

GRADUATED RESPONSE IN FRANCE: THE CLASH OF COPYRIGHT AND THE INTERNET

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Does a policy of escalating consequences for alleged copyright infringements decrease such incidents? Meyer looks at French laws passed in 2009 that provide for graduated responses up to suspension of Internet access for asserted illicit behavior. Preliminary results reported in 2011 suggest that these laws do decrease such incidents. However, Meyer argues this debate is not just about copyright, but is also used for leverage in the Internet governance debate to support broader content control. The future of the Internet, she says, should not be determined by one set of online issues that weigh the scales unduly against the open information distribution function of the Internet.

INTRODUCTION

Copyright and the Internet seem to be in a continuous heads-on clash. We need only to think of the large protests in the United States over two legislative proposals to enforce copyright online (the Stop Online Piracy Act and Protect Intellectual Property Act), or the international controversy over the multilateral Anti-Counterfeiting Trade Agreement (ACTA), to realize that the battle between copyright and the Internet is not over.¹ Intellectual property is highly valuable in our information-based economy; however, modern information and telecommunication technology and the Internet make its protection difficult. Over the past ten years, much has been done to curb the damage of illegal reproduction and distribution of copyrighted works: awareness campaigns linking piracy to theft, legislation with longer and stronger protection of copyright, lawsuits to pursue individuals and intermediaries contributing to infringement, technical restrictions on works to control permissible actions, and new business models to increase the availability of legal content online. Despite all these efforts, piracy remains rampant.

This article makes two arguments. First, it claims that there is a clash between the approaches that copyright and the Internet take toward information: copyright protects while the Internet distributes. Anti-piracy efforts mostly revolve around regaining control over content; the decentralized design of

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¹ Jonathan Weisman, "In Fight over Piracy Bills, New Economy Rises Against Old," *New York Times*, Jan. 18, 2012, accessed Apr. 5, 2012, <http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html?pagewanted=all>; "ACTA Activates European Civil Society," EurActiv.com, Feb. 6, 2012, accessed Apr. 5, 2012, <http://www.euractiv.com/infosociety/acta-activates-european-civil-society-news-510533>.

the Internet, however, aims for distributed control.² As long as efforts continue to focus mainly on controlling online content, they are bound to have a limited impact – unless the rationales and design of the Internet are changed. Indeed, today's Internet need not necessarily be tomorrow's Internet.³ This brings us to the second argument. This article contends that copyright is used as leverage for more control in the Internet governance debate. Much of the democratic and societal use of the Internet (for example, free speech writing or community building) depends on its open, cooperative, flexible, and decentralized nature. However, these very same characteristics are contested for economic or political reasons such as fighting piracy, and there are increasing calls for more and tighter regulation of the Internet.⁴

In this article, these arguments are tested by means of analyzing graduated response in France. Graduated response is a copyright enforcement mechanism, whereby Internet users are monitored and when caught infringing copyright are repeatedly warned and ultimately sanctioned through a fine, imprisonment, or suspension of Internet access. This article presents the history, objectives, and implementation of graduated response in France, and then analyzes the stakeholder discourses on the rationales underlying copyright and the Internet and the links to wider Internet governance issues. The added value of the stakeholder rationale analysis of copyright and the Internet⁵ is that it allows us to go beyond the arguments defending or opposing graduated response, and to investigate the French stakeholders' perception of copyright and the Internet as information tools in society.

This article contributes to literature in the field by carefully exemplifying the clash between copyright and the Internet, linking copyright enforcement to wider Internet governance issues and providing a detailed analysis of the policymaking debate around graduated response in France. Before the empirical case study, we first present a theoretical discussion of our two arguments.

COPYRIGHT AND THE INTERNET

Copyright: Finding the Balance Between Protection and Exploitation

Copyright gives creators temporary monopoly rights (so-called economic rights) to reproduce, adapt, and make a work of their mind available to the public. It also grants creators certain moral and personality rights, such as the right of attribution and to integrity of a work.⁶ Copyright has been around for three hundred years, has evolved with each new technology, and has taken different

² See for example Manuel Castells, *The Internet Galaxy: Reflections on the Internet, Business, and Society* (New York: Oxford University Press, 2001); Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2.0* (New York: Basic Books, 2006); Andrew L. Shapiro, *The Control Revolution: How the Internet is Putting Individuals in Charge and Changing the World We Know*, 1st ed. (New York: PublicAffairs, 1999).

³ Jonathan Zittrain, *The Future of the Internet – And How to Stop It* (London: Yale University Press, 2008).

⁴ Milton Mueller, *Networks and States: The Global Politics of Internet Governance* (Cambridge and London: MIT Press, 2010).

⁵ For a broader analysis of arguments used in debates on stronger online copyright enforcement, see Peter Yu, "Digital Copyright and Confuzzling Rhetoric," *Vanderbilt Journal of Entertainment and Technology Law* 13 (2011): 881-939.

⁶ Frank Gotzen and Marie-Christine Janssens, *Wegwijs in het Intellectueel Eigendomsrecht*, editie 2009 (Brugge: Vanden Broele, 2009); Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2001).

forms in various countries. In this article, the term *copyright* is used generically as a legal means of protecting cultural works (including the French *droit d'auteur* model).

The following four rationales for copyright (based on the work of Gillian Davies)⁷ demonstrate diverging ways of thinking about protection for creative works:

1. Natural Law: A cultural work is the fruit of a creator's mind. According to this first reasoning, the fruit of a person's mind should be considered property, because a person has a similar natural right of property to the fruit of his labors. A cultural work is also viewed as being the expression of a creator's personality and thus intrinsically linked to that person. This reasoning provides the basis for moral rights.

2. Just Reward for Labor: If something is worth creating, then it is worth protecting and a creator deserves remuneration for his work. This rationale gives copyright a firm economic foundation. It reasons that a creator should be rewarded for his effort. Similarly, the cultural industry needs to be able to expect a reasonable profit and return on investment to endeavor in the risky business of cultural production and distribution.

3. Stimulus to Creativity: Remuneration provides a stimulus to create, and a reason to contribute to science and culture. This reasoning presupposes that creators and the cultural industry need the assurance of protection and remuneration to create. Culture would be less diverse without financial encouragement.

