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

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Introduction

"We are all pirates"

1. This phrase introduced a recent article in 'Le Nouvel Observateur' in protest against the oppression felt by the users of peer-to-peer programs.[1] These programs, which allow for the transfer of files between computers without any payment, have in the last few years become a true phenomenon which has caused concern for lawyers and the representatives of right holders, has become increasingly popular with Internet users and has come to the attention of journalists.[2] It is not necessary to delve deep into the articles on the subject found in the general press. It is only necessary to examine the headlines of, for instance, the daily paper 'Le Monde' from 5 February 2005, or that of 'Libération' from 28 September 2004. Even when peer-to-peer services are not making the headlines, they are often at the core of the debate.[3]

2. The development of broadband has indeed transformed the Internet into a vast network where one can exchange protected works, reduced to simple computer files, from one computer to another with the greatest of ease. However, as Internet users began to unlock its potential, the negative effects attached to such potential also became apparent. In the majority of cases, the works exchanged are protected by copyright and neighbouring rights, thus exposing the user to the risk of becoming a counterfeiter, exposed to the heavy penalties as provided for in the French Intellectual Property Code (Code de Propriété intellectuelle – henceforth 'CPI').[4] Nevertheless, it is very difficult to make people understand just how the downloading and distribution of works causes detriment to authors, performers and producers. The world has adopted the attitude that 'everything is for free' which, while obviously attractive to someone who wants access to a wide variety of music and film, has quickly revealed its downside. Indeed, even if the debate over the economic impact of peer-to-peer file sharing was left to the economists,[5] it must be conceded that this attitude

[1] 'Le Nouvel Observateur', 3-9 February 2005

[2] Eight million people in France use, at least occasionally, peer-to-peer services. Using peer-to-peer software, the most well known of which are Kazaa, Bitorrent, eMule, Soulseek, eDonkey and Morpheus, an Internet user can connect to another user and exchange any sort of digital file (music, photos, videos, software)

[3] See for example, D. Conrod, A l'heure des journaux gratuits, du téléchargement musical et de la TNT, quel est le vrai coût de la gratuité? : Télérama no. 2884, 20 April 2005, p.26 – B. Edelman et D. Cohen, La gratuité tue-t-elle les auteurs? : Epok no. 52, Dec 2004- Jan 2005, p.50

[4] 3 years in prison and 300,000 Euro fine (French Intellectual Property Code, articles L 335-3 and L 335-4)

[5] See: Le peer-to-peer fait toujours couler l'encre : Comm.com.électr. 2004, alertes p.6. It seems that two University studies in the United States on the real economic impact of peer-to-peer file sharing led to opposite conclusions. One,

can only dissuade investors from placing their money into the production of works which may not return a profit. Thus the exchange of works without payment has a very real cost, firstly for the rightful owner and secondly for the public itself, which runs the risk of seeing a decline in the production of literary and artistic works.[6]

3. It is in this context, purely and simply flowing from this questionable attitude towards the legitimacy of literary and artistic ownership, that it is appropriate to undertake a legal analysis of the phenomenon. Peer-to-peer, as already stated, is an exchange system for files. Therefore two acts can be identified: the **downloading** which allows the user to retrieve the file made available by another user, and the **making available** of the file, which gives third parties the ability to access the work. This interpretation leads to a very simple analysis: the downloading, which allows the creation of a copy, affects the reproduction right of the author[7] and the holders of neighbouring rights[8] while the act of making the file available is analogous to an act of performance[9] and of communication to the public.[10] Thus when a work is downloaded or made available for download without the consent of the right holders, there will be an infringement of intellectual property rights.

4. The difficulty is that, currently, the authors and the holders of neighbouring rights receive no remuneration for these acts which exploit their works. As the numbers of exchanges continue to

(F. Oberholzer and K. Strumpf, The effect of file sharing on record sales, an empirical analysis) concluded that the impact was limited, the other (S.J. Liebowitz, Peer-to-peer networks: creative destruction of just plain destruction?) was much more alarmist. Basically, it can be said that the representatives of the producers tend to attribute decreasing compact disc sales to the development of peer-to-peer, while it seems that other factors could explain this phenomenon: 'economic recession, the end of the technological cycle of the CD and the replacement of vinyl, the reduction of variety on offer, the decrease of quality, the incoherence of pricing policies, artificially high prices, the movement of consumption towards other formats or media (DVD, webradio, etc)' (T. Krim, Le peer-to-peer, un autre modèle économique pour la musique, p. 136). Moreover it should be noted that between April 2004 and March 2005, sales of visual media increased by 31.3% in volume and 16.2% in value (video Barometer CNC-GFK: www.cnc.fr) even though the exchange of visual media via the Internet greatly increased during the same period.

[6] On this, see 'Telerama' of April 2004: 'In the musical domain, we can see the revenge of the consumer on the industry. There was too much promotion, too much marketing, for a product judged mediocre as a whole. The consumer eventually reacted. He takes control, he cheats, he alters, he copies, he pirates, he transforms, he distributes. Dissatisfied by what is offered by the market, he decides to decide himself. And technology facilitates this; it provides the possibility of digitization, huge storage capacities and extremely fast connections.' (J.B. Courmau, quoted by D. Conrod in his article 'A l'heure des journaux gratuits, du téléchargement musical et de la TNT, quel est le vrai coût de la gratuité?' : Télérama no. 2884, 20 April 2005, p.26. Despite this, in the same article we learn that 'this freedom, that delights us or that we take advantage of, has a cost. It is exorbitant and most likely terrifying: it concerns the limitless destruction of the essence of the right of people to benefit from their labours.

[7] French Intellectual Property Code, Article L 122-3: 'Reproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in any indirect way.'

[8] French Intellectual Property Code, Article L 212-3 for performers, L 213-1 for phonogram producers and L 215-1 for film producers.

[9] French Intellectual Property Code, Article L 122-2: 'Performance shall consist in the communication of the work to the public by any process whatsoever (…)'

[10] French Intellectual Property Code, Article L 212-3 for performers, L 213-1 for phonogram producers and L 215-1 for film producers.

increase, the right holders are no longer willing to wait and are now demanding justice in respect of their literary and artistic property rights. The question is then who should be sued; the supplier of the software (1), the Internet service provider (2) or the Internet user who performs the downloading? (3). Furthermore, beyond these judicial solutions, there remains the possibility of a legislative one, which would operate by setting out alternative systems of compensation (4).

1. Legal action against the software supplier

5. In the beginning, due to the desire to find a party capable of paying sufficient damages and to vilify the users of peer-to-peer programs, claims were brought against software suppliers. This strategy at first appeared effective, with for example the Napster case leading to the condemnation of the software company.[11] However, this victory could not be savoured for long. Indeed, as the Napster software was based on a centralised system, the fact that protected works were exchanged was difficult to contest. Napster held an index of music files on their own servers and directly linked the user searching for a file to the user making the file available. However, with the advent of 'decentralised' systems, this approach lost all relevance.

6. Nowadays, the computer of each peer-to-peer user acts as a sort of server on which the works are stored and made available to third parties. Thus the system is truly decentralised and the software supplier no longer acts as an intermediary.

7. A good example of this is the American case of Grokster.[12] When the case was decided, it was noted that the software supplier did not participate directly in the copyright infringements, since even if the supplier had interrupted its activities the exchange of files could not be stopped. Furthermore, the software supplier had no method of preventing the exchange of protected works as the supplier was unable to identify the files which were in the system. The argument developed by the advocates of peer-to-peer is rather inventive.[13] In effect, peer-to-peer services are not illegal *per*

[11] A&M Records v. Napster, 239 F. 3d 1004 (9th cir. 2001)
[12] Case of 19th August 2004 : MGM Studios, Inc et al. v. Grokster Ltd et al., 259 F. Supp. 2d 1029, 2003, US Dist. Commentary by A. Lucas : propr. Intell. oct. 2004, p.920. See also Supreme Court of the Netherlands, case Buma-Stemra v. KaZaA, 19 December 2003 (software company not held liable).
[13] Some people have used this strategy to limit the risks of having an action brought against them. Thus, the BitTorrent program was initially designed to lead the user to special websites which then allowed the user to locate the desired work for download. The work was not stored on these sites, just the location of the work. However it could have been an argument to bring an action against the software supplier. It is without doubt for this reason that nowadays 'information on the location of the file is no longer (…) centralised on a server, but exchanged directly between the different users. (R. LeMay, P2P : BitTorrent donne du fil à retodre aux majors : www.zdnet.fr)

se: the software is not illegal as it can be used to exchange public domain works as well as protected works. However it must be noted that this question has never come before a French court and there would be without doubt debate on the issue, including the theory of criminal liability for complicity and the French concept of 'responsabilité pour faute'[14] in civil law.

8. Firstly, in criminal law, liability as an accomplice is dependant on the existence of a principle offence which is objectively punishable. With peer-to-peer services, the offence is the infringement, an indictable offence under Article L 335-3 CPI.[15] The offence is committed by the user who downloads a work and makes the work available to third parties without the authorisation of the rightful owners. The act of complicity must then be established. Article L 121-7 of the French Penal Code cites two types of complicity: aiding or abetting and instigation. For the present discussion, it is the former type which is relevant: the software supplier gives the user the means of committing the offence of counterfeiting. In fact, complicity by supplying a method is provided by Article 60(2) of the old Penal Code which includes 'the broad concept of aiding and abetting.'[16] As well as the material elements of complicity, the mental element must obviously be considered and thus the accomplice must intend to aid the commission of the offence. In this case, it is difficult to defend the idea that the software supplier participates involuntarily in the exchange of protected works… The supplier can thus be punished as a principal offender.[17]

9. In civil law, 'any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.'[18] The general nature of the terms used by the legislator creates the possibility to apply it here.

10. Nevertheless, the failure of actions against software suppliers requires a discussion of the possibility of actions against Internet services providers.

[14] This doctrine is broadly akin to fault based liability in common law systems.
[15] Complicity to crimes or 'délits' is always punishable according to Article L 121-7 French Penal Code
[16] J. Pradel, Droit pénal general, Cujas, 15th ed., 2004, no. 435
[17] French Penal Code, Article L 121-6: 'The accomplice to the offence, in the meaning of Article 121-7, is punishable as a perpetrator.'
[18] French Civil Code, Article. 1382

2. Legal action against Internet service providers

11. Originally, attempts were made to force Internet service providers (henceforth ISPs) to supply the names of their subscribers suspected of infringements. This type of demand, which appeared in Canada[19] and in the United States,[20] was not very successful before the courts.

12. However, the ISPs are also confronted with other types of demands. For instance, in Canada, SOCAN (The Society of Composers, Authors and Music Publishers of Canada) was able to bring an action against the association of Canadian ISPs claiming the payment of royalties. This approach was based on the idea that the ISPs contribute to the illegal dissemination of protected works. The Supreme Court of Canada gave judgement on 30 June 2004[21] that the ISPs could not be held liable. In effect, the ISPs merely allowed for transfer of data without knowledge of the content, which for the law of Canada,[22] does not constitute a head of liability.

13. The same type of action was brought by SABAM (The Belgian Society for Authors, Composers and Editors) in Belgium.[23] This decision is of particular interest since Belgian law is interpreted in the light of the e-Commerce Directive. The court reached the conclusion that since Tiscali, the ISP, had almost 4% of the Belgian market, it was inevitable that among its customers were users of peer-to-peer services and had infringed the rights of the members of SABAM. The wording of the court was fairly clear on this point: 'there is no reason to believe that SA Tiscali would be excluded from the phenomenon, in the sense that users of their services would not use peer-to-peer programs to exchange musical works in an illegal manner.' The court went on to conclude: 'there is an infringement of the copyright of musical works under the ownership of the members of SABAM by the unauthorised exchange of computer files using peer-to-peer services, and the Internet

[19] Federal Court of Canada, 31 March 2004 BMG Canada Inc. et al. C. John Doe : 2004 FC 488. See Y. Gaubiac et T.Moreau, Peer-to-peer : chronique du Canada : Comm.com. électr. 2004, chron. 34.
[20] Court of Appeal Federal Circuit, District of Columbia, 19 Dec. 2003. See: Y Gaubiac, Logiciels et distribution de musique peer-to-peer : Comm.com. électr. 2004, chron. 7. In this case the association that represents the major record companies were unable to obtain a judgment under the Digital Millenium Copyright Act (section 512 h) because the Act was held not to apply to ISPs which simply provide a transmission service, without saving data on their own servers. This leads to the representatives of the right owners to bring an action against an unnamed individual (given the name John Doe) in order to ask the judge to order the ISP to reveal the real identity of the individual.
[21] 2004 CSC 45
[22] Article 2. 4(1) b, Copyright Act : an ISP 'whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public'.
[23] Brussels Court of First Instance, Case., 26 November 2004, SABAM v. Tiscali: www.juriscom.net

services provided by SA Tiscali.' Thus, 'if the court observes an infringement of copyright, then it must stop it.'

14. The most interesting point here is the link established between the provisions related to copyright and those contained in the 'Law of 11 March 2003 on certain legal aspects of information society services dealing with liability of ISPs acting as intermediaries.' In effect the court gave priority to the rules concerning copyright. Therefore it seems that 'a breach of copyright (in this case a breach of the exclusive right of reproduction and of the exclusive right of communication to the public of which the members of SABAM were the rightful owners) is illegal without regard to the question of fault or breach of a duty of care' and consequently, 'SABAM does not have to prove that SA Tiscali would have been at fault or would have breached its general duty of care by allowing the exchange of musical works by peer-to-peer programs through their Internet services.' Thus 'the reference made in the submissions by SA Tiscali to the provisions of the Law of 11 March 2003 on certain legal aspects of information society services dealing with liability of ISPs acting as intermediaries is (…) not relevant.' The court further ruled that 'Article 87, s.1, of the LDA as interpreted in the light of Article 8(3) of Directive 2001/29 constituted a sufficient and necessary legal basis to find infringements of copyright flowing from the use of peer-to-peer software in order to exchange protected musical works without the authorisation of SABAM and to oblige SA Tiscali, in its capacity of an intermediary whose services are used to commit these infringements, to take appropriate measures to bring these infringements to a stop.'

15. It is arguable that the same solution should be adopted by French courts. Article 6-I-2 of the law of 21 June 2004 on trust in e-Commerce, which implements the e-Commerce Directive, in effect excludes liability of 'suppliers of technical services' for their 'activities or stored information requested by the user' of their services if 'they have no actual knowledge of their illegal purpose or facts and circumstances which would suggest such a purpose or if, as soon as such knowledge is acquired, they act promptly to remove such materials or render access impossible.'

16. With the outcome of actions brought against ISPs or the software suppliers remaining uncertain, the representatives of rightful owners chose to bring actions directly against Internet users who exchange works using peer-to-peer services.

3. Legal action against Internet users

17. The number of cases against Internet users has increased in the last few months,[24] provoking strong reactions.[25] These decisions condemning users for infringement are often presented as unfair, contrary to the freedom supposed to apply to the Internet and ignoring the 'rights of the public.' On the contrary, when an individual escapes condemnation, a victory is declared from which other users infer that they too are immune from legal action. Clearly the situation is unsatisfactory.

18. 'Making an example' of some Internet users is supposed to dissuade others from continuing their exchange of files. However, the impact of these cases is very different. The decisions of both lower and higher courts have created a real confusion concerning the laws of literary and artistic property and have fostered the idea, in the mind of the public, that the rights of the author and the neighbouring rights have lost all legitimacy. Furthermore, there has been no attempt to create the possibility of an authorised peer-to-peer service, only to condemn this method of exchange, the eradication of which seems unlikely. Consequently, it is seriously doubted that these actions really have a deterrent effect. Of course, in the United States, it has been said that the direct consequence of these actions against individuals has been the reduction in the number of people using the systems. In reality, however, Internet users have not been deterred from continuing to exchange files, as they have merely switched to another peer-to-peer program.[26]

19. Due to this, it is sometimes suggested that peer-to-peer services should be 'legalised', or that this should be a question for legislative reform. The discussions in Spain regarding a modification of the Penal Code serve as a good example of the latter. FACUA (The Federation of Consumers in Action) estimates that government ordinance 15/2003 of 25 November, which amended Article 270 of the Spanish Penal Code,[27] will now bring an end to all actions against peer-to-peer users. In

[24] From 2003, the RIAA (Recording industry association of America) has engaged in legal action against users and has recently stated its intention to engage in 753 new actions, which will bring 'the association to a sum of 9000 actions in total' (See : comm.com.électr. mai 2005, p.4). In France, see for example: TGI Vannes, 29 April 2004: Comm.com.électr. 2004, comm. 86, comment by C. Caron : Propr. Intell. 2004, no. 12, p. 779, See P. Sirinelli : D. 2004, jurispr. p. 3132, see J. Larrieu, and in the same case : CA Montpellier, 10 Mars 2005 : Propr. Intell. 2005, no. 15, p.168, see P. Sirinelli : comm.com.électr. 2005, comm. 77, see C. Caron – TGI Châteauroux, 15 Dec. 2004 : Propr. Intell. no. 15, see P.Sirinelli. – TGI Pontoise, 2 Feb 2005 : Propr. Intell. no. 15, p.168, see P. Sirinelli – TGI Meaux, 21 April 2005 : www.juriscom.net

[25] See for example, F. Latrive, Musique en ligne: la tactique du prie : Libération, 28 Sept. 2004.

