IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

# MP3: Fair or Unfair Use?

"For the holder of the copyright, cyberspace appears to be the worst of both worlds – a place where the ability to copy could not be better, and where the protection of law could not be worse."[1] These words summarize the deepest fears of copyright holders with regard to new technological developments – fears that are nurtured by a compression technology called MP3[2] and the various ways of using it via the Internet.

What is MP3, and why does it pose a threat to traditional copyright models? Roughly described, MP3 is an audio compression file format designed to facilitate downloading and storage of digitised sound recordings, significantly reducing the volume of information while retaining near-CD quality sound. MP3 is not the only compression format available for music files, but it has become the *de facto* standard on the cyberspace. Users can create MP3 files from CDs using softwares available for free on the Internet, and they can listen to them directly from their computers, portable MP3 players (similar to portable CD players), or MP3 car players. They can also send their MP3 files to friends as e-mail attachments or even offer them via web sites or through file-sharing groups.

Whereas the characteristics appear to be fully beneficial to consumers, MP3 technology poses a real threat to the recording industry. Due to the ease of transmission and to the fact that each further MP3 copy is identical to the original, illegal distribution of copies of protected works has become too easy and also too inexpensive. A MP3 sharing movement has flourished, which includes a culture of indulgence towards piracy.[3]

So far MP3 is changing the world of audio works, in particular the market for CDs. Yet the principal technology is equal to that for digital versions of movies and most likely it is only a question of months until the capacity of Internet connections and further developed software allows movies to be transported as easily as is already the case for sound files today. As a consequence, the file-sharing phenomenon may soon revolutionize the audiovisual sector as a whole.

The MP3 technology itself has been greeted as a positive development that will benefit the consumer and the author/composer. In particular, representatives of the music industry declared that they would not block the exploitation of the new technology as long as the uses sufficiently respect authors' and all derivative rights.[4] The main challenge, however, is to determine in practice the threshold for sufficiently respecting copyrights. This task is particularly difficult in light of international treaties and domestic laws that allow the duplication of copyrighted audio, visual, or audiovisual works for private use, or "fair use" in the terminology of the United States Copyright Act.

The WIPO Digital Treaties[5] leave to the contracting parties the possibility of restricting exclusive rights (including a reproduction right) to certain special cases that do not conflict with the normal exploitation of the work, performance or phonogram and do not unreasonably prejudice the legitimate interests of the author, performer or phonogram producer.[6] This leaves the door open to contracting States to permit the digital private copying of works. The amended proposal for an EC Directive on Copyright and Related Rights in the Information Society,[7] which is expected to be adopted at the end of 2000 or the beginning of 2001, will also allow EU Member States to impose limitations on the exclusive right of reproduction for audio, visual, or audio-visual digital recording media made by a natural person for private and strictly personal use.[8]

Not surprisingly, the application of private use exceptions has become one focal point of recent case law on the legality of MP3 copying and/or distribution schemes. Courts have been required to draw the bright line between legal private use, on the one hand, and illicit commercial copying schemes set up to look like private use, on the other hand. In addition, they have had to review other domestic law exceptions such as public performance rights and the limited liability of Internet service providers. Public discussion has increased since the development of more sophisticated systems for sharing and exchanging MP3 files, some of which have led to the distribution of copyright works on a large scale.

This article explores some of the legal problems arising from current uses of MP3 technology by considering case law from various European countries and the United States. The case law is selected and presented according to the chronology of technical developments.

## A. MP3 Files Offered through Individuals

Once the MP3 technology became exploitable on the Internet, web sites containing MP3 files came into being as well. These sites list music works each of which could be downloaded with a simple click on the title by any visitor to that web site. The question arose whether the creation of, or hyperlinking to, such web sites is legal. The following cases demonstrate that if files are offered to unspecified customers and therefore lie outside the scope of private/fair use,[9] it is generally not legal and may even lead to criminal sanctions.

### 1. United States:
### Conviction for Listing MP3 files

On 23 November 1999, the United States District Court in Eugene, Oregon released details of the first criminal copyright conviction for unlawful distribution of MP3 files on the Internet under the "No Electronic Theft" (NET) Act.[10] The NET had been enacted in December 1997 to prevent copyright infringements on the Internet by instituting criminal penalties. Since then section 2319 in conjunction with section 506 (a) United States Copyright Act (U.S.C.A.) render punishable the illicit and willful reproduction or distribution of copyrighted works, even if the defendant acts without a commercial purpose or does not expect any private financial gain.[11]