4. Social Requirements: Finally, a creator should be rewarded not only for his own personal benefit, but also for the benefit of society. Through his creation, he enriches the national cultural patrimony. The fourth rationale lays a responsibility on creators and the cultural industry to spread their works widely. Copyright is granted in the wider interest of society.⁸

These four rationales (especially the second through the fourth) are interdependent. They provide moral, economic, and social reasons for copyright. They show how a balance needs to be found between protection and exploitation of copyrighted works. Copyright includes a social responsibility. For this reason, copyright legislation also includes limitations and exceptions to exclusive rights, such as the right to a private copy and use for commentary or research.⁹ In copyright, there is an emphasis on protection, but equally a tension between protection and exploitation of works. Neil Netanel speaks of "copyright's paradox" in which copyright is granted to spur on free speech, yet imposes unacceptable burdens on speech when private and public interests are not well balanced.¹⁰ Holders and users of copyright will have quite different definitions of where this balance between interests lies.

⁷ Gillian Davies, *Copyright and the Public Interest*, 2nd ed. (London: Sweet & Maxwell, 2002).

⁸ *Ibid.*, 13-17.

⁹ Gotzen and Janssens; Bently and Sherman.

¹⁰ Neil Netanel, *Copyright's Paradox* (Oxford and New York: Oxford University Press, 2008).

Furthermore, national copyright laws are traditionally divided into two models: copyright and *droit d'auteur*. The difference between both models lies primarily in the importance given to the underlying rationales. In the copyright model, economic principles of just reward for labor and stimulus to creativity dominate. Copyright is viewed as a positive law – rights that are not natural but rather granted by law. The aim of copyright is to incentivize creation economically with the public's interest for culture and creativity in mind. The *droit d'auteur* model emphasizes the close relationship between the author and his/her work. *Droit d'auteur* is viewed as a natural law – rights that flow from the creation of the work. The work is considered the property of the author, but limitations are set in place on this property right to ensure the public's interest is also served.¹¹ France approaches the protection of cultural works from a *droit d'auteur* perspective.

The Internet: Promoting Distributed Control

The Internet's original purpose was to facilitate communication within the academic and military spheres. Manuel Castells explains how the Internet is used for different reasons by four distinct user groups who together build up a unique Internet culture.¹² These can be interpreted as four rationales for the existence of the Internet:

- 1. Pursuit of Science:** The early Internet was the product of shared pursuit of technological advancement among computer scientists in the United States. Academics sought to build a decentralized communication network through building on each other's research and allowing peer review of one's own research. This first layer of the culture of the Internet is techno-meritocratic: merit is based on the contribution to technological discovery and on recognition and respect by other scientists.
- 2. Technological Sharing:** The second group of users – hackers – gives the shared pursuit of technological advancement a countercultural twist. Hackers also work on technical aspects of the Internet, but are part of loosely organized networks grounded in society. They are autonomous of corporate or institutional assignments. They have a distinct (at times anti-capitalist) worldview of open access and freedom to create and share knowledge. Similar to the academic setting, cooperation and free communication are again important values.
- 3. Social Interaction and Symbolic Belonging:** The Internet is also a tool to bring likeminded users together to work, discuss, and play on common topics. Hackers form a community focused on computer programming, but non-technical groups have also adopted the Internet as their means of networking. In this context, it is important to mention that the Internet is widely appreciated as a potential tool for democratization. Users can easily gather and share information with others. The Internet facilitates bottom-up and horizontal communication and can also be a medium of self-expression.

¹¹ Bently and Sherman.

¹² Castells, *The Internet Galaxy*.

4. Entrepreneurship: Finally, the Internet would not have boomed without its take-up by entrepreneurs for purposes of commerce. The Internet is essential as a collaboration and distribution medium in our information economy, but it is also a commercial space of its own. In this fourth layer of Internet culture, the capitalist values of domination (control) and profit maximization are supreme. This entrepreneurship transformed the Internet into a mass medium. The nature of a network is that the more users and uses there are, the more valuable a network becomes – not just economically but also socially.¹³

These four uses of the Internet build upon each other. Some important characteristics underlying the development of the early Internet culture have been openness (free communication, interoperability), cooperation (requests for comments, consensus), flexibility (the best efforts end-to-end approach) and decentralization (maximum autonomy of each node, distributed control).¹⁴

The fourth rationale of entrepreneurship and capitalism sits ill at ease with the other three purposes of the Internet, which are technically- or socially-oriented. The Internet has been lauded for its potential to contribute to democracy through the facilitation of free speech, deliberation between citizens, and community building. At the same time, the Internet is an important tool for innovation in managing businesses as well as an increasing business sector of its own.¹⁵ Tensions arise between social and economic uses of the Internet, in particular when it may not be economically efficient or profitable to maintain an open, cooperative, flexible, and decentralized space.¹⁶ Just as with copyright, industry actors and individual users will define the public interest of the Internet quite differently.

Copyright Enforcement: Governing the Internet and Beyond

The significant dissimilarity between these rationales and functions causes a clash between copyright and the Internet. There are tensions within copyright and the Internet about the balance between various uses of each tool; but more profoundly, their approach to information is different. Three out of the four copyright rationales identified above favor protection,¹⁷ while the Internet rationales opt for widespread distribution of information.¹⁸

¹³ Ibid., 36-63.

¹⁴ Ibid.; Lessig; Shapiro.

¹⁵ Manuel Castells, *Communication Power* (New York: Oxford University Press, 2009); John Foster and Robert W. McChesney, "The Internet's Unholy Marriage to Capitalism," *Monthly Review* 62, no. 10 (March 2011), accessed Apr. 5, 2012, <http://monthlyreview.org/2011/03/01/the-internets-unholy-marriage-to-capitalism>.

¹⁶ Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2003); Robert W. McChesney, *The Political Economy of Media: Enduring Issues, Emerging Dilemmas* (New York: Monthly Review Press, 2008); Shapiro.

¹⁷ On the one hand, thinking of copyright as a natural law – a just reward for labor and a stimulus to creativity – favors protecting information.

¹⁸ On the other hand, use of the Internet for the purposes of pursuit of science, technological sharing, social interaction, and symbolic belonging depends on and encourages sharing information widely.

