

## What is - really – new about copyright?

Without making the exegesis of intimate relationships between technology and copyright since the spread of printing in the XVth century, marking the beginning of mass publication and the need to protect authors' rights, questions are more and more raised as cultural works are spread over the Internet. Technology forces copyright to adapt itself because of the challenges it creates. The issue is not new: the young Mozart, then aged 14, during an audition of the Allegri's Miserere, which was jealously guarded by the Church, only to be played within the Sistine Chapel on special occasions, managed to reproduce from memory the Miserere's nine-voice score, thus allowing its circulation and resulting in the ultimate lifting of the papal prohibition a few years later. Sometimes considered a pirate before his time, Mozart managed to lift the exclusivity the Church claimed for this work. This type of geniuses thinly spread, the greatest challenges faced by copyright today come from technology<sup>1</sup>.

At the end of the 1990s, Unesco took stock of the tidal wave provoked by the Internet, observing that *"Protection of artists' rights is fundamental. Digital compression, virtual imagery, multimedia products of all kinds sometimes undermine those rights. Adapting to technology does not justify the dismantling of useful norms and regulations; on the contrary, copyright law ought to be extended so as to protect artists' interests as well as guarantee universal access to artistic works."*<sup>2</sup>

Reconciling many and at times divergent interests is the complicated task facing copyright law. While the role of copyright is essential in preserving creativity and inventiveness by authors, without which our cultural heritage would be undeniably

---

<sup>1</sup> The civil law notion of *"author's rights"* in mainland Europe is to be distinguished from that of the common law notion of *"copyright"*, both by the set of rights enclosed by the former, which include economic rights and moral rights that are attached to the author rather than to his or her work, contrary to the case in copyright, and by the exceptions to the monopoly held by the rightholder. In this article, copyright is used as a generic term to refer to the rights protecting authors.

<sup>2</sup> UNESCO, Our Creative Diversity, Report of the World Commission on Culture and Development, July 1996, summary version available at [www.unesco.org/images/0010/001055/105586e.pdf](http://www.unesco.org/images/0010/001055/105586e.pdf)

CABINET D'AVOCATS  
PARIS – BRUSSELS

221 Rue de la Loi  
1040 Brussels – Belgium  
O. +32 2 231 71 31  
F. +32 2 231 71 39

11-17 Rue de l'Amiral Hamelin  
75116 Paris - France  
O. +32 2 231 71 31  
F. +32 2 231 71 39

poorer, access to works by the greatest number must also be ensured. The stakes involved are also economic and financial since copyright is now recognized as an essential asset for the competitiveness of the European Union in this era of global competition.<sup>3</sup> Access to culture, protecting creativity, economic and financial interests... these key issues recently justified an intervention in this field by the European Commission.<sup>4</sup>

The advent of the Internet has profoundly shaken up copyright, both in terms of its scope of application and the relationships between the players concerned. While these few lines do not purport to provide a comprehensive review of such trends – which have been extensively addressed these past years<sup>5</sup> -, a few key points are worth noting. The Web contributes to the volatility of works which, once digitized, can then be the subject of worldwide dissemination by legal or not to legal means, via peer-to-peer sharing or streaming.<sup>6</sup> In 2008, the International Federation of the Phonographic Industry (IFPI) estimates over 40 billion files were illegally file-shared, stressing that in 2008 only 5% of all music downloads were legal.

In France, the new High Authority for the Broadcasting of Works and the Protection of Rights on the Internet (HADOPI), which sprung from the Internet and Creation Law of June 12, 2009, reported last June that it had already sent out some 400,000 warnings to unlawful downloaders.<sup>7</sup> On the other side of the Atlantic, copyright infringement has

---

<sup>3</sup> Cf. the speech by Commissioner Internal Market and Services Michel Barnier on January 22, 2011 "Copyright in the digital era", Speech/11/40, available at [www.europa.eu](http://www.europa.eu).

