Illegal downloading: proposed solutions from the EU member states

Galateia Kapellakou

Introduction

The technological evolution and the dissemination of the works in the digital environment have put into doubt the traditional copyright system. The question that arises today is whether the rights of the author as organised today are effective in the digital environment, especially as far as digital recording and transmission process, satellite communication and the Internet is concerned.[1] In this context the copyright theory does not share the same opinion on how Copyright should react to the Internet revolution.

Grosso modo, theory can be divided into three groups: the neoclassics, the minimalists and the eclectics (elitists). The neoclassics consider that copyright as organised today is perfectly capable of confronting the economic exploitation of the works on the Internet. This theory considers that the problem is that Internet and the new methods of exploitation and dissemination concurrences the existing relative industry and may provoke its disappearance if the rights of the authors are not protected more intensely. [2] Thus, if some updating is needed in the digital environment, this is in order to reinforce the position of authors and to enhance their rights in the digital environment. On the other hand, the minimalists are opposed to the expansion and reinforcement of the rights of the authors in the digital environment and are interested in reducing Copyright in favour of the users.[3] According to this theory the access to the works is almost annihilated because of the application of the rights to the mere use of the works and the restriction of the exceptions and limitations. Finally, the eclectics (elitists) seek to reach the reasonable equilibrium between the rights of the authors and the abilities offered to the users by the digital

[1] J.A. Sterling, The future of Copyright: Approaches for the new era, An address to the British Literary and Artistic Copyright Association, London 12 March 2009, available on line: http://www.blaca.org/meeting2009.htm

[2] Ignacio Garrote Fernández-Diez, El derecho de autor en Internet, Editorial Comares, second Edition, Granada 2003, p.65-66. The neoclassic theory is examined more thoroughly in pages 66-79.

[3] Ibid, p.66 and more thoroughly p.79-90. According to the author, this theory is further divided into radical liberalists that –more or less- doubt copyright's justification, and the democratic minimalism according to which internet gives the opportunity to the citizens to participate to the democratic dialogue and to the decision making process, which applied in copyright means that each member of the public can participate in the creative process (derivative works).

environment. This theory seeks to adapt the rights of the author in order to answer to the new necessities.[4]

In our view the reaction to the dissemination of the works without authorisation is legitimate and imperative. Copyright is the most efficient method to finance the intellectual creation. The remuneration of the author is the incentive that urges him to create and at the end promotes the cultural development of each country. Thus, remaining passive to the illegal downloading is not an option. This pathogen situation can be treated in two methods: prevention or repression. Though the first way seems to be the most adequate solution, we doubt whether the proposed solution from the EU member states can be classified under the preventive measures.

Before entering into the core of the proposals and express our scepticism on the efficiency of these measures, it is interesting to note that downloading and peer-to-peer file sharing is not treated in the same way in the member states. The first question that should be answered is which rights are involved in the digital transmission and then focus on the system model a legislator should follow in order to eliminate illegal downloading. Thus, before analysing the systems proposed by the EU member-states (paragraph 2) it is interesting to examine the notion of downloading and the Peer-to-peer file sharing system (paragraph 1).

1. Downloading and peer-to-peer file sharing

Though 14 years have passed since the WIPO Copyriht Treaties[5] were adopted and almost 10 since the Information Society Directive[6], the theory is not consistent regarding the interpretation, the application and the breadth of the rights. Personally, I also doubt that there is an actual harmonisation within European Union. Member-states and national judges do not respond in the same way to the new technology,

[4] Ibid p.66, more thoroughly p.90-101. This theory is divided, according to the author, in two categories, the first makes the equivalence between information and work and refers to the right of information and the second (that is in favour of the evolution of copyright and its flexibilisation) refers to the historical analysis of this branch that shows that copyright has always been adapted to the technological evolutions.

[5] Adopted in Geneva on December 20, 1996 (WCT)

[6] 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, Official Journal L 167, 22/06/2001 P. 0010-0019

while, as far as their effectiveness is concerned the facts show that one should be sceptical.

