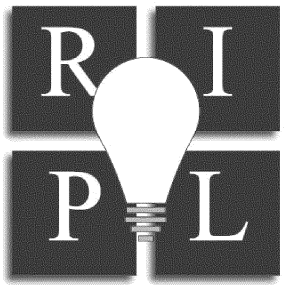
THE JOHN MARSHALL
REVIEW OF INTELLECTUAL PROPERTY LAW



AMERICAN EXCEPTIONALISM, THE FRENCH EXCEPTION, INTELLECTUAL PROPERTY LAW, AND PEER-TO-PEER FILE SHARING ON THE INTERNET

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ABSTRACT

A fundamental problem confronting policy makers is how to apply intellectual property rules and regulations developed for tangible intellectual property assets in real space to intangible, dematerialized intellectual property in cyberspace. The United States and France are self-described exceptionalist countries. American exceptionalism refers to the historical tendency of the United States to emphasize its unique status as *the* beacon of liberty, while *l'exception française* (the French exception) refers to the French ideological posture that emphasizes the specificity and superiority of French culture. *American exceptionalism* and *l'exception française* are functionally equivalent theoretical constructs that describe and explain how the United States and France highlight their respective political and cultural specificities vis-à-vis the rest of the world. The copyright regime of the United States reflects American exceptionalism, while the French *régime de droit d'auteur* (author's right regime) reflects the French exception. The purpose of this article was to study the exceptional intellectual property regimes of the United States and France, using as a comparative case study application of intellectual property laws designed for the offline environment, to online peer-to-peer file sharing on the Internet. A comparative analysis of statutory and case law in the United States and France demonstrates that: 1) The American intellectual property regime has a presumption against the legality of peer-to-peer file-sharing networks that exchange copyrighted material without permission, and 2) the French intellectual property regime classifies peer-to-peer file-sharing on the Internet as piracy, a criminal offense. The American intellectual property regime often grants copyright holders the power to violate the due process and privacy rights of citizens accused of copyright infringement, while the French system allows law enforcement officials and royalty collection societies to violate the "presumption of innocence" and privacy rights of accused peer-to-peer file-sharers.

Cite as Lyombe Eko, *American Exceptionalism, the French Exception, Intellectual Property Law, and Peer-to-Peer File Sharing on the Internet*, 10 J. MARSHALL REV. INTELL. PROP. L. 95 (2010).

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INTRODUCTION: PEER-TO-PEER AND INTELLECTUAL PROPERTY

Technological developments always have unintended consequences. When the International Organization for Standardization created the Moving Picture Experts Group ("MPEG") in 1988, and gave it the responsibility of setting international standards for audio and video compression and transmission, it did not foresee the adverse effects of technological standardization on intellectual property.[1] In effect, the Motion Picture Experts Group created a digital audio encoding format, MPEG–1 Audio Layer III ("MP3"), that would revolutionize the distribution of audio visual media, pose an existential threat to the global recording industry, and shake national intellectual property regimes to the core.[2]

As soon as it was launched in 1991, the MP3 audio format quickly became the gold standard for digital audio compression, storage, and transmission.[3] The format also became the technology of choice for playing music on consumer digital audio players.[4] From an intellectual property perspective, the MP3 format facilitated the unauthorized ripping, duplication and dissemination of copyrighted music on online peer–to–peer ("P2P") file-sharing networks. Peer-to-peer file-sharing is a system of social networking facilitated by the networking and distributed technologies of the Internet. At its core, early peer–to–peer file-sharing involved the fluid and free exchange of digital music stored in the computer hard drives of members of social networks. P2P file-sharing was facilitated by start-up companies whose software and/or servers held these networks together and made their activities possible.[5] The problem was that the bulk of the material exchanged on these peer–to–peer networks was copyrighted content exchanged without the consent of the copyright holders.

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[1] A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1012 (9th Cir. 2001); MOTION PICTURES EXPERTS GROUP, http://mpeg.chiariglione.org/ (last visited Sept. 30, 2010).

[2] *A & M Records,* 239 F.3d at 1011; *Achievements*, MOTION PICTURES EXPERT GROUP, http://mpeg.chiariglione.org/achievements.htm (last visited Sept. 30, 2010).

[3] Nicole Harris, *E-Commerce: A Consumer's Guide—Load and Listen: Lessons from a Digital-Music Junkie*, WALL ST. J., Oct. 29, 2001, at R18 (discussing how the MP3 is an "international standard for compressing music files").

[4] *See, e.g.*, Walter S. Mossberg, *The Mossberg Solution: Attack of the iPod Clones—New Players give Apple a Run for Its Money in Portable Music*, WALL ST. J., Oct. 29, 2003, at R1 (stating "Apple Computer's iPod portable music player is one of the best digital products of any kind ever invented").

[5] *A & M Records*, 239 F.3d at 1011.

Online peer–to–peer file-sharing caused the record companies to lose substantial market share, prompting them to seek remedies under intellectual property law.[6]

Peer-to-peer file-sharing posed significant problems for intellectual property regimes at the national, supranational and international levels. The fundamental problem confronting policy makers was how to apply intellectual property rules and regulations developed for tangible intellectual property assets that exist in real space—music, video programs, videogames, books, photographs, motion pictures, art works, computer software and the like—to digitized, intangible, de-materialized works that exist in cyberspace, or were illegally copied and exchanged online.[7]

Traditionally, in Continental Europe, intellectual property protection resided in "literary and artistic works" that were the embodiment or physical forms of the intellectual expression of authors.[8] In the United States, copyright was available to "original works of authorship fixed in any tangible medium of expression . . ."[9] In both jurisdictions, emphasis was therefore placed on the physicality of the copyrighted material.[10] The presumption was that the copyright holder had physical or contractual control over copying and distribution of the tangible work.[11] The common problem that confronted these different regimes was how to apply intellectual property rules and regulations designed for real space and real time to the de-materialized world of cyberspace, and especially to new communication technologies and networked phenomena like peer-to-peer file-sharing.[12] Unlike physical, copyrighted works, digitized works are de-materialized data that can be copied and distributed with lightening speed around the globe.[13] The history of intellectual property law in the age of globalization and networked communication has been a history of attempts to bring the de-materialized, digital world of cyberspace within the ambit of intellectual property law at the national, supranational and international levels.[14]

The objective of this article is to explore and explain the cultural constructions of intellectual property in the United States and France using as a comparative case study, application of the offline intellectual property rules and regulations of both countries to the phenomenon of unauthorized online peer-to-peer file-sharing. Specifically, I use American exceptionalism and *l'exception française* (the French

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[6] *Id.* at 1012–13 (discussing on appeal how the trial court's conclusion that the plaintiff's "presented a prima facie case" of copyright infringement is no longer at issue).

[7] This problem is acute in other areas of law; *see* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010).

[8] *See* Berne Convention for the Protection of Literary and Artistic Works art. 2, Sept. 9, 1886, revised in Paris, July 24, 1971, 828 U.N.T.S. 221, amended Sept. 28, 1979 [hereinafter Berne Convention].

[9] 17 U.S.C. § 102 (2006).

[10] Berne Convention, *supra* note 8, at art. 2; 17 U.S.C. § 102.

[11] Nicola Lucchi, *Intellectual Property Rights in Digital Media: A Comparative Analysis of Legal Protection, Technological Measures, & New Business Models Under EU & U.S. Law*, 53 BUFF. L. REV. 1111, 1129–31 (2005).

[12] *Id.* at 1127–28, 1129, 1147–49.

[13] *Id.* at 1128–29 (speaking generally how peer-to-peer sharing allows rapid transfer of digital files).

[14] Timothy R. Holbrook, *Extraterritoriality in U.S. Patent Law*, 49 WM. & MARY L. REV. 2119, 2120–24, 2128–29 (2008) (using patent law as an example to illustrate the issues of international application of intellectual property laws).

exception) as frameworks for the analysis of how the United States and France maintain intellectual property functions in the dynamic, technological fluid, and amorphous online environment. The focus will be on how the philosophically different intellectual property regimes of both countries regulate the common problem of unauthorized sharing of copyrighted material on online peer–to–peer networks. The questions that guided the study were as follows:

1. How did the United States apply its exceptionalist copyright laws to the phenomenon of unauthorized peer–to–peer sharing of copyrighted material on the Internet?

2. How did France apply its exceptionalist author's right regime to the phenomenon of unauthorized peer–to–peer sharing of intellectual property on the Internet?

3. How did American and French application of intellectual property enforcement rules designed for the offline environment to the Internet impact the privacy and due process rights of users of online peer–to–peer file-sharing software?

In order to answer these questions, this article proceeds in three parts. Part I will survey the imprint of American exceptionalism and the French exception on the respective intellectual property logics of both countries. In this part, I explain how each country's intellectual property regime reflects its specific national politico-cultural mentality, and how each regime is designed to promote certain governmental interests. Part II surveys application of the exceptionalist intellectual property jurisprudence of the United States to the new phenomenon of online peer–to–peer file-sharing, and shows how the law performs certain functions in the online environment. Part III is concerned with application of the exceptionalist intellectual property jurisprudence of France to online peer–to–peer file-sharing for purposes of furthering a substantial governmental interest in cultural protection and promotion. Part IV explores the tensions between individual privacy, due process and intellectual property enforcement in the United States and France. I compare and contrast the philosophical approaches of both countries towards peer–to–peer file-sharing. I argue that the constitutional "incentive" function guided legislative enactments and judicial decision-making in the United States, sometimes at the expense of privacy and due process rights. In France, regulation of peer–to–peer file-sharing has been virtually outlawed by legislative enactments and judicial decisions that seek to avoid–at the expense of the right of individual privacy and presumption of innocence–cultural harms that may be caused by unauthorized peer–to–peer file-sharing.

I. AN OVERVIEW OF AMERICAN EXCEPTIONALISM AND THE FRENCH EXCEPTION

A. American Exceptionalism, L'Exception Française (The French Exception): General Observations

The United States and France are self-described "exceptionalist" countries.[15] Both nations highlight their political and cultural differences from the rest of the world.[16] *American exceptionalism* and the French Exception are apt, functionally equivalent theoretical constructs that define the ideological postures of the United States and France on the international political stage.[17] The term "exceptionalism" has been defined as "a theory that a nation, region, or political system is exceptional and does not conform to the [political or cultural] norm."[18] Since exceptionalism is a declaration of specificity, it is by nature, oppositional. It comes into play when a self-described exceptional civilization, culture or country sets itself apart from—and in opposition to—the rest of the world.[19] The United States and France are two Western democracies that are separated by a similar logic—exceptionalism.[20] Thus, when the United States and France describe themselves as being "exceptional," they are essentially making declarations of difference.

By its very form and content, communication law is a cultural phenomenon.[21] Put otherwise, communication law is ensconced in specific national, supranational and international "contextual matrixes," to borrow the expression of Pierre Legrand.[22] These matrices affect legal mentalities and influence the outcomes of legal disputes.[23] Exceptionalism is a contextual and conceptual matrix, a political and cultural *logic* that is the result of historical, political and cultural processes and strategies.[24]

Despite problems associated with making the leap from real space to cyberspace, the United States and France have brought the Internet within the ambit of their respective exceptionalist regulatory logics. Each country regulates intellectual property—that family of intangible rights conferred on authors and inventors under the law by different national and international regimes—within the framework of its particular exceptionalist ideology.[25] In this article, I deploy American exceptionalism and *l'exception française* (the French exception) as functionally equivalent units of

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[15] Michael Ignatieff, *Introduction: American Exceptionalism and Human* Rights, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1, 15 (Michael Ignatieff, ed., 2005).

[16] *Id.*

[17] *Id.*; *see also* JACQUES RIGAUD, L'EXCEPTION CULTURELLE: CULTURE ET POUVOURS SOUS LA VE REPUBLIQUE 26–27 (1994).

[18] *Exceptionalism Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/exceptionalism (last visited Sept. 30, 2010).

[19] *Id.*; *see also* Ignatieff, *supra* note 15, at 1.

[20] Ignatieff, *supra* note 15, at 15.

[21] *See* PIERRE LEGRAND, FRAGMENT ON LAW-AS-CULTURE 5 (1999).

[22] *See* Pierre Legrand, *The Same and the Different*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 240, 261 (Pierre Legrand & Roderick Munday eds., 2003).

[23] *Id.*

[24] *See* BERNARD MIÈGE, THE CAPITALIZATION OF CULTURAL PRODUCTION 136 (1989).

[25] *See* DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 171 (2009).

analysis that affect the application of intellectual property law designed for real space, to the domain of peer–to–peer exchanges of copyrighted material in cyberspace.

1. American Exceptionalism: Historical Origins

American exceptionalism is different from the French exception in many respects. American exceptionalism is the logic, the ideological lens through which the United States conceptualizes itself as *the* global beacon of freedom and democracy.[26] American exceptionalism is Messianic and "exemptionalist," to borrow the expression of John Gerard Ruggie.[27] The United States exempts itself from international rules that are at variance with its constitutional jurisprudence.[28] The main tenet of American exceptionalism is that the American democratic system is unique and unparalleled in human history.[29] The practical result of this belief is that the United States has led the world in promoting human rights by negotiating international human rights conventions and treaties, only to exempt itself from their provisions through either expressing reservations regarding specific provisions, not ratifying some treaties, or not complying with them under the theory that American constitutional values are qualitatively superior to international human rights values.[30]

American exceptionalism is a logic that is rooted in the political and religious philosophy of the seventeenth Century Puritan settlers of New England.[31] George McKenna suggests that New England Puritanism sowed the seeds of American exceptionalism because the Puritans believed that New England was a "City on a Hill. . . whose providential mission entitled it to God's special protection. . . New Englanders were God's new chosen people, a prophetic army, a model to the world."[32] McKenna states that this "patriotic romance" exerted a powerful influence on the emerging nation, while Yankee migration to other parts of what was to become the United States diffused this unquestioned politico-religious patriotism: "Yankee patriotism simply assumed that everything authentically American was built on the foundation of Reformation Protestantism of the kind nurtured in New England."[33] Puritan ideals permeated the American Revolution.[34] The Founding Fathers of the American Republic conceptualized the United States as a new republican constellation in the eighteenth century "sky" of divine rights kings and absolute

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[26] *See* Ignatieff, *supra* note 15, at 1.

[27] *See* John Gerard Ruggie, *American Exceptionalism: Exemptionalism, and Global Governance*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 304, 305 (Michael Ignatieff, ed. 2005).

[28] *See id.* at 306.

[29] *See* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 285–86 (1955); *see also* Ronald J. Schmidt, Jr., *In the Beginning, All the World Was America: American Exceptionalism in New Contexts*, *in* OXFORD HANDBOOK OF POLITICAL THEORY 281, 282 (John Dryzek, Bonnie Honig & Anne Phillips eds., 2006).

[30] *See* Ignatieff, *supra* note 15, at 1.

[31] DEBORAH L. MADESEN, AMERICAN EXCEPTIONALISM 1, 16–40 (1998).

[32] GEORGE MCKENNA, THE PURITAN ORIGINS OF AMERICAN PATRIOTISM 19, 32, 36–37 (2007).

[33] *Id.* at 42.

[34] *See* MADESEN, *supra* note 31, at 2.

monarchs.[35] The stars in the American flag are symbolic representations of this emerging reality.[36] The *laissez-faire, free enterprise* economic system of the United States is a legacy of exceptionalism.[37] All American presidents—from George Washington through Abraham Lincoln to Teddy Roosevelt, Franklin Delano Roosevelt, Ronald Reagan and George W. Bush, have used exceptionalist rhetoric in their foreign and domestic policy pronouncements.[38]

The political manifestation of American exceptionalism is "Americanism," an ideology that is expressed in terms of "anti-statism, individualism, populism, and egalitarianism."[39] The main tenet of American exceptionalism is that American laws and democratic system are unique and unparalleled in human history.[40] President Theodore Roosevelt, who had a messianic view of the role of the United States in global affairs, expressed American exceptionalism in the first part of the twentieth Century:

> We, here in America, hold in our hands the hope of the world, the fate of the coming years; and shame and disgrace will be ours if in our eyes the light of high resolve is dimmed, if we trail in the dust the golden hopes of men . . . The worth of our great experiment depends upon its being in good faith an experiment—the first that has ever been tried—in true democracy on the scale of a continent, on a scale as vast as that of the mightiest empires of the Old World . . . .[41]

As we shall see later, American exceptionalism is evident in the penumbra of American copyright law.

2. L'Exception Française (The French Exception): Historical Origins

If American exceptionalism is the proclamation that the United States is a singular nation whose superior democratic system and unparalleled libertarian values set it apart from other nation-states, the French exception is a declaration of Gallic linguistic and cultural specificity. The French exception is therefore the ancient ideological posture through which France emphasizes the uniqueness and specificity of its language, culture, and civilization, in opposition to other languages

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[35] Flag Act of 1777, 8 J. CONT. CONG. 464 (1777) ("Resolved, That the flag of the United States be made of thirteen stripes, alternate red and white; that the union be thirteen stars, white in a blue field, representing a new Constellation.").

[36] *Id.*

[37] SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 31 (1996) (stating that "the nation's ideology can be described in five words: liberty, egalitarianism, individualism, populism, and laissez-faire").

[38] MCKENNA, *supra* note 32, at 145, 203, 244, 339, 353.

[39] *See* Seymour Martin Lipset, *American Exceptionalism Reaffirmed, in* IS AMERICA DIFFERENT? 1, 16 (Byron Shafer ed., 1991).

[40] *See* Ronald J. Schmidt, Jr., *In the Beginning, All the World Was America: American Exceptionalism in New Contexts*, *in* OXFORD HANDBOOK OF POLITICAL THEORY 281, 282 (John Dryzek, Bonnie Honig & Anne Phillips eds., 2006).

[41] Theodore Roosevelt, Address at Carnegie Hall (Mar. 20, 1912), *in* GEORGE B. LOCKWOOD, AMERICANISM 148 (1921).

and cultures. [42] French intellectuals have traditionally set France, a country that has been described as having a "Catho-secular," Latin culture,[43] as the foil of the United States, a country with Puritan, Protestant roots, and a libertarian culture.[44] The French exception and its corollary, *l'exception culturelle francaise* (the French cultural exception) are synonymous cultural defensive mechanisms erected against perceived cultural threats from America's mass entertainment, "fast culture," free enterprise religion, and excessive cultural capitalism.[45]

The French exception has become an official ideology that promotes the *rayonance* (the spreading abroad) of French culture, while protecting it at home from perceived threats posed by the "Anglo-Saxon" (Anglo-American) media and popular culture.[46] The French exception is also a nationalistic exceptionalism, which President Charles de Gaulle called "*une certaine idée de la France ou elle n'est réellement elle-même que quand elle est au premier rang"* (a certain idea of France whereby she is her real self only when she is at the forefront).[47] The French exception has led to cultural protectionism and greatly influenced the country's language laws and media law regime.[48]

The logic of the French exception can be traced to the very origins of the French state. The unique birth of the French nation out of the ashes of the Roman Empire is part of its mythic, exceptionalist worldview. In effect, after the collapse of the Roman Empire, the Franks (a Germanic people led by Clovis) swept over Gaul.[49] The pagan King converted to Roman Catholicism and was baptized on Christmas day, 496 AD, together with 3000 of his soldiers.[50] With flaming zeal and military conquests, Clovis founded a Catholic kingdom that ultimately evolved into contemporary France.[51] At its founding, this Frankish kingdom of "baptized peoples,"[52] became known as the "Eldest Daughter" of the Roman Catholic Church.[53] The French state went on to

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[42] *See* PIERRE ROSANVALLON, LE MODÈL POLITIQUE FRANÇAIS 109, 112 (2004).

[43] *See* Edgar Morin, *Le Trou Noir de la Laicité*, 58 LE DÉBAT 38 (1990) (describing France as a "*Catho-laique*" (Catho-secular) country).

[44] *Id.*

[45] *See* RICHARD KUISEL, SEDUCING THE FRENCH: THE DILEMMA OF AMERICANIZATION 232 (1993) ("In many ways the French did not succumb to Americanization . . . [t]he deluge of consumer products, the new life-style centered on the act of purchase, and the profusion of mass culture did not sweep away French differences.").