[26] See the Spedidam white paper : pour une utilisation légale du peer-to-peer : www.spedidam.fr (in total, the effect on the global volume of peer-to-peer exchanges is non existent, and this volume continues to increase regardless).

[27] 1. Any person shall be punished with a prison term of six months to two years or a fine of 12 to 24 monthly units who, with gainful intent and to the detriment of third parties, reproduces, plagiarizes, distributes or communicates to the

effect, this Article will now only punish copies made in a commercial context which are defined as copies made 'for profit in prejudice of the rights of a third party.'[28] However the situation seems less clear. As it was emphasised,[29] it is difficult to argue that the downloading of a work does not necessarily include the intent to harm the interests of the rightful owners. In addition, downloading can be seen to a way of realising a profit.

20. Therefore it seems that a dead end has been reached. Consumer associations denounce actions against users, and the representatives of the rightful owners are divided; some agree with legal action and favour developing authorised services for payment whereas others want to find an alternative solution.

4. Alternative solutions

21. It was thought that the development of pay per download services would have dissuaded people from the continued use of peer-to-peer services. In 2004, the purchases of music online strongly increased according to the International Federation of the Phonographic Industry.[30] Paid downloads may even account for 25% of the turnover of record companies in five years time according to the industry trade union.[31] At the same time, it has been noted that there has been a reduction in the number of illegal downloads, from 900 to 780 million.

22. However, it must be noted that legal downloads only represent 1% to 2% of the turnover of record companies today, since the majority of Internet users are unsatisfied by the reduced music

public all or part of a literary, artistic or scientific work or transformation or artistic performance thereof fixed in any kind of material or communicated by any medium, acting without the authority of the owners of the corresponding intellectual property rights or their licensees.
2. Any person shall be punished with a prison term of six months to two years or a fine of 12 to 24 monthly units who intentionally exports or stocks copies of such works or productions or performances without the said authority. The said penalty shall likewise be applicable to those who import meaningfully these products without such authorization, so much if these have a lawful as illicit origin in its country of origin; nevertheless, the import of the above mentioned products of a State belonging to the European Union will not be punishable when those products have been acquired directly from the right holder in such State, or with his consent.
3. The said penalty shall likewise be applicable to those who manufacture, import, distribute or have any medium specifically intended to facilitate the unauthorized removal or disablement of any technical device used for the protection of computer programs or any other work or performance, according to subparagraph 1.

[28] P2P : l'Espagne joue sa proper partition : www.journaldunet.com
[29] Impunité du P2P: Viva España? : www.ratiatum.com
[30] E. Desplanque, Musique : oreilles en pointe : Télérama 11 May 2005, no. 2887, p.62
[31] Ibid.

catalogues available on the legal download services. Furthermore, the users face compatibility problems between file formats offered and those used by portable music devices.[32]

23. Even if a legal supply could be a viable solution, it is still very difficult to imagine that peer-to-peer services will disappear completely. This is especially true amongst young people, who seem less inclined to give up free downloads.[33] Thus it seems inevitable that a solution will have to be found that embraces the peer-to-peer phenomenon, allowing its users to exchange files legally.[34] Several proposals have been formulated for this purpose, especially in the United States. These solutions are all based on the same idea: authorise the exchange of works and allow for payment to the rightful owners. Thus, Professor Fisher[35] proposed the replacement of copyright with an obligatory license. The uniqueness of the proposal was that it was voluntary: the author who wanted remuneration for the exploitation of his work on the Internet should register with a government agency that would identify the most downloaded works and distribute remuneration to the rightful owners, which would be recovered through the ISPs.[36]

24. This method seems to be one of the most interesting to explore. In addition to the fact that it provides payment to the rightful owner, it returns legitimacy to copyright and the neighbouring rights. It is however disappointing that this method prioritises the right to remuneration over exclusivity of copyright. Furthermore, an Ipsos poll from April 2005 established that 83% of French users are reluctant to pay a fee to an ISP to allow the free exchange of 'music files.'[37]

25. It is in this context that the system proposed by ADAMI and SPEDIDAM should be examined:

- For downloads: extend the private copy fee, creating a mechanism of payment from the ISPs.
- For the making available: create a regime of obligatory collective management for the right of performance and the right of communication to the public.

[32] Ibid.
[33] Thus, only a quarter of users frequent legal sites and 'the average user of fnacmusic.com is approximately 38 years old.' (ibid.).
[34] Moreover it is not possible to have a filtering system operated by the ISPs due to the associated costs. See A. Brugidou and G. Kahn, Etude des solutions de filtrage des échanges de musique sur internet dans le domaine du Peer-to-peer, Report submitted to the Ministry of Culture, Thursday 10 March 2005.
[35] An alternative compensation system, Stanford University Press, August 2004.
[36] For other examples, see the study of T. Krim, Le peer-to-peer, un autre modèle économique pour la musique, p.165.
[37] www.zdnet.fr

26. It is appropriate first to analyse the **downloading**, which constitutes the act of reproduction. The aim is to determine if the private copy exception can apply here, which would allow the rightful owners to seek an extension of the private copy fee provided by the CPI. Then, the **making available** of the work, which is defined as an act of performance or communication to the public, must be examined. Thus the possibility to create an obligatory system of collective management should be investigated. It must be stressed that, in an examination of the possibility of an obligatory system of collective management for the *performance right*, the possibility of extending the system to *the right of reproduction in the case of downloading* should not be excluded, which would allow an alternative solution to be proposed, should downloading not fall under the scope of the private copy exemption.

27. The application of such a system necessarily includes an international dimension. This aspect will however be excluded, as the use of peer-to-peer systems will not affect the rules of private international law.

28. Finally, it is necessary to precisely define the terms used in this study: this study will examine the feasibility of a system which would allow the remuneration of rightful owners, regardless of whether they own the copyright to the work or a neighbouring right. This requires a discussion of, for example, the downloading of protected works *and* protected services. However, for the sake of simplicity, the status of works shall be examined, given that works are performed by an artist and fixed by a producer. In other words, copyright and neighbouring rights will be included in the same expression, unless a difference of treatment is required.

Therefore this study is divided into two chapters:

Chapter 1 – The extension of the private copy mechanism to downloading

Chapter 2- Compulsory collective management of the performance right for making a work available

Chapter 1

The extension of the private copy mechanism to downloading

29. Downloads made through peer-to-peer services raise the question of the private copy exception, the impact of which will be discussed here. The Downloading of files containing music, film, photographs, software or text from peer-to-peer services constitutes an act of reproduction protected by copyright and/ or by neighbouring rights. The downloads will not be an infringement of these rights if they fall within the scope of the private copy exception as found in national law and if they satisfy the three step test provided by the Community Directive of 22 May 2001 and international conventions.

30. To determine whether the private copy exception can be applied requires, firstly, the law applicable to the download to be established. In France, where a non-national relies upon the right of reproduction to prevent infringing behaviour the law applicable is, according to Article 5.2 of the Berne Convention, the 'laws of the country where protection is claimed'[38] or *lex loci protectionis*. The majority of scholars[39] agree that this means the law of the country for which protection is claimed.[40]

31. In relation to peer-to-peer services, where a non-national asserts his right of reproduction, it is not *lex fori* that applies but the law of the country where the infringement of the right occurs. In other words, the laws of the country where the download occurs. For example, German law would apply if the copy is made from a computer situated in Germany. Legal opinion is always divided on

[38] Berne Convention, Article 5.2 : 'Apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.' Here, the Berne Convention applies the general rule on conflict of laws. See, on this, A. & H.-J. Lucas, Traité de la propriété littéraire et artistique, Litec, 2004, no. 1068 – J.-S. Bergé, La protection internationale et communautaire du droit d'auteur, Essai d'une analyse conflictuelle, LGDJ 1996, no. 416. *Contra*, it is argued that Article 5.2 concerns the sanction and not the existence of the right, G. Koumantos, Le droit international privé et la Convention de Berne : Dr. Auteur 1998, p.448 – A. Kerever, Chronique jurisprudence : RIDA 3/1998, p. 197.

[39] See, H. Debois, A. Françon & A. Kerever, Les conventions internationales du droit d'auteur et des droits voisins, Paris, Dalloz, 1976, no. 17. – F. de Visscher & B. Michaux, Précis du droit d'auteur et des droits voisins, Bruylant, 2000, p.632 : 'the law of the country to which the question is brought as to whether there exists and exclusive right and what is the scope of the right'. – A. Lucas, Aspects de droit international privé de la protection d'œuvres et d'objets de droits connexes transmis par réseaux numériques mondiaux, WIPO Symposium on private international law and intellectual property , Geneva, 30 & 31 January 2001, p. 12, no. 31.

[40] In most cases, *lex protectionis* will coincide with *lex fori* when an author brings an action in a country where a right is infringed. However, the author could also bring action in the country where the harm occurs, for example by claiming an exclusive jurisdiction or applying other international rules of jurisdiction to bring the action in the country where the wrongdoer has his assets. See A. et H.-J. Lucas, op. cit., no. 1066. – J.-S. Bergé, La protection internationale et communautaire du droit d'auteur, op. cit., no. 309.

the role of *lex protectionis*. Some argue that the title and the existence of the right remain subject to the law of the country of origin.[41] This study, along with others,[42] believes that *lex loci protectionis*, on the contrary, regulates all questions relating to copyright and neighbouring rights. Applied to downloads through a peer-to-peer system, *lex loci protectionis* includes the following: the existence of the exception and its application to downloads, in other words, the rules for applying this exception (definition of copier, the legality of the source, remuneration…). Returning to the example of downloading a file from a computer situated in Germany, it would be appropriate to consider whether in German law the downloading was included within the exception for private copy as also defined by German law.

32. For downloads made in France without the authorisation of the right holders, the lawfulness of the downloaded file depends on the application of the private copy exception as provided by the CPI, which must be defined here. Article L 122-5 CPI provides that the author 'may not prohibit copies or reproductions reserved strictly for the private use of the copier and not intended for collective use.' Article L 211-3 also provides that 'reproductions strictly reserved for private use by the person who has made them' are excluded from the exclusive rights of performers and producers of phonograms and videograms. However, the private copy exception does not apply to computer programs and databases.[43] This exception also provides for an equitable compensation system. Article L 311-1 CPI provides that authors, performers and producers shall to be entitled to remuneration for the reproduction, made in accordance with the private copy exception, of their phonograms and videograms. This remuneration is also owed to authors and editors of fixed works on any media, whose works are copied (in accordance with the private copy exception) onto a recordable digital media.

33. The rules provided by Articles L 122-5 and L 211-3 CPI are quite simple: reproductions made by the copier for his own private use are excluded from the exclusive right of the author, the

[41] Arguing that the existence of the right must be determined to establish the country of origin, J.-S. Bergé, op. cit. no. 320 – or the question of title, H. Battifol & P. Lagarde, Droit international privé, tome 2, LGDJ, 7e éd., 1983, n° 531. – M. Josselin-Gall, Les contrats d'exploitation du droit de propriété littéraire et artistique, Etude de droit comparé et de droit international privé, GNL Joly Editions, 1995, no. 271. – J.-S. Bergé, La protection internationale et communautaire du droit d'auteur, op. cit., no. 320. – F. Pollaud-Dulian, Propriété littéraire et artistique – in ordinary law : Répertoire Dalloz, Droit international, fascicule 563-60, no. 67. – P.L.C. Torremans, The law applicable to copyright : which rights are created and who owns them ? : RIDA 2/2001, p. 80**.**

[42] See, A. & H.-J. Lucas, op. cit., no. 986 s . – A. Strowel & J.-P. Triaille, Le droit d'auteur, Du logiciel au multimédia, préc., p. 289-290. – F. de Visschert & B. Michaux, Précis du droit d'auteur et des droits voisins, Bruylant, 2000, no. 792.

[43] Article L 122-5-2 CPI states that the private copy exception does not apply to electronic databases and only applies to computer programs (including video games) in relation to back up copies.

performer and the producer. It must now be established whether the act of downloading falls within the scope of the private copy exception provided by Articles L 122-5 and L 211-3.
It can be argued that downloading falls within the private copy exception as the user is the only beneficiary. However this application of the exception is faced with several difficulties and uncertainties. These concern the identification of the copier (I), the lawfulness of the source (i.e. the lawfulness of the system from which the download is made) (II), the private use of the copier (III) and the famous 'three step test' provided by Community law and international conventions which exceptions must fulfil (IV). Finally the methods of calculation and of distribution of the remuneration must also be determined (V).

I. The identification of the copier

34. In order to benefit from the exception provided by Articles L 122-5 and L 211-3 CPI, the copy must be strictly reserved to the private use of the copier.[44] Establishing the copier is thus important in French law. The CPI does not provide any definition of the word 'copier.' This suggests that the text is no longer adequate to deal with developments in reproduction methods.[45]

35. Case law has provided the opportunity to define the notion of the copier in relation to reprographics. The problem was the following: who should be considered as the copier? The owner of the reprography shop (practical approach) or the person who made the copy for their own private use (intellectual approach)?
In the CNRS (Centre National de la recherche scientifique) case, the court first applied the intellectual approach by deciding that the copier was the researcher who went to CNRS in order to make photocopies.[46] The French Supreme Court then adopted the other approach in the important Rannougraphie case of 7 March 1984.[47] The Court considered that the copier is the one who retains and uses the photocopying machine. The practical approach to the copier has been reaffirmed many times since.[48]

[44] Court of Appeal, Lyon 7 Nov, 1958 : RIDA 3/1957, p.146 ('to escape punishment, the copies must be strictly reserved to the private use of the copier, whereas in this case the copier is a third party working effectively as an employee').
[45] See A. & H.-J. Lucas, op. cit., no. 300
[46] TGI Paris, 28 Jan. 1974 : D. 1974, jur. p. 337, comment Desbois ; JCP 1975, II, 18163, comment Françon.
[47] Cass. civ. 1st, 7 mars 1984 : JCP 1985, II, 20351, comment Plaisant ; RTD com 1984, p. 677, obs. Françon.
[48] CA Paris, 25 June 1997 : RJDA 1997, no. 1561 ; JCPE 1997 Panor. 1348. – CA Toulouse, 25 May 1997 : RIDA 1/1998, p. 323.

36. In relation to downloads made using peer-to-peer services, some legal commentators apply the same approach to identify the copier as used in the reprography cases:[49] the question is if the copier is the one who makes the download or the one who makes the copy available to third parties from his hard disk and thus allows the copy to be made? The answer to this question plays a large role in establishing the benefit of the private copy exception. If the copier is the person who downloads for his private use, then the exception could apply. On the other hand, if the copier is the one who opens his computer to third parties, the copy is not made for the 'private use of the copier' and the exception is thus inapplicable.

37. This study finds the above comparison with definition of the copier as applied to reprography shops questionable. In the case of peer-to-peer services, it is clearly the downloader who makes the copy, regardless of whether the practical or intellectual approach is applied. In effect, the user chooses the content of the copy and makes the download with his own computer through the Internet: it the downloader who controls the machinery of reproduction. Arguably the Rannougraphie decision is of limited effect.[50] It only applies to reprographic shops and, more recently, CD writers[51] which give the public the ability to reproduce works en masse. Both situations seem far from the reality of the use of peer-to-peer services. The individual 'opening' his computer places the works at the disposal of the users of the peer-to-peer networks, and therefore commits an act of performance, not reproduction. The copier is the individual who makes the copy,[52] i.e. the user who downloads the file.[53]

[49] C. Caron, commenting on T. corr. Vannes, 29 Apr. 2004 : Comm. com. électr. 2004, comm. 86. – P. Sirinelli, obs. : Propr. intell. July 2004, p. 782.
[50] See A. et H.-J. Lucas, op. cit., no. 302
[51] See for instance, T. corr. Valence, 2 July 1999 : Comm. com. électr.1999, comm. 5, C.Caron ('if the customer himself makes the copy, or if the task is in effect completed by staff it changes way that the act is accomplished but not the overall result. By making hardware available to the public or by installing a service that can reproduce musical works or software en masse by himself or by free access, and as Mr. X did not request authorization from the rightful owner and knew that he was making this hardware easily accessible to people who had not authorization or a license, he knowingly organized infringements.')
[52] H. Desbois, Le droit d'auteur en France, 3rd ed., Dalloz 1978, no. 243 bis.
[53] Downloading though a peer-to-peer system must be distinguished from the sending of a work by email, which leads to a fixation of the work on the computer of the recipient. The private copy exception cannot be applied in this case because the copy is meant for someone other than the copier. See A. & H.-J. Lucas, op. cit, n° 302, note 446. – Internet et les réseaux numériques, Rapport du Conseil d'Etat, La documentation française, 1998, p. 143. – Y. Gaubiac & J.C. Ginsburg, L'avenir de la copie privée numérique en Europe : Comm. com. électr. 2000, chron. 1 note 3.