Downloading, according to the standing legislation, is a reproduction. It is important however to understand that downloading does not imply only permanent reproduction, meaning downloading that will be stored on the hard disk of the computer, but any form of downloading, even temporary. Since the Information Society Directive regulated that reproduction comprehends direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part (article 2), there is no doubt that reproduction can be found even in the streaming technology that transmits the work in real time. Thus, the user that receives a work in streaming without authorization is infringing both reproduction and communication to the public right and can not be excused by the (obligatory) exception set in article 5§ 1 of the Information Society Directive[7] because of the unlawful character of the use. Nonetheless, part of the European doctrine seems hesitating on the amplitude of the reproduction right. It is true that this expansion of the reproduction right is complicating the economic rights, while it is considered –by some authors- to expand unjustifiably the rights of the author and creating an access right.

The problem in our opinion is that, the member states, when proposing for solutions in order to combat Internet infringement of Copyright, they have in mind the illegal peer to peer file sharing as it operates today, though downloading and file sharing does not pass necessarily by storage. Peer-to-peer system work as follows. "The computers use a software which enables them to "communicate" and their users (or "peers") to upload, search for, access and download material stored in "shared" files on the computers' hard drive"[8]. When someone is downloading (in P2P systems) he is actually retrieving all or part of the content he wants, whether from a peer or a server. When uploading the user is sending all or part of a content (file) to other users. In order to upload a permanent reproduction is necessary. The techniques of peer-to-peer

[7] Art. 5 §1. "Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:(a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."

[8] Haflidi Kristjan Larusson, "Uncertainty in the scope of copyright: the case of illegal file-sharing in the UK", E.I.P.R. 2009, 31(3), 124-134 (124)

allow the download and upload simultaneously, meaning either the downloading/uploading of several content or of the same content: as part of a shared content is downloaded, it is immediately available for upload.[9] The actors involved in P2P file sharing are a) the one that makes the upload, thus reproduce permanently the protected work and makes possible to other users (peers) to access it, b) the one who access and downloads the work, c) the operator that provides the software that enables the peer-to-peer file sharing and d) the ISP.[10]

As far as uploading is concerned there is no doubt that it is illegal. Regarding downloading the theory is not unanimous whether downloading in P2P file sharing systems should be considered as private copying or not. In France court decisions consider downloading illegal relying on the fact that the condition of the legality of the source of the copy is not met[11]. However, the doctrine seems sceptical on the importance of this condition, since in order to apply the private copy exceptionwhat is important is that the use of the work is strictly private[12]. In the P2P case the problem is that the one who downloads is –in some cases- at the same time uploading for someone else. But even if we consider that P2P file sharing is private copying, the exception could not apply because of the three step test.[13]

Yet, one should also take into consideration that the streaming technology is going to change the way that P2P works. P2P file sharing is popular because of Internet low speed connexion (it allows to download the same file from several users simultaneously). As soon as the speeds of Internet connection become high, the users will turn to streaming techniques. In the case of streaming no permanent downloading

---

[9] Franck Macrez & Julien Gossa « Surveillance et sécurisation : ce que HADOPI rate » RLDI -2009, N°50, 50-41 (§26)

[10] Haflidi Kristjan Larusson, "Uncertainty in the scope of copyright: the case of illegal file-sharing in the UK"**,** E.I.P.R. 2009, 31(3), 124-134 (124)

[11] See Mulholland drive case, Cour de Cassation, civ.1, 19 juin 2008, M. Perquin, UFC Que choisir c/ Soc. Universal Pictures Vidéo France et a.

[12] Michel Vivant & Jean-Michel Bruguiere, Droit d'auteur, DALLOZ, First edition, 2009, p.400-401 § 591