[46] Judith Bell Prowda, *U.S. Dominance in the "Marketplace of Culture" & the French "Cultural Exception",* 29 N.Y.U. J. INT'L L. & POL. 193, 199 (1997) (quoting French film director Bertrand Tavernier, "We cannot allow Americans to treat us as they did the Redskins.").

[47] *See* CHARLES DE GAULLE, MÉMOIRES DE GUERRE, L'APPEL, 1940–42 1 (1954); *see also* EMMANUEL GODIN & TONY CHAFER, THE FRENCH EXCEPTION 5 (2005) (quoting Charles de Gaulle as saying, "[France] is only really herself when she is at the forefront of nations").

[48] *See* Prowda, *supra* note 46, at 205–09.

[49] EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 275 (1886).

[50] *Id.*

[51] *See* GREGORY BISHOP OF TOURS, HISTORY OF THE FRANKS 41 (Ernest Brehaut trans., W. W. Norton & Co., Inc. 1965) (594 A.D.); *see also* RENÉE MUSSOT-GOULARD, LE BAPTEME QUI A FAIT LA FRANCE 131 (1996) (stating that the conversion and Baptism of King Clovis and 3,000 of his soldiers, was the "founding event" of Roman Catholic France).

[52] *See* H.H. BEN-SASSON, ET AL., A HISTORY OF THE JEWISH PEOPLE 397–98, 412 (H.H. Ben-Sasson ed., Harvard Univ. Press 1976); *see also* MUSSOT-GOULARD, *supra* note 51, at 164.

[53] *See* PHILLIPPE DELORME & LUC DE GOUSTINE, CLOVIS 496–1996: ENQUÊTE SUR LE XVÈME CENTENAIRE 172 (1996).

build the great cultural edifices and cultural institutions that are the hallmark of the country.[54] The French Catholic monarchy lasted for twelve centuries.[55] It was overthrown by the Revolution of 1789.[56]

Alexis de Tocqueville situated the French Revolution and the "*specificité française*" (French specificity) in an historical continuum that is traceable to the *ancien régime*.[57]

It was indeed during the French Revolution of 1789 that the French exception was first systematically defined. The politico-cultural specificity of France that came to the fore was expressed in the Declaration of the Rights of Man and of the Citizen of 1789.[58] One of the outcomes of that Revolution was that French Constitutions became vehicles for the expression and validation of both universal humanism, and French cultural specificity.[59] The French cultural exception is therefore the result of political interactions and power struggles, understandings, and compromises between the left and the right, elected leaders, organized interest groups—the cultural professions, artists, intellectuals—and wealthy patrons of the arts, on the nature of France as a "cultural State."[60]

The French exception is also "exemptionalist," to use the expression of John Gerard Ruggie.[61] In international multi-lateral talks, France has often advanced the notion that culture should be exempt from international free trade rules.[62] For example, French cultural exemptionalism came to the fore during the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT") talks, where France introduced the concept of cultural exception in international diplomacy.[63] Under the cultural exception, audiovisual services—radio and television programming as well cinema—were classified as "cultural products" that were part of the cultural heritage

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[54] *See* RIGAUD, *supra* note 17, at 26–27 (stating that the French state has always been the founder of elite cultural institutions: fine arts academies and museums, the patron of the politically acceptable cultural elite, the organizer, manager and regulator of culture, often for purposes of power and prestige); *see also* Roger Langeron, *L'Academie Francaise et le Roi*, LE FIGARO, July 15, 1960 at 1.

[55] *See* BISHOP OF TOURS, *supra* note 51, at 41 (stating that in 496 A.D. Clovis convinced his disciples to reject their mortal gods and follow the true God).

[56] MICHEL VOVELLE, THE FALL OF THE FRENCH MONARCHY, 1787–1792, 147 (1989) (quoting the French people, "This veto does not belong to one man but to 25 million," which marked the end of the French monarchy in 1789).

[57] *See* ROSANVALLON, *supra* note 42, at 109, 112.

[58] 1789 DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (Sept. 21, 2010), *available at* http://www.legifrance.gouv.fr/html/constitution/const01.htm. The Preamble of France's Constitution incorporates The Declaration of the Rights of Man and of the Citizen of 1789.

[59] Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 59 (1997) (explaining the different Constitutions each represented "social and civic values" that controlled national power in France at any one time).

[60] *See generally id.* at 46–60.

[61] *See* John Gerard Ruggie, *American Exceptionalism: Exemptionalism, and Global Governance*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 304, 305 (Michael Ignatieff, ed. 2005).

[62] Catherine Lalumière, *France's Official Position on Withdrawing from the MAI Negotiations* (Oct. 1998) (stating that the new French government withdrew from the MAI talks citing conflicts with national sovereignty and protection of France's culture).

[63] *See* ARMAND MATTELART, LA MONDIALISATION DE LA COMMUNICATION [GLOBALIZATION OF COMMUNICATION] 90–91 (2002); *see also* Patricia M. Goff, *Invisible Borders: Economic Liberalization and National Identity*, 44 INT'L STUD. Q. 533, 550 (2000).

of nation-states.[64] As such, they were not to be considered "goods" like any other marketable good that fell within the ambit of international trade rules.[65] The international community accepted the cultural exception despite U.S. government objections, and strenuous American movie industry opposition.[66] As we shall see below, the French exception is woven into the fabric of French intellectual property policies.

II. APPLICATION TO CYBERSPACE

A. American Exceptionalism and Intellectual Property Law

American exceptionalism manifests itself in two forms in the field of intellectual property: 1) American copyright jurisprudence is grounded in a unique incentive philosophy set forth in the Constitution of the United States, and 2) the copyright regime is inextricably linked to the country's First Amendment freedom of speech regime that has been described as exceptionalist.[67] This linkage is realized through a series of limitations on exclusive copyright monopolies.[68] American exceptionalism in copyright is expressed in utilitarian terms; the Constitution of the United States stipulates that the function of copyright is: "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries . . . ."[69] The institution of copyright as an instrument for the betterment of society is what Richard Posner calls "the incentive purpose" of copyright.[70] Indeed, Posner suggests that in the Anglo-American tradition, copyright was historically granted to authors for limited periods because of governmental antipathy towards granting monopolies.[71] William Roeder aptly summarized copyright theory and law in the United States when he said: "[C]opyright in America, as limited by statute, was designed to protect only the exploitative value of creation; its protection is not granted to the creator as such, but

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[64] *See* Sophie Meunier, *The French Exception*, 79 FOREIGN AFF. 104 (2000).

[65] *Id.*

[66] *See generally* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, § 1, art. 9(1), Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), *available at* http://www.wto.int/english/docs_e/legal_e/27-TRIPS.pdf; *see also* J. CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND 248, 355 (1995) (during the Uruguay Round of the multi-lateral General Agreement on Tariffs and Trade (GATT) talks, which were concluded in 1993, the European Community, led by France, insisted on, and obtained an exception that allowed audiovisual services (radio and television programs, as well as movies) to be excluded altogether from the broad General Agreement on Trade in Services (GATS) rules).

[67] *See* Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 30 (Michael Ignatieff ed., 2005).

[68] *See* 17 U.S.C. § 107 (2006) (introducing fair use as one exception to the copyright monopoly).

[69] U.S. CONST. art. I, § 8, cl. 8.

[70] Richard Posner, *The Constitutionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique in Eldred v. Ashcroft.*, 2003 SUP. CT. REV. 143, 148 (2003).

[71] *Id.* at 147.

to the owner, the person having the power to exploit the creation."[72] The Copyright Act of 1976 focuses first and foremost on the subject matter of copyright, granting protection to "original works of authorship fixed in any tangible medium of expression."[73] Though American law recognizes authors as repositories of copyright,[74] the underlying principle of copyright law is not so much validation of the institution of the author, his or her rights, and his or her role in the cultural life of society, as is the case in France, but the benefits that ultimately accrue to society from granting copyright protection to creative persons.[75] The Supreme Court of the United States had held that the ultimate objective of copyright is to "stimulate artistic creativity for the general public good."[76] The Court reiterated this utilitarian or public good justification of copyright in *Feist Publications Inc., v. Rural Telephone Service Co.*: "[T]he primary objective of copyright is not to reward the labor of authors, but [t]o promote the Progress of Science and useful Arts."[77] The *Feist* Court ultimately rejected the existential, Biblical, "sweat of thy brow" principle,[78] which had granted copyright to facts and directly linked copyright to the labor expended by authors. Furthermore, as Lange and Powell suggest, by its very nature and subject matter, copyright touches on, and coexists rather harmoniously with expression protected by the First Amendment: "the stuff from which intellectual property interests are spun is also the stuff of First Amendment interests."[79] In order to underline the link between copyright and freedom of expression, the Supreme Court of the United States has held that the Framers of the Constitution of the United States intended for copyright to serve as "the engine of free expression."[80] Therefore, American copyright law has substantial exceptionalist free speech dimensions that are expressed in terms of fair use. This fundamental principle is set forth in the fair use provision of the Copyright Act:

> . . . the fair use of a copyrighted work, including such use by reproduction in copies or phono records or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching

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[72] William Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 576 (1940).

[73] 17 U.S.C. § 102(a) (2006).

[74] *Id.* § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work."); *See also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) ("[A]s a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to protection . . . . If the work is for hire, 'the employer or other person for whom the work was prepared is considered the 'author' and owns the copyright unless there is a written agreement to the contrary.").

[75] *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 524 (1994) (holding that "the primary objective of the Copyright Act is to encourage the production of original, literary, artistic, and musical expression for the good of the public").

[76] Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 432 (1984).

[77] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 371–72 (1991) (quoting Accord Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

[78] *Feist*, 499 U.S. at 374; *Genesis* 3:19 ("Out of the Sweat of they Brow Shalt Thou Eat Bread.").

[79] *See* POWELL, *supra* note 25, at 171.

[80] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) and asserting that "copyright's purpose is to promote the creation and publication of free expression").

(including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.[81]

Fair use is also an affirmative defense in circumstances where existing works are appropriated for purposes of creating new, transformative, critical works.[82] Parody is a notable category of transformative works protected by the First Amendment, which serves as a vehicle for politico-social criticism.[83] This is one instance in which freedom of speech clearly takes precedence over exclusive copyright. However, fair use is only an affirmative defense available to the fair use claimant who is accused of infringing on exclusive intellectual property rights.[84] Fair use is an important limitation on the copyright monopoly.[85] In order to make a determination whether a fair use claim is valid, Federal courts employ these four fair use factors set forth in the Copyright Act of 1976:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.[86]

As we shall see in part II, Federal courts transposed this fair use test in a rather fluid manner to the online environment in the framework of the legal disputes that followed in the wake of the creation of peer–to–peer file-sharing networks. Before I discuss application of intellectual property law and policy to online peer–to–peer file-sharing networks, it would be instructive to survey the tortuous journey of

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[81] 17 U.S.C. § 107 (2006).

[82] *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994) (stating, "The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'").

[83] *See, e.g.*, *id.* at 572 (holding that a commercially successful music parody was fair use); *see also* Warner Bros., Inc. v. Am. Broad. Corp., 720 F.2d 231, 242 (2d Cir. 1983) (holding that a TV show parodying Superman is protected); Elsmere Music, Inc. v. Nat'l Broad. Co., 623 F.2d 252, 253 (2d Cir. 1980) (holding that *Saturday Night Live* TV parody of the song, "I Love New York" was protected).

[84] *See* 17 U.S.C. § 107; POWELL, *supra* note 25, at 52.

[85] *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 605 (1985) (partially quoting Int'l News Serv. v. Associated Press, 248 U.S. 215, 263 (1918)) ("The Court's exceedingly narrow approach to fair use permits Harper & Row to monopolize information. This holding '[effects] an important extension of property rights and a corresponding curtailment in the free use of knowledge and of ideas.'").

[86] 17 U.S.C. § 107.

intellectual property law from the real space—and the traditional media—to cyberspace.

1. Application of American Real Space Intellectual Property Law to Cyberspace

One of the major critiques of the law is that it is almost always reactive rather than proactive.[87] This is especially true when technological innovations like the Internet create new realities that present policy makers with unprecedented legal and policy challenges.[88] The Internet is a relatively new, unprecedented—in the literal and legal sense of the term—frontier that the law is still struggling to come to terms with.[89] Transformation of the Internet from an infrastructure of military communication to a converged multi-communication platform that has become the locus of content creation, storage and dissemination immediately raised intellectual property issues.[90] In effect, intellectual property rules and regulations "had traditionally been regarded primarily as a means to exclude or limit others from using certain protected subject matter, through litigation if necessary."[91] The knowledge economy engendered by information and communication technologies changed that logic. Intellectual property law and policy took on greater significance, as intellectual property became a key asset, nay, the life-blood of the knowledge economy and the information society.[92] The challenge was thus to make intellectual property rules and regulations that had been drafted for real space content and real

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[87] *See* Stephanie Brauner, *High-Tech Boxing Match: A Discussion of Copyright Theory Underlying the Heated Battle Between the RIAA and MP3ers*, 4 VA. J. L. & TECH. 5 (1999) ("[T]here is no way for the law to proactively address all issues that will arise.").

[88] *E.g.*, Quon v. Arch Wireless Operating Co., 529 F.3d 892, 904 (9th Cir. 2008).

> The extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question. The recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored.

Id.

[89] *Id.*

[90] Reno v. ACLU, 521 U.S. 844, 849–50 (1997) ("[The Internet] is the outgrowth of what began in 1969 as a military program called 'ARPANET,' which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war."); *see also* Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could be Unimportant on the Internet*, 12 BERKELEY. TECH. L. J. 15, 17 (1997) ("The emergence of electronic networks has undeniably placed significant pressure on our existing intellectual property system.").

[91] WORLD INTELLECTUAL PROPERTY ORG., DEVELOPMENT OF WIPO'S DISPUTE RESOLUTION SERVICES 1992–2007 PART III 93–104, http://www.wipo.int/amc/en/history/ (last visited Sept. 30, 2010).

[92] *World Summit on the Information Society*, INT'L TELECOMM. UNION (Dec. 12, 2003), http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf ("Intellectual Property protection is important to encourage innovation and creativity in the Information Society; similarly, the wide dissemination, diffusion, and sharing of knowledge is important to encourage innovation and creativity.").

space media, relevant and applicable to cyberspace.[93] This required a change of mentalities, different conceptualizations of the nature of the Internet, and different expectations regarding its role in society.

In effect, the invention of the Internet, a network of computer networks, revolutionized communication, and created a virtual, interactive, global, multi-communication platform that was initially perceived in Utopian terms.[94] The extreme flux of the early cyberspace, and its attendant regulatory confusion led to quasi-Utopian exuberance about the ability of the Internet to create a virtual, libertarian space where freedom and limitless human self-expression would negate governance—including intellectual property governance—based on governmental, bureaucratic and hierarchical control.[95] Cyber enthusiasts were so elated by the prospect of cyberspace becoming the digital and intellectual equivalent of a metaphorical Wild West, that they issued a "declaration of the independence of Cyberspace."[96] This declaration was intended to free the Internet from the confines of the regulatory and bureaucratic strait-jacket of the modern nation-state, whose very existence was being called into question by cyberspace.[97] Indeed, cyber visionaries and utopians predicted that the Internet and cyberspace would be an electronic wrecking ball, an instrument of democracy and freedom that would wreck the authoritarian power structures and regimes on earth from within, and lead to a system of governance based on enlightened self-interest and the ethics of the common good.[98] The euphoria of the early days of the Internet soon gave way to a realization that geography is not history; that the advent of the Internet had not reduced the territorial nation-state into political, cultural and social irrelevance.[99]

The Internet engendered a number of intellectual property issues that policy makers in the United States and around the world had to address. The United States government took a decidedly exceptionalist posture toward the fledgling, online multi-communication platform when Congress passed the Scientific and Advanced Technology Act of 1992.[100] This act authorized the National Science Foundation "to foster and support access by the research and education communities to computer networks which may be used substantially for purposes in addition to research and education in the sciences and engineering. . . ."[101] This act essentially opened up the non-military parts of the Internet, which had hitherto been the domain of academic

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[93] Bruce A. Lehman, *Global Intellectual Property in the Twenty-First Century*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 9 (1996) ("On the legislative front, as Congress tackles such issues as the proposed revisions to the Copyright Act and other legislation dealing with the information infrastructure, ensuring protection for copyrighted works in the digital environment is a major challenge.").

[94] Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210, 212–13, 215 (2007).

[95] *See* Brian Loader, *The Governance of Cyberspace: Politics, Technology and Global Restructuring, in* THE GOVERNANCE OF CYBERSPACE 1, 1–2 (Brian Loader ed., 1997).

[96] *Id.* at 4–5.

[97] *Id.* at 4.

[98] *See id.* at 5.

[99] *See id.* at 6.

[100] Scientific and Advanced Technology Act of 1992, 42 U.S.C. § 1862 (2006).

[101] *Id.* at § 1862(g); *see also* PG Media, Inc. v. Network Solutions, Inc., 51 F. Supp. 2d 389, 403 (S.D.N.Y. 1999).

researchers and computer science enthusiasts, to commercial, cultural, educational, social and political activities.[102]

B. The French Exception and Intellectual Property: General Observations

The French exception is woven into the fabric of the French intellectual property regime, which is grounded in the *Code de la propriété intellectualle* (the Code of Intellectual Property).[103] To the French, the term "copyright" is a rather narrow, foreign concept that expresses only part of the two-fold intellectual and property right that accrues to authors.[104] The French equivalent of the word "copyright" is the expression, "*droit d'auteur*" (right of the author).[105] Under French law, intellectual property consists of two rights: a patrimonial (economic) right and an intangible, inalienable moral right.[106] Moral right is a rather "romantic" right of personality that seeks to protect the unique expression and metaphysical cachet or "mental signature" of the author on his or her work.[107] Thus, authors retain moral rights in their works even after economic rights in the work have been exercised and the rights have been transferred to third parties pursuant to contracts.[108] Additionally, moral rights can be the subject of testamentary transfers to heirs and other parties.[109] In France, intellectual property is viewed as an important component of the French cultural exception because intellectual property is an instrument for the protection and promotion of French culture.[110] French exceptionalism in intellectual property law is thus expressed in terms of a heightened recognition of the importance of cultural and knowledge production, as well as recognition and celebration of authors of *œuvres d'esprit* (works of the mind) as cultural institutions.[111] France has historically conceptualized works of the mind as *lieux de mémoire culturel* (sites of

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[102] *PG Media*, 51 F. Supp. 2d at 403.

[103] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PRO. INTELL.] (Fr.).

[104] *Id.* at art. L 121-1, L122-1.

[105] *Id.*

[106] *Id.* at art. L. 121-1–121-9, art. L.122-1–122-12.

[107] *Id.* at 121-1–121-9.

[108] *See* Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3d Chambre, Nov. 7, 2003, obs. Mr. Girardet (Fr.), *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1032 (holding that a media company which licensed a musician's compositions from a copyright clearing house for use as cell phone ring tones violated the musician's moral rights because the musician did not authorize modification of the quality of the music for purposes of selling it as a ring tone).

[109] C. PRO. INTELL., art. L.121-1.

[110] *See*, *e.g.*, Loi 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information [Law 2006-961 of Aug. 1, 2006 on Law on Author's Rights and Neighboring Rights in the Information Society], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 3, 2006, p. 11529; Loi 2009-669 du 12 juin 2009 de favorisant la diffusion et la protection de la création sur internet [Law 2009-669 of June 12, 2009 on Promoting the diffusion and Protection of Intellectual Property], OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 13, 2009, p. 9666.