II. The Lawfulness of the source

38. For a copy to be private and thus free, does the method of making the copy itself need to be lawful?[54] Although previously legal commentators paid little attention to the question of the lawfulness of the source, nowadays they are divided in relation to peer-to-peer services.[55] In reality, the debate is less concerned with whether the method of making the copy is lawful,[56] but rather whether this is a condition for the application of the private copy exception.

39. Some commentators consider that where the downloaded file is unlawful because it was made available without authorisation of the authors and owners of neighbouring rights, the act of downloading is tainted by the unlawfulness and thus does not allow the user to rely upon the private copy exception. The argument is that 'it would be inconsistent to conceive that a lawful act – making a private copy as provided by Article L 122-5 CPI- could have its origins in an infringement and follow in its wake. It is, therefore, logical that a copy made from counterfeit material is in itself tainted by this unlawful element and could not be within the scope of the private copy exception (…)'[57] It would be in this case a 'counterfeit of a counterfeit.[58] The user would not be able to benefit from the private copy exception unless he was sure that the rightful owner had given permission to make the work available.

40. In addition to this argument, Article 5.1 of the 'Information Society' Directive of 22 May 2001, which requires Member States to introduce a new exception for temporary acts of reproduction, could also be relied upon. This article provides that 'temporary acts of reproduction (…) which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject matter to be made, and which have no independent economic

[54] P. Sirinelli : Propr. intell. July 2004, p. 782.
[55] E. Papin, Le droit d'auteur face au peer-to-peer : Légipresse March 2003, no. 199, II, p. 26, esp. p. 28. – C. Caron : Comm. com. électr. 2004, comm. 86. – P. Sirinelli, obs. esp., p. 782.
[56] It is generally said that for peer-to-peer services, it is very likely that the source is unlawful.
[57] Mr. Caron also observed that in a case of the French Supreme Court of 24 Sept 2003 counterfeit merchandise was excluded from trade, i.e. it had no legal existence. (Cass. com., 24 sept. 2003 : D. 2003, jur. p. 2683, note C.Caron ; Comm. com. élec. 2004, comm. 32, obs. Ph. Stoffel-Munck ; RTD civ. 2003, p. 703, obs. J. Mestre & B. Fages). According to Mr. Caron (comm. prev.), 'the result is that a lawful exception cannot be used due to something counterfeit and thus outside of trade. That is why it appears that the exchange of files, by peer-to-peer systems, is illegal.'
[58] P. Sirinelli, obs. prev., p. 782.

significance, shall be exempted from the reproduction right.'[59] On reading this provision, it is clear that the exception for temporary acts of reproduction applies only where the author has authorised his work to be made available to the public. If the author gives no authorisation, the use of the work is unlawful and temporary acts of reproduction are infringing.
This provision seems to suggest a requirement of lawfulness in order to apply the private copy exception. This condition would be a prerequisite of benefiting from the exception.[60]

41. In addition to this interpretation, it should be noted that German law is more developed than the French law on this issue. In implementing the Directive of 22 May 2001, the German legislator in effect introduced a further refinement: the individual who makes a copy from material which is clearly unlawful cannot rely upon the private copy exception.
It must be conceded that there is a problem in the application of this argument for downloads. How can the lawfulness of the source be determined? This obstacle is both technical and practical.

42. Despite these difficulties, the requirement of lawfulness of the source is only relevant, in French law, for temporary acts of reproduction and not for private copies. In effect the link between the theory that the copy can be tainted by the original file and the interpretation of the private copy exception goes beyond the wording of the law. This requirement is not present in Articles L 122-5 and L 211-3 CPI. Furthermore, there is no reference to this link in the preparatory works of the law of 11 March 1957 and the law of 1985. With regards to case law, it seems that the question has never arisen. However, should the principle of restrictive interpretation of exceptions be applied? This study believes it should not.[61] The principle of strict interpretation of exceptions does not allow the addition of a new requirement if it is absent from the law.

43. Therefore, the possibility of a private copy exception which only applies if the source of the material is lawful should be discussed. In effect, if 'the private copy is lawful only if the copy is legitimately acquired, (…) this would considerably limit the scope of the exception.'[62] This argument is based on the idea that 'a legitimate purchaser of media containing the work would

[59] Emphasis added. The bill on copyright and neighboring rights in the information society adopted by the 'Conseil des ministries' on the 12 Nov 2003 introduced this rule into Article L 122-5 CPI by a new subsection 6.
[60] See, F. Valentin & M. Terrier, Peer-to-peer : panorama des moyens d'action contre le partage illicite des œuvres sur Internet : Legicom no. 32, 2004/3, p. 22.
[61] *Contra*, P. Sirinelli, obs. prev., p.782
[62] E. Papin, Le droit d'auteur face au peer-to-peer : Légipresse March 2003, no. 199, II, p. 26.

rarely want to reproduce the work, as he already has a copy.'[63] It is also said that 'it is not certain that a legislative provision would have been necessary to grant such a right to the legitimate purchaser of a copy of an intellectual work. How the purchaser uses the work, for his own purposes, in his private home, cannot require legal authorisation because the monopoly on the public exploitation of the work by the author is not affected.'[64] However, it must be noted here that this argument holds little weight. While, for a long time, it has been difficult to control copies within the privacy of the home, this does not diminish the importance of copyright. According to the principles of the law of literary and artistic property, when a reproduction is made, it must be authorised except where provided for by law.

44. It can thus be said that downloading constitutes the production of a private copy regardless of the origin of the copy. There is much to learn from different legal systems on this issue.

45. In a decision of 12 May 2004, the court of Haarlem in the Netherlands rejected the claim of *Stichting Brein* (a local associate against piracy), by refusing to hold liable the search engine 'Zoekmp3' for any infringement because it provided links to Internet sites from which music could be download in the mp3 format without the authorisation of the rightful owners. According to the court, the action of directing users to websites which offered, without authorisation, music files was not illegal since, according to the websites, downloading of illegal files without sharing them its not contradictory to the copyright legislation:[65] 'the legislator provides, according to the law of copyright and the law of neighbouring rights, and also according to the [European] Directive and its process of implementation, that the copy for private use of an illegal mp3 file does not constitute a breach of the current law … it is only a question of a fraudulent act if the user of the downloaded file made additional copies or made it available.'[66] In other words, only making the files available is forbidden.

[63] *Ibid.*
[64] *Ibid.*
[65] According to the law in the Netherlands, an individual can make copies of a work protected by copyright on the condition that he does not make this work available to the public, regardless of whether he still has the original. (Article 16.b of Copyright Act 1912 [ivir.nl]). See Joe Figueiredo, Court clears Dutch music search engine of copyright violation, 13 May 2004 : http://www.dmeurope.com.
[66] Translation by Wouter Van Lancker, Le MP3 en toute liberté aux Paye-Bas : www.juriscom.net, 13 May 2004 (emphasis added) – See also, S. Brandner, MP3 : télécharger n'est pas pirater, selon le tribunal d'Haarlem : edited 20 May 2004, www.juriscom.net.

46. This decision is isolated in Europe, but follows that of the Federal Court of Canada dated 31 March 2004[67] in a case which was between the major record companies (BMG, EMI, Sony, Universal, Warner, etc) and several Canadian ISPs (Shaw Communications Inc., Rogers Cacle Communications Inc., Bell Sympatico, Telus Inc., and Vidétron Itée.) The Federal Court of Canada decided that the downloading of online music files is not illegal. According to the Court, downloading a file to a hard disk is covered by Article 80(1) of the copyright law which states that 'the act of reproducing all or any substantial part of (…) a work (…) does not constitute an infringement of the copyright (…) if it is made for the private use'
The Court confirmed what had already been proposed by the Canadian commission on copyright in its decision published 12 December 2003, 'the private copy 2003-2004.'[68], according to which 'the regime is not about the source of the copy. Part VIII does not require that the original copy is a legal copy. It is thus not necessary to know if the source of the copy was owned by the copier, a borrowed CD, or a downloaded file from the Internet.' The commission concluded that the downloading of mp3s on the Internet was thus covered by the private copy exemption.

47. The same conclusion could be reached in France as Articles L 122-5 and L 211-3 do not make a distinction according to whether the copier owned the original or not and according to whether the source is lawful or not.

48. In all cases, it should be remembered that the obstacle to the lawfulness of the source of the copy will be overcome if a system of compulsory collective management for the making available of the works is put in place.[69]

III. The private use of the copy

49. One of the essential conditions for the application of the private copy exception is precisely that the copy *must* be the object of a 'private use.' It is important to examine this condition, firstly to better understand it (A), then to highlight as with all exceptions, that it must, in principle, be interpreted restrictively (B) and finally to consider the need to redefine the concept (C).

[67] V. N. Vermeys, Citoyens Canadiens, téléchargez en paix ! : edited 5 April 2004, www.juriscom.net
[68] See p.20 of the report available at www.cb-cda.gc.ca – See also N. Vermeys, Au Canada, le téléchargement de MP3 sur les réseaux P2P peut-il être légal ? : edited 5 Jan 2004, http://www.juriscom.net.
[69] See *infra*.

A. The concept of the private copy and 'private use'

50. To determine if a download constitutes an act of private copy or not, the concept of private copy must be examined as defined by the legislator. According to Article 122-5-2 CPI, 'where the work is communicated to the public, the author cannot prevent: copies or reproductions strictly for the private use of the copier and not intended for collective use.' Article L 211-3-2 CPI is a similar provision which restricts the monopoly of neighbouring rights for 'reproductions strictly reserved for private use by the person who has made them and not intended for any collective use.'
Two criteria are present here: the private use of the copier and the collective use. This distinction appears *a priori* to be redundant, since private use and collective use are opposites.

51. Clearly, the requirement of private use contains a reference to personal use, which leads for instance to the conclusion that the exception cannot apply if the copy is used for financial benefit. The individual who makes the copy must make it for his own use, and only for that.[70] Then it is again necessary to consider that the usage cannot be 'collective.' Consequently, in order to follow this prohibition on collective use, it must be conceded that 'the private use exception would cease to function where the reproduction, even though reserved to the personal use of the copier, would impact collective aims',[71] for example use of a copy for education in a classroom. This demonstrates the problem at hand.

52. Clearly this is a restrictive view of the concept of the private copy. The result is that it the Internet user downloads a work and then makes it available, with or without intent, then the copy is no longer made for private use and the exception in Articles 122-5 and L 211-3 CPI cannot apply. The user becomes an infringer. This was the conclusion of the recent decision from the Court of First Instance of Meaux.[72] In this case the defendants admitted downloading works and then making them available using peer-to-peer software. They were found liable for infringement as their behaviour fell outside the scope of 'private use.'

[70] On this point, See A. & H.-J. Lucas, op cit., no. 303. See also for a strict approach to personal use : Y. Gaubiac et J.Ginsburg, L'avenir de la copie privée numérique en Europe : Comm. com. électr. 2000, chron. 1. En ce sens : TGI Meaux, 21 April 2005 : www.juriscom.net ('copies exchanged between defendants which are not included in private use')
[71] A. & H.-J. Lucas, op. cit., no. 304.
[72] 21 April 2005 : www.juriscom.net

53. One of the difficulties linked to peer-to-peer software is that it implies by definition an exchange of files and in this case, protected works. Furthermore, if the system automatically and unavoidably makes the works downloaded available to other users, it is impossible to define this download as a private copy as the reproduction is not just for 'the private use of the copier' but also made available for all other users. This was illustrated in the judgement given by the Court of First Instance of Pontoise on 2 February 2005.[73] In effect the private copy exception was excluded for the reason that the software in question, DC++, contrary to the claims of the defendant, imposed the obligation on users to open their hard disks to everyone else connected to the system.

54. On this question, it is difficult to adopt a definitive position covering all cases of downloading. Indeed, where peer-to-peer software is installed, the hard disk of the user is 'split' into two parts; the first contains personal and private files, whilst the other contains files to be made available to other users of the software. Thus the user who downloads files can avoid making these files available. If this is done, it is arguable that the user should benefit from the private copy exception, whilst taking into account the issue of the lawfulness of the source which has already been discussed. Thus the conclusion will vary from case to case: it all depends on the attitude of the user. If he decides to leave all the downloaded works in the open part of his hard disk, then he will struggle to fall within the scope of the private copy exception as provided by French law. On the contrary, if he moves the works into his personal files, he could rely on the protection of this exception. It must however be mentioned, as a practical point, that peer-to-peer software automatically places downloaded works at the disposal of the whole network. The user who is not aware that the downloaded files are put at the disposal of everyone or ignores the possibility to restrict the use of the copies is thus, sometimes without knowing, committing an act which will prevent him from relying upon the private copy exception.

55. However, there is one case in which a more restrictive position can be adopted. Several peer-to-peer programs rely on a system of fragmented files. This is the case in programs such as eDonkey, eMule and Bittorent. In this situation, through a desire for efficiency, the works made available on the network are automatically fragmented as soon as the download completes. The user who downloads will receive 'fragments' of works, each fragment being in itself unreadable. When the whole work is downloaded, the program rebuilds the file which can then be read without difficulty.

[73] Comm.com.élec.2005, comm. No. 35, obs. C.Caron ; Propriétés intellectuelles, apr. 2005, p. 168, obs. P. Sirinelli. See also F. Macrez, A l'abordage des pirates, à propos du jugement du tribunal de grande instance de Pontoise du 2 février 2005 : Revue Lamy Droit de l'immatériel, march 2005, no. 3, p.14.

The peculiarity of the system is that each downloaded fragment is automatically made available to other users and the downloader cannot object to this. In this case, the downloader cannot move the downloaded work from the 'open' to the 'closed' part of his hard disk until the file has been rebuilt by the program, unless the download is interrupted.
Of course, it could be assumed that the making available concerns the fragments of files and not a whole work, but it is argued that this is difficult to defend. In effect, it is irrelevant whether the making available of the work concerns the whole work or only fragments which, as soon as they are compiled, recreate the work. In all these cases, there is communication to the public of a protected work. Thus, it is argued here that is would be impossible to say that the private copy exception would apply.

56. In order to justify the application of the private copy exception, it could be supposed that the aim of peer-to-peer software is not the making available of works but merely the downloading of works. The mentality of such a user would be selfish; the software would be used as a video or music library not to be shared with any other users. It would be difficult to establish sufficient intent as required in criminal law if this was the case.
Furthermore, as the download is completed, it is impossible to determine whether the user will keep the copy for his own personal use or whether he will share the file with other members of the community. The impossibility to determine the intent of the user could lead to the application of the private copy exception. However, it is equally plausible to suggest that an individual, who uses a system which by definition is designed to exchange files, will adhere to the purpose of the software and thus make downloaded works available. The relevant factor is whether the works are actually available. There is no need to undertake a chronological examination of the user's actions.

57. The conclusion, resulting from the wording of the law and principles of strict interpretation of the exception, is inevitable: it is impossible to conclude that *all* peer-to-peer downloads would benefit from the private copy exception. Several further factors affect the French approach:

- First there is a real tendency to stray from the principle of strict interpretation of exceptions.
- By comparing the approach at Community level and that of other countries, it appears the French concept of private copy is overly strict.

B. The principle of strict interpretation for exceptions.

58. This principle, consecrated by legal commentators[74] and confirmed by case law,[75] is directly linked to the classic humanist approach to copyright.[76] In effect, if copyright 'flows' from the individual creator, who is thus protected, it is logical that exceptions to the exclusive right are subject to a restrictive interpretation. The interests of the author must prevail over any other interest.[77] This is not a specifically French approach, as it is found also in Belgium, Spain and Portugal.[78]

59. Evidently, this approach has not been followed in all legal systems. Common law countries tend to prioritise the public interest and grant real rights to users. This can be seen as a more 'comprehensive' interpretation of what should constitute a limit to the exceptions.
In this context, a reversal of the principle of strict interpretation of exceptions seems inevitable. This leads to the question of whether a peer-to-peer user infringes rights when he makes downloaded works available to other users. At the same time, there is a growing public sentiment that works should be exchanged freely.[79] This 'gap' inevitably led to a reversal of this principle despite the fact that it was heavily entrenched in French law. It can even be said that this notion of private copy is no longer an exception to an exclusive right but a subjective right granted to users. Thus, even if the courts[80] affirm that 'the private copy is not a right granted absolutely to users', they admit that in situations where the exception fulfils the three step test, technical copy prevention measures become illegal to the extent that they prevent the copy. In other words, a right of private copy is created. Even some legal commentators have become advocates of this approach.