In our information society, copyright has steadily increased in importance because information is a valuable economic asset.¹⁹ Control over information is necessary to succeed in today's economy and most copyright enforcement efforts aim at regaining control. Locally and globally, legislative endeavors²⁰ have extended the length and breadth of copyright, made the use of circumvention technologies illegal, and provided rights holders with more means of enforcement to fight digital piracy. Lawsuits against Internet users and content providers, as well as measures to technologically protect cultural works, have been pursued. Additionally, as piracy levels remain high the role of Internet service providers (ISPs) – so far mainly limited to notice and takedown procedures – is questioned in favor of proactive involvement. Filtering techniques, such as deep packet inspection of online content, are also advocated as a viable means of detecting and removing illegally distributed works.²¹

These enforcement efforts clash with the Internet's distributed approach to the control of information. Many enforcement efforts directly target the architecture of the Internet, creating centralized points of control in the flow of information over the network. An answer is increasingly sought in altering the rationales and functioning of the Internet, with consequences that reach far beyond the problem of online piracy. Indeed, although copyright enforcement may not directly impact a citizen's ability to find a job, fill out an online tax form, or gather information on upcoming elections, it fits within a wider trend of controlling access to information. There is little room for reflection on the value of widespread access to information and privacy for democratic purposes within an approach that advocates strong property rights and tampering with the architecture of the Internet.

Milton Mueller contends that “[t]o govern copyright or trademark in the digital world is to govern the Internet.”²² He identifies contentions over intellectual property rights, cybersecurity, content regulation, and critical Internet resources as four drivers of change in Internet governance today and asserts that “[t]here is a distinct possibility of a ‘regulatory alliance’ between content regulators, intellectual property interests, and security advocates, which attempts to reassert and strengthen hierarchical, nation-state based control over the Internet.”²³ Similarly Dutton et al. emphasize the need for a perspective on the wider ecology of freedom of expression and Internet regulation.²⁴

¹⁹ Castells, *Communication Power*, Tuomas Mylly, *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Informational Power* (Helsinki: Gummerus, 2008).

²⁰ Examples of legislative endeavors are the US Digital Millennium Copyright Act, the EU Copyright in the Information Society Directive, the WIPO Copyright and Performance & Phonograms Treaties, the WTO Agreement on Trade Related Aspects of Intellectual Property Rights, and more.

²¹ Annemarie Bridy, “Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement,” *Oregon Law Review* 89 (2010): 81-132; T.J. McIntyre and Colin Scott, “Internet Filtering: Rhetoric, Legitimacy, Accountability and Responsibility,” in *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes*, ed. Roger Brownsword and Karen Yeung (Oxford: Hart Publishing, 2008), 109-124.

²² Mueller, *Networks and States*, 131.

²³ *Ibid.*, 157. For a critical reflection on cybersecurity, see also Derek E. Bambauer, “Conundrum,” *Minnesota Law Review* 96 (2011): 584-674.

²⁴ William H. Dutton, Anna Dopatka, Michael Hills, Ginette Law, and Victoria Nash, *Freedom of Connection, Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet* (Paris: UNESCO, 2011).

Online copyright enforcement efforts are not only about who controls copyright, but also about who controls the Internet.

GRADUATED RESPONSE IN FRANCE

Graduated response is not a new enforcement mechanism. Most university campuses in the United States have had a system of warnings and sanctions for copyright infringement in place for quite some time. Universities even use content recognition software to proactively scan and limit infringing transactions on their networks.²⁵ Furthermore, there have been examples in which Internet service providers that have a stake in content distribution implemented similar approaches.²⁶ The adoption and spread of legislation endorsing graduated response is a fairly recent phenomenon, however. Graduated response legislation has been passed in France, New Zealand, South Korea, Taiwan, and the United Kingdom. Concomitantly, interest in graduated response has increased.

Academic research on the topic of graduated response has mainly analyzed the legal aspects of the enforcement mechanism.²⁷ Scholars are severely critical of graduated response for its impact on fundamental rights and freedoms, such as the rights to a fair trial, freedom of expression, privacy, and the freedom to conduct a business.²⁸ The legal role of Internet service providers in copyright enforcement is also a subject of particular scrutiny and concern.²⁹ Other analyses of graduated response are economic in nature, focusing on the cost and effectiveness of the enforcement mechanism or behavioral changes due to the heightened risk of detection through graduated response.³⁰ Furthermore, a handful of contributions have provided in-depth analyses of the

²⁵ For example, the Copysense tool offered by Audible Magic.

²⁶ For example, the Internet service providers Eircom in Ireland and Virgin Media in the United Kingdom warn and sanction their Internet subscribers for copyright infringements.

²⁷ Emmanuel Derieux and Agnès Granchet, *Lutte Contre le Téléchargement Illégal. Lois D'ADVSI et HADOPI* (Reuil-Malmaison Cedex: Editions Lamy, 2010); Alain Strowel, "Internet Piracy as a Wake-Up Call for Copyright Law Makers: Is the 'Graduated Response' a Good Reply?" *The WIPO Journal* 1, no. 1 (2009): 75-86; Peter Yu, "The Graduated Response," *Florida Law Review* 62 (2010): 1373-1430; Alexandre Zollinger, "La Lutte des Parlements: Les Droits de l'Homme Opposés à la Riposte Graduée," *L'Épouse* no. 262 (June 2009): 77.

²⁸ Christophe Geiger, "'HADOPI,' ou Quand la Répression Devient Pédagogique. Une Analyse Critique du Dispositif Juridique de Lutte Contre le Téléchargement sur les Réseaux de Pair à Pair," *Recueil Dalloz* 11 (2011): 773; Eldar Haber, "The French Revolution 2.0: Copyright and the Three Strikes Policy," *Harvard Journal of Sports & Entertainment Law* 2, no. 2 (2011): 297-339; Nicola Lucchi, "Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression," *Cardozo Journal of International and Comparative Law* 19, no. 3 (2011): 645-678.

²⁹ Bridy; Jeremy DeBeer and Christopher Clemmer, "Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?" *Jurimetrics* 49, no. 4 (2009): 375-409; Evi Werkers, "Intermediaries in the Eye of the Copyright Storm: A Comparative Analysis of the Three Strike Approach within the European Union," ICRI Working Paper Series 4/2011, Aug. 15, 2011.