[111] INTRODUCTION TO FRENCH LAW 172 (George A. Bermann & Etienne Picard eds., 2008) (" . . . Anglo-American copyright law rests upon a basically economic logic and on significant considerations of general interest, whereas the French law of authorship reflects a more humanist conception, which places the creator at the very centre of the picture.").

cultural memory) as well as propagators of national cultural heritage.[112] The Declaration of the Rights of Man and of the Citizen of 1789, which is the preamble of the French Constitution, recognized intellectual property.[113] The Declaration states that property is a sacred, inviolable right of which citizens cannot be divested except in situations of legally ascertained political necessity, and on condition that a just and prior compensation be paid to them.[114] The French *Conseil Constitutionnel* (Constitutional Council), the institution whose task is to review the constitutionality of all bills before they are enacted, has reaffirmed the idea that intellectual property rights are part of the sacred human rights enumerated in articles two and seventeen of the Declaration of the Rights of Man and of the Citizen of 1789. [115]

1. Application of French Intellectual Property Law to Cyberspace

The exponential diffusion of the Internet across the globe—and especially in France—took the French politico-cultural establishment by surprise. The power of the Internet was first felt in France through an act of judicial defiance that took place in 1996.[116] After the *Tribunal de Grande Instance de Paris* (the High Court of Paris) banned a tell-all book written by late French President, François Mitterrand's personal physician, a French cybercafé owner scanned the prohibited volume and uploaded it on the Internet.[117] Hundreds of thousands of French citizens logged on to the Web site containing the banned book and either read or downloaded it free of charge.[118] French authorities were powerless to enforce the ban in this new medium, which they did not understand, and which, up to that point, was considered lawless, unregulated, and primarily American.[119] In effect, the French intelligentsia had dismissed the Internet as an American cultural tool that was incompatible with French Cartesian logic. Initial French skepticism toward the Internet was also driven by the fact that France already had a modest home-grown online service, the

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[112] *See* François Azouvi, *Descartes*, *in* LIEUX DE MÉMOIRE 4475, 4477 (Pierre Nora ed., 1997) (stating that French philosopher, Réné Descartes, is a "site of memory" because he is a monumental figure, and that French civilization is grounded in Cartesian logic: "Descartes is what he is to us: France.").

[113] 1958 DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, art. 17 ("The right to property being inviolable and sacred, no one shall be deprived of it, except in cases of evident public necessity, legally ascertained, and on condition of a previous just indemnity.").

[114] *Id.*

[115] Conseil constitutionnel [CC] [Constitutional Court] decision No. 2006-540DC, July 27, 2006, J.O. 11541 (Fr.).

[116] *See* Mary Dejevsky, *Court Bans Mitterrand Doctor's Book,* THE INDEPENDENT, Jan., 19, 1996, at 10.

[117] *See* Alex Duval Smith, *Minitel Tales: The French Are Keen to Use Their Home-Grown Minitel Service, but Are Suspicious of the Internet*, THE GUARDIAN, Feb. 1, 1996, at 4.

[118] *Id.; see also* Lyombe Eko, *The Law of Privacy in the United States and France: One President's Impeachable Offense is Another's Invasion of Privacy*, 22 COMM. & L. 1, 15–18 (Dec. 2000).

[119] *See* Rob Pegoraro, *The Secret's Out,* WASH. POST, Feb. 8, 1996, at C7; *see also* Jennifer Harper, *English the Lingua Franca of Internet; French View Predominantly 'Anglocentric' Cyberspace as Cultural Threat*, WASH. POST, Apr. 18, 1998, at A3; Daniel Schniedermann, *Le juge et le 'cafétier'* (The judge and the Internet café owner) LE MONDE TV, RADIO MULTIMEDIA, Jan. 28, 1996, at 39; *see also* Eko, *supra* note 118, at 15–18.

Minitel, whose stringent content regulations outlawed pornography, racism, hate speech, religious "sects" and gambling.[120] However, France soon realized that it was being left behind as the English-language dominated Internet spread at exponential rates around the world.[121] France then decided that it had to enter what French Senator, Pierre Laffitte, described as the "Anglo-saxon online world. . . in order to impose multiculturalism and multilingualism. . . so that the whole world does not express itself in basic American English."[122]

Early French Internet policy changed abruptly in 1998 when, in an unprecedented ruling, the *Tribunal de Grande Instance de Paris* applied French exceptionalist logic to the Internet.[123] It ruled that French courts had "universal jurisdiction over the totality of content disseminated on the Internet."[124] The court essentially held that material published anywhere on the Internet fell within the jurisdiction of French courts if the material could be accessed by search engines located on French territory.[125]

As part of its exceptionalist online cultural protectionism, the French government sought to create a "French Internet" by bringing information networks that operated within its national territory or whose information or data was accessible to French citizens, under the tutelage of governmental agencies.[126] A 1978

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[120] *See* Gail R. Chaddock, *France Aims to Beat the Net by Curbing It*, THE CHRISTIAN SCIENCE MONITOR, Apr. 5, 1996, at I6.

[121] *See* Harper, *supra* note 119, at A3 (stating that members of the 187-country International Telecommunications Union stated that English is the unofficial language of the Internet).

[122] *See* Christophe Agnus, *Je Suis en Croisade*, L'EXPRESS, June 26, 1997, at 72.

[123] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 13, 1998, juris. obs. M. Montfaur (Fr.).

[124] *Id.*

[125] *Id.*

[126] Loi 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (1) [Law n°2004-575 of June 21, 2004 on Confidence in the Digital Economy] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 22, 2004, p. 11168. France put its exceptional legal stamp on the Internet in 2004. This unprecedented act sets forth a specifically French Internet law regime, and defines Internet communications within the framework of the French exception. The law also enumerates the roles and responsibilities of French Internet Service Providers and international Internet companies with French subsidiaries, in the furtherance of governmental content-based regulation of the Internet (translation by the author):

> Mindful of the general interest in the repression of apology of crimes against humanity, incitement to racial hatred, as well child pornography, incitement to violence, notably violence against women, as well attacks against human dignity [Internet Service Providers] must participate in the fight against the infractions mentioned in the fifth paragraph of article 24 of the Law of 29 July 1881 on Freedom of the press (war crimes, crimes against humanity, crimes and offenses of collaboration with the enemy . . . acts of terrorism or apologies of such acts, incitement to discrimination, hatred or violence towards a person or a group of persons on account of their origin or their membership or non-membership in a specific ethnic group, nation, race or religion…incitement of hatred against or violence against an individual or a group of persons on account of their sex, sexual orientation, or handicap status) and articles 227 and 227-24 of the penal code (fixing, recording or transmitting child pornography…pornographic images of a person whose physical features are those of a minor, unless it is established that this person was eighteen years old on the date of the fixation or recording of her image).

Id.

law called "The Law on Informatics, Databases and Freedoms," which was aimed at protecting the privacy of individual privacy in computer databases, was amended to require that all Web sites in existence in France be officially registered with a government agency.[127] Furthermore, the 1986 "Law on Freedom of Communication" (*La Loi Léotard*, named after Minister of Culture, Claude Léotard) was amended and applied to the Internet.[128] This law enumerates the responsibilities of Internet Service Providers ("ISPs") towards their clients.[129] These responsibilities include informing clients of the existence and availability of technical means (software) that can assist them in blocking access to racist, anti-Semitic and other Web sites declared objectionable by the government.[130] However, French ISPs are neither criminally nor civilly liable for the content that is stored on, or transits through, their servers if they exercise no editorial control over the material.[131]

Furthermore, as part of its online cultural protectionism, France has sought to protect French national identity, language, and cultural specificity in cyberspace through legislative action.[132] The General Commission on Terminology and Neology has continually provided French equivalents for common English language information technology terminology like "e-mail" (*courier éléctronique*), "software" (*logiciel*), "hardware" (*progiciel*) "chatting" (*clavardage*) and so on, in an attempt to prevent the use of these English terms in France.[133]

III. APPLICATION TO PEER-TO-PEER FILE SHARING

A. Application of the Exceptionalist Intellectual Property Law Regimes of the United States and France to Online Peer-to-Peer File Sharing

The self-proclaimed exceptionalism of the United States and France is nowhere more evident than in the regulation of the novel, Internet-based phenomenon that posed several challenges to the intellectual property regimes of both countries in the 1990s—peer–to–peer online file sharing. Online peer–to–peer file-sharing is a system

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[127] Loi 78-17 du 6 janvier 1978 Relative à L'Informatique, aux Fichiers et aux Libertés [Law 78-17 of Jan. 6, 1978 on Information Technology, Databases and Freedoms], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 7, 1978, p. 227, art. 11-21 (stating that a "Declaration of Processing of Personal Information within the Framework of a Webpage" has to be made to the Commission nationale de l'informatique, CNIL (The National Commission on Informatics and Freedom)).

[128] Loi 2000-719 du 1 août 2000 modifiant la loi no 86-1067 du 30 septembre 1986 Relative à la Liberté de Communication [Law 2000-719 of Aug. 1, 2000, modifying Law 86-1067 of Sept. 30, 1986 on Freedom of Communications (Leotard)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 2, 2000, p. 11903, art. 1.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] J.O. du 141 du 20 juin 2003 Vocabulaire du Courrier électronique [Vocabulary of e-mail], Commission générale de terminologie et de néologie [General Commission on Terminology and Neology], OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 20, 2003, p. 10403 (presenting officially approved French equivalents for the original English terminology for e-mail and related communication technologies).

of centralized or a-centric duplication and dissemination of digital, audio-visual files between computers connected to the Internet.[134] Peer–to–peer has infringing aspects (it facilitates the unauthorized duplication and exchange of copyrighted material on the Internet) and non-infringing uses (authorized duplication and dissemination of copyrighted material or duplication and dissemination of non-copyrighted material).[135] Since the peer–to–peer phenomenon was launched in the late 1990s, the bone of contention has been its facilitation of unauthorized duplication and dissemination of copyrighted material on the Internet.[136] The point of this comparative case study is to describe and explain how the exceptionalist logics of the United States and France influence procedural and substantive problems of intellectual property law in both countries, and how each jurisdiction applies its specific intellectual property philosophy to the universal problem of unauthorized online peer-to-peer file-sharing.[137]

Peer-to-peer file sharing on the Internet posed a serious threat to the edifice of intellectual property law in the United States and France because its stock-in-trade was mostly unauthorized copyrighted material, and its business model was essentially the free unauthorized exchange of digitized private property.[138] Due to the technological and legal novelty of the online peer–to–peer file-sharing phenomenon, each country sought to bring it within the ambit of its respective intellectual property law regime.[139] All parties that had a stake in the intellectual property regime—governmental entities, the recording industry, royalty collecting agencies, musicians, and interest groups—sought to shape the emerging law of peer–to–peer online file-sharing.[140] The battle for intellectual property in the online environment essentially took place in the judicial and legislative branches of government—often in that order.[141] As noted in the second part of this article, the intellectual property law regimes of the United States and France have philosophical differences over copyright/author's rights, and moral rights. Both systems are also different in their conceptualizations of the role of plaintiffs, intellectual property royalty collection agencies, and governments in intellectual property enforcement. This part of the article surveys and analyzes the peer–to–peer case law of the United

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[134] A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1010–12 (9th Cir. 2001).

[135] *Id.* at 1014, 1019.

[136] Lateef Mtima, *Whom the Gods Would Destroy: Why Congress Prioritized Copyright Protection Over Internet Privacy in Passing the Digital Millennium Copyright Act*, 61 RUTGERS L. REV. 627, 627–28, 671 (2009).

[137] *See* Michel de S.-O.-L'E. Lasser, *The Question of Understanding*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 197, 215 (Pierre Legrand & Roderick Munday eds., 2003) (exploring the idea that "the point of comparative law is understanding").

[138] *See* Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 2–4 (2003).

[139] *See, e.g.*, Digital Millennium Copyright Act, 17 U.S.C. §§ 512, 1201–05, 1301–32; 28 U.S.C. § 4001 (2006).

[140] DAVID ARDITI, CRIMINALIZING INDEPENDENT MUSIC 58 (2007) (stating that the Record Industry Association of America's (RIAA) lawsuit threats were "ways to force consumers to change their downloading practices to legal avenues that avoid the democratizing affects of peer-to-peer (p2p) file sharing programs").

[141] *Id.* ("Without precedent to go by, courts have responded in varied ways in order to deal with complaints by organizations such as the Record Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA).").

States and France to determine how each country applied intellectual property law designed for real space to the new realities of cyberspace.

B. Peer–to–Peer File-Sharing Under American Intellectual Property Law

1. A & M Records v. Napster

Peer–to–peer technology, like most Internet technology, emerged in the United States in the 1990s.[142] Legal disputes over peer-to-peer file-sharing on the Internet erupted in the wake of the emergence of the online peer–to–peer file-sharing start-up company, Napster, Inc., which developed the free software that enabled peer–to–peer on the Internet.[143] In effect, Napster used its proprietary software, MusicShare, as well as its network servers, to facilitate online peer-to-peer exchange of both copyrighted and non-copyrighted MP3 files.[144] Peer-to-peer music exchange involves searching, duplicating, and transferring exact MP3 copies of music from one individual's hard drive to other hard drives via the Internet. [145] Napster also provided its "members" technical support for indexing and searching MP3 files.[146] Additionally, Napster had a directory where artists who willingly participated in the "peer-to-peer" exchange could list their music and provide information about it.[147]

Within a few months of its inauguration, Napster claimed that twenty million people had downloaded its software, and that the "Napster community" was engaged in a legal activity–mass copying of music for personal use.[148] The company's software and server made it possible for users to have access to and download MP3 files stored in the computer hard drives and other digital storage devices of other members of the Napster "community."[149] While Napster users distributed a lot of non-copyrighted material, they also duplicated and distributed hundreds of thousands of pieces of copyrighted music without authorization from the copyright holders.[150] As the Napster phenomenon diffused around the world, the recording industry became alarmed.[151] Record companies claimed that within six months of Napster's launching, more than seventy million users had exchanged copyrighted music

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[142] A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] Brief for Plaintiffs-Appellees at 4, A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401, 00-16403), 2000 WL 34018835 ("When Plaintiffs filed this action, Napster had approximately 200,000 users . . . [b]y the injunction hearing, it had over 20 million.").

[149] *A & M Records*, 239 F.3d at 1011–12.

[150] *Id.* at 1013.

[151] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 903 (N.D. Cal. 2000), *rev'd in part, aff'd in part, remanded in part*, 239 F.3d 1004 (9th Cir. 2001) ("Defendant's internal documents indicate that it seeks to take over, or at least threaten, plaintiffs' role in the promotion and distribution of music.").

without permission.[152] The impact on the music distribution market was immediate.[153] The record companies lost substantial amounts of their profits.[154] The recording industry, led by A&M Records, sued Napster in the United States District Court for the Northern District of California, and claimed that by facilitating unauthorized "peer-to-peer" exchange of copyright music, Napster was a contributory and vicarious infringer of its copyrights in the music so exchanged.[155] The plaintiffs also complained that Napster was engaged in unfair competition, and asked the court to issue a preliminary injunction preventing Napster "from assisting others in copying, downloading, uploading, transmitting, or distributing copyrighted music without the express permission of the rights owner."[156]

In its defense, Napster sought refuge in the exceptionalist First Amendment doctrine of "fair use," which exerts substantial limitations on the exclusivity of copyright.[157] Napster also used as its defense, the so-called "staple article of commerce doctrine" which states that manufacturers are not liable for selling products that are capable of "commercially significant, non-infringing uses."[158] Napster argued further that peer–to–peer file-sharing was protected by the First Amendment because it was merely "space-shifting"[159]—converting CDs Napster users already owned into the MP3 format, and transferring these digital music files through its servers and online network to the computers of other Napster users.[160] Additionally, Napster argued that an injunction against its activities would be tantamount to a prior restraint on its speech as well as the speech of members of its peer–to–peer network.[161] The issue before the court was whether Napster's unauthorized online exchange of copyrighted works without permission was fair use under the Copyright Act.[162] While the court conceded that copyright laws had First Amendment implications, it did not find Napster's First Amendment defense persuasive because the non-infringing aspects of Napster's peer–to–peer network were minimal at best.[163]

The court ruled that the case was all about boundaries, "the boundary between sharing and theft, personal use and the unauthorized worldwide distribution of copyrighted music and sound recordings."[164] In spatial terms, the court ruled that

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[152] *See* Matt Richtel, *In Victory for Recording Industry, Judge Bars Online Music Sharing*, N.Y. TIMES, July 27, 2000, at A1.

[153] *Id.*

[154] Brief for Plaintiffs-Appellees, *supra* note 148, at 4, 7; *see also* ARDITI, *supra* note 140, at 47.

[155] Complaint at 1, A & M Records, Inc. v. Napster, Inc., 54 U.S.P.Q. 2d (BNA) 1746 (N.D. Cal. 2000) (No. 99-5183).

[156] *A & M Records,* 114 F. Supp. 2d at 900.

[157] *Id.* at 922; POWELL, *supra* note 25, at 316–17 (explaining that fair use is exceptionalist because it is uniquely tied to the First Amendment, which is *sui generis*); *see also* CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PRO. INTELL.] (Fr.), http://www.legifrance.gouv.fr/html/codes_traduits/cpialtext.htm (demonstrating that France does not have a fair use doctrine) (last visited Sept. 30, 2010).

[158] *See, e.g., id.* at 912; Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

[159] *A & M Records,* 239 F.3d at 1019.

[160] *Id.*

[161] *A & M Records*, 114 F. Supp. 2d at 922.

[162] *Id.* at 912–17.

[163] *Id.* at 912.

[164] *Id.* at 900.

the case was about the difference between authorized personal use in real space and unauthorized world-wide distribution in the environment of cyberspace.[165] The court proceeded to apply the four fair use factors designed for analysis of copyright disputes in real space to peer–to–peer file-sharing in cyberspace,[166] and concluded that converting music from CDs to the MP3 format did not meet the requirements for transformative works set forth in the Copyright Act.[167] The court further held that though downloading and uploading MP3 files within the framework of Napster's peer–to–peer network was not a commercial activity per se, the exchange activities did not qualify as fair use because Napster users got for free, music that they would ordinarily have had to purchase.[168] Furthermore, the court held that downloading or uploading MP3 music files involves copying the entirety of the copyrighted work.[169] The court found that Napster affected the market for music in that it drastically reduced the market for recorded music among college students.[170] Additionally, its free peer–to–peer file-sharing made it practically impossible for record companies to enter the market for music downloading.[171] The district court also dismissed Napster's argument that time-shifting and space-shifting were analogous for purposes of fair use analysis.[172]

Napster's space-shifting argument was interesting from a technological and spatial perspective, given that the Supreme Court of the United States had ruled in *Sony Corp. v. Universal City Studios* that "time-shifting" (recording television programs on video tape for later viewing) was fair use under the Copyright Act.[173] The problem with Napster's argument was that peer–to–peer file-sharing was literally technological and "space-shifting."[174] It involved converting music and moving it from the CD to the MP3 and from real space to cyberspace.[175] Napster urged the court to apply the logic of time-shifting, which is appropriate for the realities of real space, to the vast, limitless expanse of cyberspace.[176] This, the court declined to do—and for good reason.[177] The sheer magnitude and world-wide scope of unauthorized peer–to–peer file-sharing facilitated by Napster exceeded by far the private time-shifting that the *Sony* Court had held to be within the ambit of fair use.[178] Therefore, the district court rightly refused to equate time-shifting and space-shifting.[179] The court also correctly refused to apply the fair use standards

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[165] *Id.* at 913.

[166] 17 U.S.C. § 107 (2006) (stating the four factors of fair use are (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work).

[167] *A & M Records*, 114 F. Supp. 2d at 912.

[168] *Id.* at 912–13.

[169] *Id.* at 913.

[170] *Id.* at 913–14.

[171] *Id.* at 913–15.

[172] *Id.* at 916.

[173] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

[174] *A & M Records,* 114 F. Supp. 2d at 904.

[175] *Id.*

[176] *Id.* at 913–14.

