

ILLEGAL DOWNLOADING: NO MORE MERCY

This is the end of an era.

Most of us already illegally downloaded or offered for download protected work through Peer to Peer networks, or the likes. All of us thought it was fairly safe to do so as the sanctions against illegal downloading was meek and often not applied.

This is not true anymore.

The French government has made clear that it was willing to strengthen the fight against illegal downloading.

Everybody has heard of the pending approval of the Law Creation & Internet, also known as “Law HADOPI”, which aims at reinforcing its action against illegal downloading by creating, *inter alia*, a new authority entirely devoted to the fight against illegal downloading.

But this is not the only strengthening initiative, nor the first.

The strengthening of the said fight first occurred in 2004 with the law known as “Loi Perben 2”, dated March 9, 2004, which increased the sanctions for illegal downloading, from a fine of 150.000 euros and two years imprisonment, to a fine of 300.000 euros and three years imprisonment.

Then came the law on Copyright and related rights in the Information Society, dated August 1, 2006, which was the transposition of a European directive. Perhaps more than any given article of said law, the written guidelines, issued by the French Ministry of Justice on January 3,

2007¹, are particularly interesting. They were addressed to French judges in order to explain the said law and guide them in cracking down illegal downloading.

The guidelines specify that judges shall distinguish three levels of liability:

- 1) providing for means to commit illegal downloading;
- 2) making copyrighted works available to the public without the author’s consent; and
- 3) illegal downloading.

“These guidelines invite judges to be less severe towards internet users than towards individuals providing for means in order to commit infringement” (illegal downloading qualifies as infringement).

In fact, according to the Minister of Justice *“authors of illegal downloading indisputably stand at a lower level of liability than individuals that, at the source, allow illegal downloading”*.

But despite the severe words of the law(s), courts decisions showing equal intransigence were scarce.

Until March 5, 2009 and the decision of the 5th division of the lower Criminal Court of Lyon (France) which sentenced a young postal services employee, *inter alia*, to one year suspended imprisonment and to pay damages to the holders of the rights that were infringed for a total amount of 130.000 euros on the ground of contributory infringement.

¹ Circulaire CRIM 2007 – I/G3-030107.

Why is this decision remarkable?

The postal employee, Mr. Budin, has been found guilty of posting key words on his website which allow internet users to locate on the web where they may download illegally copyrighted works, on peer-to-peer (“P2P”) software.

He was not offering any illegal download himself but “merely” facilitating the illegal downloading, through software such as E-Mule, by other users of hundreds of copyrighted works.

The total amount of damages awarded is unheard of in France for this type of case which was clearly used to make an example.

Mr. Budin has, as expected, lodged an appeal against the decision.

It will be interesting, in a few months from now, to see if the Court of Appeal will confirm this trend of stringency which is not specific to France but seems to be spreading across Europe.

On April 17, a Swedish court has found the four founders of the website Pirate Bay guilty of assisting in making copyrighted material available and sentenced each of

them to a year in jail. They were also ordered to pay damages for a total amount of 30 million kronor (a little above 2.700.000 euros) to the film and music industries.

The Pirate Bay is a well known website used for searching P2P downloads of music and films. The Pirate Bay claimed 22 million users in February 2009 and, according to the Swedish press, produced annual earnings slightly under 1.000.000 euros from advertising on the site.

As for Mr. Budin, the Pirate Bay’s founders made it clear they will appeal the decision.

As for Mr. Budin, they never expected such a severe sentence as they do not host copyrighted content directly on their website.

As for Mr. Budin, they consider themselves the victims of an unfair war.

However, these two decisions demonstrate clearly, if it was still needed, that times have changed and that artists, rights holders and majors have been heard by regulators and judges which have sharpened their weapons and are ready to fight.

By Diane Mullenex, Avocat à la Cour and Solicitor England & Wales, partner in charge of the TMT department, and Valentine Guillerm, legal assistant.

Ichay & Mullenex Avocats is a French law firm focusing on all legal issues related to the new technologies in France and abroad. They are considered experts in intellectual property and Internet law, e-commerce, online gaming, data protection. Ichay & Mullenex Avocats also assists its clients on all issues related to financing, mergers & acquisitions, restructuring, etc. and advises them on their litigation and arbitration procedures.

5, rue de Monceau 75008 Paris - France
Tel : +33 1 42 89 19 80
Fax : + 33 1 42 89 14 99
www.ichay-mullenex.fr