‘The Internet: an open communication network? Studying online copyright enforcement policy from a communication science perspective.’

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ABSTRACT

This paper aims to provide a theoretical framework for analyzing the impact of online copyright enforcement policies on the democratic potential of the Internet to be an open communication network.

First, we gain and test insights from theories of open communication networks, surveillance studies, and particularly political economy of communication. The Internet has democratic potential as an open communication network to empower citizens by putting them in control of information, experience and resources. However, as information has gained importance in our economy and society, control over the Internet's architecture and content is greatly sought through the creation of scarcity. We argue that copyright, technological protection measures and surveillance are used as tools for the marketization of the Internet, reducing the medium from a societal use value to a market exchange value.

Second, we draw on the results of a qualitative analysis of the French graduated response policy to verify and illustrate the theoretical statements empirically. Inspired by Bhagwati's (1989) framework of 3Is (institutions, interests and ideas), we examine the legal and political context of the French graduated response policy, the various stakeholders and their opinions, and the rationales and theories endorsed. Through this analysis, we seek to lay the underlying power structures of the policy bare and focus on how the Internet is regulated in this policy and whether this policy encourages or discourages Internet user empowerment.

In the French graduated response policy, the Internet is being regulated in favor of the economic interest of right holders for a closed Internet with strong copyright protection to the detriment of the societal interest for an open Internet with widespread access to information. Creating scarcity and changing the design of the Internet through copyright, technical protection measures and surveillance means changing the democratic potential of the Internet. Graduated response advocates a heavily regulated and privately controlled Internet that disempowers users, stripping them of their ability to control of information, experience and resources.
1. INTRODUCTION

In 2009 France passed legislation to combat online copyright infringement through a graduated response mechanism. Under this mechanism, Internet users are monitored, and when caught infringing copyright, are repeatedly warned and ultimately sanctioned through a fine, imprisonment or suspension of Internet access. In this paper, we aim to provide a theoretical framework for analyzing the impact of online copyright enforcement policies on the democratic potential of the Internet to be an open communication network.

First, we study developments in Internet regulation and marketization theoretically. The paper gains and tests insights from theories of open communication networks, political economy of communication and surveillance studies. We highlight that the Internet is a tool with democratic potential, as it allows citizens to vocalize and disseminate their thoughts and ideas widely. However, we contend that control is sought over information and its infrastructure through the creation of scarcity, because control over information gives economic and political power. We argue that copyright, technological protection measures and surveillance are used as tools for the marketization of the Internet, reducing the medium from a societal use value to a mere market exchange value.

Second, we draw on the results of a qualitative analysis of the French graduated response policy to verify and illustrate our theoretical statements empirically. We use Jagdish Bhagwati’s (1989) framework of 3Is (institutions, interests and ideas) to structure our case study, examining the legal and political context (institutions), the various stakeholders and their opinions (interests), and the rationales and theories (ideas) endorsed in the French graduated response policy. With this analysis we seek to lay the underlying power structures of the policy bare and focus in particular on how the Internet is regulated in this policy and whether it encourages or discourages Internet user empowerment.

Following the political economic tradition, we argue that in the French online copyright enforcement policy, the Internet is being regulated in favor of the economic interest of right holders for a closed Internet with strong copyright protection to the detriment of the societal interest for an open Internet with widespread access to information. A choice is made for an Internet which is driven by commerce rather than community. In the French graduated response policy, copyright, technological protection measures and surveillance are used within an economic mindset to create scarcity and control on the Internet. We contend that if the Internet becomes a medium where market interests dominate, society will lose out. Indeed, if economic and societal interests are not weighed off in Internet regulation, the Internet will not provide the content and infrastructure necessary for debate in the public sphere. The Internet will be less a tool for democratic participation, more a tool for centralized control. This is a story about the enclosure of the Internet, and more broadly the media. This is not a new story. In fact, it is a very old story about the interrelation between media, state and economy. But it’s an important story which we believe is worth repeating.

2. THEORY: POLITICAL ECONOMY

2.1 The Internet: an open communication network?

The Internet has great democratic potential, as it facilitates open communication. It is a communication technology that allows citizens to vocalize and disseminate their thoughts and ideas widely. Characteristics of early Internet architecture such as simplicity and decentralization, but also interoperability, peer review and consensus point to an openness in the Internet’s original design (Castells, 2001; Lessig, 2006). The Internet was built with open, unfettered communication in mind.

The Internet fulfills a similar role to traditional media (such as radio and television) in serving as a platform to inform, provide content and stimulate discussion. Jostein Gripsrud & Hallvard Moe (2010) indicate that the purpose of the media is to provide the content and infrastructure for debate in the public sphere. The revolutionary democratic potential of the Internet is that it is not a select group reporting and discussing as is the case with traditional media, but rather potentially a wide range of
active citizens. The vast volumes of blogs and user-generated content on the Internet illustrate how information production has altered. It is a tool for citizens, for counter-power, for the community. Indeed, in “The control revolution: how the Internet is putting individuals in charge and changing the world we know”, Andrew Shapiro (1999) describes the biggest change that the Internet brings for citizens as one of control. The Internet empowers citizens by putting them in control of information, experience and resources.

