

THE COURT OF BARCELONA CONSIDERS NON-COMMERCIAL FILE SHARING OF WORKS LAWFUL: ARE WE MOVING TOWARDS THE RECOGNITION OF PEER-TO-PEER TECHNOLOGY AS A TOOL FOR FAVOURING CULTURAL DIFFUSION?

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As is known, peer-to-peer (P2P) technologies allow the sharing of files on the Internet by a direct exchange between end-users' computers. These technologies often turn out to be at odds with copyright: indeed the use of P2P technologies aimed at sharing protected files, i.e. files containing copyright protected material (e.g. the last album from a famous rock band), is usually considered copyright infringement: see *MGM v Grokster (USA)*, *Polidor v Brown (UK)*, *Brein v Mininova (Netherlands)*, *Pirate Bay (Sweden)*, *Universal Music Australia v Sharman License Holdings (Australia)*.

Yet in the recent Spanish case [SGAE \(Sociedad General de Autores y Editores\) v Jesus Guerra](#) (Case N. 261/09, Barcelona Commercial Court N. 7, Sentencia N. 67/10, March 2010) the court of Barcelona rendered a decision at odds with the above rulings.

The facts of the case are the following. An individual, Jesus Guerra, owner of a website offering P2P file sharing services, was sued by the Spanish collecting society SGAE (Sociedad General de Autores y Editores), which claimed that the website infringed its members' copyright. The defendant argued that his activity was lawful as his website carried no advertising and merely provided links as any search engine.

The court of Barcelona held that offering an index of links and/or linking to copyright material is not the same as distributing, reproducing or communicating to the public copyrighted works, as said index merely facilitates the search for files. The decision was mainly based on the fact that Jesus Guerra did not make any direct or indirect profits off the website.

According to the Spanish judge P2P networks are mere conduits for the transmission of data between Internet users, and therefore they amount to a *"mero intercambio de archivos entre particulares, sin ánimo de lucro directo o indirecto a través de un medio como es la red de Internet, que a diferencia de otras tecnologías obsoletas (intercambio o copia de cassette a cassette), se ha tornado masivo y de ámbito mundial, como también lo es la distribución por el mismo medio con los correspondientes beneficios económicos y de **difusión cultural**"* (emphasis added). The Spanish judge thus seems to suggest that P2P technologies may contribute to cultural diffusion worldwide.

This is an interesting and pertinent observation from the Court of Barcelona.

Indeed most people massively use these technologies in order to exchange information, ideas and opinions as well as to critic other people's beliefs and in general to convey messages (and not to avoid purchasing CDs or DVDs). Even the passive sharing of songs with unknown people sitting in front of their PC at the other corner of the globe is a form of cultural exchange. Think about those websites permitting to share videos or other material and allowing people to leave comments regarding such material (e.g. YouTube). These

Internet *fora* are comparable to big rooms where persons face-to-face exchange opinions, ideas and information

Moreover P2P technology is often used as a tool for finding works which would otherwise be unavailable, finding out and stimulating new genres, carrying out personalized compilations as well as for posting creative remixes, sequels and new interpretations of existing works (including parodying). It thus provides far more opportunities than in the off line world for artists and authors to reach, analyze and further develop a great number of existing works.

The court of Barcelona therefore – by stressing that non-commercial P2P is beneficial in terms of cultural diffusion - goes in the right direction.