Surveillance and regulating code: an analysis of graduated response in France
Meyer, Trisha; Van Audenhove, Leo

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Trisha Meyer
Institute for European Studies and Vrije Universiteit Brussel, Belgium. trisha.meyer@vub.ac.be

Leo Van Audenhove
IBBT-SMIT and Vrije Universiteit Brussel, Belgium.

Abstract
This paper analyzes a recent policy initiative in France to deter copyright infringement. In 2009, France passed two laws aimed at fighting online piracy through graduated response, a warning and sanction system. Graduated response depends on surveillance of Internet uses and encourages technological regulation (code), such as Internet filtering and blocking. We analyze the rationales advocated for copyright and the Internet and the argumentation for surveillance and technical protection measures. In the French debate on graduated response, much attention was given to the policy goal, reducing piracy, while the means of reaching the policy goal, surveillance and code, were rarely discussed. Graduated response deals with much more than copyright. It promotes informational control by copyright holders and contributes to the normalization of surveillance and to an increase of centralized control on the Internet.

Keywords: Surveillance, Internet regulation, Graduated response, Copyright, France, Policy analysis

Introduction
In 2009, France passed two laws aimed at fighting online piracy through graduated response, a warning and sanction system. Under its graduated response policy, Internet users are monitored and when caught infringing copyright, are repeatedly warned about their illegal actions and ultimately sanctioned through the suspension of Internet access, fines and/or prison sentences. Graduated response depends on the surveillance of Internet uses and encourages technological regulation (code), such as Internet filtering and blocking. In this paper, we discuss the institutional context of graduated response in France and analyze how various stakeholders view copyright, the Internet, surveillance and code. The aim of the paper is to highlight the lack of attention to the implications of surveillance and code on society and the Internet in the French graduated response policy.

Surveillance and Regulating Code
In this article, we raise questions about current developments in copyright enforcement: our economy increasingly relies on the control and exchange of information, and as a consequence intellectual property rights (not only copyright, but also patents, trademarks, industrial design rights and trade secrets) have

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become central assets to many companies and countries. On the one hand, control over information is necessary to succeed in today’s economy, but on the other hand access to information is essential for participation in democratic societies (Mylly 2009). This is the context in which we analyze graduated response. Graduated response may not directly influence a citizen’s ability to find a job, fill out an online tax form or gather information on upcoming elections. It does, however, fit within a wider trend of monetizing access to information. There is little room for reflection on the value of widespread access to information and privacy for democratic purposes in an approach advocating strong property rights, public surveillance and tampering with the architecture of the Internet. Graduated response was supported as a means of fighting the large-scale problem of online piracy of cultural works. However, indirect statements were also made about the type of creativity and about the kind of Internet we wish to encourage. In the following paragraphs, we explore some sociological reflections on two key (yet often ignored) aspects of the graduated response mechanism: surveillance and Internet regulation.

Graduated response depends heavily on surveillance. In this paper, we argue that although privacy legislation is respected in the French graduated response policy, the underlying reasoning for surveillance-based enforcement is not considered. David Lyon (2001, 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 has two faces, care and control, and can be used in an enabling or a constraining way. Either way, as the second part of Lyon’s definition reveals, surveillance has the aim of influencing or managing the surveilled. From this perspective then, surveillance is a means of social control used for classifying individuals and controlling their behavior on the Internet. On the basis of selected criteria, those monitored are put in categories and a profile of them is built up (Lyon 2006). Surveillance and classification valorizes one viewpoint while silencing another (Lyon 2007). In this context, graduated response reinforces the view that cultural works are first and foremost private property and authorizes copyright holders to monitor Internet use to enforce their rights.

Surveillance is in fact inherent to our information-based society. We monitor and classify information constantly to understand and make sense of the world around us. Both in our personal lives and in our economy, we seek to gather information to calculate and manage risks. Surveillance is often communicated as benign and beneficial for consumers, and consumers allow surveillance for fear of missing out or being excluded. Indeed, surveillance is 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, or simply to get the latest great deals on the market. For Michel Foucault, however, surveillance and visibility are central to modern power. The knowledge of constant surveillance disciplines citizens into behaving according to certain norms and surveillance is part of the “apparatus” (in French “dispositif”) of how power is maintained in society through a complexity of institutional, discursive and physical mechanisms (van Peperstraten 1999). In this context, Didier Bigo’s (2006) observation that there has been a normalization of emergency since 9/11 is important. Current discourses emphasize threats and advocate exceptional measures of monitoring and control. As will be illustrated below, in the French graduated response policy, piracy is portrayed as a threat to culture and creativity, requiring an urgent response and surveillance is justified by a discourse on the need for informational control.

