, qu'il n'est démontré aucun usage collectif...Attendu qu'on ne peut déduire de ces seuls faits que les copies réalisées ne l'ont pas été en vue de l'usage privé visé par le texte... »

" Considering that the accused declared having made copies only for a private use, considering that no collective use has been demonstrated ... Given that we cannot deduct these facts only that the copies were not made with the aim of private use laid down by author... "

Given up the offence of forgery in favour of the criminal offense of infringement

The solution adopted by the case law based on the exception of private copy was then unacceptable for the producers of works and for certain artists, as it did not protect sufficiently their royalties. Moreover, the incrimination of counterfeit was badly accepted, a million of users would have been liable to be prosecuted. The users militated then for the freedom of remote loading in the name of the freedom of communication. Some representatives, sometimes confronted with a

similar behaviour in their own homes, proposed the institution of a system of payment for the authors called "global license" brought about through a tax of 7 Euros, accessory to the services of Internet supply of access.

This solution has not been retained by project DADVSI, as adopted by the *Senat*, for still in favour of a criminal issue.

These malpractices constitute infractions. The distinction was thus preserved between simple downloading and public distribution. The solution therefore appears more adequate and more efficient to sanction millions of "pirates".

The criminal offense of the technical supply of services at the origin of downloading.

Something new: the creation of a new criminal offense aimed against the creators and the distributors of sharing programs.

Softwares intended for collective work, research or exchange of files not subject to royalties are not concerned by this ban, as the legislator refuses to censor "collective intelligence" tools. Nevertheless the terms used are indistinct enough to authorize several interpretations and, given in front of the different practices authorized by the already existing software, we may wonder where will be given the distinction between the legal devices and the illicit uses ?

The Supreme Court of The United States, was already confronted with the same problem on the occasion of "Grokster" verdict, dated June 27th, 2005 and previously during the affair "Sony-Betamax". The trial "Sony-Betamax" in the disputes dividing producers of softwares of "peer to peer" sharing programs and producers of music and films, clarified that the responsibility of someone who proposes a product susceptible to licit use in a substantial way could not be involved, even though their product could be used for forgery, as softwares of "peer to peer" allows the exchange of files free of rights, their editors were not to be condemned.

Conditions of the implementation of the law: a central question.

The implementation of the new legislative measures announce for some take a hunting down of Internet users and the efficiency of such a law. Indeed, it is not possible "to put a policeman behind every Internet user" and the means employed to law will naturally have to remain proportional to penalty incurred.

It is predictable that new means will be set up within the framework of judicial procedures. The criminal offense of forgery previously led to searches, this which appears to be out of proportion with regard to the punishments now incurred.

The "streaming" or the come back of the exception of private copy.

Other legal solutions, allow free access to protected works. Such is now the case with the "recording" "catching of" of "continuous stream" or "streaming". Thanks to these new processes, the payment of the authors is now confronted with a wider phenomenon.

It is henceforth possible to broadcast radio on the Web thanks to streaming: a technology which allows to diffuse continuously audio or video. It is then necessary to distinguish "simulcasting" from "webcasting". "Simulcasting" being the broadcast on the Internet of traditional programs while "webcasting" is a program especially dedicate for the Internet. If the question of the legality of "webradios" does not settle, the payment of copyright is still to be discussed.

New dangers: these programs allow you simultaneously to record webradio stream onto the hard disk of a computer as MP3 files, as does "Stationripper". As they were 30 years ago, authors and producers are confronted with problems identical with those encountered by the arrival of AV recording. Indeed, hundreds of radio stations legally broadcast continuously musical works, on the web, and numerous programs allow you to

save these flows, much faster than using "peer to peer" programs.

Anyway, if illegal downloaders feel threatened by this new legal legislation, they will rapidly change their methods. When taking the evolutions in information and communication technologies into consideration, the model of of compensation must be thought again. Downloading is only one of many means of obtaining works without respecting copyrights.

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