[13] An analysis on how downloading from P2P systems when there is no uploading at the same time passes the three step test see Nantes report prepared by Carine Bernault & Audrey Lebois,
Under the supervision of Professor André Lucas (", By the Institute for Research on Private Law, University of Nantes), "Peer-to-peer File Sharing and Literary and Artistic Property, A Feasibility Study regarding a system of compensation for the exchange of works via the Internet, June 2005, avail. http://privatkopie.net/files/Feasibility-Study-p2p-acs_Nantes.pdf. Generally about the interpretation of three step test see, "Declaration: a balanced interpretation of the three-step-test in Copyright Law"**,** Max Planck Institute, avail.
http://www.ip.mpg.de/shared/data/pdf/declaration_three_step_test_final_english.pdf

is required since the work is transmitted in real time. The data are normally transformed into picture or sound automatically. Only in some cases data exceed the permitted volume and must be temporarily (not permanently) stored in a "buffer". The question is whether "downloaders" who stream copyright material infringe copyright. Supposing that these "streamers" do not upload at the same time protected material they should not be found liable for illegal reproduction, unless one considers that the temporary reproduction effectuated in this case does not fall under the obligatory exception of article 5§1 of the Information Society directive. [14] But neither does this question receive a unanimous answer by the doctrine. Of course, the simple answer to this is that in any case the three step test will not permit such a use and, thus, the exception becomes ineffective.

The actual problem is that once P2P starts using streaming technology and works are exchanged directly between peers (from one user to another) in streaming it will not be easily detected the IP address because there is no server involved.[15]

2. Proposals

a) Three strikes system

(i) France - HADOPI[16]

[14] For the British doctrine the question is whether buffering is a substantial copy of the work: "Storing temporary copies in the computer's buffer constitutes "copying" under s.17(6) of the CDPA, which states that "[c]opying in relation to any description of work includes the making of copies which are transient […]". Therefore, the issue here is not whether buffering leads to copying, but whether it is copying of "a whole or any substantial part" of a copyright work, as required by s.16(3)(a) of the CDPA." Haflidi Kristjan Larusson, "Uncertainty in the scope of copyright: the case of illegal file-sharing in the UK", E.I.P.R. 2009, 31(3), 124-134 (127)

[15] Liul Y., Guo Y. et Liang C., « A survey on peer-to-peer video streaming systems » in Peer-to-Peer Networking and Applications, Springer New York, 2008.

[16] Articles relevant to HADOPI (indicative): Jean-Michel Bruguière, Loi « sur la protection de la création sur internet » : mais à quoi joue le Conseil constitutionnel ?, Recueil Dalloz 2009 p. 1770/ Laurent Szuskin, « Sans contrefaçon » ? Une étude comparée de la lutte contre le piratage en ligne des droits d'auteur et voisins, RLDI, N°50, 2009/ Franck Macrez &Julien Gossa « Surveillance et sécurisation : ce que l'Hadopi rate », RLDI N°50, 2009/Asim Singh, « Le streaming et la loi « Création et Internet », RLDI - N°50/ Mathieu Coulaud, « L'adoption au Sénat du projet de loi « Création et internet » : la confirmation d'une méthode de régulation consensuelle en propriété littéraire et artistique », RLDI, N°46, 2009/ Allan Gautron, « La « réponse graduée » (à nouveau) épinglée par le Conseil constitutionnel », RLDI 2009, N°51/ Bruno Dreyfus, « Quelle est la nature de la mesure de suspension de l'accès à internet prévue par le projet de loi « Création et Internet » ? », RLDI 2009, N°49/ Hubert Bitan, , « Réflexions sur la loi « Création et Internet » et sur le projet de loi « HADOPI 2 », RLDI, 2009, N°51/ Éléonore Mirat & Patrick Boiron, RLDI 2009, N°51, « La loi HADOPI : beaucoup de bruit pour rien ? »/ Iliana Boubekeur, « De la « loi HADOPI » à la « loi HADOPI

The French proposal is the one that has been discussed the most. By this initiative called HADOPI or "reponse penal gradue" the French legislator aimed to incriminate those Internet users that participated in the exchange of protected material through P2P systems.[17] In reality this provision relies on a breach of an obligation to survey the access to internet that enabled the infringing act and not to the mere act of infringement.[18] This obligation imposes to the person that has access to online communication to the public services to "to ensure that this access is not being used for reproduction, representation, or making available or communication to the public of works or objects protected by copyright or a related rights without the permission of rights holders (...) when this permission is required." This system aims at the prevention and regulation rather than the repression of abusive users. Besides civil and penal procedure the text introduces and organises in case of misuse (infringement) a mechanism that will punish any lack of surveillance for which the holder of the access is considered to be responsible.

