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Copyright, Freedom of Expression[®] and Artistic Communication in the Internet Era: The Recorded Music

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1. Introduction

In 1998 Kembrew McLeod registered with the United States Patent and Trademark Office the phrase “freedom of expression[®]”, as an “ironic commentary on the lengths to which culture has become privatized” (McLeod, 2005: 88) and he staged prosecution of imaginary infringers. The trademark certificate has been included in several art exhibitions since. This artistic irony underlines in an original way the real incidents of censorship, related with the pursuit of the profitable control of access at all costs by the cultural industries. This pursuit leads to several paradoxes and contradictions that affect artistic creativity and the freedom of expression as well. For example, in 2004, Danger Mouse’s remix of the Beatles’ *White Album* with vocals from Jay-Z’s *Black Album* resulted in the *Grey Album* (limited edition in physical format with about 3,000 copies and online availability). EMI/Capitol and Sony – right-holders of the *White Album* – could not have possibly suffered any economic harm: it is unlikely that people would buy the *Grey Album* instead of the *White Album*. Nevertheless, they pressed and managed to prevent the distribution of this work by Danger Mouse. An online protest – named “Grey Tuesday” – by activists and fans ensured the dissemination of this work through the Internet and induced “defiant downloads” (McLeod 2005: 79-80; *The New York Times*: 25/2/2004). In this case, creativity, the freedom of expression, and the artistic methods known as collage and digital sampling were treated as copyright infringement.

Actually, this was one of the many incidents in a struggle between the corporate forces that strive to dominate the Internet on the one hand, and on the other – the artists and the public who resist the corporate domination in the field of the culture. The copyright issues involved in these incidents represent a puzzle from many points of view. The artists themselves are only a part of it, another part of it being the recipients, i.e. the public of the artistic works (musical or of whatever kind). By the end of the '90s the global recording industry started an unprecedented struggle in order to control music dissemination. While by that time controversies usually were focused on artists, since the advent of the Internet the public and ordinary people became the target of this new strategy. It is noteworthy then, that the copyright issues raised by corporate forces in the digital and Internet era do not affect only the authors, but the public as well: peer-to-peer networks for music file copying (sharing or swapping) are one of the main targets of the recording industry since 1999, setting an agenda of controversial legal, political, cultural and economic issues.

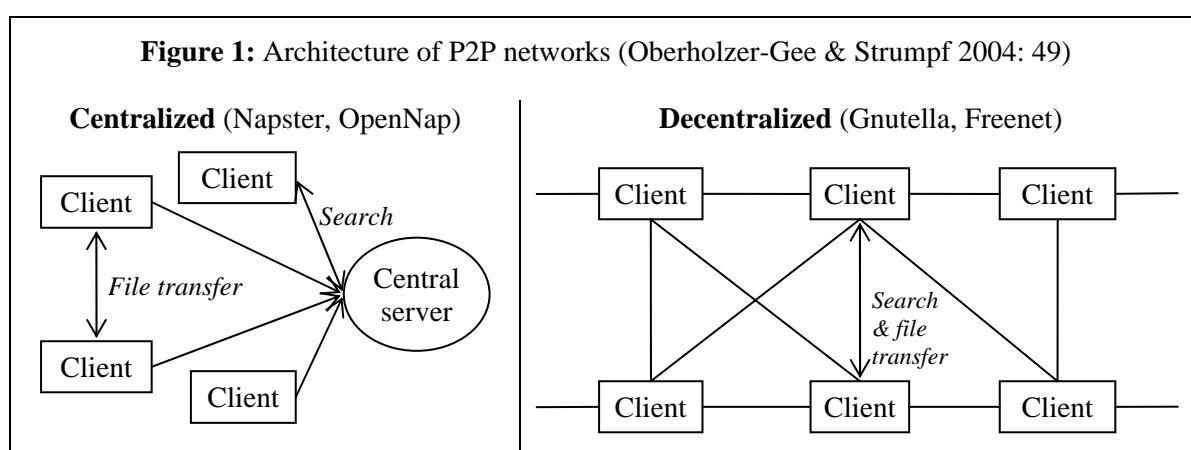
Let us consider briefly the development and scale of prosecutions of P2P file copying. In these “copyright wars”, two main phases may be distinguished:

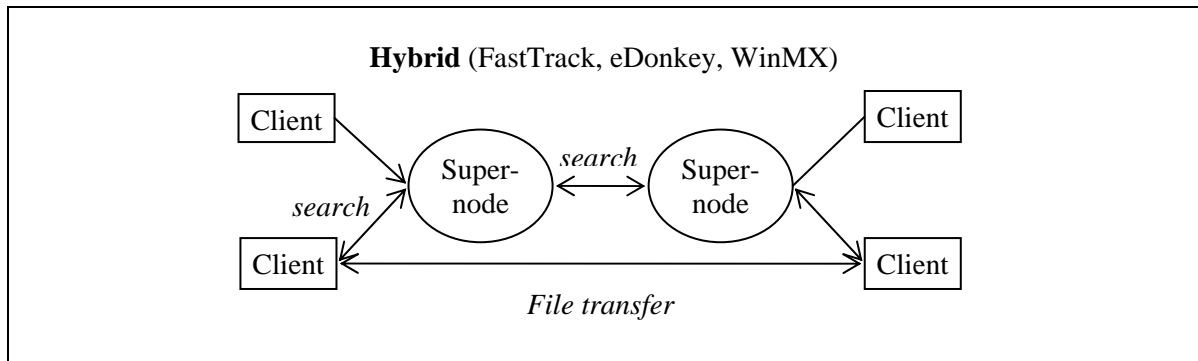
- a) **Phase one** is characterized by lawsuits against software producers and distributors. This phase was initiated in 1999 with the first case against *Napster* (USA) that concluded in 2001, when the 9th US Circuit Court of Appeals found the firm liable for both contributory and vicarious infringement of copyright, even though it did not provide the copyrighted works – a decision known as “the Napster ruling” (12 February 2001, 9th US Circuit Court of Appeals, CA San Francisco). However, during 2002 in Netherlands the Court of Appeals of Amsterdam found *Kazaa* not liable to secondary copyright infringement as its software products were also capable of significant non infringing uses (*Kazaa v. Buma/Stemra*, March 28, 2002; Castets-Renard, 2004: 6). In the USA, during 2003 (USA), the producers of the software *Kazaa Media Desktop*, *Grokster* and *Morpheus* were also found not liable to secondary copyright infringement on the same grounds (*MGM et al. v. Grokster et al.*, April 25, 2003). Finally, during 2005 in the USA, again, the Supreme Court held that distributors of the decentralized P2P software *Grokster* and *Morpheus* are liable for secondary copyright infringements committed by their users. During this phase, the controversial nature of the issues was reflected in the above mentioned cases.
- b) **Phase two** is characterized by the prosecution of ordinary users and Internet Service Providers. According to the International Federation of Phonographic Industries (IFPI) press releases (*The New York Times*, 4 April 2006) by April 2006 about 2,000

cases were launched in 10 countries. The total number of people prosecuted rose to 5,500 in 18 countries (excluding the USA). In USA the Recording Industry Association (RIAA) has filed about 18,000 lawsuits. According to the IFPI, the legal proceedings were aimed not at people who illicitly downloaded music but “uploaders” who put copyrighted music onto file-sharing networks. However, there are serious problems with this argument, since in P2P networks there is no clear distinction between “uploaders” and “downloaders”, as it will be shown.

2. The peer-to-peer networks

Generally, a peer-to-peer (or P2P) network does not have fixed clients and servers, but a number of peer nodes that function as both clients and servers to the other nodes in the network. The peer nodes may differ in local configuration, processing speed, network bandwidth, and storage quantity. Since the files are stored in private computers, in P2P networks there is no distinction between “uploaders” and “downloaders”, even if there is a central server. What a P2P network actually does is to facilitate the exchange of files between “clients”, i.e. between members of the network. The network is used to find the personal computer(s) in which the preferred file is actually stored and the file-sharing (or copying) takes place between the individual users (Jones & Lenhart 2004: 187-8; Woodworth 2004: 162-3; Bishop 2005: 459). Besides, there is a variety of P2P network structures, as indicated by Oberholzer and Strumpf in the first draft of their study on the effect of file sharing on record sales (2004) – known as “the Harvard study” (Fig. 1).





This description is essential in order to understand who and why is prosecuted, but first it is important to note that the P2P networks by most probability constitute a new phase in the metamorphosis of the artistic communication due to a series of facts:

- The recipients become communicators and mediators themselves.
- The line between public and private communication blurs.
- The values related to the original physical form of the work decline.
- New possibilities for disintermediation emerge.

In this new environment, the recording industry – as the established and dominant mediator between musicians and their public, related with the production and distribution of physical forms of music – feels threatened, due to several reasons. However, as the line between “uploaders” and “downloaders” becomes thinner, especially with the introduction of the decentralized and hybrid P2P networks, as the boundary between public and private communication blurs, due to these networks, and as P2P networks expand, several problems and challenges appear that become more and more serious. *First*, legislation and case law become more and more controversial: rigid penal clauses are used against teenagers whose acts are not commercial and not for profit; private reproduction and copying are seriously questioned in developed democratic societies for the first time; and, last but not least, the control of private non commercial reproduction involves the violation of privacy. Actually, if it becomes possible to interfere legally with private copying of music files, the question is raised why not interfere also with personal music, book etc. collections. *Second*, perhaps for the first time in the history of the cultural industries, the public is treated as a competitor that has to be defeated. *Third*, as a consequence of all of the above, the justification of the established notion about intellectual property is in deep crisis.