[177] *Id.*

[178] *Id.*

[179] *Id.* at 915–16.

appropriate for time-shifting in real space to unauthorized shifting of copyrighted material from real space to cyberspace, and exchanging that material free of any charge.[180]

The court therefore found that Napster's users were engaged in direct infringement of the intellectual property of the record company plaintiffs, and held that Napster was a "monster" that was "devouring the intellectual property" of the recording industry.[181] The court stated that the purpose and character of Napster's unauthorized online peer-to-peer file-sharing of copyrighted material militated against a finding of fair use, and issued a preliminary injunction against Napster's activities.[182] The court therefore ordered Napster to refrain from: "engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner."[183] The court's rationale was that the record companies would likely succeed on the merits of their contributory and vicarious infringement claims.[184] The preliminary injunction was an explicit application of the copyright rules and regulations designed for real space to infringing activities on cyberspace.[185] Facilitating unauthorized peer–to–peer exchanges of copyrighted material in the global medium of the Internet is spatially and quantitatively different from private time-shifting in real space.[186]

Napster appealed to the United States Court of Appeals for the Ninth Circuit.[187] The issue before the court was whether the district court had used the correct copyright standards or tests when it issued the preliminary injunction against Napster.[188] In other words, was the fair use analysis employed by the district court appropriate for the realities of the online peer–to–peer file-sharing environment? The Ninth Circuit substantially agreed with the district court that Napster and its users, who downloaded and exchanged MP3 files containing copyrighted music, effectively violated the record companies' exclusive rights of reproduction and duplication.[189] Additionally, the court held that the exceptionalist "fair use" provisions of the Copyright Act did not cover Napster's users.[190] Furthermore, the Court of Appeals concluded that the district court did not err in finding that Napster was a contributory infringer of copyright because it provided the hardware and software necessary for peer–to–peer music exchange.[191] On remand, the district court ordered Napster to remove the plaintiffs' copyrighted material from its system.[192] When Napster failed to carry out the order, the court ordered Napster to

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[180] *Id.* at 913–14.

[181] *Id.* at 924.

[182] *Id.* at 912, 927.

[183] *Id.* at 927.

[184] *Id.* at 925.

[185] *See id.* at 912–22 (applying copyright laws, specifically infringement and fair use, to peer-to-peer network sharing).

[186] *Id.* at 913–16.

[187] A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).

[188] *Id.* at 1013.

[189] *Id.* at 1014.

[190] *Id.* at 1014, 1017.

[191] *Id.* at 1020, 1022.

[192] A & M Records, Inc. v. Napster, Inc., No. 99-05183, 2001 U.S. Dist. LEXIS 2186, at *3 (N.D. Cal. Mar. 5, 2001).

shut down its peer–to–peer file-sharing system.[193] Napster declared bankruptcy in 2002 and its assets were liquidated.[194] Napster is now a music subscription service owned by consumer electronics retailer, Best Buy, Inc.[195]

2. Son of Napster: Metro-Goldwyn-Mayer Studios Inc. v. Grokster

The demise of Napster's peer-to-peer file-sharing system did not mean an end to unauthorized online peer-to-peer exchange of copyrighted material.[196] The next online challenge to the copyright regulatory regime came from two start-up companies, Grokster Ltd., and StreamCast Networks, Inc., which believed their novel, decentralized peer-to-peer online file exchange model would overcome the real space copyright hurdles that had felled Napster.[197] In effect, the companies freely distributed peer-to-peer software that allowed users to share MP3 files with one another online, without benefit of a Napster-type central server.[198] Grokster announced that it was the "New Napster", its software was written to make it compatible with the Napster program, and it was open to Napster users.[199] Nevertheless Grokster was different from Napster in that it had a "true" peer–to–peer system.[200] It simply supplied the free software that enabled individual computers to communicate directly with each other and exchange music, movies, video games, and other digital media content.[201] Its business model involved selling advertisements targeted at the millions of individuals who logged onto its Web site to download the free file-sharing software.[202]

Since Grokster and StreamCast did not use central servers to facilitate the unauthorized online peer–to–peer exchange, they technically had no direct role in the peer–to–peer file-sharing activities of the millions of people who downloaded and

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[193] A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1099 (9th Cir. 2002).

[194] *See Roxio Buys Napster Assets*, N.Y. TIMES, Nov. 28, 2002, at C10.

[195] *See* Gustav Sandstrom, *Pirate Bay Sold to Swedish Firm—Buyer Seeks to Turn Notorious File-Sharing Site into a Legal Business*, WALL ST. J., July 1, 2009, at B7 ("U.S. retailer Best Buy Co. Inc. bought [Napster] for $121 million in September 2008 . . . .").

[196] Roben Farzad, *File Swappers Get Creative as Wheels of Justice Turn*, N.Y. TIMES, June 18, 2005, at C13 (according to a research firm, peer-to-peer networks doubled in users from August 2003 from 3.8 million to 8.7 million on the day of article publication); Tom Zeller Jr., *Senate Bill Aims at Makers of File-Sharing Software*, N.Y. TIMES, Sept. 30, 2004, at C7 (explaining that Congress was looking at alternative ways to eliminate peer-to-peer networks after the Napster decision wasn't a sufficient deterrent); Matt Richtel, *Music Services Aren't Napster, But the Industry Still Cries Foul*, N.Y. TIMES, Apr. 17, 2002, at C1 (discussing the new programs created after the Napster decision); Linda Greenhouse, *Justices Agree To Hear Case On File Sharing*, N.Y. TIMES, Dec. 11, 2004, at C1 (explaining the Supreme Court decided to hear a case brought against a Napster replacement peer-to-peer network, Grokster).

[197] MGM Studios v. Grokster, 545 U.S. 913, 927–28 (2005) (explaining that the Ninth Circuit held Grokster did not have actual knowledge of infringement given the decentralized nature of the software and was therefore not liable for infringement).

[198] *Id.* at 919–20.

[199] *Id.* at 938 (discussing Groksters electronic newsletter distribution about the similar abilities of its program to Napster).

[200] MGM Studios v. Grokster, 259 F. Supp. 2d 1029, 1041 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), *vacated*, 545 U.S. 913 (2005).

[201] *Id.* at 1031, 1041, 1042.

[202] *MGM Studios*, 545 U.S. at 926.

used their software.[203] *MGM v. Grokster* therefore involved application of the staple article of commerce doctrine to decentralized, unauthorized peer–to–peer file-sharing on the Internet.[204] The doctrine states that distributors of commercial products capable of substantial non-infringing uses are not liable for contributory liability if third parties use the product to infringe copyright unless the distributors had actual knowledge of infringement and failed to act on that knowledge.[205] The recording industry and other content producers were of course not amused by Grokster and StreamCast's software.[206] A consortium of copyright holders led by Metro-Goldwyn-Mayer Studios Inc. ("MGM") sued Grokster and StreamCast Networks in the United States District Court for the Central District of California, alleging that ninety percent of the material whose exchange was facilitated by both companies' peer-to-peer software was copyrighted.[207] The plaintiffs claimed that the defendants were liable for contributory and vicarious infringement and asked the court for monetary and injunctive relief.[208] The court ruled that Grokster and StreamCast were not liable for contributory and vicarious copyright infringement and granted Grokster summary judgment.[209] MGM appealed.[210]

Relying on the staple article of commerce doctrine set forth in *Sony Corporation of America v. Universal City Studios*, Inc.,[211] the Ninth Circuit affirmed, holding that the Grokster and StreamCast software was capable of substantial non-infringing uses, that the respondents had no actual knowledge of infringement due to the decentralized nature of the peer–to–peer system, and that they could not be held liable for vicarious infringement because they did not monitor or control the use to which peer–to–peer participants put the software.[212] MGM et al appealed to the U.S. Supreme Court and certiorari was granted.[213]

The Court had to determine the circumstances under which the distributor of a product capable of both lawful and unlawful uses could be liable for copyright infringement by third parties using the product.[214] The U.S. Supreme Court held that a software distributor could be held liable when it distributes software and promotes it to third parties as a tool to infringe copyright.[215] Although Grokster and StreamCast did not mediate the peer-to-peer process, the Court said, they were

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[203] *MGM Studios*, 259 F. Supp. 2d at 1041 ("Neither StreamCast nor Grokster facilitates the exchange of files between users in the way Napster did. Users connect to the respective networks, select which files to share, send and receive searches, and download files, all with no material involvement of Defendants.").

[204] *MGM*, 545 U.S. at 927–28, 932.

[205] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

[206] Alex Pham, *Recording Industry Warns File Sharers,* L.A. TIMES, Oct. 18, 2003, at C1 (discussing the RIAA filing 261 lawsuits against alleged copyright infringing).

[207] *MGM Studios*, 545 U.S. at 922.

[208] Complaint at 11–12, 13, MGM Studios, Inc. v. Grokster, 243 F. Supp. 2d 1073 (C.D. Cal 2003) (No. 01-08541), 2001 WL 34885986.

[209] MGM Studios v. Grokster, 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), *vacated*, 545 U.S. 913 (2005).

[210] Brief for Plaintiffs-Appellants, MGM Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004) (Nos. 01-08541, 01-09923), 2003 WL 22794496.

[211] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

[212] MGM Studios v. Grokster, 380 F.3d 1154, 1165–66 (9th Cir. 2004).

[213] MGM Studios, Inc. v. Grokster, Ltd., 543 U.S. 1032 (2004) (granting certiorari).

[214] MGM Studios v. Grokster, 545 U.S. 913, 918–19 (2005).

[215] *Id.* at 941.

aware that users mostly used their software to download copyrighted material and took affirmative steps to encourage that infringement.[216] Grokster and StreamCast were therefore not passive distributors of software.[217] Indeed, StreamCast planned to be an alternative to Napster.[218] Its OpenNap software was designed to be compatible with Napster such that StreamCast could pitch its Morpheus software to Napster's fifty million users.[219]

The Court concluded that when popular software is used—more than 100 million copies of the software were downloaded—it may be impossible to go after all direct infringers.[220] The only practical alternative is to go against the distributor of the copying device for secondary liability under the theory of contributory (encouraging direct infringement) or vicarious infringement (profiting indirectly from the infringement).[221] Therefore, a defendant who distributes a device with the aim of promoting its use to infringe copyright, through giving directions, instructions or other affirmative steps taken to promote infringement, is liable for copyright infringement by those who use the software.[222] The main thrust of this decision is that validity of the staple article of commerce doctrine may depend on the intent of the distributor of the software that has substantial non-infringing uses.[223] If the intent of the software distributor is to facilitate infringement by third party peer–to–peer file-sharers, in order to benefit financially from that infringement, the distributor may be held liable for contributory and vicarious infringement.[224] This decision is medium-neutral in that though it applies intellectual property law to the special circumstances of decentralized peer–to–peer file-sharing, the same decision could be applied to both real-space and cyberspace.[225]

The decisions in *Napster I & II*, and *MGM v. Grokster* demonstrate that in the context of copyright, the free speech components of American exceptionalism are not absolute. They are balanced against other substantial interests. The fair use exception does not apply to unauthorized peer–to–peer sharing of copyrighted material on the Internet.[226] These decisions essentially reiterated the exceptionalist constitutional doctrine that was developed for real space—the principle that the ultimate objective of copyright is to "stimulate artistic creativity for the general public good"[227]—and applied it to the online environment. Furthermore, under

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[216] *Id.* at 923.

[217] *Id.* at 923–24.

[218] *Id.* at 924–25 (quoting an e-mail from a StreamCast executive, stating that "when Napster pulls the plug on their free service . . . or if the Court orders them shut down prior to that . . . we will be positioned to capture the flood of their 32 million users that will be actively looking for an alternative").

[219] *Id.* at 925 (discussing StreamCast's ads actively seeking Napster users as "#1 Napster alternative").

[220] *Id.* at 929–30.

[221] *Id.* at 930.

[222] *Id.* at 935.

[223] *Id.* at 936–37.

[224] *Id.*

[225] *Id.*

[226] A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014–15 (9th Cir. 2001).

[227] Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 432 (1984).

American exceptionalism, copyright serves as "the engine of free expression."[228] Therefore, protecting copyrighted expression from misappropriation on the Internet is tantamount to protecting freedom of expression.

C. Application of France's Exceptionalist Intellectual Property Regime to Online Peer-to-Peer File Sharing

Online peer-to-peer file-sharing is a global phenomenon that left its mark on French intellectual property law just as it did on American copyright law. The peer–to–peer phenomenon that was launched in the United States in the 1990s by Napster soon diffused to France.[229] French citizens became part of Napster and other online peer–to–peer file-sharing networks.[230] Many French residents formed mini-French language file-sharing communities within the Napster peer–to–peer network, to the alarm of the French intellectual property establishment.[231] As soon as Napster was shut down in the United States, new off-shore peer–to–peer networks with French language communities became available in France.[232] They included *Emule, Kazaa, KazaLite*, and others.[233] The French government and the French recording industry saw online peer–to–peer file-sharing as yet another "Anglo-Saxon" threat to the country's culture and cultural industry.[234] The French politico-cultural establishment struggled to understand the peer–to–peer phenomenon and address it within the framework of the *Code de la propriété intellectuelle* (the Intellectual Property Code).[235] A French governmental agency, *le Conseil supérieur de la propriété littéraire et artistique* (The Superior Council for Literary and Artistic Property, CSPL), and the French recording industry set up the Sirinelli Commission (named after former Minister of Culture, Pierre Sirinelli) to make recommendations on how France could philosophize and regulate online peer-to-peer file-sharing

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[228] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., Inc., 471 U.S. 539, 558 (1985) and asserting that "copyright's purpose is to promote the creation and publication of free expression").

[229] *Europeans at Work on Music Copyrights; Internet Swapping: They Want Stronger Legislation to Make Pirating Difficult*, TELEGRAPH HERALD, Mar. 11, 2001, at A8 ("Usage is also on the rise in Britain, where more than 1 million people use Napster, according to NetValue, with 760,000 in France and more than 650,000 in Spain.").

[230] *Id.*

[231] *E.g.,* P2PFR.COM, http://www.p2pfr.com/ (last visited Sept. 30, 2010) (showing one example of a French website dedicated to peer-to-peer file sharing).

[232] Dawn C. Chmielewski & Knight Ridder, *Online Sales of CDs Have a Spiraling Downside*, TIMES UNION, Nov. 7, 2002, at P19 ("Since last summer's collapse of pioneering file-swapping service Napster, consumers have quickly flocked to alternatives such as Kazaa and Morpehus.").

[233] *Id.*

[234] *French MPs Approve Suspension of Internet Access*, FRANCE 24 (Nov. 24, 2009), http://www.france24.com/en/20090402-french-mps-approve-suspension-internet-access (according to France's Minister of Culture, Christine Albanel, the bill has little chance of eradicating "the mass phenomenon that is piracy of cultural products").

[235] Letter from Jean-Ludovic Silicani, Chairman of the Supreme Council of Literary and Artistic Property ("CSPLA") (Fr.) to Pierre Sirinelli, Professer at the Université de Paris, Oct. 29, 2004 (on file with *The John Marshall Review of Intellectual Property Law*) (requesting that the professor form a committee to study the distribution of works on the Internet).

technologies.[236] The Commission's white paper surveyed the emerging (mostly American) peer–to–peer networks and their technologies and concluded that online peer–to–peer file exchanges, which it called *les échanges de pair à pair*, were "the tip of an increasing and uncertain technological iceberg" which, if not contained, would transform all digital cultural content into free-for-all ware.[237] However, the commission stated that peer–to–peer technologies were "juridically neutral."[238] What was problematic about these technologies, the commission said, was that they were primarily used to exchange music and films that were protected by intellectual property law, without the authorization of the rights holders. The commission therefore cautioned against the exceptionalist reflex to reject and criminalize peer–to–peer technologies for fear of their devastating impact on French culture:

> *Il est nécessaire de distinguer technique et utilisation. La technologie P2P n'est pas illégale en elle même, ce qui peut l'être est l'utilisation qui en est faite. Les nouvelles techniques ne doivent pas être combattues en tant que telles compte tenu de l'utilité d'un certain nombre d'applications mais leur essor suppose une maîtrise de leur usage afin qu'elles participent du développement harmonieux des industries culturelles.*
>
> It is necessary to distinguish between a technology and its uses. Peer–to–peer technology is not illegal in and of itself, what may be illegal is the use to which it is put. New technologies must not be resisted for the sake of it due to the usefulness of some of their applications, but their diffusion [in France] supposes a mastery of their use in order for them to participate in the harmonious development of cultural industries. [239]

The report noted the legal actions taken in the United States against *Napster.*[240] It also noted that the rise of legal music distribution systems like Apple's iTunes

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[236] *See* PIERRE SIRINELLI, INDUSTRIES CULTURELLES ET NOUVELLES TECHIQUES: RAPPORT DE LA COMMISSION PRESIDÉE PAR PIERRE SIRINELLI [Cultural Industries and New Technologies: Report of the Commission Presided by Pierre Sirinelli] (2005) (Fr.), *available at* http://eucd.info/documents/rapport-sirinelli.pdf.

[237] *Id.* § 1.1.

[238] *Id.* § 2.1.

[239] *Id.*

[240] *Id.* § 2.1.2.1.1. Translation by author:

> If one sets aside [court] decisions regarding the liability of P2P file-sharing networks with centralized servers (for example, *A & M Records v. Napster*), foreign jurisdictions have been rather reluctant [to criminalize P2P software] . . . due to the precedent set by the United States Supreme Court more than 20 years ago in the Sony 'Betamax' case [*Sony Corp., Inc., v. Universal City Studios*, 464 U.S. 417 (1984)]. In these early decisions, courts refused to hold P2P software companies liable [for third party use of their software to violate intellectual property].
>
> . . .
>
> The decision handed down by the Supreme Court of the United States on June 27, 2005 in the case, *Metro-Goldwyn- Mayer Studios Inc. et al. v. Grokster, Ltd., et al.,* does not, naturally, declare P2P technology illegal in and of itself. It also does not automatically assign liability to those who only distribute such programs without facilitating their use for counterfeiting purposes. But the Court decided

Store had slowed the volume of unauthorized online peer–to–peer music exchanges.[241] The Commission suggested that since peer–to–peer participants were generally not anonymous—peer–to–peer networks knew the Internet Protocol addresses of most of their participants—copyright holders could use this information to track down unauthorized peer–to–peer file-sharers without falling foul of French privacy laws.[242] Additionally, the Commission suggested that the French judiciary use the American court ruling in *A&M Records v. Napster* as a guideline.[243] In the final analysis, in the clash between intellectual property and individual privacy, the French legislature and judiciary adhered to the recommendations of the Sirinelli Commission and tilted the scales in favor of intellectual property.[244] An analytical survey of French peer–to–peer case law shows the outcome of this legal balancing act. Ultimately, the French legislators ignored the recommendations of the Sirinelli Commission and criminalized peer–to–peer software in France.

1. French Peer–to–Peer Case Law

A number of landmark peer-to-peer cases presented anew, the specificities of the French exception in the issue area of intellectual property on the Internet. These selected cases demonstrate how French courts reinforced the French cultural exception in the issue area of intellectual property, and applied this exceptionalist logic to online peer-to-peer file-sharing. French peer–to–peer cases generally have criminal and civil components. The ground-breaking case, *Public Prosecutor and Others v. Claude L.C. and Others,* was heard at the height of the global online peer-

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against persons whose business model is based on inciting and facilitating counterfeiting.

Id.

[241] *Id.* § 4.2.1. Translation by author:

According to the International Federation of the Phonographic Industry (IFPI, an organization of 1450 music producers and distributors), the number of [MP3] music files purchased legally in 2004 increased tenfold from 20 million downloaded in 2003, to 200 million in 2004. The global market for legal music online is expected to increase rapidly as a result of the frenzied sales of portable music listening devices.

. . .

Apple, which launched the *iTunes Music Store* at the end of 2003, had the merit of negotiating [agreements] with all the major record companies for purposes of offering consumers broad access to music works on the same platform and to offer, in the final analysis, a securitized product.

Id.

[242] *Id.* § 1.2. Translation by author:

"Most P2P networks require registration; the user is not anonymous to the distributor of the software, and his IP address is often visible to all users of the service; it is by taking advantage of this functionality [of the P2P network] that [intellectual property] rights holders can attack [unauthorized] P2P file-sharers . . . . "

Id.

[243] *Id.* § 2 (reviewing decisions by the United States and other foreign jurisdictions and discussing the benefits of those countries' analyses).