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[74] A. & H.-J. Lucas, op.cit., no. 292. – P.-Y. Gautier, op. cit., no. 192.
[75] See, for example, the confirmation that private copy is an 'exception specific' to copyright and neighbouring rights and that 'the legislator did not intend to give the right to copy any works to just anybody': TGI Paris, 3rd ch., 30 apr. 2004 : JCP E 2004, 1101, note T. Maillard ; JCP 2004, II, 10135, note C. Geiger ; Légipresse sept. 2004, n°214, III, p. 148, note M.Vivant et G. Vercken ; Comm.com. électr. 2004, comm. 85, obs. C. Caron.
[76] Even if the exception concerns both copyright and neighbouring rights, copyright will be referred to first because the private copy exception was first applied to copyrights, and then to neighbouring rights in 1985.
[77] See also, affirming that 'the limitations to exclusive rights provided by the law are an exception to the general principle of exclusivity and thus must be interpreted restrictively.': A. Lucas, Droit d'auteur et numérique, Litec, 1998, no.335. – In the same sense : J.-L. Goutal, Traité OMPI du 20 décembre 1996 et conception française du droit d'auteur : RIDA 1/ 2001, p. 101 ; P. Sirinelli, Synthèse : Journées ALAI, Les frontières du droit d'auteur, Cambridge, sept. 1998, p.133, esp. p. 136 ('the list of exceptions that users can claim is finite and can not be interpreted in a way that would be interpreted to detriment of creators.')
[78] See, P. Sirinelli, Synthèse : Journées ALAI, op.cit.
[79] See the debate between B.Edelman and D. Cohen, La gratuité tue-t-elle les auteurs ? Epok déc. 2004-janv.2005, no. 52, p. 50.
[80] CA Paris, 4th ch., 22 apr. 2005 : www.juriscom.net

60. Thus a 'strict but fair'[81] interpretation can be applied to exceptions. Even if this would depart slightly from the wording of the law, this would not result in a reversal of the essence of copyright which states that the private copy exception applies to reproduction 'in the family circle'[82] or, in other words, that private use must consist of an 'individual and domestic' use.[83] The courts sometimes also refer to 'personal or family use.'[84]

61. However, certain points of view are more 'aggressive.' It has been proposed that the technical advances of the last few years have 'upset the balance in this area'[85] and in the light of these changes, some suggest that 'copyright has become the referee between fundamental rights of equal value and that as the law tries to balance these interests sufficient attention is not paid to the priority of the author.'[86] Such an approach would inevitably lead to a reversal of the restrictive interpretation of exceptions: if the role of copyright is no longer to protect the creator there is no reason to privilege his interests when applying exceptions to his exclusive rights.[87]

62. However, nowadays the reversal of the restrictive approach to the private copy applies not only to the method of interpreting the exceptions, but also to the definition of private copy itself.

C. A new definition of the private copy?

63. Both Community law and other national legal systems shed some light on this question.
At the Community level, Article 5(2)(b) of the 'Information society' Directive is worthy of note. This article allows Member States to provide 'an exception or limitation' to the reproduction right 'in respect of reproductions on any medium made by a natural person for private use and for

[81] See J. H. Spoor, General aspects of exceptions and limitations to copyright : general report : Journées ALAI, Les frontières du droit d'auteur, Cambridge, sept. 1998, p. 27, spéc. p. 31 ('the exceptions are to be interpreted restrictively, but not leaving the rationale entirely out').
[82] See P. –Y. Gautier, op. cit., no. 194. Mr. Gautier argues that 'it would not be reasonable that exceptions to the reproduction right were treated differently, or more severely, than exceptions to the rights of performance.' See further, 'whatever the demands of the individual, they should be limited to personal or family use.' Y. Gaubiac et J. C. Ginsburg, L'avenir de la copie privée numérique : Comm.com.électr. 2000, chron. 1.
[83] P.-Y. Gautier, De la transposition des exceptions : à propos de la directive « droit d'auteur dans la société de l'information » : Comm. com. électr. 2001, chron.25.
[84] TGI Paris, ref., 5 may 1997 : RIDA 4/1997, p. 265.
[85] C. Geiger, De la nature juridique des limites au droit d'auteur, Une analyse comparatiste à la lumière des droits fondamentaux : Propriétés intellectuelles, oct. 2004, no.13, p. 882.
[86] *Ibid.*, esp. p. 887.
[87] See also, against the restrictive interpretation: E.Dreyer, L'information par l'image et le droit d'auteur : Comm.com. électr. 2004, chron. No. 6.

ends that are neither directly nor indirectly commercial', on the condition that the rightful owner receives 'fair compensation.' The definition is clearly broader than that found in French law. If these private use criteria are adopted, the focus would not necessarily be the private use of *the copier* and thus the concept could include the example of a copy made 'in the family circle.' Implementation of the Directive in French law could thus be a way to revise the definition of the private copy, even if the bill to implement the Directive did not include this option.

64. An examination of the solutions adopted in other countries reveals that the French approach is not as unique as it would first appear. In effect, when foreign courts have considered downloading as a private copy, they have always underlined that this exception was only available if there was no act of making the work available. Thus, according to the decision of the Dutch court of Haarlem of 12 May 2004: 'the legislator provides, according to the applicable law on copyright and neighbouring rights, as well as the [European] Directive and its implementation, that copying for private use of an illegal mp3 file does not constitute a violation of this law… it is only a question of a fraudulent act if the user of the downloaded file made additional copies or made it available.'[88] In addition, the Canadian commission on copyright, in its decision 'private copy 2003-2004' published 12 December 2003, affirmed that 'the exception provided by Article 80 only applies where a person makes a copy for his own private use. Expressly excluded is the sale, hire, use for a commercial purpose, distribution, communication to the public by electronic means or the public use of the copy. Thus to give a copy to a friend of a performer's latest hit single will always infringe the copyright and will not be a private use. Distribution of this same copy online is also prohibited.'[89]

65. The above does not reveal any real contradictions between the French approach and the approaches of other jurisdictions in relation to peer-to-peer services. Indeed, the Canadian approach is very original on this point. Since the decision of the copyright commission is not binding on the courts, the position of the courts was anticipated. In a decision of 31 March 2004 by the Federal Court of Canada,[90] in agreeing with the copyright commission, considered that 'the fact of downloading a song for private use does not constitute a violation of copyright.' The court went further, stating that 'the simple act of placing a copy in a shared folder which anyone can access using a peer-to-peer service is not the same as distribution.' Distribution implies a positive act by the owner of the shared folder, such as sending copies or announcing that they are available for

[88] Le MP3 en toute liberté aux Pays-Bas : www.ratiatum.com (emphasis added).
[89] P.20 of the report: www.cb-cda.gc.ca (emphasis added)
[90] 2004 CF 488, available at http://decisions.fct-cf.gc.ca/cf/2004/2004cf488.shtml

anyone who wants to copy them. In this case, no evidence of this was presented by the claimant. They simply provided evidence that the alleged infringers had placed copies of the work in their shared folders.' The decision seems surprising compared to French law and suggests that the exchange of protected works by a peer-to-peer system does not constitute an infringement, given that downloading is part of private copy and the making available of the work is based on intent. Under this approach, every act of downloading is covered by the private copy exception, whereas in the French approach the exception can only be used if the copy is not then 'shared' with other users. This solution is thus a comprehensive interpretation of the concept of making works available but it must be stressed that the Canadian court decided that the copy was made for 'private use' and so the exception could benefit the user because 'there was no proof that the alleged infringers had distributed the music recordings or authorised their reproduction.' The decision of the Court of First Instance of Rodez, given 13 October 2004,[91] must be interpreted in the same way. In this case, an Internet user was caught with 488 copied CDs containing motion pictures. The defendant admitted to downloading some of these films 'with a computer for a third party.' He admitted to 'lending but never selling nor exchanging the films, using the films for his personal use and watching the films with two or three friends.' Two points were made in the decision of the court. Firstly, 'the fact that there was only one copy of the films confirmed the claims of the defendant and were indicative that the reproductions were for personal and private use, and that there was no act of sale or exchange by the defendant.' Secondly, the court stated that 'the submission by the injured parties that Mr. D had distributed counterfeit films by sale or exchange was not proved.' For the Court, the only conclusion was that: 'as proof of another use other than strictly private as provided by Article L 122-5 CPI by the defendant of the copy made was not submitted in this case, the court had to acquit the defendant.' The same reasoning was adopted on appeal, dated 10 March 2005,[92] where the court concluded that 'no collective use was proved.'

66. The private copy exception thus applied only for the reason that it could not be proved that the downloaded works were made available to others. This result is not surprising. On the contrary, it must be noted that the court applied a broad interpretation of the concept of the private copy. In effect, even if the court made a reference to a 'strictly private' use, the facts revealed that copies had been shared amongst friends of the copier. If the CPI was applied to the letter, as soon as the copier

[91] available on www.juriscom.net
[92] CA Montpellier, 10 March 2005: Comm. com.électr. 2005, comm.77, obs. C. Caron ; Propriétés intellectuelles, apr. 2005, p. 168, obs. P. Sirinelli.

and the user of the copy are two different people, the exception cannot apply.[93] It seems that private use is conceived as 'personal and family' use to repeat the above cited expression.
Moreover, for the court, the fact that the user did not sell or exchange the copies confirmed that these copies had been made for his private use. Therefore it seems that the criterion of commercial use was relied upon. Again, this interpretation is difficult to reconcile with the letter of the law. Even if private use is incompatible with commercial use of the copy, it cannot be concluded from absence of a commercial use that the use is necessarily private. Indeed, 'as soon the use is no longer personal, its aim must not be considered. Certainly, the fact that the reproduction is not lucrative is of no relevance. It is not because the copier received no benefit from the copy that he has not infringed another's rights.'[94]

67. The position adopted by the Court of Rodez and the Court of Appeal of Montpellier on the concept of private copy, which is not isolated, is associated with the protests against the principle of strict interpretation of exceptions and perhaps reveals that French law is too strict on this point. It would without doubt be more reasonable to apply the private copy exception for all private use of the copy, regardless of whether the use is made by the copier or not. This approach can be found in the Directive of 22 May 2001 and it is disappointing that the proposed implementation of the Directive does not include this new definition, which would most likely reinforce the legitimacy of a less restrictive exception.

IV. The application of the three step test

68. National authorities can only adopt limitations or exceptions to the reproduction right if they fulfil the three step test as found in the Berne Convention,[95] as adopted by TRIPS agreement,[96] the WIPO Copyright Treaty 1996[97] and the WIPO Performances and Phonograms Treaty 1996[98] and as recently adopted by the famous Community 'Information Society' Directive of 22 May 2001.[99] In applying this test, an exception must only apply 'in certain special cases which do not conflict with the normal exploitation of the work or other subject matter and does not unreasonably prejudice the

[93] See *supra.*
[94] A. & H.-J. Lucas, op. cit, no. 303.
[95] Article 9-2.
[96] Article 13.
[97] Article 10
[98] Article 16-2
[99] Article 5-5

legitimate interests of the right holder.'[100] Many believe that the private copy exception is not subject to the three step test.[101] Due to this, the application of three step test to peer-to-peer downloads is in doubt.[102]

69. This question is important since the court can apply the three step test to exclude the application of the private copy exception claimed by the user if it states the application of the exception would prejudice the interests of the author or of the holders of neighbouring rights. The Information Society Directive makes this test mandatory for all existing legal exceptions. This could be a cause for concern for the system of exceptions.[103] Regardless, this test of Community and international origin is imposed on national courts, even if Article L 122-5 is not yet amended.[104] The Information Society Directive, which is still to be implemented, has a 'horizontal' effect which requires that in disputes between individuals, national courts 'must for legislation both prior and subsequent to the Directive, interpret national law in the light of the Directive to the greatest extent possible.'[105] French courts thus already have the opportunity to refer to the three step test[106] 'filter.'[107]

[100] Dir 22 May 2001, Article 5-5. The article is largely inspired by Article 9-2 of the Berne Convention, according to which the exceptions must be '[only] in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice legitimate interests of the author'. Article 13 of TRIPS extended this rule to all exclusive rights provided by TRIPS and the Berne Convention. The WIPO treaties extended the test to neighbouring rights of phonogram producers and the Information society Directive includes both copyright and neighbouring rights.

[101] See J. Ginsburg & Y. Gaubiac, L'avenir de la copie privée numérique en Europe : Comm. com. électr. 2000 chron. 1. – C. Caron, Les clairs-obscurs de la rémunération pour copie privée : D. 2001, chron. p. 3421. – C. Caron, Les exceptions : l'impact sur le droit français : Propriétés intellectuelles 2002, no. 2, p. 25, no. 3. – A. & H.-J. Lucas, op. cit., no. 315. 101 En ce sens, P. Sirinelli : Propr. intell., juillet 2004, p. 782. – C. Caron, note on TGI Paris, 30 apr. 2004 : Comm. com. électr. 2004, comm. 85.

[102] See P. Sirinelli : Propr. intell., juillet 2004, p. 782. – C. Caron, note sous TGI Paris, 30 apr. 2004 : Comm. com. électr. 2004, comm. 85.

[103] See M. Buydens, S. Dusollier, Les exceptions au droit d'auteur dans l'environnement numérique : évolutions dangereuses : Comm.com. électr. 2001, chron. 22. Mr Sirinelli notes that it is now up to the judge 'to use text literally or out of context. The solution is logical but legislative provisions are from now on a 'trick of the eye'. This solution creates a risk to legal certainty. Users of copies, who believe they are behaving legitimately under the CPI, could discover that in fact they are infringing rights.' (P. Sirinelli, in Les droits d'auteur et droits voisins dans la société de l'information, Actes du Colloque organisé par la Commission française pour l'UNESCO, 28-29 nov. 2003, BNF, Paris, p. 19).

[104] The French legislator clearly envisages the three step test as a 'legal filter' (expression of C. Caron, Les exceptions: Propriétés intellectuelles 2002, no. 2, p. 26) by adding a new subsection to Article L 122-5: 'exceptions provided by preceding subsections cannot prevent the normal exploitation of the work nor cause unfair prejudice to the legitimate interests of the author.' A similar provision will be introduced for neighbouring rights into Article 213-3 CPI.

[105] See Case C-91/92 Paola Faccini Dori, ECJ 14 July 1994

[106] Concerning technical protection measures which prevent the private copy of DVDs : TGI Paris, 30 avr. 2004, S. Perquin et association UFC-Que Choisir C/ SA Les Films Alain Sarde et autres : Légipresse n°214, sept. 2004, III, p. 148, comm. M. Vivant et G. Vercken. See also the appeal, CA Paris 22 apr. 2005 : www.juriscom.net.

[107] Expression from C. Caron, Les exceptions : Propriétés intellectuelles 2002, no. 2, p. 26

70. Thus this study must establish the application of the private copy exception to downloads through peer-to-peer systems that do not fall foul of the three step test, i.e.:

- Those that are a special case
- Those which do not conflict with the normal exploitation of the work or other subject matter
- And those which do not cause an unreasonable prejudice to authors and the holders of neighbouring rights.

71. The problem posed by the application of the three step test is the interpretation of the different requirements. How are these defined? It is difficult to say from the 'Mullholland Drive' case, as the reasoning of Court of First Instance of Paris decision of 30 April 2004 is 'unsatisfactory'[108] :
'Given that *it is incontestable that* the commercial exploitation of a film by DVD is a very common way of exploiting the work; given that a copy of a film made on a digital medium *cannot affect the normal exploitation* of the work; given that the effects will be *necessarily serious* – in meaning of the Berne Convention – because it will affect an essential method of exploitation of the work, indispensable to the recovery of the production costs.'[109] The appeal decision in this case is no more enlightening. The court only invalidated the point that 'the private copy was illegitimate' and 'it was not demonstrated that the private copy exception would have been in this case the origin of an unreasonable prejudice to the legitimate interests of the rightful owners.'

72. The opposite approach can be found in the report of the special Panel of the World Trade Organisation of 15 June 2000 which interpreted for the first time the three step test.[110] The WTO Dispute Settlement Body defined the three cumulative criteria of the TRIPS Article 13 test in order to apply them to the exceptions found in American law. The very precise analysis in the report and legal commentary provides guidance to confirm that the private copy exception applied to peer-to-peer downloading fulfils the three step test.

[108] M. Vivant & G. Vercken, cited above, p. 153.
[109] Emphasis added
[110] See WTO special Panel report, 15 June 2000 : Report adopted by the Dispute Settlement Body 31 July 2000 : Grands arrêts de la propriété intellectuelle, Dalloz, 2003, no. 13, com. Clément Fontaine; RTD com. 2001, p. 440, obs. A. Françon. – See also, Y. Gaubiac, Les exceptions au droit d'auteur : un nouvel avenir : Comm. com. électr. 2001, chron. 15. – A. Lucas, Le « triple test » de l'Accord ADPIC à la lumière du Rapport du groupe spécial de l'OMC : Mélanges Dietz, Verlag Beck, p. 423. – G. Ginsburg, Vers un droit d'auteur supranational ? La décision du groupe spécial de l'OMC et les trois conditions cumulatives que doivent remplir les exceptions au droit d'auteur : RIDA 1/2001, p. 2.

