Reproduction and Dissemination through Digital Networks from the Viewpoint of French Law
(Translation)

PIERRE SIRINELLI
University Paris I
Paris, France

The question we are supposed to discuss today is the choice between three legal solutions concerning the dissemination of works through the digital networks. The choice between, first, exclusive right, second, a possible copyright exception, and, third, a simple right to remuneration.

To tell the truth, this question – for a French lawyer – seems to be surprising. Certainly, we have to take it as a kind provocation for reflection by Mihály Ficsor who has proposed us the program. So let us see how we may react to this.

First of all, we have to note that, in general, the question does not emerge in such a "triptych way" – exclusive right, exception, right to remuneration – simply because we cannot apply a general exception in this respect. We cannot apply it for very simple reasons: on the one hand, because there is no social justification for this – why would copyright have to disappear from the digital networks? – and, on the other hand, because such an exception would not fulfill the conditions of the "three-step test" to which any exception or limitation should correspond in a national law. And if the legislators, in France, adopted a general exception to copyright in this field, the judges certainly would refuse to apply it as such, since they would take into account, rightly enough, the three-step test included both in the relevant international norms and in the *acquis communautaires*. Therefore, the question – from the viewpoint of a French lawyer – is only to choose between two alternatives: exclusive right or right to remuneration. Right to remuneration, provided that such a right – which would take the form of a kind of equitable remuneration – fulfills the criteria fixed in the decision of the Court of Justice of the European Communities adopted on February 3, 2003.

As regards the choice between an exclusive right and a right to remuneration, it is not clear why we would have to abandon the principle of exclusive rights. On this basis, therefore, there would not be even an alternative between two solutions; there would be only one. Why would it be necessary to abandon this principle when it has already been seen that exclusive rights may be

adapted to the digital networks? It is well known that, in many countries, and certainly in France, the judges have applied the exclusive right in respect of unauthorized inclusion of works in web-sites. No difficulty has emerged in the application of the exclusive right, and it may be applied also to "peer-to-peer" file exchanges.

Thus, it is not clear why this question of choice would emerge. And in spite of this, it does emerge. Why does it emerge then? Certainly because there is quite a big uncertainty at present. That is the reason for this session to try to find out together which is the right way to choose.

So, why does this question emerge? First of all, due to the fact that the rights owners who tried to step up against those who had made available software for unauthorized transmission failed in a number of countries. No sanctions were applied against the intermediaries. This is true, but this is only true in the case of certain countries. It seems that, for example, in Japan, it was possible to obtain the condemnation of an intermediary who offered its service for unauthorized transmissions.

It is also true that one of the reasons for which doubts exist is that the right holders abstain from acting directly against the users of unauthorized services. However, in the United States, there are already certain cases where this has happened.

Doubts have also emerged because certain right holders – authors and not the collective management societies or the producers – have expressed their indifference concerning the respect of copyright on the Internet. For example, David Bowie has declared that he is ready to waive his copyright. He can do so, of course, since his carrier is already behind him and he does not have the same success as in the past. Robbie Williams has also invited his fans that they download his works free of charge. He can also do so since he has received from his producer a colossal advance payment not linked to the success and sale of his works. However, when the producer finds that the fans – following the advice of their idol – use all his works just through free downloading and that his discs cannot be sold, next time the advance payment he receives will be much lower, and then he too will see the problem from another angle.

We can see that doubts emerge due to the contradictory declarations made nearly everywhere. May we say that an average user of the Internet has received such a bad education that he has been lost definitely from the viewpoint of copyright? Not necessarily, if we consider, for example, another sector of the musical industry. If we take a sector which seemed to be marginal but which nowadays is economically very important, what can we see? We can see that an Internet user – the same who refuses to pay 2 euros for the downloading of an entire work, and who rather downloads it illicitly – is ready to pay a price 3 euros higher for a fragment of the same work as a ring-tone for his mobile phone. This would mean two parallel markets; one for fragments of works based on an exclu-

sive right, and another one for a normal utilization of the same works which would escape copyright totally. This is a world upside down. However, if we have succeeded to educate users that they should pay for the ring-tones, perhaps we may be able to also educate in respect of downloading of complete works. At least, this is the vision of a university professor.

Beyond these uncertainties, may we consider that the law itself also contributes to the doubts? The basis for reasoning in connection with the "peer-to-peer" systems may be the following – and excuse me that my reasoning is based on the French law, but I think it may be valid also for other countries.