Gerard Levy, a student at the University of Oregon had, among others, illegally posted musical recordings and digitally-recorded movies on his University-based web site, allowing anyone to download and copy them for free. System administrators became suspicious when they discovered a large volume of bandwidth traffic from Levy's web site, and accordingly brought the case before law enforcement officials. After a search of his apartment, Levy pleaded guilty to criminal infringement of copyright in violation of the U.S.C.A.[12] He was sentenced to a period of two years on probation with conditions.[13]

### 2. France:
### Conviction for Offering MP3 Web Site

On 6 December 1999, the *tribunal de grande instance de Saint-Etienne* convicted Vincent Roche and Frédéric Battie of counterfeiting.[14] The two Defendants had created a web site called "MP3 Albums", offering the free downloading of whole albums in MP3 format by linking to other web sites owned by Roche, which were located outside of France and contained the sound files of pro-

tected musical works. The *Société Civile des Producteurs Phonographiques* (*SCPP*) and the *Société des Auteurs, Compositeurs et Editeurs de Musique/Société pour l'Administration du Droit de Reproduction Mecanique des Auteurs, Compositeurs et Editeurs* (*SACEM/SDRM*) jointly brought criminal action.

The Court ruled that, by reproducing, distributing and making available to Internet users unauthorized MP3 copies of protected musical works, the Defendants were guilty of counterfeiting as prescribed in Arts L 335-2 and L 335-4 of the French Criminal Code, and sentenced Roche to three months and Battie to two months on probation and ordered them to pay damages.

**3. Belgium:**
**Preliminary Injunction against Hyperlinking**

On 21 December 1999, the *Rechtbank van eerste aanleg* (Court of First Instance) of Antwerp in a summary proceeding ordered Werner Guido Beckers, a Belgian student who maintained a web site with 25,000 links to sites where MP3 files could be downloaded without the right holders' permission, to refrain from hyperlinking any web site to Internet sites containing unauthorised MP3 files.[15]

The International Federation of the Phonographic Industry (IFPI) had warned Beckers several times that in its view his activity was illegal. After Becker's site had been closed down by the site host at IFPI's request, Beckers quickly set up two other sites, again offering the same content. In June 1999, IFPI started injunction proceedings.[16] The Court granted the injunction and prohibited the Defendant from including hyperlinks in any web site to Internet sites containing unauthorised MP3 files. It reasoned that hyperlinking to a web site that contained unauthorized material, provides potential users with the key for locating, accessing and downloading protected music files without paying the right holders and therefore constitutes an offence (section 1382 of the Civil Code). The Defendant's argument that banning such links amounts to a restriction on freedom of expression was rejected.[17]

**4. Sweden:**
**Hyperlinking Allowed as Public Performance**

Although in a Belgian civil case hyperlinking was viewed as illegal, the Supreme Court of Sweden exonerated a Teenager from the criminal charge of committing music piracy.

On 15 June 2000, the Supreme Court of Sweden upheld the verdict of the *Göta Hovrätt* (Court of Appeal of Göta) pronouncing Tommy Olsson not guilty of taking, or participating in, actions by which unauthorized sound files were made available to the general public without the consent of the phonogram producers or their rights owners.[18]

The Defendant, student Tommy Anders Olsson, ran a web site containing links to an illegal MP3 archive. Olsson was sued for distributing copyright-protected songs free of charge over the Internet without the authorization of the phonogram producers.

The Court stated that under section 47 of the Swedish Copyright Act[19] Olsson's making available of music files was to be considered as "public performance" of a sound recording, which is exempt from the exclusive right otherwise enjoyed by performing artists and phonogram producers (sections 45 and 46). Therefore Olsson's action did not constitute a criminal offence.

It should be noted, however, that the claim had been limited to the "making available of music files" and to rights of "phonogram producers" – that is, to a direct infringement by Olsson. Accordingly, the Court had neither to consider whether Olsson aided and abetted the illegal production or distribution of copies by those downloading sound files with the help of his links, nor to evaluate the lack of consent of other rights holders such as composers and songwriters.

## B. Liability of Internet Service Providers

The lawsuits against individuals are complemented by complaints against Internet service providers whose services are required for the online exchange of MP3 files and the hosting of web sites. Accordingly, Internet service providers are mainly in the firing line for indirect infringements of copyright. The question whether an Internet service provider is liable for facilitating the illicit reproduction or distribution of MP3 files might raise a discussion as broad and as fierce as that about their liability for transmitting illegal content in general.[20] Yet the technical developments have shifted the focus to Internet services (see below C and D), which are more complex than the mere transmission of data, where service providers also seek to benefit from the private/fair use exceptions. Hence, the following cases concerning the specific Internet services of hosting web sites and Internet fora may suffice to demonstrate the potential liability of Internet service providers in the context of MP3.