The Constitutional Council censured some parts of the HADOPI for not being conformed to the French Constitution.

HADOPI is actually confided to a commission of three "magistrates" appointed by a decree that could not be revoked or renewed beyond 6 years. The magistrates were entitled to decide between 1) the suspension of the access to the internet for two months to one year while at the same time the infringer could not be subscribed to another service provider or 2) an injunction to take, within a specific time limit, some measures capable to prevent the repetition of the violation by apposing one of the security software provided by the list that had been published by HADOPI.

The Constitutional Council ruled that the access to the Internet is part of the fundamental right of the freedom of expression and communication. Even though the right should coexiste peacefully with the other constitutional freedoms (here the

---

2 »RLDI - 2009, N°51, 51-57/ Marc-Antoine Ledieu, « Le projet de loi HADOPI adopté », Communication Commerce électronique n° 6, Juin 2009, alerte 75/ Christophe Caron, Le Conseil constitutionnel au secours de la rémunération pour copie privée, Communication Commerce électronique n° 6, Juin 2009, comm. 54 etc

[17] Michel Vivant & Jean-Michel Bruguiere, Droit d'auteur, DALLOZ, First edition, 2009, p. 736-737

[18] Iliana Boubekeur, « De la « loi HADOPI » à la « loi HADOPI 2 », Revue Lamy Droit de l'Immatériel (RLDI) - N°51, 2009

property right), the administrative penalty, imposed by an independent administrative authority that has no judicial competence, is not different to a penal sanction. However, it should be noted that the actual problem was not the fact that the decision was made by an administrative authority but the fact that the freedom of expression and communication, are rights of such a particular nature that any measures taken should be necessary, adapted and proportionate to the objective pursued. The Council considered, thus, that in this case the magistrates had a very large domain of competence which could not be considered as proportionate.

The Constitutional Council also found that the HADOPI was infringing the presumption of innocence. The law provided that, in case of fraud or force majeure, no sanction could be taken against the subscriber who had apposed the security means provided by the relevant HADOPI list. At the same time the burden of proof was reversed: that the subscriber has to prove exemption from liability. Such a presumption, according to the Constitutional Council, could be valid only if the presumption did not have irrefutable character, the right of defence is respected and the facts reasonably induce probability of liability. The problem was also that the subscriber should prove not only that he is not the one who committed the infringement but also that someone else had used his IP address which is quite difficult knowing that pirating an IP address is not that difficult. Furthermore, the reverse of the burden of proof equates to a presumption of culpability, which is contrary to the Constitution.

Nevertheless, the Constitutional Council did not censure the sending of warning notices to the subscribers, thus, it validated the Commission's capability to process the subscriber's personal data. The HADOPI project modify accordingly the relavant article (L. 34-1) of the "Code de postes et telecommunications electroniques" and the ISPs will have to conserve the data for one year in order to permit so that the commission can find the users that have not survey adequately their Internet access. The commission will receive the IP addresses and any other relevant document and information such as the identity of the user, his regular address, his electronic address and his phone number. The Constitutional Council, in order to ensure a balance between privacy and other rights, admitted the possibilities for the collecting societies to effectuate the process of personal data related to copyright infringement, under the

condition that the data will acquire a personal character only in the context of legal proceedings and under the condition that the process of personal data will be authorized by CNIL (Commission Nationale de l'Informatique et des Libertés).

The censure of the Constitutional Council did not deter the French Legislator to propose the HADOPI 2 that is conform to the Council's censorship and which has been adopted by the Senat (July 2009) and the Parliament (September 2009).

The magistrates still have the power to suspend the internet access of the user in case a) a copyright infringement occurs and b) the user did not secure the Internet access. Infringement of copyright can lead to 3 years imprisonment and a penalty of 300.000 € that have already been provided under art.L.335-2, L.335-3 and L.335-4 of the CPI but complementary the suspension of the Internet access for a period of maximum 1 year pronounced by the magistrates of HADOPI. The infringer has still the obligation to pay the Internet provider even though he is disconnected or if he wants to break the contract he should encumber the costs. The Internet user that has been disconnected is not allowed to subscribe under a new ISP and in case this happens there is a risk of 2 years imprisonment and 30.000€ penalty. However, the complementary penalty of the loi HADOPI must be decided by judges of the judicial authority. A simplify, accelerated, written and not adversary procedure will be followed (provided under the penal law in art. 495) by criminal courts consisting by one judge. This judge will have the power to decide the interruption of the Internet access for a maximum period of 1 year, without the Internet user been heard. The user whose connection has been interrupted will be able to react within 45 days.