Surveillance also lies at the basis of technical protection measures. Monitoring is the first step in regulating copyright or other content problems through changes to the code – the underlying architecture or technology of the Internet. Code is thus a manifestation of surveillance in our society. Lawrence Lessig (2006) explains how a regulatory problem can be dealt with through four means: law, norms, market or code. He argues that in the online environment, code is often seen as a way to effectively enforce desirable changes in behavior. Restraints can be built into the technology to make certain actions difficult or impossible. For instance, until recently digital rights management (DRM) was a popular means of enforcing copyright of cultural works. However, due to strong consumer opposition to restrictions enabled
by DRM (such as limitations on copying content to different devices), the music industry has started to offer music DRM-free. These technical protection measures are still used for film and publishing. Other possibilities to enforce copyright on the Internet are the blocking or filtering of content.

Regulation through code can protect copyrighted work and limit illegal uses of the Internet. However, there are also significant drawbacks to using technology for control (Brownword 2008; McIntyre and Scott 2008; and Zittrain 2008). Firstly, current technical protection measures tend to over and under-block: some legal uses of the Internet might be limited, while other illegal uses pass by unhindered (this was the case with DRM). In the case of copyright infringement, technical protection measures stop users with limited computer skills, but push the technically savvy user to find a work-around. As a result the illegality is driven further underground, making it even more difficult to detect and deter. Secondly, technological solutions (especially when automated) imply a loss of human discretion and responsibility. The ability for a technology to distinguish between uses is limited to the criteria foreseen in advance. This gives those developing the technological protection measure significant power, but does not provide the flexibility of human (judicial) discretion in its application. Technically limiting what users can do on the Internet also leads to a loss of responsibility. In the case of online piracy, the moral choice between legal or illegal use of a cultural work would be reduced. Thirdly and finally, technical restraints tend to be opaque and less observable than other regulatory means. They signal the transition to a less transparent and privately regulated Internet.

In the history of the Internet, characteristics promoting openness and freedom in its design have been significant. But today’s Internet is not necessarily tomorrow’s Internet. A technology is shaped by its uses and users, especially by those in powerful positions. Lelia Green (2002) contends that neither technology nor culture is neutral but reflect the power of different social groups and the outcomes of competing priorities. Through its advocacy for technical protection measures, graduated response contributes to the debate on the relative importance of certain Internet principles and ultimately the future of the Internet. Surveillance and code promote control over individuals, information and its architecture, with significant societal consequences.

Methodology

The previous section provided some theoretical underpinnings for analyzing copyright enforcement policies, which we will now apply to the French graduated response policy against online piracy. Our analysis of the graduated response policy in France fits within a larger research project, which consists of three parts. In 2009 an initial analysis was conducted of the policy debate, comparing it with developments in the European Union and the United Kingdom (Meyer & Van Audenhove 2010). In 2011 a second analysis focused specifically on the rationales of the stakeholders towards copyright, Internet, surveillance and technological protection measures. A third and final stage of the research will follow in 2012 when we will conduct interviews with stakeholders in France and study the implementation of the graduated response policy.

In the following sections, we provide background to the institutional context in which graduated response was adopted in France and the rationales underlying the various stakeholders’ views on graduated response. It is significant to understand the discourse of graduated response, because language is another means of establishing Foucault’s idea of an “apparatus” of power in society (van Peperstraten 1999). It reveals their approach to regulation of society and the Internet and tells us more about the power struggles between stakeholders.

In the following sections, we refer to the stakeholders according to five identified groups:
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 IT industry took a nuanced stance. The civil society actors and the Commission for Information and Liberties (CNIL), however, strongly opposed the graduated response policy.