Describing the Internet as a democratic open communication network, however, doesn’t paint the full picture. If we examine practices on the Internet today, it is clear that the Internet is also used for plenty of non-democratic and harmful purposes. Reports on cyber-threats and the call for more cyber-security are increasingly common. The prevalence of child pornography on the Internet is alarming. Additionally, it is clear that although the Internet empowers individuals and puts them more in control over information production and gathering, intermediation by journalistic media and delegation to an elected government are still necessary. Ideally, journalistic reporting helps us form opinions by bringing issues to our attention and exposing us to views that we would rather not hear. In our digital, information-abundant environment we need the expertise of journalists and trained government officials. One of the dangers of the control revolution is oversteer, taking disintermediation and personalization of information too far (Shapiro, 1999). Finally and importantly, like other media, the Internet is increasingly a tool for commerce, operating under economic principles of market domination and profit maximization (Castells, 2009; Foster & McChesney, 2011). Arguably, the Internet would not have spread to its current wide usage without the commercialization of the Internet in the nineties. This change, however, has significant consequences for the modus operandi of the Internet. The following section will address the issue of Internet regulation and marketization from a political economy perspective.

2.2 The Internet: a political economy

The theory of political economy is a critique of classic economics. Vincent Mosco (1996), a leading scholar in the political economy of media, states that the theory of economics does not accurately grasp social interaction and needs, contending that

“Economics has an inadequate theory of the social which rests on the view that society is the sum of individuals, that human action is predominantly rational, that information tends to flow freely, and that markets best disperse power, signal human wants, and register human needs.” (Mosco, 1996, p. 95)

Further, Robert McChesney (2008) is also quite clear in arguing that the market does not and cannot constitute a democracy, because participation is limited to those with financial resources and choice is determined by what is most profitable. Political economists believe that capitalism leads to a skewed class basis and promotes a culture that downplays communitarian values (McChesney, 2008; Mansell, 2004).

Research on the political economy of media, and thus of the Internet, aims to examine media systems in their relation to the market and state. Following the wider political economic tradition, political economy of media research starts from a “sense of injustice that the communication industry has become an integral part of a wider corporate order which is both exploitative and undemocratic” (Mosco, 1996, p. 19). The media is perceived as an arena for struggle over democracy. On the one hand, the media is a platform and watchdog, undermining inequality by giving access to information and monitoring exploitation by those in power. On the other hand, the media is a key pivot in the global economy (McChesney, 2008; Gripsrud & Moe, 2010; Shapiro, 1999). Political economy of media theorists argue that there is a commodification of media occurring and wish to contest this reduction of media from a societal use value to a mere market exchange value (Mosco, 1996).
2.3 Copyright, technology and surveillance: tools to create scarcity and control

Indeed, control over communication, and more broadly information and its underlying infrastructure to either allow or restrain the exchange of information gives economic power in our information economy. Additionally, as communication is essential in the forming of opinions, control over information is political power. Manuel Castells (2009) emphasizes that the construction of meaning through processes of communication is essential to power\(^1\). This is why control and concentration in media industries have traditionally been a topic of scrutiny in research on the political economy of media. Having property in media means being able to decide who is a speaker and who is a listener, who may influence the public debate (Gillespie, 2007). With the digitization of information and communication technologies and the spread of the Internet, control over information has been more difficult. As described in the previous section, this open communication empowers individuals and has democratic potential. However, as control over information is valuable for political and especially market reasons, means of creating scarcity are continually sought (Mansell, 2004). In this paper, we discuss three means of control relevant to the Internet and relevant to our French case study on graduated response.

(1) Copyright is an old but powerful legal tool for creating scarcity and thus control in the cultural industries (Mansell, 2004). Copyright is an exclusive right over the reproduction and distribution of a cultural work granted to artists and right holders for a limited period. In our information economy and society, however, copyright protects much more than cultural works, it extends to core informational resources and processes (Mylly, 2009). Within the political economic tradition, copyright can be seen as an extension of market thinking to control communication and its underlying infrastructure, because copyright gives right holders a monopoly over information, which by nature is a non-rivalrous, non-exclusionary good (Foster & McChesney, 2011). Lawrence Lessig (2004) argues that overly strong copyright is now leading to the privatization of our common culture. Both copyright and the Internet are considered valuable tools for communication and creativity in society. There are, however, significant differences in the political economies underlying these two tools. While copyright seeks to encourage creativity by protecting content, the Internet facilitates widespread distribution of content. Copyright enforcement policies on the Internet such as graduated response do not adequately consider the democratic potential of the Internet and how such policies can influence the balance between an Internet for commerce and for community.