(ii) UK - Digital Economy Bill

In the UK the discussions are headed mostly over the responsibility of ISPs in the context of "survey and suspension of services". The first signs of the British response to the illegal downloading can be found in the Digital Britain Report published last year (June 16, 2009) by the Government[19]. As far as illegal downloading is

[19] According to the report, as more and more vital services, including education and health, will be delivered solely online in the future, the Government is making one of its main policy aims, to increase "affordability, capability and availability" of digital technology such as the internet. See Katrina Dick, "Digital Britain - a summary", Ent. L.R. (Entertainment Law Review) 2009, 20(8), 283-286 (283)

concerned, the British Report[20] - which is also referring to the peer-to-peer file sharing as the major concern for the content industries, is proposing a process in two times. On a first level it recognises Ofcom[21] as the responsible for the enforcement and the reduction of copyright infringement. At the same time it gives the power to Ofcom to oblige ISPs to "notify account holders on receipt of appropriate evidence that their account appears to have been used to infringe copyright and maintain and make available (on the basis of a court order) data to enable the minority of serious repeat infringers to be identified."[22] The report is also proposing the adoption of an ISP Code[23] that sets the obligations of the ISPs. At a second stage, in case the –dificult- purpose of 70% reduction of copyright infringement is not met, the report proposes that Ofcom will be able to impose to ISPs to use technical measures such as "a) blocking content, either particular websites or protocol blocking to deny access to particular services, b) reducing the speed or volume of data downloaded by bandwidth capping (which caps the speed of a subscriber's, internet connection and/or caps the volume of data traffic which a subscriber can access) and bandwidth shaping (which limits the speed of a subscriber's access to selected protocols/services and/or caps the volume of a data to selected protocols/services), and c) content identification and filtering."[24] As it is understood, the British report does not propose the disconnection as a penalty. This is the most important difference between the French and the British proposal.

Following the Digital Britain report the Digital Economy Bill was announced on 18 November 2009 and had the Second reading on December 2009.

---

[20] Which "met with criticism from opposition politicians and the media for inaction on securing the swift and wide deployment of next-generation networks that is being witnessed in some other countries", Bailey Ingram & Paul Brisby, The Digital Britain White Paper, C.T.L.R.(Computer and Telecommunications Law Review) 2009, 15(7), 151-153

[21] Ofcom is the communications regulator that regulates the TV and radio sectors, fixed line telecoms and mobiles, plus the airwaves over which wireless devices operate. Ofcom operates under the Communications Act 2003. The Act says that Ofcom's general duties should be to further the interests of citizens and of consumers. Meeting these two duties is at the heart of everything we do. (http://www.ofcom.org.uk/what-is-ofcom/)

[22] Katrina Dick, "Digital Britain - a summary", Ent. L.R. (Entertainment Law Review) 2009, 20(8), 283-286 (283)

[23] Ibid "setting out how ISPs should comply with this new regime, including practical measures, appeals, standards of evidence and the apportionment of costs. It is envisaged that Ofcom will have the power to fine ISPs and rights holders for failing to comply with the code."