**Hadopi: Institutional Context**

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).

In 2006, the French transposition of the European Union Copyright Directive (Dadvsi) (French Parliament and Senate 2006) introduced an obligation on Internet account holders to monitor their network against copyright infringements. 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 and the graduated response mechanism has been operational in France since Autumn 2010. It could be argued that the adopted French Loppsi 2 law (French Parliament and Senate 2011) 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.

Both Hadopi laws were heavily opposed by French civil society. The French Constitutional Council censored the Government’s proposition to authorize an administrative authority (Hadopi) to suspend Internet access, leading to the second law introducing a simplified judicial procedure. At the level of the European Union (EU), the suspension of Internet access also became a hot topic in the discussions on the Telecoms Reform. The adoption of the Telecoms Reform, a package of regulatory changes to telecommunications infrastructure (which initially did not relate to copyright infringement), was held up for several months 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 (European Parliament and Council 2009, art. 1(3)a).

When the first Hadopi law proposal was introduced, Christine Albanel, Minister of Culture and Communication described the objective of the law as “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: 3). The first French law creates Hadopi (Haute Autorité

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1 See Abbreviations at the end of the paper.
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.

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 labeling 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 of an author’s right or related right against any person likely to contribute to remedy it” (French National Assembly and Senate 2009a, art. 10). Further, Hadopi needs to ensure that digital rights management 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.

The graduated response mechanism itself 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 right holders, Hadopi can then decide to send an email to the holders of the account where illegal activity was detected, which reminds them of the obligation to secure their Internet access against copyright breaches and stresses the dangers of copyright infringement for the cultural industry and for creativity. 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 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.
Perceptions on Copyright

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 the losses of revenue for the cultural industry and artists due to piracy (APC & UPFI 2008; Films7.com; French Ministry of Culture and Communication 2008). The analyzed documents also indicated that copyright is considered an exception from competition and that the cultural industry and culture need protection from capitalism and cannot function in a competitive market (Le Monde 2009). At the same time, piracy was portrayed as a form of unfair competition (French Ministry of Culture and Communication 2009a).

[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 (French Ministry of Justice and Liberties 2009: 3).

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 the French cultural patrimony was endangered by the lack of copyright protection (French Ministry of Justice and Liberties 2009; Le Monde 2009). Civil society representatives, however, argued that culture was used as a pretext in the debate to defend the status quo of the cultural industry:

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,

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2 The references in this section are selective, yet representative. 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. Furthermore, the authors translated the quotes in this paper from French to English. Any misrepresentations of the original text are entirely unintentional.
systematically is the untiring advocate of an industry that is too concentrated and not innovative enough (UFC Que Choisir 2007).

We would additionally contend that in the Hadopi laws the French Government effectively made a choice for a certain type of culture by not considering alternative cultural production. Their interpretation of cultural diversity does not encourage 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. Rather, more indirect references were made through the use of the terminology of “stealing” and “plundering” to describe copyright infringement.

Finally, the term most widely used to refer to copyright infringement was piracy (“piratage”). All stakeholders, except those from civil society used the term. Jacques Attali (2009a), a critical French economist and writer, contended that free downloading is not the same as piracy, because cultural works are not material objects. Consequently, he believed it could not be considered stealing (“vol”, a term used by the cultural industry) either, as others are not deprived of its use because of downloading. In the Hadopi 1 law proposal a distinction was made between ordinary and massive piracy to argue that the penal sanctions for copyright infringement provided in French legislation were inappropriate for the current copyright infringement situation (French Ministry of Culture and Communication 2008). In this context, it is interesting to remark that a French legal term for copyright infringement, counterfeiting (“contrefaçon”), was 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 (“hemorragie”) and plundering (“pillage”) (French Ministry of Culture and Communication 2008; 2009b). Finally, stakeholders also referred to copyright infringement as illegal, illicit or unauthorized downloading (“téléchargement” illégal, illicite, non autorisé) (Olivennes 2007; SACD 2009; UFC Que Choisir 2008).