[244] *See* discussion *supra* Part III.C.

to-peer file-sharing phenomenon.[245] It originated from French police monitoring of the Internet for illegal content and activities.[246] In effect, in 2002, the French "Internet police," *le Service Technique de Recherches Judiciaires et de Documentation* or STRJD (The Technical Service for Judicial Research and Documentation), the criminal investigations arm of the Judicial Police, informed the gendarmerie, the protean, French paramilitary defense and law enforcement force, of the existence of a Web site that was engaged in illegal peer–to–peer exchange of videos.[247] Search warrants were issued on Wanadoo, the Internet Service Provider of the Web site (Wanadoo was a subsidiary of the state-owned Telecommunications company, France Telecom) as well as on Microsoft France.[248] The identity of the suspect was promptly revealed.[249] Further investigations led to the arrest of five other individuals engaged in illegal peer–to–peer file-sharing.[250]

The French public prosecutor charged Claude L.C. and the five other accused with "piracy through publication or reproduction of a work of the mind" without the authorization of the rights owner, in violation of the intellectual property code.[251] The accused were also charged with criminal reproduction and unauthorized dissemination of programs, videos and records, as well as "possessing the fruits of a crime punishable by no more than five years imprisonment."[252] An interesting detail of this case is that it was essentially a transnational legal action. While this was a criminal prosecution initiated by the French government, fifteen American motion picture, home video and animation companies joined a number of French movie production, distribution, and intellectual property collection companies as civil plaintiffs in the suit.[253] The issue before the court was whether the peer–to–peer activities of the defendants amounted to piracy and possession of the fruits of a crime.[254] The court ruled that the defendants were guilty as charged.[255] They were given suspended prison sentences ranging from one to three months, and put on probation.[256] Additionally, they were ordered to pay each of the civil plaintiff's damages ranging from one symbolic Euro to €1200.[257] In order to make this a pedagogical action, the court ordered the convicted peer–to–peer file-sharers to

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[245] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Vannes, Apr. 29, 2004, obs. Ms. Billard (Fr.), *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1348.

[246] *Id.* The gendarmerie of Vannes was informed by the Internet police, the Technical Service for Judicial Research and Documentation (STRJD) of Rosny-sous-Bois, of the existence of a website, www.echange-cd.st.fr, dedicated to the exchange of media content in all types of digital formats. *Id.* A user, whose email address was cagou56@hotmail.com, offered "copies of movies in the Divx format" and had, following an exchange of emails with [under cover] STRJD, agents, communicated to investigators, a list of 151 films in the DivX format. *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.* (stating that requisitions sent to Microsoft and Wanadoo revealed Nov. 4, 2002 that the coordinates corresponding to the email address were those of Claude SC).

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

publish, at their own expense, a statement to be drafted by the victorious French civil plaintiffs, in a number of newspapers and trade publications.[258]

2. Peer–to–Peer Enforcement and Individual Privacy: Henri S. v. SCPP

France has one of the most stringent individual privacy regimes in the world.[259] It also has one of the toughest intellectual property enforcement regimes in the world.[260] In their zeal to protect French culture from the dangers of unauthorized online peer–to–peer file-sharing, French judicial and law enforcement authorities had to strike a balance between intellectual property protection and respect for individual privacy. They also had to decide whether individual privacy in cyberspace was analogous to individual privacy in real space. The following case illustrates the legal balancing act French authorities had to engage in. In *Henri S. v. SCPP*,[261] the French judicial police raided the home of Henri S. and seized computer equipment that allegedly used the Kazaa online peer–to–peer file-sharing software to exchange intellectual property without authorization.[262] Investigators found 3,175 digital MP3 files downloaded with the aid of Kazaa on Henri's hard drive.[263] He was criminally and civilly charged with music piracy.[264] Under provisions of the *code de la propriété intellectuelle* (intellectual property code), reproducing and distributing recorded music without the authorization of the intellectual property holder is music piracy, a criminal offense.[265] Henri S. was also criminally charged with illegally possessing pirated musical products (files) on his computer equipment in violation of provisions of the intellectual property code that criminalized possession of the fruits of a criminal act, a crime punishable by a penalty of no more than five years imprisonment.[266]

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[258] *Id.*

[259] Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219, 1220 (1994) ("While in the United States the tort of public disclosure of private facts has been languishing on the vine, an analogous cause of action in France has been flourishing in a climate of receptive courts."); *See also Privacy Law Gets French, Celebrity Backing Victims of 'Media Hounding' Speak Out*, TORONTO STAR, Sept. 2, 1997, at A22 (reporting that French Culture Minister Catherine Trautmann said French privacy laws are the strictest in the world).

[260] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PRO. INTELL.] (Fr.) (showing that France does not have a fair use doctrine).

[261] Cours d'appel [CA] [regional courts of appeal] Paris, 13ème chambre, May 15, 2007, obs. Mr. Guilbaud (Fr.), *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1955; *see e.g.,* Cour de Cassation [Cass.] [Supreme court for Judicial Matters], 2ème chambre civile, Nov. 13, 2003, no. 01-11236 (demonstrating that under France's strict Presumption of Innocence laws, the surnames of parties to criminal and civil cases are routinely redacted in court and press reports until their cases have been litigated).

[262] CA Paris, 13ème chambre, May 15, 2007.

[263] *Id.*

[264] *Id.*

[265] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PRO. INTELL.], art. L-335-4 (Fr.) (listing the penal provisions for copyright infringement).

[266] *Id.* art. 34 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], 10 mars 2004 [Mar. 10. 2004]; CA Paris, 13ème chambre, May 15, 2007.

In his defense, Henri S. claimed that cyberspace was identical to real space, therefore the stringent individual privacy rules in force in real space should apply to cyberspace.[267] He argued that the Internet Protocol ("IP") addresses of Internet users fell within the category of personal information protected from invasion by the "Law on Informatics and Liberties of 1978."[268] He claimed that the Internet police and had acted illegally when it obtained his IP address, linked it to his real name and physical address, and passed on that information to the royalty collection society, *la Société Civile des Producteurs Phonographiques,* SCPP) (The Civil Society of Phonograph Producers).[269] The *Tribunal de grande instance de Paris* (High Court of Paris) agreed and acquitted Henri S. of all the charges.[270] The court ruled that Henry S.'s IP address and identity had been obtained illegally.[271] The civil plaintiff, the intellectual property royalty collection society, SCPP appealed to the *Cour d'appel de Paris* (Appeals Court of Paris).[272] The two issues before the court were as follows: 1) Whether SCPP had obtained the Internet Protocol address and the identity of Henri S. illegally, and 2) whether using online peer-to-peer music exchange software provided by peer–to–peer companies like Kazaa was a violation of the French intellectual property code.[273] The court ruled that the address and identity of Henri S. had been obtained pursuant to a search warrant served on his Internet Service Provider.[274] Therefore, obtaining the information through a warrant did not amount to a violation of individual privacy.[275] Relying on a decision of the *Conseil Constitutionnel* (Constitutional Council), the Paris Court of Appeals held that online peer-to-peer file-sharing software becomes illegal when it is used to exchange copyrighted files on the Internet without the consent of the rights holders.[276] The court reversed the judgment of the High Court of Paris, and found Henri S. guilty as charged.[277] However, due to the fact that Henri S's activities were non-commercial, the court gave him a suspended fine of €1000 (about $1,500) and ordered confiscation of the computer equipment Henri S. used in the illegal online peer-to-peer exchange.[278]

The case of Henri S. is an exemplar of how the French intellectual property regime applied the criminal provisions of the intellectual property code to unauthorized online peer–to–peer file-sharing. Non-governmental actors like the SCPP work with law enforcement agencies to investigate peer–to–peer file-sharing sites, obtain warrants and force Internet Service Providers to disclose the identity of peer–to–peer file-sharers.[279] French courts and law enforcement agencies have therefore applied intellectual property enforcement rules designed for real space, to the realities of cyberspace. In this case, the computers used by the defendant to

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[267] CA Paris, 13ème chambre, May 15, 2007.
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.* (stating that Henri S. was acquitted in the adversarial proceedings).
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] *Id.*
[279] *Id.*

download peer–to–peer software and engage in peer–to–peer file-sharing, were equated with a real space music pirate's duplicating equipment. [280] This case also shows that the French intellectual property regime has a strong statist imprint, is grounded in France's unique author's rights and moral rights regime, and has both criminal and civil law components.[281] Clearly the regime has been transformed into an instrument for the promotion of *l'exception française* on the Internet.

3. Internet Surveillance and Intellectual Property Enforcement: Alain O. v. Sacem and Others

Alain O. v. Sacem and Others was also an online peer–to–peer intellectual property infringement case initiated by French law enforcement agencies.[282] The case exemplifies the active role of the French government in intellectual property enforcement and the dual criminal and civil nature of intellectual property actions in France. The case also demonstrates the collaboration between the French government and organized interest groups in the field of intellectual property enforcement on the Internet.[283] In February 2004, officials of the French "Internet police," the *Service Technique de Recherches Judiciaires et de Documentation* (Technical Service for Judicial Research and Documentation), whose task includes surveillance of the Internet for illegal activity, located a server that was the hub of an illegal online peer–to–peer file-sharing network.[284] The server was traced to an individual named Alain O.[285] A search of the suspect's home led to the discovery of more than 10,000 MP3 files on his server.[286] The public prosecutor initiated legal action against Alain O. for recording and distributing of intellectual property without the authorization of the copyright holders.[287] The public prosecutor subsequently informed the main French royalty collecting and distribution organizations about the illegal peer–to–peer activities of Alain O.[288]

The collecting agencies promptly joined the legal action against Alain O. as civil plaintiffs.[289] In February 2005, the criminal court of Pontoise found Alain O. guilty of "piracy through publishing and reproducing a work of the mind without regard to the rights of the author," contrary to provisions of the Intellectual Property Code.[290]

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[280] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PRO. INTELL.] art. L. 335-1 (Fr.) (stating that officers of the Judicial Police are authorized to seize all illegally produced intellectual property works, as well as the equipment and software used to produce it).

[281] *Id.* art. L 335-2 (stating that music piracy or counterfeiting is punishable by three years imprisonment and a fine of €300,000).

[282] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Pontoise, 6ème chambre, May 30, 1990, obs. Mr. Jean Marie Charpier (Fr.), *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1403.

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PRO. INTELL.] arts. L. 335-1, L. 335-2, L. 335-3 (Fr.).

The court imposed a €3000 suspended fine on Alain O. and ordered the authorities to confiscate the server and computer equipment used in the peer–to–peer exchange.[291] He was also ordered to publish, at his expense, the court's judgment against him in two newspapers.[292] However, the court ordered that his name not be entered into the record of criminal convictions.[293] On appeal, the *Cour d'Appel de Versailles* (Court of Appeals of Versailles) affirmed the guilty verdict against Alain O. and sentenced him to a suspended sentence of three months imprisonment and ordered that the computer equipment and servers that had been seized from him be confiscated permanently by the government.[294] The court further ordered Alain O. to pay two royalty collecting organizations, SACEM and SDRM, €3500 each.[295]

IV. INDIVIDUAL PRIVACY AND DUE PROCESS ISSUES RAISED BY INTELLECTUAL PROPERTY ENFORCEMENT ACTIONS AGAINST ONLINE PEER-TO-PEER FILE SHARERS IN THE UNITED STATES AND FRANCE

A. The United States

In the third part of the article, we saw how American and French defendants in intellectual property actions argued that cyberspace was a new environment to which laws and values that were more appropriate for the offline sphere should not apply. We also saw how courts in the United States and France differed with this suggestion. In the United States, courts refused to equate time-shifting and space-shifting, and treated cyberspace like offline space for purposes of regulating peer–to–peer file-sharing.[296] We also saw how French judicial and law enforcement authorities treated the Internet like offline space in their quest to protect French intellectual property from unauthorized peer–to–peer file-sharing. By treating the Internet like an offline space, and MP3 files like traditional media content, French courts and the French Internet police treated unauthorized online peer–to–peer file-sharing as analogous to music piracy in offline space.[297] The problem with this failure to appreciate the subtle differences between real space and cyberspace is that in the United States copyright holders were given carte blanche to trample on the due process rights of Americans accused of peer–to–peer file sharing.[298] In France, courts put their imprimatur on the online peer–to–peer surveillance activities of the

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[291] TGI Pontoise, 6ème chambre, Feb. 2, 2005.

[292] *Id.*

[293] *Id.*

[294] Cour d'appel [CA] [Region court of appeal] Versailles 9ème chambre, Mar. 16, 2007, obs. Mr. Limoujoux, *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1874.

[295] *Id.*

[296] A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001).

[297] *See* discussion *supra* Part III.C.

[298] Leslie Walker, *New Movement Hits Universities: Get Legal Music*, WASH. POST, Mar. 17, 2005, at E1 (stating that the RIAA has filed thousands of suits against people for sharing copyrighted material).

Internet police and intellectual property royalty collection organizations.[299] The result is that law enforcement organizations trampled on the right of privacy and the presumption of innocence of persons accused of being involved in peer–to–peer file-sharing.[300]

1. Peer–to–Peer Exchanges as the Wild West of American Intellectual Property Enforcement: The Case of Capitol Records v. Thomas Rasset

As we have seen so far, unauthorized online peer-to-peer file-sharing of copyrighted material injected an element of uncertainty into the American intellectual property regime. The solutions advanced by the courts in *Napster* and *Grokster* essentially brought stability to the evolving online intellectual property environment by applying tried and true offline rules and regulations to cyberspace.[301] This led to the launching of the booming pay-per download business model pioneered by Apple's iTunes Store.[302] However, these legal developments had unintended due process consequences. The court decisions in *Napster*, *Grokster,* and other cases essentially empowered the recording industry to trample willy-nilly over the due process rights of private citizens accused (rightly or wrongly) of engaging in unauthorized peer–to–peer file-sharing.[303]

Having dismantled the major American companies involved directly and indirectly in peer-to-peer file sharing on the Internet, the cultural industry, led by the recording industry, turned their attention to individuals who allegedly participated in unauthorized online peer-to-peer file-sharing using the "successor" software of companies outside the jurisdiction of American courts—Limewire, Morpheus, Bittorrents, Kazaa, and so on.[304] The recording industry trade association, Recording Industry Association of America ("RIAA"), used the peculiarities of the American legal system to track down, investigate and harass

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[299] *See, e.g.*, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Vannes, Apr. 29, 2004, obs. Ms. Billard (Fr.), *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1348.

[300] *See, e.g.*, *id.*

[301] MGM Studios v. Grokster, 545 U.S. 913, 933–35 (2005); *A & M Records*, 239 F.3d at 1019–20.

[302] Press Release, Apple, Inc., Apple Launches the iTunes Music Store (Apr. 28, 2003), *available at* http://www.apple.com/pr/library/2003/apr/28musicstore.html.

[303] *See* Kristina Groennings, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571, 591 (2005) (stating that "[t]he recording industry has been criticized for abusing civil liberties, due process, and privacy rights, as well as expending judicial resources").

[304] *See, e.g.*, Arista Records, LLC v. Lime Group LLC, No. 06-5936, 2010 WL 2291485, at *21 (S.D.N.Y. May 25, 2010) (exemplifying case by collective group of record companies filing lawsuit against the business that produced and distributed the Lime Wire software); Jefferson Graham, *Kazaa to Pay $100 Million to Settle Copyright Lawsuits*, USA TODAY, July 27, 2006, at 2B (discussing the lawsuit filed against Kazaa by MGM and EMI as well as its affects on other file sharing software); Mark Gibbs, *U.S. Copyright Group Sets Sights on BitTorrent Users*, PCWORLD (Apr. 19, 2010, 4:15 PM), http://www.pcworld.com/article/194539/us_copyright_group_sets_sights_on_bittorrent_users.html (indicating that "the US Copyright Group has filed court actions on some 20,000 users already and around 30,000 other suits are in the works").

alleged infringers with little or no court oversight.[305] The tactics of the RIAA, and the pliability of the courts, gave the recording industry association and recording companies *carte blanche* to trample on the privacy and due process rights of thousands of ordinary American citizens.[306]

A notable feature of copyright disputes is the extensive use of discovery. In federal district courts, discovery is the process whereby civil litigants are allowed to seek information that may or may not be material to their case, from each other and from third parties (such as expert witnesses), under conditions set forth in the Federal Rules of Civil procedure.[307] Discovery was designed to avoid surprises during trials—and to create a level playing field in terms of informational availability between litigating parties.[308] However, according to Cameron Stracher, federal civil discovery has essentially degenerated into strategic and tactical probing exercises performed for the most part by the litigating parties themselves, at their own expense, with very little or no judicial oversight.[309] Rich and powerful litigants essentially manipulate the system to overwhelm poorer and weaker litigants.[310] Discovery has been applied to the Internet within the framework of electronic or e-discovery, which allows litigating parties to seek documents in electronic form.[311] In peer–to–peer litigation, recording industry trade groups like the RIAA assigned the task of monitoring peer-to-peer file-sharing networks to third parties—without benefit of court orders.[312]

Indeed, the recording industry has extensively misused e-discovery in peer-to-peer online file-sharing disputes. According to copyright attorney, Ray Beckerman, RIAA uses a wide array of legally and ethically questionable methods to harass individuals who are even remotely suspected of downloading copyrighted music from the Internet.[313] Beckerman suggests that these abusive methods include "John Doe" lawsuits filed against unnamed persons who are connected to the Internet via a private or university Internet Service Provider, misleading notices that claim the RIAA had obtained *ex parte* discovery orders (meaning a court had authorized RIAA

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[305] *See* Defendant Does #16 and #18's Motion for Sanctions Pursuant to Rule 11 with Inc. Mem. of Law at 2-3, Arista Records, LLC v. Does 1–27, No. 07-00162 (D. Me. Mar. 31, 2008); *see also* Groennings, *supra* note 303, at 591.

[306] Defendant Does #16 and #18's Motion for Sanctions, *supra* note 305, at 3.

[307] FED. R. CIV. P. 26–37.

[308] *See* Brown Badgett, Inc. v. Jennings, 842 F.2d 899, 902 (6th Cir. 1998).

[309] *See* Elektra Ent. Group, Inc. v. O'Brien, No. 06-5289, (C.D. Ca. Mar. 2, 2007), *available at* http://www.ilrweb.com/viewILRPDF.asp?filename=elektra_obrien_070302Decision (explaining the numerous lawsuits pending and the methods the RIAA uses to intimidate defendants and obtain unjust settlements). The court goes on to describe this process as "the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants. *Id.*; *See also* Defendant Does #16 and #18's Motion for Sanctions, *supra* note 305, at 2–3 (discussing the methods by the RIAA in four cases where they subpoena's Universities to obtain the identities of potential defendants and drop the suit once the necessary information is obtained).

[310] *See*, *e.g.*, CAMERON STRACHER, DOUBLE BILLING: A YOUNG LAWYER'S TALE OF GREED, SEX, LIES, AND THE PURSUIT OF A SWIVEL CHAIR 125–26 (1998).

[311] FED. R. CIV. P. 26 (a)(1)(A)(ii); FED R. EVID. 1001(1).

[312] Catherine Rampell, *To Catch a Song Thief: Inside the Anti-Pirate Patrol*, CHRON. OF HIGHER EDUC., May 23, 2008, at 11 (stating that the RIAA gives lists of songs to third parties, such as Media Sentry, hired to search for online pirates of those songs).

[313] *See* Ray Beckerman, *How the RIAA Litigation Process Works*, RAY BECKERMAN PC, http://beckermanlegal.com/pdf/?file=/howriaa.htm (last updated Apr. 9, 2008).

to gather information about the alleged infringers without their being present or having any knowledge of the accusations against them), as well as subpoenas.[314] When a "John Doe" defaults or fails to mount a defense against the anonymous suit because of lack of information or knowledge of judicial procedure, the RIAA obtains an *ex parte* "immediate discovery" order that enables it to issue subpoenas to Internet Service Providers demanding the names and addresses of subscribers. Beckerman states that courts in the United States have routinely granted these *ex parte* discovery orders.[315]

Once it obtains the name and address of the Internet subscriber through this legal maneuver, the RIAA abandons the anonymous "John Doe" suit and proceeds to bring legal action against the defendant in the defendant's real name.[316] One of RIAA's routine activities is to lodge pretrial requests to inspect the computer hard drives of individuals alleged to have infringed on their copyrights, and depose their family members and friends who may have had access to their computers.[317] Before the suit goes to trial, RIAA sends a letter to the alleged peer-to-peer file exchanger demanding a "settlement" of $3,750.[318] This amount comes from the statutory damage scheme set forth in the Copyright Act.[319] The RIAA has no patience with the niceties of proving actual damages.[320]

The case of *Capitol Records v. Thomas-Rasset* [321]is an example of this abuse of the system. In this case, RIAA filed suit against Thomas-Rasset in a federal district court in Minnesota for unauthorized peer–to–peer file-sharing of copyrighted material, using evidence collected by MediaSentry, a controversial company that specialized in investigating network traffic for purposes of identifying and locating IP addresses alleged to be engaged in unauthorized downloading and uploading of copyrighted material, and tracing the IP addresses back to specific individuals.[322] That is how MediaSentry was able to identify Thomas-Rasset.