³⁰ Olivier Bomsel and Heritiana Ranaivoson, "Decreasing Copyright Enforcement Costs: The Scope of a Graduated Response," *Review of Economic Research on Copyright Issues* 6, no. 2 (2009) 13-29; Brett Danaher, Michael D. Smith, Rahul Telang, and Siwen Chen, "The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence for an Event Study in France," Working Paper (2012); Sylvain Dejean, Thierry Pénard, and Raphaël Suire, "Une Première Evaluation

policymaking processes leading to graduated response. These studies tend to compare the different institutional contexts in which graduated response has developed.³¹ This article seeks to complement this literature by studying graduated response from a communications perspective. Copyright and the Internet are approached as two competing information tools and the impact of copyright (enforcement) on the Internet is explored here.

For a rationale analysis of graduated response in France, 82 texts, position papers, press releases, and interviews with various stakeholders were analyzed regarding their positions on copyright and the Internet.³² The first step of the analysis was to read through the documents marking the sections related to copyright and the Internet. The second step was categorization according to the four rationales for each information tool (discussed above). The third and final step was to aggregate the results by stakeholder group:

- French government: ARCEP, CNIL, Constitutional Council, Ministry of Culture and Communication, Ministry of Justice and Liberties, Parliament, and President Nicolas Sarkozy.
- European Union: Commissioner Viviane Reding, European Commission, Council of the European Union, European Parliament, MEPs Catherine Trautmann and Guy Bono.
- Cultural industry: Artists/cineasts, APC, ARP, CSDEM, IFPI, Marcel Dorcel, SACD, SACEM, SAMUP, SCAM, SCPP, SNAC, SNEP, SPPF, UNAC, UPFI.
- Telecommunications and information technology industry: AFA, ASIC, Free.
- Civil society: Guillaume Lovet, Jacques Attali, La Quadrature du Net, Patrick Waelbroeck, UFC Que Choisir.

In the French policy debate, the Ministry of Culture and Communication, President Sarkozy, and the cultural industry were clear proponents of graduated response. The European institutions, the French Regulatory Authority for Electronic Communications and Post (ARCEP), and the telecommunications and information technology industry took a nuanced stance. The civil society actors and the Commission for Information and Liberties (CNIL), however, severely opposed the graduated response policy.

Policymaking: Protecting French Culture

France was the first European country to pass legislation in 2009 introducing a graduated response mechanism to deter online copyright infringement. The statutes are known information as

des Effets de la Loi Hadopi sur les Pratiques des Internaute Français,” M@rsouin.org, Mar. 8, 2010, accessed Apr. 5, 2012, <http://www.marsouin.org/spip.php?article345>.

³¹ Trisha Meyer and Leo Van Audenhove, “Graduated Response and the Emergence of a European Surveillance Society,” *Info* 12, no. 6 (2010): 69-79; Monica Horten, *The Copyright Enforcement Enigma: Internet Politics and the “Telecoms Package”* (Basingstoke, Hampshire: Palgrave Macmillan, 2011); Thierry Rayna and Laura Barbier, “Fighting Consumer Piracy with Graduated Response: An Evaluation of the French and British Implementations,” *International Journal of Foresight and Innovation Policy* 6, no. 4 (2010): 294-314.

³² For an extended version of this analysis, see Trisha Meyer and Leo Van Audenhove, “Surveillance and Regulating Code: An Analysis of Graduated Response in France,” in production at *Surveillance & Society* (2012).

HADOPI 1 and HADOPI 2.³³ Forerunners to the legally enforced graduated response mechanism in France were the CNIL decision, the DADVSI law, and the Olivennes agreement. In 2005, copyright holders requested permission from the French Commission for Information and Liberties (CNIL) to monitor peer-to-peer networks. This request was initially denied; however, in 2007 the French Council of State reversed the decision.³⁴ In 2006, online surveillance was further endorsed when the French transposition of the European Union copyright directive (DADVSI) introduced an obligation on Internet account holders to monitor their networks against copyright infringements.³⁵ In 2007, the government brokered a multi-stakeholder agreement with the cultural and technology industries that included many obligations of the graduated response mechanism.³⁶ This agreement was made legally enforceable with HADOPI 1 and 2 in 2009.

When the first HADOPI law proposal was introduced, Christine Albanel, Minister of Culture and Communication, 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.”³⁷ The first law creates HADOPI (*Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet*), a public authority. The second law deals with an expedited criminal 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.³⁸

The graduated response mechanism in France consists of monitoring, warning, and sanctions. Rights 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 rights holder, HADOPI can then decide to send an e-mail to the holder 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 the user to legal alternatives for obtaining copyrighted works and ways to secure their Internet access. In case of renewed detection of illegal file sharing within six months, the account holder can be sent a second e-mail and a registered letter. In case of a third detection within one year, HADOPI can notify the account

³³ French National Assembly and Senate, LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (HADOPI 1); French National Assembly and Senate, LOI n° 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet (HADOPI 2).

³⁴ French Commission for Information and Liberties, Surveillance des Réseaux ‘Peer to Peer’: La CNIL Prend Acte de la Décision du Conseil d’Etat, 2007.

³⁵ French National Assembly and Senate, LOI n° 2006-961 du 1 Août 2006 relative au Droit d’Auteur et aux Droits Voisins dans la Société de l’Information, 2006.

³⁶ Denis Olivennes, “Accord pour le Développement et la Protection des Œuvres et Programmes Culturels sur les Nouveaux Réseaux,” *Discours et communiqués*, Nov. 23, 2007, accessed Apr. 5, 2012, <http://www.culture.gouv.fr/culture/actualites/index-olivennes231107.htm>.

³⁷ French Ministry of Culture and Communication, “Projet de Loi Favorisant la Diffusion et la Protection de la Création sur Internet,” June 12, 2009, accessed Apr. 5, 2012, <http://www.senat.fr/dossier-legislatif/pjl07-405.html>. The author translated the quotations in this article from French to English. Any misrepresentation of the original text is accidental.

³⁸ French National Assembly and Senate, LOI n° 2009-669, art 5.

holder 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 of 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 of up to one month, in addition to a fine and prison sentence. Non-cooperation by Internet service providers is also subject to a fine. A visualization of the procedure can be found in Figure 1 below.