**Perceptions on the Internet**

The French stakeholders presented the Internet as a tool for entrepreneurship and commerce (French Ministry of Culture and Communication 2008). For example, the European Commission (2008) stressed the importance of the Internet for employment and innovation, and the telecommunications and IT industry agreed and emphasized the Internet as a vector for economic growth and an environment with new profit opportunities:

> The Internet is an information highway where every actor – whether a multinational or an SME, a traditional actor or not – can participate on an equal basis to offer services to end users (ASIC 2009).

However, some antagonism between the functions of the Internet as a tool for industry on the one hand, and for society on the other hand could be observed.

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” (French Constitutional Council 2009, § 15). The Constitutional Council continued its reasoning to say 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 (French Constitutional Council 2009, § 16).

It 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 (2008) and civil society representatives stressed the role of the Internet for new non-commercial content creation and discovery, indicating the potential of the Internet for the democratization of cultural production, distribution and consumption.

Furthermore 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 (French Ministry of Culture and Communication 2008). 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 cultural industry described the Internet as a jungle, an uncivilized environment where only the fittest survive (Le Monde 2009). They strongly urged for regulation of the Internet, something which 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 (Presidency of the French Republic 2009a).

The European Commission (2008) and civil society actors interpreted the reactions of the cultural industry (and Government) to the Internet as driven by loss of control (Capital.fr 2009). The discourse of the French Government and cultural industry on the need to civilize the Internet justifies control over the medium through surveillance and technological regulation. It is a step in the direction of a restricted mass medium comparable to the radio and television, a change, which several artists indeed supported in a letter to the socialist parliamentarians (Le Monde 2009).

**Perceptions on Surveillance**

In the analyzed documents, only the French Commission for Information and Liberties (CNIL) and the civil society representatives raised the question of surveillance. Other stakeholders took surveillance for granted, which is perhaps not so surprising when we consider that 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. The precedents for surveillance had in fact already been set. In 2006, the French transposition of the European Union Copyright Directive obliged Internet account holders to monitor their Internet connection. In 2007, the French Council of State took it a step further and reversed a decision by the Commission for Information and Liberties, which had disallowed copyright holders to monitor P2P networks (French Commission on Information and Liberties 2007). Thus, surveillance was gradually introduced into French copyright policy. We believe the limited contestation over surveillance indicates a normalization of surveillance in French society. Overall, the suspension of Internet access was more strongly criticized than the surveillance of Internet activities.

The following quote explains the legal basis for personal surveillance in graduated response:

[Graduated response] does not rely on the offence of counterfeiting, but on an obligation of the Internet subscriber to monitor, already set in place by the current article L.335-12 of the intellectual property law. [This obligation] will be specified and from now on accompanied with a sanction. The holder of the Internet account will thus be obliged to ensure that his account is not used to infringe literary and artistic property rights (French Ministry of Culture and Communication 2008).
On the one hand, CNIL had reasoned in its refusal of private monitoring by right holders that these practices “led to a massive collection of data and could allow the extensive and continuous monitoring of file-sharing networks” (French Commission for Information and Liberties 2007). Guy Bono, a French Member of the European Parliament from the socialist party, and La Quadrature du Net (2008a, 2009a), a digital rights organization, also sought to limit surveillance through privacy legislation – with limited success. They made references to Orwell’s 1984 and Bentham’s Panopticon, and argued that graduated response would lead to a big brother society and a police state where suspicion is the norm:

Generalized surveillance on the Net, including by private actors, obligatory over-referencing of ‘accredited sites’ by search engines, putting hosting providers and content editors under administrative supervision, filtering and cutting off access without a judicial procedure … these projects outline a democracy in decline, a ORTF Internet, a Big Brother society. [They are] in no way a model for Europe (La Quadrature du Net 2008b).

The French Government and the cultural industry contended that graduated response is a proportionate and mainly educational measure as it gives Internet users several chances to change their behavior and seeks to provide an alternative to harsh penal sanctions (French Ministry of Culture and Communication 2010; APC & UPFI 2008). Graduated response and surveillance were thus portrayed as tools for care rather than control. There was also a clear sense of emergency to be found in the documents. Urgent and exceptional measures were advocated to fight online copyright infringement. The French Government made a declaration of urgency for the adoption of Hadopi 1 (French Ministry of Culture and Communication 2009b; Presidency of the French Republic 2009b) and invoked an accelerated legislative procedure for Hadopi 2. This corresponds with the motive for the state of exception, which Didier Bigo (2006) contends is part and parcel to the surveillance rhetoric of a state.