(2) The use of technologies to block and filter on the Internet is a second means of creating control in the digital environment. Changes to the infrastructure of the communication technologies are indeed a powerful way of controlling. The original openness of the Internet which spurs on unfettered, open communication should not be taken for granted. For example, through deep packet inspection, each packet on the Internet can be analyzed and ultimately filtered out of the network (Mueller et. al., 2011). This is a means of control which can be used to combat cyber-security, child pornography or copyright infringement on the Internet, but steps away significantly from early characteristics of the Internet such as simplicity and decentralization. Media systems are not neutral, their built-in possibilities and restraints are the result of value-laden choices (Shapiro, 1999; Lessig, 2006; Zittrain, 2008). Political economists examine whether changes to the technologies empower or diminish individual control, because changes to communication technologies affect who we are politically and socially (Shapiro, 1999; Castells, 2009). In “Intellectual property and European economic constitutional law: the trouble with private informational power”, Tuomas Mylly (2009) places these discussions about copyright and technological change in a wider societal context and states that what is being decided here is not just market choice, but rather the rule of either democratic participation or centralized control.

"The social and political conflicts produced by technological change and ownership of informational resources cannot be reduced to the question of interests of individual market actors, as diverse values and comprehensive views are involved in these conflicts, too.

\(^1\) In line with Castells (2009, p. 10), we define power in this paper as “the relational capacity that enables a social actor to influence asymmetrically the decisions of other social actor(s) in ways that favor the empowered actor’s will, interests, and values.”
Increasingly often, these conflicts entail decisions between democratic participation and centralized control." (Mylly, 2009, p. 21)

(3) Surveillance is a third means of creating power in the Internet environment. Surveillance is a growing problem on the Internet. David Lyon (2001, p. 2) defines surveillance as "the collection and processing of personal data, whether identifiable or not, for the purposes of influencing or managing those whose data have been garnered". Surveillance can be used for care or control and has multiple purposes such as deterrence, consumption, entertainment, health, accountability, etc (Lyon, 2006). However, as the second part of Lyon’s definition reveals, surveillance does aim to influence or manage the surveilled. Surveillance is a means of social control. Through monitoring people who reside at a lower point in the social hierarchy, surveillance establishes and reinforces social inequalities. On the basis of selected criteria, the surveilled are put in categories and a profile of them is built up (Lyon, 2006). Surveillance is becoming increasingly normalized in our society, advocated as a means of averting risks. We are encouraged to give up a little privacy to protect against terrorism, to ensure the future of cultural production, to get the latest great deals on the market. However, just as copyright legislation and technical solutions can be used as tools to enforce policies and strategies of Internet regulation and marketization, surveillance is a tool used for classifying and controlling on the Internet. Surveillance and classification valorize one viewpoint while silencing another (Bowker & Star cited in Lyon, 2007). Surveillance strengthens the regime behind its design and frames its subjects as criminals, seeking to normalize them into rehabilitation (Lyon, 2001).

Two important remarks need to be made in conclusion. First, political economic approaches tend to highlight the structure of an issue to the detriment of agency (Mosco, 1996). Indeed, we focus on how changes to the structure of the Internet - the overarching policies, the underlying architecture - are shifting the Internet from a community-centered to a commerce-centered medium. However, the Internet as an open communication medium offers outlets for counter-power, for resistance to these changes (Benkler, 2006; Castells, 2009; Shapiro, 1999). The analysis of agency in forming a technology is just as important as the analysis of the structure. After all, this is what the Internet's democratic potential is all about. Second, we are not arguing that copyright, technological protection measures or surveillance are inherently bad. Each has its purpose when balanced. Instead we are arguing that they are often employed in policies and strategies that focus on economic features of the Internet. The core contention of this paper is that if the Internet becomes a medium where market interests dominate, society will lose out. The Internet will be less a tool for democratic participation, more a tool for centralized control.

In the following section, we will introduce our analysis of the French graduated response policy to enforce online copyright. Inspired by Bhagwati’s (1989) framework of 3Is (institutions, interests and ideas), we examine the legal and political context of the French graduated response policy, the various stakeholders and their opinions, and the rationales and theories endorsed. We seek to lay the underlying power structures of the policy bare and focus in particular on how the Internet is regulated in this policy and whether this policy encourages or discourages Internet user empowerment. Following the political economic tradition, we argue that in the French online copyright enforcement policy, the Internet is being regulated in favor of the economic interest of right holders for a closed Internet with strong copyright protection to the detriment of the societal interest for an open Internet with widespread access to information.
3. CASE STUDY: GRADUATED RESPONSE IN FRANCE

3.1 Methodology

The analysis of the graduated response policy in France fits within Trisha Meyer's doctoral research project and consists of three parts. In 2009 a first analysis was made of the policy debate, comparing it with developments in the EU and the UK (Van Audenhove, Morganti & Meyer 2009; Meyer & Van Audenhove, 2010). Then in 2011 a second analysis was made, focusing specifically on the rationales of the stakeholders towards copyright, Internet, surveillance and technological protection measures (Meyer & Van Audenhove, 2011). A third and final analysis will follow in 2012 to conduct interviews with stakeholders in France and study the implementation of the graduated response policy.