A. Certain special cases

73. The first step in evaluating the legitimacy of exceptions or limitations to copyright and neighbouring rights is that they must only be in 'certain special cases.' According to the special Panel, the word 'certain' requires a clear definition of the exception and the expression 'special cases' means that the exception must have a restricted impact. It is not however 'necessary to explicitly identify each situation where the exception could apply, in so far as the impact is known and identifiable.' The WTO Panel has refused to consider whether the exception must have a 'special aim.' The WTO Panel also refused to give a 'moral judgement on the legitimacy of an exception or limitation' stating instead that 'general public policy would always present a subsidiary interest on which to draw conclusions on the impact of the exception and the clarity of the definition.' This approach of the special Panel is understandable. As Mrs. Ginsburg[111] has said, 'in the absence of any document or debate on the choice of the word 'special', it not certain that the drafters intended to include a general policy justification in the first step.' However, Mr. Lucas[112] has argued the opposite: the study of a group composed of Swedish government representatives and the United International Bureaux for the Protection of Intellectual Property (BIRPI) composed for the 1967 Revision Conference, Stockholm, and cited by the Panel report,[113] suggested that countries should be authorised to restrict the reproduction right by 'clearly defined aims.'

In addition, it is generally thought that 'the sole fact of placing quantitative limits on an exception will not be sufficient to constitute a 'special case'; otherwise the rule could be avoided with great ease.'[114] Furthermore, concerning the quantitative aspect, the WTO Panel stated that this would encroach on the second step, i.e. not affecting the normal exploitation of the work.[115] The present study, with others, argues that the first step implies that the exception must be justified by a 'clear reason of general policy or other exceptional circumstance.'[116] The justification can be freedom of speech, information of the public, teaching and research.[117]

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[111] Vers un droit d'auteur supranational ?, esp., p. 38.
[112] A. Lucas, Le « triple test » de l'Accord ADPIC à la lumière du Rapport du groupe spécial de l'OMC, above.
[113] § 6.179.
[114] *Ibid.*
[115] See M. Senftleben, Copyright, Limitations and the Three-Step Test, An Analysis of the Tree-Step Test in International and EC Copyright Law, Kluwer Law international, 2004, p. 144
[116] S. Ricketson, The Berne Convention for the Protection Literary and Artistic Works : 1886-1986, Londres, Queen Mary College, Kluwer, 1987, p. 482. – See also, M. Ficsor, How Much of What ?, The Three-Step Test and Its Application in Two Recent WTO Dispute Settlement Cases : RIDA 2/2002, p. 133. – J. Reinbothe & S. von Lewinski, The WIPO Treaties 1996 – The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – Comentary and Legal Analysis, Butterworths, 2002, p. 124. – M. Senftleben, op. cit., p. 152.
[117] See J. Reinbothe & S. von Lewinski, op. cit., p. 124. – M. Ficsor, op.cit., p. 133. – M. Ficsor, The Law of Copyright and the Internet – The 1996 WIPO Treaties, their Interpretation and Implementation, Oxford, Oxford University Press,

74. This first step is therefore not so demanding. This study believes that the private copy exception, provided for in Articles L 122-5 and L 211-3 CPI, satisfies the first step. General exceptions are excluded, but not one for private use.[118] The law defines the private copy exception in a way that is clear and in relatively precise terms.[119] This limit to the exclusive right only concerns a restricted and clearly defined category of users, i.e. copiers who made reproductions for their private use. This study suggests that the fact that making private copies has become a 'standard practice'[120] does not cause the exception to no longer constitute a 'special case' as defined by international and Community law.[121] On the other hand, with numerous situations such as peer-to-peer downloading, the private copy will disturb the normal exploitation of the work and/or cause unreasonable prejudice to the legitimate interests of rightful owners.

B. The absence of conflict with the normal exploitation of the work

75. The second stage in the three step test is the following: the exception must not conflict with the normal exploitation of the work or other subject matter. How should 'normal exploitation' be defined?

76. According to the WTO special Panel, 'an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work and thereby deprive them of significant or tangible commercial gains'[122], taking into account 'the actual or potential effects on the commercial and technological conditions that prevail in the market currently or in the near future.'[123] In other words, there must be no risk of 'commercial parasitism.'[124]

2002, p. 284 & 516. P.-Y Gautier, De la transposition des exceptions : à propos de la directive « droit d'auteur dans la société de l'information » : Comm. com. électr. 2001, chron. 25, no.19 (According to Mr. Gautier, for an exception to be allowed, the 'legitimate cause must be proved by those who to rely upon it.')

[118] See A. & H.-J. Lucas, op. cit., no. 296. – S. Ricketson, op. cit., p. 485 s.

119 See M. Vivant & G. Vercken, above., p. 152. – TGI Paris 30 apr. 2004 above. ('an exception precisely defined and 'strictly reserved to a specific use' to the exclusive rights of the author and the owners of neighbouring rights' is required.)

[120] Expression of C. Caron, commenting on TGI Paris, 30 apr. 2004 : Comm. com. électr. 2004, comm. 85.

[121] *Contra*, C. Caron, comm. esp., p. 26.

[122] §6.183.

[123] §6.187.

[124] P.-Y. Gautier, previous comment. no. 19

77. This strongly economic interpretation[125] has met with approval from some French legal commentators. According to Mr. Caron,[126] an economic approach is important and relates to the following questions: is the consumer going to buy a new work as he could not copy the first one? Does the copy reduce the sales of works? In relation to peer-to-peer downloading, the question is whether downloaded works affect the sales of works and the legal systems of downloading works, such as music and video. It seems rather difficult to respond to this question, since studies on the subject are contradictory. However, the second step is much more demanding than the first (certain special cases). There is a concern that its application could wipe out the private copy exception. The digital private copy in general is perhaps under threat.

78. There is another interpretation of the WTO Panel decision.[127] Mr. Ricketson[128] suggests that ‘‘logically’ the ‘normal exploitation’ would simply be ways by which it is reasonable to believe that an author would exploit his work.’ He goes further by saying that perhaps there would never be a conflict with the normal exploitation of the work ‘where there is no real possibility that the rightful owner could assert his right in prohibiting the exploitation or obtaining remuneration by free negotiation….’[129] It can be argued that peer-to-peer downloads fulfil the second requirement of the three step test. In effect, the authors and neighbouring right holders cannot practically control the peer-to-peer downloading. They cannot prohibit nor obtain remuneration using the individual management of rights, i.e. contracting with users. Mr. Ricketson[130] highlights that in this case, an exception for the use of a work ‘would ‘fail the third step’ and thus should be the object of a compulsory license.’ Thus the third step must be examined.

[125] For a critique of this economic interpretation see A. Lucas, Le triple test de l’article 13 de l’Accord ADPIC, op. cit. – E. Bréart, Parlez-moi de droits intellectuels : Petites affiches 8 august 2001, chron. p. 20.
[126] Comment on TGI Paris, 30 april 2004 : Comm.com.électr. 2004, comm. 85.
[127] As the WTO Panel decision has no binding effect (except on the United States who was a part to the dispute), the interpretation is limited and another one should be found. See E. Bréart, Parlez-moi de droits intellectuels : P. affiches 8 august 2001, chron. no. 28s.
[128] International Conventions and Treatiers, in Libby Baulch, Michael Green & Mary Wyburn (eds), The Boundaries of Copyright, its Proper Limitations and Exceptions 10-11, ALAI Journal of Studies, Cambridge, 14-17 september 1998, 1999.
[129] As J.C.Ginsburg said (op. cit., p.42 & 44) it would mean that ‘the normal exploitation’ of the work can change with the evolution of techniques. In other words the normal exploitation of the work depends on technical evolution. Uses which would be too expensive to control could then become tomorrow the object of an efficient contractual license system. In this case it would be a normal exploitation.
[130] International Conventions and Treatiers, op.cit.

C. The absence of an unreasonable prejudice

79. The last condition of the three step test is that the exception cannot be permitted if its application would cause an unreasonable prejudice to the legitimate interests of the rightful owner. The threshold for unreasonableness, according to the WTO Panel, is 'if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.'[131] (This takes into account actual and potential loss of income).[132] The WTO Panel reasoned that the prejudice could remain at a tolerable level if the law provided at least for some remuneration: 'In this case there would be a potential loss of income for the author and so the law should provide him with some compensation (an obligatory license with remuneration).'[133]

80. The above implies a test of proportionality. On this point, this study follows the opinion of Mr. Gaubiac and Mrs. Ginsburg[134] that 'unreasonable prejudice' to the author's interests must be considered in relation to 'the alternatives to the exception.'
If there are no means to apply copyright to 'private' copies without unreasonable costs and without infringing an individual's privacy, a private copy exception with equitable compensation is justifiable. On the other hand, if the obstacles to an efficient right of reproduction were to disappear, then the 'legitimate interests' of the authors would be at stake, and the prejudice would not be reasonable.

81. In the matter of peer-to-peer downloads, it is clear that there is a potential loss which prejudices the legitimate interests of the authors and the holders of neighbouring right holders.[135] However it seems practically impossible for the right holders to assert and control their rights. The application of a system of remuneration for private copies is thus possible on the condition that it adequately compensates the potential loss of income. Otherwise the prejudice will remain unreasonable.
This leads to the final questions; that of the remuneration (equitable compensation), its calculation and its distribution.

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[131] § 6.229.
[132] § 6.247 & § 6.261.
[133] § 6.229.
[134] Y. Gaubiac & J. C. Ginsburg, L'avenir de la copie privée numérique en Europe : Comm. com. électr. 2000, chron. 1.
[135] See J. C. Ginsburg (op. cit. p. 54 et 56), 'authors have necessarily a legitimate interest to restrict the private copy, and thus especially in the digital environment which is particularly likely to cause a large increase in 'private' copies. In effect, an exception dealing with the general creation of private copies of the kind shared over the Internet would risk a conflict with the normal exploitation of the work (supposing that it is possible to assert the copyright in such a situation).

V. The remuneration

82. The remuneration system for private copies is laid out in Article L 311-1 CPI. Authors, performers and producers have a right to remuneration for the private copying of phonograms and films. Authors and editors also have a right to remuneration for private copy of works in a digital format. Article L 311-4 CPI states that this remuneration is paid by the manufacturer or the importer of 'recordable media' used to make the private copy. Finally, Article L 311-5 states the types of recordable media, the level of remuneration and the method of payment is to be determined by an administrative commission.

83. There are four questions here: Who benefits? Who must pay? To what is the remuneration applied? And how is it distributed?

84. The first poses no difficulty. Authors, performers, artists and producers are concerned by these downloads, and thus it is logical that they benefit from the remuneration for private copies.

85. If it is reasonable that the remuneration is paid by the 'users', in other words by those who download works, in practice, it is difficult to imagine direct payment of a fee by users. If the users would have to pay a certain amount directly to a collection society which represented the different categories of rightful owners, these societies would without doubt struggle to identify their debtors and the system may not function.
It is thus necessary to pass this problem to an 'intermediary', which would become the debtor of the remuneration and thus could recover the 'cost' from the users.
In the case of peer-to-peer services, the software supplier could be the intermediary. After all, this approach is logical as it is the software that allows users to exploit the work, i.e. the act to be remunerated. The advantage of this proposal is that, as the software supplier is bound to pay these fees, he can then recover these fees from the users who download the peer-to-peer program. Clearly, these programs could be used to exchange something other than protected works but it is generally accepted that nowadays it is mainly musical and audiovisual works that are exploited and not works within the public domain. Thus, the only debtor would be users of peer-to-peer software. This proposition may seem attractive but it is without doubt impossible to put into place. Several difficulties exist. The majority of the software suppliers are domiciled abroad and it would be difficult to force them to pay remuneration that they would have to recover only from their French

customers. The software is often free to Internet users, with profit realised thanks to advertisements on the supplier's website. They would have to *create* a payment system… how would they recover the fee from users who have already downloaded software? How would they recover repeat payments after the software is downloaded?

86. If the software suppliers cannot be made to pay, another debtor must be found. If the user is to be made to pay, and thus legalising their downloading of protected works, it seems that the ISPs, contractually linked to their subscribers, are the best potential intermediaries. As soon as the fee is determined, they could recover the fee at the same time that they recover their subscription costs. With this solution it would be rather simple. However the legitimacy of this system can be questioned. In effect the ISP would be in charge of a new task: to guarantee the remuneration for the holders of the copyright and neighbouring rights. This situation could be confusing. However, it is more or less the system that has been working in France for several years.

87. Indeed, when remuneration for the private copy was created, it was conceded that recovering the fee directly from the consumer would be impossible in practice. Consequently the remuneration had to be recovered by the 'manufacturer of, the importer of or the person who acquired within the EU (…) the recordable media for making private reproductions of the work, when the media was placed on the French market.'[136] In other words, manufacturers and importers of recordable media are the debtors of the remuneration. The justification for this is very simple: it is they who 'supply the material means to copy the works.'[137] This approach is easy to apply to peer-to-peer services: ISPs supply the technical means for users to download protected works so should be considered the debtors of the remuneration of the rightful owners. Furthermore, it has been highlighted that in another system, not the manufacturer but those who make the copying possible for payment (for example telephone companies or certain technical intermediaries on the Internet) could be the debtor.[138] However it is clear that, in this case, the ISPs would be 'intermediate debtors' who recovered the fees due to the rightful owners to the subscribers and the users would be the 'initial debtors.'[139]

This system has the advantage of simplicity, but can be seen as too general. In effect, this would be equivalent to making *all* the users of the Internet pay, including those who never download

[136] CPI Article L 311-4
[137] C. Caron, Rémunération pour copie privée : J.-Cl. Propriété littéraire et artistique, fasc. 1510, no. 29.
[138] *Ibid.*
[139] The distinction between the intermediate and initial debtors adopted by Mr. Caron concerning the remuneration for private copy. (op.cit., J.-Cl., no. 29 & 33).

protected works. This critique of the private copy remuneration is not novel. Indeed, the consumer who buys recordable media must also pay the private copy remuneration, whether the media will be used to fix a protected work or not.
In addition, it is uncertain as to how this system could be applied to ISPs who provide free Internet access to their customers. The ISP is remunerated through advertisements but it seems unlikely that the fees could be recovered from the advertisers as it is not the advertisers who are using peer-to-peer services, but the Internet users.

88. Furthermore, the application of the private copy exemption to downloading would in effect extend the remuneration for the private copy in order to compensate the prejudice suffered in France for downloads. The remuneration currently only concerns recordable media.

89. Thus, a system which recovers the remuneration from the ISPs seems feasible. The solution is logical. The large increase in the amount of subscribers to the Internet is principally due to the desire to download works.[140] Moreover the ISPs have used this benefit in their advertising, without properly distinguishing between legal services and peer-to-peer downloads.

90. It will be necessary to convince users that the increase in their Internet subscription is not a tax, but instead remuneration for private copying that prejudices the authors and neighbouring right holders.[141] The remuneration for private copying has as a 'social aim: everyone (businesses, counterfeiters, people copying for their own use protected or unprotected works, even works in the public domain etc) pays for legal private copies that someone is able to make.'[142]

91. This solution would necessarily require an amendment of Articles L 311-4 and L 311-4 CPI that currently only refers to a levy on 'recordable media', including digital media (CD-R, DVD-R, portable mp3 players etc) due to the decision of 4 January 2001 of the administrative commission provided by Article L 311-5 CPI. The commission decided that this levy did not apply to the sale of computer hard disk drives. If peer-to-peer services were taken into account, it is reasonable to

[140] See CNC, La piraterie de films : motivation et pratique des internautes. Analyse qualitative, Service des études, des statistiques et de la prospective, may2004, esp. p. 52 (available at www.cnc.fr)
[141] This task may be difficult. The CNC study (La piraterie de films, p. 52 & 53) revealed that users 'have poor understanding that copying onto legally sold and taxed recordable media is prohibited. In the same way, they do not understand that the tax on the media is a fee for private copying and not a tax on the product itself.' Finally, 'some users assume they already pay for the download of movies in their Internet subscriptions. They consider that the high price of broadband connections legitimises the downloads.'
[142] C. Caron, note on TGI Paris 30 apr. 2004 : Comm. com. électr., com. 85.

assume that the levy would have applied to hard disks: it is this disk that allows the downloaded audio and video to be stored. However, for the rightful owners there is a greater economic interest in a remuneration system through the ISPs as it would provide regular payments. This could be the only way to satisfy the requirement of causing no unreasonable prejudice in the three step test.[143]

92. This solution, if adopted, would make it difficult to extend the private copy levy to computer hard disk drives. Would it be possible to defend the legitimacy of copyright and neighbouring rights when private copying is compensated several times (1- CDR or DVDR, 2- Internet subscription, 3- Hard disk) ?