We are in the following situation: the person who uploads a work, who makes it, thus, available to the public without authorization, certainly commits an infringement. This has been judged in this way in all countries. However, does the person who downloads the work carry out private copying? We have spoken about this issue this morning. In France the greatest doubt possible exists about this. This is so since, in France, for an act, in order that it may qualify as private copying, the person who makes the copy and the user of the copy must be the same person. This is the only condition set by the Code. If we only consider the act of downloading, we may say that we are faced with private copying since the copy is for private use. This would escape the right of authorization, and maybe it would be sufficient to compensate it by an equitable remuneration. However, perhaps this reasoning is not exact. Perhaps it should be taken into account that a copy may only be regarded to be covered by the concept of private copying if it is made on the basis of a legally obtained copy. We have found that, in the stage of uploading, there is an infringement. Therefore, the person who obtains a work through on-demand transmission that, at the origin, is the result of an infringement cannot launder the copy he makes and cannot escape copyright liability by pretending that what he does is private copying.

What I have stated is just a result of legal reasoning. There is nothing in the French law that would say this explicitly. However, for example, the German law seems to have developed recently into this direction. It will be possible, under the German law, to consider that somebody who makes a copy on the basis of a manifestly illicit copy will not be able to benefit anymore from the exception for private copying. Everything will depend how this term – "manifestly illicit" – will be interpreted. Of course, we should ask our German colleagues present among us about this. But, if the solution adopted in the German law is transposed to the French law, the answer is certain: in the case of a "manifestly illicit" uploading, the downloading would also be an act of infringement. That is, in such a case, it would not be clear why an exception or a right to remuneration would be adopted.

A reasoning may be made in this way. The problem is that the various actors themselves scramble the situation. In fact, it is not impossible that certain insti-

tutions in charge of administering the remuneration for private copying – as, for example, the commission for private copying in France – has already indirectly taken into account in the calculation of the tariffs for the remuneration those copies made through the Internet which do not really qualify as being covered by the concept of private copying. In other words, the commission, a state institution, launders infringing acts and transforms them into private copying. This cannot be found in writing anywhere, and certain French colleagues present in this room may say that I invent this; however, when we read the reports of the commission, this is there implicitly. This is a silent agreement, a compromise which nobody dare to admit.

It may be believed that, in the practical field, this is a realistic solution: if we cannot achieve respect for the law, we should offer at least compensation. However, from a theoretical viewpoint, this is totally disastrous. In this way, the borders between what is permitted and what is forbidden become definitely blurred. The message for the Internet users – who may be made by this schizophrenic – is that "when you are at the uploading side of a transmission, you are an infringer, but when you receive the same transmission and you download it, you are not, but, nevertheless, you have to pay in order that your act be recognized as legal!". There will be a tendency – because the users do not know the legal implications as much as we may do – to think that, by the payment, not only the downloading, but also the uploading is laundered. And then, there is immediately the question of how we may make liable the person who distributes the software permitting all this, when those who are mainly interested in the use of protected material do not commit any illicit act. If we accepted this course, we would completely blur the borders and we would take a wrong direction undermining the principle of exclusive rights.

We should see, nevertheless, that the principle of exclusive rights – even if we had difficulties with it in the digital environment – may be respected. The abandonment of this principle would take place in an era when, at last, we are in the possession of technological means that permit assuring the efficacy of exclusive rights, and it would take place also in an era when the law is ready to offer assistance for the technological means and, by this ensures for them higher efficiency. And there is already an entire sector within the audiovisual industry that is protected in this way, and which was born in a secure environment in the technological field; namely the production of DVD. The audiovisual industry nowadays produces as important business results through the production and distribution of DVDs as those obtained through theatrical performances. And it is able to do so because technological protection offers security for this. We have also found that in the case of telephone ring-tones, the exclusive right has been maintained, and that it functions quite well. It represents a very important percentage in the income of authors' societies.

This means that exclusive rights can function. However, we should note again that the attitude of right holders is not clear. Here, a reference to right holders reflects again the vision of a university professor. A right holder – this is a mysterious human being who creates, performs, produces and communicates; but, as soon as we are in the practical field, we can see authors, performers, producers, etc. And it is not sure at all that performers and producers have the same viewpoint concerning this question. The family of right holders is divided, and, therefore, it is an enfeebled family. Why? Very simply, because the producers would like to apply locks that could ensure the application of their exclusive rights – and the collection of money. However, the performers have already received a lump-sum payment for the recording of their performances, and there is no exclusive right which could add anything to it, while in the case of a right to remuneration, it is the law which provides for remuneration and it also fixes a percentage. In other words: while a producer is interested in an exclusive right, a performer is interested in a right to remuneration. This complicates the negotiations.