During the trial, Thomas-Rasset's attorney, Kiwi Camara, decried the tactics the recording industry used to identify his client and gather evidence against her.[323] He said that MediaSentry's evidence of Thomas-Rasset's peer–to–peer file-sharing activities was illegally collected and should be suppressed:

> Media Sentry committed criminal violations of the Minnesota, New Jersey, and federal Wiretap Acts and the Minnesota Private Detectives Act in collecting this evidence; that the RIAA's lawyers, including opposing counsel, breached their ethical obligations as lawyers in procuring this evidence illegally to fuel a five-year litigation campaign in which their

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[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] 17 U.S.C. § 504(c) (2006).
[320] *See* Beckerman, *supra* note 313.
[321] 680 F. Supp. 2d 1045 (D. Minn. 2010).
[322] Complaint, Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010) (No. 06-1497), 2006 WL 1431921; *see also* Capitol Records Inc. v. Thomas, No. 06-1497, 2009 WL 1664468, at *1–2 (D. Minn. June 11, 2009) (describing how MediaSentry acquires IP addresses).
[323] *Capitol Records Inc.,* 2009 WL 1664468, at *1.

> recording-industry clients have recovered more than $100 million in settlements. . . . [324]

The judge did not find Camara's arguments persuasive and rejected his motion to suppress the evidence collected by MediaSentry.[325] In June 2009, the federal jury found Jammie Thomas-Rasset liable for using peer-to-peer software to willfully download and distribute twenty-four copyrighted sound recordings without the authorization of the copyright holders.[326] The court fined her $1.92 million.[327] The outcome of this case shows that in matters of copyright enforcement in the domain of peer–to–peer file-sharing, America's exceptional discovery process strips accused persons of their due process rights, invades their privacy and leaves them at the mercy of the recording industry.

Capitol Records v. Thomas-Rasset was only one of the more than 35,000 lawsuits the recording industry filed in the United States against anonymous "John Does" for allegedly violating music reproduction and distribution rights through unauthorized online peer-to-peer file-sharing.[328] In effect, in the face of the massive online peer–to–peer file-sharing pioneered by Napster, Kazaa, Grokster, and other start-ups, record company and movie trade associations developed a strategy that consisted of filing lawsuits against unnamed defendants for purposes of using the legal discovery process to monitor peer-to-peer networks for copyright infringement.[329] These trade associations assigned the task of monitoring peer-to-peer networks to MediaSentry.[330] The names and addresses of individuals identified as peer–to–peer file-sharers were turned over to collection agencies, which threatened these individuals with legal action if they did not cease and desist their peer–to–peer file-sharing activities and pay huge sums of money.[331]

These legal and extra-legal copyright enforcement measures are artifacts of the historic specificity of American exceptionalism in the issue area of intellectual property. In effect, these legal actions are grounded in the unique statutory damages regime of the United States, which gives plaintiffs the right to choose statutory damages rather than actual damages at any time during the litigation, until the court enters its final judgment.[332] Applying these rules to cyberspace has resulted in violations of the due process rights of ordinary American citizens. Pamela Samuelson & Tara Wheatland suggest that American courts have applied the statutory damages regime "in a manner that often results in arbitrary, inconsistent, unprincipled, and

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[324] Statement of Case as to Jammie Thomas at 3; Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010) (No. 06-1497), *available at* http://docs.justia.com/cases/federal/district-courts/minnesota/mndce/0:2006cv01497/82850/266/.

[325] Capitol Records, Inc. v. Thomas, No. 06-1497, 2009 WL 1664468, at *27 (D. Minn. June 11, 2009).

[326] Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010).

[327] *Id.*

[328] *See* Sarah McBride, *Changing Tack, RIAA Ditches MediaSentry*, WALL ST. J., Jan. 5, 2009, at B2.

[329] *See* Beckerman, *supra* notes 313–318, 320.

[330] Artista Records LLC v. Does 1–16, No. 08-00765, 2009 U.S. Dist. LEXIS 12159, at *4 (N.D.N.Y. Feb. 18, 2009).

[331] *File-Sharing Drops as Legal Threats Multiply*, CHI. TRIB., Aug. 23, 2003, at C1.

[332] 17 U.S.C. § 504(c)(1) (2006).

grossly excessive awards" which are entirely at variance with American due process principles.[333]

2. Copyright Enforcement Against Peer-to-Peer File-Sharers on College and University Campuses

After its victories over Napster, Grokster and private individuals accused of peer–to–peer file sharing, the recording industry turned its attention to colleges and universities.[334] Due to their high-speed, broadband Internet connections, institutions of higher learning are essentially the Internet Service Providers for thousands of their students, especially those who live in dormitories.[335] Napster, Grokster, Morpheus, Kazaa, Limewire and other peer-to-peer file-sharing systems were heavily used on college and university campuses.[336] In *A & M Records v. Napster* (discussed above) the record companies succeeded in entering into the trial record evidence to the effect that online sharing of MP3 files caused them irreparable harm.[337] That is, loss of "album" sales within college markets.[338] The Motion Picture Association of America ("MPAA") and the recording industry essentially considered colleges and universities to be cesspools of copyright infringement.[339] From 2007, RIAA carried out a virtual campaign against college and university students alleged to be involved in illegal peer-to-peer music exchange activities.[340] It sent more than 4,000 pre-litigation settlement letters to students at 160 colleges and universities.[341] Additionally, the recording industry trade group went after universities whose networks were allegedly used for illegal peer-to-peer music exchange activities.[342] Though many students and some universities gave in to the demands of the

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[333] Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 497 (2009).

[334] Frank Ahrens, *Four Students Sued Over Music Sites; Industry Group Targets File Sharing at Colleges*, WASH. POST, Apr. 4, 2003, at E1.

[335] David Sharos, *Bug-Proofing 101*, CHI. TRIB., Aug. 13, 2005, at C3.

[336] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 909–10 (2000); *see also* Ellen Lee, *Music Industry Threatens Student Downloaders at UC*, S.F. CHRON., Mar. 22, 2007, at A1 (reporting that Illegal music downloads jumped 47 percent between 2005 and 2006 with college students accounting for more than 1.3 billion, or about a quarter, of the unauthorized downloads and sites such as LimeWire.com and Kazaa.com being the most popular).

[337] *A & M Records*, 114 F. Supp. 2d at 925.

[338] *Id.* at 909.

[339] *See Illegal Movie Downloading*, PITT. POST-GAZ., Jan. 23, 2008, at A4 ("In a 2005 study it commissioned, the Motion Picture Association of America claimed that 44 percent of the industry's domestic losses came from illegal downloading of movies by college students, who often have access to high-bandwidth networks on campus."); *See also* Mike Musgrove, *Music Industry Tightens Squeeze on Students*, WASH. POST., Mar. 9, 2007, at D3 (quoting the president of the RIAA as saying, "More than half of college students acquire music illegally").

[340] *See* Lee, *supra* note 336.

[341] *Id.*; *see also* Eric Bangeman, *Colleges Serious About Dealing with Copyright, P2P issues,* ARS TECHNICA (Dec. 5, 2007), http://arstechnica.com/old/content/2007/12/colleges-serious-about-dealing-with-copyright-p2p-issues.ars.

[342] *See* Musgrove, *supra* note 339.

recording industry, a number of universities successfully challenged RIAA's ex parte discovery procedure and Internet investigation methods.[343]

3. Statutory Regulation of Online Peer–to–Peer File-Sharing: The Higher Education Opportunity Act (HEOA) of 2008

While policing the Internet for unauthorized online peer–to–peer sharing of copyrighted works was carried out mostly within the ambit of the courts, the recording industry put pressure on Congress to close the remaining peer–to–peer file-sharing loopholes.[344] The industry used its political and economic clout to influence legislation against the epicenter of peer–to–peer file-sharing–college and university campuses. Members of Congress from major intellectual property-producing states like California and New York agreed with the motion picture and recording industries that colleges and universities were complicitous in intellectual property violation on their campuses.[345] Industry interest groups knew that as a major source of funding for higher education in the United States, Congress had the power to regulate peer-to- peer file-sharing on college and university campuses.[346] Under pressure from these interest groups, Congress inserted a section entitled, "Campus Based Digital Theft Prevention" in the Higher Education Opportunity Act (HEOA) of 2008.[347] The campus digital theft prevention provision gave colleges and universities an incentive to eliminate unauthorized peer-to-peer exchange of copyrighted material from their networks. The Act stipulates that:

> . . . the Secretary may make grants to institutions of higher education, or consortia of such institutions . . . to develop, implement, operate, improve, and disseminate programs of prevention, education, and cost-effective technological solutions, to reduce and eliminate the illegal downloading and distribution of intellectual property . . . . [348]

The act further states that in order to be eligible for funding, each institution of higher learning must certify that it:

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[343] *See* Beckerman, *supra* note 313 (stating, "The first challenge of which we are aware that has been made by a college or university itself, rather than by the affected students, is Arista v. Does 1-17, where the Oregon Attorney General has filed a motion to quash the RIAA's subpoena directed to the University of Oregon, seeking student identities").

[344] *See, e.g.,* David Segal, *A New Tactic in the Download War*, WASH. POST., Aug. 21, 2002, at A1 (reporting that record labels are supporting a bill that would make it legal to impair the operation of peer-to-peer networks, such as Limewire).

[345] *See* Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 751 (2005) (stating that in July of 2002, Representative Howard Berman (R-Cal) introduced the Peer to Peer Piracy Prevention Act, which would have allowed companies to hack into personal computers and P2P networks when they were suspected that infringing materials were being circulated); *see also* Ken Fisher, *Congressman Hollywood: Universities a Wretched Hive of Scum and Villainy*, ARS TECHNICA (Mar. 9, 2007, 11:14 AM), http://arstechnica.com/tech-policy/news/2007/03/senator-hollywood-universities-a-wretched-hive-of-scum-and-villainy.ars.

[346] *See, e.g.*, Higher Education Act of 1965, § 484, 20 U.S.C. § 1091 (2006).

[347] Higher Education Opportunity Act, § 801, 20 U.S.C.A. § 1161r (2010).

[348] *Id.* § 1161r(a).

> (A) has developed plans to effectively combat the unauthorized distribution of copyrighted material, including through the use of a variety of technology-based deterrents; and
>
> (B) will, to the extent practicable, offer alternatives to illegal downloading or peer-to-peer distribution of intellectual property, as determined by the institution in consultation with the chief technology officer or other designated officer of the institution.[349]

By enacting the "Campus Based Digital Theft Prevention" provision of the Higher Education Opportunity Act, Congress shifted the burden of monitoring peer–to–peer file sharing to institutions of higher learning where thousands of students share millions of files containing copyrighted and non-copyrighted material.[350] The Higher Education Opportunity Act of 2008 essentially gives American colleges and universities financial incentives to police the Internet on behalf of the recording industry.[351] They therefore have a stake in clamping down on students using their networks for unauthorized peer–to–peer file sharing, and complying with the *ex parte* discovery requests of the RIAA.[352] The Act essentially funds colleges and universities to use their network architectures to resolve the online peer–to–peer file-exchange problems of the recording industry.[353] Private, non-educational Internet Service Providers do not have this kind of financial incentive to police the activities of their subscribers or comply with record industry discovery requests.[354]

Actually, even before enactment of the "Campus Based Digital Theft Prevention" provision of the Higher Education Opportunity Act, the majority of American colleges and universities had already instituted "bandwidth abuse" policies aimed at addressing complaints from copyright holders.[355] In order to dissuade unauthorized peer–to–peer exchange of copyrighted material on campus networks, institutions instituted disciplinary measures that included: revoking the network access of student "offenders," choking network traffic—thereby reducing speeds—sending offending students on probation or suspending them from school.[356]

B. France: The Tension Between Intellectual Property Enforcement and the Right to Privacy in the Context of Online Peer-to-Peer File Sharing

In France, individual privacy is a fundamental constitutional right set forth in the Declaration of the Rights of Man and of the Citizen of 1789, and the European

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[349] 28 U.S.C. § 1094(a)(29)(A)–(B).

[350] 20 U.S.C.A. § 1161r.

[351] *Id.*

[352] *Id.*; *see also* Beckerman, *supra* note 313.

[353] 20 U.S.C. § 1161r.

[354] *See id.* § 1001(a)(4) (stating that one of the requirements for the Act is that the institution of higher education must be a public or other nonprofit institution, which excludes private educational institutions and private Internet service providers).

[355] *See* Groennings, *supra* note 303, at 582–83.

[356] *Id.*

Convention on Human Rights and Fundamental Freedoms of 1950.[357] We have seen that intellectual property—composed of *droit d'auteur and droit moral* (rights of the author and moral rights)—are also sacrosanct constitutional rights.[358] Furthermore, cultural protectionism is an important element of the French exception.[359] The online peer–to–peer file-sharing phenomenon that was launched by Napster Inc., in the United States soon found its way to France and created acute tensions between the three sacrosanct pillars of *l'exception française*: cultural protection, respect for individual privacy, and protection of intellectual property.[360] In 2004, the *Conseil Constitutionnel* (Constitutional Council), the highest constitutional authority in France, provided guidelines on how the judiciary and legislative should handle peer–to–peer conflicts when it decided that unauthorized online peer–to–peer file-sharing was a new "piracy practice being developed on the Internet."[361] Counterfeiting or piracy is both a criminal and a civil offense under the Intellectual Property Code.[362]

The story of peer–to–peer regulation in France is the story of governmental attempts to ease tensions between intellectual property and individual privacy through legislative enactments and judicial decision-making.[363] Since the decision of the Constitutional Council, judicial attempts at striking a balance between individual privacy rights and intellectual property rights have generally tilted the scales in favor of intellectual property and cultural protectionism.[364] This is demonstrated by a series of clashes: a clash between individuals accused of unauthorized peer–to–peer file-sharing and intellectual property royalty collection societies, a clash between administrative agency management of individual privacy in the context of data processing, and intellectual property collection society attempts to monitor peer–to–peer networks.[365] Finally, there was the peer–to–peer aspect of harmonization of French law with European Union Information Society directives.[366]

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[357] 1789 DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN arts 2, 10, 11, *available at* http://www.legifrance.gouv.fr/; Convention for the Protection of Human Rights and Fundamental Freedoms arts. 5, 8, 11, Nov. 4, 1950, 213 U.N.T.S. 221.

[358] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PRO. INTELL.] arts. L. 121-1-1–L.121-9, L.122-1-1–L.122-12.

[359] *See* KUISEL, *supra* note 45, at 232 (stating, "In many ways the French did not succumb to Americanization . . . [t]he deluge of consumer products, the new life-style centered on the act of purchase, and the profusion of mass culture did not sweep away French differences").

[360] *See* discussion *supra* Part III.C.

[361] Conseil constitutionnel [CC] [Constitutional Court] decision No. 2004-499DC, July 29, 2004, J.O. 14087 (Fr.), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2004/2004-499-dc/decision-n-2004-499-dc-du-29-juillet-2004.904.html.

[362] C. PRO. INTELL. arts. L. 335-1–10 (Fr.).

[363] *See* discussion *supra* Part III.C.

[364] *See* discussion *supra* Part III.C.

[365] *See* discussion *supra* Part III.C.

[366] *See* Council Directive 2001/29, 2001 O.J. (L 167) 10 (EC); *see also The French Copyright Law Changed by the Constitutional Council*, EDRI.ORG (Aug. 2, 2006), http://www.edri.org/edrigram/number4.15/dadvsi; *Enforcement of Intellectual Property Rights*, EURACTIV (Apr. 26, 2007), http://www.euractiv.com/en/infosociety/enforcement-intellectual-property-rights/article-117513.

1. Royalty Collecting Societies and Unauthorized Online Peer-to-Peer File Sharing

Intellectual property is an important component of the French cultural exception. Unauthorized online peer-to-peer file-sharing poses a serious threat to the French intellectual property industry, and by extension, the French cultural exception.[367] The first group to rise to that challenge was the intellectual property collection societies.[368] In France, IP collecting societies are tightly controlled by the government, within the framework of the Intellectual Property Code.[369] Under intellectual property law, these societies are required to use a proportion of their receipts to promote cultural activities.[370] The intellectual property code further empowers these societies to become civil plaintiffs in intellectual property violation cases.[371] Furthermore, collecting societies are allowed to set up data processing systems for purposes of monitoring and tracking intellectual property violators.[372]

The enforcement activities of collecting societies led to acute tensions between intellectual property law and privacy law. In effect, under the provisions of Law n°78-17 of 6 January 1978 on Informatics, Files and Freedoms, collecting societies seeking to monitor computer networks for violation of the intellectual property rights they manage must first seek authorization from the *Commission nationale de l'informatique et des libertés* (National Commission on Informatics and Freedoms, CNIL).[373] In early peer–to–peer file-sharing disputes, tensions arose between Intellectual Property Code provisions authorizing collecting agencies to monitor and take legal action against intellectual property violators, and data processing laws, which forbid computerized data processing of nominal data about an identified or identifiable human person.[374] The idea behind this law is that information processing "must not violate human identity, human rights, the right of privacy,

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[367] *See, e.g.*, PIERRE SIRINELLI, INDUSTRIES CULTURELLES ET NOUVELLES TECHIQUES: RAPPORT DE LA COMMISSION PRESIDEE PAR PIERRE SIRINELLI [Cultural Industries and New Technologies: Report of the Commission Presided by Pierre Sirinelli] (2005) (Fr.), *available at* http://eucd.info/index.php?2005/11/14/176-exclusif-rapport-de-la-commission-sirinelli.

[368] *See* Barbara Cohen, *A Proposed Regime for Copyright Protection on the Internet*, 22 BROOKLYN J. INT'L L. 401, 424 (1996) (stating, "European nations also have their own copyright societies for the licensing of public performance rights . . . [i]n France, the Societe des Auteurs, Compositairs, et Editeurs de Musique (SACEM) is the clearinghouse for performing rights"); *see also* THE SOCIETE DES AUTEURS, COMPOSITAIRS, ET EDITEURS DE MUSIQUE, http://www.sacem.fr/cms (last visited Sept. 30, 2010).

[369] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PRO. INTELL.] arts. L. 321-1-1–L.321-13 (Fr.).

[370] *See id.*; *see also* Loi 98-536 du 1 juillet 1998 portant transposition dans le code de la propriété intellectuelle de la directive 96/9/CE du Parlement européen et du Conseil, du 11 mars 1996, concernant la protection juridique des bases de données [Law 98-536 of July 1, 1998 Transposing into the [French] Code of Intellectual Property Directive 96/9/EC of the European Parliament and the Council of Mar. 11, 1996 on the Legal Protection of Databases] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 2, 1998, p. 10075.

[371] *See* C. PRO. INTELL. arts. L. 321-1-1–L.321-13; *see also* Law 98-536 of July 1, 1998, art. 4 (Fr.).

[372] *See* C. PRO. INTELL. arts. L. 321-1-1–L.321-13; *see also* Law 98-536 of July 1, 1998, art. 4 (Fr.).

[373] Loi 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés [Law 78-17 of Jan. 6, 1978 Relating to Data, Files and Freedoms], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 7, 2008, p. 227.