(1) The comparative analysis of the graduated response policy debate in the EU was primarily based on stakeholder responses to a public consultation of the European Commission dealing with Creative Content Online in the Single Market. At the research center IBBT-SMIT, we made a stakeholder and content analysis of all 239 non-citizen contributions to the consultation. Relevant to the graduated response debate were the last two questions, which concerned graduated response in France and Internet filtering as a way of preventing online copyright infringements. We also made a comparative study of the French and British graduated response policy proposals, focusing in particular on the political and legal context of the proposals (institutions) and the stakeholders involved (interests).

(2) In the second rationale analysis of the French graduated response policy we further identified the involvement of the French legal and political institutions, studied the main arguments used for and against graduated response (interests) and finally conducted an in-depth study of the rationales of the stakeholders towards copyright, Internet, surveillance and technological protection measures (ideas). This analysis was based on 82 texts, position papers, press releases and interviews of various stakeholders and provided us with insight into the ideas and theories underlying actors’ argumentation and endorsed in the French policy. It told us more about their views on copyright infringements, but more broadly also on the Internet and user empowerment.

In the following sections, we will refer to the analyzed stakeholders in group. The annex to this paper provides the full names and descriptions of the stakeholders. The five identified French stakeholder groups are:

• Government: ARCEP, CNIL, constitutional council, ministry of culture and communication, ministry of justice and liberties, parliament, president Nicolas Sarkozy
• European Union: commissioner Viviane Reding, European commission, council of the European Union, European parliament, MEP Catherine Trautmann, MEP Guy Bono
• Cultural industry: artists/cineasts, APC, ARP, CSDEM, IFPI, Marcel Dorcel, SACD, SACEM, SAMUP, SCAM, SCPP, SNAC, SNEP, SPPF, UNAC, UPFI
• Telecommunications and IT industry: AFA, ASIC, Free
• Civil society: Guillaume Lovet, Jacques Attali, La Quadrature du Net, Patrick Waelbroeck, UFC Que Choisir

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3 The references in the sections below are selective, yet representative. We could have included many more references, but this would not have bode well for the legibility of the paper. Please feel free to contact the authors at trisha.meyer@vub.ac.be if you would like a more extensive list of references for specific statements.
3.2 Legal and political context (institutions)

**Forerunners and framework**

France was the first European country to pass legislation in 2009 introducing a graduated response mechanism to deter online copyright infringement: LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (Hadopi 1) and LOI n° 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet (Hadopi 2).

Forerunners to the legally enforced graduated response mechanism in France are the DADVSI law and Olivennes agreement. In 2006, the French transposition of the European Union copyright directive\(^4\) (DADVSI) introduced an obligation for Internet account holders to monitor their network against copyright infringements. Then, in 2007, the government brokered a multi-stakeholder agreement (Olivennes, 2007) which further laid the basis for graduated response. This agreement was made legally enforceable with Hadopi 1 and 2 in 2009. The graduated response mechanism has been operational in France since Autumn 2010.

The French approach to copyright online fits within a wider framework to regulate the Internet. Arguably, the recently adopted French LOPPSI 2 law\(^5\) which deals with homeland security and issues such as online child pornography, has been the next step in the development of a French surveillance regime and its endeavor to control the Internet. LOPPSI 2 permits an administrative authority to order the blocking of Internet addresses containing pornographic depictions of minors. Furthermore, president Nicolas Sarkozy has developed a discourse of the need for the “civilization of the Internet” (Presidency of the French republic, 2009), which he has employed not only in the context of copyright protection but more generally at the level of Internet regulation as well. The latest venue for this discourse has been the G8, over which France is presiding this year. President Sarkozy has successfully placed Internet governance on the agenda of a meeting between the eight largest global economies, moving the debate away from its traditional international multi-stakeholder venue, the UN Internet Governance Forum, and towards a closed, government forum. International support for Internet control is thus also sought.