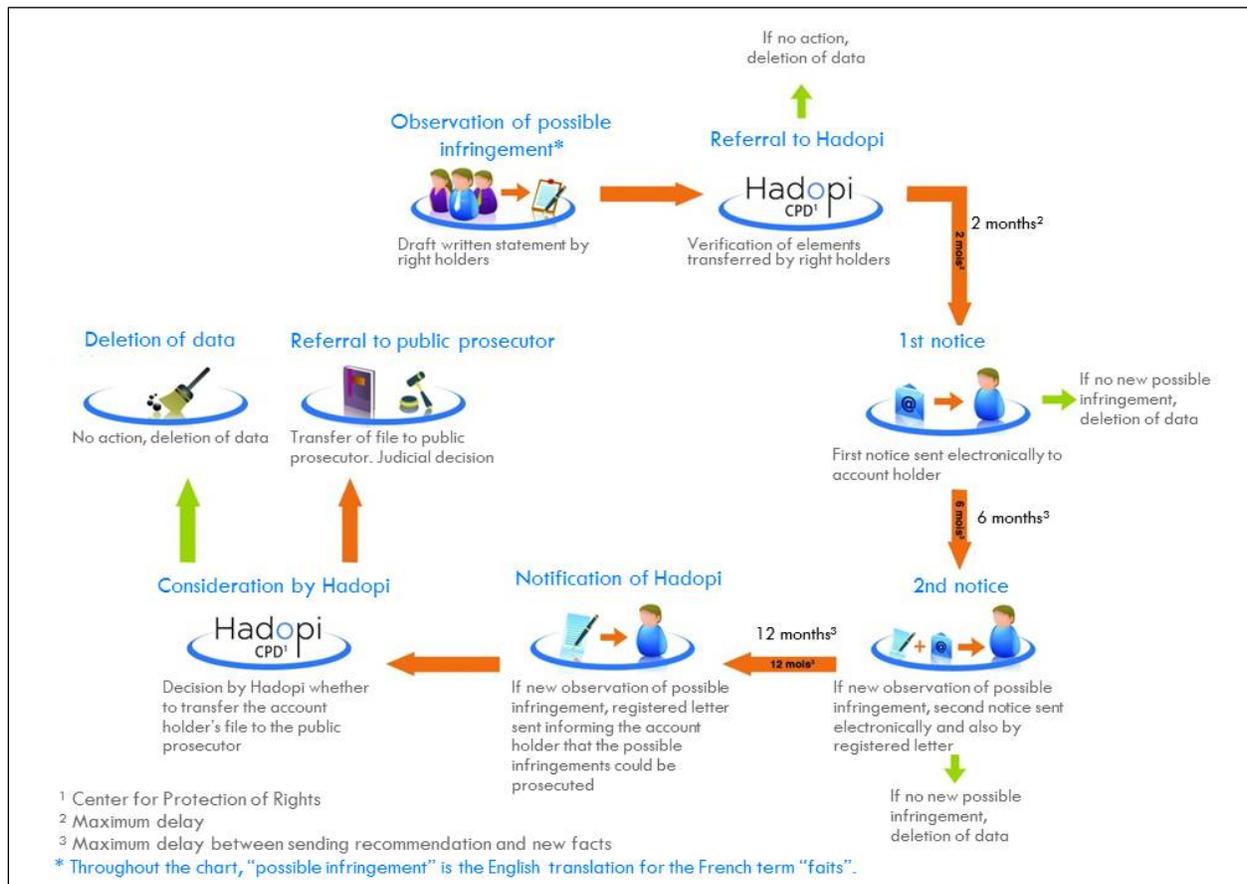


Figure 1: HADOPI Graduated Response Procedure³⁹

The graduated response mechanism has been operational in France since August 2010. By June 2011, HADOPI had made 1,023,079 requests to ISPs to identify account holders, sent 470,935 first notices, and sent 20,598 second notices.⁴⁰

³⁹ HADOPI, "Réponse Gradué," accessed Apr. 5, 2012, <http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduee.html>. Translated by the author.

⁴⁰ HADOPI, *L'Essentiel du Rapport D'Activité. 2010* (Paris: Hadopi, 2011).

When presenting HADOPI's first activity report in September 2011, agency president Marie-Françoise Marais described graduated response as functioning and well accepted by Internet users.⁴¹ Preliminary results of a longitudinal study commissioned by HADOPI indicate a decrease in illicit behavior: 72% of respondents who had received a notice answered that they had decreased or stopped consuming cultural works illegally. Moreover, the study found that half of the respondents supported the introduction of HADOPI and increased their legal usage of copyrighted works. The study stipulates, however, that these changes need to be handled with precaution, as only 7% of the total number of respondents had received a notification so far.⁴² Importantly, these results also rely on reported rather than observed behavior. Once the graduated response mechanism was on track, HADOPI started working towards increasing online legal offers and consumption. The agency introduced the slogan "PUR" (Promote Responsible Uses) and created working groups to reflect on issues such as consumer expectations, copyright exceptions, and the cost of enforcement.⁴³ The French approach acknowledges the importance of legal offers, yet considers graduated response inseparable from any new development.⁴⁴ Finally, in November 2011 HADOPI announced that it would investigate and, if necessary, step up enforcement on streaming and direct forms of online downloading. The measures proposed are similar to policy proposals in the United States, seeking cooperation with the platforms concerned, but importantly also with intermediaries such as financial service providers.⁴⁵

STAKEHOLDER VIEWS: CULTURAL DIVERSITY AND THE INTERNET JUNGLE

Copyright

The references to stakeholder documents in this section are selective, yet representative. The most frequent reasoning for copyright in the analyzed texts was economic in nature: copyright as a just reward for labor. There was a strong concern about losses of revenue for the cultural industry and artists due to piracy.⁴⁶ The analyzed documents also indicated that copyright is considered an

⁴¹ Marie-Françoise Marais, "Discours de la Présidente de la Haute Autorité Lors de la Présentation du Rapport d'Activité le 29 Septembre 2011," Sept. 29, 2011, accessed Apr. 6, 2012, http://www.hadopi.fr/sites/default/files/page/pdf/Discours_Presentation_RA_Hadopi.pdf.

⁴² HADOPI, *Hadopi, Cultural Property and Internet Usage: French Internet Users' Habits and Points of View: 2nd Survey – Overview and Key Figures* (Paris: Hadopi, 2011).

⁴³ Marais.

⁴⁴ French Ministry of Culture and Communication, "Projet de Loi Favorisant la Diffusion et la Protection de la Création sur Internet."