In order to get a better idea and complete the image of the new situation, we should take into consideration that the rightholders (i.e. mainly the major recording companies) are lobbying through the IFPI and other organizations for: total prohibition by filtering and controlling

P2P networks, control of any network and control of the use of the files. However, these suggestions in most cases have been proved *technically* ineffective (as in the case with the digital watermark included in the sound files. They also have been proved *legally* problematic, since they interfere with basic civil and human rights. Finally, it is more likely that they will expand already existing social and economic asymmetries in the cyberspace and they also might create new ones.

3. Why is P2P so important to the recording industry?

According to the IFPI estimations (although they differ from publication to publication by the same source), the increase of sales in 2005 was not enough to make up for a continuing decline in physical format (like CDs) sales, and the total sales were down 3%. However, if we take a look into the growth of the digital music market (again according to data published by the IFPI) the record company revenues from digital music (online & mobile) almost tripled within a year, jumping from \$397 millions to \$1,143 millions, an increase of 288% (IFPI, 2006: 4). That is, an effective increase of revenues has been noted, since the recording industry started to develop strategies to tap the new market created in the Internet. On the other hand, while all physical formats (CDs, MCs, Singles, LPs) account for the 95% of sales, digital formats account only for 5% of sales (again, in different publications by IFPI, different numbers are given) (IFPI, 2006: 4). If these data are indicative, interesting questions are raised about the interest that IFPI shows especially in P2P networks and their control. The industry's arguments include some considerations about the amount of the (alleged) infringing files in the Internet. According to some estimation, about 1 billion music files considered to be infringing, are available at any time online (IFPI, 2005: 23; IFPI 2006: 21). Actually, these files are *alleged* infringing, since (a) they are stored in personal computers and can be copied only after the owner of the machine permits access, and (b) they still are considered to be private copies under these circumstances and in several countries (e.g. France). It is also estimated that most of these files are in P2P networks. While 12.41% of them are in Web & FTP sites, 87.59% are in P2P networks (IFPI, 2005: 23; IFPI 2006: 21). To summarize, according to the data published by the IFPI, although the growth rates of the digital markets are unprecedented, the industry is still considering the P2P networks a serious threat, even though its strategy to tap the new markets seems successful.

In order to understand the industry's attitude and concerns it might be useful to take into consideration some of its features:

- As in most cultural industries, revenues enough to make up with losses of the major part of the production and to ensure viability of the business come from a very small fragment of the whole production.
- The market is volatile and the tastes of the audiences are fragmented.
- The costs for the promotion are too high.
- The product is perceivable, but not consumable.

Considering these features and the facts mentioned above about the new phase in the metamorphosis of the artistic communication, the exploitation of ideas and already owned rights is far less risky for any recording enterprise. Therefore, from the industry's point of view, the distribution becomes more important than production. This is why the copyright protection (conceived of in a certain, quite specific way) becomes the most valuable instrument, regardless of its political, cultural and legal consequences and ramifications. Actually, the transition from the "production paradigm" to "the exploitation (circulation) paradigm" makes the copyright protection a top issue for the entertainment business in general – not only for the recording industry.

4. What is really at stake?

As it is already insinuated, there are good indications that – despite the claims of the (major) recording industry – the issues at stake are far more complicated and disguised in the form of complains about revenue losses. To begin with, there is no hard evidence about the extent of the harm done to the recording industry by P2P downloading. The research findings are quite controversial. The IFPI assumes that causal relations may be established by coincidence in time (decline of record sales and appearance of the P2P networks). Nevertheless, contradicting results came to light by various studies (see for example: Zentner, 2003; Liebowitz, 2003 and 2005; Oberholzer & Strumpf, 2004 and 2005; Blackburn, 2004; Hong, 2004; Jones & Lenhart, 2004; Peitz & Waelbroeck, 2004; Rob & Waldfogel, 2004; Rochelandet & Le Guel, 2005). Some research results show that the harm is insignificant and that the recording industry is exaggerating its impact. Other results show that P2P file copying is beneficial in the long run, due to the "sampling" or "exposure" effect. There are also results, according to which this type of music dissemination is destructive for the music business (known as the "substitution effect").