**Objectives of Hadopi**

Christine Albanel, minister of culture and communication when the first Hadopi law proposal was introduced, described the objective of the law “to stop the hemorrhage of cultural works on the Internet and to create the indispensable legal framework for the development of the legal offer of music, films, audiovisual works and programs, even literary works on the new communication networks” (French ministry of culture and communication, 2008, p. 3). The first French law creates Hadopi (Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet), an independent public authority. The second law deals with the expedited judicial procedure for suspending Internet access. Hadopi has three missions: to encourage the development of legal offers, to prevent online copyright infringement and to regulate and monitor technical protection measures.\(^6\)

Concerning legal offers, the first Hadopi law includes provisions to shorten the release windows for audiovisual works and to offer music catalogues free of technical protection measures. Further, Hadopi has developed a labelling scheme to make it easier for Internet users to identify legal offers. The French government has also launched a music card for young people, doubling the amount of credits on a card purchased as an incentive to obtain music legally.

Concerning technical protection measures, the first Hadopi law includes provisions for Hadopi to evaluate experimentations in the field of content recognition and filtering. It also stipulates that, at the request of right holders, a judge can order “all measures to prevent or put an end to an infringement

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\(^4\) LOI n° 2006-961 du 1 août 2006 relative au droit d’auteur et aux droits voisins dans la société de l’information.
\(^6\) LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, art. 5.
of an author’s right or related right against any person likely to contribute to remedy it”. Further, Hadopi needs to ensure that digital rights management on works is not used for anti-competitive purposes and does not deprive consumers of the benefit of certain legal exceptions, such as the right to a private copy.

**Procedure of graduated response**

The graduated response mechanism consists of monitoring, warning and sanctions. Right holders monitor the activities of Internet users. When they detect illegal file-sharing of copyrighted works, they can notify Hadopi. Based on the IP address provided by the right holders, Hadopi can then decide to send an email to the holders of the account where illegal activity was detected, reminding them of the obligation to secure their Internet access against copyright breaches and stressing the dangers of copyright infringement for the renewal of creativity and the economy of the cultural sector. The notification also points them to legal alternatives to obtain copyrighted works and ways to secure their Internet access. In case of renewed detection of illegal file-sharing within six months, account holders can be sent a second email and a registered letter. In case of a third detection within one year, Hadopi can notify account holders that their file will be transferred to the judicial authorities. Through an expedited criminal procedure, taking into account the gravity of the breach and the situation of the account holder, a judge can decide to suspend the Internet access for a period up to one year, in addition to a fine and prison sentence. Account holders who are not found guilty of illegal file-sharing but who repeatedly neglected to secure their Internet access risk losing their Internet access for a period up to one month, in addition to a fine and prison sentence. A visualization of the procedure can be found in figure 1.

![Graduated response procedure](image)

**Figure 1: Graduated response procedure (Hadopi, 2010)**

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7 LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, art. 10.
3.3 Main arguments for/against graduated response (interests)

The debate on graduated response in France centers on (1) the proportionality of the mechanism - and the balance between copyright and other fundamental rights, (2) its efficiency, and (3) its relation to legal offers. In our analysis, proponents of graduated response were the ministry of culture and communication, president Sarkozy and the cultural industry. The European institutions, the French regulatory authority for electronic communications and post (ARCEP) and the telecommunications and IT industry took a nuanced stance. Opponents were the civil society and the French commission for information and liberties (CNIL).

**Proportionality**

The ministry of culture and communication, president Sarkozy and the cultural industry stressed the pedagogical and preventive character of the mechanism (French ministry of culture and communication, 2010; APC & UPFI, 2008). Graduated response gives Internet users several chances to change their behavior. The suspension of Internet access was also deemed proportionate, because it is an alternative to the penal provisions (fine, imprisonment) in copyright law (French ministry of culture and communication, 2008).

The civil society, however, strongly advocated that the law proposals were “liberticide” - not respectful of fundamental rights of citizens, in particular the right to freedom of expression and communication, privacy, defense and presumption of innocence (La Quadrature du Net, 2008a; UFC Que Choisir, 2008). In its decision on Hadopi 1, the French constitutional council agreed that the government’s proposal to allow an administrative (rather than a judicial) authority to suspend Internet access was disproportionate considering the exercise of freedom of expression and communication is “a condition of the democracy and one of the guarantees of respect for other rights and liberties”. Further, in 2005, CNIL refused to allow right holders to monitor P2P networks for copyright enforcement purposes. This decision, however, was overturned by the French council of state in 2007.

**Efficiency**

The efficiency of graduated response was argued for by referring to various studies conducted about changes in behavior of Internet users if warned and sanctioned (for example studies by Entertainment Mediaresearch and IPSOS were referred to in French ministry of culture and communication, 2008, p. 7). Preliminary results of a longitudinal study commissioned by Hadopi indeed seem to indicate a decrease in illicit behavior: 72% of respondents who had received a notification answered that they has decreased or stopped consuming cultural works illegally. The study also stipulates, however, that these changes need to handled with precaution, as only 7% of the total number of respondents had received a notification so far (Hadopi, 2011). The proponents of graduated response also praised how these laws have stimulated cooperation between right holders and Internet service providers (SACD & SCAM, 2008).