[24] Carolyn Burbridge, Graeme Maguire, Digital Britain – the final report, computer law & security review 25 (2009) 482 – 484

According to the Bill the two stages of procedure remain as proposed in Digital Britain Report. The first stage provides for two initial obligations by the ISPs. ISPs are obliged to send letters to users, subscribers who have been found to infringe copyright and in case of repeated copyright infringement they will be required to collect information on the infringers that will be handed out to copyright owners but the identity of the infringer is not possible to be revealed unless there is a court decision.[25] The proposal of a Code of Practice is also a fact. This Code, that is supposed to be carried out by Ofcom after consultation will actually be an agreement between the parties involved (meaning the ISPs, the copyright holders and the consumers).[26] Ofcom will also have to prepare (full and interim) reports that will state the progress of fighting against internet infringement of copyright in order to be able to assess the effectiveness of the measures.[27]

At a second level the Bill provides for obligations on limiting internet access as proposed in the Digital Britain Report (technical measures that will be able to "limit the speed or other capacity of the service provided to a subscriber, prevent a subscriber from using the service to gain access to particular material, or limit such use, suspend the service provided to a subscriber, limit the service provided to a subscriber in another way.")[28] The Code will also regulate the limiting of internet access and must set down the procedure when the user wants to appeal to the imposition of technical measures that restrict his access to material available on Internet.[29] In case ISPs do not comply with the obligation to limit the access, Ofcom is entitled to set a penalty of maximum 250,000euros. The costs of the notifications are shared between the rights holders and the ISPs (flat fee for the rights holders for

[25] The Explanatory Notes propose a definition of serious repeat infringer, e.g. as someone who has received 50 copyright infringement reports. See Florian Koempel, Legislative Comment, DIGITAL ECONOMY BILL, Computer and Telecommunications Law Review, (C.T.L.R.), 2010, 16(2), 39-43 (40)

[26] This Code is supposed to: a) "cover the procedure of this process, detailing among others: the way copyright owners detect copyright infringement; standard of evidence to be submitted to ISPs in a copyright infringement report; appeal mechanism" and b)" specify the notification obligation, including: description of apparent infringement; information on the purpose of copyright; advice on legal sources for copyright content; advice on protection for electronic communications networks; possible other requirements established in the Code, including information on possible legal action by right holders and reference to potential technical measures" ibid

[27] ibid

[28] ibid

[29] For more details ibid p.41

each notification that will be calculated on the cost that encumbers the ISP in order to process the notification).

(iii) Ireland

The only member state that has actually applied the three strikes "method" is Ireland. However, no relevant Law has been adopted –or proposed as far as we know- by the Irish legislator and the three strikes systems is applied only by one telecommunication's Company.

What has actually happened is that the ISP that holds the biggest part of the Irish telecoms market reached an out-of-court settlement in February 2009 with the Irish Recorded Music Association (Irma) (EMI, Sony, Universal, Warner etc), according to which the telecoms company agreed to introduce the graduate response system. Actually, the provider will suspend the internet service for the internet connection of those users who are repeatedly sharing music. The High Court in Dublin (16th of April 2010), ruled that an IP address is not personal data in this specific case, approving, thus, the agreement and permitting the implementation of the settlement.[30]

Infringing customers will on the first strike be reached on the phone in order to be informed on their illegal activity. In case the user is identified to infringe for a third time, the company will send a termination notice and, subject to extenuating circumstances arising the user will be disconnected thereafter. Disconnections, however, are supposed to be carried out when the company is certain that there is an infringement and that the user had the opportunity to explain its circumstances and that there is no fraud in the detriment of the user.

b) "Softer" systems

(i) Spain – Project of Economic Sustainability

[30] According to the "The right to be identified with and to reasonably exploit one's own original creative endeavour" constitutes in his belief a human right. That it is completely within the legitimate standing of the company to act as an entity that which protects the law and Constitution and that "Internet is 'only' a means of communication and has not rewritten the laws of countries through which it passes."

The Spanish legislator decided not to follow the three strikes system and instead of punishing the public that accesses and downloads the illegal content, he is turning to the responsible of the websites that are making available the protected material (with or without knowing it). The proposed solution was announced by the Project of the Law for Economic Sustainability[31] and seems must softer that the three strikes system. However, it is not certain if it is going to have the desired results –Spain is the European country with the most illegal downloads- especially when blocking a website is not something new. This project Law manages only to reduce the duration of the procedure.

The process of blocking a website starts when the rights holders complaint to the Commission that a page is storing, making available or linking to protected material without authorization. The Commission then checks if there is actually an infringement and -if this is the case- notifies the web administrator over the complaint and gives a time limit to responsible of the website in order to present his arguments. If these arguments and are rejected, the Commission notifies the responsible of the website that the infringing files that are the object of the unlawful use should be removed and designates the period in which the content should be removed.