**1. Belgium:**
**Liability under Trade Practices Act**

On 2 November 1999, the *tribunal de commerce* (Commercial Court) of Brussels ruled against the Internet service provider Belgacom Skynet for having violated the Belgian Trade Practices Act (*Loi sur les pratiques du commerce et sur l'information et la protecion du consommateur*).[21]

The Defendant not only provided Internet transmission services but also hosted web sites, including two web sites containing links to unauthorized sound files, in which the Plaintiffs claim copyrights-. When the Plaintiffs' request for removal of these links was not honored by Defendants, the Plaintiffs filed suit.

The Court followed the decision of the *Rechtbank Den Haag* (District Court of The Hague) in the Scientology case[22] that established the liability of a service provider for hosting sites with links on his server that, when activated, reproduced a copyright work on the computer screen of the user without the Plaintiff's consent. This rule applies on condition that the server provider has been notified, the correctness of the alleged facts cannot be reasonably doubted, and the service provider does not remove the link from the server as soon as possible.

Based thereupon, the Court held that the Defendants were liable for indirect infringements, namely the provision of a service (web site hosting) for distributing information on the Internet.[23] It concluded that the Defendants had acted (as vendor of this service) in conflict with fair trading practice within the meaning of Art. 93 Trade Practices Act[24] and caused damage to the Plaintiffs' interests by knowingly storing information on the Defendants' server and thereby brought about the unlawful electronic distribution of musical recordings in which Plaintiffs owned copyrights.

**2. Germany:**
**Liability under Copyright Act and Tele-Services Act**

On 30 March 2000, the *Landgericht München* (Munich Regional Court) ruled that an online service provider breached the terms of the *Urheberrechtsgesetz* (Copyright Act – *UrhG*) by making pieces of music protected by copyright available on a server without permission.[25]

The Defendant, an online service provider, runs a music forum where users can store music files that can then be downloaded by other users. The Defendant only allows the files to be downloaded if they have been checked by a supervisory body for viruses and

recognised indications of copyright. In January 1998, three music files in which the Plaintiff held the copyright were made available on the server. Visitors to the music forum could copy the files onto their own computers.

The Court ruled that the Defendant had made the music available for downloading even though signs indicating copyright could easily have been recognised. It was true that, since the music files had been saved on the server by third parties, they did not constitute "own content" in the sense of section 5.1 of the *Teledienstegesetz* (Tele-Services Act – *TDG*) and the Defendant was therefore not responsible for them under general law. However, section 5.2 of the *TDG* stated that service providers were responsible for third-party content that they made available to others if they had knowledge of such content and if they were technically able and could reasonably be expected to block access to it.[26]

The Court explained that an online service provider could, in principle, be held liable for third-party content even if it was not aware of the copyright situation in every single case.[27] It was a fact that many pieces of popular and light music were subject to copyright since, under section 64 of the Copyright Act, such rights only expired 70 years after the author's death. For this reason, enabling people to store and download the files was a breach of the author's reproduction and distribution rights. Since it was impossible to trace users who stored protected music files on the server, the author had no means of preventing infringements of his rights. It was therefore the responsibility of the online service provider if he knew the actual piece of music by name.[28]

## C. The MP3.com Case

The lawsuit against MP3.com targeted a Defendant who claimed to have merely facilitated the formatting of music from CDs into MP3 files and their storing for the private use of CD owners. The case is peculiar because the Defendant denied direct infringement of copyrights by its customers claiming that their activities were protected fair use. As a consequence, the Defendant also contested that it had any indirect liability.

MP3.com, Inc., is a company,[29] that offers over its Internet site, *inter alia*, the so called "My.MP3.com service" ("My.MP3"). My.MP3 is advertised as allowing subscribers to store, customize, and listen to the recordings contained on their CDs from any place where they had an Internet connection. In order to do so, a customer had two options. He could demonstrate that he already owned the CD version of the recording that he wished to access in MP3 format by using the "Beam-it Service". This meant he had to play his copy for a few seconds using his computer CD-ROM drive. Alternatively, he could purchase the CD from one of MP3.com's cooperating online retailers via the "Instant Listening Service." Then the customer could call up, and listen to, the music contained on this particular CD from any computer around the globe through MP3.com's Internet services. Yet what the company was re-playing for the customer was a copy made by MP3.com from CDs for which in most cases it did not possess copyrights. Neither did it have authorization for copying.

