

# Where Does Piracy Start?

## **The difficult case of p2p-networks**

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A challenge to the audiovisual industries  
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**SLIDE 1**

**Where does piracy start? The difficult case of p2p networks**

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Minister, Chair, Ladies and Gentlemen,

Piracy leads to many legal questions and the first one is how to define piracy. This has been discussed emphatically and sometimes doggedly for peer-to-peer networks – that is networks, permitting the exchange of electronic music and film files between two private parties. Let me therefore talk to you about:

“The difficult case of p2p networks” regarding the question:

“Where does piracy start?”

# Point of Departure

Insensitivity to authors' rights?

Ignorance of the Law?



Are p2p networks illegal?

## **SLIDE 2: POINT OF DEPARTURE**

Industry and government sponsored surveys strongly suggest that certain age groups see little or even no reason *not* to engage in peer-to-peer sharing of audio and audiovisual files. Are the file-sharing people just insensitive to the rights of authors? Is it possible that they are not aware of the law?

Applying existing copyright law to the intricacies of peer-to-peer technology and enforcing the law constitutes an important challenge. The Observatory has published two legal studies and several newsletter articles on this issue. Let me summarise some of our results. And let me invite you to consult our website in order to fill the gaps that this brief overview will certainly leave open.

# Court Cases

concerning:

- music
- film

focusing on:

- reproduction right
- right of making available

from different countries

### **SLIDE 3: COURT CASES**

Peer-to-peer networks litigation started because of the exchange of music files. Legal action concerning the sharing of moving picture images is more recent and still less frequent. I will highlight cases concerning music and cases concerning film, simply because the legal issues are largely the same.

You will see “file-sharing” cases are very complicated both technologically and legally. If there is a single piece of information that I would like you to take away from this short presentation it is that *details matter*. By changing a small function of a file-sharing system you might change the outcome of a court case. Indeed the designers of peer-to-peer systems draw on this fact in order to avoid liability. Also it matters which country’s courts handle the claim and my presentation is necessarily limited to only very few examples.

Among the many legal arguments against file sharing, possibly the most straightforward allegation is that it violates the reproduction right and the right of making available. Let us therefore focus on these rights, which are recognised by WIPO Treaties and the EC Copyright Directive. In principle, only the rightsholders are entitled to make or authorize the making of a digital copy and only they have the right to offer music or film files over the Internet.

# Uploading and Downloading

- CA – *KazaA* (p2p)  
Law lacks right of making available
- NO – *Napster hyperlinking* case  
uploading illegal (right of making available)  
downloading = private use
- NL - *Zoekmp3.nl* (music search engine  
portal – hyperlinking)  
downloading = private use
- US *Napster* (p2p with central server)  
up/downloading is NOT fair use

## **SLIDE 4: UPLOADING AND DOWNLOADING**

In some countries, however, legislation is not fully compatible with the WIPO standards. Canada, for example, has neither ratified the WIPO treaties nor adopted the right of making available. This had consequences in a recent court decision concerning the exchange of music files in a peer-to-peer network based on **KaZaA**. The Federal Court of Canada turned down a motion for disclosure aiming to identify certain of the Internet Service Providers' customers who had allegedly infringed the – non-existing – right of making available.

In a **Norwegian case**, the court concluded that any *uploading* on the Internet has to be viewed as an act of making a copy available to the public and was therefore illegal. Notably, the uploading was not covered by the right to make private copies. In contrast, the court found that *downloading* of files was covered by the private use exception.

A Dutch court took the same view for “copying” by means of downloading an infringing mp3 file in the **Zoekmp3** case. Zoekmp3 is a search-engine portal with hyperlinks to music files.

PRIVATE USE is the most litigated exception invoked in file-exchange litigation. Copying for private use is recognised by the EC Copyright Directive's catalogue of exceptions and limitations – from which the MS can choose – and it has been endorsed by the US Copyright Act as fair use doctrine.

**Napster**, the most prominent US case, resulted in a denial that uploading and downloading of music files was covered by fair use.

The Napster service connected Internet users directly but kept a log of information exchanged on each user and the files they had stored on a central server for as long as the user remained logged on to the Napster system. By this token not the file itself but the possibility to access a single private copy in MP3 format, was multiplied. The exchange of music files via Napster lacked the characteristics of a typical personal use, given its enormous volume and anonymous setting.

In a file-sharing network, the “peers” sharing files are linked together by software that allows the exchange. Most cases so far decided by the courts were brought against software developers or service providers that had orchestrated some type of file-sharing network.

Addressing the connecting services is by far more efficient. In closing down one particular service the industry successfully prevents a whole network of users from exchanging files.

Randal C. Picker made these points crystal clear by writing:

”Chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem”



# Connecting Services: Contributory Liability ?

- US - Napster: yes
- US – Grokster: no
- US - Streamcast Network: no
- US - Aimster: yes
- NL - KaZaA: no
- NL- *Zoekmp3.nl*: no

## **SLIDE 5: CONNECTING SERVICES**

In most cases the connecting services were sued based on the theory of contributory liability. This had been successful in the notorious **Napster** case mentioned earlier.