Opponents of graduated response, however, stressed that technical measures and surveillance can always be circumvented and argued that identification on the basis of an IP address is inadequate (Capital.fr, 2009; Read Write Web Francophonie, 2009). Additionally, they thought the laws were already outdated as Hadopi only deals with copyright infringement on P2P networks (Attali, 2009a).

**Legal offers**

In the Hadopi 1 law proposal, graduated response is viewed as creating the necessary legal framework for the development of legal offers (French ministry of culture and communication, 2008). Proponents emphasized that reducing piracy levels is a prerequisite for legal offers (Presidency of the French republic, 2009; Films7.com, 2009), while opponents advocated a global license. A global license is an alternative remuneration model where right holders receive revenue through a tax collected on Internet service providers. Création Public Internet (2009), which brings together two civil society organizations, two cultural industry organizations and the French division of ISOC, believed

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the legislators and cultural industry should focus on developing a model, such as the global license, which encourages rather than discourages file-sharing.

3.4 Specific positions on copyright, the Internet, surveillance and code (ideas)

Copyright

The most recurrent reasoning for copyright in French graduated response policy is economic in nature: copyright as a just reward for labor. There is a strong concern about the losses of revenue for the cultural industry and artists due to piracy. The economic reasoning is intrinsically linked with cultural diversity and creativity. A just reward for labor is viewed as a prerequisite, a stimulus for creativity and legal offers. The French government and cultural industry frequently mentioned cultural diversity as a reason for graduated response (Ministry of justice and liberties, 2009; Le Monde, 2009). They argued that the French cultural patrimony was endangered by lack of copyright protection. The civil society, however, argued that culture was being used as a pretext in the debate to defend the status quo of the cultural industry (UFC Que Choisir, 2007). We would additionally contend that in the Hadopi laws the French government is effectively making a choice for a certain type of culture by not considering alternative cultural production. Their interpretation of cultural diversity does not encourage Internet users’ participation in the creation of non-copyrighted works.

Further, references were also made to the property and moral rights of authors in a few documents of the French ministry of culture and communication and cultural industry (Le Monde, 2009). In the droit d’auteur tradition, moral rights are the prime example of copyright as a natural law, a cultural work is the expression of its author’s personality. Considering the strong droit d’auteur tradition in France, we were expecting more reasoning based on the natural right of an author to property. Indirect references were made through the use of the terminology “stealing” and “plundering” to describe copyright infringement.

Internet

All stakeholders perceived the Internet as a communication and distribution medium, for legal and illegal purposes, although this was not always explicitly mentioned (Films7.com, 2009; SACD, 2009). Technical aspects of the Internet were not often referred to, except when discussing technical protection measures. The civil society and telecommunications and IT industry pointed to characteristics of the Internet (decentralized, international, open and neutral) which they believe were endangered by graduated response and the EU Telecoms Reform (La Quadrature du Net, 2009a; ASIC, 2008; ASIC, 2009).

Further, the Internet was presented by stakeholders as a tool for entrepreneurship and commerce on the one hand, and as a tool for social interaction and belonging, a tool for freedom of expression and access to information on the other hand (Ministry of culture and communication, 2008). The European commission (2008) stressed the importance of the Internet for employment and innovation. The telecommunications and IT industry agreed and emphasized the Internet as a vector for economic growth, an environment with new profit opportunities (ASIC, 2008). Some antagonism between the functions of the Internet as a tool for industry and for society could be observed. Importantly, the French constitutional council in its decision on Hadopi 1 considered that “in the current state of communication means and in view of the general development of online public communication services as well as the importance of these services for the participation in democratic life and the expression of ideas and opinions, this right [free communication of thoughts and opinions] implies the freedom to access these [Internet] services”.9 It ruled that considering the importance of the Internet for the exercise of human rights, Internet access could only be suspended by a judge. The European parliament (2008) and civil society further stressed the role of the Internet for new non-commercial content creation and discovery, indicating the potential of the Internet for the democratization of information production, distribution and consumption.

Finally and interestingly, most stakeholders perceive the information society and the Internet as revolutionary and unstoppable. The Hadopi 1 law proposal compared the current developments in cultural distribution and diffusion to the invention of the printing press (Ministry of culture and communication, 2008). This was, however, often accompanied with a discourse on the dangers of the Internet. The French ministry of culture and communication, the president and the cultural industry described the Internet as a jungle, an uncivilized environment where only the fittest survive (Presidency of the French republic, 2009; Le Monde, 2009). They strongly urged for regulation of the Internet. The European commission (2008) and civil society interpreted the reactions of the cultural industry (and government) to the Internet as one driven by loss of control (Capital.fr, 2009). We consider that the discourse of the French government and cultural industry on the need to civilize the Internet seeks to justify control over the medium through surveillance and technical regulation. It is another step in the direction of an enclosed Internet, of a restricted mass-medium comparable to the radio and television - a change which several artists indeed advocated in a letter to the socialist parliamentarians (Le Monde, 2009).