⁴⁵ HADOPI, "'Streaming' et Téléchargement Direct de Contenus Illicites: l'Hadopi S'Engage Dans une Nouvelle Etape de sa Mission de Protection des Droits," Nov. 25, 2011, accessed Apr. 6, 2012, http://www.hadopi.fr/sites/default/files/page/pdf/CP_Hadopi_251111_0.pdf.

⁴⁶ APC & UFPI, "Les Producteurs Indépendants de Films et de Musique Soutiennent la Démarche de la 'Réponse Graduée' qui Préserve le Droit de Propriété et les Libertés Individuelles. L'APC et l'UPFI Dénoncent les Manœuvres Visant à Empêcher la Création d'une Voie entre le Tout Répressif et le Tout Libéraire sur Internet," Sept. 25, 2008, accessed Apr. 6, 2012, http://www.upfi.fr/index.php?page=presse&action=communiqués&date=2008-09-25&com_id=52&PHPSESSID=42a069fdd5; "Signataires Hadopi: Cinéastes Pour et Cinéastes Contre – Loi Création et Internet," Films7.com, accessed Apr. 6, 2012, <http://films7.com/story/note/hadopi-cineastes-pour-et-cineastes->

exception to competition and that the cultural industry and culture itself need protection from capitalism and cannot function in a competitive market.⁴⁷ At the same time, piracy was portrayed as a form of unfair competition.⁴⁸

In the words of the French Ministry of Justice and Liberties, “[HADOPI 1 and 2 aim] to prevent the plundering of works on the Internet, whose size in our country saps the very foundations of cultural diversity by drying up the sources of remuneration and financing of artists and cultural industries.”⁴⁹ As this quote indicates, the economic reasoning was intrinsically linked with cultural diversity and creativity. A just reward for labor was viewed as a prerequisite, a stimulus for creativity and legal offers. Indeed, the French government and cultural industry asserted that French cultural patrimony was endangered by lack of copyright protection.⁵⁰

Civil society representatives, however, argue that culture has been used as a pretext in the debate to defend the status quo of the cultural industry. For example, “UFC-Que Choisir denounces the repressive approach and the lack of clarity of the Cultural Minister who, under the pretext of defending Culture and its diversity, systematically is the untiring advocate of an industry that is too concentrated and not innovative enough.”⁵¹

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.⁵² 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, one would expect more reasoning based on the natural right of an author to property. Indirect references to property are made through the use of the terminology “stealing” and “plundering” to describe copyright infringement.

The term most widely used to refer to copyright infringement is piracy (*piratage*). All stakeholders use the term, except those from civil society. Jacques Attali, a critical French economist and writer, contends that free downloading is not the same as piracy, because cultural works are not material objects. Consequently, he believes that downloading cannot be considered stealing (*vol*, a term used by the cultural industry) either, as others are not deprived of using the cultural item because of

French Ministry of Culture and Communication, “Projet de Loi Favorisant la Diffusion et la Protection de la Création sur Internet.”

⁴⁷ “Loi sur le Piratage: Des Artistes ‘de Gauche’ Dénoncent la Stratégie du PS,” *Le Monde*, May 4, 2009, accessed Apr. 6, 2012, http://www.lemonde.fr/politique/article/2009/05/04/loi-sur-le-piratage-des-artistes-de-gauche-denoncent-la-strategie-du-ps_1188363_823448.html.

⁴⁸ Christine Albanel, “Christine Albanel Remercie les Sénateurs et Députés de Tous Bords Politiques qui ont Apporté leur Soutien au Projet de Loi Création et Internet,” *Discours et communiqués*, May 13, 2009, accessed Apr. 6, 2012, http://www.culture.gouv.fr/culture/actualites/communiq/albanel/com_creation_internet_130509.html.

⁴⁹ French Ministry of Justice and Liberties, *Projet de Loi relatif à la Protection Pénale de la Propriété Littéraire et Artistique sur Internet* (Paris: French Ministry of Justice and Liberties, 2009), 3.

⁵⁰ *Ibid.*; “Loi sur le Piratage: Des Artistes ‘de Gauche’ Dénoncent la Stratégie du PS.”

⁵¹ UFC Que Choisir, “Mission Olivennes – La Surenchère Répressive,” Nov. 23, 2007, accessed Apr. 6, 2012, <http://www.quechoisir.org/telecom-multimedia/image-son/musique/communique-mission-olivennes-la-surenchere-repressive>.

⁵² “Loi sur le Piratage: Des Artistes ‘de Gauche’ Dénoncent la Stratégie du PS.”

downloading.⁵³ In the proposal for the HADOPI 1 law a distinction was made between ordinary and massive piracy to argue that the criminal sanctions for copyright infringement provided in French legislation were inappropriate for the current copyright infringement situation.⁵⁴ In this context, it is interesting to remark that the French legal term for copyright infringement, counterfeiting (*contrefaçon*), is seldom used by the Ministry of Culture and Communication, although the analyzed documents did show other strong imagery being evoked by the Ministry through terminology such as hemorrhage (*hémorragie*) and plundering (*pillage*).⁵⁵

The Internet

All stakeholders perceive the Internet as a communication and distribution medium, for legal and illegal purposes, although this is not always explicitly mentioned.⁵⁶ Technical aspects of the Internet are not often referred to, except when discussing technical protection measures. Civil society groups and the telecommunications and information and technology industries point to characteristics of the Internet (decentralized, international, open and neutral) that they believe are endangered by graduated response and the European telecommunications reform (a package of EU regulatory changes to telecommunications infrastructure passed in 2009).⁵⁷

The French stakeholders also presented the Internet as a tool for entrepreneurship and commerce.⁵⁸ For example, the European Commission stressed the importance of the Internet for employment and innovation, and the telecommunications⁵⁹ and information technology industries agreed and emphasized the Internet as a vector for economic growth, and an environment with new profit opportunities. For example, “The Internet is an information highway where every actor – whether a

⁵³ Jacques Attali, “Hadopi: Dix Propositions,” blog, Apr. 27, 2009, accessed Apr. 6, 2012, <http://www.attali.com/actualite/blog/art-et-culture/hadopi-dix-propositions>.

⁵⁴ French Ministry of Culture and Communication, “Projet de Loi Favorisant la Diffusion et la Protection de la Création sur Internet.”