93. The difficulties of distribution are essentially practical. The system provided for by the CPI for musical works distributes 50% to the author, 25% to the performers and 25% to the producers. For private copies of visual works, the distribution is equal (1/3 for each category of owners). Finally, for other works the distribution is equal between the author and the editor. These proportions seem applicable to peer-to-peer downloads.

94. Then there is the question of the works themselves. It is difficult to establish in peer-to-peer systems which song, which film or which text has been downloaded and on how many occasions. Even if we manage to identify the downloaded works, it is certainly not possible to use the number of downloads to calculate the distribution of the remuneration. In effect, as highlight by Mr. Fisher,[144] there is a risk of serious fraud[145] and moreover, it is impossible to know if a downloaded work is actually viewed or heard.[146] It would be necessary to use surveys, which are already used by collective management societies to establish reliable statistics.[147]

[143] See *infra*

[144] An alternative compensation system for the entertainment industry : http://cyber.law.harvard.edu/people/tfisher/PTKChapter6.pdf, 2004

[145] It is easy to imagine an automatic downloading system which repeated downloaded the works of one artist so that the artist's remuneration would increase.

[146] M. Fisher (op.cit., p. 39) cites a particularly interesting study on this point : « Of approximately 8000 MP3 recordings downloaded through the system by students at Oberlin College during a two-month period in 1999, more than 15% were listened to only once, more than 50% were listened to less than once (meaning that the downloader began playing the song but concluded, even before it was finished, that she didn 't like it), and more than 10% were never listened to at all ».

[147] See Mr. Fisher (op. cit) who proposes a system which chooses representative users, whose behaviour will be observed, analysed and which would permit to establish general tendencies. The problem is that this system relies upon the willingness to cooperate of the users in question.

95. The private copy exception seems to be applicable to the downloading of works with the exception of downloads of software and databases, on the condition that the downloads are strictly reserved to the private use of the copier, and are not for collective use. It is precisely this last restriction that creates the most problems. When the download is made, the copy is for the benefit of both the user and the next user who wishes to download the file. If the making available of the copy is necessarily included in the act of downloading then this copy cannot be defined as a private copy in French law.

96. In conclusion, several factors constitute obstacles for the application of the private copy exception in relation to downloading:

- The lawfulness of the source. Even if some legal commentators consider that lawfulness is a condition for the application of the exception, the question remains debated.
- The concept of private use. This study has demonstrated that French law provides a concept which is too restrictive. In effect, when the downloaded work is made available, the copy is no longer made for the private use of the copier.

Chapter 2

The compulsory collective management of the performance right for making a work available.

97. Making a work available can be analysed as an act of performance or communication to the public. Due to this, the authorisation of authors and neighbouring rights holders is necessary. Firstly, it is necessary to dismiss an argument which is sometimes raised in favour of excluding the requirement of authorisation to make works available. The argument supposes that the partial or fragmented transmission of a work does not constitute an act of communication to the public. However, there is communication to the public as soon as the individual makes the protected work available, on the open part of his hard disk. This is regardless of the fact that only a few bytes of data are transmitted or that the file has been 'cut' and transmitted in 'packets' that travel different paths through the peer-to-peer system and when received are reordered and decoded by the computer of the downloader. The sole act of making the work available constitutes a communication to the public, regardless of the size or the format of the file. The 'division of the file' is thus irrelevant.
Having dismissed this argument, the 'mechanisms' by which the authorisation of the right holders can be acquired must be determined.

98. Clearly, given that the French approach towards literary and artistic property is based on the person, it would be logical to prioritise the individual management of rights, which requires that each author, each performer and each producer personally consents to the exploitation of his creation or fixation. However, this is obviously inapplicable to peer-to-peer services. The high volume of the acts of exploitation is incompatible with individual rights management. Thus, 'frequently, some argue that if the exclusive rights cannot be exercised in a traditional way by the rights holders themselves, these rights should be abolished or converted into a simple right of

remuneration.'[148] The latter would not lead to the replacement of the exclusive right with a remuneration right, but rather proposes to allow Internet users to make works available to other users with the authorisation of right holders.

99. The first solution to be contemplated is to put in place a legal license. This solution would obviously concern the copyright and neighbouring right holders and would apply regardless of the category of works. Unfortunately, it is immediately obvious that this solution is difficult to reconcile with the international obligations of France.

100. According to Articles 9 and 10 of the Berne Convention, authors must be granted the exclusive rights of reproduction and performance. In the above solution, it is clear that creators would be denied these prerogatives. Despite this, Article 13 of the Convention allows the possibility to 'each country of the Union' to 'impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorised by the latter.' This is under the condition that these reservations and conditions 'shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by a competent authority.' In addition, the effect of the reservation or condition will be 'strictly limited' to the country were it is established. Therefore a legal license could be feasible, subject to the express condition that remuneration is provided for. However, this solution could not, for example, apply to audiovisual works since no possibility for a 'reservation or condition' is provided for in the Convention is this case.[149] This simple fact is enough to reject the possibility of a legal license in the present circumstances. Similarly, in the field of copyright the WIPO Treaty of 20 December 1996 provides (in Article 1-4) that 'contracting parties shall comply with Articles 1 though 21 and the appendix of the Berne Convention.'

101. Finally, it should be added that the situation for neighbouring rights is no different. The rule provided by Article 15-2 of the Rome Convention is quite simple: 'compulsory licenses may be provided for only to the extent to which they are compatible with this Convention.' The Convention allows for legal licenses in three strictly limited cases that would not include peer-to-peer

[148] M. Ficsor, La gestion collective du droit d'auteur et des droits connexes, op. cit., no. 20.
[149] See, reaching the same conclusion: T. Fisher, An alternative compensation system for the entertainment industry: http://cyber.law.harvard.edu/people/tfisher/PTKChapter6.pdf.

services,[150] and there is a consensus that 'except in these cases, not other compulsory license can be justified according to Article 15-2.'[151]

102. Since the recourse to a legal license does not appear viable, another possibility should be discussed: the compulsory collective management of the performance and communication rights.

103. Before discussing this proposal, a preliminary point must be made. In the system proposed by L'ADAMI and SPEDIDAM, compulsory collective management can only concern the performance right applied to the making available of works. Given that downloading is considered to be an act of private copy (as discussed in Chapter 1), all that is required is to authorise the making available of the work. This could be done through a collecting society.

104. However, it is interesting to ask whether a compulsory licence could be imposed for the right of reproduction as for the performance right. In other words, a collecting society would authorise both the download and the making available of the work, and remuneration would be collected against *both* acts of exploitation. Such a solution is especially relevant, as has already been demonstrated, as it is not definite that all circumstances of downloading constitute an act of private copy with the definition currently found in the CPI.

105. In any case, the use of compulsory collective management is not compatible with the 'French tradition' of literary and artistic property rights. As it has already been said, 'France greatly respects the freedom of authors and neighbouring right holders. Thus it considers that authors and right holders must have the control over the administration of their rights and it does not like to impose collective management of these rights by collecting societies.'[152]

106. Despite this, the legislator has not hesitated to impose collective management where it thought it necessary. In the beginning, this approach was adopted to allow the collection of the 'simple' remuneration right. This system was then put in place in relation to private copying[153] and for the equitable remuneration of the performers and the producers of phonograms in application of Article

[150] They concern: broadcasting of performances or fixations (Article 7-2-2), broadcasting of phonograms (Article 12) and the making available to the public of certain broadcasts (Art 13 d).
[151] S.Ricketson, Etude de l'OMPI sur les limitations et les exceptions au droit d'auteur et aux droits connexes dans l'environnement numérique, SCCR/9/7, apr. 2003, p. 50.
[152] D. Gaudel, Rapport français : Congrès ALAI 1997, Montebello, p.622 (esp. p. 624).
[153] CPI Article L 311-6.

L 214-1 CPI. An important step was the collective management of exclusive rights in relation to reprography[154] and the singular case of cable broadcasts.[155] The last two situations are most relevant for the current study. In effect, with the development of peer-to-peer services, it is not a question of creating a remuneration right of which the collective management would be compulsive. On the contrary, it is a question of determining whether it is possible to organise the collective management of exclusive rights such as the performance right for the making available, and eventually the reproduction right for the downloading of the work.

107. Therefore, this study must determine if this situation, born from the development of peer-to-peer services, can justify the compulsory collective management of the rights of literary and artistic property (I) before establishing in which circumstances such a solution would be compatible with the international obligations of France (II) and to define the conditions to put in place such a management system (III).

I. The justification for compulsory collective management

108. The 'mistrust' of the French legislator towards compulsory collective management seems clear from the opinion of the deputy reporting judge, Alain Richard, in the preparatory works that preceded the adoption of the law of 3 July 1985: 'The institution of compulsory mechanisms of collective management (…) would lead to a fundamental change to the nature of copyright and the erosion of the creator's individual autonomy.'[156] Nevertheless, as has already been shown, the legislator has not hesitated to impose compulsory collective management of exclusive rights in two cases. It is of interest, for the purposes of this study, to discuss the reasons why compulsory collective management was imposed in these two cases, in order to determine if, 'the same causes produce the same effects.' These arguments could justify the application of a similar mechanism to peer-to-peer services.

109. The first situation to be discussed here is that of reprography, where the similarities to peer-to-peer services are remarkable. The proposals of the Ministry of Culture, from the time when

[154] CPI Article. L 122-10, as created by the law of 3 January 1995.
[155] CPI Article L 132-20-1 (concerned with the broadcast of 'simultaneous and integral and without change' of a broadcasted work 'from a Member State of the European Community') created by the law of 27 March 1997.
[156] JOAN CR 28 june 1984, p. 3823.

reprography was under discussion, are not difficult to apply to the current situation. This can be seen from the following extracts:

- The bill 'will complete an existing law that has never been respected, whereas criminal sanctions are provided against 'photocopy-pillaging.' The simple aim of this text is to bring an end to the criminal sanctions (…)'[157]
- 'The proliferation of photocopying is explained by both technical and cultural reasons: simplicity, the development of reproduction machines, and broader diffusion of protected works.'[158]
- 'The negative effects are well known: violation of the need to obtain authorisation from the rightful owner for collective use of the protected work, serious prejudice to already fragile economic sectors of publishing and the press.'[159]
- 'Regarding the responsible parties, that is the users, that is every one of us who photocopies without counting if I may say so. As the Prime Minister said: Who nowadays is not an infringer and thus liable in a criminal court?'[160]
- There is also 'the detestable habit of our citizens to systematically violate the law.'[161]
- And it is highlighted that 'even the criminal sanctions, provided by the CPI, could not stop the illegal proliferation of photocopying.'[162]

110. The reporting judge of the Senate Legal Commission, Mr. Jolibois, has also stated that: 'the extraordinary development of photocopying has jeopardised the control of copyright violations, as it is defined in French legislation, and has caused significant financial prejudice to authors.'[163]

111. The above analysis is thus highly similar to the development of peer-to-peer services:

- A law that is not respected, or that can only be respected by suing users 'to make an example of them.'
- The considerable development of peer-to-peer services, as facilitated by technical progress and broadband connections.
- The fact that practically all Internet users are infringers.
- And the serious prejudice to the right owners and the decline in the sale of CDs.

[157] J. Toubon : JO Sénat CR 18 nov. 1994, p. 5826.
[158] *Ibid.*
[159] *Ibid.*
[160] *Ibid.*
[161] J. Toubon : JOAN CR 15 dec. 1994, p. 9225.
[162] Ibid.
[163] J. Toubon : JO Sénat CR 18 nov. 1994, p. 5827.

112. On the last point, as seen in the introduction, the link between the development of peer-to-peer services and the strong decrease in the sales of CDs is debatable. Despite this debate, there is no reason that this should invalidate the arguments for the application of compulsory collective management. In 1994, the impact of the development of photocopiers on the sale of books was discussed in the same way that peer-to-peer services and the sale of CDs are discussed today.[164] However the discussion did not affect the implementation of the law.

113. If the conclusion reached for photocopying can be applied to peer-to-peer services, what is the remedy? In 1995, the solution selected was the compulsory collective management of the reproduction right in relation to photocopying. Here again, the arguments that justified this choice should be highlighted:

- 'The object of the proposed text is simple and adapted to this situation: to help the users (…) to respect the law without taking away from the rightful owners (…) their moral and economic rights'[165] or 'to create a greater respect for copyright by helping users to avoid committing infringements.'[166]
- 'A good understanding, by users and authors, of the balance between interests and rights'[167] should be established.
- Compulsory collective management is not perceived as reversing the fundamental principles of copyright, but instead 'reinforcing and (…) organising the protection granted to authors against infringements of their fundamental rights, as consecrated in French law since 1793'[168]
- 'The project recommends (…) one of the best systems, both efficient and protective of the author's rights, all while taking into consideration the rights that we respect and that must also be protected: the rights of all the users (…).'[169]
- From the point of view of the users, this system has two advantages: 'First there is legal certainty because all risk of individual legal action is removed. Secondly there is simplicity because authorisation will be given by a single intermediary.'[170]

[164] See for example J. Cluzel : JO Sénat CR 18 nov. 1994, p. 5830 ('the considerable development of reprographic procedures has been accompanied by a decline in the sale of books – I say accompanied by, I do not say caused, which is different.')
[165] J. Toubon, Ibid., p. 5826.
[166] J. Toubon : JOAN CR. 15 dec. 1994, p. 9225.
[167] JO Sénat CR 18 nov. 94 p. 5826. See also, J. Cluzel : JO Sénat CR 18 nov. 1994, p. 5830.
[168] C. Jolibois, *Ibid.*, p. 5827. See also: J. Bignon : JOAN CR 15 dec. 1994, p. 9226 (It must 'reinforce and complete the existing legislation by organising the protection granted to authors against the violation of their rights')
[169] C.Jolibois, JO Sénat CR 18 nov. 94, p. 5827.

- Recourse to compulsory collective management is presented as 'assuring and reinforcing the guarantee of the fundamental principles of the author's rights and assuring certainty, taking into account the diverse evolutions of the last few years.'[171]

114. It also clear that this proposition can be applied without difficultly to peer-to-peer systems. On this point, during the preparation of the law of 3 January 1995 discussions were deliberately limited to 'copying on paper', according to the Minister of Culture,[172] but it was noted that other difficulties could appear in the future, notably in the face of the 'digitisation of media.'[173] Due to this, the law concerning reprography could be considered a 'road to the future' and even affirms that 'the works will be able to be protected if the principles that we set out now are applied.'[174] Thus nothing prohibits the consideration that compulsory collective management can be an appropriate solution to the difficulties of peer-to-peer downloading.

115. Regarding cable broadcasts, the theory is slightly different because the compulsory collective management was imposed here by the Directive of 27 September 1993 and, as was confirmed by the Senate, it was not the task of the French Parliament to 'judge the appropriateness of the measures decided by the Council.'[175] It is thus interesting to note that this choice has been largely approved by the legislator, which seems to prefer this system to that of extended collective management. Here again, the views of the members of Parliament on this subject are found in the preparatory works:

- 'The Directive imposes, in this case, compulsory collective management and we certainly approve of this approach. The bill implicitly excludes extended collective management, which is essentially used in Nordic countries and which is foreign to our traditions.'[176]
- 'We can congratulate ourselves on the fact that this measure facilitates the task of the secondary cable operators while assuring the effective protection of copyright and neighbouring rights thanks to mandatory intervention by collective management societies.'[177]

[170] M. Schumann, President and reporting judge for the advisory commission on cultural affaires : JO Sénat CR 18 nov. 94, p. 5829.
[171] I. Renar : JO Sénat CR 18 nov. 94, p. 5831.
[172] JOAN CR 15 dec. 1994, p. 9225.
[173] *Ibid.*
[174] *Ibid.*, p. 9226.
[175] R.-P. Vigouroux : JO Sénat CR 5 march 1996, p. 1011.
[176] P. Laffite, Reporting judge of the commission of cultural affaires: JO Sénat CR 5 march 1996, p. 1010.
[177] R.-P. Vigouroux : JO Sénat CR 5 march 1996, p. 1012.

- The recourse to compulsory collective management is presented as 'the essential part of the system, and the professionalism of the numerous French authors societies (…) can be trusted for the future and for the balancing of these interests.'[178]

116. The reading of the preparatory works of the law of 27 March 1997 established the same conclusion as that for the reprography law: Far from being hostile to the idea of compulsory collective management, the French Parliament found it to be a satisfactory solution and protective of the interests of authors and others associated with creations. There is nothing to prevent the adaptation of this solution to peer-to-peer services, given that the solution is very close to the solution for reprography.