<sup>4</sup> In September 2010, the European Parliament adopted the Gallo report calling for the harmonization of copyright legislation at the EU level. In spring 2011, the European Commission unveiled a new intellectual property strategy (for more information cf. [www.ec.europa.eu/internal\\_market/indprop/index\\_fr.htm](http://www.ec.europa.eu/internal_market/indprop/index_fr.htm)).

<sup>5</sup> Cf. for example, in France, the report of the Working Group chaired by Gabriel de Broglie, "Le Droit d'auteur et l'internet", July 2000, available at [www.droitsdauteur.culture.gouv.fr/rapportbroglie.pdf](http://www.droitsdauteur.culture.gouv.fr/rapportbroglie.pdf).

<sup>6</sup> Streaming is "a technique that allows playing a file quasi-simultaneously to its delivery. In principle, all works can be distributed by streaming: works of music, audiovisual works, literary works, video games, etc. In this respect, streaming should be distinguished from conventional downloading (such as peer-to-peer downloads), which requires recovery of the full file before it can start to be played" ([www.labs.hadopi.fr/wiki/quel-encadrement-juridique-pour-le-streaming#definition](http://www.labs.hadopi.fr/wiki/quel-encadrement-juridique-pour-le-streaming#definition)).

<sup>7</sup> Cf. in particular the article published in Le Figaro on June 6, 2011, "L'Hadopi a envoyé 400 000 avertissements" ("Hadopi has sent out 400,000 warnings").

CABINET D'AVOCATS  
PARIS – BRUSSELS

221 Rue de la Loi  
1040 Brussels – Belgium  
O. +32 2 231 71 31  
F. +32 2 231 71 39

11-17 Rue de l'Amiral Hamelin  
75116 Paris - France  
O. +32 2 231 71 31  
F. +32 2 231 71 39

given rise to staggering lawsuits and copyright pirates have been hit with millions of dollars in damages.<sup>8</sup>

While it is evident that a discussion on the tools needed to protect authors' rights is needed, upstream thinking must be carried out to identify the players concerned. Internet access providers (IAPs), distributors and technical platforms, rightholders, end users and others, the digital era has spawned a plethora of protagonists. The respective scope of their duties and responsibilities has represented, in the eyes of the World Intellectual Property Organization (WIPO), "*one of the earliest problems in the cyberspace*".<sup>9</sup> Recently, public debate has focused on the issue of the respective responsibilities of operators using cloud computing<sup>10</sup> services. In this respect, the EMI v. MP3Tunes case resulted in an interesting ruling by the US courts: co-founded in 1997 by Michael Robertson, former CEO of Mp3.com – the company was successfully sued for copyright infringement in 2000.<sup>11</sup> MP3Tunes is a music sharing platform combining downloading and streamlining capabilities and offering users storage lockers. In 2007, music major EMI decided to sue MP3Tunes for copyright infringement, demanding that more than 100 million music files stored in all 125,000 MP3Tunes user accounts be turned over. In that case – which could still be overturned by a higher court -, the New York court held that MP3Tunes was simply a technical platform which as such benefited from limited liability in case of infringement of the Digital Millennium Copyright Act (DMCA) by its users.<sup>12</sup> So as to fight against piracy, the court nonetheless recognized

---

<sup>8</sup> See in particular the 2007 *Capitol v. Thomas* case before the US District Court of Minnesota, where the jury verdict against a user who had unlawfully downloaded 24 songs was an award of \$1.5 million in damages. In July 2011, the judge found this award to be wholly disproportionate and lowered the amount to \$54,000, or \$2,250 per song.

<sup>9</sup> According to WIPO, "*the problem of liability of Internet intermediaries for content authored by, or activities carried out by, third parties (...) was one of the earliest problems in the cyberspace*". WIPO, *Role & Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*, L. Edwards, p. 3, available at [www.wipo.int](http://www.wipo.int).