⁵⁵ Ibid.; Christine Albanel, “Christine Albanel Dénonce une Manoeuvre Cynique de l’Opposition, et Fait Part de Sa Détermination Intacte à Se Battre pour la Défense des Créateurs et contre le Pillage des Œuvres,” *Discours et communiqués*, Apr. 9, 2009, accessed Apr. 6, 2012, <http://www.culture.gouv.fr/culture/actualites/communiq/albanel/comvoteloici.html>.

⁵⁶ “Signataires Hadopi: Cinéastes Pour et Cinéastes Contre – Loi Création et Internet;” SACD, “Projet de Loi Création et Internet: Les Créateurs Se Mobilisent au Théâtre de l’Odéon,” Mar. 30, 2009, accessed Apr. 6, 2012, <http://www.sacd.fr/Projet-de-loi-creation-et-internet-les-createurs-se-mobilisent.1079.0.html>.

⁵⁷ La Quadrature du Net, “Paquet Télécom: Une Occasion Manquée pour les Droits des Citoyens,” Nov. 24, 2009, accessed Apr. 6, 2012, <http://www.laquadrature.net/fr/paquet-telecom-une-occasion-manquee-pour-les-droits-des-citoyens>; ASIC, “L’Avenir de l’Internet Se Joue Ce Lundi à Bruxelles,” Sept. 21, 2009, accessed Apr. 6, 2012, <http://www.lasic.fr/?p=275>; ASIC, “Création et Internet: L’ASIC Accueille Favorablement la Proposition des Deux Commissions du Sénat à propos du ‘Filtrage de Contenus,’” archived with the author. For an extensive analysis of the EU telecom reforms, see Horten.

⁵⁸ French Ministry of Culture and Communication, “Projet de Loi Favorisant la Diffusion et la Protection de la Création sur Internet.”

⁵⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market, COM(2007) 836 final (2008).

multinational or an SME, a traditional actor or not – can participate on an equal basis to offer services to end users.”⁶⁰

However, one observes some antagonism between the functions of the Internet as a tool for industry on the one hand and for society on the other hand. Importantly, the French Constitutional Council in its decision on HADOPI 1 considered that “free communication of thoughts and opinions is one of the most precious human rights: any citizen can thus talk, write and print freely, except in the cases of abuse of this liberty determined by law.”⁶¹ The Constitutional Council continued its reasoning: “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”.⁶² The Council ruled that considering the importance of the Internet for the exercise of human rights, only a judge could suspend Internet access. Moreover, the European Parliament and civil society stressed the role of the Internet for new non-commercial content creation and discovery, indicating the potential of the Internet for democratization of cultural production, distribution, and consumption.⁶³

Finally, most stakeholders perceive the information society and the Internet as revolutionary and unstoppable. The proposal for the HADOPI 1 law compared current developments in cultural distribution and diffusion to the invention of the printing press.⁶⁴ This was, however, often accompanied with a strong discourse on the dangers of the Internet. The French Ministry of Culture and Communication, the president, and the culture industry have described the Internet as a jungle and as an uncivilized environment where only the fittest survive.⁶⁵ They strongly urged regulation of the Internet, something that the following quote illustrates well: “Art is the highest expression of civilization. It is up to us to make sure that a civilized Internet exists.”⁶⁶ With this in mind, it is interesting to note that HADOPI described itself in its 2010 activity report as “the only French institute exclusively dedicated to the Internet.”⁶⁷ The European Commission and civil society actors

⁶⁰ ASIC, “Création et Internet: L’ASIC Accueille Favorablement la Proposition des Deux Commissions du Sénat à propos du ‘Filtrage de Contenus’.”

⁶¹ French Constitutional Council, Décision n° 2009–580 DC du 10 Juin 2009. Loi Favorisant la Diffusion et la Protection de la Création sur Internet (2009), §15.

⁶² Ibid., §16. See also Lucchi, who argues that HADOPI has unexpectedly resulted in the inclusion of Internet access in freedom of speech. See also Strowel.

⁶³ European Parliament, Resolution of 10 April 2008 on Cultural Industries in Europe, INI/2007/2153 (2008).

⁶⁴ French Ministry of Culture and Communication, “Projet de Loi Favorisant la Diffusion et la Protection de la Création sur Internet.”

⁶⁵ “Loi sur le Piratage: Des Artistes ‘de Gauche’ Dénoncent la Stratégie du PS.”

⁶⁶ Presidency of the French Republic, “Validation, par le Conseil Constitutionnel, de la Loi relative à la Protection Pénale de la Propriété Littéraire et Artistique sur Internet,” Oct. 2009, accessed Apr. 6, 2012, <http://www.elysee.fr/president/les-actualites/communiqués-de-presse/2009/octobre/validation-par-le-conseil-constitutionnel-de-la.1477.html>.

⁶⁷ HADOPI, *L’Essentiel du Rapport D’Activité*, 9.

have interpreted the reactions of the cultural industry (and government) to the Internet as driven by loss of control.⁶⁸

President Nicolas Sarkozy has employed the discourse of the need for a “civilization of the Internet”⁶⁹ 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 presided in 2011.⁷⁰ President Sarkozy 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. Furthermore, civil society actors like La Quadrature du Net argue that regulators have used copyright infringement and child pornography, with an implied connection between the two, as justification for regulating the Internet more closely.⁷¹ The new French LOPPSI 2 law was passed in 2011 and deals with homeland security;⁷² importantly, this permits an administrative authority to order the blocking of Internet addresses containing pornographic depictions of minors.

CONCLUSION

Copyright and the Internet are not neutral artifacts; there are rationales and values embedded in them, which change throughout their use and regulation.⁷³ There is not one approach, argument, or use for these information tools. The analysis of graduated response in France illustrates this well. The argumentation on copyright and the Internet includes most of the rationales that were identified theoretically earlier in this article. In particular, this article observes that there are significant tensions between the social and economic rationales and uses of copyright and the Internet.