117. Finally, creating compulsory collective management seems subject to one important condition: the impossibility of exercising rights individually. In this sense, in addition to the proposals made before the Parliament and reported here, Article 10 of the 'Cable and Satellite' Directive of 27 September 1993 should be mentioned. This text excludes compulsory collective management where the rights are 'exercised by a broadcasting organisation in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners.' This can be explained simply by the fact that there are not that many broadcasting organisations, and so they can be easily identified and can manage their rights efficiently themselves.[179]

118. In the same sense, when Mrs. Von Lewinski discussed the situations where Hungarian copyright law had imposed collective management, she found that this management 'seems not to limit the author's ability to individually exercise his exclusive rights in any way.'[180] And, referring to the preamble of the Berne Convention: 'Given that the Berne Convention and other relevant treaties aim to protect copyright 'in the most efficient and uniform manner possible', it would be an internal contradiction to consider that in the case where individual management is barely conceivable, compulsory collective management reduces the exclusive rights to minimal ones.'[181] Mrs. Gaudel[182] reached the same conclusion: 'in certain fields, individual initiative is bound to fail

[178] F. Bredin : JOAN CR 10 oct. 1996, p. 5309.
[179] See: P. Douste-Blazy : JO Sénat CR 5 march 1996, p. 1017.
[180] S. von Lewinski, La gestion collective obligatoire des droits exclusifs et sa compatibilité avec le droit international et le droit communautaire du droit d'auteur – Etude de cas : Bull. dr. auteur march 2004.
[181] *Ibid.*
[182] French Report: Congrès ALAI 1997, Montebello, p.622, esp. p. 625.

because either private rights are difficult to identify and the remuneration has to be calculated on general criteria which are often based on simple statistics, or the recovery of the levy for redistribution is complicated by the number of beneficiaries, or that individual control will fail, or huge increase in exploitation makes the prevention of the behaviour of private individuals difficult.' Finally, Mr. Ficsor[183] concluded that 'in the case of executory rights, the reprographic reproduction right and the right to broadcast simultaneously and without changes to the broadcast programme, collective management is indispensable to the exercise of exclusive rights.' He highlights that in these situations, 'it is practically impossible for the users to identify at the time the rightful owners and to request their authorisation, negotiate the remuneration and the other conditions of use and to pay this remuneration on an individual basis.' This is the consequence of the 'number of users', the 'conditions of use' and of 'diversity of the works used.'

119. Finally, collective management only seems feasible if it is imposed on the basis of what are often called the 'rights collective by nature',[184] in other words rights which can not be individually managed. In this case, this method of management 'allows the author to keep the principle of his exclusive right in a field of exploitative acts where control is impossible for him.'[185]

120. In relation to peer-to-peer services, the present situation suggests that the individual management of rights is difficult, if not impossible. It must be noted that, at the present time, the rightful owners have only brought actions against a few Internet users which only obtained the condemnation of the user and not the respect of their rights in their proposal to receive payment for downloads or making their works available. The right to authorise and to prohibit is in fact only a right to prohibit. Without doubt it is impossible in practice to put in place a recovery of the right after each Internet user has exploited a protected work and this is precisely the reason why compulsory collective management should be considered here.

121. Having reached this conclusion, it remains to be determined whether the international obligations of France could act as an obstacle to implementing this solution.

[183] La gestion collective du droit d'auteur et des droits connexes, OMPI, 2002, no. 341.
[184] On this expression, see E. Deliyanni, Le droit de représentation des auteurs face à la télédiffusion transfrontalière par satellite et par câble, LGDJ, Bibliothèque de Droit privé, Tome 233, 1993, n° 226.
[185] *Ibid.*

II. The compatibility of compulsory collective management with international obligations of France.

122. Before addressing this issue, an important point must be made. In relation to peer-to-peer services, the proposal put forward by this study is the possibility of putting in place compulsory collective management for both copyright and neighbouring rights. It is therefore logical to determine whether such as solution is compatible with the many treaties and conventions on copyright and neighbouring rights to which France is a party. However, due to content of these instruments in relation to neighbouring rights, it is only necessary to refer to copyright. In effect, no treaty concerns the rights of performers and producers of audiovisual works, so compulsory collective management could be applied in this case. Only the WIPO Treaty and Rome Convention deal with neighbouring rights for phonograms.
These two texts, in Articles 16 and 15-2 respectively, apply the same approach in almost the same terms: contracting States can provide in their national legislation 'the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for in connection with the protection of copyright in literary and artistic works', to quote the Rome Convention. Therefore, copyright is clearly the reference point here. Moreover, in Community law, the Directive of 22 May 2001 grants the same exclusive rights to authors and the holders of neighbouring rights, and deals with the question of limitations and exceptions in an article which is common to all right holders. Thus the distinction between copyright and neighbouring rights does not seem necessary here.

123. Despite the above, when legal commentators have written on the subject of the compatibility of compulsory collective management with international conventions with respect to copyright, their conclusions are radically different.

124. International treaties on copyright have been interpreted as not allowing the compulsory collective management of exclusive rights. This argument is clearly explained by Mr. Ficsor.[186] The Berne Convention,[187] along with TRIPS[188] and the WIPO Copyright Treaty,[189] provide the

[186] La gestion collective du droit d'auteur et des droits voisins à la croisée des chemins : doit-elle rester volontaire, peut-elle être étendue ou rendue obligatoire ? : Bull. Dr. auteur oct. 2003.
[187] Article 11 bis 2 & 13-1.
[188] Article 9-1, according to which: 'members must comply with Articles 1 to 21 of the Berne Convention'
[189] Article 1-4, according to which: 'the contracting parties must conform with Articles 1 to 21 and the annex to the Berne Convention'

conditions to put in place a non voluntary licence; they must not prejudice the right of the author to recover an equitable compensation.

According to Mr. Ficsor, the scope of application for Articles 11bis 2 and 13-1 of the Berne Convention, which has already been referred to here, cannot be limited only to non-voluntary licences. Therefore, these texts demonstrate that the 'conditions of exercise of the right' and 'the possibilities to 'establish these conditions' are exhaustive within the conventions. Due to this, in general, compulsory collective management of exclusive rights can only be applied in cases analogous to those of non voluntary licenses (in other words for simple rights of remuneration.)'[190]

In the present case, peer-to-peer services deals both with the right of reproduction for the downloading (unless the private copy exception applies) and the right of performance for the making available of the work. Both these cases involve exclusive rights and not remuneration rights, so consequently it would seem that compulsory collective management cannot be applied.

On occasion, of course, Community Directives have imposed or authorised compulsive collective management. This was the case in the Directive of 27 September 1993 concerning cable broadcasts, as has already been discussed, but also in the Directive of 19 November 1992 which permitted compulsory collective management for rental rights, and Directive 27 September 2001 for the resale right.

For Mr. Ficsor, the fact that it has been necessary to provide in these directives the possibility to apply compulsory collective management, 'shows implicitly that in the *acquis communautaire* – unless this possibility directly flows from an international treaty to which the EU Member States are parties – this possibility must exist: in other words, *compulsory collective management is not lawful where international rules of copyright* (such as the Berne Convention discussed above) *or the acquis communautaire* (if the right in question is too specific to be found in these international rules such as the rental right), *do not authorise it expressly*.'[191]

125. The conclusion is very clear. 'Where international rules on copyright and/or the *acquis communautaire* provide the possibility of the individual exercise of an exclusive right, and where the relevant rules do not establish *conditions* for the exercise of this right (and also do not permit limiting the right to a simple right of remuneration), it would be contrary to these rules to impose that condition that this right can only be exercised through collective management.'[192]

[190] M. Ficsor, La gestion collective du droit d'auteur et des droits voisins à la croisée des chemins : doit-elle rester volontaire, peut-elle être étendue ou rendue obligatoire ? ,op.cit.
[191] Ibid.
[192] Ibid.

Thus, in the case of peer-to-peer services, the solution of imposing collective management of the performance right, or even to reproduction right, seemed excluded. In effect, no international text authorises it expressly and the 'Infosoc' Directive of 22 May 2001 consecrates the reproduction right and the right of communication to the public as exclusive rights.[193]

126. This analysis relies on the principle that compulsory collective management limits exclusive rights which are entrenched by international agreements or recognised by Community texts. The Berne Convention, along with TRIPS and the WIPO Treaty recognise 'minimum' exclusive rights, to which it is possible to apply limitations or exceptions only on the conditions provided by the same agreements. Furthermore, at the Community level, Article 5 of the 'Infosoc' Directive enumerates the circumstances in which Member States can provide 'exceptions and limitations' to the exclusive rights of the author and the holders of neighbouring rights.

127. Thus, in order to establish if compulsory collective management is compatible with these texts, it is necessary to determine if this management constitutes a limitation or exception to exclusive rights. It is only on this condition that the reasoning of Mr. Ficsor cited above will constitute an obstacle to the application of this solution to peer-to-peer services. The stakes are made clear by Mrs. von Lewinski:[194] 'The first question to analyse is whether compulsory collective management constitutes an exception or a limitation to the exclusive rights in question. If it does not, and thus it is not provided for by an international treaty, there is no problem of compatibility. If, on the other hand, compulsory collective management does constitute an exception or a limitation, it will be necessary to determine if it is one of the permitted exceptions or limitations.'

128. It is thus appropriate to consider whether compulsory collective management limits exclusive rights and 'only' allows the organisation of the exercise of the right. The question concerns the difference between the existence and the exercise of the right. When the question of limitations and exceptions to exclusive rights arises, the reply tends to focus on the existence of the exclusive rights, and the scope is defined from the cases where the authors can invoke their right against third parties. It has been decided that 'the author will not be able to prohibit certain uses.'[195] On the other hand, when the question of the management of these rights arises, their existence is not in question,

[193] Articles 2 & 3.
[194] La gestion collective obligatoire des droits exclusifs et sa compatibilité avec le droit international et le droit communautaire du droit d'auteur – Etude de cas : Bull. dr. auteur march 2004.
[195] Ibid.

but only the methods of exercise of these exclusive rights. It is therefore possible to analyse compulsory collective management as a limitation to exclusive rights, and whether it will be compatible with the international obligations of France.

129. In summary, Mrs. von Lewinski has stated that: 'compulsory collective management does not breach the exclusive right in itself; the uses are not authorised by law. In reality, the author has limits only on the conditions of the exercise of the right. Only the right to exercise his exclusive right by the intermediary of the management society is allowed, but the right in itself is not limited.'[196] Even though Mr. Ficsor believes that compulsory collective management is incompatible with international conventions, he has clearly affirmed that 'the obligation of collective management is a condition on the exercise of the right.'[197]
To reiterate this argument, it should be noted that Article 9 of the Cable and Satellite Directive, which imposes compulsory collective management, is entitled the 'exercise of the cable retransmission right.'

130. Even if compulsory collective management is not considered a limit or an exception to exclusive rights, it must still be determined whether it is compatible with the provisions which prohibit the requirement of formalities for the existence of the right. Article 5-2 of the Berne Convention clearly provides that 'the enjoyment and the exercise of his right shall not be subject to any formality.' This solution rests on the distinction between the exercise and existence of the rights. Where compulsory collective management is seen as affecting the exercise of the right and not its existence, the obligation on the authors does not seem to interfere with Article 5-2. In this sense, it has already been highlighted that this text refers to formalities 'on which the existence of the right depends', which is not the case with compulsory collective management.[198] In addition, it can be considered that compulsory collective management in itself does not constitute a formality because 'an author does not need to comply with any formalities. He does not even need to register with the competent management society, since the society is obliged to exercise the rights of the authors even if they are not members.'[199]

[196] Ibid.
[197] La gestion collective des droits d'auteurs et des droits connexes, OMPI, 2002, no. 372.
[198] A. & H.-J. Lucas, Traité de la propriété littéraire et artistique, op.cit. , no. 694.
[199] S. von Lewinski, La gestion collective obligatoire des droits exclusifs et sa compatibilité avec le droit international et le droit communautaire du droit d'auteur – Case study, op.cit.

131. In fact, this discussion is linked to the meaning given to the term formality. 'According to some, all formalities are included, regardless of their necessity for the existence or exercise of the right, whereas for others only the formalities which are necessary for the existence or exercise of the right or of the same right are within the scope of the provision.'[200] Whatever the result, it must be acknowledged that 'it would be a paradox to refuse as a limitation to author's rights a method of management which is aimed at strengthening the content rights, which otherwise would be empty.'[201]

132. Even if it seems possible to accept that compulsory collective management does not constitute a limitation or an exception to exclusive rights, which would allow its use without breaching France's international obligations, it must be added that if the approach of Mr. Ficsor, which considered this a limit to exclusive rights, was applied, two obstacles would have to be surmounted in order to put in place this method of management. It would have to be established that the limitation is provided by international agreements and that this limitation would not fail the 'three step test.'

As has already been demonstrated, if compulsory collective management is considered a limit to exclusive rights, it can only be applicable for the rights of remuneration.[202] However, this argument can be debated. Mrs. von Lewinski[203] invokes the '*e majore ad minus*' principle to conclude that 'as Article 11bis 2 (of the Berne Convention) allowed mandatory licenses, and thus, the replacement of the exclusive right with a remuneration right, this restriction is clearly broader than the compulsory collective management of the exclusive right – which remains intact.' In other words, since a remuneration right can replace an exclusive right, why not allow the compulsory collective management of the exclusive right?

133. Thus the only remaining obstacle is the three step test. This study has already discussed in detail the three steps, so here the test can be applied directly to the case in hand. If collective management is imposed in a specific case, well defined and with a narrow scope, it can be considered a special case. Next, this solution does not affect the normal exploitation of the right

[200] C. Doutrelepont, General Report, Raison d'être des sociétés de gestion des droits, importance, essor et développements récents : Congrès ALAI 1997, Montebello, p. 469 (esp. p. 497).
[201] A. Lucas, Observations finales: Congrès ALAI 1997, Montebello, p. 1153 (esp. p. 1159).
[202] See the approach of Mr. Ficsor as discussed above.
[203] La gestion collective obligatoire des droits exclusifs et sa compatibilité avec le droit international et le droit communautaire du droit d'auteur – Case study ,op.cit.

since it is 'practically impossible for the copyright holder to rely on a private license.'[204] Finally, since the proposed management assures an equitable remuneration to the rightful owners, it does not cause an 'unreasonable prejudice' to their 'legitimate interests' and thus the third condition is fulfilled.

In conclusion, it appears that all the arguments regarding the incompatibility of compulsory collective management with the numerous international conventions can be debated. This does not minimise the difficulties that will occur if such a system was implemented in France for peer-to-peer services. It simply suggests that, in all cases, the solution of compulsory collective management should not be immediately dismissed.

[204] The condition of the breach of normal exploitation as interpreted by S.Ricketson, Etude de l'OMPI sur les limitations et les exceptions au droit d'auteur et aux droits voisins dans l'environnement numérique, apr. 2003, p. 83.

III. Implementing compulsory collective management

135. If the use of compulsory collective management can be justified and deemed compatible with the international obligations of France, it remains to be determined in what circumstances this management could be implemented.

136. Before attempting this, it is necessary to define the scope of application of this collective management. In other words, it is necessary to decide what rights would be covered. The efficiency of the system implies that both copyright and neighbouring rights would be covered without the need to distinguish the type of the work. Therefore, the system would cover the reproduction right and eventually the performance right and right of communication to the public to include the terms used for neighbouring rights. However, above all, compulsory collective management must be applied only when the reproduction and eventually the performance are made by individuals using digital networks with non commercial aims. On this, inspiration can be taken from Article 122-10 CPI which relates to reprography. Applying this, the right(s) would be granted to a collecting society approved by the Ministry of Culture. Only this society could contract with users.
This system has the advantage of avoiding two difficulties. Firstly, since the right can only be managed by a collecting society, the transfer of this right by the initial owners to a third party, such as a producer, would be impossible. Secondly, it would avoid all difficulties linked to identifying the managed catalogue of works. When French law is applicable, i.e. when the act of making the work available is made in France, the competent society is entitled to recover remuneration for the exploitation of this work.

137. Thus beyond this preliminary question, the concrete methods of implementation of compulsory collective management must be discussed.
Firstly, ‘peer-to-peer consumption’ essentially concerns music works, but also includes audiovisual works. However for films, the system known as the ‘chronology of medias’ has been a part of French law since the 1980s, and then at the European level, in order to protect cinemas from competition from television and recorded media. Nowadays cinematographic works are exploited in the following way: first in cinemas, then six months later by pay per view services and by video or

DVD,[205] then one year later the release for encrypted subscription channels, two years later the release on unecrypted channels which co-produced the film and three years later the release for the other channels.[206]

138. For audiovisual works, the exchange of files on peer-to-peer networks will breach this chronology of media, which is an essential part of the commercial strategy of the rightful owners. Exchanges by users can include the latest releases[207] and are hard to control. Regarding this, to authorise the making available of the works by compulsory collective management could affect the order of diffusion of cinematographic works.[208]

139. In addition, some further points of interest are found in the solution presented by the laws of 3 January 1995 and of 27 March 1997.