Besides, there is also an argument, according to which copyright – for the time being – actually protects mainly the publishers and *some* of the authors (the most famous, known, and

popular). In addition, according to some analysis (Bishop, 2005: 453-454), the pressure exerted by the cultural industries to extend further the term of copyright may well result in blocking the passing of works into the public domain for nearly a century and a half (140 years). This cannot be for the protection of the author, but for the protection of the business. Such a protection prevents cultural development, since only what is profitable will be reproduced. These are some of the issues at stake, which the (major) recording industry is very chary of speaking about. At the same time, it represents itself as *the* institution that promotes artistic creativity, protects and encourages talent and cultural diversity.

In concluding, let us add some hints to the bottom line of these complicated issues. The P2P networks regulation claimed and lobbied for by the recording industry:

- More than the economic aspect, it is about ownership, control, access and use and therefore related with the freedom of communication and expression
- Its legal, political and cultural ramifications are not less important than its economic consequences
- Penalizing inconsiderably private copying might result in controlling creativity
- It results in developing movements of defiance and resistance and it undermines the culture of rewarding the authors
- Both on a local and a global level it imposes certain values, regardless of cultural and subcultural peculiarities and this may lead to further asymmetries and contradictions
- The particular features of this form of communication should be taken into account in order to balance between different interests (authors, industry, and public domain)
- Finally, the attitude of the recording industry in the case of P2P file copying indicates that the corporate culture might prove one-sided and reckless, unless it is counterbalanced by other forces

References

- Bishop, Jack (2005): "Building International Empires of Sound: Concentrations of Power and Property in the 'Global' Music Market". *Popular Music and Society*, 28(4), pp. 443-71.
- Blackburn, David (2004): *On-line Piracy and Recorded Music Sales*. Job Market Paper. Harvard University, Department of Economics. Accessed on 11/1/2006 from the following URL: http://www.economics.harvard.edu/~dblackbu/papers/blackburn_fs.pdf.
- Castets-Renard, Celine (2004): "La responsabilité sur les réseaux d'échange de fichiers illicites (peer-to-peer)". *Legalis.net* 2004/1: 5-15.

- Hong, Seung-Hyun (2004): *The Effect of Napster on Recorded Music Sales: Evidence from the Consumer Expenditure Survey*. SIEPR Discussion Paper No. 03-18. Stanford University, The Stanford Institute for Economic Policy Research. Accessed on 11/1/2006 from the following URL: <http://siepr.stanford.edu/Papers/pdf/03-18.pdf>.
- IFPI (2005) *IFPI: 05 Digital Music Report*. London: IFPI.
- IFPI (2006) *IFPI: 06 Digital Music Report*. London: IFPI.
- Jones, Steve & Amanda Lenhart (2004): "Music Downloading and Listening: Findings from the Pew Internet and American Life Project". *Popular Music and Society*, 27(2), pp. 185-99.
- Liebowitz, Stan (2005): "Pitfalls in Measuring the Impact of File-sharing". *CESifo Economic Studies*, 51(2-3): 435-73.
- Liebowitz, Stan J. (2003): "Will MP3 downloads Annihilate the Record Industry? The Evidence so Far". Available at SSRN (Social Science Research Network): <http://ssrn.com/abstract=414162>.
- McLeod, Kembrew (2005): "Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist-Academic". *Popular Music and Society*, 28(1), pp. 79-93.
- Oberholzer-Gee, Felix & Koleman Strumpf (2004): *The Effect of File Sharing on Record Sales. An Empirical Analysis*. Accessed on 11/1/2006 from the following URL: http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.
- Oberholzer-Gee, Felix & Koleman Strumpf (2005): *The Effect of File Sharing on Record Sales. An Empirical Analysis*. Accessed on 11/1/2006 from the following URL: http://www.unc.edu/~cigar/papers/FileSharing_June2005_final.pdf.
- Rob, Rafael & Joel Waldfogel (2004): "Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students". *Journal of Law and Economics*, 49(1): 29-62.
- Rochelandet, Fabrice & Fabrice Le Guel (2005): "P2P Music Sharing Networks: Why the Legal Fight against Copiers may be Inefficient". *Review of Economic Research on Copyright Issues*, 2(2): 69-82.
- The New York Times*, 4 April 2006.
- Woodworth, Griffin Mead (2004): "Hackers, Users, and Suits: Napster and Representations of Identity". *Popular Music and Society*, 27(2), pp. 161-84.
- Zentner, Alejandro (2003): *Measuring the Effect of Music Downloads on Music Purchases*. University of Chicago, Department of Economics. Accessed on 11/1/2006 from the following URL: <http://home.uchicago.edu/~alezentn/musicindustrynew>.