[374] *Id.* at arts. 9-4, 25-3.

individual or public freedoms."[375] Under the provisions of the law on informatics, collection, storage and transfer of personal information without the authorization of the National Commission on Informatics and Freedoms ("CNIL"), is forbidden.[376] Additionally, individual data cannot be processed without the consent of the individual concerned except in specific medical emergencies defined by law.[377] Furthermore, under the provisions of this law, CNIL must grant special permission before nominal data (data containing names or other identifying human characteristics) can be processed by computers, transformed into computerized directories, stored in computers or transmitted via networks like the Internet, where it can be transferred to other countries.[378]

The Informatics law of 1978, which predated personal computers and the Internet by at least twenty years, is a legacy of World War II, during which the Vichy regime compiled an intricate database, the so-called *fichier juif* (Jewish files), a dossier of French Jews that facilitated the identification and deportation of thousands of Jews to Nazi German concentration camps.[379] Furthermore, the European Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data is incorporated into French individual privacy law.[380] The privacy rights set forth in these statutes essentially erected barriers against intellectual property rights holders, intellectual property management companies, and intellectual property collecting societies which sought to carryout surveillance on French citizens suspected of involvement in unauthorized online peer–to–peer file-sharing.[381]

In order to resolve the tension between intellectual property enforcement and respect for the right of privacy, French regulatory authorities had to make a determination 1) whether an Internet Protocol ("IP") address—the unique identification number assigned to each computer linked to the Internet—is nominal data about identified or identifiable human persons, and 2) whether the methods used by royalty collecting agencies to track down individuals suspected of engaging in illegal peer–to–peer file-exchange activities on the Internet—identifying and

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[375] *Id.* at art. 1.

[376] *Id.* at arts. 9-4, 25-3.

[377] *Id.*

[378] *Id.*

[379] *See Fiche d'orientation: Les sources conservées aux Archives nationals relatives à la spoliation des Juifs de France* [Guide to National Archives Holdings on the Despoiling of French Jews], Le Centre Historique des Archives Nationales [Historical Center of the National Archives] (1998), http://www.archivesnationales.culture.gouv.fr/chan/chan/notices/aj38f9.htm (displaying archives of the Vichy regime's *Commissariat aux questions juives* [Commission on Jewish Questions] whose policy of "Aryanization" was aimed at eliminating Jewish influence from the French economy through the seizure and sale of their businesses, companies and private properties to French "Aryans"). These archives contain very detailed personal information on all Jewish adults and children.

[380] Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Jan. 28, 1981, CETS no. 108, *available at* http://conventions.coe.int/treaty/en/treaties/html/108.htm.

[381] *See, e.g.*, Loi 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés [Law 78-17 of Jan. 6, 1978 Relating to Data, Files and Freedoms], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 7, 2008, p. 227 (showing an example of French privacy law that has been amended numerous times since its inception in 1978 to comply with the changing privacy standards).

collating the domain names and geographical locations of alleged offenders, as well as their Internet Service Providers through their IP addresses–violated the individual privacy provisions of the 1978 Law on Informatics, Files and Freedoms.[382] This case illustrates how courts have issued opinions that have decidedly tilted the balance of rights in favor of intellectual property protection.

2. Legality of Peer-to-Peer File-Sharing: Anthony G. v. SCPP

Anthony G. v. SCPP was a case that showed how France progressively applied intellectual property law enacted for the offline world, to online peer-to-peer file-sharing.[383] In this case French judicial and administrative institutions regulated the Internet like the rest of the offline media, a closed cultural sphere in which old and new technologies were treated similarly under the intellectual property code.[384] The case also illustrates the posture of French courts toward the recording industry, and organized interest groups seeking to enforce intellectual property regulations in the online environment.[385] In 2004, the SCPP, a royalty collecting society discussed above, lodged a complaint with the gendarmerie to the effect that an unidentified person operating from a certain Internet address was exchanging MP3 files online without the authorization of the copyright holders, contrary to provisions of the Intellectual Property Code.[386] The paramilitary gendarmerie obtained the identity of Anthony G. from his Internet Service Provider, the state-owned Wanadoo.[387] The gendarmerie then raided Anthony G.'s residence, seized his hard drive and found 1,875 MP3 music files in a "shared folder."[388] The French public prosecutor charged Anthony G. with unauthorized reproduction and distribution of copyrighted material through peer–to–peer software provided by Kazaa, a non-French peer-to-peer exchange site on the Internet.[389] Anthony G. was also criminally charged with illegally possessing pirated digital musical files on his computer's hard drive in violation of provisions of the Intellectual Property Code that criminalize possession of the fruits of a criminal act.[390] The penalty for this violation was a maximum of five years imprisonment.[391]

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[382] *See, e.g.*, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Vannes, Apr. 29, 2004, obs. Ms. Billard (Fr.) (providing an example of French courts dealing with privacy issues in relation to intellectual property lawsuits).

[383] Cour d'appel [CA] [regional courts of appeal] de Paris, 13ème chambre, Apr. 27, 2007, obs. Ms. Barbarin (Fr.), *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1954.

[384] *Id.*

[385] *Id.* (showing that Société civile des Producteurs Phonograhiques (SCPP), a royalty collecting society is party to the lawsuit); *see also* SOCIÉTÉ CIVILE DES PRODUCTEURS PHONOGRAHIQUES, http://www.scpp.fr/SCPP/ (last visited Sept. 30, 2010).

[386] CA Paris, 13ème chambre, Apr. 27, 2007.

[387] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 31ème chambre, Dec. 8, 2005, obs. Ms. Plantin (Fr.).

[388] *Id.*

[389] *Id.*

[390] *Id.*

[391] *Id.*

The *Tribunal de Grande Instance de Paris* (High Court of Paris) found Anthony G. not guilty on both counts.[392] It held that using peer–to–peer software for private, non-commercial purposes was not a violation of the Intellectual Property Code.[393] The state and SCPP appealed to the Paris Court of Appeals.[394] At the appellate level, Anthony G. sought refuge in the law of privacy.[395] He claimed that SCPP had violated his privacy by illegally monitoring his online activities, identifying his IP address and lodging a complaint against him with the gendarmerie.[396] The issues before the court were: 1) whether, Anthony G's identity had been obtained through illegal surveillance and data processing that amounted to a violation of the right to privacy, and 2) whether online peer-to-peer exchange of copyrighted material was protected under the "private copy exception" of the Intellectual Property Code.[397]

The court held that Anthony G's identity had been obtained legally and that unauthorized online peer-to-peer exchange of copyrighted material did not fall within the "private copy exception" of the intellectual property code.[398] The court therefore found Anthony G guilty as charged and imposed a suspended fine of €5000.[399] He was also ordered to pay SCPP €1500.[400] The court did not address Anthony G's claim that the unique IP addresses of computers fell within the category of personal information protected by the Law on Informatics and Liberties of 1978.[401] Interestingly, the court ordered that the criminal conviction not be entered into Anthony G's record.[402]

3. Individual Privacy and Intellectual Property Collection Agency Monitoring of Online Peer–to–Peer Activities

As noted above, the right to privacy is one of the fundamental tenets of the French exception. Computerized processing of the personal data of identified or identifiable human persons without consent is illegal under the French Penal Code.[403] However, intellectual property protection is also a crucial component of the French exception. Duplicating and distributing intellectual property products without the consent of the rights owners is classified as piracy.[404] French legislators and French courts had to decide whether the intellectual property enforcement activities of royalty collecting agencies—monitoring and recording the IP addresses of online peer–to–peer file-sharers for purposes of determining those who engaged in illegal file-sharing –fell within the category of data processing activities that require

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[392] *Id.*
[393] *Id.*
[394] Cour d'appel [CA] [regional courts of appeal] de Paris, 13ème chambre, Apr. 27, 2007, obs. Ms. Barbarin (Fr.), *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1954.
[395] *Id.*
[396] *Id.*
[397] *Id.*
[398] *Id.*
[399] *Id.*
[400] *Id.*
[401] *Id.*
[402] *Id.*
[403] CODE PÉNAL [C. PÉN] art. 226-16–226-23 (Fr.).
[404] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PRO. INTELL.] art. L. 336-3 (Fr.).

the prior authorization of the National Commission on Informatics and Individual Freedoms ("CNIL"), under the Law on Informatics, Files and Freedoms of 1978.[405]

The first legal test of this question occurred in 2004, when French intellectual property royalty collection societies, led by *la Société des Auteurs, Compositeurs et Editeurs de Musique* (the Society of Music Authors, Composers and Publishers, SACEM), requested that CNIL grant them permission to set up a system of automatic monitoring of illegal online peer–to–peer file-sharing.[406] The proposed system would have involved the surveillance, systematic collection and processing of the IP addresses of peer–to–peer file-shares, and identification of the individual file-sharers.[407] The intent of the data processing exercise was to send warning messages to alleged offenders informing them of the legal sanctions they were exposing themselves to by indulging in unauthorized online peer–to–peer file-sharing.[408] SACEM also indicated that it wanted to use the evidence gathered from its monitoring activities to take legal action against large-scale peer–to–peer file exchangers.[409]

CNIL denied the request on the grounds that the scale of the proposed automatic online surveillance would violate privacy and data protection laws.[410] The commission held that the proposed scheme to collect evidence was "disproportionate" to the aim of combating online peer–to–peer piracy "since it did not put in place a system of one-off actions strictly limited to the needs of fighting [piracy] but its monitoring could lead, on the contrary, to mass collection of online personal data and to an extensive and constant surveillance of peer–to–peer networks."[411] The

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[405] *Surveillance of Peer-to-Peer Networks*, COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS, http://www.cnil.fr/english/main-issues/tracking-web-surfers/#c1476 (last visited Sept. 30, 2010) ("In Oct. 2005, CNIL had rejected applications for the installation of four peer-to-peer surveillance systems filed by royalties collection and copyrights distribution societies in the music industry (SCAEM, SDRM, SPPF and SCPP).").

[406] *See id.*

[407] *See id.*

[408] *See PHR2006—French Republic*, PRIVACY INTERNATIONAL, http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-559537 (last visited Sept. 30, 2010).

> The data protection authority is the Commission nationale de l'informatique et des libertés (CNIL), an independent agency that enforces the. Law on Informatics, Files and Freedoms of 1978 and other related laws. The Commission takes complaints, issues rulings, sets rules, conducts audits, makes reports, and ensures public access to information by being a registrar of all computerized data processing activities. In addition, the 2004 amendments to the Law on Informatics, Files and Freedoms allow the CNIL to investigate computerized data processing, issue warnings, and impose sanctions (fines of up to €150,000). In 2006 the CNIL issued its first financial sanction (a €45,000 fine) against the French bank, Crédit Lyonnais, for violating its customers' right of access to their personal data.

Id.

[409] *See, e.g.*, Cour de cassation [Cass.] [Supreme Court for Judicial Matters], Chambre criminelle, Jan. 13, 2009, obs. Mr. Pelletier, http://www.legalis.net/jurisprudence-decision.php3?id_article=2563 (showing one of the instances in which SACEM took legal action with evidence gathered by surveillance).

[410] CNIL, Oct. 8, 2005, Deliberation 2005-235; *see also* CODE PÉNAL [C. PÉN] art. 226-16 – 226-23 (Fr.).

[411] CNIL, Oct. 8, 2005, Deliberation 2005-235.

collecting societies, led by SCPP, appealed the decision to the *Conseil d'Etat* (the Council of State), the court of last resort on matters pertaining to administrative law.[412] The issue before the court was whether the proposed surveillance system would potentially constitute a violation of the right of privacy of French citizens.[413] The *Conseil d'Etat* said it would not, and quashed CNIL's decision.[414] The court ruled that the intent of the proposed surveillance program was to collect evidence of illegal file-sharing, not to invade the privacy of law-abiding French citizens.[415] The State Council concluded that the surveillance program was not disproportionate to the aim of combating intellectual property violation, given the scope of the problem of online digital piracy.[416] The consequence of this decision was that under administrative law, monitoring and recording the IP addresses of online peer–to–peer file-sharers for purposes of determining those who engaged in illegal file-sharing was not a violation of individual privacy.[417]

However, this decision did not resolve outstanding legal issues related to unauthorized online peer–to–peer file-sharing. Due to the highly compartmentalized nature of the French judicial system,[418] definitive answers had to be found for the criminal and civil law aspects of the problem. The *Cour de Cassation* (The French Supreme Court for civil and criminal matters) addressed these issues in 2009. In the *case Sacem et autres c/. Cyrille S.* (*Sacem and Others v. Cyrille S.*), the court held that agents of intellectual property royalty collecting societies are not required to obtain prior authorization from the CNIL in order to proceed with collection of the IP addresses of persons suspected of unauthorized uploading and downloading of

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> Délibération portant refus d'autorisation de la mise en oeuvre par la Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) d'un traitement de données à caractère personnel ayant pour finalités, d'une part, la constatation des délits de contrefaçon commis via les réseaux d'échanges de fichiers dénommés "peer to peer", d'autre part, l'envoi de messages pédagogiques informant les internautes sur les sanctions prévues en matière de délit de contrefaçon.
>
> [Deliberations on the denial of authorization to the Society of Authors, Composers and Music Editors (SACEM), which sought [permission] to put in place a system of processing of personal data destined, on the one hand, to establish [the existence of] counterfeiting offenses committed through file-sharing networks known as "peer to peer," and, on the other hand, to send pedagogical messages informing Internet users about [legal] sanctions against counterfeiting].

Id.

[412] *Decision 288149*, CE SECT., May 23, 2008, *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1922.

[413] *Id.*

[414] *Id.*

[415] *Id.*

[416] *Id.*

[417] *Id.*

[418] France has a number of jurisdictions of last resort: The *Conseil Constitutionnel* (Constitutional Council). is the highest constitutional authority in France. However, it is not a "supreme court" in the American sense of the term. It reviews bills submitted to it by the legislature and determines whether they conform to the constitution before they are enacted. The *Cour de Cassation* is the supreme court for criminal and civil matters (it has separate criminal and civil chambers), while the *Conseil d'Etat* is the court of last resort for administrative matters.

intellectual property protected works in online peer-to-peer file-sharing networks.[419] The Court held that the use of peer-to-peer software to manually compile lists of songs exchanged online, as well as the IP addresses of the exchangers, for purposes of enforcing intellectual property rights under provisions of the Intellectual Property Code, did not amount to the type of automatic data processing that required prior authorization from CNIL under article twenty-five of the Law on Informatics, Files, and Liberties of 1978.[420] The implication of this case is that royalty collecting societies that subscribe to peer–to–peer networks, monitor activities in the network, and use the peer–to–peer software to manually compile lists of MP3 files exchanged and the IP addresses of the exchangers for purposes of collecting evidence, did not violate the right of privacy of peer–to–peer file-sharers.[421] The outcome of this case is that in the domain of peer-to-peer online file sharing, intellectual property rights enforcement supersedes privacy rights.

4. Online Peer-to-Peer File-Sharing and Harmonization of the European Union Information Society Directive of 2001

In order to bring the Internet within the ambit of international intellectual property law, a World Intellectual Property Organization ("WIPO") Diplomatic Conference led to signing of treaties designed to protect authors, performers and phonogram producers–the WIPO Copyright Treaty,[422] and the WIPO Performances and Phonograms Treaty ("WPPT").[423] The aim of both treaties was to keep intellectual property and related rights abreast of innovations in information and communication technologies.[424] The treaties were also aimed at responding to new the economic realities engendered by globalized, Internet-based forms of creation, reproduction and exploitation of cultural productions.[425] These treaties essentially brought intellectual property law and policy into the age of the Internet. The European Community was a signatory to the WIPO Copyright Treaty of 1996, and the WIPO Performances and Phonograms Treaty of 1996.[426]

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[419] Cour de cassation [Cass.][Supreme Court for Judicial Matters], Chambre criminelle, Jan. 13, 2009, obs. Mr. Pelletier, *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=2563.

[420] *Id.*

[421] *Id.*

[422] WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65, *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

[423] WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76, *available at* http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.

[424] J.A.L. STERLING, WORLD COPYRIGHT LAW 707 (2d ed. 2003) ("In sum, the Treaties represent a considerable advance in the search for solutions to the problems posed for copyright and related rights by recent technological developments, but they should, it is suggested, be regarded as only the beginning of a process of updating the law in this field.").

[425] *See* Council Directive 2001/29, 2001 O.J. (L 167) 10 (EC).

[426] WIPO Copyright Treaty, *supra* note 422 (displaying a list of all signatories here: http://www.wipo.int/treaties/en/notifications/wct/treaty_wct_2.html); WIPO Performances and Phonograms Treaty, *supra* note 423 (displaying a list of all signatories here: http://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_1.html).

In order to implement some of the international obligations of these treaties in the European economic space, the European Union issued a directive on the harmonization of intellectual property rights in the Information Society.[427] France was one of the last EU member-states to transpose this directive into its national intellectual property regime.[428] The French government opted to solve the online peer–to–peer file-sharing problem within the framework of its transposition of the European Union Information Society Directive.[429] The transposing legislation was the "Law on Author's Rights and Neighboring Rights in the Information Society."[430] This law criminalized unauthorized peer-to-peer sharing of intellectual property works on the Internet.[431] A provision of the law banned the creation, distribution, advertising and utilization of peer-to-peer file-sharing software:

> *Est puni de trois ans d'emprisonnement et de €300 000 euros d'amende le fait:*
> *1° d'éditer, de mettre à la disposition du public ou de communiquer au public, sciemment et sous quelque forme que ce soit, un logiciel manifestement destiné à la mise à disposition du public non autorisée d'œuvres ou d'objets protégés ;*
> *2° d'inciter sciemment, y compris à travers une annonce publicitaire, à l'usage d'un logiciel mentionné au 1°.*[432]

> It is punishable by a term of three years imprisonment and a fine of €300,000 to:
> 1. Publish, put at the disposal of the public or communicate to the public, knowingly and in any form, software manifestly destined to make available to the unauthorized public, protected works or objects;
> 2. Knowingly encourage, including through advertising, use of the software mentioned in 1.

At least sixty members of the National Assembly challenged the constitutionality of this provision.[433] The draft bill was referred to the Constitutional

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[427] Council Directive 2001/29, 2001 O.J. (L 167) 10 (EC).

[428] Loi 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information [Law 2006-961 of Aug. 1, 2006 on Law on Author's Rights and Neighboring Rights in the Information Society], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.][OFFICIAL GAZETTE OF FRANCE], Aug. 3, 2006, p. 11529; *see also* Joachim Schöpfel, *The New French Law on Author's rights and Related Rights in the Information Society*, 34 INTERLENDING & DOC. SUPPLY 167 (2006) ("Most of the countries modified their laws on copyright and author's rights between 2003 and 2005. . . . Spain implemented the directive in June 22, 2006, and after the votes of the National Assembly and Senate June 30, 2006, the French President finally promulgated a new law on the author's rights and related rights in the information society.").

[429] Law 2006-961 of Aug. 1, 2006; *see also* Schöpfel, *supra* note 428.

[430] Law 2006-961 of Aug. 1, 2006.

[431] *See id.* at art. 21.

[432] *See id.*

[433] Letter from Sixty Members of the National Assembly to Pierre Mazeaud, President of the Constitutional Council, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2006/2006-540-dc/saisine-par-60-deputes.47803.html; *see also* Deana Sobel, *A Bite Out of Apple? Itunes, Interoperability, and France's Dadvsi Law*, 22

Council, the institution that exercises legislative review in France.[434] The Constitutional Council held that this statutory revision passed constitutional muster.[435] The Constitutional Council also held that the use of peer-to-peer software to engage in unauthorized online sharing of copyrighted material violated article twenty-four of the Law on Author's Rights and Neighboring Rights.[436]

5. Statutory Law of Unauthorized Online Peer–to–Peer File-Sharing in France

As we saw earlier, intellectual property law in France protects the property and moral rights of creators of intellectual property works. Unauthorized online peer–to–peer exchange of intellectual property posed a serious philosophical and moral challenge to the French intellectual property regime and French exceptionalism. The emergence of Apple's iPod, and iTunes Store Audio visual distribution service in the wake of the legally-sanctioned demise of the Napster and Grokster peer–to–peer file-sharing model, set off an online "cultural race" between France and the Internet.[437] France wanted to digitize and make available as much of its *patrimoine national* (national heritage) as possible on the Internet to counter Anglo-American dominance of online content.[438] The French government decided that the solution to the peer–to–peer file-sharing problem was to create a French cultural platform that would provide legal French language cultural content on the Internet.[439] In 2006, the French legislature brought statutory law abreast of case law in the area of peer–to–peer file-sharing.[440] The French National Assembly passed a law extending the ambit of the intellectual property code to include unauthorized downloading and uploading of MP3 files within the context of peer–to–peer file-sharing.[441] The aim of the law was to prevent the illegal uploading, downloading and sharing of audiovisual

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BERKELEY TECH. L. J. 267, 273 (2007) (stating that more than one hundred members of the National Assembly demanded that the bill be reviewed by the Constitutional Council).