Several essential points appeared:

- The necessity to subject the relevant collective management societies to the requirement of **authorisation**. This solution was applied for the first time in the bill regarding reproduction by reprography. Two essential justifications were advanced: it was seen as the 'normal balance to a monopoly'[209] and an indispensable 'guarantee' for the implementation of the system.[210]

  The principle of authorisation seems unavoidable. Proof of this can be found in the solution provided by the law of 27 March 1997: whereas the Directive did not require an

[205] Article 2, D. no. 2000-1137 24 November 2000

[206] The law, which was very restrictive, is nowadays more open: See Article 7, 'Television without frontiers' Directive of 30 June 1997 and Article 70-1, law of 30 Sept 1986, amended 1 August 2000. This hierarchy of use is unknown in American law. This has for instance allowed American director Steven Soderbergh to sign a contract with a production company to make a series of six films to be broadcasted simultaneously in cinemas, on television and made available on DVD (Source: Reuters).

[207] Films transmitted on a peer-to-peer network are sometimes not even officially in cinemas (films recorded by cameras in previews). For this reason the USA has recently reinforced its copyright law, penalising the making available on peer-to-peer networks of films, songs or software before their official release. The 'Family Entertainment and Copyright Act' signed the 27 April 2005 by George Bush provides a penalty of up to 3 years in prison and heavy fines. (Durcissement de la législation américaine contre le P2P, CNET News.com, Thursday 28 April 2005: www.zdnet.fr).

[208] On this, see: Estelle Dumont, Peer-to-Peer : la grande alliance entre industrie du cinéma et FAI s'annonce difficile, ZDNet France, Monday 25 October 2004 : www.zdnet.fr. – Sophie Fievee-Balat, La VOD doit se situer entre six et neuf mois dans la chronologie des médias, interview de Pascal Rogard, directeur de la SACD, JDN, 2 November. 2004: www.journaldunet.com. – See also La « chronologie des médias », prochaine victime collatérale du haut débit ? : www.journaldunet.com.

[209] See C. Jolibois : JO Sénat CR 18 Nov. 1994, p. 5827. – P. Douste-Blazy : JO Sénat CR 5 March 1996, p. 1018 & 1022 ; JOAN CR 10 Oct. 1996, p. 5304. – N. Ameline : JOAN CR 10 Oct. 1996, p. 5306.

[210] J. Cluzel : JO Sénat CR 18 Nov. 1994, p. 5830. See also, J. Toubon : JOAN CR 15 Dec. 1994, p. 9231.

authorisation system for the societies in charge of cable broadcasting, the Government decided to provide such a system in the initial Bill, and this was approved by the Parliament. Here again, authorisation was presented as the 'counterpart' of compulsory collective management[211] and was easyly imposed. The critique that 'copyright is a private right and authors' societies are private societies which consist of authors and rightful owners, and which are formed to protect their rights and interests'[212] did not prevent the implementation.

- **The definition of the authorisation criteria**. This subject has already been discussed by the Parliament, which has formulated several proposals. For instance, it was discussed whether to take into account 'the equitable distribution of the amounts between the rightful owners',[213] and to ensure that the society 'presents indisputable guarantees of their professional competence and that they represent an appropriate proportion of artists.'[214] Generally, the choice of criteria has not caused any real disagreement. It has simply been stated that when considering the societies' 'material means', this included 'financial' means.[215]

  The discussions preceding the vote on the law of 27 March 1997 reveal in any case the necessity of providing for authorisation in the law. The initial Bill did not, so the senators took the initiative to fill this gap.[216]

  The implemented criteria are thus, according to Article L 132-20-1 CPI:

  1. 'The professional qualifications of the directors of the societies and the means that the societies are able to bring to bear for the exercise of the rights (…) and the exploitation of works in their repertoire.' On this subject, explanation was made during the parliamentary debate of the expression 'the means that the society is able to bring to bear' which must now be understood as 'both the financial and human means of control.'[217]

  2. 'The size of the repertoire.'

  3. 'Their observance of the obligations imposed on them by the provisions of Title II of Book III.'

[211] See, P.Laffitte : JO Sénat CR 5 March 1996, p. 1010 & 1022.
[212] J. Delaneau : JO Sénat CR 5 March 1996, p. 1021.
[213] C. Jolibois : JO Sénat CR 18 Nov. 1994, p. 5828.
[214] M. Schumann : JO Sénat CR 18 Nov. 1994, p. 5829.
[215] J. Toubon : JO Sénat CR 22 Dec. 1994, p. 8070.
[216] See for example, the intervention of Senator Pierre Laffitte: JO Sénat CR 5 mars 1996, p. 1021.
[217] N. Ameline : JOAN CR 10 Oct. 1996, p. 5314.

These choices are slightly different from those provided for reprography under Article L 122-12 CPI:

- 'The diversity of the partners.'
- 'The professional qualifications of the officers.'
- 'The human and material means they propose to use to administer the reprographic production right.'
- 'The equitable nature of the conditions foreseen for distributing the amounts collected.'

In the case of peer-to-peer services, certain criteria would logically need to be imposed: the qualification of officers, the means put in place, the representative quality of the society. It would be without doubt appropriate to also consider the 'equitable character of the methods of distribution.' This detail was judged useful at the time of the vote on the law related to reprography in order to take into account the different interests of authors and publishers. Thus this could be applied to peer-to-peer downloading to reconcile the opinions of producers, authors and performers.[218]

- **The desire to guarantee that the exploitation of the work has a contractual basis**: 'these management societies will have to conclude agreements with the users; the exploitation of the reproduction right by reprography will be thus assured, as we all want it to be, on a contractual basis.'[219] The same wish can be found in the debates prior to the law of 27 March 1997: 'the idea is thus to ensure the respect of the exclusive rights of the author on a contractual basis.'[220] In the case of peer-to-peer services, the difficulty consists in determining with which competent management societies to contract.

  The competent collecting society could contract with the consumer representatives, eventually adding the ISPs to this agreement.

  It remains to justify the intervention of these intermediaries. First of all, the principle of compulsory collective management supposes that 'users' of the protected works and fixations would be parties to the agreement and in this case, 'representatives' must be found for them. The most logical solution would be consumer associations, but this raises the question of the legitimacy and the representative quality of these associations. This difficulty must not be ignored, but instead the intervention can be justified by establishing a link with the commission created by Article L 311-5 CPI in order to determine 'the types of

[218] If of course, the rules of distribution were not provided by the legislator. See *supra*.
[219] C. Jolibois : JO Sénat CR 18 Nov 1994, p. 5827.
[220] J.-Y. Basselat : JOAN CR 20 March 1997, p. 2123.

media, the rate of remuneration and the methods of payment' of the remuneration for private copy. According to the same article, this commission is composed in the following way: 'half of the members are designated by the organisations representing the beneficiaries of the right of remuneration, a quarter are the members designated by the organisations representing the manufacturers or importers of the media and the other quarter are members designated by consumer organisations.' It must be highlighted that in the initial Bill, placed before the National Assembly on 4 June 1984, consumer organisations did not have a role on the commission. Alain Richard, the deputy reporting judge for the judicial commission decided that it was appropriate to propose an amendment for this, motivated by 'the fact that it is the purchasers of the blank cassettes who will pay the remuneration for the private copy.'[221] The amendment was passed with approval of the Government, and the special commission of the Senate simply wanted that the consumer organisations be 'representative' of the consumers.[222] The same solution could be used for peer-to-peer services, given that the Internet user would be the final debtor of the remuneration.

Finally, it remains to justify the participation of ISPs. Here again, a comparison with the regime put in place for the private copy is relevant. In this case, as already discussed,[223] manufacturers and importers of blank media are members of the Article L 311-5 commission. There position on the commission is justified by the fact that they 'supply the material means to copy the works.'[224] Therefore it is logical that they determine the applicable rules for remuneration of the private copy.

In the case of peer-to-peer services, it could be said that because ISPs supply the user with the technical methods to make protected works available it would legitimate to allow them to participate in the agreement which must authorise these acts of exploitation of literary and artistic property rights.

It is thus the same reasoning which justified the payment of remuneration for the private copy by the ISPs. They would be identified as intermediary debtors, the guarantor of the payment of the remuneration, which they could pass on to the subscriber. After all, in the field of reprography the French centre of exploitation of the copy right (CFC) concludes

[221] Report no. 2235, 26 June 1984, p. 60. The argument was revisited in the debate : R.Rouquette : JOCR Ass. nat. 29 June 1984, p. 3906.
[222] C. Jolibois, no. 212, 24 Jan 1985, p. 17.
[223] See. I A
[224] C. Caron, Rémunération pour copie privée : J.-Cl. Propriété littéraire et artistique, fasc. 1510, no. 29.

agreements with photocopy shops who are not the 'direct users' of the copies.[225] In fact, these shops supply, against remuneration, the means to make the copies, as the ISPs allow their subscribers to download and make protected works available.

- **The question of the equitable distribution of the amounts between the rightful owners.** If distribution was surrendered in the law on reprography, it was not without reluctance[226] and with a wish that during the preparation 'in the statutes of the future management society' would be established 'some rules of distribution of the rights which reflect the common desire to defend the copyright.'[227] The fixing in statute of the distribution methods has been abandoned as it would have introduced too much rigidity.[228] It is thus only a criterion of authorisation for the society[229] which led to the conclusion that the 'rules of distribution between authors and publishers would have to be equal.'[230] In practise, the 'agreement related to the distribution of the reprography rights between the society of writers and the national association of publishers'[231] provides a distribution 'equally between the author(s) and the editor(s)' for works in field of literature, news, art books, youth fiction, religious books, esoteric and occultism works and comics.[232] Specific rules of distribution are however provided in other fields, such as scientific books, human and social sciences, encyclopaedias and dictionaries for example.[233]

  On this point, concerning remuneration for private copy[234] and equitable remuneration under Article L 214-1 CPI, the legislator did not hesitate to impose rules of distribution between the different rightful owners. In relation to the private copy, the initial Bill did not provide any rule of distribution between the beneficiaries. This silence has been seen as a 'gap'[235]

[225] The CFC and the national association of reprography concluded an agreement in 1990, renewed on 12 February 1996, that provided by the signature of each reprographer an individual contract of authorisation of reproduction by reprography of protected works (www.cfcopies.com). This contract concerns the reproductions of book or press article pages by the photocopy machines of these shops.
[226] See thus, the amendment placed before the National Assembly which stated that the remuneration 'should benefit equally the author and the publishers of the copied work' : JOAN CR 15 Dec 1994, p. 9235.
[227] M. Schumann : JO Sénat CR 18 Nove 1994, p. 5830. See also : J. Toubon : JO Sénat CR 18 Nov 1994, p. 5833. See also, in favour of a 'distribution between authors and editors fixed by law' : G. Hage : JOAN CR 15 Dec 1994, p. 9229 and further, wishing 'that the statutes of the authorised societies provide an equitable remuneration of the amounts between rightful owners' and that this disposal would be 'the condition to their authorisation'' : C. Jolibois : JO Sénat CR 18 Nov 1994, p. 5828
[228] In this sense, the interventions of J. Bignon & J. Toubon : JOAN CR, 15 Dec. 1994, p. 9235.
[229] CPI, Article L 122-10 & R 322-1-4 CPI.
[230] P.-Y. Gautier, op.cit., no. 195, p. 384.
[231] J.-Cl. Propriété littéraire et artistique, fasc. 1580.
[232] Point 1 of the Agreement
[233] Point 2 of the Agreement
[234] CPI Article L 311-7
[235] Report A. Richard, op.cit. (p. 61).

and during the parliamentary debates, it was judged 'indispensable to provide in the law the rules of distribution of the private copy between the different categories of beneficiaries.'[236] This choice has been justified by the 'importance of this new 'income source' and by the desire to guarantee to the rightful owners an equitable remuneration.'[237] The amendment was adopted easily without any real discussion.

The situation is slightly more complex for the equitable remuneration under Article L 214-1 CPI. For this, the rules of distribution were in the original Bill and have been adopted without difficulty by the National Assembly.[238] The Senate adopted a different approach, based on the proposition of reporting judge Jolibois.[239] On the assumption that 'wherever possible, **priority must be given to contractual agreements on legal obligations**', it was thus provided that 'in default of an agreement, the scale and methods of remuneration are to be fixed by an expert and the distribution of the remuneration is to be equal between performers and producers of phonograms. On the other hand, where the parties agree, they must remain free to fix as they wish the rules of distribution of the remuneration.'[240] The National Assembly refused to approve the Senate's text, believing that the principle of equal distribution 'must prevail over the freedom to negotiate of the parties.'[241] In the face of the Senate's resistance, the 'Commission Mixte Paritaire'[242] imposed the text known today.

In the case of peer-to-peer services, if the legislator did not necessarily want to impose the rules of distribution, the argument referring to the 'income source' of the private copy would without doubt be repeated.

- **The question of the plurality of the management societies**. For some, 'there can only be one management society' to efficiently protect the rightful owner.[243] For others, 'if it is easier in this to have only one and unique intermediary' it can nevertheless be asked if it is 'not regrettable to create a monopolistic situation where competition would improve the relationship between the different parties.'[244] In relation to cable broadcasting, the Ministry of Culture supported a monopoly because it would 'reflect the reality' and was precisely due

[236] R. Rouquette : JOAN CR 29 June 1984, p. 3906.
[237] Report of C. Jolibois, Sénat, no. 212, 24 Jan 1985, p. 22.
[238] JOAN CR 29 June 1984, p. 3903.
[239] For the vote, see JO Sénat CR 4 April. 1985, p. 141.
[240] Report C. Jolibois, op.cit., p. 119.
[241] A. Richard: JOAN CR 20 May 1985, p. 836.
[242] This body resolves disputes between the two chambers of the French legislator.
[243] M. Schumann : JO Sénat CR 18 Nov. 1994, p. 5829.
[244] P. Richet : JO Sénat CR 5 March 1996, p. 1013.

to this that a procedure of authorisation of the society was implemented, as seen previously.[245]

Each system has its advantages. The creation of several societies will allow a better defence of the interests of each category of rightful owners, unless some *de facto* become subservient to others. On the other hand, the creation of only one society guarantees it a strong position against users and would simplify the tasks of these users as they only have one intermediary.[246]

- **The question of creating one or several *ad hoc* management societies** or whether the existing collecting societies can be used. Until recently, there was a tendency to create new societies: the CFC for reprography, the SPRE (société pour la perception de la remuneration équitable de la communication au public des phonogrammes du commerce) for the management of the equitable remuneration under Article L 214-1 CPI, SORECOP and Copie France for the private copy, the first society representing authors, performers and producers of phonograms and the second competent for videos. In practice, these societies recover remuneration and then distribute between the collecting societies which represent the different categories of beneficiaries, which themselves then redistribute to the rightful owners.

[245] V. JO Sénat CR 5 March 1996, p. 1018.
[246] On these arguments, see V. M. Ficsor, La gestion collective du droit d'auteur et des droits connexes, op.cit., no. 359

Conclusion

This study has demonstrated the feasibility of a system of compensation for the exchange of works on the Internet.

1. The downloading can, in certain cases, be considered as an act of private copy.

Article L 122-5 CPI provides that 'the author may not prohibit: (…) copies or reproductions reserved strictly for the private use of the copier and not intended for collective use (…).'

The copier must incontestably be considered to be the one who takes the initiative of copying a work. The Internet user who downloads can benefit from the private copy exception. The argument of the **unlawfulness** of the source is not particularly relevant. Despite the impossibility of the user to determine the lawfulness of the source, it is clear that demanding a lawful origin would in effect be to add a condition to the law. In addition, the argument concerning the **'strictly' private use** of the copy does allow the systematic removal of the exception where the Internet user can move the downloaded file from the 'open' part of the hard disk to the 'closed' part. It could, without doubt, be maintained that certain downloads do not constitute private copy acts. However, should this conclusion automatically defeat the proposed system? What would be the difference compared to the current situation? Is remuneration for the private copy not already recovered in situations where there is not really a private copy in the strict sense of the French legislator?

The exception could be applied. All that remains is to adapt the existing system of remuneration. The **Internet Service Providers** could be the intermediary debtors, just as the manufacturers and importers of blank media are currently. The providers would recover the levy through the users, the final debtors.

Finally, this solution seems compatible with the international obligations of France given that conditions of the **three step test** are satisfied. The private copy made by the Internet user constitutes a 'special case' which 'does not conflict with the normal exploitation of the work or other protected subject matter' and which does not cause 'any unreasonable prejudice to the legitimate interests of the author.'

2. ***The making available of a work can give rise to compulsory collective management of the performance right***

The circumstances in which peer-to-peer services are developing are comparable to those which led to collective management for reprography. This system would allow Internet users to enjoy peer-to-peer networks completely **lawfully**, without causing damage to the rightful owner. The law of literary and artistic property would recover **legitimacy** when it is no longer perceived as an obstacle to the exchange of works. Finally, the **efficiency** of this system could easily be applied to peer-to-peer downloading.

In addition, here again the **international obligations** of France would not constitute an obstacle, given that the proposed solution does not impose, according to this study, any limitation or exception to exclusive rights.

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