Therefore several music recording and publishing companies that claimed to hold copyrights for these recordings brought an action against MP3.com for illegal copying of several thousand commercial audio CDs onto its computer servers.[30]

On 28 April 2000, U.S. District Judge Jed Rakoff granted the Plaintiffs' motion for partial summary judgment confirming that Defendant had infringed the Plaintiffs' copyrights. The District Judge even went so far as to state that: "The complex marvels of cyber spatial communication may create difficult legal issues; but not in this case."[31]

Indeed the only legal issue raised by the Defendant, who did not contest the facts usually amounting to a direct infringement of copyrights, concerned the affirmative defense of "fair use". The equitable "fair use" doctrine is based on the idea that copyright protection as provided for in the United States Copyright Act (U.S.C.A.) "has never accorded the copyright owner complete control over all possible uses of his work. Rather the Copyright Act grants the copyright holder 'exclusive rights' to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies. All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a 'fair use;' the copyright owner does not possess the exclusive right to such a use."[32]

The fair use doctrine has been endorsed by section 107 U.S.C.A., which establishes the factors to be considered when balancing the conflicting interests. These factors include (but are not limited to):[33]

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyright work;
(3) the amount and substantiality of the portion used in relation to the copyright work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyright work.

With regard to the first factor, the purpose of My.MP3 was found to be commercial, because the Defendant sought to attract a sufficiently large subscription base to draw advertising and otherwise make profit.[34] According to the Judge the service essentially repackaged or republished existing recordings to facilitate their transmission through another medium, even though the Defendant claimed it entailed a transformative "space-shift".[35] With regard to the second factor, the Judge found that the type of copyright work at issue in the case was not one amenable to fair use. As for the third factor, he held against the Defendant as he had copied the entire work. Concerning the fourth factor, the Judge found that Plaintiffs had begun to enter into a new market deriving directly from reproduction of their copyright works by concluding licensing agreements for offering their works in MP3 format over the Internet.[36] The Judge further held, that aside from Plaintiffs' new market activity, they would have even been entitled to refuse licensing for the development of such a new MP3 market.

The MP3.com case facilitated matters for the music industry in that the industry could target a single company rather than individual copyright pirates. By winning the partial summary judgment against MP3.com, the industry took the first step in closing the gate against thousands of illegally copied CDs.[37]

## D. The Napster Case

While My.MP3 was vulnerable to legal claims because its operator had created a database containing a significant number of illicit copies, which were offered to third parties outside the scope of fair use, the next generation of MP3 uses aimed to avoid elements that could trigger such liability. Possibly the most prominent example is the sophisticated system for trading MP3 files provided by Napster, Inc. (Napster), an Internet start-up based in San Mateo, California. This system was designed to connect Internet users directly with each other and thus avoid the problems faced by MP3.com.

In order to understand the Napster case, it is useful to look at

the system from which it emerged, namely Internet Relay Chat (IRC) channels. IRC channels allow people to find online the music of their choice. Yet any individual can do so only after having downloaded special IRC software, hooked up to a special IRC server, and selected a particular channel focusing on MP3. MP3-links can be received only from group members who have joined this particular channel. Also the person in search of his favourite music must be present in the "chat room" while the relevant information is being supplied.

The Napster system build on the same "club principle" and improved it by keeping a log of the information exchanged in the "chat room" concerning Napster users and the files they had stored and were willing to share. This Information remained available and accessible on a Napster provided Index after it was dispatched on Napster's channel and as long as the dispatcher stayed online. In order to transfer files, users had to be logged on to the Napster system so that they could establish a direct connection to each other as the MP3 files remained stored with the individual users/owners. By this token not the file itself, but the possibility to access a single private copy in MP3 format, was multiplied. The private copy could then be shared with an unlimited number of people to whom the owner was connected solely via the Napster system.

In contrast to My.MP3, the Napster system did not involve any direct copying by Napster nor did Napster appear to maintain its own music archive. Nevertheless, on 6 December 1999, several record and music entertainment companies (the Plaintiffs) brought suit against Napster, Inc. (the Defendant) alleging contributory and vicarious federal copyright infringement.[38]

On the first count, the Plaintiffs claimed that the Defendant violated and continues to violate their exclusive rights to distribute and reproduce sound recordings embodied in phonorecords to the public by knowingly and systematically inducing, causing, and materially contributing to the unauthorized reproduction and/or distributions of copies and thus to infringements of their copyrights (sections 106 (1) and (3) and 501 U.S.C.A.). They argued that Napster services facilitate and encourage the unauthorized downloading of MP3 music files by one Napster user from another user's computer. This, the Plaintiffs claimed, constitutes unauthorized distribution and results in illicit copies.

In addition, the Plaintiffs alleged vicarious liability because the Defendant had the right and ability to supervise and/or control the infringing conduct of its users by preventing or terminating a user's access to its servers and/or by refusing to index and create links to infringing music files. According to the Plaintiffs, the Defendant at all times derived substantial financial benefit from the infringements of copyrights by soliciting advertising and also, most likely, by charging fees for advertising on Napster.

