

MUSIC: FREE (AND IT'S LEGAL!)

In the wake of the controversial French HADOPI law that has many strong supporters and equally fervent dissenters, alternative methods of legal music distribution are being discussed worldwide with increased seriousness.

The Reality of Illegal Downloading

Illegal downloading of music has been prevalent throughout France and the world. The music industry has suffered great losses. Many reports exist citing various figures, but they tend to be problematic. In fact, most are heavily contested since they rely on the assumption that each illegal download would have been a purchase that was not made. However, the flaw is evident: not every internet user who downloads music would have otherwise purchased the content.

On the contrary, a report by the Dutch government, published just a few weeks before the HADOPI law first was adopted, maintains that the influence of peer-to-peer sharing, also called outright “pirating,” is actually a good thing. In fact, its impact on culture and the economy is positive!

The report finds that many people do indeed listen to music for free, often by illegally downloading it. Nevertheless, they claim that many of these people actually buy the music after they have tried it out. This would be especially true for smaller or less-known bands and artists.

This information may prove to be significant, especially coming from a technologically-advanced country. For example, 90% of the population of Holland is connected to the internet, compared to just over 50% in France.

On the other hand, on March 6, 2009 Business Week presented information indicating that online music sites are actually serving as a substitute, not a catalyst for more purchases. The article predicts that the new world of music is in the clouds, meaning instead of storing music on personal computers, it will be on a server accessible by any device with an

internet connection (through streaming services, for example).

Nonetheless, despite the disagreement regarding the quantum of losses, it remains incontestable that the current business model of the music industry is slowly sinking.

But is illegal downloading over peer-to-peer services a fatality? Current and future legislature has the power to completely change the music experience as we know it.

An Outdated Method? Legislative Shortcomings

Currently, governments are reacting against illegal downloading through legislative measures designed to preserve the ailing current model of the music industry and to punish “pirates”. However, laws preventing illegal downloading have revealed their shortcomings.

For example, the proposed French HADOPI law, officially called the Bill of Law Promoting the Diffusion and Protection of Creation on the Internet, seeks to regulate and control the usage of the internet and promote compliance with copyright laws. Although the bill was rejected by the French National Assembly on April 9, 2009, it was subsequently reconsidered and ultimately adopted.

The law sought to tailor the punishment for illegal downloading to best fit the culprits. Determining that the majority of individuals illegally downloading content were young and tended to spend a large amount of time on the internet, cutting off their internet access was deemed the best-suited punishment. Losing internet connection was considered both effective as a deterrent and sufficient as a punishment.

However, this central part of the bill was struck down on June 10, 2009 by the Constitutional Council of France. It found the bill unconstitutional, asserting that the law violated the 1789 Declaration of the Rights of

Man and of the Citizen, more specifically the presumption of innocence, separation of powers and freedom of speech. The problematic section that was struck down had allowed sanctions against people merely accused of copyright infringement, instead of actually convicted.

The modified HADOPI law was rendered without bite. With the shake-up of the French government and the appointment of Frédéric Mitterrand as the new Minister of Culture, the fate of the law remains to be determined.

Nevertheless, even if the law is passed, its approach of punishing illegal downloading may be thinking backwards. The solution will have to encompass a forward thinking, innovative approach and seek to make illegal downloading irrelevant rather than to fight it directly.

A Solution? Music in the Clouds

The interest of law makers and professionals lies with the future of the music industry. As with other industries, technology has certainly turned the music industry's business model upside-down.

Nathalie Kosciusko-Morizet, the Minister of State to the Prime Minister and responsible for Forward Planning, Assessment of Public Policies and Development of the Digital Economy, announced on June 23, 2009 that she would work towards ensuring that listening to music acquired legally would be the obvious, well-known and spontaneous choice made by consumers.

Her goal is not just to suppress illegal downloading, but to change habits and promote a type of legal downloading. She emphasized that the legal offer did not necessarily cost money. The fact that "legal" is automatically associated with "costly" is a myth that she wishes to bust.

Google provides a great example of a new type of profitable business model in China. China is a market where the music industry was not making any money, since the vast majority of music there is downloaded illegally. Google saw this as an opportunity to change the way music was distributed. Those with internet access in China can use the Google search

engine to search for music, which has a link to the Chinese website Top100.cn, where consumers can then legally download songs for free.

The consumer has a service that feels free. However, Google has negotiated contracts with the music industry, including Sony BMG Music Entertainment, EMI Group, Universal Music and the Warner Music Group, and secured licenses for the freely-accessible music. These licenses are being paid for from the revenue generated by advertising on the Top100.cn website. It seems to be a win-win situation. The consumers get free, quality music legally while the music industry has access to a new source of revenue in a market where it previously had none.

These types of innovative business models are what futurist Gerd Leonhard calls the new wave of the future of music. Leonhard emphasizes that with the rise of the internet, "streaming and listening IS downloading, access IS ownership." He advocates a great shift in mentality, stating that compensation, not control, is the only way the music industry has a chance to remain profitable.

For Leonhard, 2009 is the rise of a new ecosystem. He predicts that sectors that were previously separated, including advertising, telecommunications, and media, will undergo drastic role changes as the economy shifts from being "content-based" to "attention-based." He foresees profits coming from selling the "stuff" or "packaging" around the content, ranging from the consumer's experience (being able to rank the content or share it, comment on it, etc) to the social network or software that allows the consumer to interact with or around the content. The source of profits will completely change from selling a copy of the content to selling the experience, and even providing the content for free.

Consequently, Leonhard qualifies "attention data" as valuable. The consumer must give his attention in exchange for access to the content. To make the most of this, advertising has to shift forward to the next generation as well. He calls the future of advertising inventing an idea that will attract a new audience. The appropriate business model to maximize on this could be bundling access to music by

providing a subscription-based service. He foresees that a flat-rate cost for music is imminent, and already in planning stages for twelve countries.

For example, on June 15, 2009, Virgin Media and Universal announced the launch of an unlimited download subscription service in the United Kingdom, which will be available later this year. For 10-15 pounds per month, customers will have access to streaming and downloading music. Downloaded songs will be in MP3 format, and without restrictive anti-

piracy software embedded in it. According to Reuters, this is a “world-first” service.

The service was warmly received by the international music trade body, IFPI. Its chairman and chief executive, John Kennedy stated, “This is the kind of partnership between a music company and an Internet service provider that is going to shape the future for the music business internationally.”

According to Leonhard, the future lies in “connecting the crowd to the cloud”.

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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.

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