Perceptions on Code

Finally, technical protection measures were hardly mentioned in the documents either. The one commonality between arguments of various stakeholders was criticism on the lack of interoperability and transparency in digital rights management (DRM). The European Commission (2008) indicated that the use of DRM for copyright protection constituted a paradigm shift, possibly to the detriment of consumers.

Usage governed by licensing agreements enforced by technical measures now complements usage of copyright protected work governed by law. As a result consumers must increasingly confront complex contractual terms when purchasing music, film or other creative content online, and are not necessarily fully aware of the usage restrictions applied or the use of their personal data. This is perceived as severely affecting user interests, and putting the existing balance between copyright holders and user interests at risk (European Commission 2008: 6-7).

In this vein, Hadopi 1 encourages legal offers of music without technical protection measures.

However, Hadopi 1 also 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” (French National Assembly and Senate 2009a, art. 10). In the French law there is an openness to regulate through code. Importantly, the vagueness of the article also leaves the possibility to involve Internet intermediaries more closely in the enforcement of copyright, an approach which copyright holders are currently pushing heavily.

In arguing against technical protection measures, 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). As the following quote illustrates, the civil society representatives further elaborated on this argument,
stating that filtering is dangerous for innovation and liberties and promotes the criminalization of the Internet:

[Hadopi is] dangerous, because it attacks freedom, which however fuels artistic creation. Hadopi is the establishment of web filtering by the High authority, which was created for this purpose: the putting in place of proactive control of online exchanges, and retroactive criminalization of the Internet. Breaking freedom to speech, stifling innovation, those will be its effects. For access to public Wi-Fi, the law already provides limited filtering through use of a ‘white list’ of authorized sites. In summary, a restriction on free thought, free information, free navigation (Attali 2009b).

The civil society actors also argued that technology evolves and can always be circumvented (Capital.fr 2009; Read Write Web Francophonie 2009), and along with the telecommunications and IT industry, expressed concern about the preservation of the decentralized, open and neutral character of the Internet (La Quadrature du Net 2009b; ASIC 2008, 2009). Thus, although technological regulation did not receive much attention in the discussion surrounding Hadopi 1 and 2, all three sets of reservations about code as a regulator were mentioned.

**Conclusion**

The French graduated response policy is mainly framed in terms of piracy and copyright. However, in our view graduated response policy is about much more than this. In the process of finding solutions for the piracy of copyrighted works, fundamental decisions are taken about the type of creativity, and the kind of Internet we want in the future.

At the center of graduated response is a desire for informational control and the monetizing of access. The French graduated response policy supports strong copyright, perceives the Internet as a danger, and advocates technological measures and the suspension of Internet access as proportionate responses to the lack of control over cultural works. The fact that this interference in the code of the Internet implies constant monitoring and surveillance of citizens is not seen as a problem. On the contrary it is portrayed as a necessary step to protect diversity. Although the European Parliament and French civil society indicated the potential for the Internet for non-commercial content creation, proponents of graduated response repeatedly emphasized the relationship between cultural diversity and copyright revenues. Certainly copyright is key to many content business models, but culture exists regardless of legalities and business strategies. Piracy is a problem for the content industry, but not necessarily for culture and creativity in general.

Additionally, the French graduated response policy is an attempt to gain control over the infrastructure feeding the lack of informational control. The willingness to apply technical protection measures and the vagueness in Hadopi 1 on the role of intermediaries in combating piracy, as well as the striking discourse of the French government and cultural industry on the need to civilize the Internet all point in the direction of closer Internet regulation. In May 2011, President Sarkozy placed Internet governance on the agenda of the G8, moving the debate away from its traditional international multi-stakeholder venue, the UN Internet Governance Forum, and towards a closed, governmental forum. The same discourse of civilization was employed, and international support for Internet control was sought. The current open, flexible and decentralized character of the Internet is not a coincidence; normative choices encouraging widespread distribution of information were made. In an economy where information plays such an important role, however, these early Internet principles are unfortunately increasingly thrown overboard.