The Defendant tried to rebut these allegations by describing Napster services as merely facilitating the swapping of music files among users for personal use. The fair use defense implied that the Napster service was used for legal purposes and did not infringe upon copyright laws. The Defendant claimed that the Napster technology was even protected by copyright law, namely by the Audio Home Recording Act of 1992, which prohibits actions against certain noncommercial copying of sound recordings (see section 1008 U.S.C.A.). In addition, the Defendant portrayed its services as a vehicle for new performers to gain exposure to the public.

Seeking to terminate the lawsuit even before going to trial, the Defendant filed a motion for summary adjudication under section 512 (a) U.S.C.A., a safe harbour provision introduced by the Digital Millennium Copyright Act (D.M.C.A.) that limits the liability of service providers for vicarious and contributory infringement of copyrights.[39] Because the Plaintiff did not object to the qualification of Napster as service provider, the consideration of the Defendant's motion focused on the question as to whether the Defendant enabled transmission or another alternative service, as required under section 512 (a) "through" its server. This was denied because the transfer of MP3 files takes place directly from the computer of one Napster user through the Internet to the computer of the requesting user and, thus, it bypasses the Defendant's server.[40] The same evaluation was made regarding potential alternative routing, providing connections or storage activities.[41] The Defendant had also failed, at least at the beginning of its operations, to set up and respect a copyright compliance policy, an additional requirement contained in section 512 (i)(A) U.S.C.A. Finally, it was noted that other functions of Napster services such as the offering of location tools (search engine, searchable directory, index, and links), would have had to be reviewed under the more rigorous safe harbour provision of section 512 (d),[42] which, however, had not been invoked by the Defendant. As a consequence, the Defendant's motion for summary adjudication failed.[43]

On 26 July 2000 oral proceedings took place addressing the Plaintiffs' motion for preliminary injunction. US District Judge Marilyn Hall Patel granted the injunction because the Plaintiffs had shown "a strong likelihood of success on the merits" on both counts and none of the potential defenses could be invoked by Napster.[44]

In her reasoning the judge first established that a majority of Napster clients used the service to download and upload copyright music and that this *prima facie* constituted a direct infringement of the Plaintiffs' copyright musical compositions and recordings.[45] She then went on to reject the defenses of fair use and therefore, could not find a "substantial noninfringing use"[46] of Napster services either.[47] Regarding the fair use criteria, she explained that the exchange of music files among Napster clients is not a typical personal use, given its enormous volume and anonymous setting.[48] She stressed that Napster users would get for free what in most cases they would otherwise have to pay for. She underlined that the substantial or commercially significant use of the service was and continues to be copying pieces of popular music in their entirety, most of which are copyright and for which no authorization has been obtained. Considering the possible effect on the potential market for copyrighted work, she cited evidence that Napster use reduces CD sales among college students, raises barriers to the Plaintiffs' entry into the market for the digital downloading of music and, thus, harms the market. Finally, she concluded that even a potential fair use such as the authorized distribution of the work of new artists would not be substantial and noninfringing within the meaning of the affirmative defense.

The judge also denied protection of the file-sharing technology under the Audio Home Recording Act ("A.H.R.A.") of 1992, which *inter* alia excludes liability for copyright infringement for making or distributing a digital audio recording device or for using these devices to create personal, noncommercial recordings (§ 1008 U.S.C.A.).[49] First, the A.H.R.A. was irrelevant because the Plaintiffs had not brought any related claims. Second, the judge found that neither computers nor hard drives were audio recording devices, for which the A.H.R.A. had been conceptualized.[50] Third, she did not accept the only potential personal, noncommercial use, namely space-shifting,[51] as being commercially significant.

The judge enjoined Napster from causing, assisting. enabling, facilitating or contributing to the copying, duplicating or other infringement of all copyright songs, musical compositions or mate-

rial in which Plaintiffs held copyright and ordered that the injunction should come into effect on 28 July 2000. On that same day, however, the 9th U.S. Court of Appeals granted the Defendant an emergency stay.[52]

The Appeals Court saw substantial questions being raised about the merits and form of the injunction and its potential for precedent-setting. The Appeals Court found that the ruling had possibly been overly broad because Napster services were at least also used to swap non-copyright works. In addition, it was concerned about the scope of the damage that the shutdown of Napster would have entailed. The stay allows the Defendant to deliver additional arguments against the injunction (deadline 18 August) and the Plaintiffs to bring forward their counter-arguments (deadline 12 September) before the appeal will be decided and the case referred back to the District Court for a final decision.