[434] Letter from Sixty Members of the Nat'l Assembly to Pierre Mazeaud, President of the Constitutional Council, *supra* note 433.

[435] Conseil constitutionnel [CC] [Constitutional Court] decision No. 2006-540 DC, July 27, 2006, J.O. p. 11541 (Fr.).

[436] *Id.*

[437] Press Release, Apple, Inc., *supra* note 302

[438] Sophie Hardach, *France Joins Race to Digitize World's Book*s, INT'L BUS. TIMES (Jan. 10, 2010, 7:24 PM), http://www.ibtimes.com/articles/20100120/france-joins-race-to-digitize-worlds-books.htm.

[439] J.O. du 141 du 20 juin 2003 Vocabulaire du Courrier éleectronique [Vocabulary of e-mail], Commission générale de terminologie et de néologie [General Commission on Terminology and Neology], OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 20, 2003, p. 10403 (presenting officially approved French equivalents for the original English terminology for e-mail and related communication technologies).

[440] Loi 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information [Law 2006-961 of Aug. 1, 2006 on Law on Author's Rights and Neighboring Rights in the Information Society], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.][OFFICIAL GAZETTE OF FRANCE], Aug. 3, 2006, p. 11529.

[441] *Id.* at art. 21.

material protected by copyright or neighboring rights.[442] The end result is that peer–to–peer file-sharing is essentially illegal in France.

While courts in the United States ruled that unauthorized peer–to–peer exchange of copyrighted content on the Internet was not fair use, they left resolution of online music distribution issues to the private sector.[443] Apple's iPod and iTunes music distribution service quickly provided a legal online music distribution alternative.[444] The approach was different in France. The country is, as we have seen, a cultural state where the government is the main patron and sponsor of the arts and culture. As such, France did what came naturally; it opted for a statist, bureaucratic solution to the peer–to–peer and Internet content problem.[445] The National Assembly passed a law that criminalized unauthorized online peer–to–peer file-sharing, and created an governmental agency, *la Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet (HADOPI)* (The High Authority for the Diffusion of [intellectual property] works and Protection of Rights on the Internet).[446] This law was aimed at controlling the transmission of protected works on the Internet and to create a French cultural imprint on the online multi-media distribution industry that was set in motion, and was being dominated by Apple Inc.'s iTunes Store.[447] To make matters worse, Apple Inc.'s iPods and iPhones dominated the market in France.[448]

France wanted to diversify Internet content by increasing the amount of legal French language content available in commercial distribution networks. The HADOPI law was therefore conceptualized as a solution not only to unauthorized online peer–to–peer file-sharing, but also to the problem of the paucity of legal French language cultural content on the commercial online distribution services.[449] In presenting the law to the French National Assembly, the French Minister of Culture, Christine Albanel, asked the legislators a rhetorical question: "Is technology going to dictate its rules to us or are we going to impose on it, in a modest

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[442] *Id.*

[443] A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1017 (9th Cir. 2001).

[444] Press Release, Apple, Inc., *supra* note 302.

[445] Loi 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information [Law 2006-961 of Aug. 1, 2006 on Law on Author's Rights and Neighboring Rights in the Information Society], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.][OFFICIAL GAZETTE OF FRANCE], Aug. 3, 2006, p. 11529; Loi 2009-669 du 12 juin 2009 de favorisant la diffusion et la protection de la création sur internet [Law 2009-669 of June 12, 2009 on Promoting the diffusion and Protection of Intellectual Property], OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 13, 2009, p. 9666.

[446] Law 2006-961 of Aug. 1, 2006, art. 21 (criminalizing unauthorized online P2P file-sharing); Law 2009-669 of June 12, 2009, art. 5 (establishing The High Authority for the Diffusion of [Intellectual Property] Works and Protection of Rights on the Internet).

[447] Law 2009-669 of June 12, 2009, art. 5; *see also* Eric Pfanner, *France Approves Crackdown on Internet Piracy*, N.Y. TIMES (May 12, 2009), http://www.nytimes.com/2009/05/13/technology/internet/13net.html.

[448] Décision n° 08-MC-01 du 17 décembre 2008 relative à des pratiques mises en oeuvre dans la distribution des iPhones [Decision No. 08-MC-01 of Dec. 2008 Relative to Practices Implemented in the Distribution of iPhones], http://www.autoritedelaconcurrence.fr/pdf/avis/08mc01.pdf (last visited Sept. 30, 2010) (stating that In France, 35,000 iPhones were sold within four days of their being placed on the Market July 18, 2008).

[449] Law 2009-669 of June 13, 2009, p. 9666 (Fr.).

and pragmatic fashion, the rules that our French society has set for itself?"[450] This question summarized the French government's posture towards application of the intellectual property code designed for the offline media, to the realities of cultural content distribution on the Internet.

The terms of reference of the High Authority for the Diffusion of [intellectual property] works and Protection of Rights on the Internet (HADOPI) include: encouraging the development of legal content on the Internet, monitoring legal and illegal use of works protected by intellectual property and neighboring rights in online communication networks, and protection of intellectual property infringement in the online environment.[451] The law contained certain penal provisions that applied intellectual property enforcement measures enacted for offline media to cyberspace.[452] These measures include empowering the judicial police to seize computers and servers used in unauthorized peer–to–peer file-sharing on the Internet.[453]

This law stipulates that the task of the High Authority for the Diffusion of [intellectual property] works and Protection of Rights on the Internet (HADOPI) was to control the transmission of protected intellectual property works on the Internet through a graduated, three-strikes system—subsequently declared unconstitutional—that included the right to suspend the Internet connections of illegal peer–to–peer file-sharers for a period ranging from two months to one year.[454] The HADOPI law of June 2009 did not solve the peer–to–peer and other Internet content problems. Four months later, the French National Assembly modified and

expanded HADOPI I by another statute, *Loi relative à la protection pénale de la propriété littéraire et artistique sur internet* (The Law Concerning the Penal Protection of Literary and Artistic Property on the Internet (HADOPI II).[455] This law reintroduced the penal provisions of HADOPI I that had been declared unconstitutional by the Constitutional Council. Under the provisions of this law, the mission of the High Authority for Diffusion of [Intellectual Property] Works on the Internet) includes:

- Encouragement of the development and availability of legal French cultural content on the Internet,

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[450] Assemblée nationale XIIIe legislature, session ordinaire de 2008-2009 Compte rendu Integral Première séance du mercredi 11 mars 2009 [National Assembly, 13th Legislature, Ordinary Session of 2008–2009, Complete Minutes of the Meeting of Mar. 11, 2009], http://www.assemblee-nationale.fr/13/cri/2008-2009/20090189.asp#P374_69661.

[451] Law 2009-669 of June 12, 2009, at art. 5.

[452] *Id.*

[453] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PRO. INTELL.], art. L 335-1.

[454] Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580 DC, June 10, 2009, J.O. p. 9675 (Fr.) (declaring that the provision giving HADOPI an administrative agency, rather that the courts, the power to impose what were essentially legal penalties–namely, termination of the Internet connections of persons engaged in repeated, illegal online P2P file-sharing was not constitutional).

[455] Loi 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet [Law 2009-1311 of Oct. 28, 2009 on the Penal Protection of Literary and Artistic Property on the Internet], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.][OFFICIAL GAZETTE OF FRANCE], Oct. 29, 2009, p. 18290.

- Monitoring the legal and illegal use of intellectually protected works and objects in online P2P file-sharing networks,

- Protection of intellectually property works and objects in cyberspace.

- Regulation and surveillance of Digital Rights Management (DRM) technologies. . . .[456]

Additionally, the law has a number of criminal sanctions that are applicable to intellectual property violations that occur in cyberspace.[457] These criminal penalties include suspension of the Internet access of intellectual property violators for a maximum period of one year.[458] Furthermore, Internet Service Providers that refuse to secure their networks against illegal peer–to–peer file-sharing, and fail to enforce Internet access suspension orders, face criminal liability.[459] HADOPI II amended the Code of Criminal Procedure and the Penal Code in order to bring unauthorized peer-to-peer file-sharing and other "crimes of counterfeiting committed by means of an online public communication service,"[460] within the ambit of the criminal provisions of intellectual property laws that were originally drafted to tackle piracy in the traditional media. Furthermore, HADOPI II requires the High Authority for Diffusion of [Intellectual Property] Works on the Internet to turn over evidence of illegal peer-to-peer file-sharing to single judge panels which are competent to impose criminal sanctions, fines, or order suspension of the Internet access of persons found guilty of unauthorized peer-to-peer file-sharing.[461]

C. Comparative Analysis

This article surveyed how the United States and France applied the rules of their respective intellectual property regimes to the novel phenomenon of peer-to-peer file-sharing on the Internet. We saw that in the United States, the exceptional, utilitarian "incentive" function of copyright guided legislative and judicial actions in online peer–to–peer file-sharing disputes.[462] Congress and courts at all levels laid emphasis on the adverse impact of unauthorized, facilitated, large-scale, online peer–to–peer exchanges on the incentive to produce intellectual property works for the general good.[463] For its part, French legislators and French courts applied the exceptional, romantic, cultural, and protectionist logic that underpins intellectual property regulation in the traditional media, to unauthorized peer–to–peer file-sharing on the Internet, irrespective of the scope of the file-sharing.[464] By criminalizing the manufacture, distribution or advertising of peer–to–peer software,

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[456] C. PRO. INTELL. art. L 331-13.
[457] *Id.* at art. L. 335-7.
[458] *Id.*
[459] *Id.* at art. L. 335-7-1.
[460] CODE DE PROCÉDURE PÉNAL [C. CRIMINAL PROCEDURE] arts. L. 398, L.398-1 (Fr.).
[461] Law 2009-1311 of Oct. 28, 2009, at art. 6.
[462] *See supra* Part II.A.
[463] *See supra* Part III.B.
[464] *See supra* Part III.C.

France reiterated its hostility towards those aspects of the Internet that are thought to pose a threat to French cultural sovereignty.[465]

A fundamental difference between the United States and France is that the United States has the doctrine of "fair use," which injects and protects First Amendment interests in intellectual property law.[466] This First Amendment "loophole" through which creative persons can safely slide transformative works, is non-existent under French law.[467] France has a narrow parody exception that can be used as an affirmative defense in intellectual property actions only if the parodist can show that his parody is harmless.[468] Furthermore, the Supreme Court of the United States has held that the commercial use of a copyrighted work without consent "weighs against, but does not preclude, a determination of fairness."[469] In France, unauthorized, commercial use of any intellectual property is presumptively illegal because the Internet is generally conceptualized as a medium of communication not a true marketplace.[470]

Though American and French legislatures and courts succeeded in creating a semblance of predictability and stability in the intellectual property "Wild West" that was the Internet, through application of rules and regulations designed for the media in real space to the media platforms in cyberspace, legal predictability came at the expense of due process and privacy rights.[471] In the United States, courts focused on the economic and systemic harms caused by large-scale, unauthorized online peer-to-peer exchange of copyrighted works.[472] The decisions in *Napster*, *Grokster,* and other cases led to the launching of legal avenues of downloading music.[473] However, the unintended consequence of these decisions is that they enabled the recording industry to declare "open sesame" on peer-to-peer software distribution companies, private individuals who participate in peer-to-peer file exchanges, as well as college and university students suspected of bulk peer–to–peer sharing of copyrighted material without the permission of copyright holders.[474] By manipulating the discovery process that was intended to create equality of arms between litigants,[475] the recording industry routinely invades the privacy of private citizens who are alleged to participate in online peer-to-peer exchanges. The recording industry has

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[465] C. PRO. INTELL. art. L 335.

[466] 17 U.S.C. § 107 (2006); *see also* POWELL, *supra* note 25, at 46–54 (discussing how the fair use doctrine is in line with the goals of the First Amendment).

[467] C. PRO. INTELL. (Fr.) (showing that France does not have a fair use doctrine).

[468] *Id.* at art. L. 122-5.

[469] *See* A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 913 (9th Cir. 2000); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

[470] *See* Lyombe Eko, *Many Spiders, One World Wide Web: Towards a Typology of Internet Regulation*, 6 COMM. L. AND POL'Y 445, 471 (2001).

[471] *See, e.g.*, Cours d'appel [CA] [regional courts of appeal] Paris, 13ème chambre, May 15, 2007, obs. Mr. Guilbaud (Fr.), *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1955; *see also, e.g.,* Def. Docs #16 and #18's Mot. for Sanctions Pursuant to Rule 11 with Inc. Mem. of Law at 2–3, Arista Records, LLC v. Does 1-27, No. 1:07-cv-00162-JAW, (D. Me. Mar. 31, 2008), *available at* http://www.ilrweb.com/viewILRPDFfull.asp?filename=arista_does1-27_080502DeftsReplyPapersRule11Motion.

[472] *See, e.g., A & M Records*, 114 F. Supp. 2d at 1016–17.

[473] *Id.*; *see also* MGM Studios v. Grokster, 545 U.S. 913 (2005); Press Release, Apple, Inc., *supra* note 302.

[474] *See* Beckerman, *supra* note 313.

[475] *See* STRACHER, *supra* note 310.

also succeeded in intimidating alleged file-sharers into reaching pre-litigation settlements worth more than $100 million.[476] Record industry abuse of the legal system through anonymous lawsuits, heavy-handed civil discovery, monitoring of the activities of individuals in online peer-to-peer networks without judicial oversight, and judicial awards of excessive damages to record and movie company plaintiffs may violate the spirit of the American due process edifice.[477]

Clearly, the American copyright regime favors wealthy copyright holders. Its "per infringed work" rule, which gives plaintiffs the ability to elect to receive, at any time before final judgment, an award of statutory damages which can be granted in any amount between $750 and $150,000 per infringed work, puts alleged infringers at the mercy of the recording and movie industry.[478] Plaintiffs do not have to show actual damages resulting from the alleged intellectual property violation to collect damages.[479] Pamela Samuelson & Tara Wheatland suggest that the United States is an "outlier," (that is, an exceptionalist nation), in the global copyright community because American courts have applied the statutory damages regime "in a manner that often results in arbitrary, inconsistent, unprincipled, and grossly excessive awards" that are entirely at variance with American due process principles.[480] The federal jury award of $1.92 million in *Capitol Records v. Thomas Rasset* is a case in point.[481]

In order to have true equality of arms between litigants in peer–to–peer suits, American courts must have greater oversight over the discovery process in order to eliminate abuses. Additionally, in order to ensure respect for the privacy and due process rights of alleged illegal peer-to-peer file-sharers, Congress needs to revisit its "per infringed work" rule and statutory damages regime, which have proved to be a boon to the recording industry.[482] Plaintiffs in peer-to-peer suits should be required to prove damages before they are allowed to collect damages.[483] Furthermore, Congress must not transform colleges and universities into investigating arms of the recording and movie industries.[484] Colleges and universities should refrain from cooperating with the abusive investigative activities of the recording and movie industries.[485] They should act like regular ISPs and require recording industry plaintiffs who want to monitor student participation in peer-to-peer file-sharing on university networks to follow due process, and present court issued search warrants.

In France, mitigation of the cultural harms caused by unauthorized online peer–to–peer file sharing of intellectual property is the government's rationale for suppressing the practice. French legislature and judiciary reaction to peer–to–peer

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[476] *Minn. Woman Who Lost Music-Share Suit Gets Reply*, BISMARCK TRIB., June 14, 2009, at 8C (stating that while the settlements add up to more than $100 million the RIAA contends its legal costs exceeded the settlement money it brought in).

[477] *See* Beckerman, *supra* note 313.

[478] 17 U.S.C. § 504(c) (2006).

[479] *Id.*; *see also* New Form, Inc. v. Tekila Films, Inc., 357 F. App'x 10, 11 (9th Cir. 2009) ("We have consistently held and stated that statutory damages are recoverable without regard to the existence or provability of actual damages.").

[480] *See* Samuelson, *supra* note 333.

[481] Capitol Records Inc. v. Jamie Thomas-Rasset, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010).

[482] 17 U.S.C. § 504(c).

[483] *See New Form, Inc.*, 357 F. App'x at 11.

[484] *See* Eric Bangeman, *supra* note 341.

[485] *See id.*

file-sharing on the Internet reflects French hostility and ambivalence towards the Internet, a network over which France has struggled to exercise its jurisdiction. Court decisions in the cases, *Anthony G. v. SCPP*, and *Sacem et autres v. Cyrille S.* essentially made the government the co-partners of French intellectual property royalty collection societies.[486] Additionally, the Internet police, *le Service Technique de Recherches Judiciaires et de Documentation*, which monitors cyber crime, partners with royalty collecting societies to monitor peer-to-peer file-sharing networks for purposes of collecting evidence of intellectual property violation.[487] While the French intellectual property regime does not have either the onerous statutory damages system of the United States or the pre-litigation discovery regime of the American system, its heavy-handed statist intervention in intellectual property disputes imposes a culturalist political solution on a global intellectual property problem. This has often taken place at the expense of the presumption of innocence that is guaranteed under French law.

However, it should be noted that French court decisions have been very lenient towards those convicted criminally and civilly of illegal peer-to-peer file-sharing on the Internet.[488] In fact, French court sentences have essentially been pedagogical exercises aimed at educating offenders about the cultural evils of intellectual property infringement. None of the legal disputes involving peer-to-peer file-sharing has resulted in a financial bonanza for the French culture industry.[489] No French court awarded fines or penalties of more than $5,000 to the plaintiffs.[490] This is clearly in line with the communitarian, social and pedagogical orientation of the country's exceptionalist intellectual property regime.

CONCLUSION

As we have seen throughout this article, the American copyright regime gives too much power to record and movie industry interests, which have taken advantage of this reality to file thousands of anonymous lawsuits against "unnamed persons" in order to be able to troll the Internet, gather information from private computers, and use this information to extort payments from private individuals.[491] This practice is at variance with American due process tradition. France has its own peer–to–peer problems to be sure. As we saw earlier, at the political, cultural and legislative levels, the Internet has posed several problems for France.[492] This is due in part to

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[486] *See* discussion *supra* Part III.C.

[487] *See, e.g.*, Cour d'appel [CA] [regional courts of appeal] de Paris, 13ème chambre, Apr. 27, 2007, obs. Ms. Barbarin (Fr.)(implying a relationship between the "Internet police" and the collection agencies as the police investigated and raided the defendant and a collection agency brought suit using that evidence); *see also* Cohen, *supra* note 368, at 424 ("European nations also have their own copyright societies for the licensing of public performance rights . . . [i]n France, the Societe des Auteurs, Compositairs, et Editeurs de Musique (SACEM) is the clearinghouse for performing rights."); THE SOCIETE DES AUTEURS, COMPOSITAIRS, ET EDITEURS DE MUSIQUE, http://www.sacem.fr/cms (last visited Sept. 30, 2010).

[488] *See* discussion *supra* Part III.C (discussing French law and the corresponding damages).

[489] *See* discussion *supra* Part III.C.

[490] *See* discussion *supra* Part III.C.

[491] *See* Beckerman, *supra* note 313.

[492] *See* discussion *supra* Part III.C.

the country's cultural exceptionalism, and its penchant for putting an abstract spin on practical technological innovations.[493] The story of the encounter between France and the Internet is the story of attempts by France to come to terms with the phenomenon, problematize it, and re-invent it in its Cartesian image for political and cultural reasons.

American and French application of intellectual property rules and regulations originally crafted for the traditional media to the online environment in general, and peer–to–peer file-sharing in particular, reflects the exceptionalist intellectual property logics of both countries. However, maintenance of the function of intellectual property on the online environment through judicial decisions and robust enforcement actions has raised individual privacy and due process concerns in the United States, and individual privacy and presumption of innocence concerns in France.[494] As both countries strive to enforce intellectual property rules and regulations in the online environment, legislatures, courts and law enforcement agencies continue to walk a fine line between protecting individual freedoms and protecting intellectual property. One thing is clear; though intellectual property rights need to be protected in the online and offline environments, this protection need not come at the expense of individual rights.

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[493] *See* discussion *supra* Part II.B.
[494] *See* discussion *supra* Part III.