In contrast, **Grokster** and Streamcast Networks, both advanced peer-to-peer file-sharing programmes that enable users to share any digital file including images, audio, and video were *not* found responsible even though their software was used in some illegal file sharing activity. For the Californian Court it was decisive that neither Grokster nor StreamCast provided the “site and facilities” for direct infringement. This made them different from Napster, which had indexed the files contained on each user's computer, and passed each and every request through its servers. Also important, Grokster and StreamCast had a substantial amount of non-infringing uses for the software among them distributing movie trailers, non-copyrighted works, or sharing the works of Shakespeare.

The file-sharing software **KaZaA** has been subject of a case that made its way up to the Dutch Supreme Court. KaZaA's mere provisions of means for publication or multiplication of copyright-protected works were found *not* to be in itself an act of publication or multiplication. KaZaA's software was also *not* unlawful because some of the works exchanged were in the public domain or works used with the author's permission.

In the Dutch **Zoekmp3** case, the operator of the music search-engine portal was also cleared of liability because providing services or assistance that could subsequently lead to infringement and unlawful trade by third parties was in itself not unlawful.

So far I have discussed the legal problems surrounding file-sharing as “media insensitive”. Yet the fact that DVDs – before CDs – enjoyed elaborate anti-piracy protection, resulted also in film-specific litigation.

# Film-specific litigation

## Jon Johansen Case

- CSS = Anti-piracy protection for DVDs
- DeCSS = Software “breaking” CSS
- ➔ Enables exchange of movie files over the Internet

## Holding of the Court:

- Development of DeCSS was legal
- No contributory liability (private use)

## **SLIDE 6: FILM-SPECIFIC LITIGATION**

Access to digital movie files is controlled by the “Content Scrambling System” (CSS), which prevents their copying. One problem of technical protection is that technical programmes cannot distinguish between illegal and legal copying. They block copying without checking whether private use, use for teaching or scientific research or another sanctioned exception might justify reproduction.

This might have inspired teenager Jon Johansen to break the CSS system by reverse-engineering a licensed DVD player. He developed a computer programme, called “DeCSS”, that unscrambles the CSS and enables users to watch DVD films on unlicensed players and to copy them in digital format. As a result, the movie files can be sent over the Internet like any other digital file. Johansen had been indicted in Norway in criminal court among others for reproduction of DVD movies, and for having illegally acquired the decryption programme used in developing DeCSS. Furthermore he was accused of contributory infringement regarding the use of DeCSS by others. He was acquitted of all charges.

According to the appellate court the copying of DVD files was covered by the private use exception because consumers made backup copies of legally owned DVDs. This lawful use *disqualified* Johansen as a contributory infringer. He was also *not* liable regarding the decryption programme because the development was reverse engineering.

In the United States the DVD Copy Control Association, who provides and licenses CSS keys, brought several lawsuits against the posting of, and linking to, web sites containing DeCSS.

# DeCSS Lawsuits in the US

Against posting of, linking to websites containing DeCSS

- Bunner case: violation of trade secrets
- Corely case: violation of DMCA
- Both cases: DeCSS is speech but limitations target non-speech element

## **SLIDE 7: DECSS LAWSUITS IN THE US**

These cases brought a new dimension to litigation over file sharing.

The Californian Bunner case tested the applicability of Trade Secret Laws. The fact that DeCSS had been drawing on confidential information on the licenses was found to violate trade secrets.

The New York Corley case presented the Digital Millennium Copyright Act (DMCA) for consideration. DeCSS was found to be a tool for illicit circumvention of copyright protection measures legally prohibited under the DMCA. The Court, thus accepted that the DMCA could *de facto* limit fair use even though fair use is itself protected by the US Copyright Act.

The two lawsuits raised further the question whether DeCSS itself benefited from constitutional protection under the First Amendment – the right to free speech. The answer was “yes” – DeCSS is speech because it conveys information, namely the software code. But DeCSS also contains a “functional” non-speech element and because the limitations introduced by law targeted this non-speech element, the limitations did not violate free speech.

# Anti-Piracy Measures *versus* Private Use

- Law protects anti-piracy measures  
US: DMCA  
EU: EC Copyright Directive
  - Law protects private use  
US: Copyright Act  
EU: EC Copyright Directive
- ➔ The answer is pending with the courts and national legislators

## SLIDE 8: Anti-Piracy Measures versus Private Use

The validity of the DMCA provision prohibiting the circumvention of anti-piracy measures and the fair use exception are further being tested in two cases involving the company 321 studios. The company produces DVD-duplication software based on DeCSS. For the time being preliminary rulings stopped 321 studios from marketing the software.

The 321 studios litigation has also reached Europe. In England, two suits are pending with the High Court aimed at banning the sale of the duplication software. One of them will test the new Copyright and Related Rights Regulations 2003, which introduced into British law a provision against the circumvention of technical protection measures.

This new Regulation transposes the EC Copyright Directive. The Directive prohibits both conduct and the manufacture or distribution of devices that could be used to defeat technological copyright protections. The Directive also tackles the question how to reconcile legal protection for anti-circumvention measures with the private use exception. If a Member State adopts the exception, it has to ensure that private use remains sufficiently possible despite the technological copyright protections.

While courts on both sides of the Atlantic continue to struggle with the evaluation of peer-to-peer and anti-piracy technology, proposals are made to solve the tension between copyright and private use through fair remuneration. This, however, will be discussed by our third panel.

Let me close by reminding you of what I hope to have illustrated:  
peer-to-peer *is* an ocean problem!



Peer-to-peer  
*is*  
an ocean problem!