<sup>10</sup> The World Privacy Forum defines cloud computing as "*sharing or storage by users of their own information on remote servers owned or operated by them and accessed through the Internet or other connections.*"

<sup>11</sup> Cf. for example, the *UMG Recordings Inc. v Mp3.com* case (2000).

<sup>12</sup> US District Court Judge Pauley considered in this case that "*the DMCA does not place the burden of investigation on the Internet service provider.*" Greg Julia, MP3Tunes representative, declared for his part that this ruling was "*a major victory*" (...). *Users can still download songs from publicly available websites, and store them without a separate license*

CABINET D'AVOCATS  
PARIS – BRUSSELS

221 Rue de la Loi  
1040 Brussels – Belgium  
O. +32 2 231 71 31  
F. +32 2 231 71 39

11-17 Rue de l'Amiral Hamelin  
75116 Paris - France  
O. +32 2 231 71 31  
F. +32 2 231 71 39

that the website must inform users of their rights and responsibilities in case of illegal music sharing, and the website must promptly take down any illegal files identified by record companies.

While copyright offers possible responses on how to protect works on the Internet, we would be mistaken to look to it for any panacea or miracle cure. To the contrary, the time has come to explore legal tools to bolster if not mitigate the deficiencies of copyright law and encourage creativity on the Web. Other tools are certainly worth exploring, as recognized by Unesco, which considers that “*with technologies like the Internet, leaders may come to consider new systems of law, which will not necessarily rely on the principles of copyright*”.<sup>13</sup> The emergence of soft law, i.e., instruments without legally binding force (codes of good conduct, memorandums of understanding etc.), among rightholders and Internet access providers, with the encouragement of the European Commission, is compensating for the slow progress made by lawmakers in this field.<sup>14</sup> Such soft law is also likely to morph into “hard law” in the future. At the same time, initiatives that are particularly innovative due to their flexibility have permitted striking a balance between the protection of authors and broad dissemination of culture.<sup>15</sup> In this respect, the nonexclusive *Creative Commons* licenses created back in 2002 allow their holders the possibility of determining in advance what rights are reserved by them, and what use can freely be made by the public. The former “*all rights reserved*” licensing model is thus giving way to a “*some rights reserved*” model in the context of a voluntary agreement between the parties concerned.

Mozart can be forgiven much, but he was no ordinary mortal. Challenged by the Internet, copyright is at a crossroads, and the slow progress and wavering by lawmakers

---

*fee, so long as MP3TUNES complies with takedown notices.*” (cf. Le Monde, “*La justice américaine se penche sur la musique dans le nuage*”, August 23, 2011).

<sup>13</sup> Unesco, *Our Creative Diversity*, 1996, quoted by J. HUET in *Quelle culture dans le “cyber-espace” et quels droits intellectuels pour cette ‘cyber-culture’?*, Dalloz, 1998, p. 185.

<sup>14</sup> Cf. for ex. the memorandum of understanding of May 4, 2011 available at [www.ec.europa.eu/internal\\_market/iprenforcement/docs/memorandum\\_04052011\\_en.pdf](http://www.ec.europa.eu/internal_market/iprenforcement/docs/memorandum_04052011_en.pdf).

<sup>15</sup> Cf. on this point: [www.fr.creativecommons.org](http://www.fr.creativecommons.org).

# SAMMAN

---

CABINET D'AVOCATS  
PARIS – BRUSSELS

221 Rue de la Loi  
1040 Brussels – Belgium  
O. +32 2 231 71 31  
F. +32 2 231 71 39

11-17 Rue de l'Amiral Hamelin  
75116 Paris - France  
O. +32 2 231 71 31  
F. +32 2 231 71 39

is encouraging initiatives by private players. True adaption of copyright to the digital era will only be possible by agreement between all of the players concerned on the appropriate rules of flexibility, striking the right balance between protection and freedom.

*Thaima Samman, Partner, Cabinet Samman*  
*Alexandre Biard, lawyer, Cabinet Samman*