If the web administrator does not remove the infringing content then -and only then- it is possible to ask for precautionary measures on Court. These measures are the interruption of the service provision or the data storage in case of a national site or the blocking of foreign Web sites with illegal content. This blocking will be carried out by national operators of Internet access.

The judge does not enter into the merits of the case, but can decide whether the Commission is competent to the close the site or not and if the measure taken by the Commission is conflict with the fundamental rights (such as the right to information or freedom of expression). This judicial phase is supposed to last less than a month. Ordinary legal proceedings in order to examine the merits of the case can be asked by each party.

(ii) **Sweden – Development of digital services & Public awareness campaigns**

[31] Proyecto de Ley de Economía Sostenible http://www.economiasostenible.gob.es/wp-content/uploads/2010/03/01_proyecto_ley_economia_sostenible.pdf

Sweden preferred the more debatable way to fight against piracy, but surprisingly it seems that it is working. Instead of turning to solutions such as the three strikes, "Sweden's resurgence appears to show a combination of the carrot of music offerings and the stick of the new enforcement legislation"[32]. Thus, the Swedish campaign that informed the public on the new law (implementation of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights)[33] along with the development of user-friendly digital services had as a result the increase of the digital sales in Sweden. Of course, one should keep in mind that public awareness campaigns[34] do not have the same effect in all the member states, even when user friendly digital services are offered.

c) EU level

After having exposed our doubt on the harmonisation of the economic rights at European level concerning and on the effectiveness of the economic rights as set by the European directive of the Information Society directive, we will try to understand towards which direction European Commission is moving.

First of all we must refer to the issue of personal data which seems to be quite delicate for the European Court which hesitates to give a definitive answer on this matter. The ECJ refused to uphold a decision when was asked by the Commercial Court of Madrid (preliminary ruling) whether an (ISP) is obliged in civil proceedings to disclose the identities of people allegedly infringing copyright by illegally downloading content. The ECJ held that nothing in the wording of the European Directives required that they must be interpreted as forcing Member States to lay down such an obligation and pointed out that the Directive 2004/48 specifically provides that efforts to ensure effective protection of copyright apply without

[32] IFPI Digital Music Report 2010, "Music how, when, where you want it", avail. online http://www.ifpi.org/content/library/DMR2010.pdf

[33] We will refer to the most interesting part of the new Swedish Law –at least for our topic. The Court can order to an ISP to give the rights holder information on the identity of the user who is alleged to infringe copyright, under the condition that there is sufficient evidence. The principle of proportionality will apply while the interests of both parties (rights holder and alleged infringer) must be respected)

[34] Regarding public awareness see Maria Canelopoulou-Bottis, "Public awareness of copyright issues: a perspective for the future", avail. www.ccsr.cse.dmu.ac.uk/conferences/ethicomp/ethicomp2008/abstracts/ethicomp2008_bottis.php

prejudice to statutory provisions that govern the protection of confidentiality of information sources or the processing of personal data.[35]

Thus, the ECJ did not change the status of the ISPs nor did it rule in favour of the IP rights holders. We will have to wait either for another decision in order to understand whether the ISPs safe harbour is going to change or for the European Legislator to adopt a new directive that will deal with personal data in the field of IP or the change of the status of the ISPs.

Secondly, the Gallo report 2010[36] on enforcement of intellectual property rights in the internal market, prepared by the Commission and adopted in the JURI committee of the European Parliament on the 6th of June, gives some information on the position of the EU concerning illegal downloading and generally Internet infringement. In order for the EU to eliminate the unlawful downloading, it is not impossible to see the enforcement directive amended. EU seems to be open to any solution that would have as a result the development of the European digital market and the creation of a legitimate online market.

Although this report does not give specific information on how illegal downloading is going to be treated at a European level, whether the ISPs safe harbor is going to be preserved or whether the personal data legislation is going to be modified, some parts of the Parliament's proposal are worth to mention.