Graduated response is not only about the suspension of Internet access. The French Government portrays it as an educational measure, as Internet users are given multiple opportunities to change their downloading behavior.⁷⁴ Furthermore, HADOPI endeavors to improve legal offers of copyrighted works. This article’s analysis of stakeholder views, however, reveals that copyright has

⁶⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market; “Hadopi, Loppsi 2... La Succession de Textes Diabolise Internet, Sans Pour Autant Apporter des Réponses Viables à Son Contrôle,” *Capital*, June 17, 2009, accessed Apr. 6, 2012, <http://www.capital.fr/a-la-une/interviews/hadopi-loppsi-2-la-succession-de-textes-diabolise-internet-sans-pour-autant-apporter-des-reponses-viables-a-son-controle-392817>.

⁶⁹ Presidency of the French Republic. “Validation, par le Conseil Constitutionnel, de la Loi relative à la Protection Pénale de la Propriété Littéraire et Artistique sur Internet.”

⁷⁰ Eric Pfanner, “G-8 Leaders to Call for Tighter Internet Regulation,” *New York Times*, May 24, 2011, accessed Apr. 6, 2012, <http://www.nytimes.com/2011/05/25/technology/25tech.html>.

⁷¹ La Quadrature du Net, “French Constitutional Council Validates Internet Censorship,” Mar. 11, 2011, accessed Apr. 6, 2012, <http://www.laquadrature.net/en/french-constitutional-council-validates-internet-censorship>.

⁷² French National Assembly & Senate, LOI n° 2011-267 du 14 Mars 2011 d’Orientation et de Programmation pour la Performance de la Sécurité Intérieure, 2011.

⁷³ Lessig, *Code: And Other Laws of Cyberspace, Version 2.0*.

⁷⁴ French Ministry of Culture and Communication, “Projet de Loi Favorisant la Diffusion et la Protection de la Création sur Internet.”

been mainly subjected to economic reasoning. HADOPI aims to “prevent the plundering of works on the Internet,”⁷⁵ primarily through the enforcement of rights. Social considerations for copyright are much less present in the discourse of the French Ministry of Culture and Communication and the cultural industry. Remarkably, moral argumentation pointing to the intrinsic link between authors and their works is also missing. Civil society representatives consequently saw graduated response as a means of protecting an overly concentrated and outdated industry.⁷⁶

These conflicts point to an enduring clash between copyright and Internet rationales in France. The stakeholders debated heatedly about the proportionality of Internet suspension. At the level of the European Union, the adoption of the telecoms reform (which initially did not relate to copyright infringement), was held up for several months in 2009 over a provision on the need for a “prior fair and impartial procedure” with “the right to an effective and timely judicial review” to take measures limiting Internet access or use.⁷⁷ The French Constitutional Council also concluded that the Internet was too important for participation in democratic life and freedom of expression to cut off without the involvement of a judge.⁷⁸ At the same time, however, the French president, Ministry of Culture and Communication, and the cultural industry depicted the Internet as savage and unstoppable. The Internet in its current form, and thus its approach to distribution of information, was considered as threats to art and civilization.⁷⁹

The discourse on the dangers of the Internet in France is strong and not limited to the debate on copyright. President Sarkozy has continued to use the term “civilization of the Internet” in Internet governance discussions. In “Freedom of Speech, the Internet, and the Costs of Control: The French Example,” Julien Mailland argues that a precedent of seeking to centrally control a communication network can be found in the French approach to the Minitel. France long resisted the development of the Internet, as it had introduced its own alternative communication network technology called the Minitel in the 1970s. The infrastructure supporting this videotex technology was centralized and restricted to France, and content on the Minitel network was strongly regulated by the French government.⁸⁰

Considering the national precedent set by the Minitel, the proactive approach of France to policymaking in general and the fact that the cultural industries in France are among the largest in Europe, it is not surprising that graduated response legislation was adopted in the country. The object of this article has been to determine whether and how this enforcement effort illustrates

⁷⁵ French Ministry of Justice and Liberties, *Projet de Loi relatif à la Protection Pénale de la Propriété Littéraire et Artistique sur Internet*, 3.

⁷⁶ UFC Que Choisir.

⁷⁷ European Parliament and Council, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive), Consolidated Version of 19 December 2009, art. 1(3)a.

⁷⁸ French Constitutional Council. Décision n° 2009–580 DC du 10 Juin 2009.

⁷⁹ Presidency of the French Republic. “Validation, par le Conseil Constitutionnel, de la Loi relative à la Protection Pénale de la Propriété Littéraire et Artistique sur Internet;” “Loi sur le Piratage: Des Artistes ‘de Gauche’ Dénoncent la Stratégie du PS.”

⁸⁰ Julien Mailland, “Freedom of Speech, the Internet, and the Costs of Control: The French Example,” *Journal of International Law and Politics* 33, no. 4 (2001): 1179-1234.

clashes between copyright and the Internet and current changes in Internet regulation. The importance of this analysis of the underlying rationales lies in the lessons learned for future online copyright legislation.

Two consequences of graduated response are particularly worrying. First, the prerequisite for enforcement and the emphasis on regaining control over information in the graduated response approach precludes discussions on the rebalancing of copyright (the “copyright paradox”) in the digital environment. It promotes strong property rights rather than a reflection on the possibilities of the Internet to reform creativity. Second, there is a willingness to tamper with the architecture of the Internet for copyright purposes. Placed in the wider context of global online policy developments, graduated response acts as leverage for more Internet regulation. Graduated response argues for an Internet where the distribution of information is controlled, the national government is the main regulatory actor, and policy is made in a fragmentary fashion.

This article recommends copyright efforts that work with, rather than fight with, the distributed approach of the Internet to control of information.⁸¹ In copyright, the increase in online streaming services, subscription-based business models, and legislative proposals to facilitate use of orphan works or copyright clearance can only be encouraged. HADOPI’s increasing attention to legal offers is a positive development. Furthermore, at the international level discussions on overarching issues of Internet governance are welcomed, provided that all stakeholders are represented. The G8 with its exclusive structure and economic focus is not the right forum to discuss the future of the Internet. As calls for Internet regulation increase, the rationales and functioning of the Internet should not be determined by copyright or one set of online issues and interests alone – lest we end up with a civilization⁸² and colonization of tomorrow’s Internet.

⁸¹ For in-depth assessments of graduated response and recommendations for its improvement, see Yu, “The Graduated Response;” Bridy.

⁸² Presidency of the French Republic. “Validation, par le Conseil Constitutionnel, de la Loi relative à la Protection Pénale de la Propriété Littéraire et Artistique sur Internet.”

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