## E. Scour, Gnutella, Freenet, and the Future

The importance of the Napster litigation for the audiovisual industry has recently been underlined by the setting up of a company called Scour.com (Scour). The company offers software called Scour Exchange (SX) enabling file-sharing among SX users. Like other file-sharing tools, SX is based on the same principles as Napster with the sole difference that its users can exchange not only MP3 files, but also video and image files. Accordingly, a lawsuit similar to that against Napster has been brought by the audiovisual industry against Scour.[53]

In a way, the Napster system resembles the file-sharing through hyperlinking, where individuals offer on their web site hyperlinks to other web sites from which visitors can download music in MP3 format. In both settings, litigation focuses on the connecting party rather than on the individuals who download or upload the file. In both cases, the file-sharing system and the illegal copies for downloading are offered from different entities. However, whereas Napster connects two individuals with each other, the hyperlink providers direct unspecified users to a web site. In addition, Napster might be able to claim that their users respect copyrights but the hyperlink providers had been warned that the content of the web sites included copyright material.

This explains why fair use was invoked as a defense in the Napster case while its European equivalent of private use is lacking as argument in the hyperlinking cases. Whether the fair use defense of Napster will be successful remains open and is questionable , even in light of the stay granted by the Court of Appeals. The stay was used by new technology lobbyists to reiterate their position that the fair use exception is vital for the further development of Internet services.

The ongoing discussions help to pin-point two main aspects, which are likely to define the scope of traditional copyrights in the future: the legal limits of private/fair use in light of digitalization, and the desirability of promoting digital technology and Internet services. To the extent Europe is concerned, these two aspects are supplemented by the question of what system of remuneration could be introduced (and enforced!) to compensate copyright holders for financial losses incurred because of private use or similar exceptions.[54]

Furthermore, the cases indicate that MP3 users are likely to find many more and different offers of MP3 related services in the future. Companies will not wait until the cases have made it through to the highest courts before they continue to explore the possibilities of the MP3 world. Rather we can expect to witness further refined "swapping" techniques aimed at reaching the safe harbours of specialized laws or designed for private and strictly personal – and therefore protected – use. And we can expect more litigation. The more sophisticated technology gets, the more the feasibility of legal control may become a serious question.

Some people think that the end of legal control has already come with Gnutella – software that allows the transfer of all kinds of files directly from user to user without a centralized server. Users are part of a peer-to-peer network, that is, everybody on the network acts as a client and as a server. When one user connects to another user on the network, he is virtually connected to many others. To launch a search, the user sends his request to the user or users, to whom he is connected. They in turn send it to the users to whom they are connected in a chain reaction, until the desired file is found. In the end, only one private user will download only one MP3 file from another private person, who is even likely to be the owner of the original CD and the perhaps legally-made copy. It will become much harder for the record industry to target those who set up the file-sharing systems. At the same time, suing individual infringers has little attraction when balancing the costs and benefits of such lawsuit. In addition, Gnutella users will also argue that their transactions adhere to fair use criteria.

Freenet is another variant of the "peer-to-peer" idea. The main difference between it and Gnutella is that users remain completely anonymous. As a result, nobody is able to track down their activities on the Freenet. As soon as the exchange of MP3 files leaves no traces behind, copyright enforcement becomes practically impossible. It might turn out be a challenge to courts and legislators to counter these developments. ■

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1) Lawrence Lessig, Code and other Laws of Cyberspace, Basic Books 1999, page 125.
2) MP3 stands for "MPEG 1 (Moving Picture Experts Group 1), audio layer 3".
3) "Some 14% of Internet users, about 13 million Americans, have downloaded free music files on the Internet that they do not own in other forms. Only a fraction of Internet users, just 2%, say they have paid for downloading music and a similarly small percentage say they own the same music they have grabbed online in other forms such as compact disks or cassette tapes. The act of pulling free music files from online sources – an act we call "freeloading" – is particularly popular with students and it is especially appealing to young men. Still, 42% of those who have done freeloading are between the ages of 30 and 49 and they tend to be those with a lot of experience online." Quote from Internet Tracking Report, Pew Internet & American Life Project: "13 million Americans 'freeload' music on the Internet; 1 billion free music files now sit on Napster users' computers", available at: http://www.pewinternet.org/reports/toc.asp?Report=16
4) "As for MP3 technology, RIAA [Recording Industry Association of America] only has a problem with the illegal uses of the format to distribute copyrighted recordings without the permission of the artist or record company. To the extent that artists use MP3 technology to distribute their work - music that they own the rights to - that's great; in fact, it's a potent example of the ways in which the Internet can connect creators and fans and produce new opportunities for the distribution of music." Napster Lawsuit Q&A, available at: http://www.riaa.com/Napster.cfm
5) WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). See IRIS 2000-2: 15-20.
6) The entailed loss of copyright protection is normally softened by a requirement of fair compensation for the right holders.

7) Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 21 Mai 1999 COM(1999) 250 final 97/0359/COD. See IRIS 2000-2: 15-20.
8) The draft proposal also envisages that for all digital private copying fair compensation for all rightholders must be provided. See Article 5 2. b) bis of the draft Copyright Directive.
9) The national laws of the countries from which these cases originated all provide the right to reproduction for private purposes (though mostly supplemented by a system aimed at remunerating the artists). See for the United States section 107 Copyright Act, for France Articles L 122-5 (2) and L 211-3 (2) of the Intellectual Property Code, for Belgium Articles 22 (1) 5. and 46 4. of the Law on Copyright and Neighbouring Rights, for Sweden Art. 12 of Lag (1960:729) *om upphovsrätt till litterära och konstnärliga verk* (the Act on Copyright in Literary and Artistic Works and for Germany section 53 et seq. Copyright Act).
10) See Press Release, US Department of Justice, United States Attorney's Office, District of Oregon, 23 November 1999.
11) According to the definition laid down in 17 U.S.C. § 101, the term "financial gain" includes even the expectation of receipt of anything of value including the receipt of other copyrighted works.
12) 18 U.S.C. § 2319(c)(1) and 17 U.S.C. § 506(a)(2). The latter states: "Any person who infringes a copyright wilfully either-...(2) by the reproduction or distribution, including by electronic means, during any 180-day period, or 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $ 1,000, shall be punished as provided under section 2319 of title 18, United States Code. ..."
13) Section 2319 (c)(1) addresses first-time copyright infringers whose contravention concerns works with a total retail value of USD 2,500 and it provides for a maximum prison term of 3 years and a fine of up to USD 250,000. The probation in the Levy Case is explained by the fact that the precise retail value could not be exactly determined.
14) Tribunal de Grande Instance de Saint-Etienne, SCPP et al. v. Roche and Battie (3561/1999), Judgement of 6 December 1999.
15) Court of First Instance of Antwerp, Case IFPI Belgium v. Werner Guido Beckers (ARK no. 99/594/C), Order of 21 December 1999.
16) At the time of finishing this article, the judgement on the merits was still pending.
17) The Judge, *ibid.*, page 4, responded that "Freedom of expression is in fact limited and offers no alibi for committing an offence."
18) *Högsta Domstolen (*Supreme Court*), Case Dr Record Kommanditbolag et al. v. Tommy Anders Olsson (no. B 413-00), Judgement of 15 June 2000.*
19) The relevant part, section. 47 states: "Notwithstanding the provisions of sections 45, second paragraph, and 46, first paragraph, sound recordings may be used in a sound radio or television broadcast or in another public performance. In such a case, the producer and the performers whose performances are recorded have a right to remuneration."
20) See for example the judgements in the German Compuserve case reported in IRIS 1998-6: 4 and IRIS 2000-5: 12.
21) Commercial Court of Brussels, IFPI V.Z.W. and Polygram Records N.V. v. Belgacom Skynet N.V. (V.S. 2192/99), Judgment of 2 November 1999.
22) District Court of The Hague, Church of Spiritual Technology c.s. v. XS4ALL c.s./Spaink (96/1948). Decision of 9 June 1999. See IRIS 1999-7: 4, 1996-4: 3 and 1995-9: 4.
23) The specific liability of Skynet in the present case was not affected by the fact that others might also be liable concerning the illegal distribution of music.
24) Article 93 Trade Practices Act states: *Est interdit tout acte contraire aux usages honnêtes en matière commerciale par lequel un vendeur porte atteinte ou peut porter atteinte aux intérêts professionnels d'un ou plusieurs autres vendeurs.*
25) Ruling of the Munich Regional Court, 30 March 2000; case no. 7 O 3625/98.
26) In this context the announcement of America Online is noteworthy that it will take down a new Internet search engine that allows users to find MP3 files, because this service cannot distinguish between legal and illegal MP3 files. Until this function is properly installed, the search engine will be down. See http://www.zdnet.co.uk/news/2000/31/ns-17219.html
27) In contrast, in the Compuserve case the same Court applied the limitation of liability set out in Article 5.3 of the Tele-Services Act. See IRIS 2000-5: 12.
28) The summary of the case was contributed by Kerstin Däther, Institute of European Media Law (EMR) and edited by the authors.
29) MP3.com, Inc. is organised under the laws of Delaware, with its principal place of business in San Diego, California.
30) UMG Recordings, Inc. Sony Music Entertainment Inc., Warner Bros. Records Inc., Arista Records Inc., Atlantic Recording Corporation, BMG Music d/b/a The RCA Records Label, Capitol Records, Inc., Elektra Entertainment Group, Inc., Interscope Records, and Sire Records Group Inc., v. MP3.Com, Inc,, Case 00 Civ. 0472 (S.D.N.Y. filed 21 January 2000).