We have seen that the solutions are not clear and that certain questions emerge in a complex way because we do not know who speaks and on what basis. Could we then try to profit from experience, from history? And which is the domain where we can speak about history? This is just the domain of private copying! Can we say that the solution so far adopted in the field of private copying may be transposed for solving the problem we are discussing now? Not at all! Why? Because, at least in the French law, the wind of history blows in one direction as regards private copying and it blows in another direction as regards our question today. I am going to explain this.

At the beginning, the right holders were opposed to an exception as regards private copying. In France, in 1957, it was explained to them that they did not have any right; zero. In 1985, the right holders were fighting for transforming the exception into a right to remuneration, and they passed from zero to something. The right to remuneration was a progress at that time. Nowadays, however, the technological means would allow to go further and to say: since I have now these means, I am going to abandon the equitable remuneration and pass to the exclusive right. And perhaps the idea is to get even more than everything – if this is possible – since certain right holders think of applying the exclusive right and, at the same time, also maintaining the right to remuneration. Bingo!

Thus, obviously, in this respect there is a progress. However, in the situation we are studying now, we can speak about a regression. We begin with an exclusive right and we finally only get a right to remuneration. Consequently, it is impossible to deduce any lesson from history; we cannot say that what has been done in one case can be repeated in another case.

To finish, we may ask whether, in addition to a legal analysis, there are some other possible analyses, such as an economic analysis, on the basis of which we might find some other solutions to serve – at least during the time of reflection – as a symptomatic cure? First of all, the right holders can complicate the task of Internet users by applying access control, or by uploading on the network bad-quality or incomplete files. A French society has paid to another French society for uploading false files in MP3 format. The Internet user tries to download the file which then begins to repeat itself; it goes back every 30 seconds to its beginning. This lasts for hours. The Internet user is discouraged. There is a French artist whose works have been downloaded 2 million times, but no user has obtained a real copy of the works. All of them were unusable. This could be a solution. There is also another one which is studied, it seems to me, by French phonogram producers. The study in question proposes to the French government to introduce a tariff on Internet communication which would take into account the level of utilization. This would mean that those who saturate the system would have to pay for it. In what would this solution consist? It would consist in introducing a tax, a supplement to the price; and it would not be paid by those who download the material – those who try to use works free of charge – but by those who upload it. That is, by those who are so generous nowadays with the authors' money. If such a tax is introduced, when everybody contacts the person's web-site who makes works available, the latter would have to pay for it, and he would learn that, if he wants to be generous, it is not enough being generous with the authors' money, but also with his own money. This means that what the French producers want to do is to close the source of free offer of their recordings in MP3 format. If nobody were generous anymore, such offer would be quasi non-existing.

This is a possible solution, but it raises some dangers. In fact, it would generate money: an economic solution to an economic problem. But who would receive the money? Certain producers say that, since the money is generated indirectly by their music, it should be distributed to them. As in the case of private copying. This would be a totally disastrous solution from the viewpoint of certain principles. This would mean that, on the basis of an "upload tax," certain sums would be demanded as compensation for the uploading, transmission and downloading through the Internet and these sums would be transferred to the right holders. This would mean again that the whole operation would be laundered, because the Internet users would think that, since a payment is made, the copies become licit. Therefore, if this system is adopted, the sums collected must not be transferred to the right holders.

This is not the end yet, since in our field, we are like in the field of Russian dolls: as soon as we open something, we find something else. In our case, the

final point of our reasoning would be that access providers would not be happy at all if such a tax were introduced. They would probably say that, since our users do not propose works anymore for downloading, because it is too expensive, we ourselves propose them. We will become active participants in the "peer-to-peer" system by uploading works on our servers and by making them thus available to Internet users. There is no tax anymore, since only we are concerned. It is possible that then the access providers would have to pay for this the same way as those who upload works using their services. However, if they were obliged to pay – not on the basis of copyright but due to the fact that they carry out an economic activity – and if the right holders received the money, we would adopt again a system of a right to remuneration instead of an exclusive right.

I began my presentation in saying that the question posed to the panel was a provocation for reflection by Mihály. As you have seen I have undertaken such a reflection, but I have done as the Internet users do, going around in circles, and still I am not sure where the response may be found. Hopefully, the debate that follows will offer it for us.