**Technological protection measures**

Regulation through technological protection measures was not mentioned frequently in the discussions on graduated response. Hadopi 1 encourages legal offers of music without technical protection measures. The lack of interoperability and transparency in digital rights management (DRM) was perceived negatively by all stakeholders. The European commission (2008) also indicated that the shift to regulation through code constituted a paradigm shift for consumers.

Further, Hadopi 1 includes a provision on experimentation with content identification and filtering technologies and allows a judge to order “all measures to prevent or put an end to an infringement of an author’s right or related right against any person likely to contribute to remedy it”. The telecommunications and IT industry pointed to the possible conflict of filtering with the rights to access to information and freedom of speech (ASIC, 2008). The civil society elaborated by stating that filtering is dangerous for innovation and liberties and entailed the criminalization of the Internet (Attali, 2009b). They also argued that technology evolves and thus can always be circumvented (Capital.fr, 2009; Read Write Web Francophonie, 2009). As mentioned above, the civil society and telecommunications and IT industry expressed concern about the preservation of decentralized, open and neutral character of the Internet (La Quadrature du Net, 2009a; ASIC, 2008; ASIC, 2009).

**Surveillance**

Only the French commission for information and liberties (CNIL) and the civil society raised surveillance as an issue in the graduated response. Other stakeholders took surveillance for granted, which is not unsurprising considering personal surveillance of the network by account holders and private surveillance on P2P networks by right holders were agreed upon before the passing of the Hadopi laws. It does illustrate, however, a normalization of surveillance in French society. The French government and the cultural industry argued that graduated response is mostly a proportionate and educational measure as it gives Internet users several chances to change their behavior and seeks to provide an alternative to the harsh penal sanctions (French ministry of culture and communication, 2010; APC & UPFI, 2008). Graduated response and surveillance are portrayed as tools for care rather than control.

CNIL (2007) originally sanctioned monitoring by right holders as it considered that these practices “led to a massive collection of data and could allow the extensive and continuous monitoring of file-sharing networks”. Guy Bono, a French MEP from the socialist party, and La Quadrature du Net (2008b; 2009b) also made reference to Orwell’s 1984 and the panopticon. They argued that graduated response would lead to a big brother society, a police state where suspicion is the norm. They sought to oppose surveillance with privacy legislation - with very limited success.

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4. CONCLUSION

In this paper, we discussed graduated response, an increasingly popular policy to fight online copyright infringement, from a communication science perspective. We started by sketching a theoretical framework for analyzing graduated response policies. We pointed to the democratic potential of the Internet as an open communication network to empower citizens by putting them in control of information, experience and resources (Shapiro, 1999). Relatively quickly, however, we indicated that this model of the Internet as a tool for community is not today’s reality. There is a strong pull on the Internet towards marketization, control of the Internet for economic reasons.

From a political economic perspective of the media, this commercializing trend of the Internet is unsurprising, yet deplorable. Political economists contend that economics has an inadequate theory of the social and wish to contest the reduction of media from a societal use value to a mere market exchange value (Mosco, 1996). We argued that copyright, technological protection measures and surveillance are three examples of means employed to create scarcity and thus control on the Internet. Indeed, in our information society the protection granted by copyright extends well beyond cultural works to core informational resources and processes (Mylly, 2009). Blocking and filtering in turn intervene at the technical layers of the Internet and introduce closed and centralized control in a system which previously ran on principles such as simplicity and decentralization, interoperability, peer review and consensus. Finally, surveillance aims at social control by strengthening the regime behind its design and framing its subjects as criminals, seeking to normalize them into rehabilitation (Lyon, 2001).

In the second part of the paper, we communicated the results of our study of the graduated response policy in France, because we believe graduated response illustrates the shift that is taking place on the Internet well. Graduated response deals with more than just copyright. We contend that it advocates the Internet as a tool for commerce to the detriment of community and user empowerment. In our case study, we first discussed the institutional context of graduated response in France and pointed out that graduated response fits within a wider international discourse of president Sarkozy to civilize the Internet. We also reported on the interests of the stakeholders involved by summarizing the arguments used for and against graduated response as a means of protecting copyright. These arguments deal with the proportionality and efficiency of the measure and its relation to legal offers. We are convinced that there is a need to go beyond these arguments and raise objections at a more fundamental level. Our analysis of the ideas underlying the graduated response policy is a step towards a critique of the core of this policy.