31) Opinion in Case 00 Civ 472 (JSR) of 4 May 2000, first page.
32) Sony Corporation of America, et al. v. Universal City Studio, Inc. etc., et al., 464 U.S. 417, 104 S.Ct.774 (II).
33) See 17 U.S.C. § 107. "Other relevant factors may also be considered, since fair use is an equitable rule of reason to be applied in light of the overall purposes of the Copyright Act.", Opinion in case 00 Civ 472 (page 4).
34) The company not only created an enormous archive of music works (RIAA complains that 45000 audio CDs have been recorded) but it also became extremely popular.
35) In Recording v. Diamond of the U.S. 9th Circuit Court of Appeals "space-shifting" is explained as rendering portable or "space-shift", those files that already reside on a user's hard drive. See the opinion under II B 2 c. The opinion is available at http://laws.findlaw.com/9th/9856727.html
36) Currently, MP3.com has reached a settlement with three record companies (EMI, Warner Music Group, BMG Entertainment and Sony Music Entertainment) in the copyright infringement suit. In addition the labels have granted MP3.com a license to use their music catalogue in My.MP3.com service. See http://progress.mp3.com/?mc=hpim01
37) On 6 September, Judge Jed S. Rakoff ruled that MP3.com willfully infringed Universal Music Group's copyrighted works, and ordered MP3 to pay Universal USD 25,000 per CD made available on the site, creating potential liability of USD 118 million. Previously, MP3.com enjoyed a slight victory, when Judge Jed S. Rakoff refused the plaintiffs' request to be awarded a summary judgement that tacked damage costs onto each song MP3.com used without authorisation, and not onto each CD. MP3 has announced that they will take the case to the Court of Appeals.
38) Case No. C99-5183-MHP, filed 6 December 1999.
39) See section § 512 (a) U.S.C.A.
40) The Defendant had indeed argued that its services enables the connection of users' hard-drives and the transmission of MP3 files directly from the Host hard drive and Napster browser through the Internet to the user's Napster browser and hard drive. Yet it had also alleged that Napster's servers and Napster's MusicShare browsers on its users' computers (but not their computers!) were all part of Napster's overall system and as a result the activity would take place through the Defendant's server.
41) The three remaining factors determined by section 512 (a) – that recipients are not selected (but by automatic response), no copy of the material is maintained on the system or network, and no modifications are made to the transmitted material – were satisfied.
42) According to § 512 (d) (1) a service provider who offers search engines linking to pirated material is exempt from liability if he does so unknowingly, a case hard to make for MP3 files of which it is known that the majority are unauthorised copies. In addition § 512 (d) (2) requires that the service provider does not receive a financial benefit.
43) Opinion of US District Judge Marilyn Hall Patel of 5 May 2000.
44) For the full opinion addressing all potential defences and discussing in great detail all technical aspects of Napster services, see Opinion No. C 99-5183 MHP and No. C 00-0074 MHP, published 16 August 2000 and available at http://www.cand.uscourts.gov/cand/tentrule.nsf/4f9d4c4a03b0cf70882567980073b2e4/74bf2867dde99f0f88256938007a1205/$FILE/NapsterF%26C2.pdf
45) Direct copyright infringement is a necessary requirement for the finding of contributory and/or vicarious liability.
46) For further explanations, see Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).
47) See the Transcript of Proceedings of 26 July 2000, page 72 et seq.
48) In her opinion, *ibid*., page 19 line 18-19, she writes: "At the very least, a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester."
49) On 8 September, the United States submitted a brief as an *amicus curiae*, to address the effect of the immunity provision of the Audio Home Recording Act of 1992, 17 U.S.C. § 1008. In this brief, it is affirmed that Section 1008 of the A.H.R.A. does not excuse Napster from liability, therefore supporting the district court's views on this subject. See http://www.loc.gov/copyright/docs/napsteramicus.pdf
50) See Recording v Diamond of the U.S. 9th Circuit Court of Appeals (under II B 2 a), which deals with the playback device for MP3 files called Rio.
51) See above footnote 35 for further explanations of space-shifting.
52) United States Court of Appeals for the 9th Circuit, Order in cases No. 00-16401 DC# CV-99-5183-MHP and No. 00-16403 DC# CV-99-5183-MHP of 28 July 2000.
53) Plaintiffs Twentieth Century Fox Film Corporation et al. v. Scour Inc., complaint filed 26 July 2000, see http://www.mpaa.org/Press/ScourComplaint.htm
54) See for example the levy for reproduction of compressed music files in Austria reported in IRIS 1999-10: 16.