After admitting that the unauthorized file sharing is a problem that affects the European economy in terms of job opportunities and revenues for the industry as well as for government[37], the Parliament expresses its regret "that the Commission has not mentioned or discussed the delicate problem of online IPR infringements, which constitutes a major aspect of this worldwide phenomenon in the age of digitisation of our societies, particularly the issue of the balance between free access to the Internet and the measures to be taken to combat this scourge effectively; urges the Commission to broach this problem in its IPR strategy"[38] The Parliament then stresses

[35] Isabel Davies & Stuart Helmer, E.I.P.R. 2008, 30(8), 307-308, Productores de Musica de Espana ("Promusicae") v Telefonica de Espana SAU ("Telefonica") (C-275/06)
[36] Link: http://www.laquadrature.net/files/JURI_Gallo_report_adopted_EN.doc

[37] Thought 26, Gallo Report
[38] Thought 27, Gallo Report

out the necessity to develop in European level "a diversified, attractive, high-profile, legal range of goods and services for consumers" recognising that a functioning internal European digital market should be developed or else it will not be possible to create a legitimate online market[39]. It also points out that appropriate solution must be found (all parties involved should participate in the dialogue –stakeholders and ISPs) or else should the Commission consider a legislative proposal or the amendment of the existing legislation, (particularly Directive 2004/48/EC), so as to upgrade the Community legal framework in this field on the basis of national experiences.[40]

Conclusion

Governments have to choose between the political costs of adopting a 3 strike system while at the same time the lobbies are pressing for action pointing out that the economic loss of the cultural industry is affecting the national economy and the cultural development.

Should the Peer-to-Peer file sharing be one of the most important issues of the proposals from the EU member states, one should not forget firstly that illegal downloading is not found only in peer-to-peer systems but also in temporary reproduction that is necessary for example in streaming technology too. One should also have in mind that the way file sharing is operating today is going to turn to streaming technology, in which case it is not easy to detect the assumed infringers or to other technologies such as Bluetooth.

The proposals do not take into consideration systems working on friend-to-friend scale, either. "Such a system works, as its name indicates it, between friends, or at the most by a mechanism of invitation. Networks, get organized around communities in which the communications are deprived, preventing any control of the exchanged data. Investigations within such networks to notice infringements of rights of literary and artistic property require considerable means of intervention and infiltration inside "friends' networks" which exchange protected works."[41] To this should be added that,

[39] Thought 29, Gallo Report
[40] Thought 32
[41] Franck MACREZ & Julien GOSSA « Surveillance et sécurisation : ce que HADOPI rate » RLDI - 2009, N°50, 50-41 (§13). This article, that is quite critical to the HADOPI law, are analyses why HADOPI will not have the results that have been attended by the government. The utility of HADOPI is exhausted before its coming into force since technology offers new possibilities to Internet users that

supposing that national commissions start sending notices to these users, the result will be that the members of these networks will abandon the "community". This is not impossible to be found as not respecting the freedom of expression (these social networks do not aim at copyright infringement).

In our opinion, whether a system chosen to eliminate illegal downloading is going to be effective or not does not depend only on the strictness of the law or the willingness of the Member-States to enforce the law. The possible reluctance of the citizens to apply might lead to rethinking the model Europe is following. We share the same opinion with professors Vivant and Bruguière that the three strike system, "is finally more severe than the actual one. Under the guise of prevention, the legislator would hold a collective punishment mechanism via an administrative authority. An insidious decriminalisation because repression would finally be harder…"[42].

Many studies have been conducted on the matter of illegal downloading and unlawful file sharing providing for alternative solutions as far as the remuneration of the author is concerned (without depriving him from the exclusivity of his rights) or how legalisation of peer-to-peer file sharing could be in accordance with the droit d'auteur system. [43] Isolated reactions of the Member-states are, in our view, condemned not to last. The word frontiers is difficultly applied to the digital environment

---

can not be detected easily. Besides, as mentioned by the authors of this article, the identification of the infringers is not such an easy task as expected.

[42] Michel Vivant & Jean-Michel Bruguiere, Droit d'auteur, DALLOZ, First edition, 2009, p. 739

[43] On European level see Report Nantes mentioned above