The French approach to copyright in graduated response is economic, it reasons that a loss of revenue is a loss of culture. Further, the Internet is considered as a key communication and distribution medium for commercial and societal purposes in the French copyright enforcement discourse, but importantly is also depicted as a jungle and a danger. User empowerment is absent, instead suspicion has taken its place and the approach is to deter and control the activities of Internet users. Surveillance is taken for granted and there is an openness towards regulation through technological protection measures. Only the civil society and telecommunications and IT industry referred to the wider implications of these means of control for Internet and society.

In this paper, we contend that graduated response is contributing to the enclosure of the Internet for economic interests. Following the political economic tradition, we argue that in the French online copyright enforcement policy, the Internet is being regulated in favor of the economic interest of right holders for a closed Internet with strong copyright protection to the detriment of the societal interest for an open Internet with widespread access to information. A choice is made for an Internet which is driven by commerce rather than community. In the French graduated response policy, copyright, technological protection measures and surveillance are used within an economic mindset to create scarcity and control on the Internet.

What is being battled out is the role of media in a society driven by capitalist values. We contend that if the Internet becomes a medium where market interests dominate, society will lose out. Indeed, if economic and societal interests are not weighed off in Internet regulation, the Internet will not provide the content and infrastructure necessary for debate in the public sphere. It will serve much less as a platform and watchdog, undermining inequality by giving access to information and monitoring.
exploitation by those in power, much more as another tool to gain advantage in the global economy, reinforcing capitalism’s skewed class basis and promoting a culture that downplays communitarian values. The Internet will be less a tool for democratic participation, more a tool for centralized control.

This paper has not told a new story by any means. However, it is an important story which should continue to be told. Finding the right balance between the societal benefits that the market brings through the creation of jobs, income, culture and so much more, and the fundamental unsocial biases of the capitalist system, is difficult if not near impossible. We believe that a first modest step towards finding a balance on the Internet is more awareness of the fundamental changes that policies such as graduated response are bringing about and more respect for the original set-up of the Internet as an open communication network.

Characteristics of early Internet architecture have encouraged use of the Internet for citizens, for counter-power, for the community. Creating scarcity and changing the design of the Internet through copyright, technical protection measures and surveillance means changing the democratic potential of the Internet. Graduated response advocates a heavily regulated and privately controlled Internet that disempowers users, stripping them of their newly found ability to control of information, experience and resources. From a communication science perspective, we conclude that the online copyright enforcement policy in France is leaning much more towards a colonization than a civilization of the Internet.
BIBLIOGRAPHY

**Theory: political economy**


Case study: graduated response in France


## ANNEX 1: LIST OF STAKEHOLDERS

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<tr>
<th>Stakeholder group</th>
<th>Stakeholder</th>
<th>Description</th>
<th>Analyzed documents</th>
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<td><strong>Government</strong></td>
<td>ARCEP</td>
<td>“Autorité de Régulation des Communications Electroniques et des Postes”&lt;br&gt;French regulatory authority for electronic communications and post</td>
<td>Advice on Hadopi 1 law proposal</td>
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<td>CNIL</td>
<td>“Commission Nationale de l'Informatique et des Libertés”&lt;br&gt;French commission for information and liberties</td>
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<td>Constitutional council</td>
<td>Assesses the constitutionality of laws</td>
<td>Hadopi 1 and 2 decisions</td>
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<td>Olivennes agreement; Hadopi 1 law proposal; communications on ministry website</td>
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<td>Ministry of justice and liberties</td>
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<td>President Nicholas Sarkozy</td>
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<td>Commissioner Viviane Reding</td>
<td>European commissioner for information society and media (2004-2010)</td>
<td>Letter to the French cultural industry</td>
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<td></td>
<td>European commission</td>
<td>Proposes EU legislation and checks it is properly applied across the EU. Works in the interests of the EU as a whole</td>
<td>Communication on creative content online in the single market</td>
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<td>Council of the European Union</td>
<td>National ministers meet to discuss and – together with Parliament – adopt EU laws. Works in the interests of national member states</td>
<td>Conclusions on the development of legal offers of online cultural and creative content and the prevention and combating of piracy in the digital environment</td>
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<td>European parliament</td>
<td>Members of the European Parliament (MEPs) are directly elected by EU voters. Works in interests of EU citizens</td>
<td>Internet freedom provision of telecoms reform; Resolution on cultural industries in Europe</td>
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<td>Communication</td>
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<td>Patrick Waelbroeck</td>
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<td>Création Public Internet</td>
<td>ISOC France, la Quadrature du Net, Pour le cinéma, SAMUP, UFC-Que Choisir</td>
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<td>Alliance of civil society and cultural industry organizations proposing alternative remuneration model (global license)</td>
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**ANNEX 2: ARCHIVED CNIL PRESS RELEASE**

Read the full press release [here](https://www.cnil.fr/FR/que-sommes-nous/la-cnille/article/surveillance-des-reseaux-peer-to-peer-la-cnille-prend-acte-de-la-decision-du-conseil-detat/).