Furthermore, although the French Constitutional Council stressed the importance of access to the Internet for participation in democratic life and the expression of ideas and opinions, the interests of copyright
holders are valued more highly than those of citizens in graduated response, a policy developed to meet the needs of an economically powerful industry without due regard given to the consequences for public life. Although the suspension of Internet access was highly contested in the graduated response policy debate, this sanction was ultimately accepted (with judicial overview) on both a national and European levels. Interestingly, there was much less resistance to the idea of online surveillance. Precedents had been set in previous legislation and decisions. Essentially surveillance is about influencing the behavior of citizens. In graduated response, surveillance is a mechanism for copyright holders to assert power over Internet users. The economic view on copyright, the discourse of the Internet as a threat, the acceptance of surveillance and the willingness to regulate through code are not a given. They portray a particular formulation of the policy problem and are the result of power plays between stakeholders in France. Our analysis has shown that economic considerations took the upper hand in the graduated response policy. Societal reservations, although mentioned, were mostly disregarded in the debate.

In conclusion, graduated response changes society as it allows the move towards a permanent surveillance of citizens’ conduct on the Internet. In the graduated response policy debate, the goal – reducing piracy, was continually central. With the exception of the suspension of Internet access, the means of reaching the goal – monitoring, surveillance and regulating code were rarely discussed. The end of this policy should not justify the means, however. Surveillance, code and the (lack of) discourse on these issues are part of the “apparatus” to valorize the viewpoint and status quo of the cultural industry. The French graduated response policy adopts a narrow and economic interpretation of creativity, moves towards a closed, nationally regulated Internet environment, and promotes informational control by copyright holders. In France, graduated response contributes to the normalization of surveillance and increases centralized control on the Internet, with little consideration given to the long term social and democratic consequences of the policy.

**Abbreviations**

- AFA: Association des Fournisseurs d'Accès et de services Internet [Association of Internet access and services providers]
- ARCEP: Autorité de Régulation des Communications Electroniques et des Postes [French regulatory authority for electronic communications and post]
- APC: Association des Producteurs de Cinéma [Association for cinema producers]
- ARP: Société civile des Auteurs Réalisateurs Producteurs [Society for authors, directors and producer]
- ASIC: Association des Services Internet Communautaires [Association of Internet community services]
- CNIL: Commission Nationale de l'Informatique et des Libertés [French commission for information and liberties]
- CSDEM: Chambre Syndicale De l'Edition Musicale [Syndicate for the music production]
- DADVSI: Loi sur le Droit d'Auteur et les Droits Voisins dans la Société de l’Information [Law on authors’ rights and related rights in the information society]
- DRM: Digital Rights Management
- EU: European Union
- HADOPI: Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet [High authority for the diffusion of works and protection of rights on the Internet]
- IP: Internet Protocol
- IFPI: International Federation of the Phonographic Industry
- IT: Information Technology
- LOPPSI: Loi d'Orientartion et de Programmation pour la Performance de la Sécurité Intérieure [Law of orientation and programming for the performance of domestic security]
- MEP: Member of the European Parliament
ORTF Office de Radiodiffusion-Télévision Française [Office of French radio and television]
SACD Société des Auteurs et Compositeurs Dramatiques [Society of authors and drama writers]
SACEM Société des Auteurs, Compositeurs et Editeurs de Musique [Society of music authors, composers and producers]
SAMUP Syndicat National des Artistes Interprètes et Enseignants de la Musique et de la Danse de France [National syndicate for interpretative artists and teachers of music and dance in France]
SCAM Société Civile des Auteurs Multimédia [Society of multimedia authors]
SCPP Société Civile des Producteurs Phonographiques [Society of phonographic producers]
SNAC Syndicat National des Auteurs et des Compositeurs [National syndicate of authors and composers]
SNPF Syndicat National de l'Édition Phonographique [National syndicate of the phonographic production]
SPPF Société Civile des Producteurs de Phonogrammes en France [Society of phonographic producers in France]
UNAC Union Nationale des Auteurs et Compositeurs [National union of authors and composers]
UPFI Union des Producteurs Phonographiques Français Indépendants [Union for French independent phonographic producers]

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